Aneeta Hada vs M/S Godfather Travels & Tours Pvt.Ltd on 8 May, 2008

Equivalent citations: 2008 AIR SCW 3608, 2008 (13) SCC 703, AIR 2008 SC (SUPP) 1849, 2009 (3) SCC (CRI) 845, (2008) 3 CIVILCOURTC 604, (2008) 62 ALLCRIC 269, (2008) 85 CORLA 375, (2008) 4 JCC 415 (SC), (2008) 2 BOMCR(CRI) 24, (2008) 3 CHANDCRIC 146, (2008) 2 ALLCRIR 2273, (2008) 3 ALLMR 881 (SC), (2008) 3 CTC 840 (SC), (2008) 2 NIJ 102, (2008) 40 OCR 881, (2008) 8 SCALE 25, (2008) 67 ALLINDCAS 153 (SC), (2008) 3 RECCRIR 11

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Bench: S.B. Sinha, V.S. Sirpurkar

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           CASE NO.:
Appeal (crl.)  838 of 2008

PETITIONER:
Aneeta Hada

RESPONDENT:
M/s Godfather Travels & Tours Pvt.Ltd.

DATE OF JUDGMENT: 08/05/2008

BENCH:
S.B. SINHA & V.S. Sirpurkar

JUDGMENT:
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JUDGMENT REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO. 838 OF 2008 [Arising out of SLP (Crl.) No. 2094 of 2007] Aneeta Hada ...Appellant Versus M/s. Godfather Travels and Tours Pvt. Ltd. ...Respondent WITH CRIMINAL APPEAL NO. 842 OF 2008 [Arising out of SLP (Crl.) No. 2117 of 2007] JUDGMENT S.B. SINHA, J :

1. Leave granted.

2. Appellant is said to be an authorised signatory of M/s. Intel Travels Ltd (Company). The said Company as also the respondent company had business transactions. Appellant on behalf of the company issued a cheque dated 17.1.2001 for a sum of Rs.5,10,000/- in favour of respondent which was dishonoured. Respondent filed a complaint petition against the appellant under Section 138 of the Negotiable Instruments Act, 1881 ('the Act' for short).

The Company which is a juristic person was not arrayed as an accused.

The learned Magistrate took cognizance of the offence against her. Respondent had not even served any notice upon the Company in terms of Section 138 of the Act. It served a notice only on the appellant presumably on the premise that she was in charge and responsible to the company for its day to day affairs.

3. The High Court by reason of the impugned judgment refused to quash the proceedings, as prayed for by the appellant, holding:

> "This section does not say that the cheques should have been drawn for the discharge of any debt or other liability of the drawer towards the payee. Even the Section 139 of the Negotiable Instruments Act, by which a legal presumption is created, the Parliament has only fixed the presumption that the cheque was issued 'for the dishcarge, in whole or in part, or any debt or other liability.' This would mean that the debt or other liability includes the due from any other person. It is not necessary that the debt or liability should be due from the drawer himself. It can be issued for the discharges of any other man's debt liability. Legally enforceable debt or liability would have a reference to the nature of the debt or liability and not the person against whom the debt or liability can be enforced. One has to go by the averments in the complaint. The complainant has averred that it is the petitioner who had purchased the tickets from the complainant and the cheque in question was given by them in discharge of their liability. The demand notice dated 8.5.2001 is also sent to the two petitioners and not to the company. What the petitioners state here may be their defence."

4. A company being a body corporate is capable of suing and being sued in its own name.

Section 7 of the Act defines "drawer" to mean the maker of a bill of exchange or a cheque. The authorised signatory of a company does not become the drawer of the cheque only because he has been authorised to do so for the purpose of banking operations. Admittedly, the bank account was also in the name of the company. The account was, therefore, maintained by the Company.

5. Section 138 of the Act reads as under:

> "Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be

extended to two years, or with fine which may extend to twice the amount of the cheque, or with both;

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

6. A complaint petition may be maintainable at the instance of the person in whose favour the cheque was drawn only when:-

(i) the cheque was drawn by `a person'; and

(ii) the cheque was drawn on an account maintained by `him' with a banker for payment of any amount of money to `another person' from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of the drawer is insufficient to honour the cheque or that it exceeds the amount to be paid from that account; and

(iii)in that event `such a person' shall be deemed to have committed an offence.

7. The person referred to in the said provisions, therefore, must not only be the drawer of the cheque but should have been maintaining an account with the banker.

8. Appellant does not answer either of the descriptions of such `the person' referred to in Section 138 of the Act. Admittedly, she was only an authorised signatory and the amount with the banker was to be maintained by the Company. Cheque was drawn by the Company and not by the appellant. She did not do so on her own behalf. She issued the cheque in course of ordinary business transaction.

9. The Parliament for meeting a contingency of this nature, namely, where a company is an offender, has raised a legal fiction in terms whereof any person who at the time the offence was committed, was incharge of and was responsible for the conduct of business of the company, shall be deemed to be guilty of the offence.

10. For the said purpose, the company itself must be made an accused. It has been so held by this Court in a number of decisions to which I would refer to a little later.

11. In this case, indisputably the company is the principal offender. A director of the company inter alia can be proceeded against if he is found to be responsible therefor as envisaged under Section 141 of the Act.

12. The said provision reads, thus:

> "141. Offences by companies .--(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
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> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
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> 2 "Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this chapter."

(2) Notwithstanding anything contained in sub- section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-- For the purposes of this section,-- (a) "company" means any body corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm."

13. If a person, thus, has to be proceeded with as being vicariously liable for the acts of the company, the company must be made an accused. In any event, it would be a fair thing to do. Legal fiction is raised both against the Company as well as the person responsible for the acts of the Company. Unlike other statutes, this Act raises a presumption not only in tems of Section 139 of the Act but also under Section 118(a) thereof. Those presumptions in given cases may have to be rebutted. The accused must be given an opportunity to rebut the said presumption. An accused is entitled to be represented in a case so as to enable it to establish that allegations made against it are not correct.

