



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 697 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J. C. DOSHI

Approved for Reporting	Yes	No
	✓	

ABDUL LATIF SAIYED & ANR.

Versus

M/S BHAGWATI CONSTRUCTION & ORS.

Appearance:

MR ASIFKHAN I PATHAN(2459) for the Applicant(s) No. 1,2

NOTICE SERVED BY DS for the Respondent(s) No. 1,2,3

MR SOHAM JOSHI, APP for the Respondent(s) No. 4

CORAM:HONOURABLE MR. JUSTICE J. C. DOSHI

Date : 07/03/2025

ORAL JUDGMENT

1. By this application under Section 482 of the Code of Criminal Procedure (for short “the Code”), the applicant seeks to quash and set aside complaint and order dated 20.01.2018 passed by learned Additional Chief Judicial Magistrate, Ahmedabad in Criminal Case No.1132 of 2018 and further proceedings arising thereof.

2. Facts of the case are as under :-



2.1. That petitioner No.1 is Director of the Company namely M/s ALF Construction Pvt. Ltd and petitioner No.2 is also Director and wife of petitioner no.1. The petitioner no.1 had sent email to the respondents on 6/11/2017 wherein it is specifically stated that the amount of Rs.4 lakhs has not been transferred by the respondent as agreed by the respondents therefore, the questioned cheque of the complaint was to be returned back to the petitioner. That the respondents is involved in construction business and the respondents had signed sub contract agreement which has been obtained by the respondents from Indian Railway at site Sanawad - Khandwa section of Ratlam Mhow Khandwa GC Project. The said agreement has been entered between the petitioner no.1 and respondent no.2 on 6/5/2015 which has been executed in writing on 12/5/2017. After executing agreement the work had been started by the petitioner no.1 and his company and due to technical reasons and negligence on the part of the respondent No. 1 to 3 the work was not carried forward and dispute had been started between the respondent No. 1 to 3 and petitioner no.1 and his company. Therefore petitioner no.1 have done number of communications to the respondent No. 1 to 3 and but respondent No. 1 to 3 failed to perform his part of duty and thereby the sub contract had been come to end in between the project. There is huge outstanding of Rs.80.66 lakhs against the respondent No. 1 to 3 and the legal notice was given to the respondent No. 1 to 3 on 22/11/2017 the same has been served to the respondent No. 1 to 3 wherein it is specifically stated that as per the sub contract between the parties, Arbitrator is required to be appointed in subject to the amount not paid to the petitioners Company. That inspite of the email dated 6/11/2017 send to the



respondent No. 1 to 3 the respondent have deposited the disputed cheque in the bank on 13/11/2017 and the date has been written by the respondent No. 1 to 3 on the cheque was 10/11/2017. The respondent No. 1 to 3 has intentionally deposited the cheque in the Bank just to pressurize the petitioner no.1 that the petitioner no.1 may not claim for the outstanding amount which is on the head of the respondent No. 1 to 3. Petitioner no.2 is not an active Director nor the petitioner no.2 have entered into any agreement with the respondent No. 1 to 3 and the disputed cheque was also not signed and handed over by the petitioner no.2 to the respondent No. 1 to 3. That the petitioner no.1 when came to know about mischievous act on the part of the respondent No. 1 to 3 by depositing the disputed cheque in bank, petitioner's No.1 Company has given legal notice through his Advocate on 27/11/2017 with regard to the questioned cheque in the complaint immediately informing the respondent No. 1 to 3 not to misusing the cheque in question which was given for security purpose against demand loan which has not been paid by respondent No. 1 to 3. Thereafter, the petitioners have approached the Hon'ble High Court by filing Arbitration petition No.91/2018 for appointment of Arbitrator. The Hon'ble Gujarat High Court has passed an order dated 13/07/2018 appointing sole Arbitrator. That the respondent No. 1 to 3 have send reply to the notice for appointment of the Arbitrator and also the respondent No. 1 to 3 have sent notice under N.I. Act on 5/12/2017. After receiving the notice of respondents the petitioners send reply on 13.12.2017. It is alleged in the complaint that accused persons have failed to make payment towards loan amount and amount has been taken from complainant.



