2024 INSC 1024

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 5556 OF 2024

(Arising out of SLP (Crl) No. 13133/2024)

BIJOY KUMAR MONI **…APPELLANT**

VERSUS

PARESH MANNA & ANR. **…RESPONDENT(S)**

J U D G M E N T

J.B. PARDIWALA, J. :-

For the convenience of exposition, the present judgment is divided into the following parts:

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1. Leave granted.

2. This appeal arises from the judgment and order dated 19.03.2024 passed by the High Court at Calcutta in Criminal Revision No. 887 of 2019 by which the High Court allowed the criminal revision application preferred by the respondent herein (original accused) and thereby quashed and set aside the judgment and order of conviction passed by the Trial Court and affirmed by the Sessions Court for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, the "NI Act").

3. For the sake of convenience, the appellant herein shall be referred to as the complainant and the respondent herein shall be referred to as the accused.

4. Since these proceedings arise from a private complaint, the respondent no. 2, that is, the State of West Bengal, although represented by Mr. Kunal Chatterji, has no role to play.

A. FACTUAL MATRIX

5. The facts giving rise to this appeal may be summarised as under:

    a. The case of the complainant is plain and simple. According to him, for the purpose of operating his trade loan account, he would

frequently visit the U.B.I. Raghunathpur Branch and it is during one such visit sometime in the month of January, 2006 that he came to be introduced to the accused by one Ashoke Mondal who was the Manager of the said branch. Thereafter, the accused maintained amicable relations with the complainant through telephonic conversations.

b. In February 2006, the accused was in need of some financial assistance and in such circumstances, he approached the complainant with a request that a particular amount may be lent to him with a promise to repay on demand.

c. Accordingly, the complainant issued a bearer cheque for an amount of Rs.7,00,000/- (Rupees Seven Lakh only) which indisputably was encashed by the accused.

d. Upon the complainant requesting the accused to repay the amount referred to above, he issued a cheque dated 28.04.2006 drawn on the Standard Chartered Bank, N.S. Road, Kolkata for the amount of Rs.8,45,000/- (Rupees Eight lakh forty five thousand only). It is the case of the complainant that Rs. 7,00,000/- was lent by him by way of a bearer cheque and Rs. 1,45,000/- was subsequently lent in cash. That is how the accused issued a cheque of Rs. 8,45,000/- for the purpose of discharging his debt towards the complainant.

e. However, the said cheque was signed by him in his capacity as a Director of Shilabati Hospital Pvt. Ltd. and was drawn upon the bank account maintained in the name of the hospital.

f. There is a stamp of Shilabati Hospital Pvt. Ltd. on the cheque and beneath the signature of the accused there is a stamp of the Director.

g. It is not in dispute that the cheque in question came to be dishonoured for want of sufficient funds.

h. In such circumstances, the complainant issued a statutory notice to the accused under Section 138 of the NI Act dated 14.08.2006 calling upon him to make the payment within 15 days of the receipt of the notice.

6. The statutory notice referred to above is reproduced herein below:

" *DATE: 14/8/2006*

To

Sri Paresh Manna

C/o SHILABATI HOSPITAL PVT. LTD.

P.O. CHATAL, Distt. Peschim Midnapur

Dear Sir,

Under the instructions of my client Sri Bijay Kumar Moni son of Sri Mursrimohan Nond, resident of Raghunathpur, P.O./P.S. Raghunathpur, Distt. Purulia. I do hereby serve you this notice to the following effect.

That my client had been introduced to you by Sri Achoke Mondal, Branch Manager United Bank of India,

Raghunathpur Branch some time in the month of February, 2008.

That my client was also informed by Sri Ashok Mondal that you are contemplating to start a -Nursing Home with huge investment at Raghunathpur.

That taking advantage of the said introduction by Sri Ashok Mandal you - approached my client for a sum of Rs. 8,45,000/- (eight lakhs forty five thousand) only to be repaid within a very short period.

That my client very innocently acceded to your request and arranged to handover a sum of Rs. 8,45,000/- (eight lakh forty five thousand) out of the said sum of Rs. 7,00,000/- (Seven lakhs) was given to you by my client through cheque No. 951764 on his trade loan A/C maintained with U.B.I. Raghunathpur Branch on 28.02.06 and the rest amount was paid by my client to you in cash.

That you in discharge of your existing legal debts and outstanding liabilities had issued A/C. payee cheque No.997309 in favour of my client on 28.04.06 for Rs. 8,45,000/- (eight lakhs forty five thousand) against your account maintained in standard chartered Bank, 19, N.S. Road, Kolkata-700001. That as per your instruction my client had presented the said cheque for encashment through his banker, U.B.I. Raghunathpur Branch on 22.07.06.

That my client had received back the cheque refused by you with the bank unpaid issue memo dated 27.07.06 that the same has returned due to insufficient fund.

That as per instruction of my client I am sending this demand notice to you with the intimation that you must pay back to my client the sum of 8,45,000/- (eight lakhs forty-five thousand) within 15 days from the date of receipt of the notice, failing which my client will be constrained to take recourse to law without any further intimation.

Thanking you,

Yours faithfully,
Sd/- Arun Kumar Moni
Advocate
Dt. 14-08-06"

7. It is not in dispute that the accused upon receipt of the above notice failed to give any appropriate reply to the complainant.

8. In such circumstances, the complainant was left with no other option but to file a private complaint in the Court of the A.C.J.M. at Raghunathpur, District Purulia for the offence punishable under Section 138 of the NI Act which came to be registered as Complaint Case No. 39 of 2006.

i. Proceedings before the Trial Court

9. As the facts of this case are little peculiar, we deem it necessary to reproduce the entire complaint as under:

"In the Court of the A.C.J.M. at Raghunathpur, District Purulia.

Complaint Case No. 39 of 2006.

Bijoy Kumar Moni son of Sri Murari Mohan Moni, resident of Raghunathpur, P.O. & P.S. Raghunathpur, Dist. Purulia.

...Complainant

-Versus-

Paresh Manna son of not known c/o. Shilabati Hospital

Pvt. Ltd., P.O. Chatal, P.S. Ghatal, District East Midnapur.

…Accused Person

***Offence committed**: U/s. 138 of Negotiable Instrument Act, 1881.*

***Date of occurrence**: Since August, 2006 onwards.*

***Name of witnesses**:*

1. Sri Ashoke Mondal s/o. Naba Kumar Mondal, Manager of U.B.I Raghunathpur Branch, Dist. Purulia.

2. Sanjoy Ganguly s/o. Late Dhirendranath Ganguly.

3. Shyamapada Kumbhakar, s/o. Late Gopal Chandra Kumbhakar both of Raghunathpur, P.O. & P.S. Raghunathpur, Dist. Purulia.

The humble petition on behalf of the complainant

Most respectfully showeth:

1. That the complainant hails from a very respectable family of Raghunathpun, District Purulia and he has been engaged in construction enterprise and considering his credibility and goodwill the local U.B.I. Raghunathpur Branch has provided him with a trade loan account bearing A/C No. 9.

2. That the complainant in operating his trade loan account has very often visits to the U.B.I. Raghunathpur Branch and thus a close tie grew up with the Branch Manager, Sri Ashoke Mondal.

3. That sometime in the month of January, 2006 the complainant along with witness No. 2 had met the Branch Manager, U.B.I. Raghunathpur Branch and there he noticed the accused present in his chamber. Sri Ashoke Mondal introduced the accused to the complainant saying that the latter is an established personality in construction

work at Raghunathpur and is a solvent party having trade loan A/C in his Branch. Sri Mondal also informed the complainant that he knows the accused personally and he is the owner of a renowned nursing home styled "Shilabati" Hospital Pvt. Ltd. of Ghatal, East Midnapur. Sri Mondal also apprised the complainant that the accused is contemplating to start a nursing home Project at Raghunathpur with huge investments.

