IN THE HIGH COURT OF JUDICATURE AT BOMBAY
: NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION (APL) NO. 682 OF 2013

APPLICANTS : 1] Harikisan Vithaldasji Chandak,
Aged about 52 years, Occu. Business,
R/o. Arvi, Tal. Arvi, Dist. Wardha.

2] Ganesh Vithaldasji Chandak,
Aged about 50 years, Occu. Business,
R/o. Arvi, Tal. Arvi, Dist. Wardha.

3] Suresh Kanakmal Bothara,
Aged about 50 years, Occu. Business,
R/o. Arvi, Tal. Arvi, Dist. Wardha.

4] Dhiraj Champalal Chhallani,
Aged about 39 years, Occu. Business,
R/o. Manikwada, Tal. Ner, Dist. Yavatmal.

VERSUS

NON-APPLICANTS: Syed Mazaruddin Syed Shabuddin
(Since dead, through his Lrs)

1] Kazi Syed Shabuddin Sayad Mazarhuddin,
Aged about Major,

2] Akila Begum Wd/o Kazi Syed Mazarhuddin,
Aged about Major,

3] Taslim Durdana Shafal Ahmed,
Aged about Major,

4] Firdos Rukhsana Athar Moyuddin,
Aged about Major,

All 1 to 4 R/o. Gawalipura, Darwaha taluka
Darwaha, Dist. Yavatmal.

Mr. M. M. Agnihotri, Advocate for the applicants.
Mr. R. J. Mirza, Advocate for the non-applicants.

CORAM : G. A. SANAP, J.
Date of Reserving the Judgment : January 06, 2023.
Date of Pronouncement of Judgment : April 28, 2023

JUDGMENT

1. In this criminal application, filed under Section 482 of the Code of Criminal Procedure, 1973, challenge is to the order dated 20.04.2013 passed by the Judicial Magistrate, First Class, Darwha, whereby learned Magistrate allowed the application (Exh.68) in Cri. Complaint Case No. 579 of 2008, made by the complainants seeking amendment to the complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the N.I. Act" for short).

2. The facts relevant for the decision of this application may be stated thus :

The applicants are the accused and the non-applicants are the complainants. They would be referred by their nomenclature in the complaint. The original complainant was Syed Mazaruddin. He died on 19.08.2008 during pendency of the complaint. His heirs, the

present complainant nos.1 to 4, are allowed to prosecute the complaint. The deceased complainant had agreed to sell his land to the accused. The accused issued a cheque bearing No. 493370 dated 30.10.2007 for Rs.20,00,000/-, drawn on the account of the firm maintained with the Buldhana Urban Cooperative Bank Ltd., Branch Wardha. The deceased complainant presented the cheque for encashment through his bank namely Central Bank of India, Darwha. The bank informed the deceased complainant that the cheque was dishonoured on the ground that "the drawer had stopped the payment". The deceased complainant issued notice dated 17.04.2008 to the accused. It is stated that despite receipt of the notice, the accused did not pay the amount. Therefore, the deceased complainant filed the complaint.

3. Learned Magistrate took cognizance of the offence and issued process against the accused persons. The complaint was fixed for recording of the evidence. The complainants at that time made an application at Exh.68 for amendment. The proposed amendment was set out in paragraph 2 of the application. The sum and substance of the amendment application was that the relevant facts with regard to the vicarious liability of accused nos. 1 to 3 remained to be pleaded due to oversight. It was also stated that one Partner Shri Dhiraj Champalal

Chhallani was not added as a party. A prayer is made to add this Partner as an accused. It was also stated in the said application that accused nos.1 to 3 being the Partners of the firm, are responsible for the conduct of day-to-day business of the firm and as such they are vicariously liable.

4. This amendment application was opposed by the accused persons. According to them, the amendment application was not maintainable. The application was *mala fide*. There is no provision to entertain an application for amendment of a criminal complaint.

