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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:07.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

CRL.O.P.(MD)No.15000 of 2017 and
Crl.M.P(MD).Nos. 9981 and 9982 of 2017

1.K.Lakshmipriya
2.B.Jeyanthi : Petitioners

-Vs-

R.S. Ashok : Respondent

PRAYER: Criminal Original petition is filed under Section 482 of Criminal Procedure Code to call for the records relating to STC.No.126 of 2017, on the file of the Judicial Magistrate Court No.II, FTC.No.II, Magistrate Level, Madurai and to quash the same as illegal as against these petitioners.

For Petitioners : Mr.V. Santha Kumaresan

O R D E R

This petition is filed to call for the records relating to STC.No.126 of 2017 on the file of the Judicial Magistrate Court No.II, FTC.No.II, Magistrate Level, Madurai and quash the same.

2. The petitioners, who are arrayed as A3 and A4 are the respondents 3 and 4 in the complaint in S.T.C.No.126 of 2017. The respondent herein has filed a complaint in S.T.C.No.126 of 2017 for the offences under Sections 138 and 142 of Negotiable Instruments Act, before the learned Judicial Magistrate No.II, Fast Track Court No.-II, Magistrate Level, Madurai. The respondent's complaint clearly discloses that the offence under Section 138 of Negotiable Instrument Act has been committed by the respondents 3 and 4 in the complaint, who are the petitioners herein. The first respondent in the complaint is the Private Limited Company and the second respondent in the complaint is the Managing Director of the Company. The petitioners herein / respondents 3 and 4 are arrayed as Directors of the company and shown as persons who are in-charge of the day to day affairs of

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the company. Paragraph 2 of the complaint reads as follows:-

> "முதல் எதிரி ஒரு நிறுவனமாகும், மேற்படி நிறுவனத்தை எதிரிகள் கூட்டாக நடத்தி வருகின்றனர், 2வது எதிரி மேற்படி நிறுவனத்தின் நிர்வாக இயக்குனர் ஆவார், 3 மற்றும் 4 வது எதிரிகள் மேற்படி நிறுவனத்தின் பங்குதாரர்கள் ஆவார்கள், அனைவரும் மேற்படி நிறுவனத்தின் அன்றாட தொழில் நடவடிக்கைகளை கவனித்துக் கொண்டு வந்தனர், மேற்படி நிறுவனத்தின் அனைத்து தொழில் நடைமுறைகளுக்கும் சட்டப்படி பொறுப்பாவார்கள்,"

Section 141 of Negotiable Instruments Act reads as follows:

"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 be 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 offence 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."

3. The petitioners, who are arrayed as respondents 3 and 4 in the complaint are shown as person in charge of and responsible to the company for the conduct of the business. It is stated by the petitioners that the complaint is not maintainable as against the petitioners. The accused in the present case are either Managing Director or Director of the Company, who are shown to be in-charge of and responsible for the conduct of the business of the company, at the relevant point of time. Since specific allegations are found in the complaint making the petitioners responsible, as

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persons who are in-charge of and responsible for the conduct of the day to day business of the company, the contention of the petitioners that the complaint is not maintainable as against the petitioners is un-sustainable in law.

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4. In support of his contention, the learned counsel for the petitioners has relied on the following Judgments:-

(i) The Hon'ble Supreme Court, in the case of ***(S.M.S. Pharmaceuticals Limited Vs. Neeta Bhalla and another)***, reported in ***(2005) 8 SCC 89*** held as follows in paragraph nos. 10,18 and 19 :

> 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

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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.

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.

19. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement

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of Section 141 is that 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.

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(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

(ii) In the Judgment reported in (***2007) 9 SCC 481*** in the case of ***(N.K.Wahi Vs. Shekhar Singh and others)***, the Hon'ble Supreme Court has followed the Judgment of the Hon'ble Supreme Court reported in ***(2005) 8 SCC 89 (S.M.S. Pharmaceuticals Limited Vs. Neeta Bhalla and another).***

(iii) In yet another Judgment reported in ***(2007) 12 SCC 788*** in the case of ***(K.Srikanth Singh Vs. North East Securities Ltd and another)***, the Hon'ble Supreme Court has held as follows:-

4. It is not in dispute that for showing a vicarious liability of a Director of a Company, upon the complaint it is incumbent to plead that the accused was responsible to the company for the conduct of the business of the Company. No such allegation having been made in the complaint petition, in our opinion, the High Court was not correct in passing the impugned judgment. The allegation contained in the complaint petition was that all the accused Directors participated in the negotiations for obtaining financial help for the accused No. 1, which in our opinion, would not give rise to an inference that the appellant was responsible for day-to-day affairs of the Company. An offence envisaged under Section 138 of the Negotiable Instruments Act contains several ingredients as has been held by a Three-Judge Bench of this Court in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr., [2005] 8 SCC 89, in the following terms:-

"10. ... 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

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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 the 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 the 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 the 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."

5. All the above Judgments relied upon by the learned counsel appearing for the petitioners have no application to the facts of the present case. Specific allegations are made against the petitioners 1 and 2, who are respondents 3 and 4 in the complaint and they are in-charge of and responsible for the conduct of the business of the company. Since the involvement of the petitioners as persons in-charge of the business and day to day affairs is specifically stated in the complaint, this Court see no legal ground to entertain this petition.

6. Except relying upon the Judgment of the Hon'ble Supreme Court the learned counsel appearing for the petitioners has not made any other statements, controverting the statements in the petition, especially paragraph no.2 of the petition. Hence, the Criminal Original Petition is dismissed. Consequently, connected Miscellaneous Petitions are closed.

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7. However, the learned counsel appearing for the petitioners seek indulgence of this Court to dispense with the personal

appearance of the petitioners. It is open to the petitioners to file a petition before the lower Court and the lower Court will decide the same in accordance with law.

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Sd/-
Assistant Registrar (CO)

/True Copy/

Sub Assistant Registrar

To

The Judicial Magistrate No.II, FTC.No.II,
Magistrate Level, Madurai.

TRP
TE/MR-KKR/SAR-2 : 06/12/2017 : 7P/2C

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