THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.8231 OF 2016

ORDER:

This criminal petition is filed under Section 482 of Cr.P.C to quash the proceedings in C.C.No.207 of 2016 pending on the file of Special Magistrate Court No.1, Cyberabad, Kukatpally.

The first respondent who is an interior decorator filed a complaint under Section 190(1)(a) of Cr.P.C for the offences punishable under Sections 138 & 142 of Negotiable Instruments Act (for short 'Act').

The brief facts of the case are that the petitioners are the accused 1 & 2 who are the Managing Director and Director of Viyaan Silks Private Limited, Visakhapatnam respectively got furnished their shopping mall with interior and exterior and agreed to pay Rs.1,95,00,000/- to the 1st respondent/complainant. Accordingly, the first respondent executed interior work for the petitioners company on 17.12.2014 and towards consideration, the petitioners paid an amount of Rs.51,70,000/- and for the remaining amount of Rs.1,43,30,000, petitioners have executed a demand promissory note for Rs.1,43,30,000/- in favour of the complainant agreeing to repay the same with interest @ 24% per annum either to the complainant or to his order as and when demanded. After repeated demands made by the complainant the petitioners have issued a cheque bearing No.000040 dated 15.07.2015 drawn on City Union Bank, Dwarakanagar Branch, Visakhapatnam for Rs.60,00,000/- and another cheque bearing No.000240 dated 15.07.2015 drawn on HDFC Bank, Dabagardens, Visakhapatnam for Rs.83,30,000/-

towards discharge of the part of the debt due to him. It is the case that both the cheques were dishonored with the reason 'Insufficient Funds' & 'Exceeds Arrangement' and returned vide cheque return memos dated 22.07.2015 and 23.07.2015 respectively. Thereupon, the first respondent got issued a legal notice to the petitioners on 18.08.2015 demanding the petitioners to pay the amount covered by the cheques within the specified time. The first petitioner issued a reply notice dated 31.08.2015 admitting the execution of work by the complainant but stated that the cheques were not issued by the petitioners 1 & 2. Hence, filed a complaint before the Special Magistrate Court No.1, Cyberabad, Kukatpally.

The present petition is filed to quash the proceedings in C.C.No.207 of 2016 on various grounds. The following are the specific contentions urged before this Court.

1. The notice was not addressed in the name of company namely Viyaan Silks Private Limited, but addressed in the name of K. Satish Reddy and Gogi Reddy Manasa Reddy, whereas the complaint was filed against the company. Thus, the first respondent did not comply the requirement under Section 138 of the Act.

2. It is also contended that unless the principal is made as party, the Director of the Company is not liable for punishment under Section 138 of the Act. Thus, failure to issue notice to the company is fatal to the case of prosecution and even if the allegations made in the complaint are true, the prosecution cannot be sustained and continuation of such prosecution is nothing but abuse of process of law and prayed the quash the

proceedings.

During hearing, learned counsel for the petitioner reiterated the contentions urged in the petition and submitted that when notice was not issued to the company which allegedly issued the cheques, the proceedings initiated for the offence punishable under Section 138 of the Act cannot be sustained.

Learned counsel for the respondent while contending that the complaint is maintainable, since notice was issued to the Directors of the company of the petitioners and when the notice is spelt out in clear terms demanding the amount to the Directors, it is sufficient compliance of Section 138.

Based on the law declared by the Supreme Court in the above two judgments, learned counsel for the respondent contended that when a notice was issued to the Director of the company, it is sufficient compliance of Section 138, thereby on that ground, the complaint cannot be quashed at this stage and prayed to dismiss the petition.

The dispute with regard to compliance of Section 138 of the Act is not purely a question of law. As the petitioner questioned the cause of action for filing the compliant for the offence punishable under Section 138, it is necessary to advert to the contents of the notice issued by the respondent.

It is stated in the complaint that, on 18.08.2015 a notice was allegedly issued to accused 1 & 2 i.e. K. Satish Reddy, Managing Director and Gogireddy Manasa Reddy, Director, Viyaan Silks Private Limited, Dabagardens, Visakhapatnam. Whereas, copy of the notice on record dated 18.08.2015 was also addressed to K. Satish Reddy, Managing Director and Gogireddy Manasa Reddy, Director, Viyaan Silks Private Limited, Dabagardens, Visakhapatnam. Thus, the notice was issued to K. Satish Reddy and Gogireddy Manasa Reddy as Directors of the company, but not to the company. But, the allegation made in paragraph (g) of the complaint is totally contrary to the notice dated 18.08.2015. When adverted to the promissory note dated 18.12.2014, the promissor under the promissory note is Viyaan Silks Private Limited represented by its Managing Director K. Satish Reddy and Director, Gogireddy Manasa Reddy. Therefore, the promissor is only Viyaan Silks Private Limited, but not K. Satish Reddy and Gogireddy Manasa Reddy. Similarly, cheques were issued jointly by K. Satish Reddy and Gogireddy Manasa Reddy for Viyaan Silks Private Limited. The drawee under the cheques is Viyaan Silks Private Limited represented by K. Satish Reddy and Gogireddy Manasa Reddy and the promissory note was also executed by Viyaan Silks Private Limited represented by its Managing Director and Director, K. Satish Reddy and Gogireddy Manasa Reddy respectively.

