REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2021
(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO. 3913 OF 2020)

DAYLE DE'SOUZA ..... APPELLANT(S)

VERSUS

GOVERNMENT OF INDIA THROUGH
DEPUTY CHIEF LABOUR COMMISSIONER
(C) AND ANOTHER ..... RESPONDENT(S)

J U D G M E N T

SANJIV KHANNA, J.

Leave granted.

2. The appellant, Dayle De'Souza, is a director of M/s. Writer Safeguard Pvt. Ltd. (hereinafter referred to as 'the Company'). In 2009, the Company had entered into an agreement titled "Agreement for Servicing and Replenishment of Automated Teller Machines" with M/s. NCR Corporation India Private Ltd., the latter having earlier entered into an agreement with the State Bank of India for maintenance and upkeep of the State Bank of India's

ATMs. On 19th February 2014, the Labour Enforcement Officer (Central) had inspected the State Bank of India's ATM at AST, Komal Chand Petrol Pump, Civil Lines, Sagar, Madhya Pradesh (hereinafter referred to as 'the ATM'). On 06th March 2014, a notice was issued by the Labour Enforcement Officer (Central) to the appellant and one Vinod Singh, Madhya Pradesh head of M/s. Writer Safeguard Pvt. Ltd. alleging non-compliance with the provisions of the Minimum Wages Act, 1948 (for short, 'the Act') and Minimum Wages (Central) Rules, 1950 (for short, 'the Rules') at the ATM. On 02nd April 2014, the Company responded claiming that they neither manage nor work at the ATM. After more than four months, the Labour Enforcement Officer (Central), by letter dated 08th August 2014, informed the appellant and Vinod Singh that they were required to appear in the court on 14th August 2014. On 14th August 2014, the Labour Enforcement Officer (Central) filed a criminal complaint before the Court of the Chief Judicial Magistrate, Sagar, Madhya Pradesh, under Section 22A of the Act. We shall refer to the contents of the complaint later.

3. On the date of presentation of the complaint, that is, 14th August 2014, the Judicial Magistrate, First Class, Sagar, Madhya Pradesh took cognisance of the offence and issued a bailable warrant against the appellant and Vinod Singh in Criminal Case No.

3398/2014. On 01st August 2015, the Company submitted a detailed representation to the Deputy Chief Labour Commissioner (Central), Marhatal, Jabalpur, Madhya Pradesh denying the contents of the notice dated 06th March 2014.

4. Thereafter, on 01st August 2015, the appellant filed a petition M.Cr.C. No. 846/2016 under Section 482 of the Code of Criminal Procedure, 1973 ('the Code', for short) before the High Court of Madhya Pradesh at its Principal Seat at Jabalpur for quashing the complaint in Criminal Case No. 3398/2014. By the impugned order in M.Cr.C. No. 846/2016 dated 20th January 2020, the High Court dismissed the petition as *sans* merit. Hence, the present appeal.

5. Upon perusal of the complaint in question, which is placed on record, we note that two individuals have been enlisted as accused, namely: (i) Dayle De'Souza – the appellant before us, who as per the cause-title is stated to be a director of M/s. Writer Safeguard Pvt. Ltd. and resident of Writer House located in Mumbai, Maharashtra; and (ii) Vinod Singh, who it is stated is the Madhya Pradesh head of M/s. Writer Safeguard Pvt. Ltd. and a resident of Bhopal, Madhya Pradesh. The Company is not

enlisted as an accused in the complaint and has not been summoned to stand trial.

6. The complaint, with reference to the two accused, in paragraph 3 states:

> "(3) That the accused persons are Contractor who were getting work of cash loading and security of cash through labours and they are responsible for employment and payment of labours employed in said work under said Act, who is Employer under Part 2 (E) of the Minimum Wages Act, 1948."