4. That the complainant innocently believed all the narration of Sri Mondal. Accused also taking advantage of such introduction grew familiar with the complainant and also apprised him in details his contemplated project at Raghunathpur and sought for complainant's co-operation in as much as he is a man of the locality. The Complainant was greatly impressed by the talking of the accused and assured to cooperate with him in all respect.

5. That the accused thereafter kept close contact with the complainant and over phone from Ghatal. On 28.02.2006 the complainant along with witnesses Nos. 2 and 3 had come to the U.B.I. Raghunathpur Branch and there the accused met him and informed that he is in dire need of Rs. 7,00,000/- (Seven Lacs) only for a couple of months for incidental expenses relating to his contemplated project. Complainant innocently believed the accused and issued a cheque No. 951764 on his trade loan A/C for Rs. 7,00,000/- in favour of the accused on 28.02.06.

6. That the accused withdrew the sum of Rs. 7,00,000/- and shortly thereafter the accused again approached the complainant for another sum of Rs. 1,45,000/- (One Lac forty five thousand) in presence of the witnesses Nos. 2 and 3. Complainant was hesitant to accede to such request of the accused but latter due to repeatedly insistence the complainant arranged for the sum on the promise of the accused to repay the entire sum very shortly.

7. That the complainant accordingly paid Rs. 1,45,000/- to the accused in presence of Witnesses Nos. 2 and 3 in the early part of March, 2006.

8. That the accused thereafter started avoiding the complainant. However, on 28.04.2006 the accused in

discharge of his existing debt and liabilities issued in favour of the complainant at Raghunathpur a cheque bearing No. 997309 for Rs. 8,45,000/- (Eight Lac forty five thousand) on his A/C maintained in Chartered Bank, N.S. Road Kolkata. However the accused while handing over the said cheque requested the complainant not to present the same for encashment before third week of July, 2006.

9. That the complainant as per the instructions of the accused presented the Cheque No. 997309 dated 28.4.2006 for encashment on 22.07.2006 through his Banker U.B.I. Raghunathpur Branch. The said cheque bounced and the complainant received back the cheque along with unpaid item nemo, of standard chartered Bank dated 27.7.06 through his Banker on 03.08.2006 with the note "Insufficient funds.

10. That the complainant thereupon through his Lawyer Sri Arun Kumar Moni of Raghunathpur Court had issued a demand notice to the accused dated 14.08.2006. It was sent under registered Post with A/D on 16.08.2006 and it was duly received on behalf of the accused on 19.08.2006 as per the endorsement appearing on the A/D card.

11. That the accused even inspite of the receipt of the demand notice failed to pay Rs. 8,45,000/- to the Complainant. However he kept on giving false and frivolous excuses to the complainant over phone and through Sri Ashok Mondal Branch Manager, Raghunathpur U.B.I. Branch that he would repay the sum soon.

12. That the accused had with fraudulent intention prevailed! Accused had upon the complainant with the tacit support of Sri Ashoke Mondal to part with Rs. 8,45,000/- (Eight Lac forty five thousand) and he also with malafide intention issued the cheque knowing fully well that the same would never get cleared.

13. That the accused has thus committed an offence U/s. 138 of the Negotiable Instrument Act, 1881 and is liable to be prosecuted and punished in accordance with law.

14. That the complainant is filing the Cheque No. 997309 along with unpaid item memo. issued by the Bank, Postal

receipt A/D card and office copy of the demand notice. It is therefore most respectfully prayed that your Honour will be pleased to take cognisance of the offence and issue process against the accused to stand his trial in the court of law in accordance with law.

AND

For this act of kindness, your petitioner as in duty bound shall ever pray.

Affidavit

Sd/-illegible

28/8/2023"

10. During the trial, the complainant entered the box and led oral evidence. He was cross examined by the defence counsel appearing for the accused. It appears that the accused also examined himself and as his witness the Branch Manager was also examined.

11. In the further statement of the accused recorded under Section 313 of the Criminal Procedure Code, 1973 (for short "the Cr.P.C."), the Trial Court put a specific question:

> *"11; P.W.1 Sri Bijoy Kr Moni, has stated in his examination-in-chief that, since thereafter you started avoiding the complainant. However, on 28/04/06 you in discharge of your existing debts and liabilities issued a cheque bearing No. 997309 for Rs. 8,45,000/- on your account maintained in chartered Bank. N.S Road. Kolkata. Do you have anything to say about this statement?"*

12. To the aforesaid Question No. 11, the accused replied that he had issued

the cheque as a security towards a loan transaction.

13. The Question No. 21 in the further statement of the accused reads thus:

> *"21) Qus:- P.W.1 Sri Bijoy Kumar Moni, further stated during in his evidence that, you have prevailed upon the complainant by gaining his confidence took Rs.8,45,000/- and thereafter issued cheque no. 997309 to him with the knowledge that there is no sufficient fund in the account. What do you have to say about his statement?"*

14. To the aforesaid question, the answer of the accused was that the cheque was issued by the company as a security towards some mortgage.

15. Upon appreciation of the oral as well as documentary evidence, the Trial Court *vide* Judgment and Order dated 19.07.2017 held the accused guilty of the offence punishable under Section 138 of the NI Act. The operative part of the order passed by the Trial Court reads thus:

> *"That the convict Paresh Manna is sentenced to suffer simple Imprisonment for one year. The convict is further sentenced to pay compensation amounting to Rs. 10,00,000 (Ten lakhs only) to the complainant namely Bijoy Kumar Moni within two months from the date of this order, in default of payment of which the convict is liable to further suffer rigorous imprisonment for two months."*

ii. Proceedings before the Sessions Court

16. The accused, aggrieved by the order of conviction and sentence passed by

the Trial Court, went in appeal before the Sessions Court. The Sessions Court affirmed the findings recorded by the Trial Court and dismissed the appeal *vide* Judgment and Order dated 22.02.2019. The operative part of the order passed by the Sessions Court reads thus:

> *"Accordingly it is ordered that the Criminal appeal no 03/17 be and the same is dismissed on contest.*
>
> *The impugned judgment and order of conviction dt. 19.07.17 passed by Ld. Judicial Magistrate, 1" Court, Raghunathpur in C.Case no. 39/06 (TR No. 315/06) is hereby affirmed.*
>
> *The stay of operation of judgment and order of conviction dt. 19.07.17 is thus vacated.*
>
> *The appellant is directed to surrender before the Trial Court to serve out the sentence as directed within a month from the date of delivery of judgment."*

17. At this stage, we may also reproduce some of the findings recorded by the Sessions Court:

> *"In the case in hand before the Trial Court according to the ocular version of DW 1, the appellant himself, he tried to convince that he did not take any money in his personal capacity. Now we find the clear picture about the transaction in respect of cheque no. 951764 from evidence of DW 2, the manager of UBI, Raghunathpur branch, the banker of the respondent/complainant, who was brought by the accused/ appellant to adduce evidence on his behalf. In course of the ocular evidence the original cheque no. 951764 dt. 28.02.06 amounting to Rs. 7,00,000/- was identified and proved by DW 2 and he admitted at the time of cross examination that on 28.02.06 the sum of Rs. 7,00,000/- was debited to the accused/ appellant.*

Throughout the trial the accused/appellant did not place any document or did not adduce any evidence that he, being the Director of Shilabati Hospital Private Ltd., had joint account with the company and that was operated by him for any transaction with that company. Being questioned about getting the confidence of the respondent/complainant to get the entire amount of Rs. 8,45,000/- and subsequent issuance of cheque bearing no. 997309 in discharging the liability of repayment, the accused/appellant took the plea that the said cheque was issued from the company as security of mortgage. But again to the utter surprise in course of trial no document of any mortgage was produced by him to establish the fact that the cheque bearing no. 997309 was issued in discharging the liability as security and the company was liable also for that ground. The appellant tried to shift the onus upon the respondent/complainant, but he could not succeed to that effect. In my considered opinion I am constrained to take into account the plea of the accused that the company was also the accused of that case ad thus the ruling relied upon by the accused/ appellant do not render any support to the contention of him.