The main endeavour of the learned counsel for the petitioners is that when the drawee is Viyaan Silks Private Limited, issuing notice to the petitioners - K. Satish Reddy, Managing Director and Gogireddy Manasa Reddy, Director of the company could not satisfy the requirements under Section 138 (b) of N.I. Act. Thereby, issue of such notice would not give rise to cause of action to file a complaint against Viyaan Silks Private Limited. In the complaint, name of the first accused is mentioned as Viyaan Silks Private Limited, rep. by its Managing Director, K. Satish Reddy and the second accused is mentioned as Gogireddy Manasa Reddy w/o K. Satish Reddy. Taking advantage of this technical flaw or snag in the notice and in the complaint, the present criminal petition came to be filed raising several serious contentions.

Section 138 (b) of Negotiable Instruments Act deals with the requirement of notice of demand covered by the cheque and it reads as follows:

> "the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid"

The clear language used in Section 138(b) indicates that a notice of dishonour of cheque and demand for payment of the amount covered by the cheque must be issued to the drawer of the cheque within thirty days after receipt of information. The drawer is Viyaan Silks Private Limited. The notice dated 18.08.2015 was issued to K. Satish Reddy, Managing Director and Gogireddy Manasa Reddy, Director who are wife and husband. Notice was issued in the capacity of Managing Director and Director of the company Viyaan Silks Private Limited, but not in the individual capacity. Though the cheque was issued by Viyaan Silks Private Limited, it was signed by both the petitioners in the capacity of Managing Director and Director of the company. Taking advantage of the technical flaw in the notice, learned counsel for the petitioners contended that a notice must be issued to the drawer, but not to the individuals.

The word "drawer" and "drawee" are defined under Section 7 of Negotiable Instruments Act, which reads as follows:

> "The maker of a bill of exchange or cheque is called the 'drawer' and the person thereby directed to pay is called the 'drawee'"

So, a notice dated 18.08.2015 was issued to the persons who signed the cheques i.e. the petitioners herein and they are the makers of the cheques who fall within the definition of a drawer under Section 7 of N.I. Act.

Even otherwise, the company has no physical existence and it is represented by its Managing Director and Director. Even the notice was also issued in the capacity of Managing Director and Director. In such a case, whether such notice is short of any legal requirement under Section 138(b) is to be examined.

Learned counsel placed reliance on the judgment of the Apex Court reported in **Aneeta Hada v. Godfather Travels and Tours Private Limited**[1] and **Sunil Bharti Mittal v. Central Bureau of Investigation**[2].

In **Aneeta Hada's** case (referred supra), learned counsel for the petitioners drawn attention of this Court to paragraphs 51, 56, 58 & 59 wherein the Supreme Court opined that the decision in ***Sheoratan Agarwal v. State of Madhya Pradesh***[3] runs counter to the ratio laid down in the case of ***State of Madras v. C.V. Parekh***[4] which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the Supreme Court observed that the decision in ***Anil Hada v. Indian Acrylic Ltd***[5] has to be treated as 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. The Apex Court observed that it is

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[1] (2012) 5 Supreme Court Cases 661
[2] (2015) 4 Supreme Court Cases 609
[3] AIR 1984 SC 1824
[4] AIR 1971 SC 447
[5] (2000) 1 SCC 1

needless to emphasize, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted. The Supreme Court in the said paragraph concluded that the principle laid down in **Anil Hada**[5] case is not mere good law.

In paragraph 56 of the judgment, the Supreme Court concluded that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The Apex Court further observed that the use of the term "as well as" in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as have to be understood in the context.

Similarly in paragraph 58 of the said judgment, the Supreme Court opined that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

In view of the aforesaid analysis, the Apex Court arrived at an irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraying of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. Hence, on the basis of the ratio laid down in ***C.V. Parekh***[4] case which is a three-Judge Bench decision, the view expressed in ***Sheoratan Agarwal***[3] does not correctly lay down the law and, accordingly, is overruled. The decision in **Anil Hada**[1] case is overruled with the qualifier. The decision in **U.P. Pollution Control Board v. *Modi Distillery***[6] has to be treated to be restricted to its own facts as explained by the Supreme Court in the **Aneeta Hada**[1] case.

