

SUPREME COURT OF INDIA

Aneeta Hada

Vs.

Godfather Travels & Tours Pvt. Ltd.

Crl.A.No.838 of 2008

(Dalveer Bhandari, Sudhansu Jyoti Mukhopadhaya and Dipak Misra JJ.)

27.04.2012

JUDGEMENT

DIPAK MISRA, J.

1. In Criminal Appeal Nos. 838 of 2008 and 842 of 2008, the common proposition of law that has emerged for consideration is whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for brevity the Act) without the company being arraigned as an accused. Be it noted, these two appeals were initially heard by a two-Judge Bench and there was difference of opinion between the two learned Judges in the interpretation of Sections 138 and 141 of the Act and, therefore, the matter has been placed before us.

2. In Criminal Appeal Nos. 1483 of 2009 and 1484 of 2009, the issue involved pertains to the interpretation of Section 85 of the Information Technology Act, 2000 (for short the 2000 Act) which is *pari materia* with Section 141 of the Act. Be it noted, a director of the appellant-Company was prosecuted under Section 292 of the Indian Penal Code and Section 67 of the 2000 Act without impleading the company as an accused. The initiation of prosecution was challenged under Section 482 of the Code of Criminal Procedure before the High Court and the High Court held that offences are made out against the appellant-Company along with the directors under Section 67 read with Section 85 of the 2000 Act and, on the said base, declined to quash the proceeding. The core issue that has emerged in these two appeals is whether the company could have been made liable for prosecution without being impleaded as an accused and whether the directors could

have been prosecuted for offences punishable under the aforesaid provisions without the company being arrayed as an accused.

Regard being had to the similitude of the controversy, these two appeals were linked with Criminal Appeal Nos. 838 of 2008 and 842 of 2008.

3. We have already noted that there was difference of opinion in respect of the interpretation of Sections 138 and 141 of the Act and, therefore, we shall advert to the facts in Criminal Appeal No.838 of 2008 and, thereafter, refer to the facts in Criminal Appeal Nos.1482 of 2009 and 1484 of 2009.

4. The appellant, Anita Hada, an authorised signatory of International Travels Limited, a company registered under the Companies Act, 1956, issued a cheque dated 17th January, 2011 for a sum of Rs.5,10,000/- in favour of the respondent, namely, M/s. Godfather Travels & Tours Private Limited, which was dishonoured as a consequence of which the said respondent initiated criminal action by filing a complaint before the concerned Judicial Magistrate under Section 138 of the Act. In the complaint petition, the Company was not arrayed as an accused. However, the Magistrate took cognizance of the offence against the accused appellant.

5. Being aggrieved by the said order, she invoked the jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure for quashing of the criminal proceeding and the High Court, considering the scope of Sections 138 and 139 of the Act and various other factors, opined that the ground urged would be in the sphere of defence of the accused and would not strengthen the edifice for quashing of the proceeding. While assailing the said order before the two-Judge Bench, the substratum of argument was that as the Company was not arrayed as an accused, the legal fiction created by the legislature in Section 141 of the Act would not get attracted. It was canvassed that once a legal fiction is created by the statutory provision against the Company as well as the person responsible for the acts of the Company, the conditions precedent engrafted under such deeming provisions are to be totally satisfied and one such condition is impleadment of the principal offender. S.B. Sinha, J. dissected the anatomy of Sections 138 and 141 of the Act and referred to the decisions in *Standard Chartered Bank and others v. Directorate of Enforcement and others*[1]; *Madhumilan Syntex Ltd. & others v. Union of India and another*[2]; *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another*[3]; *Sabitha Ramamurthy and Another v. R.B.S. Channabasavaradhya*[4]; *S.V. Mazumdar and others v. Gujarat State Fertilizer Co. Ltd. and Another*[5]; *Sarav Investment & Financial Consultancy Private Limited and another v. Lloyds Register of Shipping Indian Office Staff Provident Fund and another*[6]; K.