It is also alleged in the complaint:

> "(4) That the work of said Employer is regulated under Notification No.- S.O. 1284 (E) dated 20.05.2009 of the Government of India and they are Scheduled Employer under Minimum Wages Act, 1948 and Minimum Wages (Central) Rules, 1950."

7. The complaint states that the inspection on 19th February 2014 had revealed violation of Rules 21(4), 22, 25(2), 26(1) and 26(5) on account of failure to keep and display, as the case may be, the Fine Register Form-1, Register Form-2, the notice of minimum wages, Rule, and abstract of the Act, name of Inspectors with address in Hindi and English at the worksite, overtime register, wages payment register and attendance register at the worksite or at any adjoining place(s).

8. Section 22A of the Act, the provision invoked, is a 'General provision for punishment of other offences' where "*any employer who contravenes any provision of this Act or of any rule or order made thereunder shall, if no other penalty is provided for such contravention by this Act, be punishable with fine which may extend to five hundred rupees"*. Clause (b) of sub-section (1) to Section 22B with the heading "Cognizance of offences" states that "*No court shall take cognisance of a complaint against any person for an offence - under clause (b) of section 22 or under section 22A, except on a complaint made by, or with the sanction of, an Inspector"*. Sub-section (2) to Section 22B, insofar as it relates to Section 22A, vide sub-clause (b) states that "*No Court shall take cognisance of an offence – under Section 22A, unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed."*

9. However, in the context of the present appeal, it is Section 22C of the Act which is of more relevance which reads thus:

> "22C. Offences by companies. —
>
> (1) If the person committing any offence under this Act is a company, every person who at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be

liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. — For the purposes of this section —

(a) "company" means any body corporate and includes a firm or other association of individuals; and
(b) "director" in relation to a firm means a partner in the firm."

10. Sub-section (1) to Section 22C states that where an offence is committed by a company, every person who at the time the offence was committed was in-charge of and was responsible to the company for the conduct of the business, as well as the company itself shall be deemed to be guilty of the offence. By necessary implication, it follows that a person who do not bear out the requirements is not vicariously liable under Section 22C(1) of the Act. The proviso, which is in the nature of an exception, states that a person who is liable under sub-section (1) shall not be

punished if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. The onus to satisfy the requirements to take benefit of the proviso is on the accused, but it does not displace or extricate the initial onus and burden on the prosecution to first establish the requirements of sub-section (1) to Section 22C of the Act. The proviso is to give immunity to a person who is vicariously liable under sub-section (1) to section 22C of the Act. In ***S.M.S. Pharmaceuticals Ltd.*** v. ***Neeta Bhalla and Another***,[1] in relation to *pari materia* proviso in Section 141 of the Negotiable Instruments Act, 1881, this Court observed:

> "4… A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes 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, liable for the offence. <u>The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.</u>
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> 9. The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office

[1] (2005) 8 SCC 89.

> suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence."
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> (Emphasis added)

In ***Aneeta Hada*** v. ***Godfather Travels and Tours Private Limited,***[2] this Court had reiterated that the proviso to general vicarious liability under Section 141 of the Negotiable Instruments Act, 1881, applies as an exception, by observing:

> "22. On a reading of the said provision, it is plain as day that if a person who commits the offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a "deemed" concept of criminal liability."
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> (Emphasis added)

The proviso being an exception cannot be made a justification or a ground to launch and initiate prosecution without the satisfaction of conditions under sub-section (1) of Section 22C of the Act. The proviso that places the onus to prove the exception

[2] (2012) 5 SCC 661.

on the accused, does not reverse the onus under the main provision, namely Section 22C(1) of the Act, which remains on the prosecution and not on the person being prosecuted.

11. Sub-section (2) states that notwithstanding anything contained in sub-section (1), where any offence under the Act has been committed by a company, and it is proved that such offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, then such director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Without much ado, it is clear from a reading of sub-section (2) to Section 22C of the Act that a person cannot be prosecuted and punished merely because of their status or position as a director, manager, secretary or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to Section 22C is on the prosecution and not on the person being prosecuted.

