

IN THE COURT OF HON'BLE CHIEF JUDICIAL
MAGISTRATE, WARDHA.

S.C.C. NO. 3384 OF 2002

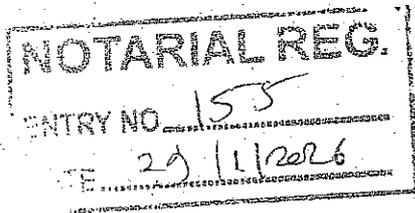
COMPLAINANT:

Wardha District Central Cooperative Bank
Limited, Wardha, through its General
Manager, r/o Wardha Taluq and District
Wardha.

//VERSUS//

ACCUSED:

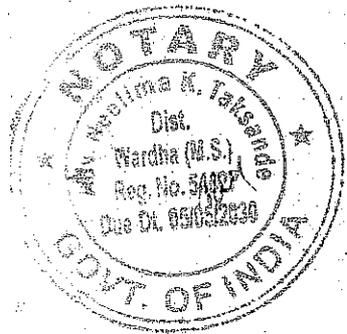
Sanjay Hariram Agarwal,
Aged about 60 years, Occupation:- Business
R/o 7 Hari Sava Street
Kidderpore, Kolkata – 700023.



APPLICATION THAT THE COMPLAINT IS NOT
MAINTAINABLE

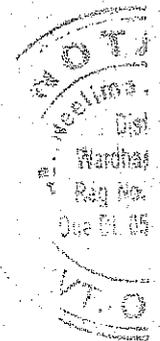
The applicant/Accused most humbly and respectfully
submits as under:-

1. The present application arises in a background where the trial from its very inception, has suffered from legal infirmities so fundamental that continuing the trial would amount to perpetuating a miscarriage of justice.
2. That the subject complaint has been instituted by the complainant alleging commission of an offence under Section 138 of the Negotiable Instruments Act, 1881. As per the complainant's own case set out in the complaint filed on 29.05.2002, the cheques in question were issued in connection with the affairs of a company,



namely Home Trade Limited, and the applicant has been arraigned only on the basis of having signed the cheques in a representative capacity.

3. That despite the complainant's own assertion that the transaction and issuance of cheques pertained to the said company, the complainant, while filing the complaint within the period of limitation prescribed under Section 142 of the Negotiable Instruments Act, did not arraign the company as an accused. Further, as per the complainant's own pleadings and documents, the statutory notice contemplated under the proviso to Section 138 was also not issued to the company within the prescribed time.
4. That the complaint, as originally instituted, was thus filed only against individuals, without arraigning the company which, according to the complainant itself, was the drawer of the cheque and the principal entity in respect of whom the alleged liability is stated to arise.
5. That several years after the filing of the complaint and long after expiry of the statutory period prescribed under the Negotiable Instruments Act, the complainant, in the backdrop of the evolving judicial position consistently holding that a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act is not maintainable in the absence of the company being arraigned as an accused, moved an application seeking addition of the company as an accused and discharge of certain directors. The said application was filed prior to issuance and service of summons upon the present applicant, and at a stage when the complainant was fully conscious of the legal infirmity in the complaint as originally instituted. The application was thus moved with a view to overcome the fatal defect in the complaint by way

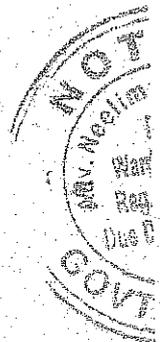


of an impermissible amendment, and the same came to be allowed by order dated 28.03.2012.

6. That the gravamen of the present application is that such subsequent addition of the company is impermissible in law, as the complaint was not maintainable on the date of its institution itself, and the defect sought to be cured by the complainant goes to the very root of jurisdiction.
7. That when summons were thereafter issued to the present applicant and he was called upon to appear before this Hon'ble Court, the applicant was supplied only with a copy of the original complaint as filed by the complainant. The applicant was not furnished with a copy of the application seeking addition of the company, nor with the order dated 28.03.2012 passed thereon, and was not made aware of the fact that any amendment or impleadment had been sought or allowed. Consequently, the applicant entered appearance on the basis of the complaint as originally instituted, without any knowledge of the subsequent proceedings or orders purporting to alter the very foundation of the prosecution.
8. That it is only much later, upon the complainant itself applying for certified copies of the entire record and roznama of the case, that the present applicant, on inspection of the judicial file, became aware for the first time that an application seeking addition of the company as an accused had been moved and allowed by this Hon'ble Court by order dated 28.03.2012. The applicant had no prior knowledge of either the filing of such application or the passing of the said order, and no material was ever furnished to him to indicate that the array of parties had been altered subsequent to the filing of the complaint.



