IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.06.2015

CORAM:

THE HON'BLE MR.JUSTICE R.S.RAMANATHAN

Crl.O.P.Nos.27907 & 27908 of 2009

Kartikeya V Sarabhai
Director
M/s ORG Informatics Ltd.,
3rd Floor, Vipul Square,
B.Block, Sushant Lok-1,
Gurgaon – 122 002.
Haryana. ... Petitioner
Presently residing at
Chidambaram, Usmanpura,
Ahmedabad 380 013.

Vs.

M/s.TVS Net Technologies Ltd.,
Represented by its Head-Finance,
Mr.K.S.Ramakrishna Rao
Having its corporate office at
7th Floor, MPL Silicon Towers,
23/1 Velachery Tambaram Main Road,
Pallikaranai, Chennai 600 100. ... Respondent in Crl.OP.27907/09

M/s.TVS Net Technologies Ltd.,
Rep.by its Head Finance
Mr.Gautam K.Murthy ... Respondent in Crl.OP.27908/09

Prayer : Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure praying to call for the records in C.C.No.5649 of 2009 and C.C.No.9908 of 2009 pending on the file of the Learned Metropolitan Magistrate No.IX, Saidapet, Chennai and quash the proceedings as against the petitioner.

For Petitioner : Mr.ARL.Sundaresan
Senior Counsel
for Mr.Sivanandaraj

For Respondent : Mr.A.Sasidharan

ORDER

The petitioner is the 3rd accused in C.C.No.5649 of 2001 on the file of the Learned Metropolitan Magistrate No.IX, Saidapet, Chennai. The Respondent/complainant filed the above complaint against the four accused stating that the first accused is a company, the second accused is the Managing Director of the first accused company, who signed and executed a corporate guarantee on behalf of the first accused, the third accused is the Director of the first accused company and the fourth accused is the Authorised signatory of the first company, who had executed a memorandum of understanding, on behalf of the first accused. The 3rd accused / petitioner herein, is the Director of the first accused and he is actively involved in the day to day affairs of the first accused along with accused 2 and 4. The complaint proceeds on the basis that the second accused, is the Authorised Signatory/Managing Director of the first accused company issued cheques which were dishonoured and thereafter, statutory notice was issued to the petitioner and other accused. Since neither any payment was made nor any reply was sent, the complaint was filed.

2. The learned senior counsel for the petitioner submitted that the petitioner who was arrayed as third accused is only a non-executive director as seen from Form 32 of Registrar of the companies and as per the judgment of the Hon'ble Supreme Court reported in (2015) 1 MLJ (Crl) 32 (SC) : 2014 (14) SCALE 170, is the matter of Pooja Ravinder Devidasani Vs. State of Maharashtra, non-executive Director was no doubt a custodian of the governance of Company but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. It is further held that to fasten vicarious liability under section 141 of the Act, on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. It is further stated that merely because a person is a Director of a company, does not make him liable under Section 141 N.I.Act.

3. On the other hand, the learned counsel for the respondent/complainant submitted that the complainant made necessary allegations in the complaint wherein paragraph 12, it has been stated that the third accused is the Director of the first accused company and he is actively involved in the day-to-day affairs of the first accused along with the accused 2 and 4 and therefore, being a Director of the company, he is responsible for the acts of the company. He further submitted that in the application filed by him Crl.M.P.No.1 of 2010 to vacate the stay granted, it is specifically stated in paragraph 6 that the 3rd accused/ petitioner herein is actively involved in the administration of the first accused company and he was a member of Audit committee, shareholders/Investors Grievance Committee and Remuneration Committee and he was also shown as one of the key management personnel. He was one of the signatories to the balance sheet of the first accused company for the year 2007 - 2008 and being a non-executive Director, it cannot be pursumed that he was not responsible for the acts of the company. He further submitted that the petitioner's digital signature certificate was also registered with the Registrar of Companies for representing A1 Company. He further submitted that when necessary averments are made, it is for the accused to prove during the course of trial that he has nothing to do with the offence of the company. I am unable to accept the contention of the learned counsel for the respondent/complainant. It is trite law that while quashing the complaint, the allegations made in the complaint have to be taken into consideration and the Court cannot look into subsequent pleadings or counters filed by the parties. On the basis of the allegations made in the complaint, If prima facie case is made out , the complaint cannot be quashed and if no prima facie case is made out, the complaint is liable to be quashed.