Srikanth Singh v. North East Securities Ltd. and Anr.[7]; Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors.[8]; N. Rangachari v. Bharat Sanchar Nigam Ltd.[9]; Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi and Ors.[10]; Saroj Kumar Poddar v. State (NCT of Delhi) and Anr.[11]; N.K. Wahi v. Shekhar Singh and Ors.[12]; and took note of the two-Judge Bench decision in Sheoratan Agarwal and Another v. State of Madhya Pradesh[13] wherein the decision of the three-Judge Bench in State of Madras v. C.V. Parekh and Another[14] was distinguished and expressed the view as follows: - 28. With the greatest of respect to the learned judges, it is difficult to agree therewith. The findings, if taken to its logical corollary lead us to an anomalous position. The trial court, in a given case although the company is not an accused, would have to arrive at a finding that it is guilty. Company, although a juristic person, is a separate entity.

Directors may come and go. The company remains. It has its own reputation and standing in the market which is required to be maintained. Nobody, without any authority of law, can sentence it or find it guilty of commission of offence. Before recording a finding that it is guilty of commission of a serious offence, it may be heard. The Director who was in charge of the company at one point of time may have no interest in the company. He may not even defend the company. He need not even continue to be its Director. He may have his own score to settle in view of change in management of the company. In a situation of that nature, the company would for all intent and purport would stand convicted, although, it was not an accused and, thus, had no opportunity to defend itself.

29. Any person accused of commission of an offence, whether natural or juristic, has some rights. If it is to be found guilty of commission of an offence on the basis whereof its Directors are held liable, the procedures laid down in the Code of Criminal Procedure must be followed. In determining such an issue all relevant aspects of the matter must be kept in mind. The ground realities cannot be lost sight of. Accused persons are being convicted for commission of an offence under Section 138 of the Act inter alia on drawing statutory presumptions.

Various provisions contained therein lean in favour of a drawer of the cheque or the holder thereof and against the accused. Sections 20, 118(c), 139 and 140 of the Act are some such provisions. The Act is a penal statute. Unlike offences under the general law it provides for reverse burden. The onus of proof shifts to the accused if some foundational facts are established.

It is, therefore, in interpreting a statute of this nature difficult to conceive that it would be legally permissible to hold a company, the prime offender, liable for commission of an offence although it does not get an opportunity to defend itself. It is against all principles of fairness and justice. It is opposed to the Rule of Law. No statute in view of our Constitutional Scheme can be construed in such a manner so as to refuse an opportunity of being heard to a person. It would not only offend a common- sense, it may be held to be unconstitutional. Such a construction, therefore, in my opinion should be avoided.

In any event in a case of this nature, the construction which may be available in invoking Essential Commodities Act, Prevention of Food Adulteration Act, which affects the Society at large may not have any application when only a private individual is involved.

6. Thereafter, the learned Judge referred to Anil Hada v. Indian Acrylic Ltd.[15] and R. Rajgopal v. S.S. Venkat[16], distinguished the decision in Anil Hada and opined that the issue decided in the said case is to be understood in the factual matrix obtaining therein as the Company could not have been prosecuted, it being under liquidation. The observations to the effect that the Company need not be prosecuted against was regarded as obiter dicta and not the ratio decidendi. Sinha J. clearly opined that the Bench was bound by the three-Judge Bench decision in S.M.S. Pharmaceuticals Ltd.s case (supra) and C.V. Parekhs case (supra). After stating so, he observed as under: - It is one thing to say that the complaint petition proceeded against the accused persons on the premise that the company had not committed the offence but the accused did, but it is another thing to say that although the company was the principal offender, it need not be made an accused at all.

I have no doubt whatsoever in our mind that prosecution of the company is a sine qua non for prosecution of the other persons who fall within the second and third categories of the candidates, viz., everyone who was in-charge and was responsible for the business of the company and any other person who was a director or managing director or secretary or officer of the company with whose connivance or due to whose neglect the company had committed the offence.

7. The learned Judge also took note of the maxim *lex non cogit ad impossibilia* and expressed thus: -

True interpretation, in my opinion, of the said provision would be that a company has to be made an accused but applying the principle "lex non cogit ad impossibilia", i.e., if for some legal snag, the company cannot be proceeded against without obtaining sanction of a court of law or other authority, the trial as against the other accused may be proceeded against if the ingredients of Section 138 as also 141 are otherwise fulfilled. In such an event, it would not be a case where the company had not been made an accused but would be one where the company cannot be proceeded against due to existence of a legal bar. A distinction must be borne in mind between cases where a company had not been made an accused and the one where despite making it an accused, it cannot be proceeded against because of a legal bar.