Learned counsel for the respondent also drawn the attention of this Court to paragraphs 22 & 24 of **Aneeta Hada**[1] case. In paragraph 22 of the judgment, the Apex Court observed that it is plain as day that if a person who commits offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under

[6] (1987) 3 SCC 684

what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a 'deemed' concept of criminal liability.

Further, in paragraph 24 of the said judgment, the Apex Court observed that Section 141 uses the term 'Person' and refers it to a company. There is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attracted to a corporation and company and it is so luminescent from the language employed under Section 141 of the Act.

Thus, the paragraphs 22 & 24 at best deal with the concept of corporate liability based on the language used in Section 141 of Negotiable Instruments Act. But, in the present case, there is no dispute regarding liability of the company and its directors.

Learned counsel for the petitioner further drawn attention of this Court to **Sunil Bharti Mittal**[2] case where the Apex Court while dealing with corporate criminal liability and the principle that criminal intent of person(s) controlling company be imputed to company based on principle of 'alter-ego', held that reverse application of principle is not permissible. The Supreme Court also held that when company is the accused, its Directors can be roped in only if there is sufficient incriminating evidence against them coupled with criminal intent or the statutory regime attracts the doctrine of vicarious liability.

There is no dispute regarding the law declared by the Apex Court in the above judgment and the Magistrate took cognizance of the offence. In the present facts and circumstances of the case, the Magistrate found that there is sufficient ground for proceeding, but sufficiency of notice to the drawer of the cheque as defined under Section 7 of Negotiable Instruments Act was not considered, since it is a question to be decided during trial only. Therefore, the above principle is of no assistance except to the extent of deciding vicarious liability of the Directors of the company when they committed an offence.

Learned counsel for the respondent raised several contentions regarding conduct of the petitioners and contended that if there is any lacuna in the complaint, amendment in the criminal complaint can be permitted, though there is no provision to amend the complaint.

Learned counsel for the respondent placed reliance on the judgments of the Supreme Court reported in **S.R. Sukumar v. S. Sunaad Raghuram**[7], **Krishna Exports and others v. Raju Das**[8], **Mainuddin Abdul Sattar Shaikh v. Vijay D. Salvi**[9], **and M/s Bilakchand Gyanchand Co. v. A. Chinnaswami**[10]

In **S.R. Sukumar**[7] case, the Supreme Court held that there is no specific provision for amendment of complaint in Cr.P.C. If the amendment to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side; the Court may permit the same, though there is no provision for it. On the other hand, if the amendment to be made in the complaint does not relate either to

[7] (2015) 9 Supreme Court Cases 609
[8] (2004) 13 Supreme Court Cases 498
[9] 2015 (2) ALD (Crl.) 599 (SC)
[10] AIR 1999 SUPREME COURT 2182

a curable infirmity, which cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the Court shall not allow such amendment in the complaint.

Suppose, the respondent is permitted to amend the complaint in view of the judgment referred supra, it will not cure the defect or short of legal requirement in the notice issued by the second respondent. Therefore, the judgment in **S.R. Sukumar**[7] case is of no assistance to the respondent, since the defect in a notice is incurable. Even if the company is required to be impleaded, the limitation would come in the way to implead the company as a party as accused by exercising power under Section 319 of Cr.P.C, since the limitation would start from the date of impleadment of the party as accused to the complaint.

Learned counsel also contended that when cheque was issued by the petitioners and on its presentation it was dishonoured, the Magistrate took cognizance of the complaint filed by the respondent, the Court cannot exercise its inherent power to quash such proceedings on the ground that notice was not sent to the company itself (vide **Bilakchand**[10] case referred supra).

If this principle is applied to the present facts of the case, this Court cannot exercise its inherent power to quash the proceedings under Section 482 of Cr.P.C for the offence punishable under Section 138 of N.I. Act, in view of the infirmity pointed out by the learned counsel for the petitioner regarding defect in the notice, which would not give rise to any cause of action against the petitioners to file a complaint.

Similarly, the notice was only in the nature of communication, which does not spell out in clear terms of demand to make payment. In such a case, it is difficult to accept that the notice was short of a legal requirement. On careful reading of the notice, it is clear that the respondent required payment of amount of cheque to be arranged, failing which he threatened to take legal action in the matter. The said letter certainly qualifies itself as a notice within the contemplation of Clause (c) of the proviso to Section 138. In such a case, taking cognizance of the case by the Magistrate for the offences punishable under Section 138 of N.I. Act, the Court cannot quash the proceedings (vide **Krishna Exports**[8] case referred supra).

