THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.11849 OF 2016

ORDER:

This Criminal Petition is filed under Section 482 Cr.P.C. to quash the proceedings in C.C.No.390 of 2015 pending on the file of XXV Special Magistrate Court, Erramanzil, Hyderabad, for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881(for short 'the Act').

2. The 2nd respondent filed a complaint against the petitioner and two others for the offence punishable under Section 138 of the Act, alleging that A1 is a company represented by A2 and A3, who are Directors and obtained loan of Rs.10,00,000/- on 12.01.2012 and the same was paid by way of cheque bearing No.614954 drawn on Indian Bank, Chilakaluripeta Branch and credited the same to the account of A1-company through RTGS. Later, A-1 company paid an amount of Rs.1,20,000/- on 19.12.2012 towards part payment of interest and failed to pay interest and principal, but issued a cheque bearing No.917145 dated 14.12.2014 for Rs.10,00,000/- drawn on Andhra Bank, Apollo Hospital Branch, Jubilee Hills, Hyderabad, towards part payment of the hand loan. But, on its presentation for collection, the same was returned by the Andhra Bank with an endorsement "insufficient funds" and issued a memo dated 30.12.2014. Thereafter, a notice in compliance of Section 138 of the Act, was issued to the accused calling upon them to pay the amount covered by the cheque within 15 days from the date of

receipt of notice but they did not comply the legitimate demand and failed to pay the amount covered by the cheque. Hence, filed complaint.

3. The present petition is filed mainly on the ground that the petitioner/A3 is not drawer of the cheque, though he executed a document and there exists no grounds to proceed against him for the offence punishable under Section 138 of the Act. It is also contended that the 2nd respondent/complainant filed a suit for recovery of amount, which is pending before the competent Court, against petitioner and two others. The petitioner is only a guarantor as per the allegations made in the complaint and when he is accepted to be a guarantor for payment of the debt due by A1 and A2 he never issued any cheque, thereby, he cannot be proceeded in a trial for the offence punishable under Section 138 of the Act and prayed to quash the proceedings.

4. During hearing the learned counsel for the petitioner would contend that the petitioner/A3 never issued any cheque in favour of the 2nd respondent and it was issued by A2-Dr.Kasi Reddy Krishna Swaroop Reddy on behalf of A1-M/s.Vitae Health Care Pvt. Ltd., represented by its Director Dr.Kasi Reddy Krishna Swaroop Reddy. Therefore, the petitioner, who has not signed on the cheque, is not liable for punishment for the offence punishable under Section 138 of the Act and prayed to quash the proceedings. He also drawn the attention of this Court to the plaint in O.S.No.93 of 2015 pending on the file of the II Senior Civil Judge, City Civil Court, Hyderabad,

for recovery of Rs.14,99,330/-, where the petitioner herein is described as Directors of a company and on behalf of company they utilized the amount for the business. When the suit is pending, the petitioner cannot be proceeded in a trial in criminal proceedings for the offence punishable under Section 138 of the Act. In the legal notice dated 05.01.2015, it is averred that both A2 and A3, being the Directors of A1, received amount and committed default in repayment and thereby the petitioner, being a guarantor, is not liable to be proceeded, and prayed to quash the proceedings.

5. The learned counsel for the petitioner has drawn the attention of this Court to several judgments of the Apex Court reported in Pooja Ravinder Devidasani v. State of Maharashtra (Criminal Appeal Nos.2604-2610 of 2014 decided on 17.12.2014), I.C.D.S.Ltd. v. Beena Shabeer[1], Smt.Supreet Kaur v. Model Cooperative Urban Bank Ltd[2], Nusun Genetic Research Ltd. v. the State of Telangana[3], in support of his contention.

6. Whereas, Sri G.Dhananjai, learned counsel for the 2nd respondent, would contend that the petitioner is also one of the borrower being a Director of A1-company and signed on the promissory note as a co-borrower representing A1 and therefore he cannot be termed as a guarantor as per the promissory note dated 12.01.2012 for Rs.10,00,000/-. When a cheque was issued on

