IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 20TH DAY OF MARCH 2015/29TH PHALGUNA, 1936

Crl.MC.No. 262 of 2013 ()

AGAINST THE ORDER IN CC 215/2011 of CHIEF JUDL.MAGISTRATE COURT, ERNAKULAM

PETITIONERS/ACCUSED 3 TO 5:-:

1. BRIJI GOPAL DAGA,
DIRECTOR, WALL STREET FINANCE LTD., UNIT NO.101-112,
FIRST FLOOR, CHINTAMANI PLAZA, KURLA ROAD,
CHAKLA, ANDHERI EAST, MUMBAI - 400 009,
RESIDING AT A-1, DEVYANI APARTMENTS,
MAHATMA GANDHI ROAD, BORIVELI EAST,
MUMBAI - 400 066.(A3).

2. MADHUKAR SARDAR,
DIRECTOR, WALL STREET FINANCE LTD., UNIT NO.101-112,
FIRST FLOOR, CHINTAMANI PLAZA, KURLA ROAD,
CHAKLA, ANDHERI EAST, MUMBAI - 400 009,
RESIDING AT B 10, NAHUR VILLA, MIMALAVIYA MARG,
NADUR ROAD, MUHUND WEST, MUMBAI - 400 080.(A4).

3. SHEFALI RAJENDRA SHAH,
DIRECTOR, WALL STREET FINANCE LTD., UNIT NO.101-112
FIRST FLOOR, CHINTAMANI PLAZA, KURLA ROAD,
CHAKLA, ANDHERI EAST, MUMBAI - 400 009
RESIDING AT PANORAMA, 20 B, WALKESHWAR ROAD,
MUMBAI - 400 006.(A5).

BY ADV. SRI.SASTHAMANGALAM S. AJITHKUMAR

RESPONDENTS/STATE AND COMPLAINANT:-:

1. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

2. MUTHOOT EXCHANGE COMPANY PVT.LTD.,
HAVING THEIR CORPORATE OFFICE AT GF 13,
KURIAN TOWERS, BANERJI ROAD, ERNAKULAM,
KOCHI - 682 018, REPRESENTED BY ITS MANAGER
MR.PRAMOD JAIN, AGED 35 YEARS, S/O.M.P.JAIN (COMPLAINANT).

R2 BY ADV. SRI.B.RAMAN PILLAI
R2 BY ADV. SRI.R.ANIL
R2 BY ADV. SRI.M.SUNILKUMAR
R2 BY ADV. SRI.SUJESH MENON V.B.
R2 BY ADV. SRI.T.ANIL KUMAR
R2 BY ADV. SRI.MANU TOM
R1 BY PUBLIC PROSECUTOR SRI. RAJESH VIJAYAN

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 04.03.2015, THE COURT ON 20-03-2015 PASSED THE FOLLOWING:

Crl.MC.No. 262 of 2013 ()

APPENDIX

PETITIONERS' ANNEXURES:

ANNEXURE A. THE CERTIFIED COPY OF THE PRIVATE COMPLAINT FILED BEFORE THE CHIEF JUDL.MAGISTRATE COURT, ERNAKULAM DATED 07.09.2011.

ANNEXURE B. COPY OF FORM 32 SUBMITTED BY THE COMPANY BEFORE THE REGISTRAR OF COMPANIES WITH RESPECT TO THE STATUS OF THE PETITIONERS.

RESPONDENTS' ANNEXURES: NIL

/TRUE COPY/

P.S. TO JUDGE

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K. RAMAKRISHNAN, J.

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Crl.M.C.No.262 of 2013

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Dated this the 20th day of March, 2015.

O R D E R

Accused Nos. 3 to 5 in C.C.No.215/2011 on the file of the Chief Judicial Magistrate Court, Ernakulam have filed this petition to quash the proceedings as against them under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code' for short).

