HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION Nos.8306 , 8307, 8308, 8309, 8310, 8311, 8312, 8313 of 2015

COMMON ORDER:

The Criminal Petition Nos.8306 of 2015, 8307 of 2015, 8308 of 2015, 8309 of 2015, 8310 of 2015, 8311 of 2015, 8312 of 2015 and 8313 of 2015 are filed by the Petitioner/ accused No.3 under Section 482 Cr.P.C seeking to quash the C.C. Nos.109 of 2015, 110 of 2015, 111 of 2015, 112 of 2015, 113 of 2015, 114 of 2015, 115 of 2015 and 116 of 2015 on the file of XXIV Special Magistrate, Hyderabad, where the learned Magistrate has taken cognizance for the offences punishable under Section 138 N.I Act, outcome of private complaint of 1st respondent—de facto complainant—Viceroy Travels Private Limited, rep. by its Finance Controller Mr.Zia Khushrooh Iqbal for the dishonour of cheques bearing Nos.202425, 202423 and 202424 dated 12.07.2014 in C.C No.109 of 2015; cheque bearing Nos.202408, 009905, dated 14.07.2014, 009903 dated 13.07.2015 in C.C No.110 of 2015; cheque bearing Nos.202418 dated 11.07.2014, 202416 dated 11.07.2014 and 202407 dated 14.07.2014 in C.C. No.111 of 2015; Cheque Nos.202345 dated 19.06.2014 and 202343 dated 14.06.2014 in C.C. No.112 of 2015; Cheque Nos.009907 dated 15.07.2014 and 202344 dated 18.06.2014 in C.C. No.113 of 2015; cheque Nos.009906 dated 14.07.2014, 009902 dated 13.07.2014 and 009904 dated 14.07.2014 in C.C. No.114 of 2015; Cheque No.202422 dated 12.07.2014 in C.C. No.115 of 2015; from the cause of action and after statutory notice for the alleged non-payment filed the private complaints that were taken cognizance by the learned Magistrate and accused were summoned.

2) The averments in the private complaints in the nutshell are that A-1 entity represented by its Managing Directors accused Nos.2 and 3 approached the complainant company for air travel tickets frequently required by them to supply time to time and in that course there was an outstanding amount of Rs.10,47,789/- from the A-2—Minto Purushotam

Gupta representing A-1 entity—Deccan Health Care Private Limited issued, three cheques in question for a total amount of Rs.22,843/- in C.C. No.109 of 2015; three cheques in question for a total amount of Rs.48,719/- in C.C. No.110 of 2015; three cheques in question for a total amount of Rs.34,219/- in C.C. No.111 of 2015; two cheques in question for a total amount of Rs.19,659/- in C.C. No.112 of 2015; two cheques in question for a total amount of Rs.73,223/- in C.C. No.113 of 2015; three cheques in question for a total amount of Rs.88,780/- in C.C. No.114 of 2015; a cheque in question for a total amount of Rs.5,296/- in C.C. No.115 of 2015; three cheques in question for a total amount of Rs.70,264/- in C.C. No.116 of 2015 towards partial discharge of debt (supra) drawn on State Bank of India, Motinagar, Kalyan Nagar Branch, Hyderabad and the same were presented for collection at Central Bank of India, Nampally Branch for realization, they were returned as dishonoured for insufficient funds. Despite legal notices served to the A-1 entity and A-2 covered by acknowledgments but for A-3 issued a false and frivolous reply. A-1 entity and A-2 issued no reply. Thereby, all the accused are liable for the offence under Section 138 N.I Act.

3) Among nine enclosures to the complaints, the reply notice given by A-3 reads that he is neither incharge nor responsible for conduct of the business of A-1 entity but for the nominal director being financial investor and not involved in the day-to-day affairs of the company including activities of vendors or service providers or for booking of tickets and he is not aware of the so-called cheques issued and the amounts fallen due. It is stated in the notice that it is only Accused No.2 as Managing Director of A-1 entity and incharge in conducting the conduct of business of A-1 entity including day-to-day affairs, hence Accused No.2 is responsible that there are disputes between A-2 and A-3 and the matter is pending before the Company Law Board, hence to proceed against the A-1 entity and its Managing Director—A2. A-3 marked copies of said reply notice to A-1 entity and its Managing Director —A-2. It is after reply as referred in the private complaints, the said private complaints were filed. Now the A-3 sought for quashing of the