3. Learned advocate for the petitioners submitted that in the present case of Directors of M/s. ALF Construction Pvt. Ltd have been joined as accused without joining M/s. ALF Construction Pvt. Ltd. as accused. It is submitted that without arraigning Company as accused, its Directors cannot be arraigned as accused for vicarious liability for offence under section 138 of NI Act. Learned advocate for the petitioners takes this Court through statutory notice issued by the complainant dated 05.12.2017 (Annexure G). It is submitted that even statutory notice is not given to the M/s. ALF construction Pvt. Ltd. but it is issued to Directors, whereas, disputed cheque was issued by Director on behalf of M/s. ALF Construction Pvt. Ltd. In nutshell, it is submitted that order issuing process for offence under section 138 of NI Act to the petitioners without joining M/s. ALF Construction Pvt. Ltd. as accused would be abuse of process of law.

3.1. In view of above, it is submitted to allow the petitioner by quashing the process issued against the petitioners. Learned advocate for the petitioners in support of his submissions relied on judgment in the case of **Anil Hada v/s. Godfather Travels and Tours Pvt. Ltd. [AIR 2012 SC 2795]** and in the case of **Himanshu v/s. B. Shivamurthy [AIR 2019 SC 3052]**.

4. Process of the petition was served to respondent no.2 - original complainant but he did not chose to remain present before this Court.

5. Learned APP Mr.Joshi for the respondent - State in given facts and circumstances submitted that it is private dispute



between the parties and therefore, the Court may pass necessary order.

6. I have heard learned advocates for the parties. To appreciate the arguments canvassed by learned advocate for the petitioner, at the outset, I may refer to Section 141 of the N.I. Act :

“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.

Provided that nothing contained in this subsection 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 :

[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 subsection (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 corporation and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

7. Sub-section (1) of 141 of NI Act speaks that 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. Explanation (a) to section 141 states that company means any body corporation and includes a firm or other association of individuals. Explanation (b) to section 141 is in relation to director to a firm, means a partner in the firm. Thus, it is clear that besides Director or in case of firm or partnership, company or firm as the case may is also accused in the matter. In the present case, statutory notice is given to petitioners who are Directors of M/s. ALF Construction Pvt. Ltd.. No notice is given to M/s. ALF Construction Pvt. Ltd. Perusal of complaint, learned Jurisdictional Court, indicates that complaint was filed



under section 138 of NI Act for dishonor of cheque issued for an on behalf of M/s. ALF Construction Pvt. Ltd. Said company has not been joined as accused but Director i.e. petitioners are joined. Cheque in question (Annexuer C) is issued by the company. The petitioner has signed the cheque in capacity of Direction.

8. In view of above operation of law, prosecution along with accused Directors without joining company as accused is not maintainable. Complaint (Annexure E) is in teeth of provision of section 141 of NI Act. Co-ordinate Bench of this Court in case of **Oanali Ismailji Sadikot vs. State of Gujarat – 2016 (3) GLR 1991**, addressed identical issue by framing three questions :-

(I) Whether a partnership firm is a legal entity like a company so far as the offence punishable under Section 138 of the Negotiable Instruments Act is concerned?

(II) Is the prosecution of the partners of a firm, by virtue of Section 141 of the Act, maintainable in the absence of the partnership firm being impleaded or arraigned as an accused?

(III) When the complaint under Section 138 of the Act has the initial defect in its sustainability, can such defect be cured by amending the proceedings by virtue of an application under Section 319 of the Cr. P.C.?"

9. The relevant paragraphs of judgment in case of **Oanali Ismailji Sadikot (supra)**, are as under :



“16. Sub-section (1) of Section 141 of the Act provides that if a person committing an offence under the section is a company, every person who, at the time 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. The offender in section 138 of the Act is the drawer of the cheque. He alone would have been the offender thereunder if the Act did not contain other provisions. It is because of section 141 of the Act that penal liability under section 138 is cast on other persons connected with the company. Three categories of persons can be discerned from the said provision who are brought within the purview of the penal liability through the legal fiction envisaged in the section. They are: (1) The company the principal offender which committed the offence, (2) Every one 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. However, if a person proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence, he shall not be liable to punishment under this section. Subsection (2) further provides that where any offence under this Act has been committed by a company and it is provided 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. The Explanation to the



section defines 'company' as any body corporate and includes a firm or other association of individuals; and 'director', in relation to a firm, means a partner in the firm.