4. As stated supra, in paragraph 12, it has been alleged that the second accused is the Managing Director and the CEO of the first accused company and he has issued the cheque on behalf of the first accused company and he has signed and executed a corporate guarantee on behalf of the first accused company. The 4th accused is also the authorised signatory and GM operations of the first accused and he had executed the Memorandum of Understanding on behalf of the first accused company. However, in so far as the petitioner is concerned, who is arrayed as the third accused, it is only stated that she is one of the Directors of the first accused and is actively involved in the day to day affairs of the first accused along with the 2nd and 4th accused. Excepting the same, nothing has been stated in the complaint regarding the role played by the petitioner /3rd accused. No doubt in the application filed by the respondent/complainant to vacate the stay, in paragraph 6, some details have been stated

regarding the role played by the petitioner. As stated supra, while dealing with the quash application, the Court can only consider the allegations made in the complaint and cannot go beyond the allegations made in the complaint.

5. In the judgment (2015) 1 MLJ (Crl) 32 (SC) : 2014 (14)SCALE 170 in paragraph 17, it is stated as follows:

> " 17. . . . There is also no dispute that the Appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability Under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N.I.Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence Under Section 141 of the N.I. Act. In National Small Industries Corporation (supra) this Court observed:
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> Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused

Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements Under Section 141."

6. It is further stated in paragraph 21 as follows..

" 21. . . . that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused is vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. By verbatim reproducing the wording of the Section without a clear statement of fact supported by proper evidence, so as to make the accused vicariously liable, is a ground for quashing proceedings initiated against such person Under Section 141 of the N.I.Act."

7. In paragraph No.23, it is stated as follows;

"23. In Gunmala Sales Private Ltd, (supra) on which learned Counsel for the Respondents has heavily relied, this Court at para 33 (c) held:

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, incontrovertible 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 avernment, 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 make quash the proceedings. It bears repetition to state that to establish such case and impeachable, incontrovertible 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."

8. It is contended by the learned counsel for the petitioner that the petitioner is a non-executive Director and " there is no dispute by the respondent and the petitioner has also filed Form 32 to prove the same. Further, the respondent/complainant has made specific allegations against the 2nd and 4th accused regarding the manner in which they are taking part in the managing of the company but at the same time, the only allegation made against the 3rd accused/petitioner herein was that he was actively involved in the day-to-day administration of the company. In the judgments referred to above, it has been held clearly that a mere reproduction of the words in the Act cannot make a personnel liable, in the absence of specific allegation made against that person. Further, when that person is a non-executive Director, he is not involved in the day-to-day affairs of the administration of the company and hence, he cannot be made responsible for the act of the company.

9. Considering all these aspects, the Court below ought not to have taken cognizance of the complaint as against the petitioner. Hence, the petitions are allowed. The complaint in C.C.No.5649 of 2009 as against the petitioner/3rd accused is hereby quashed and the

trial Court is directed to proceed with the complaint in respect of accused 1, 2 and 4, and dispose of the same within a period of four months from the date of receipt of copy of this order.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

sms

To

1. The Learned Metropolitan Magistrate No.IX,
   Saidapet, Chennai

2. The Chief Metropolitan Magistrate No.IX,
   Egmore, Chennai.

+1cc to Mr.J.Sivanandaraaj, Advocate, S.R.No.27675
+2cc's to Mr.A.Sasidharan, Advocate, S.R.No.27386 & 27385

Crl.O.P.Nos.27907 & 27908 of 2009

VSN(CO)
CA(25/06/2015)