In this regard I would like to refer the observation of Hon'ble Apex Court as reported in 2010 AIR SCW 4616 and as relied upon by the side of respondent. It has been observed by Hon'ble Apex Court that: "Negotiable Instruments Act (26 of 1881), S. 138- Dishonour of cheque Complaint- Tenable only against drawer of cheque- Cheque drawn by employee of appellant-company on his personal account- Even if it be for discharging dues of appellant- company and its Directors-Appellant-company and its Directors cannot be made liable under 5. 138."

From a bare reading of S.138 of NI Act the first and foremost ingredient is that the person who is to be made liable should be the drawer of the cheque and should have drawn the cheque 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 discharging whole or

part, of any debt or any liability.

At the time of his examination u/s 313 Cr.P.C when the memory of the appellant was shattered by putting question about issuance of cheque bearing no. 997309 amounting to Rs. 8,45,000/- from his account maintained at Chattered Bank, NS Road, Kolkata, he admitted about such issuance of cheque but placed another story about such issuance of that cheque as loan security. As I have already held, throughout the trial the accused/ appellant never bothered to prove anything to substantiate his proposition that there was any agreement between him and the complainant/ respondent about his taking loan for any purpose or that he received the amount vide cheque no. 951764 on behalf of the company i.e. Shilabati Nursing Home Private Ltd.

In this regard I would like to refer to the observation of Hon'ble Apex Court as reported in 2015 AIR SCW 4015 and as relied upon by the side of respondent. It has been observed by Hon'ble Apex Court that: "Negotiable Instruments Act (26 of 1881), S. 138- Dishonour of cheque- Liability Cheque drawn by respondent in his personal capacity and not by company of which he is Managing Director Company is not liable even if it is for discharging dues of company Respondent being drawer of cheque is alone liable for offence under S. 138," "Presumptions are devices by use of which the Courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) 'may presume (rebuttable), (2) 'shall presume (rebuttable) and (3) 'conclusive presumptions' (irrebuttable). The term 'presumptions' is used to designate inference, affirmative or dis-affirmative of the existence of a fact, conveniently called the 'presumed fact drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumptions literally means 'taking as true without examination or

proof...." (2009) 2 SCC 513.

To disprove the presumption, the accused should bring on record such facts and circumstances, upon consideration of which, the Court may either believe that the consideration and the debt did not exist or there non existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant.

In the present case in hand the appellant at the time of adducing evidence as DW 1, denied the fact of taking the cheque amount of Rs. 7,00,000/- and liquid cash of Rs. 1,45,000/- totaling Rs. 8,45,000/- In his personal capacity, but by producing D.W 2, the branch manager of UBI, Raghunathpur branch, he tilted the entire case in support of the prosecution/complainant as because said DW 2 admitted on going through the documents (Exbt. C and Exbt. D) that on 28.02.06 a sum of Rs. 7,00,000/- was debited to the appellant and that was the case of the complainant/ respondent that on 28.02.06 he issued the cheque bearing no. 951764 amounting to Rs. 7,00,000/- in favour of the appellant. During the course of trial the appellant/ accused failed to shift the burden of proof upon the respondent/ complainant that he was falsely implicated and the company was the essential party to face the trial also and thus I am of the view that the rulings relied upon by the appellant do not render any help and support to succeed with his contention.

After perusal of the evidence on record and the entire judgment, I am constrained to hold that ld. Trial Court was wrong thereby observing the appellant guilty for the commission of offence u/s 138 of NI Act, rather going through the entire judgment, I find that Id. Trial Court meticulously described the finding for holding the appellant guilty for commission of the offence and rightly

passed the order of conviction, and thus I find that this Appellate Court has no scope to make any interference with the order of conviction.

Upon my above observation the criminal appeal fails & is hereby dismissed.

C.F. paid is found correct."

iii. Proceedings before the High Court

18. The accused being dissatisfied with the dismissal of his appeal by the Sessions Court invoked the revisional jurisdiction of the High Court under Section 401 read with Section 397 of the Cr.P.C.

19. The High Court allowed the revision application and acquitted the accused on the ground that the offence as alleged could be said to have been committed by the company, that is Shilabati Hospital Pvt. Ltd., which is a separate legal entity. It further observed that as the cheque was drawn by the accused for and on behalf of the company in his capacity as one of the Directors, he could have been held vicariously liable for the alleged offence in terms of Section 141 of the NI Act, but only if the company was made an accused and held guilty. According to the High Court, as the company was not arraigned as an accused person, the accused as a Director of the said company could not be held vicariously liable for the offence.

20. The High Court placed reliance on the decision of this Court in ***Himanshu v. B. Shivamurthy and Another*** reported in **(2019) 3 SCC 797** and held that in the absence of the company being arraigned as an accused, the complaint against the accused could not be held to be maintainable. It observed that although the complainant was entitled to the benefit of the presumption under Section 139 of the NI Act as the accused had failed in rebutting the presumption cast upon him, yet in the absence of compliance with the requirements necessary for the applicability of vicarious liability as provided under Section 141, the accused could not have been convicted as a sole accused in the absence of the company being arraigned as an accused and convicted as the principal offender first. The observations made by the High Court are reproduced hereinbelow:

> *"27. The Company is neither a party nor was any notice served upon the Company of which the petitioner as director issued the cheque.*
>
> *28. The petitioner is the sole accused/opposite party in the complaint case, having signed the cheque as Director of the company, for and on its behalf.*
>
> *xxx xxx xxx*
>
> *30. The facts in the present case is very similar to the case, in Himanshu vs. B. Shivamurthy & Anr. (Supra).*
>
> *xxx xxx xxx*
>
> *31. In the present case:-*

a) The company has not been made an accused nor was any notice served upon the company, though the cheque was issued on behalf of the company.

b) The petitioner has been made an accused as the person, who signed and issued the cheque.

32. Therefore, in the absence of the company being arraigned as an accused, a complaint against the petitioner is not maintainable Himanshu vs. B. Shivamurthy & Anr. (supra).

xxx xxx xxx

37. In the present case the presumption is clearly in favour of the complainant and the petitioner has not been able to rebut the said presumption under Section 139 N.I. Act. But there is no compliance under Section 141 N.I. Act and as such the proceedings in the present case is clearly not maintainable."

21. In view of the aforesaid, the High Court set aside the order of the Sessions Court which had upheld the order of conviction passed by the Trial Court. The operative part of the impugned order passed by the High Court is extracted hereinbelow:

"40. The Judgment and Order dated February 22, 2019 passed by the Court of the Learned Additional Sessions Judge, Raghunathpur at Purulia, in connection with Criminal Appeal No. 03 of 2017 thereby affirming the Judgment and Order dated July 19, 2017 passed by the Learned Magistrate, 1 Court, Raghunathpur, Purulia in C. Case No. 39 of 2006 under Section 138 of the Negotiable Instruments Act, 1881 thereby convicting the petitioner under Section 255(2) of the Code of Criminal Procedure, 1973 for Commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and sentencing the petitioner to suffer simple imprisonment for

one year and to pay compensation of Rs. 10 lakhs to the Opposite Party no.2 within two months from the date of the Order, in default, to suffer rigorous imprisonment of further two months, is hereby set aside/quashed."

22. The complainant being dissatisfied with the judgment and order passed by the High Court acquitting the accused of the alleged offence, has come up before this Court with the present appeal.