17. It is only the drawer of the cheque, who can be held responsible for an offence under Section 138 of the Act. Section 141 provides for the constructive liability. It postulates that a person, in charge of and responsible to the company, in the context of the business of the company, shall also be deemed guilty of the offence. The drawer can be a company, a firm or an association of individuals, but only those directors, partners, or officers can be held responsible for the offence punishable under Section 138 of the Act, who are responsible to the company - firm for the conduct of its business.

18. The Legislature has thought fit to provide an explanation in Section 141 of the Act and the plain reading of the expression "company" as used in Sub-clause (a) of the explanation appended to Section 141 of the Act shows that it is an inclusive of any body corporate or "other association of individuals". Though the heading of Section 141 of the Act reads "offences by companies"; according to the explanation to that Section, "company" means "any body corporate and includes a firm or other association of individuals and "director", in relation to a firm means "a partner in the firm". The term "other association of individuals" should not be understood to refer even to informal understanding between the individuals. It has to be understood in the context of body corporate and partnership firms. The principal of ejusdem generis gets attracted in such a case. Therefore, a sole proprietary concern is not a company within the meaning of "company" as defined under the explanation to



Section 141 of the Act.

19 The Explanation to Section 141 makes it clear that wherever there is a reference under Section 141 to a company it has to be substituted by the word firm where the accused is a partnership firm and the provision has to be read as if it refers to the firm. What this means is that a complaint can be filed for the offence under Section 138 Negotiable Instruments Act not only against the partnership firm on whose behalf the cheque was issued but also against an individual partner or person who, at the time of the commission of the offence, was in charge of the affairs of the firm or responsible to it for the conduct of its business. There is nothing in the provision which indicates that in every complaint involving the dishonour of a cheque issued by a firm both the firm as well as its partners have to be compulsorily impleaded. In other words a complaint in which only the firm is made an accused and the partners are not would not be bad in law for that reason. Clearly that is not the intention of the Parliament.

20. A partnership firm is a separate legal entity in terms of the Indian Partnership Act 1932 and it is answerable in law in that capacity. That is how under various statutes like the Income Tax Act 1961, the Central Excises Act 1944, the Sales Tax Laws and Section 141 Negotiable Instruments Act, a firm can be proceeded against as such. It is perfectly possible for a complainant, aggrieved by the dishonour of a cheque issued by or behalf of a firm, to file a complaint for the offence under Section 138 Negotiable Instruments Act only against the firm. The complainant may choose not to proceed against the individual partners as accused either because he is not aware as to who are the partners or is not interested in proceeding against the



partners apart from the firm.

21. It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in 'Interpretation of Statutes' while dwelling on the various aspect of an Explanation observes as follows:

"(a) The object of an explanation is to understand the Act in the light of the explanation.

(b) It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute."

*** **

28. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the



purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

The first question is answered accordingly in the affirmative.”

10. After answering question No.1 in aforesaid terms, for question No.2, the coordinate Bench held as under :

“30. Thus, it has been laid down in unequivocal words in the aforesaid decision that for maintaining the prosecution against the director under Section 141 of the Negotiable Instruments Act, arraigning of a company as an accused is imperative. In view of explanation to Section 141 of the Negotiable Instruments Act referred to above, this legal position needs to be automatically made applicable in case of prosecution against a partnership firm also. Therefore, it has to be held that for maintaining prosecution against a partner under Section 141 of the Negotiable Instruments Act, arraigning of partnership firm as an accused is imperative.

31. The conclusions drawn by the Supreme Court in the case of Aneeta Hada (supra) are not based merely on the fact that the company is a separate legal entity and juristic person, but these conclusions are drawn on the basis of the



fact that Section 141 of the Negotiable Instruments Act deals with the vicarious liability. In paras 58 and 59 of the said judgment, referred above, the Supreme Court has referred to the wordings in Section 141 of the Negotiable Instruments Act and observed that commission of offence by a company is an express condition precedent to attract the vicarious liability of others. It was further held that the words "as well as the company" appearing in the section make it unmistakably clear that when a company is 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. It was further observed that the other categories of offenders like directors or partners of the firm can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself.

