

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.09.2017

CORAM

THE HON`BLE MR.JUSTICE **A.D. JAGADISH CHANDIRA**

Crl.O.P.No.25540 of 2010 and M.P.No.1 and 2 of 2010

Mrs.Shanthi Papli,
Director, M/s. Franch Herbs
Technologies Ltd.
3.A & 3.B, Vishwa Villa Apts.
31 & 32, Balfour Road,
Kilpauk, Chennai-10.

... Petitioner/3rd Accused

Vs

Mr.Bala Sing Samuel
Proprietor, M/s.Vijaya Agency
Represented by its Power Agent
Mr.J.Doss, No.110, Arcot Road,
Vadapalani, Chennai-26.

... Respondent/Complainant

Criminal Original Petition filed under Section 482 Cr.P.C to call for the records and quash the complaint in C.C.No.1811 of 2010 on the file of II Metropolitan Magistrate, Egmore, Chennai as against the petitioner.

For Petitioner : M/s.V.T.Narendiran

For Respondent : R.Gunasekaran

ORDER

The petitioner/Accused No.3, the Director of the first Accused company has filed the present quash petition to quash the proceedings against her in C.C.No.1811 of 2010 on the file of II Metropolitan

Magistrate, Egmore, Chennai for the offence punishable under Section 138 of Negotiable Instruments Act.

2. The main contention grounds raised by the petitioner is that the very complaint under Section 138 of the Negotiable Instruments Act is not maintainable against the petitioner as she is not a signatory to the cheque and that she being a nominal director is in no way connected with the day today affairs of the company and that the second accused had issued the cheque as Managing Director and Chairman of the first accused company and that on the entire reading of the complaint there is no averment against the petitioner as required under Section 141 of the Negotiable Instruments Act, warranting implication of the petitioner for the offence alleged and thereby the further proceedings against her is an abuse of process of law.

3. Learned counsel appearing for the respondent/complainant has vehemently contended that the petitioner is the wife of the Managing Director of the company and as such she is involved in the day to day affairs of the company and that she being a Director is also liable for prosecution under the Act.

4. For the sake of convenience, the relevant paragraphs in the complaint are extracted hereunder.

"1. The complainant states that the accused company had business dealings with the complainant in the past and during such business transactions with the complainant, the accused company owes to the complainant various amounts on various dates and towards the discharge of the same, the accused in the capacity of Authorized Signatories issued the following cheques in favour of the complainant:

Sl. No .	Cheque No. & Date	Cheque amount Rs.	Drawn on (Bank's name)
1	292195/26.4.2009	12,50,000/-	ICICI Bank, Purasawalkam Branch, Chennai-84
2	292196/26.5.2009	25,00,000/-	-do-
3	292197/26.6.2009	25,00,000/-	-do-
4	292198/26.7.2009	25,00,000/-	-do-
5	292199/26.8.2009	15,00,000/-	-do-

2.The complainant states that he had presented the cheques bearing No.292198 dt. 26.7.2009 for Rs.25,00,000/- and No.292199 dt. 26.8.2009 for Rs.15,00,000/- both drawn on ICICI Bank Ltd., Purasawalkam Branch, Chennai-84 in favour of the complainant on the promise and assurance of the accused that the cheques would be honoured on presentation of the same in the Bank. But the said cheques were returned dishonoured from the Bank of Baroda, Vadapalani Branch where they were presented by the complainant on 3.9.2009 with the

Bank Return Memo dt. 5.9.2009 with the remarks 'Insufficient Funds'. The complainant states that he had informed the accused about the dishonour of the said cheques and whereas the accused both requested him to re-present the said cheques in the Bank in the 1st week of October 2009 with the promise that they would arrange sufficient funds to honour the said cheques.

3. Accordingly, the complainant presented the above said two cheques bearing No.292198 dt. 26.7.2009 for Rs.25,00,000/- and No.292199 dt. 26.8.2009 for Rs.15,00,000/- both drawn on ICICI Bank Ltd., Purasawalkam Branch, Chennai-84 in his Bank i.e. Bank of Baroda, Vadapalani Branch, Chennai-26 for encashment, on 3-10-2009. But this time also the said cheques were returned dishonoured with the Bank Return Memo dt. 6.10.2009 with the Bank's remarks 'Refer to Drawyer'.

4. The complainant in this connection caused and sent a legal notice dt.19.10.2009 to the accused, calling upon them to pay the dishonoured cheques amounts to the complainant, within fifteen days on receipt of the notice. The said notice was received by the accused on 28.10.2009 and reply notice from them was received dated 5.11.2009 denying their legal liability.

5. The complainant states that the accused deliberately and wantonly failed and neglected to pay

the dishonoured cheques amounts to the complainant within the stipulated period, causing wrongful loss to him, and thereby committed an offence punishable under section 138 of Negotiable Instruments Act."

