

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 31th DAY OF AUGUST, 2021

BEFORE

HON'BLE MR. JUSTICE ANOOP CHITKARA

CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC No. 613
of 2019

Between:-

**DEVENDER SHARMA
SON OF SHRI DHANI RAM
SHARMA, RESIDENT OF NEGI
BUILDING UPPER KHALINI,
SHIMLA-2, H.P.**

....PETITIONER.

**(BY MS. MEERA DEVI &
MR. HEMANT KUMAR
THAKUR, ADVOCATES)**

AND

**JAI SINGH SON OF SH. VED
RAM, RESIDENT OF VILLAGE
KATER, P.O. TANUN, TEHSIL
NIRMAND, DISTRICT KULLU, H.P.**

..RESPONDENT.

**(BY MR. B.S.THAKUR,
ADVOCATE).**

Reserved On : 25th August, 2021.

Decided On : 31st August, 2021.

This petition coming on for hearing this day, the Court
passed the following:

ORDER

CASE BEFORE MAGISTRATE	NUMBER JUDICIAL	Order dated 22.11.2018, passed in Case number 285-3 of 2018, by learned Additional Chief Judicial Magistrate, Rampur Bushahr, District Shimla, H.P.
------------------------------	--------------------	---

Challenging the order taking cognizance for offences punishable under Section 138 of Negotiable Instruments Act, issuance of summons, and further proceedings, the accused has come up before this Court.

2. The complainant Jai Singh had received cheque No.518117, dated 25.08.2018, for Rs.1,00,000/- and Cheque No.341473, dated 10.06.2018, for Rs.61,332/- from Himudayath Producer Company Limited signed by its Director. When the complainant presented these cheques for encashment, the same were dishonored for 'insufficient funds' vide memos dated 05.09.2018 of Himachal Pradesh Gramin Bank, Jagat Khana Branch.

3. After that, complainant issued a legal notice to respondent Devender Sharma, General Manager, Himudayath Producer Co. Ltd., Negi Building, Upper Khalini, Shimla-171002 H.P., through Advocate.

4. On failure to receive the payment within the stipulated time, the complainant filed a criminal complaint before learned Additional Chief Judicial Magistrate, Rampur Bushahr under Section 138 of the Negotiable Instruments Act against the persons mentioned above. Vide order dated 22nd November, 2018, learned Additional Chief Judicial Magistrate, Rampur Bushahr took cognizance of the offence and summoned the accused.

5. Challenging the order described above, the accused came up before this Court under Section 482 CrPC seeking quashing of

summons and all consequential proceedings by filing the present petition.

6. I have heard learned counsel for the parties and gone through the records.

7. Mr. B.S. Thakur, learned counsel argued that in reply to the legal notice issued on behalf of the complainant, the accused had admitted the contents, as such these admissions are relevant. Now the accused cannot blow hot and cold. Learned counsel further submits that the case has no merits given these admissions, and the present petition deserves to be dismissed.

8. The controversy involved in this case is very short. A perusal of the trial Court record reveals that the concerned Bank had issued a memos vide which the cheques issued by the Company have got dishonored. Even the memos vide which the cheques were dishonored show the insufficiency of funds and nothing else. The legal notice issued on behalf of the complainant also refers to Himudayath Producer Company Limited, which had a legal liability to pay the complainant. Thus, the complainant had entered into a commercial transaction with a separate legal entity, i.e., the Company registered under the Companies Act.

9. The company is a commercial enterprise created per law. It is an artificial person with a legal personality and comes into existence on its registration under law, usually to do business and related activities. It has stakeholders who are different from the persons who run it. It is not any of these persons who do the business, but it is the company in whose name the enterprises run.

10. Per Section 2 (20) of the Companies Act, Company means a company incorporated under this Act or under any previous company Law.

11. As per Section 2(34) of the Companies Act, 'Director' means a director appointed to the Board of a Company.

12. Section 2(54) of the Companies Act reads as follows:

'Managing Director' means a director who, by virtue of the articles of the company or an agreement with a company or a resolution passed in its General meeting, or by its board of directors, is entrusted with substantial powers of management of the affairs of the Company and includes a director occupying the position of Managing Director by whatever name called.

13. In **Associated Cement Companies Limited v. Keshvanand**, (1998) 1 SCC 687, Hon'ble Supreme Court holds,

[20] It is true that the complainant M/s. Associated Cement Company Ltd. is not a natural person. We have no doubt that a complaint can be filed in the name of a juristic person because it is also a person in the eye of law. But then, who would be the complainant in the criminal Court for certain practical purposes.

