

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL PETITION No.13687 of 2010

ORDER:

This petition is filed under Section 482 Cr.P.C. to quash the proceedings against the petitioner/A3 in C.C. No.28 of 2004 on the file of the court of Additional Judicial First Class Magistrate, Avanigadda, Krishna District.

2. As directed by this court, the petitioner sent the notice to the address of the second respondent–complainant as mentioned in the complaint filed by him before the trial court. But, the said notice was returned with endorsement “*no such person is available*”. The second notice sent to the second respondent was also returned with the same endorsement. For better clarification, the address furnished by the second respondent in C.C. No.28 of 2004 on the file of the court of Additional Judicial First Class Magistrate, Avanigadda and the address to which the petitioner sent notice are furnished in the following table:

<u>Address mentioned by second respondent in his complaint</u>	<u>Address to which the petitioner sent notice by post</u>
<u>- Polavarapu Prabhakar Rao, S/o.Rama Rao, Hindu, Resident of Kuchipudi, Movva Mandal, Krishna District.</u>	<u>- Sri Polavarapu Prabhakar Rao, S/o.Rama Rao, R/o. Kuchipudi, Movva Mandal, Krishna District.</u>
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3. A perusal of the above table clearly reveals that the notice was sent to the correct address of the second respondent, as mentioned in the complaint filed by him against the petitioner herein and others before the trial court. The notice sent to the second respondent returned with endorsement ‘*no such person is available*’. Whether returning of the postal cover with such endorsement would amount to

proof of service or not?

4. To resolve the issue, this court is placing reliance on the following decisions:

In **K.Sajjan Raj v. Gopi Setty Chandra Mouli**^[1] at Para-11, it is held as follows:

“It is an admitted case that the notices were sent to the correct address of the defendant. Therefore, the finding of the lower Court, that when a notice has been sent to the correct address of a party and when the same has been returned ‘as not claimed’, the same amounts to service of notice, need not be disturbed.”

In **P.Pushpamala Reddy v. Janga Raghava Reddy**^[2] at Para -2, it is held as follows:

“This Court issued notice to the respondent/plaintiff on 21.02.2014. The notice was however returned with the endorsement ‘not claimed’. Significantly, the address to which the notice was sent to the same address furnished by the respondent/plaintiff in his plaint. Failure of the respondent/plaintiff to claim the notice sent through registered post to his last known address would therefore qualify as ‘deemed service’ (D.Vinod Shivappa v. Nanda Belliappa (1) 2006 (3) ALT (Crl.) 276 (SC) = 2006(8) SCJ 63 = (2006) 6 SCC 456).”

5. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, this court is of the considered view that the notice sent to the second respondent shall be deemed to be served.

6. In spite of service of the notice, the second respondent did not choose to appear and oppose the criminal petition. Hence, this court is inclined to dispose of the matter on merits.

7. A perusal of the record reveals that the petitioner herein is A3 and the second respondent is the complainant in C.C. No.28 of 2004.

The record further reveals that A1 is the company viz., Krishna Priya Cements Pvt. Ltd., represented by its Managing Director; A2 is the Managing Director and the petitioner/A3 is one of the Directors of the company. As per the allegations made in the complaint, A2 being the Managing Director of A1 company issued two cheques i.e., (1) bearing No.364856, dated 01.11.2003 for an amount of Rs.2,50,000/-; (2) bearing No.364857, dated 15.11.2003 for an amount of Rs.2,50,000/- in favour of the second respondent drawn on Nagarjuna Grameena Bank, Kodada. The second respondent submitted the two cheques for collection in State Bank of India, Avanigadda ADB Branch, and the said cheques were returned with endorsement "*insufficient funds*". On 30.12.2003, the second respondent got issued notice to the petitioner and others directing them to pay the amount covered under the above referred two cheques within fifteen days therefrom failing which he will be constrained to approach the court. For one reason or the other, the petitioner and others have not paid the amount covered under the two cheques to the second respondent. The second respondent, therefore, filed complaint under Section 190(a) Cr.PC on the file of the court of Additional Judicial First Class Magistrate, Avanigadda against the petitioner and others for the offence under Section 138 of Negotiable Instruments Act (N.I. Act). The learned Magistrate, after satisfying himself with the material placed before him, has taken cognizance of offence under Section 138 of N.I. Act against the petitioner and others and issued summons. Hence, the present criminal petition.