5. Learned Judicial Magistrate, First Class, by granting opportunity of hearing to the parties, was pleased to allow the application for amendment, holding that the amendment was of a formal nature. The application was maintainable. The proceeding under Section 138 of the N.I.Act is a *quasi* civil in nature. It was further held that the amendment would not cause any prejudice to the accused persons. Being aggrieved by this order, the accused have come before this Court under Section 482 of the Cr.P.C.

6. I have heard Mr. M. M. Agnihotri, learned advocate for the applicants/accused and Mr. Raheel J. Mirza, learned advocate for the non-applicants/complainants. Perused the record and proceedings.

7. Learned advocate for the accused submitted that by the proposed amendment the very core and crux of the complaint has been changed. Learned advocate pointed out that the amendment was not intended to remove any curable defect or infirmity in the complaint and as such the order granting amendment has caused severe prejudice to the accused persons. Learned advocate further submitted that before filing the complaint, notice was not issued to the partnership firm. Learned advocate submitted that therefore, there has been an inherent defect in the complaint. In order to substantiate his submissions, learned advocate placed reliance on the following decisions :

1] S. R. Sukumar .vs. S. Sunaad Raghuram, (2015) 9 SCC 609

2] Sanjay Gambhir .vs. State and another (2017 SCC Online Del 8331

3] N. Harihara Krishnan .vs. J. Thomas [(2018) 13 SCC 663

4] Pawan Kumar Goel .vs. State of U.P. and another in Criminal Appeal No. 1999/2022, decided on 17.11.2022.

8. Learned advocate for the complainants submitted that before filing the complaint, the notices were issued to the partners of the firm. Learned advocate submitted that the notice was replied, but the amount of cheque was not paid. Learned advocate submitted that the complaint was otherwise in accordance with law. Learned advocate submitted that while drafting the complaint, a specific statement of fact

that, accused nos.1 to 3 being the partners of the firm were responsible for the conduct of day-to-day business of the firm and as such vicariously liable for commission of the offence punishable under Section 138 of the N.I. Act, remained to be made. Learned advocate submitted that this was a curable infirmity and defect. Learned advocate submitted that the legal position has been well settled that an application can be made for amendment of a complaint to remove such curable infirmity or defect. Learned advocate further submitted that the facts stated in the complaint and in the reply by the accused, would show that no prejudice has been caused to them by granting the amendment. In order to substantiate his submissions, learned advocate has relied upon the following decisions :

1] *Rajendra Prasad Gupta .vs. Krakash Chandra Mishra and others,* reported at *(2011) 2 SCC 705*

2] *U. P. Pollution Control Board .vs. M/s Modi Distillery and others,* reported at *(1987) 3 SCC 684*

3] *Amol Shripal Sheth .vs. M/s Hari Om Trading Co. Ltd.* reported at *(2014) 6 Mh.L.J. 222*

9. In order to appreciate the rival submissions, I have gone through the record and proceedings and the judgments relied upon by the learned advocates for the parties. It is to be noted that the Code of Criminal Procedure has provided the procedure and machinery to deal

with the offenders for commission of substantive criminal offences. The intent and object of the legislature, in sum and substance, indicate that it is an Act to consolidate and amend the law relating to Criminal Procedure. The Cr.P.C. has provided a detailed procedural mechanism for conducting the criminal trial. It is further seen that no express provision for amendment of the pleadings has been made in the Cr.P.C. like C.P.C. It is further seen on perusal of the Cr.P.C. that no specific provision has been incorporated to create a bar to amend the criminal complaint. The moot question, therefore, is whether the application for amendment of criminal complaint can be made and allowed by the Court. If the answer to this question is in the affirmative, then the question is required to be considered and addressed keeping in mind the fact that the complaint is in respect of the dishonour of a cheque. The complainants in this case sought amendment to the complaint, which is the cheque bounce case under Section 138 of the N.I.Act. In order to address this question, it would be necessary to make a survey of the reported decisions of the Hon'ble Supreme Court and High Courts in various cases on this point.

