

*** THE HON'BLE SRI JUSTICE P. KESHA RAO**

+ CRIMINAL PETITION No.11507 of 2011

%11.10.2017

Dushyant M. Vora

....Petitioner

Vs.

\$ The State of Andhra Pradesh, rep. by its
Public Prosecutor, Hyderabad and others.

.... Respondents

! Counsel for the Petitioner: Sri B. Venkat Rama Rao

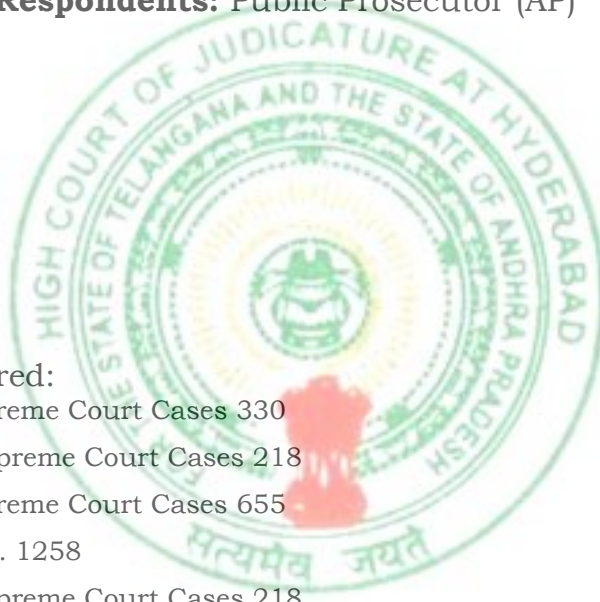
Counsel for Respondents: Public Prosecutor (AP)

<Gist :

>Head Note:

? Cases referred:

1. (2010) 3 Supreme Court Cases 330
2. (2001) 10 Supreme Court Cases 218
3. (2002) 7 Supreme Court Cases 655
4. 2004 CRI.L.J. 1258
5. (2001) 10 Supreme Court Cases 218



THE HON'BLE SRI JUSTICE P. KESHA RAO

CRIMINAL PETITION No.11507 of 2011

Date:11.10.2017

Between:

Dushyant M. Vora

..... Petitioner.

And

The State of Andhra Pradesh, rep.
by Public Prosecutor, Hyderabad
and others.

.....Respondents.

The Court made the following :



THE HON'BLE SRI JUSTICE P. KESHA RAO**CRIMINAL PETITION No.11507 of 2011****ORDER:**

The petitioner, who is the 6th respondent-accused in C.C.No.1476 of 2007, on the file of the Court of XV Metropolitan Magistrate, Hyderabad, filed the present criminal petition to quash the proceedings initiated against him under Sections 138 to 142 of the Negotiable Instruments Act, 2002 (for short 'the N.I Act').

2. The specific case of the petitioner is that the second respondent bank filed a complaint against third respondent-Akkineni Textiles Limited and eight others for the offence under Sections 138 to 142 of the N.I Act. The third respondent-company is registered under the Companies Act and obtained a loan for a sum of Rs.1,000 lakhs to the accused company for expansion of project envisaging installation of 16 numbers of indigenous shuttle looms and 12 numbers of imported shuttleless terry looms and for setting up of dyeing and processing facilities to offer a range of colours at Ramachandra Nagar, Bhimavaram Village, Vatsavai Mandal, Krishna District vide letter of intent dated 06-07-1998 as well as 19-02-1999. The third respondent-company accepted the loan and entered into a loan agreement on 26-02-1999 with the second respondent bank on certain terms and conditions as mentioned therein. The second respondent bank has fully disbursed the loan amount to the accused company. In the process, the accused company have issued post-dated cheques in favour of the second respondent bank. During the course of continuation of the said loan transaction, the second respondent