8. Being of the aforesaid view, he allowed the appeals.

9. V.S. Sirpurkar J., after narrating the facts and referring to Section 141(2) of the Act, which deals with additional criminal liability, opined that even if the liability against the appellant is vicarious herein on account of the offence having alleged to have been committed by M/s. International Travels, it would be presumed that the appellant had also committed the offence and non-arraying of M/s. International Travels as an accused would be of no consequence. His Lordship further held that there is nothing in Standard Chartered Bank and others (supra), S.M.S. Pharmaceuticals Limited (supra), Sabitha Ramamurthy and another (supra), S.V. Muzumdar and others (supra), Sarav Investment and Financial Consultants Pvt. Ltd. and another (supra) and K. Srikanth Singh (supra) to suggest that unless the Company itself is made an accused, there cannot be prosecution of the signatory of the cheque alone.

Thereafter, the learned Judge referred to the decision in Anil Hada and expressed that in the said case, the decision of C.V. Parekh (supra) and Sheoratan Agarwal (supra) had been referred to and, therefore, it is a binding precedent and cannot be viewed as an obiter dicta. Sirpurkar J. further proceeded to state that the principle of lex non cogit ad impossibilia would not apply. That apart, the learned Judge held that in the case at hand, it is yet to be decided as to whether the flaw was that of the Company or the appellant herself and it could not be made out as to whether the cheque issued by the accused was issued on behalf of the Company or to discharge her personal liability. Eventually, his Lordship referred to the allegations in the complaint which are to the effect that the two accused persons, namely, Anil Hada and Aneeta Hada, used to purchase the air tickets for their clients

and they had purchased for the Company from time to time and issued cheques. The accused No. 1 used to conduct the business of the Company and she also used to purchase the tickets from the complainant. On the aforesaid foundation the learned Judge opined that the basic complaint is against the two accused persons in their individual capacity and they might be purchasing tickets for their travelling company. Being of this view, he dismissed both the appeals.

10. We have heard Mr. Muneesh Malhotra, learned counsel for the appellant in Criminal Appeal Nos. 838 and 842 of 2008, Dr. Abhishek Manu Singhvi, learned senior counsel for the appellant in Criminal Appeal No. 1483 of 2009 and for the respondent in Criminal Appeal No. 1484 of 2009, Mr. Sidharth Luthra, learned senior counsel for the appellant in Criminal Appeal No. 1484 of 2009, Mr. Rajesh Harnal, learned counsel for the respondents in Criminal Appeal Nos. 838 of 2008 and 842 of 2008, Mr. P.P.Malhotra, learned Additional Solicitor General for the respondent in Criminal Appeal No. 1483 of 2009 and Mr. Arun Mohan, learned Amicus Curiae.

11. The learned senior counsel appearing for the appellants, in support of the proponent that the impleadment of the company is a categorical imperative to maintain a prosecution against the directors, various signatories and other categories of officers, have canvassed as follows: -

(a) The language of Section 141 of the Act being absolutely plain and clear, a finding has to be returned that the company has committed the offence and such a finding cannot be recorded unless the company is before the court, more so, when it enjoys the status of a separate legal entity. That apart, the liability of the individual as per the provision is vicarious and such culpability arises, ipso facto and ipso jure, from the fact that the individual occupies a decision making position in the corporate entity. It is patent that unless the company, the principal entity, is prosecuted as an accused, the subsidiary entity, the individual, cannot be held liable, for the language used in the provision makes the company the principal offender.

(b) The essence of vicarious liability is inextricably intertwined with the liability of the principal offender. If both are treated separately, it would amount to causing violence to the language employed in the provision.

(c) It is a fundamental principle of criminal law that a penal provision must receive strict construction. The deeming fiction has to be applied in its

complete sense to have the full effect as the use of the language in the provision really ostracizes or gets away with the concepts like identification, attribution and lifting the corporate veil and, in fact, puts the directors and the officers responsible in a deemed concept compartment on certain guided parameters.

