THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION Nos.10507 AND 10508 OF 2010

COMMON ORDER:

The quash petitioner in both the petitions is A5, by name Sri Naseem Ahmed respectively in C.C.No.27 and 22 of 2010 on the file of VI Additional Chief Metropolitan Magistrate, Nampally, Hyderabad, where the learned Magistrate has taken cognizance for the offence punishable under Section 138 N.I.Act on the private complaint of the respective 2nd respondent by name M/s.Harsha Electronics, represented by its Proprietor Ms.M.Manorama in C.C.No.27 of 2010 and M/s.Creative Electronics, represented by its Managing Partner, Mr.K.K.Harinath Reddy in C.C.No.22 of 2010.

2. There are in all eight accused of each case including the quash petitioner A5 respectively and out of the said eight accused, A1 is M/s.Enso Seecutrack Limited (Formerly Tyche Peripheral Systems Limited), represented by its Managing Director, Amit Datta Amiya Majumdar, said Amit Datta Amiya Majumdar as 2nd accused and directors of the entity by name Pradeep Chauhan, Vaibhav Maloo, Naseem Ahmed, Jagdish Mal Lodha, Ram Prasad Gadde Siva and Sabari S.Kambli (as directors of it shown) as other accused.

3. In the two quash petitions, the grounds urged by the A5/petitioner to quash the cognizance taken for the offences

against him concerned respectively are that the complaints are bereft of particulars as to how the petitioner leave about the others among A3 to A8 as directors of the A1 entity personally liable or responsible for day to day affairs of the entity except stating all the accused are responsible for day to day affairs, there is no mention as to how they are incharge of day to day affairs and they are not the signatories as drawers of the alleged cheques in question but for A3 and A8 and particularly, the petitioner is not even drawer of any of the cheques and so far as the petitioner concerned, he is not resident director and cannot be prosecuted for the alleged dishonour of the cheque issued in question and thereby the cognizance order in so far as against the petitioner in the two cases are liable to be quashed.

4. In view of the above grounds urged, it is necessary to read the contents of the respective two complaints, where the averments are almost uniform, that A1 is a limited company and A2 to A8 are directors of it and are liable for day to day affairs of it and A1 approached complainant for supply of electronic cash registers and cash counting machines that were supplied pursuant to the orders placed on credit basis on the running account and accused fallen due for the credit purchased, promised to pay for the late payments with interest as per business norms and it is for the demands A1 represented by A2 to A8 issued cheque bearing Nos.254973 (subject matter of C.C.No.27 of 2010) and 254971 (subject

matter of C.C.No.22 of 2010), dated 07.01.2009, drawn on State Bank of India, Commercial Branch, Hyderabad, for the sums respectively of Rs.13,78,153/- and Rs.80,60,546/- in part payment of the amounts due for the legally enforceable credit liabilities and all promised to pay and the cheques when presented returned dishonoured as payment stopped by the drawer and from the intimation of the bank covered by cheque return memo, the complainant cause issued legal notice demanding for payment and the accused failed to pay and all the accused are thereby liable including A3 and A8, who are the drawers of the two cheques in question respectively for the said offence and thereby from accrual of cause of action, maintained the complaints to take cognizance.

5. From the very complaint averments, the cheques were issued on behalf of A1, by A3 and A8, as signatories and not by others and A2 as Managing Director of A1 Company leave about otherwise liable any from the status. So far as A4 to A7 including the petitioner as A5 concerned, merely because their status as Directors, they are not responsible for not even drawers like A3 and A8 on behalf of A1 entity and the stray allegation of all are responsible for day to day affairs is not even suffice to mulkt them with liability for the offence under section 138 N.I.Act.

6. Even from reading of section 141 of the Act, the law is fairly settled more particularly from the expression of this Court, referring to catena of expressions in **Narendra Kurangi and Others Vs. Greenmint India Agritech (P) Limited, Hyderabad and Another**[1] by scanning the law categorically held that there must be specific averments in the complaint if at all other than the drawer and even for a company for any of its directors or other officers to make them responsible under Section 141 of the Act as to how and in what manner they are responsible either in issuing the cheques or for its dishonour, without which even any legal notice after dishonour of its cheques received by them with or without reply that will not make them liable even with any reply and the Company and its Managing Director as drawer of the cheque on behalf of the Company can prima facie liable, but not the other directors in the absence of any specific allegation making them responsible as in-charge of affairs of the company with clear averment. For more clarity Para 5 of the **Narendra Kurangi** supra as follows:

> "5) From the above rival contentions to answer in so far as liability of a Company concerned, law is very clear on the principle of alterego. The Constitutional bench in ***Standard Chartered Bank V. Directorate of Enforcement***[2] held that Company can be prosecuted and convicted for an offence which requires a minimum sentence of imprisonment. Though it was held that it is not