bank has presented two cheques bearing Nos.0238320 & 0238321, dated 20-07-2003, for a sum of Rs.5,00,000/- each respectively for realisation in its bank i.e., HDFC Bank Limited, Vijayawada. However, the said two cheques were dishonoured and returned with an endorsement '*funds insufficient*' vide Banker's Return Memo dated 26-07-2003. The complainant-second respondent received the same on 28-07-2003. After receiving the said Cheque Return Memo, the second respondent bank issued a legal notice to the accused on 11-08-2003 demanding the dishonoured cheque amount within 15 days. The said notice was served on the 3rd respondent company on 13-08-2003 as well as on the accused Nos.3, 6, 8, 9 & 7. In spite of the receipt of the said legal notice, no reply notice has been issued and no amounts are paid. Therefore, the complaint was registered against the accused including the petitioner, who is arrayed as accused No.6. It is relevant to mention that as far as the petitioner is concerned, in the complaint, no specific allegation is made against him, but for stating that the petitioner is one of the directors, who are accused Nos.3 to 9 and are responsible for the day to day business of the 3rd respondent company and also for the person incharge of the 3rd respondent company. Assailing the said proceedings initiated, the petitioner filed the present Criminal Petition.

3. Heard the counsel for the petitioner. Though notice was served on the 2nd respondent in the year 2011 i.e., on 17-11-2011, there is no representation on its behalf.

4. The petitioner challenged the proceedings mainly on the ground that he is not the director of the accused No.1-company and the second respondent has not filed any documentary evidence along with the complaint to show that the petitioner is one of the directors and it is also brought to the notice of the Court as per the Articles Of Association of the accused No.1-company, one Akkineni Sethu Rama Rao and one Vadde Rama Krishna Prasad are shown to be the directors of the company. Apart from the same, he also advanced alternative arguments without prejudice to his rights that even if assumed that he is a director of the A1-company, he is not responsible and incharge of the day to day affairs of the company and he has no connection with the financial matters of the accused No.1-company. The second respondent, except making a bald statement, has not made out any *prima facie* case satisfying the basic ingredients of Section 141 (1) & (2) of the N.I Act to initiate proceedings against him. At this stage, the counsel appearing for the petitioner also brought to the notice of the Court, the language employed in Sections 141(1) & (2) of the N.I Act i.e., at the time the offence was committed, the petitioner should be incharge of and was responsible to the company for the conduct of the business with the company, as well the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly and for the sake of convenience, the same is extracted hereunder:-

“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.”*

5. The counsel for the petitioner also brought to the notice of the Court, Section 291 of the Companies Act, and submitted that though a company is a legal entity, it can act only through its Board of Directors. The settled position is that a Managing Director is *prima facie* incharge of, and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as the Directors are concerned, they can be prosecuted only if they were in-charge of and responsible for the conduct of the business of the company.

6. Further, a combined reading of Sections 5 and 291 of the Act with the definitions in sub sections (24), (26), (30), (31) and (45) of Section 2 of the Companies Act would show that the Managing Director, the whole-time of Director, the Manager, the Secretary and any other person in accordance with whose directions or

instructions, the Board of Directors of the company is accustomed to act and any person charged by all the Directors with the responsibility of complying with that provision are considered to be persons, who are responsible to the company for the conduct of the business of the company. To substantiate his contentions, he has relied on the following judgments:

“NATIONAL SMALL INDUSTRIES CORPORATION LIMITED vs. HARMEET SINGH PAINTAL AND ANOTHER¹, MRS. ANITA MALHOTRA vs. APPEREL EXPORT PROMOTION COUNCIL & OTHERS (CRIMINAL APPEAL No.85 of 2011, dated 08-11-2017), K.P.G. NAIR vs. JINDAL MENTHOL INDIA LTD.², KATTA SUJATHA (SMT) vs. FERTILIZERS & CHEMICALS TRAVANCORE LTD AND ANOTHER³, M/S. VETERAN COMPANY PVT., LTD., AND ANOTHER vs. STATE AND OTHERS⁴ and K. SRIKANTH SING vs. NORTH EAST SECURITIES LTD., AND ANOTHER (APPEAL No.919 OF 2007, DATED 20TH JULY, 2007).”

7. In **NATIONAL SMALL INDUSTRIES CORPORATION LIMITED vs. HARMEET SINGH PAINTAL AND ANOTHER¹**, the Hon'ble Apex Court was pleased to consider the aspect of the role of a Director in a company and quashed the proceedings against him since no specific allegations are made against the appellant therein. The relevant paragraphs are extracted hereunder:

“12. It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, 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. Every person connected with the company shall not fall within the ambit of the provision. 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. It follows from the fact that if a

¹ (2010) 3 Supreme Court Cases 330

² (2001) 10 Supreme Court Cases 218

³ (2002) 7 Supreme Court Cases 655

⁴ 2004 CRL.L.J. 1258

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 for a criminal offence under the provisions. The liability arises from being in-charge of and responsible for the conduct of the 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.

