

[2022 LiveLaw \(Del\) 448](#)

IN THE HIGH COURT OF DELHI AT NEW DELHI

HON'BLE MS. JUSTICE ASHA MENON; J.

CRL.M.C. 1382/2022; 9th May, 2022

SHRI HARI SHAMSHER KAUSHIK

Versus

SHRI JASBIR SINGH, MANAGING DIRECTOR, M/S ACCURA CARE PHARMACEUTICALS PVT. LTD.

Negotiable Instruments Act, 1881; Section 138 - Directors and other persons responsible for conduct of business cannot be held liable, if no offence is attributed to company.

Petitioner through: Mr. Mahesh K. Mehta, Advocate.

J U D G M E N T

1. This petition has been filed under Section 482 Cr.P.C. by the complainant for setting aside the orders dated 28th August, 2015 and 23rd October, 2017, passed by the learned Trial Court and the learned Appellate Court respectively, dismissing his complaint case.

2. The petitioner had filed a complaint case under Section 138 of Negotiable Instruments Act, 1881 („N.I. Act“, for short) against the respondent. It was stated in the complaint that the commercial space owned by the petitioner in Punjabi Bagh (West) had been let out upon terms and conditions incorporated in the registered Rent Agreement dated 23rd February, 2010. This was executed between the petitioner (landlord) and the respondent’s company, namely, M/s Accura Care Pharmaceuticals Pvt. Ltd. through its Managing Director i.e., the respondent. In March-April, 2013 the respondent is alleged to have issued five cheques across the company duly signed by him as Managing Director to discharge the company’s liability to pay the rent aggregating to Rs.16,95,000. These bounced. As a result of which, the complaint was filed.

3. Mr. Mahesh K. Mehta, learned counsel for the petitioner submitted that the learned Trial Court dismissed the complaint observing that since the company had not been impleaded as an accused, the liability of the respondent as its Managing Director could not be attached under section 141 of the N.I. Act. Reliance was placed on the judgment of the Supreme Court in ***Aneeta Hada v. Godfather Travels & Tours (P) Ltd.***, (2012) 5 SCC 661. According to the learned counsel for the petitioner, this reliance was misplaced and instead of rectifying the error, the learned Appellate Court also concluded that the dismissal of the complaint was proper, as the Trial Court had followed the decision of the Supreme Court which had held that for maintaining the prosecution under Section 141 of the N.I. Act, the Company had to be arrayed mandatorily as an accused. The learned counsel has relied on various judgments, ***S.R. Sukumar v. S. Sunaad Raghuram***, (2015) 9 SCC 609; ***Rajneesh Aggarwal v. Amit J. Bhalla***, (2001) 1 SCC 631; ***Bilakchand Gyanchand Co. v. A. Chinnaswami***, (1999) 5 SCC 693; ***U.P. Pollution Control Board vs Modi Distillery & Ors***, 1988 AIR 1128 and ***Manish Kalani & Another v. Housing & Urban Development Corporation Ltd. (Hudco) & Another***, 2018 MPHC

13, to contend that when the lacuna was only of a technical nature, then the Trial Court ought to have allowed amendment of the complaint, rather than dismissing it. Thus, it was prayed that the impugned order be set aside and the complaint be restored, granting an opportunity to the petitioner to amend his plaint to, ipso M/s Accura Care Pharmaceuticals Pvt. Ltd.

4. The learned counsel further submitted that the judgment in ***Aneeta Hada (supra)*** was a *per incuriam* judgment, as the Supreme Court in other cases had held that mis-description of the company or the noninclusion of the company in a complaint case was only a curable defect which could be rectified by way of amendment.