B. SUBMISSIONS ON BEHALF OF THE APPELLANT / COMPLAINANT

23. Mr. Uddyam Mukherjee, the learned counsel appearing for the complainant, vehemently submitted that the High Court committed an egregious error in acquitting the accused on the ground that he could not have been held vicariously liable for the offence said to have been committed by the company in the absence of the company being prosecuted and punished.

24. According to the learned counsel, the transaction in question was between the accused and the complainant. The company was not at all in picture. He submitted that there is nothing on record to indicate that the accused had borrowed the amount for the company or on behalf of the company.

25. He submitted that although the cheque in question might have been issued by the accused containing a stamp of the hospital on it and signed by him in his capacity as a Director of the company, yet the said cheque was issued in discharge of his personal debt.

26. He further submitted that even before the Trial Court, it was not the defence of the accused that he had issued the cheque to discharge the debt of the company. He led no evidence worth the name in this regard. On the contrary, his defence was that the cheque was issued by way of a security towards a loan transaction and the same had been misused by the complainant.

27. In such circumstances, referred to above, the learned counsel prayed that there being merit in his appeal, the same be allowed and the impugned judgment and order passed by the High Court be set aside.

C. SUBMISSIONS ON BEHALF OF THE RESPONDENT / ACCUSED

28. On the other hand, Mr. Gaurav Kejriwal the learned counsel appearing for the accused, while opposing this appeal, submitted that no error not to speak of any error of law could be said to have been committed by the High

Court in passing the impugned order.

29. According to him, it is well-settled that if the accused is to be held vicariously liable for the offence alleged to have been committed by the company, then in the absence of company being prosecuted, no vicarious liability can be fastened on the Director of the company who is said to have drawn the cheque in question. He submitted that there is no possibility of any doubt arising as regards whether the cheque in question was drawn upon the account maintained by the company as the cheque was duly stamped with the stamp of the company. It was the responsibility of the complainant to exercise due diligence and issue a statutory notice to the drawer of the cheque, that is Shilabati Hospital Pvt. Ltd.

30. He would submit that all throughout the defence of his client was that the cheque was issued by way of security towards a loan transaction and not in discharge of any legally enforceable debt.

31. In such circumstances, referred to above, the learned counsel prayed that there being no merit in the appeal the same may be dismissed.

D. ANALYSIS

32. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned order.

i. Section 138 of the NI Act

33. Section 138 of the NI Act is contained in the Chapter XVII which was inserted vide Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988. Chapter XVII of the NI Act, which consists of Sections 138 to 147, *inter alia* provides for penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts. Paragraph (xi) of the Statement of the Objects and Reasons specifies the legislative intent behind introduction of Chapter XVII to the NI Act in the following words:

> *"(xi) to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers."*

34. Section 138 of the NI Act reads as under:

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

Provided that nothing contained in this section shall apply unless—
(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;
(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
(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.

Explanation.—For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability."

35. This Court in ***Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd. and Others*** reported in **(2000) 2 SCC 745** explained the ingredients

which are to be satisfied for making out a case under Section 138 of the NI Act in the following manner:

> *"10. On a reading of the provisions of Section 138 of the NI Act it is clear that the ingredients which are to be satisfied for making out a case under the provision are:*
>
> *(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;*
> *(ii) that 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;*
>
> *(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;*
>
> *(iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;*
>
> *(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."*

36. In the case on hand, the cheque in question came to be signed by the accused, in his capacity as the Director and Authorised Signatory of the Company Shilabati Hospital Pvt. Ltd., on the account maintained by the Company with the Standard Chartered Bank. Hence, the question that falls

for our determination is whether the accused could be said to be covered by the expression "account maintained by him" as it appears in Section 138 of the NI Act. In other words, could it be said that the accused was "maintaining" the bank account upon which the dishonoured cheque had been drawn.

37. Section 6 of the NI Act *inter alia* defines a "cheque" as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. Section 7 defines the "drawer" as the maker of a bill of exchange or cheque and "drawee" as the person thereby directed to pay. Sections 30 and 31 of the NI Act respectively define the liability of the drawer and the drawee of a cheque as follows:

> *"30. Liability of drawer.—The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided.*
>
> *31. Liability of drawee of cheque.—The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and , in default of such payment, must compensate the drawer for any loss or damage caused by such default."*

38. The proviso (b) to Section 138 provides that the payee or the holder of the cheque which has been dishonoured must give a written notice to the

drawer of the cheque within 30 days of the receipt of information from the bank that the cheque has been returned as unpaid. Further proviso (c) provides that if the drawer of the cheque makes the payment of the amount mentioned in the cheque within 15 days of receiving the notice mentioned in proviso (b), then he cannot be held liable under Section 138.

39. What invariably follows from a perusal of the aforesaid provisions is that it is only the drawer of the cheque who can be held liable under Section 138. Section 141 is an exception to this scheme of the NI Act and provides for vicarious liability of persons other than the drawer of the cheque in cases where the drawer of the cheque under Section 138 is a corporate person.

40. The question as to whether a person who was not the drawer of the cheque upon an account maintained by him could be held to be liable for an offence under Section 138 of the NI Act fell for the consideration of this Court in the case of ***P.J. Agro Tech Ltd. and Others v. Water Base Ltd.*** reported in **(2010) 12 SCC 146**. The Court construed the provision strictly and answered the question in the negative. The relevant observations are reproduced hereinbelow:

> *"11. From the submissions made on behalf of the respective parties, it is quite apparent that the short point*

for decision in this appeal is whether a complaint under Section 138 of the 1881 Act would be maintainable against a person who was not the drawer of the cheque from an account maintained by him, which ultimately came to be dishonoured on presentation.

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13. From a reading of the said section, it is very clear that in order to attract the provisions thereof a cheque which is dishonoured will have to be drawn by a person 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 any debt or other liability. It is only such a cheque which is dishonoured which would attract the provisions of Section 138 of the above Act against the drawer of the cheque.

14. In the instant case, the cheque which had been dishonoured may have been issued by Respondent 11 for discharging the dues of Appellant 1 Company and its Directors to Respondent 1 Company and the respondent Company may have a good case against Appellant 1 Company for recovery of its dues before other fora, but it would not be sufficient to attract the provisions of Section 138 of the 1881 Act. The appellant Company and its Directors cannot be made liable under Section 138 of the 1881 Act for a default committed by Respondent 11. An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence."

(Emphasis supplied)

41. In ***Jugesh Sehgal v. Shamsher Singh Gogi*** reported in **(2009) 14 SCC 683**, this Court emphasised on the importance of the dishonoured cheque having been drawn by the accused person on an account held in his name for the offence to be made out and held thus:

> *"22. As already noted hereinbefore, in Para 3 of the complaint, there is a clear averment that the cheque in question was issued from an account which was non-existent on the day it was issued or that the account from where the cheque was issued "pertained to someone else". As per the complainant's own pleadings, the bank account from where the cheque had been issued, was not held in the name of the appellant and therefore, one of the requisite ingredients of Section 138 of the Act was not satisfied. Under the circumstances, continuance of further proceedings in the complaint under Section 138 of the Act against the appellant would be an abuse of the process of the court. In our judgment, therefore, the decision of the High Court cannot be sustained."*
>
> (Emphasis supplied)

42. The aforesaid discussion makes it clear that as per the legislative scheme it is only the drawer of the cheque who is sought to be made liable for the offence punishable under Section 138 of the NI Act. Thus, the next question that requires consideration is whether a Director of a company, who is also the authorised signatory, to sign and issue cheques on its behalf could be said to be the drawer of a cheque drawn upon the bank account held in the name of the company. In other words, whether such an authorised signatory could be said to "maintain" the bank account upon which the dishonoured cheque has been drawn for the reason that such a

person has the authority to enter into transactions using the bank account of the company and also look after the day-to-day functioning of the bank account of the company.

ii. Whether authorized signatory of a company falls within the ambit of the expression "drawer"?

