HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.6500 of 2017

ORDER:

The petitioner is accused No.6 of C.C.No.206 of 2017 on the file of III Special Metropolitan Magistrate, Cyberabad at Kukatpally, among 6 accused for the offence punishable under Section 138 r/w 142 of the Negotiable Instruments Act (for short 'the Act') from the private complaint of the 2nd respondent against the 1st accused M/s. Devarakonda Educational Soceity represented by its Vice President, the 2nd accused-Mr. D.K. Sridhar, 3rd accused-Sri Devarkonda Satish, Executive Member, 4th accused-Smt. D.Padmajyoti, Joint Secretary, 5th accused-Smt. D.Deepti, Member, none other than wife of 2nd accused and 6th accused-Smt. Devarakonda Vijaya, Treasurer of the society.

The averments in the complaint are that accused No.2 being Vice President of the A.1 society having good acquaintance with V.G. Sankar Rao, proprietor of complainant firm M/s. Vijaya Trade Centre, approached him and made a request to extent financial help in order to meet the necessities of A.1 society and in pursuance of the same, A.1 availed hand loans from complainant occasionally in the name of A.1 and A.2 through RTGS and online transfer an amount of Rs.4,09,80,000/- with an understanding that they would repay said amount with interest @ 24% per annum. It is averred that in fact the complainant obtained said amounts as loans got sanctioned from Canara Bank, Prashant Nagar and Ameerpet branches in order to oblige the request of A.2 on behalf of A.1. Subsequently, A.1 & A.2 failed to repay said amount in spite of repeated reminders made by the complainant, however A.2 on behalf of A.1 society addressed letters dated 09.12.2014 & 12.12.2014 to the complainant and to the Chief Manager, Canara Bank, SME Branch, Kukatpally, confirming the dues as Rs.3,46,00,000/- and assured to repay the amount at the earliest, though the actual loan is Rs.4,09,80,000/-. It is further averred that subsequently, A.2 and his father D.Vittal Rao executed letter for debt agreement dated 04.02.2016 agreeing to pay the total amount to the creditor, Sri V.G. Shanker Rao, proprietor of the complainant firm. Thereafter, on demand made by the complainant, A.2 in his personal capacity and in the capacity of authorized signatory of A.1 society and also in his capacity of joint account holder along with his wife A.5 have issued the following cheques in favour of the complainant firm towards part payment of said hand loan amounts i.e., cheques Nos.010213, 010219, 010215, 010214, 010216, 010217, 010220 & 010218 of Rs.5,00,000/- each drawn on The Shamrao Vithal Co-operative Bank Limited, Panjagutta, Hyderabad, dated 08.11.2016, 08.11.2016, 10.11.2016, 10.11.2016, 12.11.2016, 12.11.2016, 09.11.2016 & 09.11.2016 respectively and further cheques bearing Nos.788619, 033416, 596914, 521898 & 521941 for Rs.10,00,000/-, 15,00,000/-, Rs.15,00,000/-, Rs.25,00,000/- & Rs.22,00,000/- respectively drawn on ICICI Bank, Panjagutta Branch, dated 08.11.2016, 07.11.2016, 15.11.2016, 10.11.2016 & 15.11.2016 respectively. It is further averred that when the complainant presented said cheques, they were returned dishonoured as “refer to drawer”, “funds insufficient” and payment stopped by drawer” respectively. Thereafter, the complainant issued statutory legal notice dated 01.12.2016, A.1 to A.5 received the notice on 03.12.2016 & 05.12.2016, whereas A.6 deliberately evaded to receive the said notice and the same was returned. It is also averred A.2 to A.5 are actively participating in the society of A.1, thereby are all liable for prosecution under Section 138 of the Act. Hence to take action.

The contentions in the quash petition are that there is no involvement of the petitioner/A.6 for the offence and there is no specific averment about the petitioner in the complaint, except as treasurer of the society and also she is not the drawer of the cheques. It is contended that she is no way concerned for the offence and there is no whisper of her role in the said offence. It is further contended that the transaction is in between the complainant and accused Nos.1 & 2 and there is a civil suit filed by the complainant against the petitioner and other accused persons for recovery of amounts and the complainant is doing money lending business for interest without registering and obtaining licence under Section 3 of the A.P. (TA) Money Lenders Act, 1349 fasli and doing illegal business on interest not in accordance with law and initiation of the private complaint is illegal and thereby allow the Criminal Petition by quashing the proceedings against the petitioner.

Whereas it is the submission of the learned counsel for the complainant that the prosecution is sustainable including against the quash petitioner and the learned Magistrate rightly taken cognizance against A.1 to A.6 including the petitioner/A.6, who is also responsible for the affairs of the company A.1 along with A.2-Vice President and the complaint averments are sufficient to take cognizance and there is nothing to interfere with the cognizance orders and the accusation made out against the accused and sought for dismissal of the quash petitions.

Heard learned counsel for the petitioner/accused No.6 and also learned counsel for the complainant and perused the material on record.

The facts supra are in no need of repetition for purpose of deciding the petition. Coming to the scope of law, this Court 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 expressing any opinion on the question whether a Corporation

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

could be attributed with requisite Mensrea 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 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

[3] (2011)1 SCC 74
[4] (2015)4 SCC 609

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 ***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 far as it states that the Director or any other officer can be prosecuted

---

[5] (2012)5 SCC 661
[6] (2005)8 SCC 89
[7] (2000)1 SCC 1
[8] (2008)13 SCC 703

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 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

---

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

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 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

[12] (2007)3 SCC 693
[13] (2010)3 SCC 330
[14] 2010(2) ALD (Crl.) 564 (SC)

S.M.S. 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."

From the above legal position, coming to the facts detailed supra there are no specific allegations against the petitioner/A.6 as to how he is responsible for the issuing of the cheques and the dishonour of the cheques in question, it is suffice to say the taking of cognizance by the learned Magistrate against the petitioner/A.6 for the offence under Section 138 of the Act on facts referred supra is unsustainable and is liable to be quashed.

Accordingly and in the result, the Criminal Petition is allowed by quashing the proceedings against the petitioner/A.6 by setting aside the cognizance order and bail bonds if any stand cancelled. Consequently, miscellaneous petitions, if any shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 04.10.2017
ska

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