5. I have considered the judgments relied upon by the learned counsel for the petitioner and the material on the record.

6. The contention of the learned counsel that ***Aneeta Hada's*** case is *per incuriam* as it has overlooked the decisions of the Supreme Court in ***U.P. Pollution Control Board (supra)***, ***Rajneesh Aggarwal (supra)*** and ***Bilakchand Gyanchand Co. (supra)*** is completely misplaced. ***Aneeta Hada's*** case is an exhaustive judgment. ***U.P. Pollution Control Board (supra)*** has been specifically referred to in this case in Para 52. The decisions in ***Rajneesh Aggarwal*** and ***Bilakchand Gyanchand Co.*** cases were also cited before the Supreme Court and referred to in para 16 of the judgment. Except for making a wild claim that a three judges' decision in ***Aneeta Hada (supra)*** is *per incuriam*, the learned counsel has been completely unable to explain how it was so.

7. Before coming to the decision in ***Aneeta Hada's*** case, the other three judgments may be discussed. In ***U.P. Pollution Control Board (supra)***, instead of lodging a prosecution against M/s Modi Industries Ltd., its unit called M/s Modi Distillery had been impleaded. Since this error had occurred on account of the details furnished by the Board of the company itself, it was held that the infirmity was curable as it was of a minor kind. However, it was held that there could be no vicarious liability saddled on the Chairman, Vice-Chairman, Managing Director and other members of the Board of Directors of the Company [under Section 47 of the Water (Prevention and Control of Pollution) Act, 1974] unless there was a prosecution of the Company, which in that case was M/s Modi Industries Ltd. and not M/s Modi Distillery. That was the reason why the court went on to hold that in order to make the controlling company of the Industrial Unit as an accused in the complaint, all that was required was filing of a formal application for amendment seeking leave to amend or substitute the name of M/s Modi Industries Ltd. in place of M/s Modi Distillery.

8. Clearly the facts are distinguishable from the present case as we shall see.

9. A perusal of the complaint placed on the record as Annexure P-1 would show that in the present matter, the company has not been impleaded, leave alone a wrong company, as was the case in ***U.P. Pollution Control Board (supra)***. That makes a material difference in the fact situation in the present case.

10. In ***Rajneesh Aggarwal's*** case (*supra*), the complaint had been filed without impleading the company as an accused and the cheques which had bounced had been

issued in the capacity of the Director of the Company. The Supreme Court had only held that the issuance of the notice to the Director of the Company was sufficient notice to the drawer of the cheque.

11. With regard to the judgment of the Supreme Court in **Rajneesh Aggarwal (supra)** while noticing in para 2, the High Court had concluded that a complaint could lie under Section 138 of the N.I. Act without impleading the company of which the accused is the Director, as a party, but concluded that the notice issued to the accused was in an individual capacity and no offence had been committed by the Company M/s Bhalla Technical. It is clear that in **Rajneesh Aggarwal's** case (supra), the complaint was dismissed because no offence was found to have been committed by the company and recourse could not be taken to Section 141 of the N.I. Act to saddle the accused/Director with vicarious liability. The Supreme Court answered that the notice issued to the accused/Director was sufficient notice to the Company and, therefore, the Company had committed an offence. In other words, it is only when the Company is found to have committed an offence under Section 141 that vicarious liability would attach to the Director. Therefore, this judgment is not directly on the point whether in the absence of a Company being impleaded as an accused, its directors can be so impleaded. This question has been directly answered in **Aneeta Hada (supra)**.

12. In **Bilakchand Gyanchand Co. (supra)** once again the question was on issuance of notice. Here again it was held that cheques were signed by the Managing Director of the company and notice under Section 138 of the N.I. Act having been sent to the Managing Director, the complaint could not be quashed on the ground that the notice was not sent to the company. Again, this is not a judgment directly relevant to the question before this Court.

13. Coming to **Aneeta Hada's** judgment, where two enactments were before the Supreme Court – (i) Sections 138 & 141 of the N.I. Act and, (ii) Section 67 read with Section 85 of the Information Technology Act, 2000, the three Judges Bench formulated the “core issue” in the following words:

“3. The core issue that has emerged in these two appeals is whether the Company could have been made liable for prosecution without being impleaded as an accused and whether the Directors could have been prosecuted for offences punishable under the aforesaid provisions without the Company being arrayed as an accused.”