43. This Court in one of its recent decisions in the case of ***Shri Gurudatta Sugars Marketing (P) Ltd. v. Prithviraj Sayajirao Deshmukh and Others*** reported in **2024 SCC OnLine SC 1800** had the occasion to consider the issue of whether the authorised signatory of a company who had signed a cheque drawn on the bank account of the company and which got dishonoured subsequently could be held to be liable for the payment of interim compensation under Section 143A of the NI Act. This Court while answering the issue in the negative, applied the doctrine of separate corporate personality and held that it is only the drawer of the cheque who could be held to be liable for the payment of interim compensation under Section 143A of the NI Act and the authorised signatory of a company cannot be said to be the drawer of the cheque. The relevant observations made by the Court are reproduced hereinbelow:

> *"13. The appellant has challenged the judgment and order of the High Court dated March 29, 2023 as well as the relied upon judgment and order dated March 8, 2023. The present appeal is filed assailing the correctness of these*

orders vis-a-vis the larger question of law, as framed by the High Court:

> *"Whether the signatory of the cheque, authorised by the 'company', is the 'drawer' and whether such signatory could be directed to pay interim compensation in terms of section 143A of the Negotiable Instruments Act, 1881 leaving aside the company?"*

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28. The High Court's interpretation of section 7 of the Negotiable Instruments Act, 1881 accurately identified the "drawer" as the individual who issues the cheque. This interpretation is fundamental to understanding the obligations and liabilities under section 138 of the Negotiable Instruments Act, 1881, which makes it clear that the drawer must ensure sufficient funds in their account at the time the cheque is presented. The appellants' argument that directors or other individuals should also be liable under section 143A misinterprets the statutory language and intent. The primary liability, as correctly observed by the High Court, rests on the drawer, emphasizing the drawer's responsibility for maintaining sufficient funds.

29. The general rule against vicarious liability in criminal law underscores that individuals are not typically held criminally liable for acts committed by others unless specific statutory provisions extend such liability. Section 141 of the Negotiable Instruments Act, 1881 is one such provision, extending liability to the company's officers for the dishonour of a cheque. The appellants' attempt to extend this principle to section 143A, to hold directors or other individuals personally liable for interim compensation, is unfounded. The High Court rightly emphasised that liability under section 141 arises from the conduct or omission of the individual involved, not merely their position within the company.

> *30. The distinction between legal entities and individuals acting as authorized signatories is crucial. Authorised signatories act on behalf of the company but do not assume the company's legal identity. This principle, fundamental to corporate law, ensures that while authorised signatories can bind the company through their actions, they do not merge their legal status with that of the company. This distinction supports the High Court's interpretation that the drawer under section 143A refers specifically to the issuer of the cheque, not the authorised signatories.*
>
> *31. The principle of statutory interpretation, particularly in relation to sections 143A and 148, was also correctly applied by the High Court. The court emphasised that when statutory language is clear and unambiguous, it should be given its natural and ordinary meaning. The legislative intent, as discerned from the plain language of the statute, aims to hold the drawer accountable. The appellants' argument for a broader interpretation to include authorised signatories under section 143A contradicts this principle and would lead to an unjust extension of liability not supported by the statutory text."*
>
> (Emphasis supplied)

44. In yet one another decision of this Court in the case of ***N. Harihara Krishnan v. J. Thomas*** reported in **(2018) 13 SCC 663**, while dealing with the issue of commission of an offence under Section 138 of the NI Act by a company, the Court observed that Section 138 only contemplates the drawer of the cheque to be responsible for the commission of the offence. It is only by virtue of Section 141 that certain persons other than the drawer of the cheque can be made liable for the offence in cases where the offence under Section 138 is committed by a company and not an individual

person. The Court, in the facts of the case before it, further held that the identity of the drawer of the cheque was apparent from the cheque itself and thus it was not open to the payee/complainant to seek impleadment of the company, that is, the drawer of the cheque, at a belated stage by filing an impleadment application when it had instituted the complaint only against the authorised signatory who had signed the cheque on behalf of the company. The Court also held that the offence under Section 138 is person specific and in the absence of applicability of the principles of the Code of Criminal Procedure, 1973, the magistrate cannot take cognizance of the complaint unless it is made against the drawer of the cheque, as it is only the drawer who can be an accused under Section 138. The relevant observations are reproduced hereinbelow:

> *"20. The offence under Section 138 of the Act is capable of being committed only by the drawer of the cheque. The logic of the High Court that since the offence is already taken cognizance of, there is no need to take cognizance of the offence against Dakshin is flawed. Section 141 stipulates the liability for the offence punishable under Section 138 of the Act when the person committing such an offence happens to be a company—in other words when the drawer of the cheque happens to be a company. [...]*
>
> *xxx xxx xxx*
>
> *22. The High Court failed to appreciate that the liability of the appellant (if any in the context of the facts of the present case) is only statutory because of his legal status as the Director of Dakshin. Every person signing a cheque on behalf of a company on whose account a cheque is drawn does not become the drawer of the cheque. Such a*

signatory is only a person duly authorised to sign the cheque on behalf of the company/drawer of the cheque. If Dakshin/drawer of the cheque is sought to be summoned for being tried for an offence under Section 138 of the Act beyond the period of limitation prescribed under the Act, the appellant cannot be told in view of the law declared by this Court in Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] that he can make no grievance of that fact on the ground that Dakshin did not make any grievance of such summoning. It is always open to Dakshin to raise the defence that the initiation of prosecution against it is barred by limitation. Dakshin need not necessarily challenge the summoning order. It can raise such a defence in the course of trial.

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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, Parliament declared under Section 142 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.

(Emphasis supplied)

iii. Meaning of the expression "on an account maintained by him" used in Section 138 of the NI Act

45. It is of vital importance to understand the import of the expression "on an account maintained by him with a banker" used in Section 138 of the NI Act. The expression, in our considered opinion, describes the relationship between the account holder and the banker. This relationship is fundamental to the application of Section 138. The act of maintaining an account is exclusively tied to the account holder and does not extend to any third party whom the account holder may authorize to manage the account on its behalf. Therefore, any delegation of authority to manage the account does not alter the intrinsic relationship existing between the account holder and the banker as envisaged under the NI Act. Corporate persons like companies, which are mere legal entities and have no soul, mind or limb to

work physically, discharge their functions through some human agency recognised under the law to work. Therefore, if some function is discharged by such human agency for and on behalf of the company it would be an act of the company and not attributable to such human agent. One such instance of discharge of functions could be the authority to manage the bank accounts of the company, issue and sign cheques on its behalf, etc. which may be delegated to an authorised signatory. However, such authorisation would not render the authorised signatory as the maker of those cheques. It is the company alone which would continue to be the maker of these cheques, and thus also the drawer within the meaning of Section 7 of the NI Act.

46. The authorised signatory is merely the physical limb that signs and makes the cheque on behalf of the company's incorporeal personality. The company, for all purposes, continues to remain the drawer of the cheques. If the interpretation as being canvassed by the complainant is accepted then even an employee of the Company, who on account of his being an authorized signatory signs a cheque issued by the Company towards discharge of the debt or other liability of the Company, would be liable to prosecution and conviction under Section 138 of NI Act even after he resigns from the company and is no more in its employment. This certainly

could not have been the intention of the legislature. Even the vicarious liability created under Section 138 of NI Act would not be attracted in respect of a Director or an employee of the Company who resigns and severs his connections with the company, unless the complainant is able to bring his case within the purview of sub-Section 2 of Section 141, by proving that the offence had been committed with his consent or connivance or was otherwise attributable to any neglect on his part.