5. At this juncture it is necessary to refer to Sections 138 and 141 of Negotiable Instruments Act, which extracted hereunder:-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank

within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) 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; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability."

"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 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:*

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:

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.

Explanation.—For the purposes of this section—

*(a) '**company**' means any body corporate and includes a firm or other association of individuals; and*

*(b) '**director**', in relation to a firm, means a partner in the firm."*

6. A perusal of the entire complaint shows that there is absolutely no averment against the petitioner who is arrayed as A-3 though she is in-charge and responsible for the day to day affairs of the company as contemplated under Section 141 of the Act.

7. In the judgment reported in **(2005) 8 SCC 89 (S.M.S.Pharmaceuticals Ltd., vs. Neeta Bhalla)**, the Hon'ble Apex Court has held as follows:- (paragraphs 1, 2, 10, 11, 12, 13, 14, 15 and 18)

"1. This matter arises from a reference made by a two Judge Bench of this Court for determination of the following questions by a larger Bench :

" (a) whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.

(b) whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the

Managing Directors of Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against. "

2. The controversy has arisen in the context of prosecutions launched against officers of Companies under Sections 138 and 141 of the Negotiable Instruments Act of 1881 (hereinafter referred to as the "Act"). The relevant part of the provisions are quoted as under :

"Section 138 :

Dishonour of cheque for insufficiency, etc., of funds in the account Where any cheque drawn by a persons on an account maintained by him with a banker for payment of any amount of money to another persons from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) 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 account 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; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

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 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:

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.

Provided [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."

It will be seen from the above provisions that Section 138 casts criminal liability punishable with imprisonment or fine or with both on a person who issues a cheque towards discharge of a debt or liability as a whole or in part and the cheque is dishonoured by the Bank on presentation. Section 141 extends such criminal liability in case of a Company to every person who at the time of the offence, was incharge of, and was responsible for the conduct of the business of the Company. By a deeming provision contained in Section 141 of the Act, such a person is vicariously liable to be held

guilty for the offence under Section 138 and punished accordingly. Section 138 is the charging section creating criminal liability in case of dishonour of a cheque and its main ingredients are :

- (i) Issuance of a cheque.*
- (ii) Presentation of the cheque*
- (iii) Dishonour of the cheque*
- (iv) Service of statutory notice on the person sought to be made liable, and*
- (v) Non-compliance or non-payment in pursuance of the notice within 15 days of the receipt of the notice.*

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.

11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement.

12. 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.

13. The question of what should be averments in a criminal complaint has come up for consideration before various High Courts in the country as also before this Court. Secunderabad Health Care Ltd. and others v. Secunderabad Hospitals Pvt. Ltd. and others [1999 (96) C.C.(AP) 106] was a case under the

Negotiable Instruments Act specifically dealing with Sections 138 and 141 thereof. The Andhra Pradesh High Court held that every Director of a company is not automatically vicariously liable for the offence committed by the company. Only such Directors or Director who were in charge of or responsible to the company for the conduct of business of the company at the material time when the offence was committed alone shall be deemed to be guilty of the offence. Further it was observed that the requirement of law is that "there must be clear, unambiguous and specific allegations against the persons who are impleaded as accused that they were in charge of and responsible to the company in the conduct of its business in the material time when the offence was committed."

14. The same High Court in *v. Sudheer Reddy v. State of Andhra Pradesh and others* [2000 (99) CC (AP)107] held that

"the purpose of Section 141 of the Negotiable Instruments Act would appear to be that a person who appears to be merely a director of the Company cannot be fastened with criminal liability for an offence under Section 138 of the Negotiable Instruments Act unless it is shown that he was involved in the day-to-day affairs of the company and was responsible to the company."

Further, it was held that allegations in this behalf have to be made in a complaint before process can be

issued against a person in a complaint. To same effect is the judgment of the Madras High Court in R. Kannan v. Kotak Mahindra Finance Ltd. 2003 (115) CC (Mad) In Lok Housing and Constructions Ltd. v. Raghupati Leasing and Finance Ltd. and another [2003 (115) CC (Del) 957], the Delhi High Court noticed that there were clear averments about the fact that accused No.2 to 12 were officers in charge of and responsible to the company in the conduct of day-to-day business at the time of commission of offence. Therefore, the Court refused to quash the complaint. In Sunil Kumar Chhaparia v. Dakka Eshwaraiah and another [2002 (108) CC (AP) 687, the Andhra Pradesh High Court noted that there was a consensus of judicial opinion that:

" a director of a company cannot be prosecuted for an offence under Section 138 of the Act in the absence of a specific allegation in the complaint that he was in charge of and responsible to the company in the conduct of its business at the relevant time or that the offence was committed with his consent or connivance."

