HON'BLE SMT JUSTICE ANIS

CRIMINAL PETITION No.9482 OF 2012

O R D E R:

This Criminal Petition is filed under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C') by the petitioners/accused Nos.3 to 5 to quash the proceedings against the petitioners in S.T.C.No.222 of 2011 on the file of the III Additional Judicial Magistrate of First Class, Tirupati.

2. The petitioners are accused Nos.3 to 5 in S.T.C.No.222 of 2011 on the file of the III Additional Judicial Magistrate of First Class, Tirupati. First respondent is the complainant who filed a private complaint against the petitioners/A.3 to A.5 and also A.1 and A.2 for the offence punishable under Sections 138 & 142 of the Negotiable Instruments Act, 1881 (for short, the Act). On 15.07.2011, the learned Magistrate, after recording the sworn statement of the complainant has taken the case on file against accused Nos. 1 to 5 under Sections 138 and 142 of the Act and summons were issued.

3. The first respondent filed a private complaint alleging that the petitioners/A.3 to A.5 along with A.1 and A.2 availed a term loan with account No.53868013 for setting up a unit for Rotogravure Printing and an amount of Rs.88,10,000/- was sanctioned as loan on 22.11.2005 and the accused including the petitioners availed the loan of Rs.70,79,736/- on 31.10.2006, executed all necessary documents in favour of respondent/complainant and agreed to repay the same with interest @ 15% per annum in 19 quarterly instalments at Rs.4,70,000/-. The first respondent/complainant also stated that the total outstanding amount is Rs.1,04,88,598/- as on 31.07.2010 and the first accused issued a cheque bearing No.219295 dated 15.07.2010 for a sum of Rs.4,00,000/- drawn on State Bank of India, Varadaiahpalem. When the said cheque given by A.1 was presented in Syndicate Bank, Tirupati for collection by the complainant, the same was returned by the banker with an endorsement 'funds insufficient' and the said fact was communicated to the complainant on 24.07.2010. Thus, the accused knowing fully well that there is no balance in their account, issued the cheque. Immediately the *de facto* complainant R.1 got issued a legal notice on

04.08.2010 calling upon the accused to pay the cheque amount and the notice was acknowledged by the accused and petitioners, but they neither paid the amount nor gave any reply. Hence the first respondent filed the complaint.

4 . The learned counsel for the petitioners – A.3 to A.5 argued that the petitioners are innocents and they have not committed any offence as alleged by the *de facto* complainant muchless the offence under Section 138 of the Act and there is no allegation against the petitioners in the complaint as well as in the sworn affidavit. It is also argued that the petitioners are not responsible for the conduct of the business of the Company and they were not incharge of the Company. It is also argued that there is no allegation against the petitioners 1 and 2 who are wife and daughter of the third petitioner. It is also argued that the second accused who is the Managing Director of the first accused, who is responsible for day-to-day affairs of the Company, issued the cheque on behalf of A.1-company. Therefore, the petitioners are innocents and the complaint as well as the sworn statement are silent about the role played by the petitioners and how they are connected to A.1 company and how they are responsible for the conduct of the business of the company at the time of commission of offence. Learned counsel, therefore, prayed the Court to quash the proceedings in S.T.C.No.222 of 2011 against the petitioners as they are nothing but abuse of process of Court and to allow the petition.

5. The learned counsel relied upon the case law reported in **S.M.S.Pharmaceuticals Ltd. v Neeta Bhalla and others,** wherein the Apex Court held that:

> ***10. While analysing 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. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words " 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 etc." What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the***

company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company 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 under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"..etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.

19. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of

Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

6. The learned counsel for the petitioners also relied upon the case law reported in **K.K.Ahuja v V.K.Vora and another,** wherein the Apex Court held that

22. Section 141 uses the words "was in charge of, and was responsible to the company for the conduct of the business of the company". (emphasis supplied) It is evident that a person who can be made vicariously liable under sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and in addition is also in charge of the business of the company. There may be many Directors and secretaries who are not in charge of the business of the company at all. The meaning of the words "person in charge of the business of the company" was considered by this Court in Girdhari Lal Gupta v. D.H. Mehta[10] followed in State of Karnataka v. Pratap Chand[11] and Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd.[12] This Court held that the words refer to a person who is in overall control of the day-to-day business of the company. This Court pointed out that a person may be a Director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

24. Therefore, the averment in a complaint that an accused is a Director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly

affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" (listed in para 21 above), then merely by stating that "he was in charge of the business of the company" or by stating that "he was in charge of the day-to-day management of the company" or by stating that "he was in charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act.

28. If a mere reproduction of the wording of Section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act.

7. The learned counsel for the petitioners also relied upon the case law reported in **National Small Industries Corporation Limited v Harmeet Singh Paintal and another,** wherein it was held as under:

39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

> ***(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 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 offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.***
>
> ***(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.***
>
> ***(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.***
>
> ***(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.***
>
> ***(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.***

8. It is also argued by the petitioners' counsel that in another similar case, the *de facto* complainant has mentioned that he is the Chief Promoter of the Company and filed another STC against A.2 in the year 2009 and prayed the Court to take the same into consideration.