47. We would hasten to add that the above interpretation should not in any manner be misconstrued to affix liability upon the joint account holder of an account unless the cheque is shown to have been made/drawn jointly by such joint account holder. A company *vis-à-vis* its authorised signatory stands on a completely different footing as compared to account holders of a joint account. In the former, it is only the company which holds an account with the banker, whereas in the latter, each joint account holder can be said to hold an account with the banker. Thus, while in the case of a cheque drawn on the account of the company the authorised signatory cannot be held to be the drawer, in the case of a cheque drawn upon a joint account, each account holder affixing his signature to the cheque may be said to have drawn such a cheque. The position of law on this issue has been settled by this Court in the case of ***Aparna A. Shah v. Sheth***

Developers (P) Ltd. reported in **(2013) 8 SCC 71**, wherein it was observed thus:

> *"28. We also hold that under Section 138 of the NI Act, in case of issuance of cheque from joint accounts, a joint account-holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account-holder. The said principle is an exception to Section 141 of the NI Act which would have no application in the case on hand. The proceedings filed under Section 138 cannot be used as arm-twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under Section 138. The culpability attached to the dishonour of a cheque can, in no case "except in case of Section 141 of the NI Act" be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the Act. [...]"*
>
> (Emphasis supplied)

48. The expression "on an account maintained by him" has been construed by a learned Single Judge of the Kerala High Court in the case of ***P.N. Salim v. P.J. Thomas & Another*** reported in **2004 SCC Online Ker 269** to also include those cases where the cheque was issued by the drawer after the closure of the account maintained by him with the bank. The High Court said so having regard to the underlying object behind the enactment of Section 138. A similar view was taken by the Gujarat High Court in the case of ***Hashmikant M. Seth v. State of Gujarat & Anr.*** reported in **2004**

SCC Online Guj 300. We are in agreement with both the High Courts on the understanding of the expression "on an account maintained by him".

49. We are in seisin of the fact that in the case at hand, the accused had allegedly borrowed the amount from the complainant on the pretext that he was in need of financial help regarding some infrastructure development project he was undertaking. Nothing was brought on record during the course of the trial which would suggest that there was some sort of an understanding between the complainant and the accused that the debt of the accused would be discharged by the Shilabati Hospital Pvt. Ltd. A perusal of the notice issued by the complainant to the accused as well as a reading of the complaint filed by the complainant before the magistrate clearly brings out that the complainant was under the impression that the cheque was drawn by the accused in personal capacity upon a bank account maintained by him with the Standard Chartered Bank. Further, the defence that the bank account upon which the cheque was drawn was held in the name of Shilabati Hospital and not in the name of the accused was taken for the first time in the appeal filed by the accused before the Sessions Court. Although it can be understood that the complainant had no occasion to believe that the cheque was drawn upon the bank account of Shilabati Hospital as the debt was one which was taken by the accused in his

personal capacity, yet a bare perusal of the cheque shows that the cheque was signed by the accused in the capacity of the Director of the Shilabati Hospital Pvt. Ltd. as the same bears both the stamp of the director as well as the hospital.

50. A catena of decisions of this Court have settled the position of law that in case of a cheque issued on behalf of a company by its authorised signatory, prosecution cannot proceed against the such authorised signatory or other post-holders of the company as described under Section 141 of the NI Act, unless the company who is the drawer of the cheque is arraigned as an accused in the complaint case filed before the magistrate. Further, vicarious liability can only be affixed against the directors, authorised signatories, etc. of the company after the company is held liable for the commission of offence under Section 138.

51. It is not the case of the complainant that the cheque in question was drawn by the accused on a bank account maintained by him, rather the case is that the cheque was issued in discharge of the personal liability of the accused towards the complainant, and hence there was no occasion for it to implead the company as an accused.

iv. Scope of the expression "any debt or other liability" appearing in Section 138 of the NI Act

52. Section 138 of the NI Act does not envisage that only those cases where a cheque issued towards the discharge of the personal liability of the drawer towards the payee gets dishonoured would come within the ambit of the provision. The expression "of any debt or other liability" appearing in Section 138 when read with the Explanation to the provision is wide enough to bring any debt or liability which is legally enforceable within its fold. Thus, the requirement under the provision is that the debt or any other liability has to be legally enforceable and the emphasis is not on the existence of such debt or other liability between the drawer and the payee. A number of decisions of this Court have clarified that even those cases where a person assumes the responsibility of discharging the debt of some other person, and in furtherance thereof draws a cheque on an account maintained by him, which subsequently gets dishonoured upon being presented before the drawee, would be covered by Section 138 if the payee is able to establish that there was some sort of an arrangement by way of which the debt was assumed by the drawer.

53. This Court in the case of ***Anil Sachar and Another v. Shree Nath Spinners Private Limited and Others*** reported in **(2011) 13 SCC 148** observed thus:

"15. Upon perusal of the record, we find that the complainants had established before the trial court that there was an understanding among the complainants and the accused that in consideration of supply of goods to M/s Shree Nath Spinners (P) Ltd., M/s AT Overseas Ltd. was to make the payment. The aforestated understanding was on account of the fact that Directors in both the aforestated companies were common and the aforestated companies were sister concerns. In the circumstances, it can be very well said and it has been proved that in consideration of supply of goods to M/s Shree Nath Spinners (P) Ltd., M/s AT Overseas Ltd. had made the payment. In view of the above fact, in our opinion, the trial court was not right when it came to the conclusion that there was no reason for M/s AT Overseas Ltd. to give the cheques to the complainants.

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17. The trial court materially erred while coming to a conclusion that in criminal law no presumption can be raised with regard to consideration as no goods had been supplied by the complainants to M/s AT Overseas Ltd. The trial court ought to have considered the provisions of Section 139 of the Act, which reads as under:

> *"139.Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."*

18. According to the provisions of the aforestated section, there is a presumption with regard to consideration when a cheque has been paid by the drawer of the cheque. In the instant case, M/s AT Overseas Ltd. paid the cheque which had been duly signed by one of its Directors, namely, Munish Jain. Munish Jain is also a Director in M/s Shree Nath Spinners (P) Ltd. As stated hereinabove, both are sister concerns having common Directors. Extracts of books of accounts had been produced before the trial court so as to show that both the companies were having several

transactions and the companies used to pay on behalf of each other to other parties or their creditors. The above fact strengthens the presumption to the effect that M/s AT Overseas Ltd. had paid the cheques to the complainants, which had been signed by Munish Jain, in consideration of goods supplies to M/s Shree Nath Spinners (P) Ltd. Of course, the presumption referred to in Section 139 is rebuttable. In the instant case, no effort was made by Munish Jain or any of the Directors of M/s AT Overseas Ltd. for rebuttal of the aforestated presumption and, therefore, the presumption must go in favour of the holder of the cheques. Unfortunately, the trial court did not consider the above facts and came to the conclusion that there was no consideration for the cheques which had been given by M/s AT Overseas Ltd. to the complainants."

(Emphasis supplied)

54. In another judgment delivered by this Court in ***ICDS Ltd. v. Beena Shabeer and Another*** reported in **(2002) 6 SCC 426**, reference was made to the nature of liability which is incurred by the one who is a drawer of the cheque and observed that if the cheque is given towards any liability or debt which might have been incurred even by someone else, the person who is the drawer of the cheque can be made liable under Section 138 of the Act. The relevant observations made therein are reproduced hereinbelow:

"10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the section stands with the words "Where any cheque". The abovenoted three words are of extreme significance, in particular, by reason of the user of the word "any" — the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by

him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.

11. The issue as regards the coextensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. "Any cheque" and "other liability" are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. Any contra-interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus do not lend any assistance to the contentions raised by the respondents."