12. Unlike sub-section (2) to Section 22C, sub-section (1) conspicuously does not use the term 'director, manager, secretary or other officer of the company' to bring them within the ambit of the vicarious liability provision, *albeit* every person in-charge of and responsible to the company for the conduct of its business at the time of the commission of the offence in question is deemed to be additionally liable. The words 'in-charge of the company' and 'responsible to the company' are pivotal to sub-section (1). This requirement has to be satisfied for the deeming effect of sub-section (1) to apply and for rendering the person liable to be proceeded against and, on such position being proved, punished. Interpreting an identical expression used in Sections 23-C(1) and 23-C(2) of the Foreign Exchange Regulation Act, 1947, this Court in ***Girdhari Lal Gupta*** v. ***D.H. Mehta and Another,***[3] has held:

> "6. What then does the expression "a person in-charge and responsible for the conduct of the affairs of a company" mean? It will be noticed that the word "company" includes a firm or other association, and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person "in-charge" must mean that the person should be in over-all control of the day to day business of the company or firm. This inference follows from the wording of Section 23-C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually is in charge of the business but

[3] 1971 (3) SCC 189.

> not in over-all charge. Similarly, the other officers may be in-charge of only some part of business.
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> 8. In R.K. Khandelwal v. State D.S. Mathur, J., in construing Section 27 of the Drugs Act, 1940, a provision similar to the one we are concerned with, observed:
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> > "There can be directors who merely lay down the policy and are not concerned with the day to day working of the company. Consequently, the mere fact that the accused person is a partner or director of the Company, shall not make him criminally liable for the offence committed by the Company unless the other ingredients are established which make him criminally liable.""

Those not in overall control of the day to day business of the company or the firm are not deemed to be constructively liable under Section 23-C(1) of the Foreign Exchange Regulation Act, 1947.

13. This exposition on the meaning of the term 'in-charge and responsible for' was referred to with approval in ***State of Karnataka*** v. ***Pratap Chand and Others***.[4] This decision relates to the prosecution of the partner of a firm under the Drugs and Cosmetics Act, 1940. The judgment referred to the explanation to Section 34 in the said Act (which is *pari materia* with the explanation in Section 22C of the Minimum Wages Act, 1948) to observe that for the purpose of imposing liability on the company

[4] (1981) 2 SCC 335.

under the said Section, a company includes a body corporate, a firm or an association of individuals. A director in relation to a firm means a partner in that firm. Therefore, even in the case of partners, when a firm commits an offence, the requirement of either sub-section (1) or sub-section (2) to Section 22C must be satisfied. This means that in terms of sub-section (1), the partner should be "in-charge of" and "responsible to" the firm for the conduct of its business as per the dictum in ***Girdhari Lal Gupta*** (supra). Further, as per sub-section (2), a partner may also be liable, just as a director is liable for the conduct of the business of a company, if the offence is committed with the consent or connivance of, or is attributable to any neglect on the part of the partner concerned.

14. Way back in 1982, in ***Municipal Corporation of Delhi*** v. ***Ram Kishan Rohtagi and Others***,[5] this Court had quashed criminal proceedings under the Prevention of Food Adulteration Act, 1954 against the directors of a manufacturing company at the summoning stage, observing that the presumptive assertion made in the complaint that the directors of the accused company 'as such' were in-charge of and responsible for the conduct of the business of the company at the time of sampling was vague. The

[5] 1983 (1) SCC 1.

use of the words “as such” in the complaint indicated that the complainant had merely presumed that the directors must be guilty because they held the office of the director. The Court opined that such presumptive accusations against the directors without any specific averment or criminal attribution being made in the complaint would be insufficient. Thereafter, reference was made to Section 319 of the Code of Criminal Procedure, 1973 which empowers the Court to take cognisance of and proceed against a person who is not an accused before it and try him along with others. Upholding the reasoning of the High Court quashing the proceedings against the directors, it was highlighted:

