

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 10.11.2017

Pronounced on : 20.11.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.S.RAMESH

Crl.O.P.No.4695 of 2017

and

Crl.M.P.Nos.3550, 3551 & 11015 of 2017

Vishwanathan Lakshmi Sridhar,
Director
Aascar Film Pvt. Ltd.,
(As shown in the cause title),
32/5, III Street,
Abhiramapuram,
Chennai-600 018.

.. Petitioner

Vs.

AGS Entertainment Pvt. Ltd.,
B-2, First Floor, Shoba Flats,
No.12, 10th Avenue,
Ashok Nagar, Chennai-600 083.

.. Respondent

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C., praying to call for the records in C.C.No.5584 of 2015 on the file of the learned XVIII Metropolitan Magistrate, Saidapet, Chennai and to quash the same.

For Petitioner : Mr.S.Thankasivan

For Respondent : Mr.S.Ashok Kumar, Sr. Counsel
for Mr.A.Sasidharan

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O R D E R

Challenge in the present petition is to the proceedings under Section 138 of the Negotiable Instruments Act, 1881, filed by the respondent herein against the Aascar Film Private Limited, who has been arrayed as first accused in the said complaint.

2.Heard Mr.S.Thankasivan, learned counsel for the petitioner and Mr.S.Ashok Kumar, learned Senior counsel for the respondent.

Company, has been arrayed as fourth accused.

4.The only ground raised by the petitioner in the present petition is that the petitioner, though was one of the directors of the Company was neither in-charge of day to-day affairs nor responsible for the conduct of its business. According to the learned counsel for the petitioner, the averments in the complaint implicating the petitioner are very vague and do not make out a case as against him. Hence, the learned counsel for the petitioner sought for quashing of the complaint.

5.The learned Senior counsel appearing for the respondent/complainant, on the other hand, submitted that there was specific averment in the complaint in para 3 that the petitioner herein/the fourth accused is the Director of the first accused company and is also responsible for the conduct of the business of the company. In view of the averments, the learned senior counsel submitted that the petitioner, since was the director of the company during the time of transaction and that the impugned cheque was issued, is also responsible for the offence.

6.I have given careful considerations to the submissions made by the respective counsels.

7.It would be appropriate to reproduce Section 141 of the Negotiable Instruments Act, 1881, since the issue involved in this petition revolves around it. Section 141 of the Negotiable Instruments Act, 1881 reads thus:

"141.Offences by companies:(1)If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was incharge 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:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

[Inserted by Act 55 of 2002:-Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial Corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not

be liable for prosecution under this Chapter.]

(2)Notwithstanding anything contained in sub-section(1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

8.The averments with regard to the overt act made as against the petitioner/fourth accused is also extracted herein:

"3)The third and fourth accused are the Directors of the first accused company and also responsible for the conduct of the business of the Company.

5)The complainant states that the entire business transactions in respect of the above mentioned agreement had taken place with the knowledge and in the presence of the accused 2 to 4 who are responsible for the conduct of the business of the first accused company.

7)The notice sent to the fourth accused was returned stated the reason as 'not claimed, returned to sender'."

The above are the only averments made as against the petitioner.

9.The learned counsel for the petitioner by relying on the two- Judge Bench judgment of the Hon'ble Apex Court in Gunmala Sales Private Limited Vs. Anu Mehta and others reported in 2015 (1) SCC 103 submitted that insofar this petitioner is concerned, the allegations as against him are not sufficient to maintain a complaint under Section 138 of the Negotiable Instruments Act. The learned counsel for the petitioner has relied on para 28 of the said judgment which reads as follows:

"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 above- mentioned 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. That is why this Court in SMS Pharma-(1) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 of the Code which recognize the Magistrate's discretion to reject the complaint at the threshold if he finds that there is no sufficient ground for proceeding. Thus, if this basic averment is missing the Magistrate is legally justified in not issuing process. But here we are concerned with the question as to what should be the approach of a High Court when it is dealing with a petition filed under Section 482 of the Code for quashing such a complaint against a Director. If this averment is there, must the High Court dismiss the petition as a rule observing that the trial must go on? Is the High Court precluded from looking into other circumstances if any? Inherent power under Section 482 of the Code is to be invoked to prevent abuse of the process of any court or otherwise to secure ends of justice. Can such fetters be put on the High Court's inherent powers? We do not think so."