(d) The company, as per Section 141 of the Act, is the principal offender and when it is in existence, its non-impleadment will create an incurable dent in the prosecution and further, if any punishment is inflicted or an unfavourable finding is recorded, it would affect the reputation of the company which is not countenanced in law.

(e) The decision in Sheoratan Agarwal and Another (supra) has incorrectly distinguished the decision in C.V. Parekh (supra) and has also misconstrued the ratio laid down therein. That apart, in the said decision, a part of the provision contained in Section 10(1) of the Essential Commodities Act, 1955 (for brevity the 1955 Act) has been altogether omitted as a consequence of which a patent mistake has occurred.

(f) The decision in Anil Hada (supra) has not appreciated in proper perspective the ratio decidendi in C.V. Parekh and further there is an inherent contradiction in the judgment inasmuch as at one point, it has been stated that the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company but at another place, it has been ruled that the accused can show that the company has not committed the offence, though such company is not made an accused.

(g) The terms used as well as the company in Section 141(1) of the Act cannot mean that no offence need be committed by the company to attract the vicarious liability of the officers in-charge of the management of the company because the first condition precedent is commission of the offence by a person which is the company.

12. The learned counsel for the respondents, resisting the submissions propounded by the learned counsel for the appellants, have urged the following contentions: -

(i) If the interpretation placed by the appellant is accepted, the scheme, aims, objects and the purpose of the legislature would be defeated inasmuch as Chapter XVII of the Act as introduced by the Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988) is to promote efficacy of banking to

ensure that in commercial or contractual transactions, cheques are not dishonoured and the credibility in transacting business through cheques is maintained. The Chapter has been inserted with the object of promoting and inculcating faith in the efficacy of the banking system and its operations and giving credibility to negotiable instruments in business transactions. The fundamental purpose is to discourage people from not honouring their commitments and punish unscrupulous persons who purport to discharge their liability by issuing cheques without really intending to do so. If the legislative intendment is appositely understood and appreciated, the interpretation of the various provisions of the Act is to be made in favour of the paying-complainant. To bolster the aforesaid submission, reliance has been placed on *Electronics Trade and Technology Development Corporation Ltd., Secunderabad v. Indian Technologists and Engineers (Electronics) (P) Ltd. and another*[17], *C.C. Alavi Haji v. Palapetty Mohammed and Another*[18] and *Vinay Devanna Nayak v. Ryot Sewa Sahakaro Bank Ltd.*[19]

(ii) The reliance placed by the appellants on the decision in *C.V. Parekh (supra)* is absolutely misconceived. In the first case, the Court was considering the question of acquittal or conviction of the accused persons after considering the entire evidence led by the parties before the trial court but in the present case, the challenge has been at the threshold where summons have been issued. That apart, the 1955 Act and the Act in question operate in different fields having different legislative intents, objects and purposes and further deal with offences of various nature. In the case at hand, the new dimensions of economic growth development and revolutionary changes and the frequent commercial transactions by use of cheques are to be taken note of. Further, Section 141 creates liability for punishment of offences under Section 138 and it is a deemed liability whereas the criminal liability created for an offence under Section 7 of the 1955 Act is not a deemed offence.

(iii) After the amendment of the Act, the unscrupulous drawers had endeavoured hard to seek many an escape route to avoid the criminal liability but this Court with appropriate interpretative process has discouraged the innovative pleas of such accused persons who had issued cheques as the purpose is to eradicate mischief in the commercial world. To buttress the aforesaid submission, heavy reliance has been placed on *D. Vinod Shivappa v. Nanda Belliappa*[20], *M/s. Modi Cement Ltd. v. Shri Kuchil Kumar Nandi*[21], *Goaplast Pvt. Shri Ltd. v. Chico Ursula Dsouza*

and Anr.[22], NEPC Micon Ltd and Ors. v. Magma Leasing Ltd.[23], Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders and Agencies Ltd and Ors.[24], I.C.D.C. Ltd. v. Beena Shabeer and Anr.[25] and S.V. Majumdar and others v. Gujarat Fertilizers Co. Ltd and Anr.[26]