> “12.....The main clause of the complaint which is the subject-matter of the dispute is clause 5 which may be extracted thus:
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> > 5. That accused 3 is the Manager, of accused 2 and accused 4 to 7 are the Directors of accused 2 and as such they were incharge of and responsible for the conduct of business of accused 2 at the time of sampling.
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> 14. Reliance has been placed on the words “as such” in order to argue that because (sic) the complaint does not attribute any criminal responsibility to Accused 4 to 7 except that they were incharge of and responsible for the conduct of the business of the Company. It is true that there is no clear averment of the fact that the Directors were really incharge of the manufacture and responsible for the conduct of business but the words “as such” indicate that the complainant has merely presumed that the Directors of the Company must be

> guilty because they are holding a particular office. This argument found favour with the High Court which quashed the proceedings against the Directors as also against the Manager, Respondent 1."

However, the initiation of a prosecution and the summoning order against the manager in the factual context was held to be proper.

15. In another decision by the same Bench titled ***Municipal Corporation of Delhi*** v. ***Purshotam Dass Jhunjunwala and Others,***[6] the assertions were that the individual accused, namely the chairman, managing director and directors of the company, were "in-charge of and responsible to it for the conduct of its business at the time of commission of the offence". The words "as such" were missing. This Court, therefore, concluded that the directors of the company were not being prosecuted merely because of their official position but because of the assertion that they were "in-charge of and responsible for the conduct of the business at the time of commission of the offence". There was a clear averment regarding the active role played by the accused and the extent of their liability. Accordingly, restoring the order passed by the Metropolitan Magistrate by which the directors etc. were summoned for trial in accordance with the law and setting

[6] (1983) 1 SCC 9

aside the order of the High Court quashing the prosecution against them, this Court has held:

> "3.....The relevant allegations against the accused-respondents are to be found in para 5 of the complaint which may be extracted thus:
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> > 5. That accused Ram Kishan Bajaj is the Chairman, accused R.P. Neyatia is the Managing Director and Accused 7 to 12 are the Directors of the Hindustan Sugar Mills Ltd. and were incharge of and responsible to it for the conduct of its business at the time of commission of offence.
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> > 5. In the instant case, a clear averment has been made regarding the active role played by the respondents and the extent of their liability. In this view of the matter, it cannot be said that para 5 of the complaint is vague and does not implicate Respondents 1 to 11. As to what would be the evidence against the respondents is not a matter to be considered at this stage and would have to be proved at the trial. We have already held that for the purpose of quashing the proceedings only the allegations set forth in the complaint have to be seen and nothing further."

16. The legal position has undergone further elucidation in a number of judgments.[7] However, for the present decision, we would refer to the summarisation in ***National Small Industries Corporation Limited*** v. ***Harmeet Singh Paintal and Another***,[8] to the following effect:

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[7] See, *Pooja Ravinder Devidasani* v. *State of Maharashtra and another*, (2014) 16 SCC 1; *Gunmala Sales Private Ltd.* v. *Anu Mehta and Others*, (2015) 1 SCC 103; *Shailendra Swarup* v. *Deputy Director, Enforcement Directorate*, (2020) 16 SCC 561.
[8] (2010) 3 SCC 330.

"39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

> (vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

17. The necessities of sub-section (2) to Section 22C of the Act are different from sub-section (1) to Section 22C of the Act. Vicarious liability under sub-section (2) to Section 22C can arise because of the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day to day business of the company when the offence was committed. Vicarious liability is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company.