private complaint proceedings for the offence under Section 138 N.I Act on the ground that the private complaints are with false allegations and the cognizance taken is contrary to law so far as petitioner/ A-3 concerned and the continuation of the proceedings tantamount to abuse of process for there are no specific averments in the complaint as per Section 141 of N.I Act, so far as petitioner/ A-3 is concerned to fix any vicarious liability for even not concerned with any of the affairs of the A-1 entity. If at all there is any liability for the offence under Section 138 N.I Act, it is only A-1 entity and its Managing Director—A2. It is thereby the submission that the petitioner/ A-3, being nominal director, is not responsible for day-to-day affairs of A-1 entity and the private complaints averment no way attract the offence against accused No.3, hence it is liable to be quashed for the learned Magistrate in taking cognizance committed an error by not adverting the facts with reference to law.

4) The 1st respondent/ complainant even served with notice (leave about other respondents/ A-1 and A-2) order of this Court, the respondents 2 and 4/ A-1 entity and accused No.2 failed to attend before the Court, hence taken as heard. Heard learned counsel for petitioner / accused No.3 as well as 4th respondent—State represented by learned public prosecutor and perused the material on record including the interim order of this Court dated 01.09.2014.

5) From the above rival contentions to answer in so far as liability of a Company concerned, law is very clear on the principle of alterego. The Constitutional bench in ***Standard Chartered Bank V. Directorate of Enforcement***[1] held that Company can be prosecuted and convicted for an offence which requires a minimum sentence of imprisonment. Though it was held that it is not expressing any opinion on the question whether a Corporation could be attributed with requisite Mensrea to prove the guilt the same is later clarified by the subsequent expression of the Apex Court in ***Iridium India Telecom Ltd. V. Motorola Inc.***[2] referring to the several expressions of the American and England Courts