10. The first decision is in the case of ***U.P. Pollution Control Board .vs. Modi Distilleries and others***, reported at ***(1987) 3 SCC 684***.

In this case, the amendment application was made for correction in the name of the company as Modi Distilleries instead of Modi Industries Limited. Hon'ble Apex Court recognizing the right to amend the complaint, held that a mere curable infirmity or defect can be rectified/corrected by making an application for amendment. It is held that, to this extent, the amendment in a complaint is permissible.

11. The next important decision is in the case of ***S.R. Sukumar .vs. S. Sunaad Raghuram (supra)***. The Hon'ble Supreme Court in this case has considered the decision in *U.P. Pollution Control Board* (supra). It is held by the Hon'ble Supreme Court that if the amendment sought to be made relates to simple infirmity, which is curable by means of formal amendment and by granting such an amendment, no prejudice is likely to be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the Court may permit such an amendment to be made. It is further held that if the amendment sought to be made in the complaint does not relate either to a curable infirmity which can be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the Court shall not allow the amendment in the complaint. It is further pertinent to note that in this case, the Hon'ble

Supreme Court granted amendment despite making a note that the amendment sought to be made in the complaint was not of a formal in nature, but a substantial amendment. It is further seen on perusal of this judgment that in the case before the Hon'ble Supreme Court, the amendment application was made before taking cognizance and issuance of process.

12. Learned advocate for the complainants placed heavy reliance on the decision of the Coordinate Bench of this Court in the case of *Amol Shripal Sheth .vs. M/s Hari Om Trading Co. and others, (supra)* to substantiate his submission. In this case, the Coordinate Bench of this Court has held that the Magistrate has incidental and ancillary power to the main power of taking cognizance of offence to entertain and allow the amendment application and that, such power can be exercised before and after taking cognizance of the offence. The Coordinate Bench held that while entertaining and deciding the amendment application to the complaint, the Court has to bear in mind the fundamental principle of law that the Court takes cognizance of the offence and not of the offender. The Co-ordinate Bench was dealing with the case under Section 138 of the N.I. Act.

13. Learned advocate for the accused, relying upon the number of decisions of Hon'ble Supreme Court including the decisions in ***Aneeta Hada .vs. Godfather Travels and Tours Pvt. Ltd.***, reported at ***(2012) 5 SCC 661*** and *N. Harihara Krishnan .vs. J. Thomas (supra)*, submitted that the law laid down in *Amol Shripal Sheth (supra)* is not the correct law.

14. It would, therefore, be necessary to consider the decisions in the case of *Aneeta Hada* (supra) and *N. Harihara Krishnan* (supra). It would also be necessary to consider here the law laid down in *N. Harihara Krishnan's* case (supra). Paragraphs 26 and 27 of the report would be relevant. The same are extracted below :

> *26. The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of the Cr.PC. 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 inspite 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, the Parliament declared under Section 138 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.*

15. The Hon'ble Apex Court has held that the first ingredient for constituting offence under Section 138 of the N.I. Act is the fact that a person has drawn the cheque. Identity of the drawer of cheque is thus necessarily required to be known to the complainant (payee). It is held that therefore, in the context of prosecution under Section 138 of the N.I. Act, the concept of taking cognizance of the offence and not of the offender, is not applicable since disclosure of the name of the drawer is imperative i.e. offence under Section 138 of the N.I.Act is person specific.

16. It would be necessary at this stage to consider the law laid down in *Aneeta Hada's* case (supra). Paragraphs 58 and 59 of the report would be relevant. The same are extracted below :

> *"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](1970) 3 SCC 491)] which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352)] does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000)1 SCC 1] is overruled with the qualifier as stated in paragraph 51. The decision in Modi Distilleries [(1987) 3 SCC 684]has to be treated to be restricted to its own facts as has been explained by us hereinabove."