14. Section 141 of the Act raises a legal fiction. Such a legal fiction can be raised only when the conditions therefor are fulfilled; one of it being that company is also prosecuted.

15. The Section uses the terms "as well as the company". The company which is, thus, the principal offender must be included in the category of the accused. Here, I am not dealing with a case where an individual act of a person is purporting to represent a company. In relation to business transactions, a company as a corporate entity may have created its own reputation. It must maintain it. If a complaint is filed, in a given case, only on the basis of the presumptions raised in the statute, it may be held to be guilty as a result whereof the reputation of the company shall suffer. It may, thus, suffer grave civil consequences.

16. It is no longer res integra that a company can be proceeded against in a criminal proceeding, even where imposition of substantive sentence is provided for.

17. The question as to whether a company can be proceeded against when a mandatory imprisonment is prescribed in law came up for consideration before a Constitution Bench of this Court in Standard Chartered Bank and Others v. Directorate of Enforcement and Others [(2005) 4 SCC 530] wherein this Court upon considering a large number of decisions as also the principle "lex non cogit ad impossibilia" opined:

> "30. As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned under Section 56(1) of the FERA Act, 1973, namely, those under Section 13; clause (a) of sub-section (1) of Section 18; Section 18-A; clause (a) of sub- section (1) of Section 19; sub-section (2) of Section 44, for which the minimum sentence of six months' imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than Rs. one lakh, and that they could be prosecuted only when the offences involve an amount or value less than Rs. one lakh.
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> (Emphasis supplied)
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> 31. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the

> company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy."

(Emphasis supplied) An earlier decision of this Court in Asstt. Commissioner v. Velliappa Textiles Ltd. [(2003) 11 SCC 405] was overruled by the Constitution Bench.

In the context of the provisions of the Income Tax Act, recently a Division Bench of this Court in Madhumilan Syntex Ltd. & Ors. v. Union of India & Anr. [AIR 2007 SC 1481], held :

> "23. From the above provisions, it is clear that wherever a Company is required to deduct tax at source and to pay it to the account of the Central Government, failure on the part of the Company in deducting or in paying such amount is an offence under the Act and has been made punishable. It, therefore, cannot be said that the prosecution against a Company or its Directors in default of deducting or paying tax is not envisaged by the Act.
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> 24. It is no doubt true that Company is not a natural person but 'legal' or 'juristic' person. That, however, does not mean that Company is not liable to prosecution under the Act. 'Corporate criminal liability' is not unknown to law. The law is well settled on the point and it is not necessary to discuss it in detail."

18. Section 141 of the Act even does not provide for a mandatory minimum imprisonment. A fine can be imposed upon the offender for commission of an offence under Section 138 of the Act.

19. Interpretation of Section 141 of the Act came up for consideration before a Three-Judge Bench of this Court in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another [(2005) 8 SCC 89] wherein it was opined that criminal liability on account of dishonour of cheque primarily falls on the drawer company and is extended to the officers of the company. Analysing Section 141 of the Act, the Bench observed:

"...Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company.

Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence."

[underlining is mine]

20. In Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya [2006 (9) SCALE 212], this court held that though a person was not personally liable for the offences committed by the company, however, he would only be liable vicariously for the acts of company in terms of Section 141 of the Act only if the requisite averments, are made in the complaint petition.

21. In S.V. Muzumdar and Ors. v. Gujarat State Fertilizer Co. Ltd. and Anr. (2005) 4 SCC 173, this Court explicitly laid down the following categories of persons who are covered under Section 141 of the act:

(1) The company who committed the offence.

(2) Everyone who was in charge of and was responsible for the business of the company.

(3) Any other person who is a director or a manager or a secretary or

officer of the company with whose connivance or due to whose neglect the company has committed the offence.

22. In Sarav Investment and Financial Consultants Pvt. Ltd. and Anr. v. Llyods Register of Shipping Indian Office Staff Provident Fund and Anr. 2007 (12) SCALE 123, this Court opined that the director of the company is only vicariously liable for the acts of the company, and could be prosecuted only if the conditions precedent laid down in Section 141 of the Act are satisfied.

In K. Srikanth Singh v. North East Securities Ltd. and Anr. [2007 (9) SCALE 371], a Criminal complaint was filed for the dishonour of cheque. Appellant therein had been proceeded against for alleged commission of an offence under Section 138 of the Negotiable Instruments Act by the Trial Court. Before the High Court, quashing of proceedings under Section 482 of the Code of Criminal Procedure, 1973 was sought.

It was contended by the appellant that at the relevant point of time since he was not the Director of the Company, hence no cognizance could be taken as the same does not satisfy the requirements of Section 141. The High Court dismissed the petition holding the same as fact in respect thereof was required to be established before the Trial Court.

In an appeal to this court, this Court while referring inter-alia to the decisions in S.M.S. Pharmaceuticals Ltd.(Supra) and Sabitha Ramamurthy (supra) held that for showing a vicarious liability of a Director of a Company, it was incumbent to plead that the accused was responsible to the Company for the conduct of the business of the Company in the complaint. The allegation in the complaint petition would not give rise to an inference that the Appellant was responsible for day-to-day affairs of the Company. A negotiation for obtaining financial assistance on behalf of the Company by its Directors itself was not an ingredient for the purpose of constituting an offence under Section 138. Thus, vicarious liability on the Director of the company part must be pleaded and proved and not inferred. [See also Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors. 2008 (1) SCALE 331] In Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors. [(1983) 1 SCC 1], the Respondent No. 1 was the manager and respondents No. 2 to 5 were directors of X company . Respondents were charged for offences under Sections 7 and 16 of the Prevention of Food Adulteration Act, 1954 and Section 482 of Criminal Procedure Code, 1973 as the Toffees manufactured by X company was found to be not conforming to the standards prescribed for toffees . On appeal, the High Court quashed the proceedings against respondents.