8. The contention of learned counsel for the petitioner is three fold: (1) the trial court has taken cognizance of offence against the petitioner without considering the scope of Section 141 of N.I. Act; (2) the petitioner is not the signatory of the cheques; therefore, the complaint is not maintainable against him; and (3) the allegations made in the complaint do not constitute the alleged offence.

(i) National Small Industries Corp. Ltd., v Harmeet Singh Paintal^[3]

wherein the Hon'ble Supreme Court held as follows:

25. 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 accused therein vicariously liable for offence committed by company along with averments in the petition containing that 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 accused is Managing Director or 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 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 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.

(ii) S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla^[4], wherein the Hon'ble Supreme Court held as follows:

16. Section 141 of the Act does not say that a Director of a company shall automatically be vicariously liable for commission of an offence on behalf of the Company. What is necessary is that sufficient averments should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an offence by the Company must be in charge and shall

also be responsible to the Company for the conduct of its business.

(iii) **Gunmala Sales (P) Ltd. v. Anu Mehta**^[5], wherein the Hon'ble Apex Court held as follows:

28. We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the abovementioned cases that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company. This is a basic requirement. There is no deemed liability of such Directors. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director.

34. We may summarise our conclusions as follows:

34.1. Once in a complaint filed under Section 138 read with Section 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 offence was committed, the Magistrate can issue process against such Director.

34.2. If a petition is filed under Section 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.

34.3. 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 the 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 process of 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, 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. In the absence of such evidence or circumstances, complaint cannot be quashed.

34.4. No restriction can be placed on the High Court's powers under Section 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.

9. It is not in dispute that the petitioner herein is one of the directors of A1 Company. As per the allegations made in the complaint, the petitioner being one of the directors of A1 Company, is vicariously liable for dishonour of the cheques. It is not specifically mentioned in the complaint that the petitioner has been looking after the day to day affairs of A1 Company. It is also not the case of the second respondent that the petitioner is one of the signatories of the cheques. Merely because the petitioner is one of the Directors of A1 company by itself is not a valid ground to take cognizance of offence against the petitioner for the offence under Section 138 of N.I. Act.

10. A perusal of the record further reveals that A4 to A6 in C.C. No.28 of 2004 (Directors of A1 company) filed Crl.P. No.4858 of 2007 on the file of this court to quash the criminal proceedings against them. This court allowed the criminal petition on 23.9.2010 and

quashed the proceedings against A4 to A6 in C.C. No.28 of 2004, who are the other Directors of A1 Company. The petitioner is also on the same footing.

11. In the light of the foregoing discussion, I have no hesitation to hold that the allegations made in the complaint do not constitute the offence alleged to have been committed by the petitioner for the offence under Sections 138 of N.I. Act.

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12. Having regard to the facts and circumstances of the case and also the principles enunciated in the cases cited supra, I am of the considered view that continuation of criminal proceedings against the petitioner/A3 would amount to abuse of process of the Court. Therefore, this is a fit case to quash the proceedings against the petitioner/A3.

13. In the result, the criminal petition is allowed quashing the proceedings against the petitioner/A3 in C.C.No.28 of 2004 on the file of the court of Additional Judicial First Class Magistrate, Avanigadda. Miscellaneous petitions, if any pending in the criminal petition, shall stand closed.

T.SUNIL CHOWDARY, J

June 03, 2016.

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[\[1\]](#) 2011(4) ALD 96

[\[2\]](#) 2015(4) ALT 447

[\[3\]](#) (2010) 3 SCC 330 = 2010(2) ALT (Cri.) 55 (SC)

[\[4\]](#) (2007) 4 SCC 70

[\[5\]](#) (2015) 1 SCC 103