9. That the applicant submits that the aforesaid factual sequence is of critical legal significance, inasmuch as the maintainability of a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act has to be examined strictly with reference to the complaint as instituted within the statutory period prescribed under Section 142 of the Act. Any subsequent attempt to add the company as an accused, after expiry of the statutory timelines and in the absence of a statutory notice having been issued to the company, cannot validate or cure a complaint which was not maintainable in law on the date of its institution.
10. That the law on this issue is no longer *res integra*. The Hon'ble Supreme Court in *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661, while interpreting Sections 138 and 141 of the Negotiable Instruments Act, has held that commission of offence by the company is an express condition precedent for fastening vicarious liability upon directors or officers, and that arraigning of the company as an accused is mandatory. The Hon'ble Supreme Court has held as under:
- "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. (...)
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."
11. That it is pertinent to note that the judgment of the Hon'ble Supreme Court in *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, reported in (2012) 5 SCC 661, itself records that the matter arose out of a difference of opinion between two Hon'ble



Judges of the Supreme Court in an earlier decision rendered in the year 2008, necessitating a reference to a larger Bench. The reference was made precisely on the question whether, in a prosecution under Sections 138 and 141 of the Negotiable Instruments Act, persons in charge of and responsible for the conduct of the business of a company could be prosecuted in the absence of the company being arraigned as an accused. The said reference was authoritatively answered by the three-Judge Bench in *Aneeta Hada* by holding that arraigning of the company is mandatory and that prosecution without the company is not maintainable. It is submitted that the application seeking addition of the company in the present case was filed subsequent to the split opinion by the two judge bench, and was clearly aimed at curing a defect identified by the complainant which strikes at the core of the complaint and which, as later conclusively declared, is fatal and incurable in law.

12. That the legal consequence flowing from *Aneeta Hada (Supra)* is that where, according to the complainant's own case, the cheque is drawn on the account of a company, a complaint filed without arraigning the company within the period of limitation prescribed under Section 142 is not a valid complaint in the eyes of law.
13. That the aforesaid legal position was further considered and clarified by the Hon'ble Supreme Court in *Himanshu v. B. Shivamurthy, reported in (2019) 3 SCC 797*. In the said case, the complaint under Section 138 of the Negotiable Instruments Act had been filed only against a director, without arraigning the company as an accused. The High Court, in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure, had declined to interfere on the premise that it would be open to



the complainant to take steps to proceed against the company and other persons responsible for its affairs. The Hon'ble Supreme Court, however, set aside the said view and held that in the absence of the company being arraigned as an accused and in the absence of statutory notice to the company, the complaint itself was not maintainable. The Hon'ble Supreme Court held:

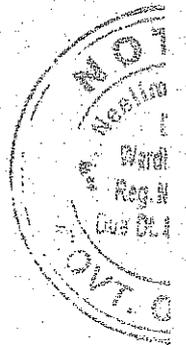
"11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

(...)

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."

14. That the Hon'ble Supreme Court has thus held that non-impleadment of the company at the inception renders the complaint not maintainable and that such a foundational defect cannot be cured by subsequently arraigning the company.

15. That the Hon'ble Bombay High Court in *Harikisan Vithaldasji Chandak v. Syed Mazaruddin*, 2023 SCC OnLine Bom 955, after an exhaustive consideration of the aforesaid judgments, has held that non-impleadment of the company and absence of statutory notice to the company strike at the very substratum of the



complaint and that permitting amendment or subsequent impleadment would amount to altering the very foundation of the prosecution. The court held that:

"19. The legal position is, therefore, well settled that the curable infirmity or defect can be removed by amending the complaint. The amendment cannot be allowed to change the basic core, crux and tenor of the complaint. The amendment, which results in prejudice to the other side, cannot be allowed. In other words, the amendment sought for to the complaint, if does not cause prejudice to the other side, the same can be allowed. When the amendment application pertains to addition of company or firm as a principal offender, after taking cognizance of the offence mentioned in the complaint by the Magistrate, by applying the principle of law that the Criminal Court takes the cognizance of the offence and not of the offender, cannot be made applicable and company or firm cannot be added. If the cheque is drawn on the account of company or firm, then the principal offender is the company or firm and therefore, in the absence of the company or firm being arraigned as accused in the complaint, the prosecution against the Directors or Partners cannot be maintained. It, therefore, goes without saying that if the company or firm is not a party to the complaint and the application is made to add the company or firm as a party to remove such defect, the same cannot be entertained.