in paras 59 to 64 of the expression page Nos.98 to 100 in nutshell that a Company in many ways be like a human body they have a brain and nerve centre which controls what they do. Some of the people in the Company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent directing the mind and will of the Company and control what they do. The state of mind of these managers is the state of mind of the Company and is treated in the eye of law as such. The fault of the manager will be the personal fault of the Company. The knowledge and intention must be imputed to the body corporate. It was concluded therefrom by referring to ***Standard Chartered Bank*** para No.6 supra of a Company is liable to be prosecuted and punished for criminal offences in deviation to the earlier authorities in India of Corporations cannot commit a crime, for generally accepted modern rule is that except for such crime as a corporation is held incapable of committing by reason of the fact that they involve personally with maliciolus intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agent. The criminal intent of the alterego of the Company, that is the personnel group of persons that guide, the business of the Company would be imputed to the Company/corporation. It was the observation in ***Iredium*** supra that again followed in the latest three Judge bench expression of the Apex Court in ***Sunil Bharti Mittal V. C.B.I***[3]***.*** It was observed in ***Sunil Bharti Mittal*** (supra) that the corporate entity, an artificial person acts through its officers, directors, managing director, charman etc, if such act continues an offence involving Mensrea it would normally be evident and action of that individual who would act on behalf of the Company in particular in relation to criminal conspiracy. However, the cordial principle of criminal jurisprudence is that there is no vicarious liability unless the statute specifically provides so. An individual who has perpetrated the commission of an offence on behalf of a Company can be made as an accused along with the Company, if there is sufficient material on his active role. Second situation is knowledge it may be imputed is in those cases where statutory regime itself attracts the doctrine of vicarious liability by specifically incorporating by such a provision. It is therefrom referring the Section 141 of N.I.Act in particular as an example at para No.44 of ***Sunil Bharti Mittal*** supra and the expression of the Apex Court in ***Aneeta Hada (ii) V. Godfather Travels & Tours (P) Ltd***[4] held that the group of persons that guide the business of the company if the criminal intent that would be imputed to the body corporate and in this back drop Section 141 of the N.I.Act has to be understood. Such a position is therefore because of statutory intendment making it a deemed fiction. In ***Sunil Bharti Mittal*** supra it also referred the three Judge bench expression of the Apex Court in ***S.M.S.Pharmaceuticals Ltd. V. Neeta Bhalla***[5]. In ***S.M.S.Pharma*** supra at para No.8 it is observed that there is no universal rule that a Director of a Company is in-charge of its every day affairs. It all depends upon the respective roles assigned. A company have managers or secretaries for different Departments and may have more than one Manager or Secretary. In ***Aneeta Hada (ii)*** supra it is observed with reference to Section 141 of N.I.Act that the deeming fiction makes the functionaries of the Companies to be liable as its own signification. In fact before ***Aneeta Hada, S.M.S.Pharmaceuticals, Standard Chartered Bank*** and ***Iridium India*** supra, some of which referred in ***Sunil Bharti Mittal,*** the expression of the Apex Court in ***Anil Hada V. India Accrelic Limited***[6] speaks in a case under Section 141 of the N.I.Act that even the Company or Corporation not impleaded as accused the proceedings against a Director can be issued. The same later held not good law in ***Aneeta Hada (I) V. Godfather Travels & Tours (P) Ltd.***[7] saying without the Company impleaded as accused on the principle of *Lex non cogit ad impossibilia* and from that legal snag if the Company is not made accused, the proceedings against others cannot be. The said principle of ***Aneeta Hada*** (i) then came before three Judge bench expression in ***Aneeta Hada*** (ii) supra where the ***Anil Hada*** is over ruled and ***Aneeta Hada*** (i) is affirmed in saying at paras 51 to 59 the relevancy of which reads the decision in ***Anil Hada*** has to be treated not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the Company on the doctrine referred supra. Section 141 of the N.I.Act makes the other persons vicariously liable for commission of an offence on the part of the Company and to attract the vicarious liability the condition precedent laid down in Section 141 of the N.I.Act has to be satisfied. Thus, the words 'as well as the Company' used therein makes it absolutely and unmistakably clear that when the Company can be prosecuted, then the only persons mentioned in the other categories could be vicariously liable for the offence subject to the specific averments in the complaint and proof thereof. For maintaining prosecution under Section 141 of the N.I.Act, arraying of a Company as an accused is imperative. The other categories of offenders can only be brought in the drag, net on the touch stone of vicarious liability as the same has been stipulated in the petition itself as held in ***State of Madras V. C.V.Parekh***[8]. The same question when again came for consideration before the two Judge bench in ***Anil Gupta V. Star India Private Limited***[9], ***Aneeta Hada (ii)*** of two Judge bench referred supra is reiterated in para No.12 in saying the decision in ***Anil Hada*** supra is over ruled with the clarification as stated in Para No.51 of ***Aneeta Hada*** (ii) and the decision in ***U.P.Pollution Control Board V. Modi Distillery***[10] has to be restricted to its own facts. In ***S.M.S Pharmaceuticals*** (three Judge bench) supra also it is made clear with reference to section 141 of the N.I.Act that it is necessary to aver that at the time the offence was committed, the person accused was in-charge of and responsible for conduct of business of the Company and without this averment being made in the complaint, the requirements of Section 141 of the N.I.Act cannot be said to be satisfied. A clear case should be spelled out in the complaint against the persons sought to be made liable to show as incharge of and responsible to the Company for the conduct of its business. Every person connected with the Company thereby shall not fall within the ambit of Section 141 of the N.I.Act but of those persons who were incharge of and responsible for the conduct of business of the Company at the time of commission of the offence. The liability arises on account of conduct or act or omission on the part of a person and not merely on account of holding an offence or a position in a Company. The complaint therefore must disclose the necessary facts which make a person liable, specifically aver that at the time of offence committed, the person accused was incharge of and responsible for conduct of the business of the company. A director cannot be deemed to be incharge of and responsible to the Company for the conduct of the business for no deemed liability of a Director from that status, unless the aforesaid requirement of Section 141 of the N.I.Act has been averred as a fact in the complaint. In another expression referring to Section 141 of the N.I.Act by the Apex Court in ***Saroj Kumar Poddar V. State***[11] referring to ***S.M.S. Pharmaceuticals*** supra apart from another expression, that for dishonour of cheque making of requisite averments in the complaint is a statutory requirement and the allegations satisfy the same and in the absence of which the proceedings are liable to be quashed. The other expression of the Apex Court two Judge bench in ***National Small Industries Corporation V. Harmeet Singh***[12] also referring to ***Parekh*** supra and ***S.M.S.Pharmaceuticals*** supra among other expressions held that vicarious liability on the part of any Director or other person as incharge and responsible to the conduct of business be specifically averred, though same is not required against a Managing Director. Section 141 of the N.I.Act is very clear that it must be shown that the person for vicariously liable should be at the time of offence committed incharge of and responsible to the Company for conduct of its business. Otherwise every person connected with the Company shall not be made liable but those persons responsible for conduct of its business. A Director of a Company who is not incharge and not responsible for conduct of business at relevant time will not be made liable for the criminal offence, as the liability arises from being incharge and responsible for conduct of business of the Company at the relevant time of commission of offence. It is not even sufficient to make a bald and cursory statement in a complaint that the Director is incharge of and responsible to the Company for conduct of its business without saying anything more as to his role. The complaint should spell out as to how and in what manner a co-accused was incharge of or responsible to the accused company for conduct of its business. Same is also reiterated in another two Judge bench expression of the Apex Court in ***Central Bank of India V. Asian Global Limited***[13] relying on ***S.M.S. Pharmaceuticals*** and those were followed by a single Judge expression of this Court in ***Arrakuntal V. Ganeshan V. Sai Rama Cotton Syndicate***[14]. Even other latest expression in ***Poojari Ravinder Devi Dasani V. State of Maharashtra***[15] reiterates the same relying upon ***National Small Industries Corporation*** supra. Apart from it, the petitioner/A-3 is not even be said a drawer of the cheque, for A-2 and not A-3 signed the cheque on behalf of A-1 entity and thereby also not liable for prosecution vide ***M/s.Aparna Ashah v.Sheeth vs Sheeth Developers***[16]