14. The question of impleadment of a company before vicarious liability could be invoked, was considered in the light of the conflicting views taken by the two Division Benches of the Supreme Court and the question was answered with no ambiguity that is sought to be canvassed before this Court. Various judgments were considered and extensive arguments were advanced before the Supreme Court on the question of vicarious liability, the liability of the company, the impleadment and the prosecution of the Directors and other persons in charge of the business of the company. After consideration of all the cited judgments and the arguments advanced, it was held by the Supreme Court that on a reading of the provisions of Section 141 of the N.I. Act “*it is plain as day*” that where the offence has been committed by a Company, the Company

as well as every person incharge and responsible for the conduct of its business at the time of commission of the offence, is “*deemed*” to be guilty of the offence. It further held that the word “*deemed*” used in Section 141 of the N.I. Act applied to the company and the persons responsible for the acts of the company, as it crystalized the criminal liability and vicarious liability of the person who is in charge of the company.

15. The Supreme Court referred to the decision in ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla***, (2005) 8 SCC 89 regarding what averments would be required to make a person vicariously liable, as criminal liability on account of dishonor of the Company would primarily fall on the drawer Company, which liability would be extended to the officer of the company on account of the specific provisions extending the liability to such officers, subject to fulfillment of the conditions incorporated under Section 141 of the N.I. Act.

16. Thus, it is the Company upon which the primary liability rests and a person who is sought to be made vicariously liable for an offence of which the principal accused is a company, would need to have a role to play in relation to the incriminating act. Section 141 of the N.I. Act operates only when the offence under Section 138 of the N.I. Act is committed by a company. The view taken by a two judges” Bench of the Supreme Court in ***Anil Hada v. Indian Acrylic Ltd.***, (2000) 1 SCC 1 was discussed, while also observing that even in ***Anil Hada’s*** case, the view has been taken that the actual offence should have been committed by the Company and then alone the other two categories of persons would become liable for the offence. It was only if there was a legal snag, where the company, though prosecuted, cannot be proceeded against, the prosecuted persons cannot escape liability created through legal fiction as envisaged under Section 141 of the Act.

17. In other words, the Company being the primary accused must be found to have committed an offence. Thereafter, through the legal fiction created by Section 141 of the N.I. Act, the Directors and other persons responsible for the conduct of its business also become vicarious liable. If no offence is attributed to the company, it is but the natural corollary, that its Directors and other persons responsible for the conduct of its business cannot be saddled with any liability.

18. As noted hereinabove in para 52, the decision in ***U.P. Pollution Control Board (supra)*** was noted by the Supreme Court that the two Judges Bench had correctly stated that there could be no vicarious liability unless there is prosecution against the company or the industrial unit. It noted that there was a peculiar factual matrix in that case, as the technical fault in impleading the Company had arisen, because the Company had failed to furnish the requisite information to the Pollution Control Board. That was why a direction was issued for filing of a formal amendment by the applicant for substitution of the name of the company M/s Modi Distilleries in place of M/s Modi Industries.

19. It was held that, thus it was a defective complaint which was curable, but nowhere either ***U.P. Pollution Control Board (supra)*** or ***Aneeta Hada (supra)*** concludes that even without the primary liability of the Company, vicarious liability can be imposed on its Directors/Officers. Considering that Section 141 of the N.I. Act imposes a liability

which was penal in nature, the Supreme Court concluded that a strict construction of the provision was necessary and warranted. It further observed that a penalty cannot be imposed affecting the rights of a person, whether juristic entities or individuals, unless they were arrayed as accused.

20. Applying the doctrine of strict construction, the Supreme Court held that the commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, it concluded:

“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 : 1971 SCC (Cri) 97] which is a threeJudge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000) 1 SCC 1 : 2001 SCC (Cri) 174] is overruled with the qualifier as stated in para 51. The decision in Modi Distillery [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

21. It is this judgment that has been followed by the learned Trial Court as well as the Appellate Court.

22. Admittedly, in the complaint filed by the petitioner, the Company M/s Accura Care Pharmaceuticals Pvt. Ltd. has not been impleaded. Following the judgment in **Aneeta Hada's** case, the learned Trial Court and Appellate Court had rightly concluded that the complaint was not maintainable.