Learned counsel for the respondent also drawn attention of this Court to the judgment of the Supreme Court in **Mainuddin**[9] case (referred supra). In the facts of the above case, the acquittal of the accused was challenged for the offence punishable under Section 138 before the Apex Court on the ground that the Magistrate took cognizance of the offence without impleading the company as accused for the offence punishable under Section 138 of N.I. Act. As per Section 141 of N.I. Act, if the person 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. In the complaint and the affidavit the company (M/s Salvi Infrastructure Pvt. Ltd) was made accused. The accused was the drawer of the cheque who had drawn the cheque on the bank account maintained by him towards the refund and therefore he is a drawer of the cheque. But, in paragraph 13 of the judgment, the Apex Court specifically held as follows:

> "13. Thus, in the light of the position which the Respondent in the present case held, we are of the view that the Respondent be made liable Under Section 138 of the NI Act, even though the Company had not been named in the notice or the complaint. There was no necessity for the Appellant to prove that the said Respondent was incharge of the affairs of the company, by virtue of the position he held. Thus, we hold that the Respondent Vijay D. Salvi is liable for the offence Under Section 138 of the NI Act."

If the principle laid down in **Mainuddin**[9] case is applied to the present facts of the case, even though a notice to the company was not issued and the company was not arrayed, when the petitioners were drawers of the cheque as defined under Section 7 of N.I. Act, they are liable for punishment for the offences punishable under Section 138 of N.I. Act. But, here, the notice was served on the petitioners in the capacity of Managing Director and Director of the company and Viyaan Silks Private Limited was not arrayed as a party in the complaint which was represented by K. Satish Reddy, Managing Director and Gogireddy Manasa Reddy, Director respectively. But, both the accused signed the cheques and notice was issued informing about dishonour of cheque while making demand of payment of debt to them in the capacity of Managing Director and Director of the company. But, in the complaint, the company was arrayed as an accused represented by Managing Director and Director. The purpose of notice is to impute knowledge about dishonour of cheque to the drawer. The company is only a jurist i.e. person and it is represented by the petitioners, being the Managing Director and Director. Mere failure to serve notice on the company separately would not vitiate the entire proceedings and even otherwise, when a notice was issued and specific contention was raised, the notice issued is beyond legal requirement. But the said question cannot be decided by this Court at the threshold of trial of calendar case for the offence punishable under Section 138 of N.I. Act, exercising power under Section 482 of Cr.P.C, as held by the Apex Court in **D. Vinod Shivappa v. Nanda Belliappa**[11], that whether a statutory notice issued by the drawee must be deemed to have been served on the dishonour of cheque is a question of fact which has to be decided on evidence.

When such disputed question of fact is involved in the matter, the Court cannot exercise power under Section 482 of Cr.P.C and the Court cannot quash the proceedings.

In **Samepally Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd**[12], the Apex Court held that a disputed question of fact cannot be gone into while exercising power under Section 482 of Cr.P.C.

If the principles laid down in **Vinod Shivappa**[11] **& Samepally Satyanarayana Rao**[12] cases are applied to the present facts of the case, it is difficult to quash the proceedings at this stage, as it is not a fit case to quash the proceedings, since such disputed questions of fact are involved. The principle laid down in **Mainuddin**[9] case and **Aneeta Hada**[1] case are in conflict in certain aspects, all the more **Mainuddin**[9] is recent in point of time whereas, Anneta Hada is the years older than **Mainuddin**[9]. If, point in later judgment is applied, the proceedings cannot be quashed. Hence, I find no grounds to quash the proceedings to exercise inherent power under Section 482

[11] (2006) 6 SCC 456
[12] 2016 (2) ALD (Crl.) 809 (SC)

of Cr.P.C. Section 482 of Cr.P.C confers no new powers but merely safeguards existing powers possessed by the High Court. Such power has to be exercised sparingly in exceptional cases and this power is external in nature to meet the ends of justice.

Hence, I find no ground to quash the proceedings at this stage, in view of a disputed question of fact regarding notice and maintainability of the complaint. That apart, the complaint was filed in 2015 and major part of trial is completed as contended by the learned counsel for the respondent. Having considered the facts and circumstances of the case, I deem it appropriate to issue a direction to the concerned Magistrate to decide the case before it as expeditiously as possible, in any even not later than six months from the date of receipt of the order, while leaving it open to the parties to raise all contentions permissible under law before the concerned Magistrate during trial.

In the result, the criminal petition is dismissed at the admission stage.

Consequently, miscellaneous applications pending if any shall stand closed. No costs.

M. SATYANARAYANA MURTHY, J

Date:21-12-2016
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