18. In the factual context present before us it is crystal clear that the complaint does not satisfy the mandate of sub-section (1) to Section 22C of the Act as there are no assertions or averments that the appellant before this Court was in-charge of and responsible to the company M/s. Writer Safeguard Pvt. Ltd. in the manner as interpreted by this Court in the cases mentioned above. The proviso to sub-section (1) in the present case would not apply. It is an exception that would be applicable and come

into operation only when the conditions of sub-section (1) to Section 22C are satisfied. Notably, in the absence of any specific averment, the prosecution in the present case does not and cannot rely on Section 22C(2) of the Act.

19. There is yet another difficulty for the prosecution in the present case as the Company has not been made an accused or even summoned to be tried for the offence. The position of law as propounded in ***State of Madras*** v. ***C.V. Parekh and Another*****:**[9] , reads:

> "3. Learned Counsel for the appellant, however, sought conviction of the two respondents on the basis of Section 10 of the Essential Commodities Act under which, if the person contravening an order made under Section 3 (which covers an order under the Iron and Steel Control Order, 1956), is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. It was urged that the two respondents were in charge of, and were responsible to, the Company for the conduct of the business of the Company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of clause (5) of the Iron and Steel Control Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel Control Order was made by the Company. In fact, the

[9] (1970) 3 SCC 491.

> Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself. Since, in this case, there is no evidence and no finding that the Company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible. The actual contravention was by Kamdar and Vallabhdas Thacker and any contravention by them would not fasten responsibility on the respondents. The acquittal of the respondents is, therefore, fully justified. The appeal fails and is dismissed."

20. However, this proposition was later deviated from in ***Sheoratan Agarwal and Another*** v. ***State of Madhya Pradesh***.[10] This case pertained to the *pari materia* provision under Section 10 of the Essential Commodities Act, 1955. The court held that anyone among: the company itself; every person in-charge of and responsible to the company for the conduct of the business; or any director, manager, secretary or other officer of the company with whose consent or connivance or because of whose neglect offence had been committed, could be prosecuted alone. However, the person-in-charge or an officer of the company could be held guilty in that capacity only after it has been established that there has been a contravention by the company as well. However, this will not mean that the person-in-charge or an officer of the company must be arraigned simultaneously along with the company if he is to be found guilty and punished.

[10] (1984) 4 SCC 352.

21. Relying upon the reasoning in ***Sheoratan Agarwal*** (supra) and limiting the interpretation of ***C.V. Parekh*** (supra), this Court in ***Anil Hada*** v. ***Indian Acrylic Ltd.***[11] had held that:

> "13. If the offence was committed by a company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt a finding that the offence was committed by the company is sine qua non for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act."

22. However, subsequent decisions of this Court have emphasised that the provision imposes vicarious liability by way of deeming fiction which presupposes and requires the commission of the offence by the company itself as it is a separate juristic entity. Therefore, unless the company as a principal accused has committed the offence, the persons mentioned in sub-section (1) would not be liable and cannot be prosecuted. Section 141(1) of

[11] (2000) 1 SCC 1.

the Negotiable Instruments Act, extends vicarious criminal liability to the officers of a company by deeming fiction, which arises only when the offence is committed by the company itself and not otherwise. Overruling ***Sheoratan Agarwal*** and ***Anil Hada*****,** in ***Aneeta Hada*** v. ***Godfather Travels and Tours Private Limited***,[12] a 3-judge bench of this court expounding on the vicarious liability under Section 141 of the Negotiable Instruments Act, has held:

> "51. We have already opined that the decision in *Sheoratan Agarwal* runs counter to the ratio laid down in *C.V. Parekh* which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in *Anil Hada* has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted.
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> 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* which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal* does not correctly lay down the law and, accordingly, is hereby overruled. The decision in *Anil Hada* is overruled with the qualifier as stated in para 51. The decision in *Modi*

[12] (2012) 5 SCC 661.

Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

23. The proposition of law laid down in ***Aneeta Hada*** (supra) was relied upon by this Court in ***Anil Gupta*** v. ***Star India Private Limited and Another***:[13]

> "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* has been overruled by a three-Judge Bench of this Court in *Aneeta Hada*, 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."