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[1] 2002 (6) SCC 426
[2] 2011 CriLJ 762
[3] CDJ 2016 APHC 077

behalf of company by its one of the Directors, the petitioner is also liable for the offence punishable under Section 138 of the Act, being one of the Directors, who is participated in day to day affairs of the company. Therefore, the petitioner was never acted as guarantor but a co-borrower. The allegation made in para-4 of the complaint does not disclose that the petitioner was a guarantor not as a borrower. On the other hand, it averred that A2 and A3 individually and also executed a guarantee agreement agreeing to repay the amount in case A1 commits default in repayment of the amount. Therefore, he cannot escape from liability to pay the debt and there exists sufficient grounds to proceed against the petitioner for the offence punishable under Section 138 of the Act and drawn the attention of this Court to several judgments reported in Rallis India Limited v. Poduru Vidya Bhushan[4], Anil Hada v. Indian Acrylic Ltd.[5] and Standard Chartered Bank v. State of Maharashtra[6]. On the strength of the law declared by the Court in the above judgments, he prayed to dismiss the petition, while contending that whether petitioner/A3 is a Director of A1 is a disputed question of fact, which cannot be decided while exercising inherent power under Section 482 Cr.P.C.

[4] (2011) 13 SCC 88
[5] 2000(1) SCC 1
[6] AIR 2016 SC 1750

7. In view of specific contentions of both parties, the point that arises for consideration is:

> "Whether there exists any grounds to proceed against the petitioner/A3 in C.C.No.390 of 2015 pending on the file of XXV Special Magistrate Court, Erramanzil, Hyderabad, for the offence punishable under Section 138 of the Act? If not, whether the proceedings in C.C.No.390 of 2015 against the petitioner are liable to be quashed?'

8. Undisputedly, the 2nd respondent filed C.C.No.390 of 2015 against the petitioner arraying him as A3 and two others i.e., M/s.Vitae Health Care Pvt. Ltd., represented by its Director Dr.Kasi Reddy Krishna Swaroop Reddy and Dr.Kasi Reddy Krishna Swaroop Reddy in another capacity for the offence punishable under Section 138 of the Act. The limited question to be decided before this Court is that the petitioner was not the person issued the cheque towards discharge of debt due, since the cheque was not signed by him. The basis for claiming relief in C.C.No.390 of 2015 is that M/s.Kalpatharuvu Finances lend an amount of Rs.10,00,000/- on 12.01.2012 and executed promissory note on the even date by M/s.Vitae Health Care Pvt. Ltd., represented by its Director Dr.Kasi Reddy Krishna Swaroop Reddy and Dr.Kasi Reddy Krishna Swaroop Reddy, Dr.Kareti Mahendranath Reddy, who is a third borrower on behalf of A1, Dr.Kasi Reddy Krishna Swaroop Reddy alone signed but A2 and A3 signed on the promissory note in the individual capacity also. They also executed a guarantee agreement for due payment of debt in the individual capacity by Dr.Kasi Reddy

Krishna Swaroop Reddy and Dr.Kareti Mahendranath Reddy, the petitioner/A3 in favour of M/s.Kalpatharuvu Finances in favour of the complainant/2nd respondent herein. The terms of agreement of guarantee dated 12.01.2012 are clear that M/s.Vitae Health Care Pvt. Ltd., represented by its Director Dr.Kasi Reddy Krishna Swaroop Reddy borrowed Rs.10,00,000/- and the petitioner and others undertake to discharge the debt due to the 2nd respondent in the event of A1 failed to discharge the debt due. Thus, the petitioner executed a promissory note and also an agreement of guarantee. At this stage, it is relevant to refer to the allegations made in the complaint for limited purpose to find out whether the petitioner is the Director of the company. In para-3 of the complaint it is averred that A2 and A3 being the Directors of A1 company borrowed Rs.10,00,000/- on 12.01.2012 as hand loan and later they executed a promissory note and acknowledged receipt of amount and agreement of guarantee to repay the debt by A2 and A3 in their individual capacity. The cheque was issued by A1 for Rs.10,00,000/- on 14.12.2014 but it was signed by A2 on behalf of A1 being the Director. In a notice dated 05.01.2015, it is specifically averred that A2 and A3 being the Directors of A1 borrowed Rs.10,00,000/- for the business purpose while agreeing to repay the same together with interest at 18%p.a. and executed promissory note on 12.01.2012 for Rs.10,00,000/- and issued a receipt acknowledging receipt of the amount. Thus, the petitioner, along with A2 being Director of A1, borrowed amount and executed promissory note in the capacity of one of the Directors of the company. Merely because the cheque was signed by A2 on behalf of A1, the petitioner cannot avoid his criminal liability since he is one of the Directors of the company-A1. But under Section 141 of the Act, the main requirement is that unless the other Director is participating in day to day affairs of the company, he cannot be made liable for the offence punishable under Section 138 of the Act. In the entire complaint, there was no allegation that the petitioner is directly participating in the day to day affairs of the company, in view of the requirement under Section 141 of the Act and in such a case, he cannot be made liable for prosecution for the offence punishable under Section 138 of the Act. The learned counsel for the petitioner placed reliance on the judgment of the Apex Court in Pooja Ravinder Devidasani (referred supra), where the Supreme Court while deciding liability of the accused, Directors of the Company other than Managing Director held that when the Director being a non-executive Director was no doubt custodian of governance of company but not involved in day to day affairs of running its business and only monitored executive activity. To make a non-executive Director liable for the offence committed by the company under Section 141 of the Act, there must have been specific averments against such non-executive Director showing as to how and in what manner such Director was responsible for conduct of business of company. In the absence of such allegation and proof of the same, such non-executive Director cannot be proceeded for the offence punishable under Section 138 of the Act and the High Court by exercising its jurisdiction can quash proceedings against non-executive Director, when there is no averment in the complaint that the non-executive Director is involved in day to day affairs of the company i.e., A1 herein, the Apex Court after analyzing Law declared in various judgments earlier came to such conclusion that unless there is an allegation to the effect that the non-executive Director is participating or involved in day to day affairs of the company, he cannot be made liable.