It was held by this court that:

> "So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable."

However, as regards the Manager of the Company, the court held that since he could not fall in the same category as the Directors, and as he was directly incharge of the affairs of the company, he should be held to be liable.

23. In S.M.S. Pharmaceuticals Ltd. (supra) it was held that requisite averments must appear on the face of the complaint petition itself stating:

> "18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section
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> 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."

24. This position was reiterated in N. Rangachari v. Bharat Sanchar Nigam Ltd. 2007 (5) SCALE 821, wherein this court referring to the observations in S.M. Pharmaceuticals on specific averments in the complaint itself opined that "The scope of Section 141 has been authoritatively discussed in the decision in S.M.S. Pharmaceuticals Ltd. (supra) binding on us and there is no scope for redefining it in this case. Suffice it to say, that a prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company."

It was further held:

> "Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the directors of the company are incharge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a company, every person, who at the time when the offence was committed was incharge of and was responsible to the company for the conduct of

> the business of the company, shall also be deemed to be guilty of the offence along with the company. It appears to us that an allegation in the complaint that the named accused are directors of the company itself would usher in the element of their acting for and on behalf of the company and of their being incharge of the company."

25. Again in Everest Advertising Pvt. Ltd. v. State, Govt. of NCT of Delhi and Ors. 2007 (5) SCALE 479, this court relying on S.M. Pharmaceuticals (supra) and Saroj Kumar Poddar v. State (NCT of Delhi) and Anr. 2007 (2) SCALE 36 on the question of the liability of the company officials held that :

> "The averments must state that the person who is vicariously liable for commission of the offence of the Company both was incharge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefor must be satisfied."

To the same effect is the decision of this court in N.K. Wahi v. Shekhar Singh and Ors. 2007 (4) SCALE 188.

In Balaji Trading Company v. Kejriwal Paper Ltd. and Anr. [2005 (2) ALD (Cri) 162 : 2005 Cri L J 3805], a similar question arose for the consideration before the Andhra Pradesh High Court.

In the said case, on the dishonour of the cheques issued by the accused-company, a proceedings was initiated against the company in the trial court. During the pendency of the said ease, the accused-company filed a Criminal Misc. Petition under Sections 239 and 245, Cr. P.C. for discharge and acquittal for the offence under Section 138 read with Section 141 of the Act. In the said application the Director of the company pleaded that as the complainant did not mention anywhere in the complaint that he was personally responsible for the day-to-day business of the accused firms, he is not liable to be prosecuted. The learned Magistrate after hearing both parties dismissed the application. The accused-company being aggrieved by the order, preferred an revision before the Sessions court. respondent- company contended before the Sessions Court that the learned Magistrate erred in holding that a complaint can be lodged against the company through its Director without there being any specific allegation that the said Director was incharge of and was responsible to the company in the conduct of the business at the relevant point of time and that the offence was committed with his consent or connivance and the non-pleading of the Directors in their personal capacity is contrary to Section 141 of the Act, as such, the Director cannot be made to undergo the trial in the absence of any allegation or averment in the complaint that he was incharge of the affairs of the company.

The learned Sessions Judge set aside the order on the ground that Section 141 had not been complied with as the said director was not impleaded as an accused.

Before the High Court it was contended by the revisioner petitioner that since the cheques issued by the company were dishonoured, the prosecution against the company is perfectly maintainable

under Section 141 of the Act and the non-prosecution of the person in charge of the affairs of the company or other Directors in their individual capacity is no bar to maintain the prosecution against the company.

Thus, the point for consideration was Whether the respondent- company was liable to be prosecuted under Section 138 of the Negotiable Instruments Act by virtue of Section 141 of the Act in the absence of prosecution of the person incharge of the affairs or other Directors of the company?

The High Court after going through Section 141 opined:

> "The above provision makes it clear that the company as well as the person in-charge of the affairs of the company is liable to be prosecuted. The liability envisaged in Section 141(1) on the person so incharge of and responsible for the conduct of the business of the company is directly responsible for the offence. He can escape from his liability only if he proves that the offence was committed without his knowledge or that he has exercised his powers with due diligence to prevent commission of such offence. Where the offence is committed by a company, the company as well as the person incharge of the business of the company are liable to be prosecuted for the offence under Section 138 of the Act. Though the company is an artificial person handicapped of committing any crime personally, if certain crimes are committed by its officials, the company is liable for prosecution. But, when the company is convicted, the liability can be only in terms of fine as the company is responsible for the acts of commissions and omissions of the persons working for it."

Referring to a large number of judgments of this court on Section 10 of the Essential Commodities Act as also on Section 141, setting aside the order of the Sessions Court, it was held:

> "Section 141 is specifically incorporated to prosecute the companies for the offence under Section 138 of the Act. The mandate of the section clearly indicates that the company is liable for prosecution when a cheque is issued on its behalf and bounced on presentation of such cheque. The intendment of the section is not to give scope for individuals to escape by issuing cheques in the names of the companies. Therefore, when cheques are issued in the name of the company, the company is invariably liable for prosecution for the offence under Section 138 of the Act. Regarding the prosecution of the Directors of the company, the legal position makes it clear that the person who is in charge of and was responsible to the company in conduct of its business at the material time is also liable to be prosecuted. But, the non-prosecution of any of the Directors is no bar to prosecute the company. The revision petitioner is pleading that he is prejudiced on account of mentioning of his name as the person representing the company. The prosecution never intended to prosecute Sri Rahul Kejrlwal in his Individual capacity. The Courts below also made it clear that Sri Rahul Kejrlwal is not personally liable for prosecution on account of the absence of specific allegations that he is in charge of the affairs of the company or managing its affairs. The judgments placed on behalf of the revision petitioner are only regarding the

> aspect whether a Director or Directors arc liable to be prosecuted when there are no specific allegations that he or they were in charge of and were responsible to the company in conduct of its business. In the light of the above circumstances. I find sufficient force in the grounds of revision. The company is liable for prosecution despite non-prosecution of the Director or Directors responsible for the management of the affairs of the company or in charge of its affairs."

