

2021 SCC OnLine Guj 2242

In the High Court of Gujarat at Ahmedabad
(BEFORE NIKHIL S. KARIEL, J.)

Pareshbhai Ashwinkumar Mittal
Versus

State of Gujarat and Others

R/Criminal Misc. Application No. 34560 of 2016
Decided on July 2, 2021

Advocates who appeared in this case:

- Mr. Chetan K. Pandya (1973) for the Applicant(s) No. 1
- Mr. Dharmesh V. Shah (1050) for the Respondent(s) No. 2
- Ms. M.D. Mehta, APP for the Respondent(s) No. 1

The Judgment of the Court was delivered by

NIKHIL S. KARIEL, J.:— Heard learned Advocate Mr. Chetan K. Pandya for the applicant, learned APP Ms. M.D. Mehta for the respondent - State and learned Advocate Mr. Dharmesh V. Shah for the respondent No. 2-original complainant.

2. By way of this application the applicant challenges the criminal complaint being Criminal Case No. 3784 of 2013, pending before the learned Chief Judicial Magistrate, Ahmedabad (Rural) filed by the respondent No. 2 under Section 138 of the Negotiable Instruments Act, 1881 (for short "the NI Act"), on the ground that the cheque in question had been issued by the applicant in his capacity as partner of a partnership firm and **since the partnership firm had not been joined as an accused, therefore the complaint would not be maintainable against the applicant in his individual capacity.**

The applicant contending that the learned Magistrate could not have taken cognizance of the offence without the partnership firm being impleaded as an accused.

3. Facts in brief can be enumerated as under:

3.1 A cheque dated 27.04.2013 drawn on the Axis Bank had been issued by the applicant in favour of the complainant as partner/authorized signatory of M/s. Car Care Center for an amount of Rs. 10,00,000/- which upon being presented by the complainant on 27.04.2013 in his bank account with M/s. Corporation Bank had been returned with an endorsement "Fund Insufficient" on 29.04.2013, upon which a notice had been issued by the learned Advocate for the complainant on 03.05.2013 calling upon the applicant-accused to make the payment of the amount in the cheque in question. Incidentally, while the notice had been issued to the applicant-accused in his capacity as partner of M/s. Car Care Center, the allegations made in the notice are with regard to personal transaction between the complainant and the applicant. The said notice had been replied to by learned Advocate for the applicant-accused denying the allegations of any personal transaction, but stating about a transaction between the partnership firm and the complainant and whereas it is stated in the notice that the cheque was given as a security by the partnership firm for an order placed by the firm with the complainant. The complainant thereafter had filed the impugned complaint against the applicant-accused in his capacity as partner of M/s. Car Care Center without joining the partnership firm in question. The learned Chief Judicial Magistrate, Ahmedabad (Rural) had taken cognizance of the complaint vide order dated 28.05.2013 and summons had been issued to the applicant-accused herein. The complaint and the order of the learned Magistrate taking cognizance are challenged by way of the present application by the applicant.

4. Learned Advocate Mr. Chetan Pandya for the applicant-accused has submitted that the learned Magistrate has failed to appreciate that the partnership firm namely M/s. Car Care Center had neither been made an accused nor statutory notice issued to the partnership firm, hence cognizance ought not to have been taken of the complaint. In this regard learned Advocate refers to decision of the Supreme Court in case of *Aneeta Hada v. Godfather Travels and Tours Private Limited* reported in (2012) 5 SCC 661 and submits that the Supreme Court in the said judgment has held that it is mandatory for impleading the company as one of the accused as provided under Section 141 of the NI Act. He has further submitted that the Supreme Court in the above referred judgment has held that the company being a juristic person, therefore for a complaint under Section 138 of the NI Act to be maintainable, the company ought to have been joined as an accused. Learned Advocate has further submitted that in the instant case, the cheque in question had been issued by the applicant in capacity as partner of the partnership firm, which is a juristic person, from the account of the partnership firm and therefore, for the complaint to be maintainable, the partnership firm ought to have been joined as an accused. Learned Advocate has further relied upon the decision rendered by this Court on 29.03.2017 in Criminal Misc. Application No. 701 of 2016 and allied matters, where this Court (Coram : J.B. Pardiwala, J) had set aside a complaint inter alia relying upon the decision of the Supreme Court in case of *Aneeta Hada* (supra) where in a complaint for an offence under Section 138 of the NI Act, the complainant had not joined the partnership firm, from the account of which the cheque had been issued, as an accused in the complaint. Thus, learned Advocate for the applicant has submitted that the impugned complaint being filed without joining the partnership firm and the learned Magistrate having taken cognizance thereupon, both being in clear breach of provisions of Section 141 of the NI Act, may be quashed and set aside by this Court.

5. On the other hand, learned Advocate Mr. Dharmesh Shah for the respondent No. 2-complainant submits that the transaction between the complainant and the applicant-accused was in the nature of a private transaction and not in the nature of a transaction with the accused in his personal capacity. It is further submitted that the applicant himself was not aware about his status or rather was contradicting his own status since in the cause title of the application has mentioned his status as partner of M/s. Car Care Center which is stated to be a proprietorship firm. Learned Advocate has thus submitted that in view of personal transaction and in view of the fact of the status of the applicant being unclear, this Court may not interfere with the complaint at this stage.