9. On the other hand, the learned counsel for the respondent argued that the *de facto* complainant no doubt filed another complaint against A.2, but the said criminal case is not part of the record. As such, the contention of the petitioners' counsel about another STC cannot be considered. It is also argued that A.5 is the Chief Promoter of A.1 company and hence he is liable under Section 141 of the Act. He further contended that whether the petitioners are having any interest in the business or whether they are nothing to do with the business of the A.1 company has to be gone into trial and it can be proved during the trial by producing cogent evidence and it is a matter of trial. Therefore, at this stage this petition is liable to be dismissed and relied upon the case law reported in **Aparna A.Shah v Sheth Developers Private Limited**

and another, wherein it was held thus:

> ***"Therefore, the officers of the company, who are responsible for the acts done in the name of the company, are sought to be made personally liable for the acts which result in criminal action being taken against the company. In other words, it makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company".***

10. The learned counsel for the respondent also relied upon the case law reported in **Jugesh Sehgal v Shamsher Singh Gogi**, wherein it was held as under:

> ***"The scope and ambit of powers of the High Court under Section 482 of the Code has been enunciated and reiterated by this Court in a series of decisions and several circumstances under which the High Court can exercise jurisdiction in quashing proceedings have been enumerated. Therefore, it is unnecessary to burden the judgment by making reference to all the decisions on the point. It would suffice to state that though the powers possessed by the High Courts under the said provision are very wide but these should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the Courts exist."***

11. Learned counsel for the respondent finally prayed the Court to dismiss the petition as the petitioners has not made out any case to quash the proceedings in S.T.C.No. 222 of 2011 on the file of the III Additional Judicial Magistrate of First Class, Tirupati.

12. Now, the point for determination is --

> Whether the petitioners are entitled to quash the proceedings in STC.222 of 2011 on the file of the III Additional Judicial Magistrate of First Class, Tirupati as prayed for?

13. **P O I N T**:

A perusal of the record shows that there is no dispute that A.P.State Financial Corporation represented by its Branch Manager filed the private complaint against the accused Nos.1 and 2 and petitioners A.3 to A.5 under Section 138 and 142 of the Act. It is borne out from the record that sworn affidavit of Assistant Manager was taken into consideration and on 20.11.2012 the case was taken on file and summons were issued to the accused including the petitioners. The complaint and the sworn affidavit filed by the Assistant Manager of the *de facto* complainant have not stated anything about the allegations against the petitioners who were shown as A.3 to A.5 in the complaint. The allegations in the complaint are that accused availed the loan facility about Rs.70,79,736/- on 31.10.2006 and executed all necessary documents. Thereafter they committed default in payment of the said amount. Accused No.1 issued a cheque for Rs.4,00,000/- which was returned by banker with an endorsement 'insufficient funds'. Thereafter the *de facto* complainant got issued a legal notice. Having received the notice, accused failed to pay the amount and failed to give any reply to the said notice. Hence, the complaint filed. A perusal of the complaint as well as the sworn statement shows that they did not speak any specific allegations and specific overt acts against the petitioners. The Hon'ble Supreme Court in **S.M.S.Pharmaceuticals Ltd.** (1 supra) clearly held that every person connected with company shall not fall within the ambit of provisions and it is only those persons who were incharge responsible for the conduct of business of the company at the time of commission of offence will be liable for criminal action. The complaint as well as the sworn affidavit of Assistant Manager are silent about how the petitioners are responsible for conduct of the business of the company at the time of commission of offence and they are only persons connected with the company to run the business of the company. In the complaint as well as the sworn statement, it is nowhere mentioned that the petitioners have any role in conduct of the business of the company of A.1 and this averment is essential requirement under Section 141 of the Act. In the absence of said averment in the complaint merely by stating that all the accused availed the loan and executed the documents, it cannot be stated that they are incharge of the business of the company.

14. So far as the contention of the learned counsel for the respondent that whether the accused are responsible for conducting business of the company has to be considered during the trial but not at the time of taking cognizance and thus the petition is liable to be dismissed is concerned, it is no doubt the

learned counsel for the respondent relied upon the case law reported in **Aparna A.Shah (4 supra)** wherein Hon'ble Supreme Court also clearly held that 'criminal liability on account of dishonour of a cheque primarily falls on the drawer, if it is a company, then the drawer company and is extended to the officers of the company. It is also held the normal rule in the cases involving criminal liability is against vicarious liability. No one is to be held criminally liable for an act of another. In the present case, the respondent has not stated how the petitioners are responsible for the acts done in the name of the company and in fact, the case law relied upon by the respondent in **Aparna A.Shah (4 supra)** is helpful to the petitioners' case. Therefore, in the absence of any *prima facie* evidence against the petitioners about their acts and responsibilities for conduct of the business of the company, they cannot be held liable, as every person connected with the company shall not fall within the ambit of the provisions. Further, the complaint as well as the sworn statement of the Assistant Manager are silent about the specific averments that petitioners are responsible for conduct of the business of the company and these averments are essential under Section 141 of the Act and have to be made in the complaint. In the absence of such averment in the complaint, the petitioners cannot be held responsible for the acts of the company and the Managing Director. Under these circumstances, continuance of further proceedings in S.T.C.No.222 of 2011 under Section 138 of the Act would be an abuse of process of Court. Therefore, the petition is allowed quashing the proceedings in S.T.C.No.222 of 2011 on the file of the III Additional Judicial Magistrate of First Class, Tirupati.

15. Accordingly, the Criminal Petition is allowed.

16. Miscellaneous petitions pending, if any, in this Criminal Revision Case shall stand closed.

ANIS, J

Date:26.03.2015

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