The Court has quoted several judgments of various High Courts in support of this proposition. We do not feel it necessary to recount them all.

15. Cases have arisen under other Acts where similar provisions are contained creating vicarious liability for officers of a company in cases where

primary liability is that of a company. *State of Karnataka v. Pratap Chand and others* 1981 (2) SCC 335 was a case under the Drugs and Cosmetics Act, 1940. Section 34 contains a similar provision making every person in charge of and responsible to the company for conduct of its business liable for offence committed by a company. It was held that a person liable for criminal action under that provision should be a person in overall control of day-to-day affairs of the company or a firm. This was a case of a partner in a firm and it was held that a partner who was not in such overall control of the firm could not be held liable. In *Municipal Corporation of Delhi v. Ram Kishan Rohtagi and others* [1983 (1) SCC 1], the case was under the Prevention of Food Adulteration Act. It was first noticed that under Section 482 of the Criminal Procedure Code in a complaint, the order of a Magistrate issuing process against the accused can be quashed or set aside in a case where the allegation made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is arrived at against accused. This emphasises the need for proper averments in a complaint before a person can be tried for the offence alleged in the complaint.

18. To sum up, there is almost unanimous

judicial opinion that necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."

8. In the later decision reported in 2014 (16) SCC 1 (Pooja Ravinder Devidasani Versus State Of Maharashtra), the Hon'ble Apex

Court has held as follows:- (paragraphs 17 to 21)

"17 There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company-M/S Elite International Pvt. Ltd. on 1st July, 2004 and had also executed a Letter of Guarantee on 19th January, 2005. The cheques in question were issued during April, 2008 to September, 2008. So far as the dishonor of Cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N.I. Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at

the time of commission of an offence will be liable for criminal action. A Director, 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 for an offence under Section 141 of the N.I. Act. In National Small Industries Corporation (supra) this Court observed:

"Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a

sufficient or adequate fulfillment of the requirements under Section 141.

18 In *Girdhari Lal Gupta Vs. D.H. Mehta & Anr.* (1971) 3 SCC 189, this Court observed that a person 'in charge of a business' means that the person should be in overall control of the day to day business of the Company.

19 A Director of a Company is liable to be convicted for an offence committed by the Company if he/she was in charge of and was responsible to the Company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned [See: *State of Karnataka Vs. Pratap Chand & Ors.* (1981) 2 SCC 335].

20 In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the N.I. Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.

21 In *Sabitha Ramamurthy & Anr. Vs. R.B.S. Channbasavaradhya* (2006) 10 SCC 581, it was held by this Court that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement

of fact so as to enable the court to arrive at a prima facie opinion that the accused is vicariously liable. [pic]Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned 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 the offence committed by the company. By verbatim reproducing the wording of the Section without a clear statement of fact supported by proper evidence, so as to make the accused vicariously liable, is a ground for quashing proceedings initiated against such person under Section 141 of the N.I. Act."

9. Heard the learned counsel for both sides and gone through the complaint. In the complaint other than the cause title depicting the petitioner as director and impleading her as the third accused no other averment has been made that she is a person who at the time of the commission of the offence was incharge of and was responsible to the company for the conduct of the company as well as the company.

10. As per the dictum laid down by the three Judges Bench reported in (2005) 8 SCC 89 (***S.M.S.Pharmaceuticals Ltd., vs. Neeta Bhalla***) that absolutely when there is no averment in the complaint that the petitioner was in charge and responsible for the day to day affairs of the company, the essential requirements under Section 141 of the N.I Act, is not satisfied. Excepting the oral submissions raised by the counsel for the respondent at the time of the arguments before this court that the petitioner is the wife of the second accused who is the Managing Director and that she is also involved in the day to day affairs of the business no other averment has been made against her in the complaint. In view of Section 141 when there is no averment against the petitioner the proceedings against the petitioner is an abuse of process of law and is liable to be quashed.

11. In the result, this Criminal Original Petition is allowed and the complaint in C.C.No.1811 of 2010 on the file of II Metropolitan Magistrate, Egmore, Chennai as against the petitioner alone is quashed. Consequently, the connected Miscellaneous Petitions 1 and 2 of 2010 are closed.

12. Since the matter is pending from 2010, the learned

Magistrate is directed to proceed with the trial in respect of the other

A.D.JAGADISH CHANDIRA,J

gr.

accused and complete the trial within a period of four months from the date of receipt of a copy of this order.

08.09.2017

gr.

Index : Yes

Internet: Yes

To

1.The II Metropolitan Magistrate, Egmore, Chennai.

2.The Public Prosecutor, High Court, Chennai.



Crl.O.P.No.25540 of 2010

and

M.P.No.1 and 2 of 2010

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