2. It is alleged in the petition that the petitioners were arrayed as accused 3 to 5 in C.C.No.215/2011 on the file of the Chief Judicial Magistrate Court, Ernakulam, which was taken on file on the basis of a private complaint filed by the second respondent/complainant alleging an offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act' for short). The second respondent is a Private Limited Company engaged in the business of foreign exchange, forward money transfer and other financial services. They filed Annexure-A complaint against Wall Street Finance Limited, a Company registered under the Companies Act, having its head office at Mumbai represented by the second accused, the whole

time Director and Chief Executive Officer and the present petitioners and one Muhammed Shibu as Directors of the first accused company alleging that they had some business transaction with the first accused company at its Kollam branch and the transactions were done through Mr. Rajesh P.P, the Forex Executive of the first accused Company at its Kochi office and in discharge of some amount due, the first accused company issued a cheque No.165452 drawn on Kollam Branch of the Axis Bank Ltd dated 16.7.2001 for an amount of ₹38,77,111/- and it was delivered to Kottayam branch by the Manager of Kollam branch by name A.S.Abhilash and it was signed by the 6th accused and the said Abhilash. The said Abhilash is no more. The entire transaction in this case including issuance and execution of the cheque were done with the knowledge, consent and connivance of accused 2 to 5 and they were in charge of and responsible for the functioning of the first accused Company at the time of issuance of the cheque. The cheque when presented was dishonoured for the reason 'funds insufficient' as per memo dated 20.7.2011. The second respondent issued a demand notice dated 17.8.2011 to the accused persons intimating dishonour and demanded payment of the amount and accused 1 to 5 received the notice on 19.8.2011 and notice sent to the 6th accused was returned undelivered with the endorsement 'addressee left' in the notice sent by speed post and in the notice sent by courier with the endorsement 'party resigned from service'. So, according to the complainant, all the accused were responsible for the commission of the offence. It is alleged in the petition that the petitioners were not in charge of the management and day to day affairs of the company. The first petitioner is only a non Executive Director, joined the Company from 3.9.2009. The third petitioner is appointed as non Executive Director on 3.9.2009 and she resigned with effect from 13.8.2011. The second petitioner is also a non Executive Director appointed on 6.5.2010. They have no role in the day to day administration of the Company and it is having full time Managing Director and Chief Executive Officer, who is in charge of the day to day affairs of the Company and they have no control over the management of the branch at Kollam. Except vague allegation in the complaint that they were in charge of and responsible for the day to day affairs of the company and transactions including issuance of the cheque had taken place in connivance and consent of all the Directors, there is no specific role mentioned in the transaction by the present petitioners and that is not sufficient to make them liable under section 138 of the Act read with section 141 of the Act and proceeding with the case against them is nothing but an abuse of process of court. So they have no other remedy except to approach this Court seeking the following relief:

> "On the above grounds, it is humbly prayed that the Honorable court may be pleased to call for the records of the case C.C.No.215/2011 on the file of the Chief Judicial Magistrate Court, Ernakulam and quash Annexure-A complaint as against the petitioners in the exercise of the inherent powers of this court in the interests of justice"

3. Heard the counsel for the petitioners and the respondents.

4. The counsel for the petitioners submitted that the petitioners are only non Executive Directors and they have no role in the day to day administration of the Company and they have no say in the issuance of the cheque etc and they are only giving advise to the Company in the respective field in which they were experts, for which purpose they have been appointed as Directors. Merely because it was mentioned that they are

Directors of the Company and vaguely stating that they are in day to day administration of the Company and it was done with the consent and connivance except mentioned the role played by them is not sufficient to make them liable under section 138 of the Act. He had relied on the decisions reported in **Singhania A.K and another v. Gujarat State Fertilizer Co. Ltd. and another** (2013(4) KHC 264) = (AIR 2014 SC 71) and **Briji Gopal Daga and others v. State of Kerala and another** (2013 (3) KHC 167) in support of his case.

