



IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS,
COURT NO. 2, WARDHA

(Presiding Officer : Hemant P. Pancholi)

Complainant :- Wardha District Central Cooperative Bank,
Limited, Wardha, Through its General
Manager, r/o Wardha, Tah. Dist. Wardha

-Versus-

Accused :- **1.Sanjay Hariram Agarwal,**
Aged -60 years, Occupation- Business,
R/o 7 Hari Seva Street, Kidderpore,
Kolkata-700023
2. Home Trade Limited,
A company registered under Company
Law and registered as Stock Broker Exchange
Bombay & National Stock Exchange also
registered with securities Through Accused
no. 1 its Director.

Accused No. 2 added
order passed below
Exh. 72 on 28.03.2012

Order Below Exh. 266

This is an application filed by the accused seeking acquittal/discharge
and dropping of the proceedings on the ground that the mandatory
statutory requirements contemplated under Sections 138 and 141 of the

Negotiable Instruments Act, 1881 (hereinafter referred to as “the N.I. Act”) were not complied with at the inception of the proceedings.

2. The case of the applicant/accused, in brief, is that as per the averments in the complaint, the cheque in question bearing cheque no. 695186 dated 20/04/2002 of an amount of Rs. 26,75,15,270/- and cheque no. 695187 dated 20/04/2002 of an amount of Rs. 1,28,12,500/- drawn on Ms Cooperative Bank Limited fort, Mumbai, were issued towards discharge of the liability of the company. However, the company was not arraigned as an accused, when the complaint was filed on 29/05/2002. The complaint was initially filed only against the directors accused no. 1 to 11. The process came to be issued by this Court on 04/09/2002.

3. It is further contended that the statutory demand notice contemplated under proviso (b) to Section 138 of the N.I. Act was never issued to the company. According to the accused, since the cheque was drawn on the account of the company, the company was the principal offender and its arraignment as an accused was a condition precedent for maintaining prosecution against its directors under Section 141 of the N.I. Act.

4. It is further submitted that subsequently, vide order dated 28/03/2012 (Exh.72), the complainant was permitted to implead the company as an accused no.2 and the names of the other directors, i.e. accused Nos. 2 to 11, were deleted from the proceedings. According to the accused, such subsequent impleadment of the company, after about ten

years from institution of the complaint and without issuance of statutory notice to the company, could not cure the fundamental defect existing in the original complaint.

5. The learned Advocate for the accused has relied upon the judgments of the Hon'ble Supreme Court, particularly:

- (i) *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661;
- (ii) *Himanshu v. B. Shivamurthy*, (2019) 3 SCC 797;
- (iii) *Hrishikesh Vitthaldasji Chandak v. Saiyyad Majuruddin*; and
- (iv) *Satin Son Kuttapan v. P.P. Sudhakaran*, 2023 SCC OnLine Bom 2216.
- (v) *Manjula Kapoor v. State of Himachal Pradesh*, 2026 INSC 789,
- (vi) *Hitendra Vishnu Thakur -vs- State of Maharashtra*, (1994) 4 SCC 602.

6. The sum and substance of the submissions of the learned Advocate for the accused is that where the cheque is drawn on the account of a company and the company is the principal offender, prosecution of its director/person liable under Section 141 of the N.I. Act cannot be maintained without arraigning the company as an accused. It is further submitted that service of the statutory demand notice upon the drawer/company is an essential requirement under proviso (b) to Section 138 of the N.I. Act. Since the company was neither arraigned as an accused in the original complaint nor served with the statutory demand notice, the complaint itself suffered from a fundamental defect. According to the accused, subsequent impleadment of the company after expiry of the

statutory period could not revive the defective complaint. The beneficial provisions made for the accused be given effect retrospectively.