(Emphasis supplied)

55. A perusal of the above two decisions indicates that even if the cheque might have been issued for the discharge of personal liability of the accused

towards the complainant, had the company Shilabati Hospital Pvt. Ltd. been arraigned as an accused in the complaint case before the Trial Court, it would have remained open to the complainant to establish with the aid of the presumption under Section 139 that the cheque issued by the company was in discharge of a legally enforceable debt. However, in the absence of the drawer of the cheque having been arraigned as an accused, it was rightly held by the High Court that no prosecution could have proceeded against the accused in his personal capacity. The only way by which the accused could be held liable was under Section 141 of the NI Act, however the same could not have been done in the absence of the company being arraigned as an accused. This position of law has been explained by a number of decisions of this Court. A three-Judge Bench of this Court in ***Aneeta Hada v. Godfather Travels and Tours Private Limited*** reported in **(2012) 5 SCC 661** observed thus:

> *"17. The gravamen of the controversy is whether any person who has been mentioned in Sections 141(1) and 141(2) of the Act can be prosecuted without the company being impleaded as an accused. To appreciate the controversy, certain provisions need to be referred to.*
>
> *xxx xxx xxx*
>
> *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 : 1971 SCC (Cri) 97] which is a three-Judge 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."

(Emphasis supplied)

56. As specified in paragraph 59 of the aforesaid decision, the only exception to the general rule as laid above is embodied in the doctrine of *lex non cogit ad impossibilia* which means that the law doesn't compel the impossible. Thus, it is only in those cases where the impleadment of the company is not possible due to some legal impediment that this general rule can be exempted. In the facts on hand, it cannot be said that there was any legal

difficulty in impleading Shilabati Hospital Pvt. Ltd. as an accused in the complaint case filed by the complainant. Thus, even the benefit of the exception cannot be extended to the complainant in the present case.

57. In ***Himanshu v. B. Shivamurthy*** *(supra)*, the Court was examining the legality and validity of the order quashing a complaint passed by the High Court in exercise of its inherent powers under Section 482 of the CrPC in a case where the Director of the company was arraigned as the sole accused for the dishonour of a cheque drawn upon the bank account held in the name of the company. Reiterating the principles laid down in ***Aneeta Hada*** *(supra)*, this Court upheld the decision of the High Court in quashing the complaint case.

58. In yet another decision of this Court in ***Mainuddin Abdul Sattar Shaikh v. Vijay D. Salvi*** reported in **(2015) 9 SCC 622**, the facts interestingly were virtually opposite to the facts of the case on hand. In the said case, the accused, who was the Managing Director of a company had issued a cheque drawn on his personal account in discharge of the liability of the company. The cheque later came to be dishonoured and a private complaint was lodged against the accused under Section 138 of the NI Act. Both the trial court and the High Court acquitted the accused on the ground that the company was not made a party to the proceedings. However, this Court set

aside the order of acquittal and held the accused liable for the offence under Section 138. It was observed by this Court that as the cheque was drawn by the accused on an account maintained by him, the Company or any of its directors could not be made liable for the offence, even if the cheque was issued by the accused towards the discharge of the debt of the company. The relevant observations made by the Court are reproduced hereinbelow:

> *"10. In the present case, it is an admitted fact that the drawer of the cheque was the respondent, who had drawn the cheque, bearing No. 075073 for Rs 74,200 on a bank account maintained by him towards the refund of the booking amount. Therefore, he was the drawer of the cheque. The case of the appellant, apart from being supported by the provision of Section 138 of the NI Act, also gets buttressed by the judgment in P.J. Agro Tech Ltd. v. Water Base Ltd. [(2010) 12 SCC 146 : (2010) 4 SCC (Civ) 588 : (2011) 2 SCC (Cri) 164] , where this Court has dealt with the scope of Section 138 and held that : (SCC p. 150, para 13)*
>
> > *"13. ... it is very clear that in order to attract the provisions thereof a cheque which is dishonoured will have to be drawn by a person 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 any debt or other liability. It is only such a cheque which is dishonoured which would attract the provisions of Section 138 of the above Act against the drawer of the cheque."*
>
> *11. About the liability under Section 138 of the NI Act, where the cheque drawn by the employee of the appellant Company on his personal account, even if it be for discharging dues of the appellant Company and its*

Directors, the appellant Company and its Directors cannot be made liable under Section 138. Thus, we observe that in the abovementioned case, the personal liability was upheld and the Company and its Directors were absolved of the liability. The logic applied was that the section itself makes the drawer liable and no other person. […]"

(Emphasis supplied)

v. Section 141 of the NI Act

59. In ***Aneeta Hada*** *(supra),* this Court fortified the view that criminal liability on account of dishonor of cheque primarily falls on the drawer company and then extends to its officers only when the conditions incorporated in Section 141 of the NI Act are satisfied. While explaining the import of the words "*as well as the company*" occurring in the provision, the Court observed that the commission of an offence by the company is an express condition precedent and only when the prosecution is maintainable against the Company that the persons mentioned in the other categories under Section 141 can be vicariously made liable for the offence committed under Section 138 of the NI Act. The relevant observations are reproduced hereinbelow:

"53. It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature,

a strict construction of the provision would be necessitous and, in a way, the warrant.

xxx xxx xxx

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."

(Emphasis supplied)

60. Following the rationale in ***Aneeta Hada (****supra)*, this Court in ***Anil Gupta v. Star India Private Limited and Another*** reported in **(2014) 10 SCC 373** held that the guilt for the offence under Section 138 is only deemed upon the other persons who are connected with the Company as a consequence of Section 141 of the NI Act. Herein, since the complaint against the respondent Company was not maintainable, the High Court had quashed the summons issued by the trial court against the respondent Company. This Court opined that since the Company was not a party to the proceedings under Section 138 read with Section 141 of the Act, the

proceedings against the appellant Managing Director also could not be continued with. The relevant observations are reproduced hereinbelow:

> "*13. In the present case, the High Court by the impugned judgment dated 13-8-2007 [Visionaries Media Network v. Star India (P) Ltd., Criminal Misc. Case No. 2380 of 2004, decided on 13-8-2007 (Del)] held that the complaint against Respondent 2 Company was not maintainable and quashed the summons issued by the trial court against Respondent 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 [Anil Hada v. Indian Acrylic Ltd., (2000) 1 SCC 1 : 2001 SCC (Cri) 174] has been overruled by a three-Judge Bench of this Court in Aneeta Hada [Aneeta Hada v. Godfather Travels and Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] , we have no other option but to set aside the rest part of the impugned judgment [Visionaries Media Network v. Star India (P) Ltd., Criminal Misc. Case No. 2380 of 2004, decided on 13-8-2007 (Del)] 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 13-8-2007 [Visionaries Media Network v. Star India (P) Ltd., Criminal Misc. Case No. 2380 of 2004, decided on 13-8-2007 (Del)] passed by the High Court so far as it relates to the appellant and quash the summons and proceeding pursuant to Complaint Case No. 698 of 2001 qua the appellant.*"
>
> (Emphasis supplied)

61. This Court's decision in ***Ashok Shewakramani and Others v. State of Andhra Pradesh and Another*** reported in **(2023) 8 SCC 473** acknowledged the normal rule that there cannot be any vicarious liability under a penal provision but however, held that Section 141 of the NI Act

is an exception to this rule. It further stated that vicarious liability would only be fastened when the person who is sought to be held vicariously liable was "in charge of" and "responsible to the Company" for the conduct of the business of the Company at the time when the offence under Section 138 was committed. In circumstances where such persons are indeed found vicariously liable, those persons as well as the Company shall be deemed to be guilty of the offence under Section 138 of the NI Act. The relevant observations made by the Court are reproduced hereinbelow:

> "*21. Section 141 is an exception to the normal rule that there cannot be any vicarious liability when it comes to a penal provision. The vicarious liability is attracted when the ingredients of sub-section (1) of Section 141 are satisfied. The section provides that every person who at the time the offence was committed was in charge of, and was responsible to the Company for the conduct of business of the Company, as well as the Company shall be deemed to be guilty of the offence under Section 138 of the NI Act.*"
>
> (Emphasis supplied)

62. It follows from a conspectus of the aforesaid decisions that it is the drawer Company which must be first held to be the principal offender under Section 138 of the NI Act before culpability can be extended, through a deeming fiction, to the other Directors or persons in-charge of and responsible to the Company for the conduct of its business. In the absence of the liability of the drawer Company, there would naturally be no

requirement to hold the other persons vicariously liable for the offence committed under Section 138 of the NI Act.

