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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.M.C. 5124/2017

GEETA SINGH ..... Petitioner

Through: Mr. Atul Parmar, Advocate

versus

PRADEEP SINGH ..... Respondent

Through: Mr. Tarun Rana and Mr. Waseem Akram, Advocates

**CORAM:**
**HON'BLE MR. JUSTICE CHANDRA DHARI SINGH**

**<u>O R D E R</u>**

% **29.04.2022**

1. The instant petition has been filed under Section 482 of the Code of Criminal Procedure, 1973, (hereinafter "Cr.P.C.") on behalf of the petitioner against the impugned order and judgment dated 13th September, 2017 passed by learned Additional Sessions Judge, Tis Hazari Courts, New Delhi (hereinafter "ASJ") in Criminal Revision Petition No. 135/2017.

2. The petitioner instituted Complaint Case No. 542676/2016 under Section 138 of the Negotiable Instruments' Act, 1881 (hereinafter "NI Act") against the respondent before the learned Metropolitan Magistrate alleging that the respondent had taken a loan from the petitioner for a sum of Rs. 99,00,000/- and for its repayment he submitted seven post-dated cheques amounting to Rs. 80,00,000/-, including the cheque bearing no. 000118, in pursuance of which the proceedings were initiated by petitioner against the respondent, since the cheque was dishonoured with the remarks "Insufficient

Funds" when presented. Summoning order was passed by the learned Metropolitan Magistrate vide order dated 11th July, 2016. Aggrieved by the summoning order, the respondent approached the learned ASJ invoking its revisional jurisdiction impugning the order. Vide order dated 13th September, 2019, the learned ASJ allowed the revision petition and set aside the order of summoning as well as the application under Section 216 of the Cr.P.C. filed by the petitioner against the respondent for addition if charge under Section 420/468/471/120B of the Indian Penal Code, 1860. The petitioner is assailing the said Order of the learned ASJ dated 13th September, 2017.

3. Learned counsel appearing on behalf of the petitioner submitted that the learned ASJ has committed an error by presuming the cheque in question was issued on of the accused no.2/Company, namely, Shree Krishna Vanaspati Pvt. Ltd., while deciding the revision petition. The respondent avoided the trial initiated against him and the accused company and instead approached the revisional court assailing the summoning order on the sole ground that the company was principally liable being the drawer of the cheque and yet it was not made a party. It is submitted that the respondent was not able to establish the status and role in the accused Company or in what capacity he issued the cheques in question. The question as to who was the drawer of the cheque could only be adjudged at the stage of trial.

4. It is further submitted that the learned ASJ did not appreciate the letter dated 18th December 2014 sent by the respondent to the husband of the petitioner, which was a conclusive proof to the effect that the respondent drew the cheque in question with the intention to defraud the petitioner. It is submitted that the learned ASJ presumed the fact that the respondent was

authorised to make statements on behalf of the accused Company. The learned ASJ failed to appreciate that the respondent issued the cheque in question against his personal liability in favor of petitioner.

5. It is further submitted that the revision petition was filed only by the respondent and not the accused company and the company did not appear throughout the entire revisional proceedings. It is stated that the learned ASJ wrongly appreciated the question of facts in exercise of its revisional powers and instead of deciding the limited question of law about the legality of the summoning order it delved into deciding the question of facts without appreciating the evidence.

6. Learned counsel for the petitioner further submitted that the learned ASJ wrongly dismissed the application of the petitioner filed under Section 216 of the Cr.P.C. without going into the merits of the application and dismissing it for the reason of it not being maintainable.

7. It is submitted that the learned ASJ has passed the impugned order based on wrong presumption based on surmises and conjecture and had presumed the question of facts instead of drawing and appreciating evidence. Hence, the order passed by the learned ASJ is liable to be set aside.

8. *Per Contra,* the learned counsel for the respondent opposed the insant petition. It is submitted that the cheque in issue was issued by the accused Company, making it the drawer of the cheque, however, the petitioner failed to make the accused Company a party to the complaint and it was only at a subsequent stage that the Company was included in the proceedings under Section 138 of the NI Act. It is submitted that the Company was a necessary party to the statutory notice as well as the proceedings initiated under

Section 138 of the NI Act, however, the said notice was not issued to the accused Company in accordance with law. It is submitted that in light of the above facts the complaint filed by the petitioner was not maintainable against the accused Company on the ground that the legal notice was not issued to it and also it was not maintainable against the respondent since he only signed the cheque in question on behalf of the accused Company. Learned counsel for the respondent relied upon ***Aneeta Hada vs. Godfather Travels & Tours (P) Ltd.*** **(2008) 13 SCC 703,** ***Vijay Power Generators Ltd. vs. Sumit Seth*****,** ***2014 SCC OnLine Del 2957*****,** ***Kirshna Texport & Capital Markets Ltd. v. Ila A. Agrawal,*** **(2015) 8 SCC 28,** amongst others to give force to his arguments.

9. In rejoinder, it is submitted by the learned counsel for the petitioner that the judgment of ***Aneeta Hada (Supra)*****,** which the respondent has relied upon, is not applicable since, in the judgment Aneeta Hada was an office bearer in the company and not its director, the cheques issued in the case was against the liability of the company and not against her personal liability and the fact was proved in the trial after leading evidence in the matter, hence, the facts in the judgment and the matter at hand are distinguishable.