[Emphasis Supplied]

26. While saying so, I am not unmindful of views differently taken by some Benches of this Court. I would notice some of them to place on record how different Benches took different views.

27. I may, however, notice first a three Judge Bench decision of this Court in State of Madras v. C.V. Parekh and another, [(1970) 3 SCC 491].

There the company was not made an accused. The Directors of the company were acquitted. A contention was raised that the accused being liable to the company should have been convicted. This Court held :-

> "3. Learned Counsel for the appellant, however, sought conviction of the two respondents on the basis of Section 10 of the Essential Commodities Act under which, if the person contravening an order made under Section 3 (which covers an order under the Iron and Steel Control Order, 1956), i<a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. It was urged that the two respondents were in charge of, and were responsible to, the Company for the conduct of the business of the Company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of clause (5) of the Iron and Steel Control Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel Control Order was made by the Company. In fact, the Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself.

Since, in this case, there is no evidence and no finding that the Company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible. The actual contravention was by Kamdar and Vallabhdas Thacker and any contravention by them would not fasten responsibility on the respondents. The acquittal of the respondents is, therefore, fully justified. The appeal fails and is dismissed."

(Emphasis supplied) The clear findings contained in a binding precedent were, however, sought to be explained by a two Judge Bench of this Court in Sehoratan Agarwal and another v. State of Madhya Pradesh, [(1984) 4 SCC 352] stating :-

> "The Section appears to our mind to be plain enough. If the contravention of the order made under Section 3 is by a Company, the persons who may be held guilty and punished are (1) the Company itself (2) every person who, at the time the contravention was committed, was in charge of, and was responsible to, the Company for the conduct of the business of the Company whom for short we shall describe as the person-in-charge of the Company, and (3) any director, manager, secretary or other officer of the Company with whose consent or connivance or because of neglect attributable to whom the offence has been committed, whom for short we shall describe as an officer of the Company. Any one or more or all of them may be prosecuted and punished. The Company alone may be prosecuted. The person-in-charge only may be prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the person-in-charge or an officer of the Company may not be prosecuted unless he be ranged alongside the Company itself. Section 10 indicates the persons who may be prosecuted where the contravention is made by the Company. It does not lay down any condition that the person- in-charge or an officer of the Company may not be separately prosecuted if the Company itself is not prosecuted. Each or any of them may be separately prosecuted or alongwith the Company. Section 10 lists the person who may be held guilty and punished when it is a Company that contravenes an order made Under Section 3 of the Essential Commodities Act. Naturally, before the person-in- charge or an officer of the Company is held guilty in that capacity it must be established that there has been a contravention of the Order by the Company. That should be axiomatic and that is all that the Court laid down in State of Madias v. C.V. Parekh (supra) as a careful reading of that case will show and not that the person-in-charge or an officer of the Company must be arraigned simultaneously along with the Company if he is to be found guilty and punished. The following observations made by the Court clearly bring out the view of the Court :
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> It was urged that the two respondents were in charge of, and were responsible to, the company for the conduct of the business of the Company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of Clause 5 of the Iron and Steel (Control) Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate OR by the High Court that the sale in convention of Clause 5 of the Iron & Steel (Control) Order was made by the Company. In fact, the Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself. Since, in this case, there is no evidence and no finding that the Company contravened Clause 5 of the Iron & Steel (Control), Order the two

> respondents could not be held responsible. The actual contravention was by Kamdar and Villabhadas Thacker and any contravention by them would not fasten responsibility on the respondents."

28. With the greatest of respect to the learned judges, it is difficult to agree therewith. The findings, if taken to its logical corollary lead us to an anomalous position. The trial court, in a given case although the company is not an accused, would have to arrive at a finding that it is guilty. Company, although a juristic person, is a separate entity. Directors may come and go. The company remains. It has its own reputation and standing in the market which is required to be maintained. Nobody, without any authority of law, can sentence it or find it guilty of commission of offence. Before recording a finding that it is guilty of commission of a serious offence, it may be heard. The Director who was in charge of the company at one point of time may have no interest in the company. He may not even defend the company. He need not even continue to be its Director. He may have his own score to settle in view of change in management of the company. In a situation of that nature, the company would for all intent and purport would stand convicted, although, it was not an accused and, thus, had no opportunity to defend itself.

29. Any person accused of commission of an offence, whether natural or juristic, has some rights. If it is to be found guilty of commission of an offence on the basis whereof its Directors are held liable, the procedures laid down in the Code of Criminal Procedure must be followed. In determining such an issue all relevant aspects of the matter must be kept in mind. The ground realities cannot be lost sight of. Accused persons are being convicted for commission of an offence under Section 138 of the Act inter alia on drawing statutory presumptions.

Various provisions contained therein lean in favour of a drawer of the cheque or the holder thereof and against the accused. Sections 20, 118(c), 139 and 140 of the Act are some such provisions. The Act is a penal statute. Unlike offences under the general law it provides for reverse burden. The onus of proof shifts to the accused if some foundational facts are established.

It is, therefore, in interpreting a statute of this nature difficult to conceive that it would be legally permissible to hold a company, the prime offender, liable for commission of an offence although it does not get an opportunity to defend itself. It is against all principles of fairness and justice. It is opposed to the Rule of Law. No statute in view of our Constitutional Scheme can be construed in such a manner so as to refuse an opportunity of being heard to a person. It would not only offend a common- sense, it may be held to be unconstitutional. Such a construction, therefore, in my opinion should be avoided.

In any event in a case of this nature, the construction which may be available in invoking Essential Commodities Act, Prevention of Food Adulteration Act, which affects the Society at large may not have any application when only a private individual is involved.

30. Our attention has also been drawn to a Two-Judge Bench decision of this Court in Anil Hada v. Indian Acrlic Ltd. [(2000) 1 SCC 1] and R. Rajgopal v. S.S. Venkat [AIR 2001 SC 2432].