24. In ***Sharad Kumar Sanghi*** v. ***Sangita Rane,***[14] this Court observed that:

> "11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the

[13] (2014) 10 SCC 373.
[14] (2015) 12 SCC 781.

> Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in *Aneeta Hada v. Godfather Travels and Tours (P) Ltd.* in the context of the Negotiable Instruments Act, 1881.
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> 13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant."

25. This position was again clarified and reiterated by this Court in ***Himanshu*** v. ***B. Shivamurthy and Another*****.**[15] The relevant portion of the judgment reads thus:

> "6. The judgment of the High Court has been questioned on two grounds. The learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. The learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the

[15] (2019) 3 SCC 797.

prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

7. The first submission on behalf of the appellant is no longer res integra. A decision of a three-Judge Bench of this Court in *Aneeta Hada* v. *Godfather Travels & Tours (P) Ltd.* governs the area of dispute. The issue which fell for consideration was whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The three-Judge Bench held thus: (SCC p. 688, para 58)

> "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."

In similar terms, the Court further held: (SCC p. 688, para 59)

> "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."
>
> xx xx xx
>
> 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."

26. Applying the same proposition of law as laid down in ***Aneeta Hada*** (supra)***,*** this Court in ***Hindustan Unilever Limited*** v. ***State of Madhya Pradesh***[16] applying *pari materia* provision in Prevention of Food Adulteration Act, 1954, held that:

> "23. Clause (a) of sub-section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of sub-section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the company as well as the nominated person to be held guilty of the offences and/or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of

[16] (2020) 10 SCC 751.

> the company, the nominated person cannot be convicted or vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to the appellant-nominated person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the nominated person as unsustainable."

27. In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well.

28. There is also another aspect which requires our attention. We have noted in some detail the contents of the complaint, which refers to the violation as certain notices were not displayed and certain registers and forms were not kept at the 'worksite', namely, ATM of the SBI at AST, Komal Chand Petrol Pump, Civil Lines, Sagar, District Sagar. A response to the show-cause-cum-compliance notice in the form of a short reply by the authorised

signatory of M/s. Writer Safeguard Pvt. Ltd. on 02nd April, 2014, which factum though accepted, has not been adverted to in the complaint. This short reply states that the Company neither manages the ATM nor works at the ATM and that the ATM site was managed by the respective banks and, therefore, the volitional as alleged do not apply to them. The complaint does not state why the reply was deficient or indicate even briefly as to the nature of activity and involvement of the Company's workers at the ATM site of the State Bank of India mandating compliance at the site in question. We are not ruling on merits, *albeit* highlighting the complaint being bereft and silent on these aspects and whether the authorities considered the legal provisions in the context of the factual background before initiating prosecution.

29. The authorities bestowed with the duty to confirm compliance are often empowered to take stringent including penal action to ensure observance and check defiance. There cannot also be any quarrel on the need to enforce obedience of the rules as the beneficial legislation protects the worker’s basic right to receive minimum wages. The rulebook makes sure that the workers are made aware of their rights and paid their dues as per law without unnecessary disputes or allegations as to absence, overtime payment, deductions, etc.

30. At the same time, initiation of prosecution has adverse and harsh consequences for the persons named as accused. In ***Directorate of Revenue and Another*** v. ***Mohammed Nisar Holia,***[17] this Court explicitly recognises the right to not to be disturbed without sufficient grounds as one of the underlying mandates of Article 21 of the Constitution. Thus, the requirement and need to balance the law enforcement power and protection of citizens from injustice and harassment must be maintained. Earlier in ***M/s. Hindustan Steel Ltd.*** v. ***State of Orrisa***,[18] this Court threw light on the aspect of invocation of penalty provisions in a mechanical manner by authorities to observe:

> "8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where

[17] 2008 (2) SCC 370.
[18] 1969 (2) SCC 627.