[1] 2016 (1) ALD (Crl.) 177
[2] (2005)4 SCC 530

expressing any opinion on the question whether a Corporation could be attributed with requisite *Mens rea* to prove the guilt the same is later clarified by the subsequent expression of the Apex Court in ***Iridium India Telecom Ltd. V. Motorola Inc.***[3]**,** referring to the several expressions of the American and England Courts in Paras 59 to 64 of the expression page Nos.98 to 100 in nutshell that a Company in many ways be like a human body they have a brain and nerve centre which controls what they do. Some of the people in the Company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent directing the mind and will of the Company and control what they do. The state of mind of these managers is the state of mind of the Company and is treated the law as such. The fault of the manager will be the personal fault of the Company. The knowledge and intention must be imputed to the body corporate. It was concluded therefrom by referring to ***Standard Chartered Bank*** Para No.6 supra of a Company is liable to be prosecuted and punished for criminal offences in deviation to the earlier authorities in India of Corporations cannot commit a crime, for generally accepted modern rule is that except for such crime as a corporation is held incapable of committing by reason of the fact that they involve personally with malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agent. The criminal intent of the alterego of the Company, that is the personnel group of persons that guide, the

[3] (2011)1 SCC 74

business of the Company would be imputed to the Company/corporation. It was the observation in ***Iredium*** supra that was again followed in latest three Judge bench expression of the Apex Court in ***Sunil Bharti Mittal V. C.B.I*[4]*.*** It was observed in ***Sunil Bharti Mittal*** (supra) that the corporate entity, an artificial person acts through its officers, directors, managing director, chairman etc, if such fact continues an offence involving Mensrea it would normally be evident and action of that individual who would act on behalf of the Company in particular in relation to criminal conspiracy. However, the cordial principle of criminal jurisprudence is that there is no vicarious liability unless the statute specifically provides so. An individual who has perpetrated the commission of an offence on behalf of a Company can be made as an accused along with the Company, if there is sufficient material on his active role. Second situation is knowledge it may be implicated is in those cases where statutory regime itself attracts the doctrine of vicarious liability by specifically incorporating by such a provision. It is therefrom referring the Section 141 of N.I.Act in particular as an example at para No.44 of ***Sunil Bharti Mittal*** supra and the expression of the Apex Court in ***Aneeta Hada (II) V. Godfather Travels & Tours (P) Ltd*[5]** held that the group of persons that guide the business of the company if the criminal intent that would be imputed to the body corporate and in this back drop Section 141 of the N.I.Act has to be understood. Such a position is therefore because of statutory intendment making it a deemed fiction. In

[4] (2015)4 SCC 609
[5] (2012)5 SCC 661

Sunil Bharti Mittal supra it also referred the three Judge bench expression of the Apex Court in ***S.M.S.Pharmaceuticals Ltd. V. Neeta Bhalla***[6]. In ***S.M.S.Pharma*** supra at para No.8 it is observed that there is no universal rule that a Director of a Company is in-charge of its every day affairs. It all depends upon the respective roles assigned. A company have managers or secretaries for different Departments and may have more than one Manager or Secretary. In ***Aneeta Hada*** supra it is observed with reference to Section 141 of N.I.Act that the deeming fiction makes the functionaries of the Companies to be liable as its own signification. In fact before ***Aneeta Hada, S.M.S.Pharmaceuticals, Standard Chartered Bank*** and ***Iridium India*** supra, some of which referred in ***Sunil Bharti Mittal,*** the expression of the Apex Court in ***Anil Hada V. India Accrelic Limited***[7] speaks in a case under Section 141 of the N.I.Act that even the Company or Corporation not impleaded as accused the proceedings against a Director can be issued. The same later held not good law in ***Aneeta Hada (I) V. Godfather Travels & Tours (P) Ltd.***[8] saying without the Company impleaded as accused on the principle of *Lex non cogit ad impossibilia* and from that legal snag if the Company is not made accused, the proceedings against others cannot be. The said principle of ***Aneeta Hada*** (1) then came before three Judge bench expression in ***Aneeta Hada*** (2) supra where the ***Anil Hada*** is over ruled and ***Aneeta Hada*** (1) is affirmed in saying at paras 51 to 59 the relevancy of which reads the decision in ***Anil Hada*** has to be treated not laying down the correct law as