32. Thus, the Supreme Court has arrived at an irresistible conclusion that for maintaining the prosecution under Section 141 of the Negotiable Instruments Act, arraigning of the company as an accused is imperative, mainly on the basis of the vicarious liability of the directors of the company and not necessarily because the company is a juristic person and it has its own respectability. That was an additional circumstance considered by the Apex Court while holding that arraigning of a company as an accused is imperative, but the main basis for arriving at its conclusion was the vicarious liability which the directors or partners of the firm can have towards the company and hence without joining the company on the touchstone of vicarious liability they cannot be prosecuted.

33. Therefore, the ratio laid down in the case of



Aneeta Hada (supra) can be made equally applicable in the case of a partnership firm also. The partners are liable and sued in their vicarious liability. Whether the partnership firm is a juristic person or not is a different aspect. What is important is that a partner of the firm is arraigned as an accused in the dragnet on the touchstone of vicarious liability, as is done in the case of directors of the company. Therefore, there is no reason at all to draw any distinction in respect of the law to be made applicable to a partnership firm and the company.

34. Moreover, the Legislature has already made it clear that the company includes any body corporate which includes a firm or other association of individuals and director in relation to a firm means a partner in the firm. On this count also, when Section 141 of the Negotiable Instruments Act and explanation thereto does not make any distinction between the company and the partnership firm, there is absolutely no reason to draw such distinction while making applicable the law laid down by the Apex Court in Aneeta Hada (supra) to the partnership firm merely because in that judgment the Apex Court was considering the eventuality of nonjoining of the company. The basic premise of holding either the director or the partner liable for prosecution being the same that of the vicarious liability. Therefore, once the company is held to be an essential party and that arraigning of a company as an accused is imperative for prosecution under Section 141 of the Negotiable Instruments Act, it necessarily follows that arraigning of a partnership firm is also imperative for prosecution against the partners under Section 141 of the Negotiable Instruments Act. The prosecution launched against only one of the partners of the partnership firm, without joining the partnership firm, cannot be maintainable.



35. *In view of the specific provisions of the Act itself, it is very difficult for the Court to take a view that a partnership firm for the purpose of Section 138 read with Section 141 of the Act is not a legal entity, and therefore, it need not be made an accused in the complaint. The decisions relied upon by the learned counsel appearing for the petitioner are of no avail in any manner. Thus, the first question is answered accordingly.*

36. *The second question is answered accordingly.”*

11. In the case of **Anil Hada (supra)**, the Hon'ble Apex Court in para 14,15 and 16 has held as under :-

"14. The main part of the provision can be segregated into three compartments, namely, (i) the cheque is drawn by a person, (ii) the cheque drawn on an account maintained by him with the 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 a debt or other liability, is returned unpaid, either because the amount of money standing to the credit of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an arrangement made with the bank and (iii) such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of the 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. The proviso to the said section postulates under what circumstances the section shall not apply. In the case at hand, we are not concerned with the said aspect. It will not be out of place to state that the main part of the provision deals with the basic ingredients and the proviso deals with certain circumstances and lays certain conditions where it will not be applicable. The emphasis has been laid on the factum that the cheque has to be drawn by a person on the account maintained by him and



he must have issued the cheque in discharge of any debt or other liability. Section 7 of the Act defines 'drawer' to mean the maker of a bill of exchange or a cheque. An authorised signatory of a company becomes a drawer as he has been authorised to do so in respect of the account maintained by the company.

15. At this juncture, we may refer to Section 141 which deals with offences by companies. As the spine of the controversy rests on the said provision, it is reproduced below: - "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; 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: 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."

16. 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."

12. Applying above ratio, in absence of company, Directors cannot be prosecuted. Learned Trial Court has issued process in case, where no statutory notice is issued to the company nor company is joined as accused.

13. This Court may gainfully refer to the following observations of this Court in the case of **State of Haryana v. Bhajan Lal [1992 Suppl (1) SCC 335]**, and the law laid down therein has been consistently followed. In para 102, the Hon'ble Apex Court held as under :-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face



value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a noncognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."



14. Prosecution against the present petitioner without arraigning the Company is not maintainable and putting the petitioners into trial, according to this Court, is absurd process.

15. Resultantly, the present petition is allowed. Proceedings of Criminal Case No.1132 of 2018 pending before learned Additional Chief Judicial Magistrate, Ahmedabad and all subsequent proceedings arising therefrom are hereby quashed and set aside qua the petitioners. Rule is made absolute. Direct service is permitted.

(J. C. DOSHI,J)

SATISH