9. In I.C.D.S.Ltd. (referred supra), a similar question came up before this Court and discussed about liability of guarantor and held that guarantor is not liable. In the present case, the petitioner was not only the guarantor but he is also Director of the company and co-borrower being the Director of A1 Company. Therefore, the above judgment has no direct relevance to the issue involved in this matter.

10. In Smt.Supreet Kaur(referred supra), this Court held that to attract an offence punishable under Section 138 of the Act not only on the basis of liability to pay some of amount but also coupled with the fact that instrument is issued by the person concerned. In the facts of the above judgment, the petitioner was not signatory on the cheque but arrayed as an accused, when he is not a person issued cheque, he cannot be made liable for the said acts.

11. In Nusun Genetic Research Ltd. (referred supra), this Court discussed about the liability of the Directors of the company, who is the principal borrower and held that only on vague allegation that two Directors A3 and A4 of A1-entity are also responsible for day to day affairs and they got knowledge about lending and giving of cheques by A1-entity signed by A2, they cannot be made liable for the offence on the basis of vague allegations, in the absence of factual foundation with specific plea of prosecution against Directors, the proceedings shall not be sustained by virtue of legal fiction and statutory liability under Section 141 of the Act and thereby quashed the proceedings against its Directors, who are not responsible for day to day affairs of the company under Section 141 of the Act.

12. In view of the law referred to above, when the company is represented by its Managing Director, the other Directors, who are not participating or involving in the day to day affairs of the company are not liable to be proceeded for the offence punishable under Section 138 of the Act. In the present case, admittedly, the company is represented by A2 but petitioner/A3 herein is only one of the Directors, the complaint is bereft of allegation much less specific allegation that the petitioner/A3 is involved or participated in day to day affairs of the company. In the absence of such factual foundation in the notice dated 05.01.2015 and in the complaint specifically, he cannot be proceeded for the offence punishable under Section 138 of the Act.

13. Sri G.Dhananjai, learned counsel for the 2nd respondent while contending that even in the absence of any specific allegations regarding participation of the petitioner/A3 herein, the complaint is maintainable and he cannot be exonerated by the Court for the offence punishable under Section 138 of the Act and placed reliance on Anil Hada (referred supra). But this judgment is over-ruled by the Apex Court in 2012 in Aneeta Hada. Therefore, the principle laid down in Anil Hada is no more good law in view of law declared in Aneeta Hada v. M/s.Godfather Travels & Tours Pvt. Ltd.[7]. Consequently on the strength of the principle laid down therein, the petitioner cannot be proceeded for the above offence.

14. In Rallis India Limited (referred supra), the Apex Court specifically held that in criminal complaints, sufficient averments have been made against the respondents that they are the partners of the firm at relevant point of time and were looking after day to day affairs of partnership. This averment has been specifically mentioned in the complaint even though denied by the respondents. But the burden of proof at the relevant point of time they were not partners lies specifically on them. Thus, the parties can discharge onus of proof by leading evidence. Unless it is proved in accordance with law, they cannot be discharged from their liability. But such question cannot be decided at this stage of quashing the proceedings exercising power under Section 482 Cr.P.C. since it is a disputed question of fact.