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[6] (2005)8 SCC 89
[7] (2000)1 SCC 1
[8] (2008)13 SCC 703

far as it states that the Director or any other officer can be prosecuted without impleadment of the Company on the doctrine referred supra. Section 141 of the N.I.Act makes the other persons vicariously liable for commission of an offence on the part of the Company and to attract the vicarious liability the condition precedent laid down in Section 141 of the N.I.Act has to be satisfied. Thus, the words as well as the Company used therein makes it absolutely and unmistakably clear that when the Company can be prosecuted, then the only persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereafter. For maintaining prosecution under Section 141 of the N.I.Act, arraying of a Company as an accused is imperative. The other categories of offenders can only be brought in the drag net on the touch stone of vicarious liability as the same has been stipulated in the petition itself as held in ***State of Madras V. C.V.Parekh***[9]. The same question when again came for consideration before the two Judge bench in ***Anil Gupta V. Star India Private Limited***[10], ***Aneeta Hada (2)*** of two Judge bench referred supra is reiterated in para No.12 in saying the decision in ***Anil Hada*** supra is over ruled with the clarification as stated in Para No.51 of ***Aneeta Hada*** (2) and the decision in ***U.P.Pollution Control Board V. Modi Distillery***[11] has to be restricted to its own facts. In ***S.M.S Pharmaceuticals*** (three Judge bench) supra also it is made clear with reference to section 141 of the N.I.Act that it is necessary to aver that at the time the offence was committed, the person accused

[9] 1973 SCC 491
[10] (2014)10 SCC 373
[11] (1987)3 SCC 684

was in-charge of and responsible for conduct of business of the Company and without this averment being made in the complaint, the requirements of Section 141 of the N.I.Act cannot be said to be satisfied. A clear case should be spelled out in the complaint against the persons sought to be made liable to show as in-charge of and responsible to the Company for the conduct of its business. Every person connected with the Company thereby shall not fall within the ambit of Section 141 of the N.I.Act but of those persons who were in-charge of and responsible for the conduct of business of the Company at the time of commission of the offence. The liability arises on account of conduct or act or omission on the part of a person and not merely on account of holding an offence or a position in a Company. The complaint therefore must disclose the necessary facts which make a person liable, specifically aver that at the time of offence committed, the person accused was in-charge of and responsible for conduct of the business of the company. A director cannot be deemed to be in-charge of and responsible to the Company for the conduct of the business for no deemed liability of a Director from that status, unless the aforesaid requirement of Section 141 of the N.I.Act has been averred as a fact in the complaint. In another expression referring to Section 141 of the N.I.Act by the Apex Court in ***Saroj Kumar Poddar V. State***[12] referring to ***S.M.S. Pharmaceuticals*** supra apart from another expression, that for dishonour of cheque making of requisite averments in the complaint is a statutory requirement and the allegations satisfy the same, in the absence of which

[12] (2007)3 SCC 693

the proceedings are liable to be quashed. The other expression of the Apex Court two Judge bench in ***National Small Industries Corporation V. Harmeet Singh***[13] also referring to ***Parekh*** supra and ***S.M.S.Pharmaceuticals*** supra among other expressions held that vicarious liability on the part of any Director or other person as in-charge and responsible to the conduct of business be specifically averred, though same is not required against a Managing Director. Section 141 of the N.I.Act is very clear that it must be shown that the person for vicariously liable should be at the time of offence committed in-charge of and responsible to the Company for conduct of its business. Otherwise every person connected with the Company shall not be made liable but those persons responsible for conduct of its business. A Director of a Company who is not incharge and not responsible for conduct of business at relevant time will not be made liable for the criminal offence. As the liability arises from being incharge and responsible for conduct of business of the Company at the relevant time of commission of offence. It is not even sufficient to make a bald and cursory statement in a complaint that the Director is in-charge of and responsible to the Company for conduct of its business without saying anything more as to his role. The complaint should spell out as to how and in what manner a co-accused was incharge of or responsible to the accused company for conduct of its business. Same is also reiterated in another two Judge bench expression of the Apex Court in ***Central Bank of India V. Asian Global Limited***[14] relying on ***S.M.S.***

[13] (2010)3 SCC 330
[14] 2010(2) ALD (Crl.) 564 (SC)

> ***Pharmaceuticals*** and those were followed by a single Judge expression of this Court in ***Arrakuntal V. Ganeshan V. Sai Rama Cotton Syndicate***[15] . Even other latest expression in ***Poojari Ravinder Devi Dasani V. State of Maharashtra***[16] reiterates the same reliance upon ***National Small Industries Corporation*** supra."

7. From the above, it is suffice to say the taking of cognizance by the learned Magistrate against the petitioner/A5 among A1 to A8 particularly other than A1, A2, A3 and A8 concerned of the two cases, for the two cheques drawn by A3 and A8 on behalf of A1 besides A2 is Managing Director of A1, is unsustainable and liable to be quashed.

8. Accordingly and in the result, both the criminal petitions are allowed by quashing the proceedings against the petitioner/A.5 by setting aside the cognizance orders. Consequently, miscellaneous petitions, if any shall stand closed.

DR.B.SIVA SANKARA RAO, J

21s.08.2017
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[15] 2013(2) ALD (Crl.) 331 (AP)
[16] AIR 2015 SC 675