5. On the other hand, the learned counsel for the second respondent submitted that when there is allegation in the complaint that the Directors are also responsible for the day to day administration of the company and the act was done with the connivance and consent of all the Directors, then the complaint is perfectly maintainable and what is the role played by them need not be stated and burden is on those Directors to establish that they have no role in the day to day administration of the Company to get exemption from criminal liability. He had relied on the decision reported in **Gunmala Sales Private Ltd. v. Anu Mehta and others** (2014 KHC 4685) in support of their case.

6. Heard Sri. Rajesh Vijayan, the learned Public Prosecutor also.

7. It is an admitted fact that the first accused Company and the complainant Company are engaged in stock exchange business and they have some transaction. It is also an admitted fact that the second accused in the case was the Managing Director and Chief Executive Officer of the first accused company and he is in charge of the day to day administration of the Company. Accused 3 to 6 are the Directors of the first accused Company and according to the complainant, they are also in charge of the day to day administration of the Company and the entire transaction including issuance of the cheque had taken place with the consent and connivance of accused 2 to 6, of which the petitioners are accused 3 to 5. According to the petitioners, they are only non Executive Independent Directors of the Company and they have no role in the day to day administration of the Company and as such, they are not liable to be prosecuted under section 138 of the Act for the offence said to have committed by the first accused Company.

8. It is seen from Annexure-A complaint that the disputed cheque dated 16.7.2011 with No.165452 was drawn on Axis

Bank Ltd., Kollam branch (payable at par at all branches of the bank) for an amount of ₹ 38,77,111/- in discharge of the amount due and the cheque was executed by the 6th accused and Abhilash (who is no more now), then Manager of the Kollam Branch of the first accused Company. According to the complainant, the cheque was presented for encashment through Kottayam branch of Axis Bank Ltd and the same was returned with the endorsement 'funds insufficient' vide dishonour memo dated 20.7.2011. The complainant issued a notice dated 17.08.2011 and it was received by accused 1 to 5 on 19.8.2011 and the notice sent to the 6th accused was returned with the endorsements 'addressee left' on the speed post sent and 'party resigned from service' on the notice sent by courier. Since amount was not paid, all of them have committed the offence, is the allegation in the complaint.

9. As regards the role of accused 3 to 6, it was extracted in paragraph 6 of the complaint, which reads as follows:

> "6. It is submitted that the 2nd accused herein is the whole time Director and CEO of the 1st accused Company and the 3rd, 4th and 5th accused are the Directors of the 1st accused Company. The 2nd, 3rd, 4th, and 5th accused persons

were in charge of and responsible for the functioning of the 1st accused company at the time of the issuance of the above cheque, its presentation for encashment and thereafter. It is further submitted that the incidents mentioned in the preceding paragraphs occurred with the consent/connivance of the 6th accused also, who was the Area Manager and authorised signatory of the 1st accused Company."

10. Section 141 of the Act deals with offences by Companies, which reads as follows:

[141. Offences by companies:-(1) If the persons 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.

Explanation:- For the purposes of this section,-

(a)"company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.]

11. It is settled law that in order to make the Directors of the company vicariously liable for the offence committed by the Company, it must be alleged in the complaint that they were also in charge of the day to day administration of the Company and in order to make the persons mentioned in the proviso namely the Director, Secretary, Manager etc it must be further averred

that it was done with their connivance and offence was committed due to their negligence as well.

12. In the decision reported in **Singhania A.K's case** (cited supra) it has been held that:

> "Complainant need not allege and prove that, in fact, such of the Directors, mentioned in the complaint have any specific role in respect of the transaction leading to issuance of cheque. It shall be necessary to allege that they were in charge of and responsible to the conduct of the business of the Company. If reading of complaint shows and substance of accusation discloses necessary averments, Directors can be proceeded against. Section does not stipulate any particular form in which the averment have to be made".