In Anil Hada v. Indian Acrylic Ltd. [(2000) 1 SCC 1], this court while construing the meaning of the term "as well as" held that it would mean the persons mentioned in the first category within the dragnet of the offence on a par with the offending company.

31. In Anil Hada (supra), the company was under liquidation. A question arose as to whether permission of the company court was necessary to continue prosecution against the company. The court did not go into the said question. In that case, the Magistrate accepted the contention raised on behalf of the accused - company that the winding up had been ordered by the court and hence no prosecution proceeding could be continued against the accused - company. The said proposition of law in a situation of this nature must be understood in the factual matrix involved in the matter. In the peculiar factual matrix involved therein, it was opined:

> "12. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase "as well as"

used in sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words "shall also" in sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons can also become liable for the offence."

The ratio laid down in the said case is to be understood in the factual matrix obtaining therein, namely, the company could not have been prosecuted due to a legal snag, although was made an accused.

However, with utmost respect, the observations of the court that `company need not be proceeded against', in my opinion is obiter dicta and not its ratio-decidendi. We are otherwise also bound by the Three-Judge Bench decision of this Court in S.M.S. Pharmaceuticals Ltd (supra) and C.V. Parekh (supra)

32. It is one thing to say that the complaint petition proceeded against the accused persons on the premise that the company had not committed the offence but the accused did, but it is another thing to say that although the company was the principal offender, it need not be made an accused at all.

I have no doubt whatsoever in our mind that prosecution of the company is a sine qua non for prosecution of the other persons who fall within the second and third categories of the candidates, viz., everyone who was in-charge and was responsible for the business of the company and any other person who was a director or managing director or secretary or officer of the company with whose connivance or due to whose neglect the company had committed the offence.

33. In Raghu Lakshminarayanan v. Fine Tubes 2007(5) SCALE 353, the issue before this court was whether having regard to the explanation appended to the definition of company in section 141 of the Act would include a proprietary concern. Although the answer was rendered in the negative, the court however made a very pertinent observation as regards the liability of the directors of the company. It opined:

> "It is of some significance to note that in view of the said description of "Director", other than a person who comes within the purview thereof, nobody else can be prosecuted by way of his vicarious liability in such a capacity. If the offence has not been committed by a Company, the question of there being a Director or his being vicariously liable, therefore, would not arise. Appellant herein categorically contended that accused No. 1 was a proprietary concern of the accused No. 2 and he was merely an employee thereof. If accused No. 1 was not a Company within the meaning of Section 141 of the Negotiable Instruments Act, the question of an employee being preceded against in terms thereof would not arise."

Indisputably, all the decisions of this Court in no uncertain terms says

- company at the first instance should be proved to be offender and, thus, only question of proof that the Director is also liable being in charge of its affairs.

34. True interpretation, in my opinion, of the said provision would be that a company has to be made an accused but applying the principle "lex non cogit ad impossibilia", i.e., if for some legal snag, the company cannot be proceeded against without obtaining sanction of a court of law or other authority, the trial as against the other accused may be proceeded against if the ingredients of Sections 138 as also 141 are otherwise fulfilled. In such an event, it would not be a case where the company had not been made an accused but would be one where the company cannot be proceeded against due to existence of a legal bar. A distinction must be borne in mind between cases where a company had not been made an accused and the one where despite making it an accused, it cannot be proceeded against because of a legal bar.

35. R. Rajgopal (supra) does not lay down any law.

There are other statutes whose provisions is pari materia with Section 141 of the Act, e.g., Section 35H Wealth Tax Act, Section 14A Employees Provident Fund and Miscellaneous Provisions Act, Section 34 Drugs and Cosmetics Act, Section 10 Essential Commodities Act, Section 6 Indian Merchandise Act, Section 38 Narcotic Drugs and Psychotropic Substances Act and Section 17 Prevention of Food Adulteration Act.

In Rajasthan Pharmaceutical Laboratory, Bangalore and Ors. v. State of Karnataka [1981 (1) SCC 645] on the interpretation of the words "punished accordingly" in Section 34 of the Drugs and Cosmetics Act, 1940, this Court observed:

> "It seems clear to us that the words "punished accordingly" in the context mean that a person deemed to be guilty of an offence committed by a company shall receive the punishment that is prescribed by the Act for that offence."

To the same effect is the decision of this court in State of Punjab v. Kasturi Lal and Others [2004(12) SCC 195].

In R. Banerjee and others v. H.D. Dubey and others[1992(2) SCC 552] the question which arose for determination was whether it was permissible to launch prosecution under Sub-section (1) of Section 17 of the Prevention of Food Adulteration Act, 1954 against the Directors and Managers of public limited companies, for the commission of the alleged offence punishable under the aforesaid provisions notwithstanding the nomination made by the said companies as required by Sub-section (2) of Section 17 of the Act. This court after reading the said provision held as under:

> "It is clear from the plain reading of Section 17 that where an offence under the Act is alleged to have been committed by a company, where the company has nominated any person to be in charge of, and responsible to, the company for the conduct of its business that person will be liable to be proceeded against and punished for the commission of the offence. Where, however, no person has been so nominated, every person who at the time of the commission of the offence was in charge of, and responsible to, the company for the conduct of its business shall be proceeded against and punished for the said crime."

36. I may notice that in some of the decisions of this Court a liberal interpretation of notice had been advocated to suggest that a notice served upon a managing director of the company or a director of the company shall satisfy the requirements of law. [See Bilakchand Gyanchand Co. v. A. Chinnaswami JT 1999 (10) SC 236 and Rajneesh Aggarwal v. Amit J. Bhalla JT 2001 (1) SC 325].

37. The said decisions proceeded on the premise that what is necessary is the knowledge of the accused that the cheque has been dishonoured so that the amount may be paid within a period of fifteen days from the date of such knowledge.