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10.The learned Senior counsel on the other hand controverted the same and submitted that the averments as against the petitioner is that he is responsible for the conduct of the business of the company which is found in the complaint, is sufficient to maintain the complaint against him.

11.Before analysing the proposition of the Hon'ble Apex Court in Gunmala Sales Private Limited (supra) case referred above, it would be appropriate to have a glance on the decision of the Hon'ble three-Judge Bench in S.M.S. Pharmaceuticals Ltd., V. Neeta Bhalla reported in 2005 (8) SCC 89, wherein it was observed that merely being a director of the Company is not sufficient to make the person liable under Section 141 of the Act, as a director of a company cannot be deemed to be in-charge and responsible for the conduct of the

business of the company. The requirement of Section 141 of the Negotiable Instruments Act is that the accused sought to be made liable for the offence under Section 138 of the Negotiable Instruments Act, 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 a case. This averment is an essential requirement of Section 141 of NI Act. It needs to be borne in mind that the Managing Director or Joint Managing Director would be predominantly in-charge of the Company and responsible to the Company for the conduct of the business. However, just because one of the directors have been implicated in an offence under Section 138 of the Negotiable Instruments Act, 1881, it cannot be said that such director was responsible for the affairs of the company or its conduct. In the judgment of *Gunmala Sales Private Limited (supra)* case of the Hon'ble Apex Court which has been relied upon by the petitioner herein, it is also been held in para 34.3 as follows:

"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 role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible 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 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, uncontrovertible 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."

Thus, the Hon'ble Apex Court is of the view that the involvement of a director of a company depends on the particular facts of the case and the necessary materials placed before the High Court while rendering a decision under Section 482 Cr.P.C. This was the view of the Three-Judge Bench of the Apex Court in S.M.S. Pharmaceuticals Limited (supra) case also. Incidentally, the Hon'ble Apex Court while rendering the decision in Gunmala Sales Private Limited (supra) case, had considered this proposition through their various other decisions.

12. In one of the cases considered therein, namely, Anita Malhotra Vs. Apparel Export Promotion Council reported in 2012 (1) SCC 520, the two-Judge Bench were of the view that a mere bald statement that he/she is responsible to the company for its conduct and its business is not sufficient. Accordingly, it was held that from the facts of that case, except for the mere bald cursory statement with regard to the appellant, the complainant had not specified her role in the day to-day affairs of the company and therefore, decided that the appellant was entitled to succeed. However, this aspect was considered and distinguished in Gunmala Sales Private Limited (supra) case.

13. It is no doubt true that the essential requirement of Section 141 is that at the time when the offence was committed, the accused ought to have been in-charge of or responsible for the conduct of the business of the company. This is an essential requirement of Section 141 and has to be made in the complaint. In other words, in the absence of this averment being made in the complaint, the requirement of Section 141 cannot be said to be satisfied. In most of the decisions rendered by the Hon'ble Apex Court in this proposition, the same view has been taken that such an averment is mandatory. In the case of Gunmala Sales Private Limited (supra), all these decisions, touching upon this proposition were discussed and analysed and a decision was taken to the effect that, the averment was mandatory and the High Court while exercising its power under Section 482 Cr.P.C., needs to analyse the facts of each and every case and take a decision as to whether a mere cursory averment was sufficient or that there should be averments detailing the specific role of the director.

14. In the present case in hand, the case of the petitioner is that, he had not participated in the affairs of the company and was ignorant of the transaction between the company and the respondent herein. This statement is found in the petition filed before this Court. Apart from this mere statement, there are no other documents or materials placed before this Court to establish this fact. The learned counsel for the petitioner also submitted that after the end of the accounting year 2014-15, the petitioner has no connection whatsoever and not even visited the company and he had

tendered his resignation to the company which came to be accepted on 25.01.2016. This fact again is not specified with any materials. What is required under Section 141 is that the petitioner ought to have been the director of the company at the relevant time of the company and that the complaint should aver that he was in-charge and responsible for the conduct of the company's business. The notice of dishonour sent under Section 138 of the Negotiable Instruments Act was refused by the petitioner. It would have been comprehensible to accept the plea of the petitioner, if he had received the notice of dishonour and given his reply stating that he was not responsible for the conduct of the business of the company. On the other hand, he had refused to receive the notice, by not claiming it.