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[7] 2012 (5) SCC 661

15. In Standard Chartered Bank (referred supra), the Apex Court discussed about the vicarious liability of the Directors of company, who arrayed as accused along with whole-time Director and Executive Director, who were authorized signatories of cheque. When there is an assertion in complaint that both the directors were in charge of day to day affairs of company and all of them had with active connivance, mischievously and intentionally issued cheque, the complaint cannot be quashed. Even in the judgment referred above, there was a specific averment that the Directors are effectively participating in the day to day affairs of the company and authorized signatories on the cheque. Here, the authorized signatory was only A2-Dr.Kasi Reddy Krishna Swaroop Reddy and thereby in the absence of any specific averments in the complaint that A3 also participating in day to day affairs of the company cannot be made liable and permitted to proceed against him for the offence punishable under Section 138 of the Act, since it amounts to an abuse of process of the Court.

16. As discussed above, the complaint is bereft of a specific allegation that the petitioner was effectively participating in the day to day affairs of the company and the cheque was issued by authorized signatory A2 representing A1-company and the notice is also silent about the effective participation of the petitioner in the day to day affairs of the company. In those circumstances, petitioner/A3 being a non-participant Director of A1 in its day to day affairs cannot be proceeded, thereby, I find existence of no

grounds to proceed against the petitioner and filing said complaint against petitioner/A3 is an abuse of process of the Court. Consequently, the proceedings against the petitioner in C.C.No.390 of 2015 are liable to be quashed. As, such inherent power can be exercised by this Court to give effect and to prevent abuse of process of law and to meet the ends of justice.

17. In State of Haryana v. Bhajan Lal[8], the Apex Court laid down certain guidelines to exercise such inherent power.

> "(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
> (3) Where the allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
> (4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

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[8] 1992 Suppl.(1) SCC 335=(**AIR** 1992 SC 604)

18. In R.P.Kapoor v. State of Punjab[9], it was held as follows:

> "(i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
> (ii) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
> (iii) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and
> (iv) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge."

19. In State of Karnataka v. L. Muniswamy[10], the Apex Court held as follows:

> "In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction."

20. In view of guideline No.1 in Bhajan Lal (supra) guideline No.III in R.P.Kapoor (supra), the Court can exercise its inherent power under Section 482 Cr.P.C. where the allegations made in the First Information Report or the complaint, even if they are taken

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9 (**AIR 1960 866**)
10 1977 Cri.LJ 1125: (AIR 1977 SC 1489)

at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. In view of guideline No.1 in R.P.Kapoor (supra), and guideline No.7 in Bhajanlal (supra), where institution/continuance of criminal proceedings against an accused may amount to an abuse of process of the court or that the quashing of the impugned proceedings would secure the ends of justice, the Court can exercise its inherent jurisdiction and quash proceedings. Similarly, in L.Muniswamy (supra), the Apex Court held that though the High Court has inherent power and its scope is very wide, it is a rule of practice that it will only be exercised in exceptional cases. Section 482 is a sort of reminder to the High Courts that they are not merely courts of law, but also courts of justice and possess inherent powers to remove injustice. The inherent power of the High Court is an inalienable attribute of the position it holds with respect to the courts subordinate to it. These powers are partly administrative and partly judicial. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends of justice. The jurisdiction under Section 482 is discretionary, therefore the High Court may refuse to exercise the discretion if a party has not approached it with clean hands, as held in Padala Venkata Rama Reddy @ Ramu v. Kovvuri Satyanarayana Reddy (Criminal Appeal No. 1499 of 2011 dated 29.07.2011 (arising out of S.L.P. (CRL.) No.929 of 2011). In view of the law declared by the Apex Court, inherent powers can be exercised to prevent the abuse of process of the Court, where the Court finds that ends of justice would be met and to prevent abuse process of the Court as discussed in the earlier paras. In the present case, the 2nd respondent herein filed O.S.No.93 of 2015 against the petitioner/A3 and continuation of proceedings in the criminal case for the offence punishable under Section 138 of the Act without making any averment about his effective involvement or participation in day to day affairs of the company/A1 is an abuse of process of the Court and to meet the ends of justice, the proceedings are liable to be quashed.

21. Hence, I find that it is a fit case for quashment of the proceedings against the petitioner/A3 in C.C.No.390 of 2015 on the file of XXV Special Magistrate Court, Erramanzil, Hyderabad, for the offence punishable under Section 138 of the Act.

22. In the result, the Criminal Petition is allowed and the proceedings in C.C.No.390 of 2015 on the file of XXV Special Magistrate Court, Erramanzil, Hyderabad, are quashed against the petitioner/A3.

M. SATYANARAYANA MURTHY, J

Date:19.01.2017
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