38. A learned Single Judge of the Kerala High Court in Pramod v. C.K. Velayudhan & Ors. [2006 (1) JCC (NI) 62] inter alia relying on a decision of this Court in Monaben Ketanbhai Shah v. State of Gujarat [(2004) 7 SCC 15: 2004 Cri LJ 4249] opined:

> "...In other words, commission of offence under Section 138 of the Act by a juristic person is an inevitable legal pre-requisite or the condition precedent to proceed against a person referred to under Section 141 of the Act and to hold him guilty of the said offence."

It was further opined:

> "19. Learned counsel for petitioner placed reliance upon the decision of the High Court of Andhra Pradesh in B.S.K. Prasad v. M/s. Laxmi Vessels, 2005 (1) LJ (NOC) 7 : (2004 Cri LJ 4079) (AP) in which it is held that "as per Section 138 of the Act the drawer of a dishonoured cheque only is liable for punishment". He also cited K. Seetharam Reddy v. K. Radhika Rani, (2002) 112 Comp Cas 204 (AP) in support of his arguments. It is held in the said decision that "Section 138 of the Negotiable Instruments Act, 1881, leaves no doubt that the person who has drawn the cheque on his account is alone liable in the event the cheque drawn by him is dishonoured". In the light of the above dictum also, I find that neither first accused- society nor petitioner, as secretary of the society can be proceeded against for offence under Section 138 of the Act.
>
> 20. But, despite all these, trial Court issued summons to petitioner. The mere description on the cause-title of the complaint appears to be the sole persuading factor which propelled learned Magistrate to summon petitioner. There was no other ground to proceed against the petitioner. Needless to say, a criminal Court will not get any jurisdiction to proceed against a person at the mere sight of the details on the docket-sheet or the cause title. No Court shall act upon the sole tag, label or the badge veiled on the cause-title. No Court shall be carried away by the prints and dots on the veil of cause-title. The Court is bound to unveil the complaint, feel the texure of its contents and test, the criminality. Criminality lies not on how a person is christened at the cause-title, but how he acts, as per the contents of the complaint."

39. In B.S.K. Prasad v. M/s. Laxmi Vessels & Anr. [2005 (1) JCC (NI) 86], a learned Single Judge of the Andhra Pradesh High Court has laid down the law in the following terms:

> "4. As per Section 138 of the Act the drawer of a dishonoured cheque only is liable for punishment. If the 'person' that committed the offence under Section 138 of the Act is a company the Directors and the per-son-in-charge of the affairs of the company, who look after the day to day affairs of that company, apart from the company, would also be liable for the said offence, by virtue of Section 141 of the Act. As stated earlier there is no scope for invoking Section 141 of the Act because the dishonoured cheque was not issued for and on behalf of a company. Since petitioner, admittedly, did not draw the dishonoured cheque on an account maintained by him in a bank, and since there is no scope for invoking Section 141 of the Act to rope in the petitioner as Managing Director of a company of which A-1 is the Director, merely because A-1 is said to have given the dishonoured cheque in partial or full settlement of a debt due to 1st respondent from a company of which petitioner is the Managing Director, petitioner cannot be made liable for an offence under Section 138 of the Act. The fact that 1st respondent has a right to sue petitioner also for recovery of the debt due to him is not and cannot be a ground for making the petitioner liable for an offence under Section 138 of the Act, when the dishonoured cheque was not drawn for and on behalf of that company, on an account maintained by it in a bank. Therefore the fact that A1 who drew the dishonoured cheque happens to be a Director in the company

> of which petitioner is the Managing Director, for the debt allegedly due to 1st respondent from the said company, is of no consequence."

40. In Girish Saxena v. Praveen Kumar Jain & Ors. [2007 (2) JCC (NI) 220], a learned Single Judge of the Delhi High Court opined:

> "...It is settled law that only drawer of the cheque can be prosecuted under Section 138 of the Negotiable Instruments Act on the cheque getting dishonoured. Since the petitioner was neither the drawer of the cheque nor it is alleged that he was partner or proprietor of firm when cheque got dishonoured or he was the person responsible for non payment of cheque amount, no offence under Section 138 of Negotiable Instruments Act can be made out against the petitioner."

41. I agree with the aforementioned decisions of the High Courts as having laid down the correct law.

42. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. Appeals are allowed.

.....J. [S.B. Sinha] New Delhi;

May 08, 2008 IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO.838 OF 2008 (arising out of SLP(Crl.) NO. 2094/2007 Aneeta Hada ...Appellant Versus M/s Godfather Travels & Tours Pvt. . ...Respondent Ltd.

With (arising out of SLP(Crl.) No. 2117/2007 O R D E R In view of the difference of opinion, let the matters be placed before three-Judge Bench. The Registry is directed to place the records before the Hon'ble the Chief Justice of India for appropriate orders.

.....J. [S.B. SINHA] .....J. [V.S. Sirpurkar] New Delhi, May 8, 2008.

> "REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO.__838_____OF 2008 (Arising out of SLP (Criminal) No.2094 of 2007) Aneeta Hada .... Appellant Versus M/s.Godfather Travels & Tours Pvt. Ltd. .... Respondent WITH CRIMINAL APPEAL NO.____842_____OF 2008 (Arising out of SLP (Criminal) No.2117 of 2007) Anil Hada .... Appellant Versus M/s.Godfather Travels & Tours Pvt. Ltd. .... Respondent JUDGMENT V.S. SIRPURKAR,J.
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> 1. I have the benefit of going through the opinion of my esteemed Brother Justice S.B. Sinha, J. However, I am unable to agreed with the said judgment.
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> 2. Leave granted in both the cases.

3. The present judgment will dispose of the Criminal Appeal arising out of SLP (Criminal) 2094 of 2007 and also Criminal Appeal arising out of SLP (Criminal) 2117 of 2007. However, for the convenience sake we will be dealing with the facts arising out of SLP (Criminal) 2094 of 2007 which are identical with the facts arising out of SLP (Criminal) 2117 of 2007.