63. Before we part with the matter, we deem it necessary to address the argument advanced by the counsel appearing for the accused that the object of Section 138 of the NI Act would be defeated if cases like the present one are held to be excluded from the ambit of the provision. The counsel placed reliance on a decision rendered by a learned Single Judge of the Madras High Court in the case of ***P. Sarvana Kumar v. S.P. Vijaya Kumar*** reported in **2022 SCC Online Mad 1387**. The said decision was rendered in a petition filed under Section 482 of the Cr.P.C. for quashing of the private complaint filed against the petitioner therein for the offence under Section 138 of the NI Act. The petitioner therein, who was arraigned as the second accused in the complaint, had filed the petition seeking quashing of the complaint *qua* him on the ground that the cheque, which came to be dishonoured, was signed by him in his capacity as an authorized signatory acting on behalf of the owner of a proprietorix concern, and thus he could not be said to have drawn the cheque on an account maintained by him, and the liability under Section 138 could only be affixed on the owner of the proprietorix concern. It was also contended by the petitioner therein that the provisions of Section 141 of the NI Act would have no applicability

to a case involving a proprietorship concern as the same is not owned by a collection of individuals but a single person.

64. The High Court while rejecting the contention of the petitioner therein, adverted to the object of Section 138 of the NI Act to hold that the authorized signatory could be said to be the drawer of the cheque as he was "maintaining" the account held in the name of the proprietorix concern and thus could be held liable under Section 138 of the NI Act.

65. We find it difficult to subscribe to the view taken by the High Court in the aforesaid decision. The High Court referred to an extract from the 11th Edition of the commentary on the NI Act by Bhashyam and Adiga wherein the liability of the principal for the acts of the agents has been discussed and erroneously relied upon it to attribute liability to the petitioner therein, who was the agent acting on behalf of the proprietorix concern.

66. The position of law as has been settled by this Court and reiterated in a legion of decisions is that it is only the drawer of the cheque who can be held liable for an offence under Section 138 of the NI Act. Further, this Court has also declared through several pronouncements on the subject that an authorised signatory acting on behalf of the principal cannot be said to

be the “drawer” of the cheque “on an account maintained by him with a banker” under Section 138.

67. It is also pertinent to note that the High Court in the aforesaid decision also referred to the decision of this Court in ***Raghu Lakshminarayanan v. Fine Tubes*** reported in (**2007) 5 SCC 103** wherein it was categorically held by this Court that Section 141 of the NI Act will have no application to proprietorship concerns as they are owned by individuals and do not have a separate corporate identity. However, the High Court distinguished the said decision by holding that although the signatory of a cheque issued on behalf of a proprietorship concern cannot be said to be vicariously liable under Section 141 yet he could be held liable in his capacity as the drawer of the cheque under Section 138 of the NI Act.

68. We find it difficult to approve the line of reasoning adopted by the High Court in relying upon the object behind the enactment of Section 138 of the Act to liberally interpret the language of Section 138 of the NI Act so as to include even an authorized signatory within its ambit. Section 138 of the NI Act being penal in nature has to be strictly construed and advertence to the object behind its enactment can only be made to supplement the language employed in the text of the statute and not to supplant it or render

it overly broad and susceptible to misuse. This Court in ***P.J. Agro Tech*** *(supra)* noted as under:

> *"14. ... An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence."*

E. CONCLUSION

69. As discussed above, in the case on hand, the accused was prosecuted in his individual capacity and not in his capacity of being the Director of the Shilabati Hospital Pvt. Ltd. Although it is undisputed that the accused signed the cheque in question, yet as the cheque was drawn not on an account maintained by him with a Banker but was issued on an account maintained by the hospital, the requirement of Section 138 of the Act cannot be said to have been complied with.

70. It would have been altogether a different situation if the accused was prosecuted in his capacity as a Director of the Shilabati Hospital. In such a scenario, the cheque drawn by him on an account maintained by the Company would have satisfied the requirement of Section 138 of the Act but as the accused has been proceeded against for an offence under Section

138 of the Act in his individual capacity and inasmuch as the cheque dishonoured for insufficiency of funds was drawn on the account maintained by the Company, namely, Shilabati Hospital Pvt. Ltd., and not by the accused herein, no offence could be said to have been committed under Section 138 of the Act. The High Court rightly held that in the absence of the principal offender having been arraigned as an accused, prosecution for the commission of an offence under Section 138 of the NI Act could not have proceeded against the accused.

71. As is evident from the discussion in the preceding parts of this judgment, the requirement of Section 138 of the NI Act is that for fastening criminal liability on the accused, the cheque which was dishonoured for insufficiency of funds etc., must have been drawn on an account maintained by the accused. The mere fact that the cheque signed by the accused in his capacity as a "Director" of the Company would in the normal course be honoured by the Bank to which it was presented does not satisfy the statutory requirement of Section 138 of the Act.

72. Section 138 of the Act exposes the person who has drawn the cheque and which has been returned for insufficiency of funds to criminal liability. The provision, therefore, must be construed strictly. However, such a strict

construction should not result in defeating the very purpose for which the provision has been enacted as held by this Court in the case of ***NEPC Micon Limited and Others v. Magma Leasing Limited*** reported in **(1999) 4 SCC 253**. At the same time, the statutory provisions creating penal liability cannot be stretched too far to embrace the persons and situations patently excluded from its purview as discernible from clear and unequivocal language used in the provision.

73. Section 138 of the NI Act clearly postulates that the cheque returned for insufficiency of funds should have been drawn by a person on an account maintained by him. It will amount to doing violence to the language of the statute if Section 138 of the Act is interpreted to mean that even if a person draws a cheque on an account not maintained by him, he shall be liable if the cheque is returned for insufficiency of funds. Such an interpretation will lead to absurd and wholly unintended results.

74. However, the peculiar factual situation of the present case and the plight of the complainant is not lost upon us. We are conscious of the fact that the option of bringing civil action against the accused or the hospital will be of no avail to the complainant as the claims are hopelessly time barred. Further, it is also not open for the complainant to initiate proceedings under Section 138 of the NI Act afresh by impleading Shilabati Hospital Pvt. Ltd.

as an accused as the time period prescribed for issuance of statutory notice under Section 138 has long expired.

75. It is trite law that an act may constitute an offence under more than one statute. The encashment of the cheque for an amount of Rs 7,00,000/- issued by the complainant in favour of the accused stood proved during the course of the trial. Further, the conduct of the accused in not replying to the statutory notice of dishonour of cheque issued by the lawyer for the complainant and in not taking the plea of the cheque having been drawn on the account of the company in his capacity as a Director during the course of trial undoubtedly raises questions as regards his dishonest intention in not repaying the amount borrowed by him from the complainant.

76. In such circumstances, although it is not possible to hold the accused liable for the offence under Section 138 of the NI Act, yet the possibility of him having committed the offence of cheating cannot be ruled out. *Prima facie*, the *mens rea* (guilty mind) of the accused speaks for itself.

77. We leave it open to the complainant to approach the jurisdictional police station and lodge an appropriate FIR against the accused. If the

complainant lodges an FIR, the concerned police officer in-charge of the police station shall investigate the same in accordance with law.

78. In view of the above, the appeal fails and is hereby dismissed.

79. Pending application(s), if any, stand disposed of.

…….J.

(J.B. Pardiwala)

…….J.

(R. Mahadevan)

NEW DELHI;

20th December, 2024.