6. Heard learned advocates for the parties and perused the record.

7. The only question which arises for consideration of this Court is when the cheque in question is issued by the applicant as partner of a partnership firm then whether the partnership firm is required to be joined as an accused and in absence thereof, would the complaint itself be maintainable. This question, in the considered opinion of this Court, is no more res-integra inasmuch as the Supreme Court in case of *Aneeta Hada* (Supra) having settled this issue. The observations of the Supreme Court are quoted hereinbelow for better appreciation:

"22. On a reading of the said provision, it is plain as day that if a person who commits offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions,

there is a 'deemed' concept of criminal liability.

23. Section 139 of the Act creates a presumption in favour of the holder. The said provision has to be read in conjunction with Section 118(a) which occurs in Chapter XIII of the Act that deals with special rules of evidence. Section 140 stipulates the defence which may not be allowed in a prosecution under Section 138 of the Act. Thus, there is a deemed fiction in relation to criminal liability, presumption in favour of the holder, and denial of a defence in respect of certain aspects.

24. Section 141 uses the term 'person' and refers it to a company. There is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attracted to a corporation and company and it is so luminescent from the language employed under Section 141 of the Act. It is apposite to note that the present enactment is one where the company itself and certain categories of officers in certain circumstances are deemed to be guilty of the offence.

39. The word 'deemed' used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in *S.M.S. Pharmaceuticals Ltd.* In the said case, it has been opined that the criminality on account of dishonour of cheque primarily falls on the drawee (sic drawer) company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied.

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.

54. In this context, we may usefully refer to Section 263 of Francis Bennion's *Statutory Interpretation* where it is stated as follows:

"A principle of statutory interpretation embodies the policy of the law, which is in turn based on public policy. The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory interpretation can therefore be described as a principle of legal policy formulated as a guide to legislative intention.

55. It will be seemly to quote a passage from *Maxwell's The Interpretation of Statutes* (12th Edition):

"The strict construction of penal statutes seems to manifest itself in four ways : in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons, whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned

counsel for the respondents have vehemently urged that the use of the term “as well as” in the Section is of immense significance and, in its tentacle, it brings in the company as well as the Director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the Directors or other officers is tenable even if the company is not arraigned as an accused. The words “as well as” have to be understood in the context.

57. In *RBI v. Peerless General Finance and Investment Co. Ltd.* [44] it has been laid down that the entire statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. The same principle has been reiterated in *Deewan Singh v. Rajendra Pd. Ardevi* and *Sarabjit Rick Singh v. Union of India*.

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* which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal* does not correctly lay down the law and, accordingly, is hereby overruled. The decision in *Anil Hada* is overruled with the qualifier as stated in para 51. The decision in *Modi Distilleries* has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

8. From the above observations, it is clear that the company as a juristic person ought to have been joined as an accused without which the complaint itself would not be maintainable.

9. In the instant case, in place of company, the cheque in question had been issued by the applicant - accused as partner of the partnership firm. A partnership firm being a juristic person, the observations of the Supreme Court would apply with an equal force in the instant case inasmuch as the partnership firm was required to be joined as an accused in absence of which the complaint would not be maintainable.

10. The submissions of learned Advocate Mr. Dharmesh Shah for the respondent No. 2-complainant that the transaction was not with the partnership firm but with the applicant in his personal capacity, may be in the opinion of this Court self-defeating. The cheque in question being drawn by the applicant accused from an account of the partnership firm and the contention of the complainant that he did not have any transaction with the partnership firm, then the mandatory requirement of Section 138 that the cheque should be drawn on an account maintained by the drawer may not be fulfilled. In any case, such an argument cannot be countenanced inasmuch as the legal notice pursuant to dishonour of cheque had been issued to the applicant-accused in his capacity as partner of *M/s. Car Care Center*, the complaint also being filed against the applicant in his capacity as partner of *M/s. Car Care Center*. Thus, the complainant knew very well that the cheque had been issued by the applicant accused in his capacity as partner of *M/s. Car Care Center* and therefore the complainant was

under an obligation to have joined the partnership firm as an accused.

11. In view of the discussion and finding recorded hereinabove, this Court is of the considered opinion that the respondent-complainant not having joined the partnership firm as an accused, in view of the ratio laid down by the Supreme Court in case of *Aneeta Hada* (Supra), the present complaint would not be maintainable.

12. Thus, as a result thereof, the present application is hereby allowed. The impugned complaint filed by the respondent No. 2-complainant against the present applicant being Criminal Case No. 3784 of 2013 pending before the Court of learned Chief Judicial Magistrate, Ahmedabad (Rural) under Section 138 of the NI Act and the order dated 28.05.2013, are hereby quashed and set aside. Rule is made absolute to the aforesaid extent.

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