13. In the decision reported in **Gunmala Sales Private Ltd's. Case** (cited supra), the Hon'ble Supreme Court, after discussing all decisions on this aspect namely regarding liability of the Directors in respect of offence under section 138 of the Act, has summarized in Paragraph 33 of the judgment, which reads as follows:

> "33. We may summarise our conclusions as follows:
>
> a) Once in a complaint filed under S.138 read with S.141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct

of the business of the company at the relevant time when the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

b) If a petition is filed under S.482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

c) In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the Court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed;

d) No restriction can be placed on the High Court's power under S.482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director".

14. It is true that in the decision reported in **Briji Gopal Daga's case** (cited supra) filed by the same accused persons to quash the proceedings in respect of the complaints filed by the other complainants, this Court has quashed the proceedings holding that the allegations in the complaint are not sufficient to attract the vicarious liability of the non Executive Directors on the ground that the complainant has a duty to verify the facts as to their involvement and make specific averments in the complaint supported by sufficient proof of their involvement.

15. But in the decision reported in **Singhania A.K and another v. Gujarat State Fertilizer Co. Ltd. and another** (AIR 2014 SC 71)=(2013 (4) KHC 264) and **Gunmala Sales Private Ltd. v. Anu Mehta and others** (2015 (1) SCC 103)=(2014 (4) KLT 389)=(2014 KHC 4685), it has been observed that what is required is only that there must be allegation that the Directors were in charge of the day to day administration of the Company and it is not necessary that the complainant should allege the role of each and every Director and their involvement

in the transaction.

16. In view of the later decisions of the Hon'be Supreme Court, the dictum laid down by the Single Judge in **Briji Gopal Daga's case** (cited supra) cannot be said to have laid the correct law and it can be distinguished in view of the subsequent decisions of the Hon'ble Suprme Court on this aspect. A reading of the complaint will go to show that, it was specifically averred in the complaint that, accused 2 to 5 were in charge of and responsible for the functioning of the first accused Company at the time of issuance of the above cheque and its presentation for encashment and the offence was committed with the consent and connivance of the 6th accused, who was the Area Manager and authorised signatory of the first accused Company. So, it cannot be said that there is no allegation in the complaint that the petitioners were also in charge of and responsible for the day to day administration of the Company. Further, merely because they were non Executive Directors or independent Directors is not a ground to come to a conclusion that they have no role in the day to day administration of the Company. Though there is a Managing Director, who is normally responsible for the conduct of the Company, the

Company may also include other Directors also in the day to day administration of the Company along with the Managing Director and that will known only to the Directors alone and it need not be known to others. If the complainant had made necessary allegation in the complaint as required under section, the courts are not expected to enlarge the requirement so as to make the Directors liable for the act committed by the Company asking the complainant to explain the role played by each Directors in the complaint. It is true that they have sent a reply notice. But that alone is not sufficient to exonerate from the criminal liability committed by the first accused Company and it is a matter for evidence as to whether they have got any specific role in the day to day administration of the Company and it was only managed by the second accused or the 6th accused alone etc and it is not for this Court at this stage to conduct a rowing enquiry to come to a conclusion that they have on production of appointment of the petitioners as shown in Annexure-B series. The second petitioner had retired only after the issuance of the cheque. Whether he is liable or not is a matter to be considered on the basis of evidence and that cannot be considered at this stage invoking the power under section

482 of the Code.

17. So in view of the discussions made above, this Court feels that it is not a fit case to invoke the power under section 482 of the Code to quash the proceedings as against the petitioners for the reason stated by them in the petition which according to this Court has to be considered on the basis of evidence in view of the basic allegations made by the complainant in the complaint as against them as required under section 138 read with section 141 of the Act and the petitioners are not entitled to get the relief claimed and the same is liable to be dismissed.

In the result, this petition is dismissed. Interim order granted is vacated and Crl.M.A.No.441/2013 is dismissed.

Office is directed to communicate a copy of this order to the court below at the earliest.

Sd/-

K. RAMAKRISHNAN, JUDGE.

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P.S to Judge