16. It needs to be stated that the Court can be called upon to address the question of grant of amendment in a different factual situation. In the fact situation where the company or firm is not a party and the prayer is not made to add the company or firm as a party, but the amendment may be sought to rectify other curable legal



infirmity or defect. In this factual situation, the Court has to deal with and consider the application in the backdrop of the abovestated legal position. In such a case, the facts and circumstances in totality need to be considered to arrive at a conclusion as to the nature of amendment and the likely prejudice to the other side. In a case where company or firm is not a party, as a principal accused and application is made to add the company or firm as a party, such amendment cannot be allowed in view of above legal position.

(...)

In view of the law laid down in the decisions considered above, I am of the view that the learned Magistrate was not right in granting the amendment. The learned Magistrate has failed to take into consideration this primary legal issue. The amendment application made by the complainants could not have been decided without addressing this issue. It has been held consistently that if a cheque is issued on behalf of the company or the partnership firm, then the company or the partnership firm in case of dishonour of cheque is the principal accused. It is held that in the absence of the company or the firm as an accused, the complaint against the directors or partners is not maintainable. It is held that considering the mandatory provisions of Section 138 of the N.I. Act and its scheme, the defect of this kind cannot be rectified subsequently by amending the complaint by adding the company or firm as an accused. All the earlier decisions have been considered by the Hon'ble Apex Court in the case of Pawan Kumar Goel (supra)."

19. That the aforesaid legal position has also been reiterated and applied by the Hon'ble Bombay High Court in *Satheesan*



Kuttappan v. P.P. Sudhakaran, reported in 2023 SCC OnLine Bom 2216. In the said case, the case under Section 138 of the Negotiable Instruments Act had been initiated only against the partner of a firm, without arraigning the firm itself as an accused and without issuance of statutory notice to the firm. The Hon'ble High Court, after consideration of the binding judgment of the Hon'ble Supreme Court in *Himanshu*, held that arraigning of the company or firm, as the case may be, is mandatory and that non-impleadment thereof renders the complaint not maintainable. The Hon'ble High Court held that:

"14. Learned counsel for the non applicant no. 1 then submits that the matter may be remanded back to the trial Court for consideration afresh by giving the non applicant no. 1 permission to make the firm as party accused.

15. This submission has been rightly countered by the applicant by relying upon the judgment of the Hon'ble Apex Court in the case of Himanshu v. B. Shivamurthy; reported in (2019) 3 SCC 797. The Apex Court, while considering the compliance of Section 141 of the Act of 1881, has held that the company, which was not arraigned as accused in the complaint cannot be subsequently allowed to be added, for the reason that there was no demand notice against the company and thus the preconditions under Section 138 of the Act of 1881 were not complied with as against the company. In the present case as well, the non applicant no. 1 has not sent demand notice against the firm and thus, preconditions under Section 138 of Act of 1881 have not been complied with. In the circumstances, the request made by the counsel for the non applicant no. 1, cannot be accepted."



20. That in the present case, the attempt of the complainant to add the company at a later stage cannot revive or validate a complaint which was not maintainable on the date of its institution. The statutory timelines under Sections 138 and 142 having not been complied with qua the company, no cause of action ever arose against it in accordance with law.

21. That the subsequent order dated 28.03.2012 allowing addition of the company cannot confer jurisdiction where none existed, nor can it cure a defect which, as held by the Hon'ble Supreme Court, is fatal and incurable.

22. That the order dated 28.03.2012 reads as follows:

"Heard counsel for complainant who submitted there is expert opinion that signature of Sanjay Agarwal on cheque. Therefore, he wants to proceed with this complaint against accused no. 1 being director of company i.e Home Trade Company Ltd and he wants to add this title to main complaint. If present application is allowed no prejudice will be caused to any party as Sanjay Agarwal already joined at the time of filing complaint. Counsel for complainant accepts to discharge accused no. 2 to 11 from this complaint and want to join A company registered under the company law i.e. Home Trade Ltd as accused no. 2.

