

ANIL GUPTA

v.

STAR INDIA PVT. LTD. & ANR.  
(Criminal Appeal No.1364 of 2014)

JULY 07, 2014

[SUDHANSU JYOTI MUKHOPADHAYA AND  
V. GOPALA GOWDA, JJ.]

NEGOTIABLE INSTRUMENTS ACT, 1881:

*ss.138 and 141 - Complaint against a Company and its Managing Director alleging disonour of cheques issued by Company - Summons issued against company quashed by High Court - Maintainability of criminal proceedings against Managing Director (appellant) alone - Held: Only the drawer of the cheque falls within the ambit of s.138 of the Act whether human being or a body corporate or even a firm -- The guilt of offence u/s 138 will be deemed to be upon other persons connected with the Company in view of s.141 - In the instant case, High Court has held that complaint against Company was not maintainable and quashed summons against it -- As Company is not a party to the proceedings u/s 138 r/w s.141, the remaining part of the impugned judgment whereby High Court has held that proceedings against appellant can be continued, is set aside and summons and proceedings against him pursuant to the complaint are quashed.*

**Respondent no. 1 filed a criminal complaint for offences u/ss 138 and 141 of the Negotiable Instruments Act, 1988 against respondent no. 2, Company and the appellant-Managing Director alleging dishonour of cheques issued by respondent no. 2, Company. On a petition u/s 482 Cr.PC filed jointly by respondent no. 2, Company and the appellant, the High Court quashed the summons issued against the company and relying on**

A Anil Hada's<sup>1</sup> case held that proceedings against the Director could be continued.

B In the instant appeal filed by the Managing Director of the Company, it was contended that since the proceedings against the company were quashed, the same could not be continued against him as he was only vicariously liable.

Allowing the appeal, the Court

C HELD

D 1.1. Only the drawer of the cheque falls within the ambit of s.138 of the Negotiable Instruments Act, 1881 whether human being or a body corporate or even a firm. The guilt of offence u/s 138 will be deemed to be upon other persons connected with the Company in view of s.141 of the Act. [paras 10-11] [189-C-D]

*Anil Hada v. Indian Acrylic Ltd.* 1999 (5) Suppl. SCR 6 = (2000) 1 SCC 1- stood overruled.

E *Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.* 2012 (5) SCR 503 = (2012) 5 SCC 661; and *Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.* (2008) 13 SCC 703 - relied on.

F 1.2. In the instant case, the High Court by impugned judgment held that the complaint against respondent no.2-Company was not maintainable and quashed the summons issued by the trial court against respondent no.2-Company. Thereby, the Company being not a party to the proceedings u/s 138 read with s.141 of the Act and in view of the fact that part of the judgment referred to by the High Court in Anil Hada has been overruled by three Judge Bench of this Court in Aneeta Hada, the rest part of the impugned judgment whereby the High Court

H 1. 1999 (5) Suppl. SCR 6.

has held that the proceedings against the appellant can be continued even in absence of the Company, has to be set aside. Accordingly, that part of the impugned judgment passed by the High Court so far it relates to appellant is set aside and the summons and proceedings pursuant to complaint case No.698 of 2001 qua the appellant are quashed. [paras 15-16] [193-F-H; 194-A-B]

**Case Law Reference:**

1999 (5) Suppl. SCR 6 Stood overruled para 6

(2008) 13 SCC 703 Relied on para 13

2012 (5) SCR 503 Relied on para 14

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1364 of 2014.

From the Judgment and Order dated 13.08.2007 in CMP No. 2380/2004 of the High Court of Delhi at N. Delhi.

Ashok Mathur for the Appellant.

Aman Lekhi, R.N. Karanjawala, Manik Karanjawala, Sandeep Kapur, Shivek Trehan, Prem Prakash for the Respondents.

The Judgment of the Court was delivered by.