23. However, reliance has been placed now on the decision of the Supreme Court in **S.R. Sukumar (supra)** to submit that the petitioner ought to be permitted to amend his complaint. The facts of that case are different. The Magistrate had not taken cognizance of the complaint, the accused was yet to be summoned. Thus, no prejudice was likely to be caused to any person, if the amendment was allowed. Moreover, the amendment was with reference to a subsequent event which permitted the complainant to initiate another complaint on the new cause of action. Thus, to avoid the multiplicity of proceedings, the amendment was permitted. That case was dealing with defamation.

24. Moreover, the Supreme Court held that notwithstanding the fact that there were no enabling provisions under the Code of Criminal Procedure, the court may permit such an amendment to be made, if they were to cure „*simple infirmity*’. Considering the infirmities in the present complaint, it is clear that any amendment would go to the root of the matter and is not merely a curable/simple infirmity.

25. In the other case decided by the High Court of Madhya Pradesh in **Manish Kalani (supra)**, which was dealing with a complaint under Sections 138 and 141 of the N.I. Act read with Section 319 of the Cr.P.C. the Company could be impleaded as an accused not originally so impleaded, as the complainant had referred to the Company throughout the complaint and the only shortcoming was the absence of the name of the company in

the memo of parties. Thus, a curable infirmity was permitted to be removed by way of an amendment. That again is not the case here.

26. In the light of the observations in ***Aneeta Hada's*** case and the reiteration of the view taken in ***SMS Pharmaceuticals (supra)***, it is clear that the complaint must aver in clear terms, the commission of an offence by the Company. If such averment was there in the complaint and the only infirmity is the naming of the Company in the memo of parties, it could be said that the infirmity is only a minor infirmity which can be rectified by permitting amendment. But when there is no averment at all in respect of the Company, amendments as sought by the petitioner would be a complete overhauling of the first complaint and a clear attempt to overcome the foundational infirmity of the absence of any offence having been committed by the Company on the averments in the complaint.

27. A perusal of the complaint in the present case placed on the record as Annexure P-1, would show that all the averments are against the respondent Sh. Jasbir, who is described as Managing Director of M/s Accura Care Pharmaceuticals Pvt. Ltd. A Rent Agreement is stated to have been signed by the petitioner and the respondent; the cheques in respect of the rent were stated to have been issued by the respondent; in para 4, the petitioner has averred that it was the accused/respondent who had assured the encashment of the cheque; then it is averred that the cheques were dishonoured, upon which, the complainant approached the respondent and it was the respondent who had refused to pay the cheque amount to the complainant; the notice was issued to the respondent which was served at the residential address but remained unserved at the address of the "working place"; and finally it is averred in para 10 that *"from the above facts and circumstances it is crystal clear that the accused has committed an offence U/s 138 of Negotiable Instruments Act as well as Section 420 of Indian Penal Code for which the accused is liable to be punished in accordance with Law. It is therefore respectfully prayed that the Hon'ble court be pleased to summon, try and punish the accused in accordance with law, in the interest of justice."*

In other words, there is no pleading which suggests that the Company had committed any offence. When no offence is attributable to the Company, it is not possible to attach liability on the Managing Director by the deeming provisions of Section 141 of the N.I. Act. Amendments of simple technical infirmities alone can be allowed but not the filing of a fresh complaint with improved pleadings, in the garb of amendment. Thus, following these very judgments relied upon by the learned counsel for the petitioner, this Court does not consider it appropriate to grant such permission to amend the complaint.

28. In the light of the afore-going discussion, the petition is dismissed being devoid of merit.

29. The judgment be uploaded on the website forthwith.