15.The learned counsel for the petitioner also made one last submission that the cheque amount was already repaid to the respondent/complainant and that the present complaint is done with a mala fide intention. I am not agreeable to the said submission since the fact of repayment of the alleged liability to the respondent needs to be elucidated during the course of trial. Yet again, it can be also comprehended that the petitioner's knowledge of having repaid the liability to the respondent if taken, at its face value, can be inferred that he had knowledge about the conduct of the petitioner's company. It is made clear that this statement has been made only for the purpose of answering the submission made by the petitioner and this Court has not expressed any conclusive proof on it and it is open to the petitioner to raise the ground before the trial Court that he was not responsible for the conduct of the business.

16.In the result, the Criminal Original Petition stands dismissed. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

DP
To

1.The XVIII Metropolitan Magistrate,
Saidapet, Chennai

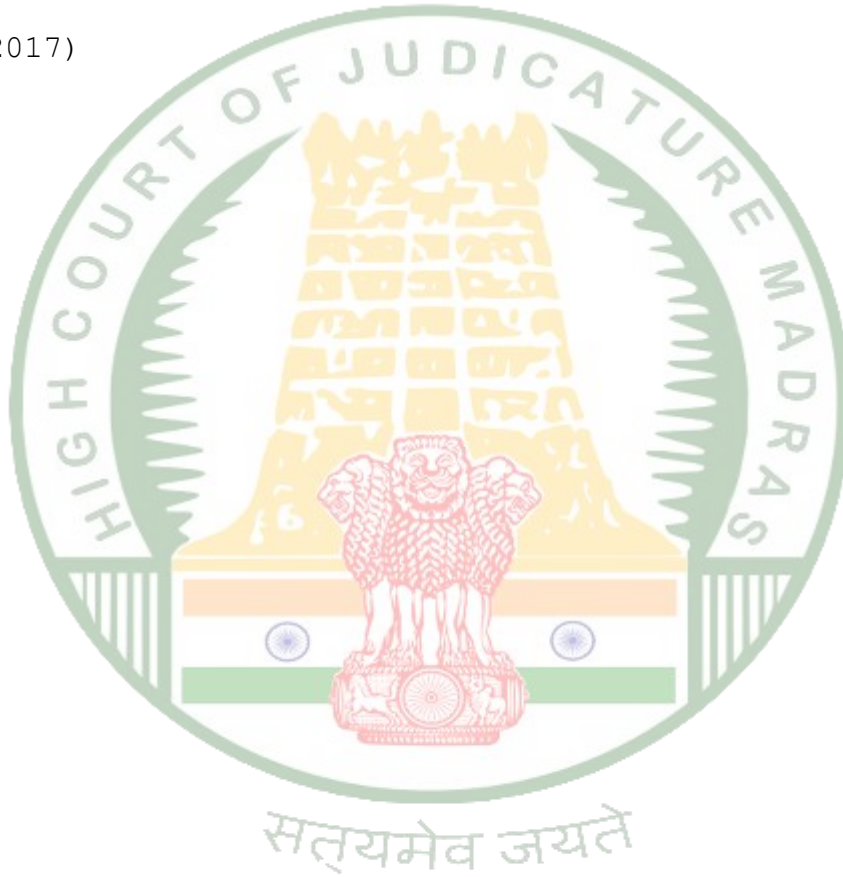
2.Do Thro the Chief Metropolitan Magistrate,
Egmore, chennai.

3.The Public Prosecutor,
High Court, Madras.

+lcc to Mr.A.Sasidharan, Advocate, S.R.No.82497
+lcc to Mr.S.Thangasivan, Advocate, S.R.No.82377

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and
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GN(21/11/2017)



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