**SUDHANSU JYOTI MUKHOPADHAYA, J. :** 1. Leave granted.

2. This appeal is directed against the judgment dated 13th August, 2007 passed by the High Court of Delhi at New Delhi in Criminal Miscellaneous Case No.2380 of 2004. By the impugned judgment, the High Court held that the complaint under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the, 'Act') was barred by limitation and quashed the summon order against respondent no.2-Visionaries Media Network (hereinafter

A referred to as the, 'Company'). It further held that the dispute qua the appellant (petitioner no.2 before High Court) is within limitation and affirmed the summon order against the appellant.

3. The factual matrix of the case is as follows:

B A subscription agreement was entered into between respondent nos.1 and 2 whereby respondent no.2-Company was appointed as distributor of Star Channels and collecting subscription fee for the same. On 27.12.2003, respondent no.2-Company issued three cheques bearing nos.790913, 790912 and 790911 for Rs.6,00,000/-, Rs.5,00,000/- and Rs.5,00,000/- respectively drawn on the Indian Overseas Bank, Gandhi Nagar, Jammu. The aforesaid three cheques were presented before the Indian Overseas Bank, Gandhi Nagar, Jammu and were dishonoured on 6.01.2004. Respondent No.1 served notice on respondent no.2-Company with a demand notice separately for all the three cheques. Respondent no.2-Company replied to the said notice on 20.01.2004 informed respondent no.1 that payments were stopped because of their inability to stop the piracy due to which the cable operators did not make payments.

F Thereafter, respondent no.1 issued second notice dated 28.01.2004 on the appellant based on the same facts and based on the same memo of dishonor in respect of the aforesaid three cheques. Respondent no.1 also issued a corrigendum of the same date to the said notice. The appellant submitted reply to the said notice on 3.02.2004.

G H 4. Respondent no.1 filed a Criminal Complaint under Sections 138 and 141 of the Act on 17.03.2004. According to appellant, respondent no.1 concealed the material fact of having earlier issued notice dated 14.1.2004 with regard to the aforesaid three cheques and by misleading the Court got summons issued by Metropolitan Magistrate in Complaint No.698 of 2001 to the appellant and respondent no.2-Company.

5. Thereafter, respondent no.2-Company and appellant jointly filed Criminal Miscellaneous Petition No.2380 of 2004 under Section 482 of the Criminal Procedure Code, 1973 before the High Court of Delhi at New Delhi for quashing the aforesaid criminal complaint filed by respondent no.1. In its reply, respondent no.1 taken the plea that first notice dated 14.01.2004 was not a notice under Section 138 of the Act. It was contended on behalf of the appellant that he was only vicariously liable on behalf of respondent no.2-Company. Learned counsel for the appellant placed reliance on decisions of this Court in support of his claim.

6. The High Court by impugned judgment while recording the stand taken by respondent no.1 that letter dated 14.01.2004 constituted a valid notice under Section 138 of the Act and hence the complaint based on second notice against respondent no.2-Company was not maintainable and quashed the summon issued by the Trial Court against respondent no.2-Company. However, so far as appellant is concerned, the High Court relying on decision of this Court in Anil Hada v. Indian Acrylic Ltd., (2000) 1 SCC 1, held that the proceeding against the Director can be issued even in absence of the Company being impleaded, The High Court further held that the summoning order was valid since the first notice was not addressed to the appellant and the second notice which was also addressed to the appellant was issued within time and therefore, criminal complaint filed by respondent no.1 against the appellant on the basis of the said notice is maintainable.

7. Learned counsel appearing on behalf of the appellant contended that the order of the High Court is contrary to the law in as much as this is not a case where proceedings were initiated against the Managing Director alone. On the contrary, the proceedings are instituted against the company/accused and its Managing Director. In the event of the company/accused being let off, the same cannot continue against the Managing Director who admittedly is only vicariously liable.

A 8. It is further submitted that even as per law laid down in Anil Handa's case, the Director of a company/accused is only liable vicariously and upon his showing that the principal accused is not liable he cannot be held guilty.