7. The learned Advocate for the complainant opposed the application. It is submitted that the matter is pending since the year 2002 and has already reached the stage of evidence. The complainant's examination-in-chief was filed on 08/10/2012 and the matter is pending for cross-examination. It is further submitted that the company was subsequently impleaded as an accused vide order below Exh.72 dated 28/03/2012 and the said order was challenged before the learned Sessions Court in Criminal Revision No. 134/2012. According to the complainant, the said challenge was unsuccessful. It is further submitted that the accused is, in substance, seeking review/recall of the earlier order whereby the company was impleaded as an accused and proceeding against the accused no. 1 initiate are bad in law. According to the complainant, such review or recall is not permissible before the same Court. It is also submitted that the present case is a summons/summary case and there is no provision under the Code of Criminal Procedure, 1973 permitting discharge of an accused at this stage. It is therefore prayed that the application be rejected.

8. The learned Advocate for the complainant has also opposed by relying upon Section 274 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as "the BNSS"), contending that the present proceedings were instituted in the year 2002 and are governed by the Code of Criminal Procedure, 1973.

9. Heard, the learned Advocate Smt. Kamana Divya Sree for the accused no. 1 and Ld. Advocate P. B. Towary for the complainant. Perused the complaint, the documents on record, the order dated 04/09/2002 issuing process, the order below Exh.72 dated 28/03/2012 and the other material available on record.

The following facts are not in dispute:

- (i) The complaint under Section 138 of the N.I. Act was instituted on 29/05/2002.
- (ii) The cheque in question was allegedly issued towards discharge of the liability of the company.
- (iii) At the time of institution of the complaint, the company was not arraigned as an accused. The directors were made the accused nos. 1 to 11.
- (iv) Process was initially issued against the directors/persons arrayed as accused.
- (v) The statutory demand notice under proviso (b) to Section 138 of the N.I. Act was not issued to the company.
- (vi) Subsequently, vide order dated 28/03/2012 (Exh.72), the company was brought on record as an accused and the names of certain directors were deleted except the present applicant.
- (vii) The complainant's examination-in-chief was thereafter filed on 08/10/2012. The matter is cross-examination on 17/01/2026 and adverse is passed against the accused.

10. In view of the rival submissions, two distinct questions (points) arise for consideration:

(i) Whether Section 274 of the BNSS can be invoked in the present proceedings; and

(ii) Whether this Court, at this stage, can grant the relief of discharge/acquittal/dropping of proceedings on the ground that the original complaint suffered from non-impleadment of the company and non-service of statutory notice upon the company.

POINT NO. 1:-

11. The present complaint was instituted in the year 2002. The proceedings were therefore instituted and pending under the Code of Criminal Procedure, 1973 much prior to coming into force of the BNSS on 01/07/2024. Section 531(2)(a) of the BNSS contains the saving provision. It provides that where immediately before the date on which the BNSS came into force any appeal, application, trial, inquiry or investigation was pending, such proceeding shall be disposed of, continued, held or made in accordance with the provisions of the Code of Criminal Procedure, 1973, as if the BNSS had not come into force. Therefore, the present proceeding continues to be governed by the Code of Criminal Procedure, 1973.

12. The Ld. Advocate for the accused argued that by relying the judgment of Hitendra Vishnu Thakur And Others -vs- State of Maharashtra & Ors, (1994) 4 SCC 602, wherein it is held that, in what manner the provisions of the statute be interpreted.

The illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation are as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) a procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

13. It needs to be noted that, in the present case the question of applicability of new section of B.N.S.S., 2023 is retrospective applicable or

not and the said Sanhita itself has guided that, the proceeding wherein trial has already begun are saved by the old Act i.e. Cr.P.C.. As such, this court do not find the said ratio applicable in the present case.