[21] The word "complainant" is not defined in the Code of Criminal Procedure, whether old or new. Any person can set the law in motion except in cases where the statute has specifically provided otherwise. The word "person" is defined in the Indian Penal Code (S. 11) as including "any company or association or body of persons whether incorporated or not". By virtue of S. 2(y) of the new Code words and expressions used in that Code but not denied therein can have the same meaning assigned to them in the Penal Code. Thus when the word "person" is

specifically defined in the Penal Code as including a company that definition can normally be adopted for understanding the scope of the word "complainant". However, the definition clauses subsumed in S. 2 of the new Code contains the opening key words that such definitions are to be adopted "unless the context otherwise requires". We have, therefore, to ascertain whether a company or association of persons or body corporate can be a complainant as per the new Code as for all practical purposes, looking at different contexts envisaged therein.

[22] Chapter XV of the new Code contains provisions for lodging complaints with Magistrates. Section 200 as the starting provision of that chapter enjoins on the Magistrate, who takes cognizance of an offence on a complaint, to examine the complainant on oath. Such examination is mandatory as can be discerned from the words "shall examine on oath the complainant.....". The Magistrate is further required to reduce the substance of such examination to writing and it "shall be signed by the complainant". Under S. 203 the Magistrate is to dismiss the complaint if he is of opinion that there is no sufficient ground for proceeding after considering the said statement on oath. Such examination of the complainant on oath can be dispensed with only under two situations, one if the complaint was filed by a public servant, acting or purporting to act in the discharge of his official duties and the other when a Court has made the complaint. Except under the above understandable situations the complainant has to make his physical presence for being examined by the Magistrate. Section 256 or S. 249 of the new Code clothes the Magistrate with jurisdiction to dismiss the complaint when the complainant is absent, which means his physical absence.

[23] The above scheme of the new Code makes it clear that complainant must be a corporeal person who is capable of making physical presence in the Court. Its corollary is that even if a complaint is

made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the Court and it is that natural person who is looked upon, for all practical purposes, to be the complainant in the case. In other words, when the complainant is a body corporate it is the de jure complainant, and it must necessarily associate a human being as de facto complainant to represent the former in Court proceedings.

[24] As the corresponding provisions in the old Code are the same for all practical purposes, the legal position discussed above is applicable to the complaint filed under the old Code as well.

[25] Be that so, we suggest as a pragmatic proposition that no Magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. There may be occasions when a different person can represent the company e.g. the particular person who represents the company at the first instance may either retire from the company's services or may otherwise cease to associate therewith or he would be transferred to a distant place. In such cases it would be practically difficult for the company to continue to make the same person represent the company in the Court. In any such eventuality it is open to the de jure complainant-company to seek permission of the Court for sending any other person to represent the company in the Court.

14. A perusal of the complaint filed under Section 138 NI Act, reveals that the complainant has arraigned Sh. Devender Sharma, General Manager, Himudayath Producer Co. Ltd., Negi Building, Upper Khalini, Shimla-171002, H.P., as accused.

15. The complainant had not prosecuted the Company, on whose behalf the cheques was issued. The persons, who had issued the cheques, are vicariously liable on behalf of the Company. However, vicarious liability only comes into play when the principal liability is sought to be enforced. The non-prosecution of the Company would not make out any legal cause against the signatories in their personal capacity.

16. In **Aneeta Hada v. M/s. Godfather Travels and Tours Pvt. Ltd.**, (2012) 5 SCC 661, a three-Judge bench of Hon'ble Supreme Court holds,

[1] In Criminal Appeal Nos. 838 of 2008 and 842 of 2008, the common proposition of law that has emerged for consideration is whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for brevity 'the Act') without the company being arraigned as an accused. Be it noted, these two appeals were initially heard by a two-Judge Bench and there was difference of opinion between the two learned Judges in the interpretation of Sections 138 and 141 of the Act and, therefore, the matter has been placed before us.

[53] It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

[58] Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well

as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

[59] In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh [(1970) 3 SCC 491] which is a three- Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352], does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000) 1 SCC 1] is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries [AIR 1988 Supreme Court 1128] has to be treated to be restricted to its own facts as has been explained by us hereinabove.

17. In *Anil Gupta v. Star India Pvt. Ltd.*, 2014(10) SCC 373, Hon'ble Supreme Court quashed the summons and criminal proceedings, relying upon *Aneeta Hada*, (2012) 5 SCC 661.

18. In **Himanshu v. B. Shivamurthy**, (2019) 3 SCC 797, Hon'ble Supreme Court holds,

[14] In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the

appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

[15] The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or 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.

[16] In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.

[17] We, accordingly, are of the view that the High Court was in error in rejecting the petition under section 482 of the CrPC, 1973.

19. The non-prosecution of the company from whose account the cheques were issued and dishonored is fatal, non-curable illegality and shall lead to the dismissal of the complaint being legally defective and not properly constituted.

20. In the entirety of facts and circumstances, the petition is allowed and the order taking cognizance and all consequential proceedings are quashed and set aside. It is clarified that the dismissal of the petition shall not come in any way in case the complainant/holder of the cheques wants to take any other legal remedy including filing of civil suit for recovery of cheque amount etc.

August 31, 2021(ps)

**(Anoop Chitkara)
Judge**