4. The facts have been succinctly stated in the judgment, therefore, the same need not be referred here. It is an admitted position that the appellant herein was a signatory to the cheque and the said cheque was bounced. It is not as if the appellant herein suggests that she is not, in any way, connected with M/s.Intel Travels on whose cheque book she has issued the cheque. The appellant had the authority to use the cheque book and sign on behalf of M/s.Intel Travels. Even if she wrote a cheque on the cheque-book of M/s.Intel Travels for paying her own debts and the cheque is bounced, the offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as "the Act") will be complete atleast against her. That is the clear import of the language of Section 138 of the Act and her act is squarely covered under the said Section. The High Court had correctly relied on Section 139 of the Act. We accept that finding of the High Court. It is true that for a proper complaint under Section 138 of the Act, the cheque must have been drawn by a person and secondly the account must be maintained by "such person" and it should have been given for payment of amount of money to another person from out of that account for the discharge of any debt or other liability and when such cheque is returned by the bank unpaid because of the insufficient funds to honour the cheque. Then such person would be liable under Section 138 of the Act. In the present case, the account was being maintained by "Intel Travels" and the appellant had the authority to sign the cheque of that account. Therefore, there will be a clear liability if the appellant used the cheque which she had the authority to use and that too for discharging the debt. It must be pointed out at this juncture that the words in Section 138 of the Act are "any debt" or "other liability". In this case since M/s. Intel Travels was maintaining the account and the appellant had the authority to operate the same, the conditions will be satisfied even if it was given for the discharge of the liability of the appellant.

5. Even if it is presumed that the account was meant to be maintained by the company, since the appellant was authorized signatory, it will have to be presumed that she had the authority to operate the account. Again even if it is presumed that the cheque was issued by the company, that will make no difference as the appellant has put her signatures on the cheque which signature she was authorized to put. This is apart from the fact that as yet no evidence is led for proving as to whose debt was sought to be discharged by the cheques which were dishonoured.

6. The legal fiction created by the Legislature under Section 138 of the Act is to be found via Section 141 where along with the company, every person who was incharge of and was responsible to the company for the conduct of the business is also made guilty. However, sub-section (2) of Section 141 which starts with non obstante clause

creates an "additional criminal liability", in that, the language of the sub-section is as follows:

"141(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary, or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

A glance at this provision would suggest that sub-section (2) starts with the non obstante clause and fixes additional criminal liability. That is clear from the words "such director, manager, secretary or other officer shall also be deemed to be guilty of that offence". In using the cheque book of M/s. Intel Travels, which the appellant was authorized to use and in signing the same which cheque ultimately was bounced, it would have to be presumed that the signatory of the cheque shall also be deemed to be guilty of the offence.

7. Even if the liability against the appellant is vicarious herein on account of the offence having allegedly been committed by M/s. Intel Travels, it would have to be presumed that the appellant had also committed the offence. However, though M/s. Intel Travels has not been joined as an accused, that would be of no consequences.

8. There can be no quarrel against the proposition that a company can be proceeded against in the criminal proceeding even where the imposition of sentence is provided for. That law is laid down in Standard Chartered Bank & Others v. Directorate of Enforcement & Ors. [(2005) 4 SCC 530]. However, there is nothing in that judgment to suggest that there cannot be a prosecution of the signatory alone in the absence of the company like Intel Travels in this case.

9. It is true that in S.M.S. Pharmaceuticals Ltd. V. Neeta Bhalla & Anr. [(2005) 8 SCC 89] a vicarious liability has been found against the person responsible for running the company where the principal accused is the company. However, it is nowhere laid down in SMS Pharmaceuticals case that unless the company itself is made an accused, the person responsible for running the same, in the present case, the signatory of the cheque, cannot be joined as an accused. Even in Sabitha Ramamurty & Anr. V. R.B.S. Channabasavaradhya [2006 (9) SCALE 212] such precise observations are not to be found.

10. In the present case it is yet to be decided as to whether the liability was that of the company or the appellant herself. It could be personal liability of the appellant herself for discharging her debt for which she might have misused the cheque-book of the company. Even under such circumstances the offence against her could be complete is not known at this stage since no evidence has been led in this regard. Therefore, the inference that the liability was that of the company and she was merely vicariously liable would, therefore, be a premature finding. On the other hand even if she has misused the cheque-book to discharge her own liability, taking advantage of her authorization to put the signatures on the cheque-book of M/s.Intel Travels, she still would be liable to be proceeded

against and it would be a question between herself and the company whether she has committed any offence vis-`-vis the company also. At this stage, however, it is not possible to say anything without any evidence having been led.

11. Law laid down in S.V. Muzumdar & Ors. V. Gujarat State Fertilizer Co. Ltd. & Anr. [(2005) 4 SCC 173], Sarav Investment and Financial Consultants Pvt. Ltd. & Anr. V. Llyods Register of Shipping Indian Office Staff Provident Fund & Anr. [2007 (12) SCALE 123] as also in K. Srikanth Singh v. North East Securities Ltd. & Anr. [(2007) 9 SCALE 371] does not even impliedly suggest that unless the company is joined as an accused it is not possible to proceed against the signatory of the cheque.

12. A close examination of the decision in SMS Pharmaceuticals's case (cited supra) as also the decision in N. Rangachari v. Bharat Sanchar Nigam Ltd. [2007 (5) SCALE 821] does not show such extreme proposition. All that SMS Pharmaceuticals and N. Rangachari say is that the prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured but it could also be initiated against every person who, at that time of committing the offence, was incharge and was responsible for the affairs of the company. However, it does not mean that both the accused must be joined together for proper prosecution and that the signatory of the cheque cannot individually be prosecuted in the absence of the company.