14. Moreover, recently in case of Parvinder Singh v. Directorate of Enforcement, 2026 LiveLaw (SC) 522, The saving clause contained in Section 531(2)(a) BNSS preserves the application of the CrPC, 1973 only where an appeal, application, trial, inquiry or investigation was actually pending immediately before 1 July 2024. The commencement of an inquiry requires judicial application of mind. Accordingly, where a complaint was filed before 1 July 2024, but cognizance was taken after 1 July 2024, and no inquiry/trial/proceeding contemplated by Section 531(2)(a) BNSS was pending immediately before commencement of the BNSS, the BNSS will apply. The accused can therefore claim a substantive right newly conferred by the BNSS. "The saving clause under Section 531(2)(a) BNSS saves only proceedings actually pending under the CrPC on 1 July 2024; a mere ministerial act of registration or listing of a complaint does not constitute an inquiry, and where cognizance is taken after commencement of BNSS, the BNSS procedure applies." Therefore, if the cognizance taken prior to coming into force of new law B.N.S.S.,2023, then, the proposed accused would not get opportunity to be heard before taking the cognizance. In the present complaint, the cognizance is taken under the old law and it is pending for the cross-examination of the accused of complainant witness. Therefore, the trial has begun in full swing. Consequently, the benefit of

new provisions of section 274 of B.N.S.S.,2023 cannot be extended on the ground of accusation against the accused is groundless. The proceeding in the present matter is governed under the Code of Criminal Procedure,1973. Accordingly, **Point No.1 is answered in the negative.**

POINT NO. 2 :-

15. The more substantial question is whether the objection raised by the accused regarding non-impleadment of the company and non-service of statutory notice upon the company is legally sustainable. Section 138 of the N.I. Act fastens criminal liability upon the drawer of the cheque subject to fulfillment of the statutory conditions contained in the proviso thereto. Section 141 deals with offences committed by companies and provides for vicarious liability of persons who were in charge of and responsible for the conduct of the business of the company.

16. **In Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661**, a three-Judge Bench of the Hon'ble Supreme Court held that arraigning the company as an accused is imperative for maintaining prosecution against the persons sought to be made vicariously liable under Section 141 of the N.I. Act. The Hon'ble Supreme Court held that commission of the offence by the company is a condition precedent for attracting the vicarious liability of the other persons.

17. The said principle was reiterated in **Himanshu v. B. Shivamurthy, (2019) 3 SCC 797**. The Hon'ble Supreme Court held that where the cheque was issued on behalf of the company, the company had to be arraigned as

an accused. The Court further considered the absence of service of demand notice upon the company and held that the defect could not be cured by subsequently arraigning the company where the statutory requirements had not been complied with.

18. The Bombay High Court has also applied the aforesaid principle in a case where the firm/company was not arraigned at the inception and the statutory notice was not issued to the firm/company, holding that the principal offender was a necessary party and that subsequent arraignment could not cure the defect in the circumstances of that case.¹⁶ The position has now been authoritatively considered by the Hon'ble Supreme Court in *Manjula Kapoor v. State of Himachal Pradesh*, 2026 INSC 789, decided on 29/07/2026. In that case, the cheque was drawn on the account of the company, the company was not initially impleaded as an accused and the demand notice was served only upon the director/authorised signatory and not upon the company. The Hon'ble Supreme Court held that where the cheque is drawn on the account of the company, the company is the person which commits the offence under Section 138, subject to fulfilment of the other statutory ingredients, and the liability of the directors is vicarious under Section 141. The Court reiterated the mandatory requirement of arraigning the company.

19. The Hon'ble Supreme Court further held in *Manjula Kapoor* that the complaint suffered from a fatal defect because the company was not impleaded as an accused. The Court held that where no cognizance

could validly have been taken on account of such fundamental defect, subsequent recourse to Section 319 of the Code could not be used to cure the defect after expiry of the limitation prescribed under Section 142 of the N.I. Act, 1881. The complaint and all consequential proceedings were consequently quashed.

20. Thus, the contention raised by the accused that non-impleadment of the company at the inception and non-service of statutory demand notice upon the company constitute matters going to the root of the prosecution cannot be rejected merely on the ground that the trial has remained pending for a long period. The mere passage of time cannot validate a proceeding which, according to the binding law declared by the Hon'ble Supreme Court, suffers from a fundamental defect.