(iv) The company being a legal entity acts through its directors or other authorized officers and it authorizes its directors or other officers to sign and issue cheques and intimate the bank to honour the cheques if signed by such persons. The legislature in its wisdom has used the word drawer in Sections 7 and 138 of the Act but not an account holder. A notice issued to the Managing Director of the company who has signed the cheques is liable for the offence and a signatory of a cheque is clearly responsible for the incriminating act and, therefore, a complaint under Section 138 of the Act against the director or authorized signatory of the cheque is maintainable. In this regard, reliance has been placed upon M/s Bilakchand Gyanchand Co. v. A. Chinnaswami[27], Rajneesh Aggarwal v. Amit J. Bhalla[28], SMS Pharmaceuticals Ltd. v. Neeta Bhalla (supra), Anil Hada v. Indian Acrylic Ltd. (supra) and R. Rajgopal v. S.S. Venkat[29].

(v) There is no postulate under Section 141 of the Act that the director or the signatory of the cheque cannot be separately prosecuted unless the company is arrayed as an accused. The company, as is well-known, acts through its directors or authorised officers and they cannot seek an escape route by seeking quashment of the proceedings under Section 482 of the Code of Criminal Procedure solely on the foundation that the company has not been impleaded as an accused. The words as well as the company assumes significance inasmuch as the deemed liability includes both the company and the officers in-charge and hence prosecution can exclusively be maintained against the directors or officers in-charge depending on the averments made in the complaint petition.

13. 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. Section 138 of the Act, which deals with the ingredients of the offence for dishonour of the cheque and the consequent non-payment of the amount due thereon, reads as follows: -

138. Dishonour of cheque for insufficiency, etc., of funds in the account
Where any cheque drawn by a person on account maintained by him with a

banker for the 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 arrangement made with the bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with a 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 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.

14. The main part of the provision can be segregated into three compartments, namely, (i) the cheque is drawn by a person, (ii) the cheque drawn on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of a debt or other liability, is returned unpaid, either because the amount of money standing to the credit of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an arrangement made with the bank and (iii) such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of the Act, be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both.

The proviso to the said section postulates under what circumstances the section shall not apply. In the case at hand, we are not concerned with the said aspect. It will not be out of place to state that the main part of the provision deals with the basic ingredients and the proviso deals with certain circumstances and lays certain conditions where it will not be applicable.

The emphasis has been laid on the factum that the cheque has to be drawn by a person on the account maintained by him and he must have issued the cheque in discharge of any debt or other liability. Section 7 of the Act defines drawerto mean the maker of a bill of exchange or a cheque. An authorised signatory of a company becomes a drawer as he has been authorised to do so in respect of the account maintained by the company.

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

141. Offences by companies.

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

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

Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

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

16. On a reading of the said provision, it is plain as day that if a person who commits offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened.

Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a deemed concept of criminal liability.

17. Section 139 of the Act creates a presumption in favour of the holder.

The said provision has to be read in conjunction with Section 118(a) which occurs in Chapter XIII of the Act that deals with special rules of evidence. Section 140 stipulates the defence which may not be allowed in a prosecution under Section 138 of the Act. Thus, there is a deemed fiction in relation to criminal liability, presumption in favour of the holder, and denial of a defence in respect of certain aspects.

18. Section 141 uses the term person and refers it to a company. There is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attracted to a corporation and company and it is so luminescent from the language employed under Section 141 of the Act. It is apposite to note that the present enactment is one where the company itself and certain categories of officers in certain circumstances are deemed to be guilty of the offence.

19. In Halsburys Laws of England, Volume 11(1), in paragraph 35, it has been laid down that in general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted of common law and statutory offences including those requiring mens rea.

20. In 19 Corpus Juris Secundum, in paragraph 1358, while dealing with liability in respect of criminal prosecution, it has been stated that a corporation shall be liable for criminal prosecution for crimes punishable with fine; in certain jurisdictions, a corporation cannot be convicted except as specifically provided by statute.

21. In *H.L. Bolton (Engineering) Co. Ltd. vs. T.J. Graham & Sons Ltd.*[30] Lord Denning, while dealing with the liability of a company, in his inimitable style, has expressed that a company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. In certain cases, where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. The learned Law Lord referred to Lord Haldanes speech in *Lennards Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[31]. Elaborating further, he has observed that in criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty.