> the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

Almost every statute confer operational power to enforce and penalise, which power is to be exercised consistently from case to case, but adapted to facts of an individual case[19]. The passage from ***Hindustan Steel Ltd.*** (supra) highlights the rule that the discretion that vests with the prosecuting agencies is paired with the duty to be thoughtful in cases of technical, venial breaches and genuine and honest belief, and be firmly unforgiving in cases of deceitful and mendacious conduct. Sometimes legal provisions are worded in great detail to give an expansive reach given the variables and complexities involved, and also to avoid omission and check subterfuges. However, legal meaning of the provision is not determined in abstract, but only when applied to the relevant facts of the case[20]. Therefore, it is necessary that the discretion conferred on the authorities is applied fairly and judiciously avoiding specious, unanticipated or unreasonable results. The intent, objective and purpose of the enactment should guide the exercise of discretion, as the presumption is that the

[19] *Secretary of State for Work and Pensions* v *B* [2005] EWCA Civ 929 at [43].
[20] See Bennion On Statutory Interpretation, Sixth Edition, Part VI at Page No. 371.

makers did not anticipate anomalous or unworkable consequences. The intention should not be to target and penalise an unintentional defaulter who is in essence law-abiding.

31. There are a number of decisions of this Court in which, with reference to the importance of the summoning order, it has been emphasised that the initiation of prosecution and summoning of an accused to stand trial has serious consequences[21]. They extend from monetary loss to humiliation and disrepute in society, sacrifice of time and effort to prepare defence and anxiety of uncertain times. Criminal law should not be set into motion as a matter of course or without adequate and necessary investigation of facts on mere suspicion, or when the violation of law is doubtful. It is the duty and responsibility of the public officer to proceed responsibly and ascertain the true and correct facts. Execution of law without appropriate acquaintance with legal provisions and comprehensive sense of their application may result in an innocent being prosecuted.

32. Equally, it is the court's duty not to issue summons in a mechanical and routine manner. If done so, the entire purpose of

[21] See – *Pepsi Foods Ltd. and Another* v. *Special Judicial Magistrate and Others*, (1998) 5 SCC 749; *GHCL Employees Stock Option Trust* v. *Indian Infoline Ltd. and Others*, (2013) 4 SCC 505; *Krishna Lal Chawla and Others* v. *State of Uttar Pradesh and Another*, (2021) 5 SCC 435.

laying down a detailed procedure under Chapter XV of the 1973 Code gets frustrated. Under the proviso (a) to Section 200 of the 1973 Code, there may lie an exemption from recording pre-summoning evidence when a private complaint is filed by a public servant in discharge of his official duties; however, it is the duty of the Magistrate to apply his mind to see whether on the basis of the allegations made and the evidence, a *prima facie* case for taking cognizance and summoning the accused is made out or not. This Court explained the reasoning behind this exemption in ***National Small Industries Corporation Limited*** v. ***State (NCT of Delhi) and Others***:[22]

> "12. The object of Section 200 of the Code requiring the complainant and the witnesses to be examined, is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of process on complaints which are false or vexatious or intended to harass the persons arrayed as accused. (See *Nirmaljit Singh Hoon* v. *State of W.B.*) Where the complainant is a public servant or court, clause (a) of the proviso to Section 200 of the Code raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before issuing process."

[22] (2009) 1 SCC 407.

The issue of process resulting in summons is a judicial process that carries with it a sanctity and a promise of legal propriety.

33. Resultantly, and for the reasons stated above, we would allow the present appeal and quash the summoning order and the proceedings against the present appellant.

34. Accused No. 2, Vinod Singh, would also be entitled to the benefit of this order. Accordingly, the proceedings initiated against the accused no. 2, namely Vinod Singh, also stand quashed.

.....J.
(R. SUBHASH REDDY)

.....J.
(SANJIV KHANNA)

NEW DELHI;
OCTOBER 29, 2021.