17. The decision in *Anneta Hada* (supra) has been considered by the Hon'ble Apex Court in the case of ***Himanshu .vs. B. Shivamurthy and another***, reported at ***(2019) 3 SCC 797***. Paragraphs 11, 12 and 13 of this report would be relevant. The same are extracted below :

> *"11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.*
>
> *12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or 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.*
>
> *13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused."*

18. All the above three decisions, namely *Aneeta Hada* (supra), *Himanshu* (supra) and *N. Harihar Krishnan* (supra) have been considered by the Hon'ble Apex Court in the case of *Pawan Kumar Goel* (supra). In this case, it is held by the Hon'ble Supreme Court that if the complainant fails to make specific averments against the company in the complaint for commission of an offence under Section 138 of

N.I. Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. It is held that since the provisions of Section 141 of the N.I. Act impose vicarious liability by deeming fiction which pre-supposes and requires the commission of the offence by the company or firm and therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) and sub-section (2) of Section 141 of the N.I. Act would not be liable to be convicted on the basis of the principles of vicarious liability.

19. The legal position is, therefore, well settled that the curable infirmity or defect can be removed by amending the complaint. The amendment cannot be allowed to change the basic core, crux and tenor of the complaint. The amendment, which results in prejudice to the other side, cannot be allowed. In other words, the amendment sought for to the complaint, if does not cause prejudice to the other side, the same can be allowed. When the amendment application pertains to addition of company or firm as a principal offender, after taking cognizance of the offence mentioned in the complaint by the Magistrate, by applying the principle of law that the Criminal Court takes the cognizance of the offence and not of the offender, cannot be

made applicable and company or firm cannot be added. If the cheque is drawn on the account of company or firm, then the principal offender is the company or firm and therefore, in the absence of the company or firm being arraigned as accused in the complaint, the prosecution against the Directors or Partners cannot be maintained. It, therefore, goes without saying that if the company or firm is not a party to the complaint and the application is made to add the company or firm as a party to remove such defect, the same cannot be entertained.

20. It needs to be stated that the Court can be called upon to address the question of grant of amendment in a different factual situation. In the fact situation where the company or firm is not a party and the prayer is not made to add the company or firm as a party, but the amendment may be sought to rectify other curable legal infirmity or defect. In this factual situation, the Court has to deal with and consider the application in the backdrop of the abovestated legal position. In such a case, the facts and circumstances in totality need to be considered to arrive at a conclusion as to the nature of amendment and the likely prejudice to the other side. In a case where company or firm is not a party, as a principal accused and application is made to add the company or firm as a party, such amendment cannot be allowed in view

of above legal position.

21. The Court may be required to consider the amendment application in a case where company or firm is a party as a principal accused, but one of the directors or partners is not made an accused. In such a case, the Court has to address the primary question as to whether the amendment sought for to add the director or partner is at all necessary and such addition is intended to cure legal infirmity or defect. The Court would also be required to consider the likely prejudice to the other side. This situation will also be required to be addressed in the totality of the facts and circumstances of the case. If the Court finds that all the basic requirements with regard to issuance of notice to the company and directors or firm and partners were fulfilled, then the Court has to consider the prayer for such an amendment keeping in mind the above legal position. It has to be mentioned that the question whether the amendment is formal and intended to curable defect or infirmity depends upon the facts and circumstances of each case and has to be addressed accordingly.

22. In order to consider the applicability of the law to the facts of this case, certain undisputed facts need to be stated. The accused are the Partners of the firm namely, Ramdeobaba Developers and Builders.

The cheque in question was signed by accused Nos.2 and 4. All the Partners have been arrayed as accused. Before filing of the complaint, the notices were issued to the Partners. The notices were replied. The notice was not issued in the name of the firm. The partnership firm has not been arrayed as an accused. It is seen that even by the proposed amendment, prayer has not been made to add the firm as an accused in the complaint. The above stated facts need to be borne in mind while deciding the controversy.