22. It may be appropriate at this stage to notice the observations made by MacNaghten, J. in *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.*[32] : (AC p. 156.) A body corporate is a person to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention indeed it is much too late in the day to suggest the contrary.

It can only know or form an intention through its human agents, but circumstance may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive. I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate.

23. In this regard, it is profitable to refer to the decision in *Iridium India Telecom Ltd. v. Motorola Inc and Ors.*[33] wherein it has been held that in all jurisdictions across the world governed by the rule of law, companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are not capable of possessing the necessary mens rea for commission of criminal

offences. It has been observed that the legal position in England and United States has now been crystallized to leave no manner of doubt that the corporation would be liable for crimes of intent. In the said decision, the two-Judge Bench has observed thus:- The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the alter ego of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation.

24. In *Standard Chartered Bank (supra)*, the majority has laid down the view that there is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the fact that the corporation cannot commit a crime, the generally accepted modern rule is that a corporation may be subject to indictment and other criminal process although the criminal act may be committed through its agent. It has also been observed that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment is mandatory imprisonment and fine.

25. We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this backdrop, Section 141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain.

26. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification.

27. In this context, we may refer with profit to the observations made by Lord Justice James in *Ex Parte Walton, In re, Levy*[34], which is as follows:

When a statute enacts that something shall be deemed to have been done, which, in fact and truth was not done, the Court is entitled and bound to

ascertain for what purposes and between what persons the statutory fiction is to be resorted to.

28. Lord Asquith, in *East end Dwellings Co. Ltd. v. Finsbury Borough Council*[35], had expressed his opinion as follows:

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents, which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

29. In *The Bengal Immunity Co. Ltd. v. State of Bihar and others*[36], the majority in the Constitution Bench have opined that legal fictions are created only for some definite purpose.

30. In *Hira H. Advani Etc. v. State of Maharashtra*[37], while dealing with a proceeding under the Customs Act, especially sub-section (4) of Section 171-A wherein an enquiry by the custom authority is referred to, and the language employed therein, namely, "to be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code", it has been opined as follows:

It was argued that the Legislature might well have used the word "deemed" in Sub-section (4) of Section 171 not in the first of the above senses but in the second, if not the third. In our view the meaning to be attached to the word "deemed" must depend upon the context in which it is used.

31. In *State of Tamil Nadu v. Arooran Sugars Ltd.*[38], the Constitution Bench, while dealing with the deeming provision in a statute, ruled that the role of a provision in a statute creating legal fiction is well settled. Reference was made to *The Chief Inspector of Mines and another v. Lala Karam Chand Thapar Etc.*[39], *J.K. Cotton Spinning and Weaving Mills Ltd. and anr. v. Union of India and others*[40], *M. Venugopal v. Divisional Manager, Life Insurance Corporation of India*[41] and *Harish Tandon v. Addl. District Magistrate, Allahabad*[42] and eventually, it was held that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between

which persons such a statutory fiction is to be resorted to and thereafter, the courts have to give full effect to such a statutory fiction and it has to be carried to its logical conclusion.

32. From the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term 'deemed' has to be read in its context and further the fullest logical purpose and import are to be understood. It is because in modern legislation, the term 'deemed' has been used for manifold purposes. The object of the legislature has to be kept in mind.

33. The word deemed used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in SMS Pharmaceuticals Ltd. (supra). In the said case, it has been opined that the criminal liability on account of dishonour of cheque primarily falls on the drawee company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied. It has been ruled as follow:- It primarily falls on the drawer company and is extended to officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonor of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. After so stating, it has been further held that while analyzing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. In paragraph 19 of the judgment, it has been clearly held as follows: -

There is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability.