Hence application is allowed. Permission is granted to add accused no. 2 in the title and accused no. 2 to 11 are hereby discharged from array of accused in title of complaint. Complainant to carry out amendment to that effect."

23. That a perusal of the above order would show that this Hon'ble Court recorded that no prejudice would be caused to any party by allowing the application for addition of the company as an accused, even though the said application was decided without



issuance of notice to, or hearing of, the present applicant. Such a recording, made in the absence of the affected accused and without affording him an opportunity to object to the very maintainability of the complaint, is ex facie unsustainable in law. The applicant submits that the complaint, as originally instituted, did not satisfy the mandatory statutory requirements under Sections 138, 141 and 142 of the Negotiable Instruments Act and was not maintainable on the date of its filing. The subsequent amendment was thus not a formal or procedural correction, but an attempt to cure a foundational and incurable defect, namely the non-impleadment of the company and non-compliance with statutory timelines. Far from causing no prejudice, the amendment altered the very basis of the prosecution and exposed the applicant to a proceeding which could not have been lawfully continued otherwise. Permitting such a course, that too without the knowledge or participation of the accused, is not sanctioned by law and strikes at the core of the guarantee of a fair trial, rendering the continuance of the proceedings legally untenable.

24. That the applicant became aware of the aforesaid illegality only when, upon the matter having proceeded to the stage of cross-examination, the applicant applied for and obtained certified copies of the entire record and roznama of the case. It is upon such inspection of the judicial file that the applicant discovered the manner in which the complaint had been sought to be altered by subsequent addition of the company and the order dated 28.03.2012 passed thereon. The present application is being filed with due promptitude immediately upon such discovery.

25. That in the aforesaid circumstances, when the complaint itself is not maintainable in law and suffers from incurable statutory

defects at its inception, compelling the applicant to undergo further stages of trial, including cross-examination, would be a wholly futile exercise. Continuation of the present proceedings would amount to an abuse of the process of this Hon'ble Court and would result in grave miscarriage of justice.

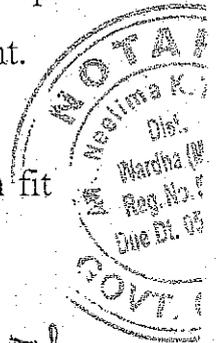
PRAYER :- In view of the aforesaid facts and circumstances and the settled position of law, it is most respectfully prayed that this Hon'ble Court may be pleased to

- a) Hold that the present complaint under Sections 138 of the Negotiable Instruments Act, 1881, as instituted, is not maintainable in law and suffers from incurable defects; and consequently be pleased to ACQUIT the applicant and drop all further proceedings against him in the present complaint.
- b) Pass such further orders as this Hon'ble Court may deem fit in the interest of justice and equity.



COUNSEL FOR ACCUSED

S. Ananta
ACCUSED



SOLEMEN AFFIRMATION

I SANJAY HARIRAM AGRAWAL, Age 60 years, Occ: Business, Residing at 7 Hari Sava Street, Kidderpore, Kolkata, 700023 above named petitioner do hereby state on solemn affirmation that the contents of above Paras Nos. 1 to 9 are true and correct to my personal knowledge and belief and have been drafted by my counsel on my

instruction and have been explained to me in vernacular and have been found to be true and correct. Hence verified and signed on this 29/01/2026 at Wardha

S. M. Ransal
DEPONENT

I know and identify the deponent

[Signature]

PATHAN TAMIJKHAN AJMALKHAN
(ADVOCATE)



N.S.F. No. 155

Substantively Affirmed Before Me:

Shri/Smt. Sanyal Hanuman Agadwal
Who is identified by Plot 7 Harsi sard street, Kidaer
Shri/Smt. Adv. P. T. Tambookhan Kolkar, 700028
Advocate Whom I

Personally Knows

Dt. 29/1/2028

[Signature]
Adv. Neelima K. T. Jadhav
Advocate & Notary
District Wardha (M.S.)
Govt. of India Reg. No.-54327
Dt. 29/6/2028 Pages _____

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