23. In view of the law laid down in the reported decisions considered hereinabove and the facts of the case on hand, I am of the view that the learned Magistrate has committed a patent illegality in granting the amendment application. By the proposed amendment, the complainants have stated that the Partners, being responsible for conduct of the day-to-day affairs and business of the firm are vicariously liable. It is seen that by the proposed amendment, a categorical statement has been made that the accused are the Partners of M/s. Ramdeobaba Developers and Builders. It is, therefore, apparent that the complainants were conscious of the fact that their transaction was with the partnership firm. The cheque was issued from the account of the partnership firm. The cheque was signed by some of the Partners of the

firm. The primary submission advanced on behalf of the accused persons, therefore, deserves acceptance. In this case, the prejudice or likely prejudice to the accused persons would be a secondary and insignificant aspect. In this case, it would not be necessary to go into the aspect of prejudice or likely prejudice to the accused persons by grant of the amendment. The primary question that needs to be considered and addressed would be the maintainability of the complaint in this form without joining the partnership firm being a principal accused in the array of the parties.

24. In view of the law laid down in the decisions considered above, I am of the view that the learned Magistrate was not right in granting the amendment. The learned Magistrate has failed to take into consideration this primary legal issue. The amendment application made by the complainants could not have been decided without addressing this issue. It has been held consistently that if a cheque is issued on behalf of the company or the partnership firm, then the company or the partnership firm in case of dishonour of cheque is the principal accused. It is held that in the absence of the company or the firm as an accused, the complaint against the directors or partners is not maintainable. It is held that considering the mandatory provisions of

Section 138 of the N.I. Act and its scheme, the defect of this kind cannot be rectified subsequently by amending the complaint by adding the company or firm as an accused. All the earlier decisions have been considered by the Hon'ble Apex Court in the case of ***Pawan Kumar Goel*** (supra).

25. In the facts and circumstances, in my view, the amendment application was not at all maintainable. There was a legal defect in the complaint itself. The defective complaint could not have been amended by incorporating the facts set out in the application. The accused have admitted that they are the Partners of the firm. They have stated the reasons for giving intimation to the bank to stop the payment. In this case, the contention that certain important facts are undisputed at the behest of the accused and therefore, no prejudice would be caused to the accused by amending the complaint, cannot be entertained. The grant of the amendment in the backdrop of this flaw would be completely against the provisions of law.

26. In the facts and circumstances, I conclude that the learned Magistrate has granted the amendment without considering the basic legal flaw in the complaint. The legal flaw in the complaint, as stated

above, is not a curable infirmity or defect. This defect cannot be allowed to be cured or rectified by granting the amendment. The grant of amendment would relate back to the date of dishonour of the cheque. Notice was not issued in this case to the partnership firm. The partnership firm has not been arrayed as an accused. Even in the amendment application, no prayer was made to add the partnership firm as an accused. In the facts and circumstances, I am of the view that the learned Magistrate was not right in granting the amendment. Therefore, the order passed by the learned Magistrate is required to be quashed and set aside.

27. It is observed in this case that the mistake has been committed by the draftsman of the notice before filing the complaint as well as by the draftsman of the complaint. The facts with regard to the issuance of cheque, signing of cheque, dishonour of cheque and the reason for dishonour of the cheque, are more or less undisputed. The unfortunate complainant, despite having all these facts on his side, seems to have been placed in the wrong hands. He did not get the proper legal advice. The litigant has a choice in selecting the advocate. Once the litigant chooses an advocate, he reposes complete faith in the advocate. The advocate has to give justice to the cause of the litigant.

The advocate must always be conscious that on account of his mistake, the litigant should not suffer. The advocate is required to bear in mind that the fundamental mistake while conducting the litigation at any stage can cause irreparable loss and harm to the litigant.

28. Accordingly, the application is **allowed**.

(i) The order passed by learned Judicial Magistrate, First Class, Darwha dated 20.04.2013 on Exh.68 in Criminal Complaint Case Nos.579/2008, is quashed and set aside.

29. The application stands disposed of.

(G. A. SANAP, J.)

Vijay