34. Presently, we shall deal with the ratio laid down in the case of C.V. Parekh (supra). In the said case, a three-Judge Bench was interpreting Section 10 of the 1955 Act. The respondents, C.V. Parekh and another, were active participants in the management of the company. The trial court had convicted them on the ground the goods were disposed of at a price higher than the control price by Vallabhadas Thacker with the aid of Kamdar and the same could not have taken place without the knowledge of the partners of the firm. The High Court set aside the order of conviction on the ground that there was no material on the basis of which a finding could be recorded that the respondents knew about the disposal by Kamdar and Vallabhadas Thacker. A contention was raised before this Court on behalf of the State of Madras that the conviction could be made on the basis of Section 10 of the 1955 Act. The three-Judge Bench repelled the contention by stating thus: - 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 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 Vallabhadas Thacker and any contravention by them would not fasten responsibility on the respondents. (emphasis supplied) The aforesaid paragraph clearly lays down that the first condition is that the company should be held to be liable; a charge has to be framed; a finding has to be recorded, and the liability of the persons in charge of the company only arises when the contravention is by the company itself.

The said decision has been distinguished in the case of Sheoratan Agarwal and another (supra). The two-Judge Bench in the said case referred to Section 10 of the 1955 Act and opined that the company alone may be prosecuted or the person in charge only may be prosecuted since there is no statutory compulsion that the person in charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. The two-Judge Bench further laid down that Section 10 of the 1955 Act indicates the persons who may be prosecuted where the contravention is made by the company but it does not lay down any condition that the person in-charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. The two-Judge Bench referred to the paragraph from C.V. Parekh (supra), which we have reproduced hereinabove, and emphasised on certain sentences therein and came to hold as follows: - The sentences underscored by us clearly show that what was sought to be emphasised was that there should be a finding that the contravention was by the company before the accused could be convicted and not that the company itself should have been prosecuted along with the accused. We are therefore clearly of the view that the prosecutions are maintainable and that there is nothing in Section 10 of the Essential Commodities Act which bars such prosecutions. For the sake of completeness, we think it apposite to refer to the sentences which have been underscored by the two-Judge Bench:- 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 and 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.

35. With greatest respect to the learned Judges in Sheoratan Agarwal (*supra*), the authoritative pronouncement in C.V. Parekh (*supra*) has not been appositely appreciated. The decision has been distinguished despite the clear dictum that the first condition for the applicability of Section 10 of the 1955 Act is that there has to be a contravention by the company itself. In our humblest view, the said analysis of the verdict is not correct. Quite apart, the decision in C.V. Parekh (*supra*) was under Section 10(a) of the 1955 Act and rendered by a three-Judge Bench and if such a view was going to be expressed, it would have been appropriate to refer the matter to a larger Bench. However, the two-Judge Bench chose it appropriate to distinguish the same on the rationale which we have reproduced hereinabove. We repeat with the deepest respect that we are unable to agree with the aforesaid view.

36. In the case of Anil Hada (*supra*), the two-Judge Bench posed the question: when a company, which committed the offence under Section 138 of the Act eludes from being prosecuted thereof, can the directors of that company be prosecuted for that offence. The Bench referred to Section 141 of the Act and expressed the view as follows: - 12. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase "as well as" used in Sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words "shall also" in Sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons can also become liable for the offence.

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. On a reading of both the paragraphs, it is evincible that the two- Judge Bench expressed the view that the actual offence should have been committed by the company and then alone the other two categories of persons can also become liable for the offence and, thereafter, proceeded to state that if the company is not prosecuted due to legal snag or otherwise, the prosecuted person cannot, on that score alone, escape from the penal liability created through the legal fiction and this is envisaged in Section 141 of the Act. If both the paragraphs are appreciated in a studied manner, it can safely be stated that the conclusions have been arrived at regard being had to the obtaining factual matrix therein.

However, it is noticeable that the Bench thereafter referred to the dictum in Sheoratan Agarwal (supra) and eventually held as follows: - We, therefore, hold that even if the prosecution proceedings against the Company were not taken or could not be continued, it is no bar for proceeding against the other persons falling within the purview of sub-sections (1) and (2) of Section 141 of the Act.

37. We have already opined that the decision in Sheoratan Agarwal (supra) runs counter to the ratio laid down in the case of C.V. Parekh (supra) which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in Anil Hada (supra) 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 emphasize, 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.