10. Heard learned counsel for the parties and perused the record, including the impugned order passed by the learned ASJ.

11. In the instant petition, the primary question to be decided who was the drawer of the cheque in question. Although the cheque was the signed by the respondent, the cheque issued to the petitioner bore the name of the accused Company as the account holder, being a separate entity from its members, and not of the respondent. Moreover, as a requirement under Section 138 of the NI Act, the holder of the cheque that is dishonoured has to make a

demand for the payment of the contested 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. It is an admitted fact that the cheque presented by the petitioner was returned dishonoured and the petitioner, as per the mandate of Section 138 of the NI Act, issued a notice intimating the dishonour of cheque solely to the respondent. It was only at the stage of complaint proceedings that the petitioner impleaded the accused company as a party.

12. The judgment of ***Aneeta Hada (Supra)*** makes the following relevant observations on the question of whether the petitioner could have moved forward with the proceedings under Section 138 of the NI Act against the respondent and the accused Company.

> *"**14.** 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 terms 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.*
>
> ***15.** 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.*
>
> ***21.** 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 [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] 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 : (SCC p. 96, para 4)*

> *"4. ... 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."*

***41.*** *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.*

***44.*** *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 common sense, it may be held to be unconstitutional. Such a construction, therefore, in my opinion should be avoided.*

> ***50.*** *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.*
>
> ***53.*** *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.*
>
> ***54.*** *True interpretation, in my opinion, of the said provision would be that a company has to be made an accused but applying the principle of 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 Section 138 as also Section 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."*

13. What is derived from the discussion made in the aforesaid judgement is that if a company is a drawer of the cheque, it is a necessary party to proceedings initiated under Section 138 of the NI Act. The liability of a private person, in his capacity of a Director or any other authority to act on behalf of the Company, if has to be severed from the liability of the

Company, cannot arise against him when the Company itself is also an accused. Such liability against the person would arise when the accused person has issued the cheque in his personal capacity which is distinguishable from his capacity as an employee or Director of a company. Where the Company has also been accused, the liability cannot be said to have been arisen only qua the private person and the Company has to be proceeded against legally by giving it an opportunity to be heard.

14. In the present case, the accused Company was made a party to the complaint case without being furnished a notice, thereby, without it an opportunity to defend itself. In such a situation, had the Company been held guilty of the offence under Section 138 of the NI Act, it would have been without giving it a fair an equitable opportunity of defending itself, since, the fact remains that it was never intimated about the dishonour of the cheque, as per requirement of the Act. The perusal of the cheque also reveals that although it was signed by the respondent, it bears the name of the accused Company and not the respondent, hence, being a separate entity, the prime liability also pertained to the Company as the drawer of the cheque. At the outset, the complaint against the Company, hence, was not maintainable.

15. Further, reference is made to N. Harihara Krishnan v. J. Thomas, (2018) 13 SCC 663, where the understated has been observed by the Hon'ble Supreme Court:-

> *"**22.** The High Court failed to appreciate that the liability of the appellant (if any in the context of the facts of the present case) is only statutory because of his legal status as the Director of Dakshin. Every person signing a cheque on behalf of a company on whose account a*

*cheque is drawn does not become the drawer of the cheque. Such a signatory is only a person duly authorised to sign the cheque on behalf of the company/drawer of the cheque. If Dakshin/drawer of the cheque is sought to be summoned for being tried for an offence under Section 138 of the Act beyond the period of limitation prescribed under the Act, the appellant cannot be told in view of the law declared by this Court in Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] that he can make no grievance of that fact on the ground that Dakshin did not make any grievance of such summoning. It is always open to Dakshin to raise the defence that the initiation of prosecution against it is barred by limitation. Dakshin need not necessarily challenge the summoning order. It can raise such a defence in the course of trial.*

***21.** This Court in Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] (SCC p. 668, para 1), had an occasion to examine the question "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" and held as follows : (SCC p. 688, para 59)*

> *"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 dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. ..."*

*Yet the High Court reached a conclusion that the revision filed by the petitioner is not maintainable because Dakshin did not choose to challenge the trial court's*

*order.*

***26.*** *The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are : (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.*

***27.*** *By the nature of the offence under Section 138 of the Act, the first ingredient constituting the offence is the fact*

*that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of the Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide "cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint."*

16. Since, the drawer of the cheque was the accused Company, solely on the ground that the respondent had signed the cheque, a liability under

Section 138 of the NI Act did not arise against him. The complaint was *prima facie* not maintainable against the Company as drawer of the cheque, the liability towards the respondent also did not arise keeping in view that respondent was acting on behalf of the Company and where the liability against the Company had been discharged, a private and severed liability against the respondent could not have arisen in the circumstances of the instant matter.

17. In light of the peculiar facts and circumstances, submissions made and judgments cited, this Court does not find any error, illegality or impropriety in the impugned order dated 13th September, 2017 passed by learned Additional Sessions Judge, Tis Hazari Courts, New Delhi in Criminal Revision Petition No. 135/2017. The order has been passed in accordance with law and after due and proper appreciation of the facts as well as material on record, keeping in view that the petitioner failed to proceed against the drawer of the cheque, i.e., Shree Krishna Vanaspati Pvt. Ltd., in accordance with law.

18. Accordingly, the petition is dismissed and pending application, if any also stand disposed of.

**CHANDRA DHARI SINGH, J**

**APRIL 29, 2022**

Aj/Ms