6) Having regard to the above propositions which are in one line speak that a bald averment in complaint is not even sufficient but for a specific allegation as to how a Director of a company who stands in a different footing to the Managing Director by his status liable or to be made liable for the offences punishable under Section 138 of the N.I.Act.

7) Here a perusal of the very complaint relevant portion extracted supra, but for a bald statement, there is no material averment as to how A-3 is liable for the cheques in question said to have been issued by A-1 entity represented by its Managing Director—A-2 and not at all A-3 is drawer of the cheques apart from it but for a stray sentence of A-1 entity is represented by A-2 and A-3 approached the complainant, there is no even date or time of alleged approach, much less any thing to show the petitioner/ A-3 approached or asked to provide tickets on credit basis. Even the statutory legal notice, which was enclosed to the complaint,

issued by complainant to A-1 to A-3 what is averred is a general allegation of at the request of A-1 to A-3, and not even mentioned as A-2 and A-3 approached much less given with any time or date even in the said notice. The petitioner/A-3 in fact in his reply referred supra, stated that he never approached and not liable for day-to-day affairs being only a nominal director and the recourse, if any is to be made against A-1 entity and its Managing Director—A-2 and not against the petitioner/ A-3. Still said reply received the complaints averments are no way show how A-3 is liable for day-to-day affairs much less for the cheques said to have been issued by
A-1 entity represented by its Managing Director—A-2 as drawer for not by A-3. Thus, it is suffice to say from the above legal position with reference to the facts that the petitioner/ A-3 cannot be made liable and the prosecution so far as petitioner/Accused No.3 is unsustainable and is liable to be quashed.

8) Accordingly, the Criminal Petitions are allowed and all the proceedings relating to C.C. Nos.109 of 2015, 110 of 2015, 111 of 2015, 112 of 2015, 113 of 2015, 114 of 2015, 115 of 2015 and 116 of 2015 on the file of XXIV Special Magistrate, Hyderabad, in so far as the petitioner/ accused No.3 is concerned are quashed. The bail bonds of the petitioner/ accused No.3, if any, shall stand cancelled.

9) Miscellaneous petitions, if any pending in this Criminal Petition, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Dt.28.10.2015
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HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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CRIMINAL PETITION Nos.8306 , 8307, 8308, 8309, 8310, 8311, 8312, 8313 of 2015

Date:28.10.2015

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[1] (2005)4 SCC 530

[2] (2011)1 SCC 74

[3] (2015)4 SCC 609

[4] (2012)5 SCC 661

[5] (2005)8 SCC 89

[6] (2000)1 SCC 1

[7] (2008)13 SCC 703

[8] 1973 SCC 491

[9] (2014)10 SCC 373

[10] (1987)3 SCC 684

[11] (2007)3 SCC 693

[12] (2010)3 SCC 330

[13] 2010(2) ALD (Crl.) 564 (SC)

[14] 2013(2) ALD (Crl.) 331 (AP)

[15] AIR 2015 SC 675

[16] 2013 CrlJ 3743.