38. At this juncture, we may usefully refer to the decision in U.P. Pollution Control Board v. M/s. Modi Distillery and others[43]. In the said case, the company was not arraigned as an accused and, on that score, the High Court quashed the proceeding against the others. A two-Judge Bench of this Court observed as follows: - Although as a pure proposition of law in the abstract the learned single Judges view that there can be no vicarious liability of the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors under sub-

s.(1) or (2) of S.47 of the Act unless there was a prosecution against Messers Modi Industries Limited, the Company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum. We have already pointed out that the technical flaw in the complaint is attributable to the failure of the industrial unit to furnish the requisite information called for by the Board.

Furthermore, the legal infirmity is of such a nature which could be easily cured. Another circumstance which brings out the narrow perspective of the learned single Judge is his failure to appreciate the fact that the averment in paragraph 2 has to be construed in the light of the averments contained in paragraphs 17, 18 and 19 which are to the effect that the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors were also liable for the alleged offence committed by the Company. Be it noted, the two-Judge Bench has correctly stated that there can be no vicarious liability unless there is a prosecution against the company owning the industrial unit but, regard being had to the factual matrix, namely, the technical fault on the part of the company to furnish the requisite information called for by the Board, directed for making a formal amendment by the applicant and substitute the name of the owning industrial unit. It is worth noting that in the said case, M/s. Modi distilleries was arrayed as a party instead of M/s Modi Industries Limited. Thus, it was a defective complaint which was curable but, a pregnant one, the law laid down as regards the primary liability of the company without which no vicarious liability can be imposed has been appositely stated.

39. 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.

40. In this context, we may usefully refer to Section 263 of Francis Bennions Statutory Interpretation where it is stated as follows: - A principle of statutory interpretation embodies the policy of the law, which is in turn based on public policy. The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory

interpretation can therefore be described as a principle of legal policy formulated as a guide to legislative intention.

41. It will be seemly to quote a passage from Maxwells The Interpretation of Statutes (12th Edition) : - The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction.

42. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term as well as in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words as well as have to be understood in the context. In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others*[44] it has been laid down that the entire statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. The same principle has been reiterated in *Deewan Singh and others v. Rajendra Prasad Ardevi and others*[45] and *Sarabjit Rick Singh v. Union of India*[46]. 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.

43. 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 dragnet 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 (supra) which is a three-Judge Bench decision.

Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.

44. We will be failing in our duty if we do not state that all the decisions cited by the learned counsel for the respondents relate to service of notice, instructions for stopping of payment and certain other areas covered under Section 138 of the Act. The same really do not render any aid or assistance to the case of the respondents and, therefore, we refrain ourselves from dealing with the said authorities.

45. Resultantly, the Criminal Appeal Nos. 838 of 2008 and 842 of 2008 are allowed and the proceedings initiated under Section 138 of the Act are quashed.

46. Presently, we shall advert to the other two appeals, i.e., Criminal Appeal Nos. 1483 of 2009 and 1484 of 2009 wherein the offence is under Section 67 read with Section 85 of the 2000 Act. In Criminal Appeal No. 1483 of 2009, the director of the company is the appellant and in Criminal Appeal No. 1484 of 2009, the company. Both of them have called in question the legal substantiality of the same order passed by the High Court. In the said case, the High Court followed the decision in Sheoratan Agarwal (supra) and, while dealing with the application under Section 482 of the Code of Criminal Procedure at the instance of Avnish Bajaj, the Managing Director of the company, quashed the charges under Sections 292 and 294 of the Indian Penal Code and directed the offences under Section 67 read with Section 85 of the 2000 Act to continue. It is apt to note that the learned single Judge has observed that a prima facie case for the offence under Sections 292(2)(a) and 292(2)(b) of the Indian Penal Code is also made out against the company.

47. Section 85 of the 2000 Act is as under: - 85. Offences by companies –

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder 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 business of the company as well as the company, shall be guilty of the contravention 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 punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

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

48. Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, the Criminal Appeal No. 1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the director. As a logical sequeter, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the company in the present form are quashed.

49. Before we part with the case, we must record our uninhibited and unreserved appreciation for the able assistance rendered by the learned counsel for the parties and the learned amicus curiae.

50. In the ultimate analysis, all the appeals are allowed.