21. However, this Court must also examine whether it possesses jurisdiction to grant the precise relief sought by the accused. The Constitution Bench of the Hon'ble Supreme Court in *In Re: Expeditious Trial of Cases under Section 138 of the N.I. Act, 1881* reiterated that the judgments in *Adalat Prasad v. Rooplal Jindal*, (2004) 7 SCC 338 and *Subramaniam Sethuraman v. State of Maharashtra*, (2004) 13 SCC 324 correctly lay down that a Trial Court has no inherent power to review or recall its order issuing summons. At the same time, the Supreme Court clarified that this does not affect the power of the Trial Court under Section 322 of the Code where it is brought to its notice that it lacks jurisdiction to try the complaint. The present objection, however, is not an objection to

the territorial jurisdiction of this Court in the ordinary sense. The accused is challenging the maintainability of the prosecution on account of the alleged fundamental defect in the original complaint under Sections 138 and 141 of the N.I. Act. Therefore, the power under Section 322 of the Code cannot be mechanically invoked merely because the accused alleges that the original complaint was defective.

22. It is also necessary to distinguish between the substantive legal position and the procedural jurisdiction of this Court. On the substantive issue, in view of *Aneeta Hada*, *Himanshu* and, in particular, the subsequent authoritative pronouncement in *Manjula Kapoor*, the objection raised by the accused is legally substantial and cannot be regarded as a mere irregularity which can automatically be cured by subsequent impleadment of the company. However, this Court cannot exercise a general power of review and recall its earlier order issuing process merely by treating the present application as an application for discharge or acquittal.

23. The contention of the accused that the subsequent impleadment of the company after about ten years cured the original defect also cannot be accepted as a proposition of law. In *Manjula Kapoor*, the Hon'ble Supreme Court specifically held that a fundamental defect in the original complaint cannot be cured by subsequently invoking Section 319 of the Code after the statutory period has expired.

24. The fact that the company was subsequently impleaded pursuant to order below Exh.72 dated 28/03/2012 therefore requires

consideration in the light of the aforesaid binding principles. However, whether this Court itself can set aside or recall that order, and whether the consequential proceedings are liable to be quashed, are matters which must be considered within the jurisdiction vested in the competent superior Court.

25. As regards the contention that the order below Exh.72 was challenged before the learned Sessions Court, the effect of that revisional proceeding cannot be determined merely from the submission of the parties. The certified copy of the revisional order and the precise grounds raised therein would be necessary to determine whether the present objection was actually adjudicated upon. This Court, therefore, does not propose to record any finding regarding the effect of the said revisional proceeding without examining the actual order passed therein.

26. It is also clarified that the present order does not amount to a finding that the complaint is substantively maintainable notwithstanding the principles laid down in *Aneeta Hada*, *Himanshu* and *Manjula Kapoor*. On the contrary, this Court acknowledges that the objection regarding non-impleadment of the company and non-service of statutory notice upon the company raises a fundamental question concerning the maintainability of the prosecution. The limited conclusion reached herein is that the relief of discharge/acquittal sought by invoking Section 274 of the BNSS cannot be granted by this Court in the present proceeding, which is governed by the Code of Criminal Procedure, 1973, and that this Court cannot exercise a

general power of review or recall of its earlier order issuing process. In view of the above discussion, the application as framed cannot be allowed.

27. The accused, however, shall be at liberty to avail such remedy as may be available in law before the competent superior Court for challenging the maintainability of the original complaint and the consequential proceedings on the grounds urged in the present application. As such, point no. 2 answered in the negative. Consequently, this court pass following order :-

ORDER : -

1. The application filed by the accused seeking acquittal/discharge and dropping of the proceedings by invoking Section 274 of the Bharatiya Nagarik Suraksha Sanhita, 2023 is **rejected as not maintainable in the present proceedings.**

2. It is held that the present proceeding, having been instituted and pending prior to 01/07/2024, is governed by the Code of Criminal Procedure, 1973 in view of Section 531(2)(a) of the Bharatiya Nagarik Suraksha Sanhita, 2023.

Pronounced in open Court.

HEMANT
PRAKASH
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Date: 28/09/2026
Wardha.

(H. P. Pancholi)
Judicial Magistrate, First Class,
[Court No.2] Wardha.