13. A complaint has been made against the two accused persons, namely, Smt.Aneeta Hada who is described as Director of M/s.Intel Travels and also Anil Hada who has also been described as Director of the company. It is then specifically suggested in the complaint that the accused persons used to purchase the air-tickets for their clients and that they had purchased the air-tickets from the complainant from time to time and issued the cheques worth Rs.5,10,000/- and Rs.4,21,000/-. It is specifically stated that Accused No.1 also used to conduct the business of her company and she also used to purchase the tickets from the complainant. The basic complaint, therefore, is against two accused persons in their individual capacity, though they might be purchasing the tickets for their traveling company. However, merely because of that fact one cannot reach at a conclusion that in the absence of M/s. Intel Travels the two accused persons and more particularly the appellant herein who was the signatory to the cheque and whose cheque was bounced cannot be prosecuted. That could not be the import of the decision in Everest Advertising Pvt. Ltd. V. State Govt. of NCT of Delhi & Ors. [2007 (5) SCALE 479], SMS Pharmaceuticals (cited supra) or the decision in N.K. Wahi v. Shekhar Singh & Ors. [2007 (4) SCALE 188].

14. In the decision in Anil Hada v. Indian Acrylic Ltd. [(2000) 1 SCC 1], it so happened that the company itself was in liquidation and the Division Bench of this Court was considering the question as to whether the signatory to the cheque could be proceeded against. The expressions in paragraph 12 of this judgment are apposite. The words used in Section 141(1) of the Act as also the words "shall also" used in sub-section (2) of Section 141 had been held to bring the third category of persons additionally within the dragnet of the offence on an equal path. The words "company need not be proceeded against" cannot be held as obiter dicta. Further there is nothing conflicting in the aforesaid two judgments in the cases of Anil Hada & SMS Pharmaceuticals. On the other hand a reading of the judgment in Anil Hada's case would suggest that the court therein considered the law laid down in State of Madras v. C.V. Parekh [(1970) 3 SCC 491] wherein the analogous provisions

under Section 7 of the Essential Commodities Act read with Section 10 of that Act fell for consideration. There also the private limited company was not included as an accused and the question was as to whether the Managing Director alone could be proceeded against. This judgment was considered in the celebrated judgment in Sehoratan Agarwal v. State of M.P. [(1987) 3 SCC 684]. The Court not only explained the observations earlier made in C.V. Parekh's case [cited supra) but went on to hold further as follows:

> "Any one or more or all of them may be prosecuted and punished. The company alone may be prosecuted. The person in charge only may be prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the person in charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. Section 10 indicates the persons who may be prosecuted where the contravention is made by the company. It does not lay down any condition that the person in charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the company." (Emphasis Supplied) Ultimately the law laid down in Sheoratan Aggarwal's case was approved by the Bench. The Court ultimately held in para 21 as under:
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> "We, therefore, hold that even if the prosecution proceedings against the company were not taken or could not be continued, it is no bar for proceeding against the other persons falling within the purview of sub-sections (1) and (2) of Section 141 of the Act. In the light of the aforesaid view we do not consider it necessary to deal with the remaining question whether winding up order of a company would render the company non-existent." (Emphasis Supplied) It will, therefore, be seen that the question as to whether the persons like accused alone in the absence of the company having been made accused could be proceeded against or not had directly fallen for consideration and it cannot be said that any observations in Anil Hada's case by any chance could be viewed as obiter. This is a binding precedent.

15. The ratio laid down in Anil Hada's case was applicable to the factual matrix thereof which is identical here. The question has been directly decided that the prosecution of the company is not a sine qua non for the prosecution of the other persons who fall within the second and third categories, namely, those who were incharge and responsible for the business of the company.

16. Even the law laid down in Raghu Lakshminarayananan v. Fine Tubes [2007 (5) SCALE 353], would not be apposite. In that case the question was whether the persons in the second category, as in the present case, could be prosecuted in the absence of the company.

17. The principle "lex non cogit ad impossibilia" would not apply here, because of the language of Section 141 of the Act and the present appellant would be completely liable since the cheques signed by her were bounced.

18. Since the decision in Sheoratan Agarwal' case (cited supra) has already been considered by the Division Bench of this Court and relied upon in the decision in Anil Hada, it need not be considered afresh.

19. Lastly, since this question was already covered by Anil Hada's case, the appellant would be liable to be prosecuted even when M/s.Intel Travel had not been joined as an accused. It is in the light of decision in Anil Hada that subsequent decisions in Bilakchand Gyanchand Co. v. A. Chinnaswami [JT 1999 (10) SC 236] and Rajneesh Aggarwal v. Amit J. Bhalla [JT 2001 (1) SC 325] would have to be read. The other cases referred to, one of Kerala High Court in Pramod v. C.K. Velayudhan & Ors. [(2006) 1 JCC (NI) 62] and Monaben Ketanbhai Shah v. State of Gujarat [(2004) 7 SCC 15: 2004 Cri. LJ 4249] in my opinion are not apposite to the present controversy.

20. The decisions in Andhra Pradesh High Court reported in B.S.K. Prasad v. M/s.Laxmi Vessels [2005 (1) LJ (NOC) 7: 2004 Cri. LJ 4079 (AP)] and K. Seetharam Reddy v. K. Radhika Rani [(2002) 112 Company Cases 204 (AP) support the view that the person who has drawn the cheque, in case the cheque is dishonoured, is liable under Section 138 of the Act itself.

21. No comment is required on the reported decision in B.S.K. Prasad's case (cited supra) since the decision in that case turns on the evidence led in that case. That opportunity has still not been given to the prosecution in this case and it is not known uptil now as to whether the cheque issued by the accused was issued on behalf of the company or to pay off her own debts. Again the judgment does not say anywhere that the signatory to the cheque cannot alone be prosecuted.

22. Appellant's reliance on the last case in Girish Saxena v. Praveen Kumar Jain & Ors. [(2007) 2 JCC (NI) 220] is also unnecessary since in that case the accused was not a signatory to the cheque. The decision in that case would not be applicable to the present case.

23. In view of the above I would be of the opinion that the appeals must be dismissed.

.....J. (V.S. SIRPURKAR) New Delhi, May 8, 2008