B 9. On the other hand, according to counsel for the respondents, the issue is no longer res integra as held by the High Court.

10. Section 138 of the Act deals with dishonor of cheque for insufficiency etc. as follows:

C "138. 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 arrangement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

F Provided that nothing contained in this section shall apply unless-

G (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;

H (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 A

(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." B

From the aforesaid provision, it is clear that only the drawer of the cheque falls within the ambit of Section 138 of the Act whether human being or a body corporate or even a firm. C

11. The guilt for offence under Section 138 will be deemed to be upon other persons connected with the Company in view of Section 141 of the Act, which reads as follows: D

"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: E

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. F

(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 G

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A        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."

B        12. Similar question was raised and considered by two Judge Bench of this Court in *Anil Hada v. India Acrylic Ltd.* (2000) 1 SCC 1. This Court held:

C        "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.

G        13. If the offence was committed by a company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution the accused can show that

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the company has not committed the offence, though such A  
company is not made an accused, and hence the  
prosecuted accused is not liable to be punished. The  
provisions do not contain a condition that prosecution of  
the company is sine qua non for prosecution of the other  
persons who fall within the second and the third categories B  
mentioned above. No doubt a finding that the offence was  
committed by the company is sine qua non for convicting  
those other persons. But if a company is not prosecuted  
due to any legal snag or otherwise, the other prosecuted  
persons cannot, on that score alone, escape from the penal C  
liability created through the legal fiction envisaged in  
Section 141 of the Act."

"21. We, therefore, hold that even if the prosecution  
proceedings against the Company were not taken or could D  
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." E

13. In *Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.*, (2008) 13 SCC 703, taking note of the maxim *lex non cogit ad impossibilia*, two Judge Bench of this Court observed:

"54. True interpretation, in my opinion, of the said provision F  
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 G  
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 H

A 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."

B 14. Again the same question was considered by three  
 Judge Bench of this Court in *Aneeta Hada v. Godfather Travels  
 and Tours Pvt. Ltd.* (2012) 5 SCC 661. The Court noticed the  
 decisions in Anil Hada (supra) case and Aneeta Hada (supra)  
 case. The three Judge Bench while partly overruled the finding  
 of Anil Hada (supra) affirmed the decision of Aneeta Hada  
 C (supra). This Court held

"51. We have already opined that the decision in  
 Sheoratan Agarwal runs counter to the ratio laid down in  
 D C.V. Parekh which is by a larger Bench and hence, is a  
 binding precedent. On the aforesaid ratiocination, the  
 decision in Anil Hada has to be treated as not laying down  
 the correct law as far as it states that the Director or any  
 other officer can be prosecuted without impleadment of the  
 company. Needless to emphasise, the matter would stand  
 E on a different footing where there is some legal  
 impediment and the doctrine of *lex non cogit ad  
 impossibilia* gets attracted."

"53. It is to be borne in mind that Section 141 of the Act is  
 F 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  
 G 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  
 H 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<sup>17</sup> 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 Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

15. In the present case, the High Court by impugned judgment dated 13th August, 2007 held that the complaint against respondent no.2-Company was not maintainable and quashed the summon issued by the Trial Court against respondent no.2-Company. Thereby, the Company being not a party to the proceedings under Section 138 read with Section 141 of the Act and in view of the fact that part of the judgment referred to by the High Court in Anil Hada (supra) has been overruled by three Judge Bench of this Court in Aneeta Hada

- A (supra), we have no other option but to set aside the rest part of the impugned judgment whereby the High Court held that the proceedings against the appellant can be continued even in absence of the Company. We, accordingly, set aside that part of the impugned judgment dated 13th August, 2007 passed by
- B the High Court so far it relates to appellant and quash the summon and proceeding pursuant to complaint case No.698 of 2001 qua the appellant.

16. The appeal is allowed with aforesaid observation.

C Rajendra Prasad

Appeal allowed.