13. 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 No.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.

14. 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.

15. In a catena of decisions, this Court has held that for making Directors liable for the offences committed by the company under Section 141 of the Act, there must be specific averments against the Directors, showing as to how and in what manner the Directors were responsible for the conduct of the business of the company.

27. The said issue again came up for consideration before a three-Judge Bench of this Court recently in *Ramraj Singh vs. State of M.P. & Anr.* ((2009) 6 SCC 729). In this case, the earlier decisions were also considered in detail. Following the decisions of *S.M.S. Pharmaceuticals Ltd.*, case ((2005) 8 SCC 89), *Sabhita Ramamurthy's case* ((2006) 10 SCC 581), *Saroj Kumar Poddar's case* ((2007) 3 SCC 693) and *N.K. Wahi's case* ((2007) 9 SCC 481) this Court held that it is necessary to specifically aver in a complaint under Section 141 that at the time when the offence was committed, the person accused was in-charge of, and

responsible for the conduct of the business of the company. Furthermore, it held that vicarious liability can be attributed only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused/Director therein vicariously liable for the offence committed by the company. It was further held that before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted. Thus, the issue in the present case is no more *res integra* and has been squarely covered by the decisions of this Court referred above. It is submitted that the aforesaid decisions of this Court have become binding precedents.

34. After noting Saroj Kumar Poddar's case ((2007) 3 SCC 693) and N.K. Wahi's case ((2007) 9 SCC 481), this Court further noted in para 15 that: (K.K.Ahuja case ((2009) 10 SCC 48), SCC p.57)

"15.The prevailing trend appear to require the Complainant to state how a Director who is sought to be made an accused, was in-charge of the business of the Company, as every Director need not be and is not in-charge of the business of the Company."

35. In Para 17, this Court has further recorded that: (K.K. Ahuja case ((2009) 10 SCC 48), SCC p.58)

"17. ... When conditions are prescribed for extending such constructive criminal liability to others, courts will insist upon strict literal compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of Section 141 is imperative."

Though the Court then said that an averment in the complaint that the accused is a Director and in-charge of and responsible for the conduct of the business may be sufficient but this would not take away from the requirement that an overall reading of the complaint has to be made to see whether the requirements of Section 141 have been made out against the accused Director or not. Furthermore, this decision cannot be said to have overruled the various decisions of this Court.

36. Section 291 of the Companies Act, 1956 provides that

"291. General powers of Board.-(1) subject to the provisions of [that] Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do."

A company, though a legal entity, can act only through its Board of Directors. The settled position is that a Managing

Director is prima facie in-charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other Directors are concerned, they can be prosecuted only if they were in-charge of and responsible for the conduct of the business of the company.

38. *But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in-charge of the business of the company" or by stating that "he was in- charge of the day-to-day management of the company" or by stating that "he was in-charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.*

39. *From the above discussion, the following principles emerge :*

(i) *The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.*

(ii) *Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.*

(iii) *Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.*

(iv) *Vicarious liability on the part of a person must be pleaded and proved and not inferred.*

(v) *If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the*

complaint and by virtue of their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

(vii) 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.”

8. In **K.P.G. NAIR vs. JINDAL MENTHOL INDIA LTD.⁵, KATTA SUJATHA (SMT) vs. FERTILIZERS & CHEMICALS TRAVANCORE LTD AND ANOTHER²**, the Hon’ble Supreme court held as follows:-

“7. From a perusal of the excerpts of the complaint it is seen that nowhere it is stated that on the date when the offence is alleged to have been committed, the appellant was incharge of or was responsible to the accused Company for the conduct of its business. Here it will be appropriate to note Sub-section (1) of [Section 141](#) which is in the following terms:

“141(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.”

8. From a perusal of [Section 141](#) it is evident that in a case where a company committed offence under [Section 138](#) then not only the company but also every person who at the time when the offence was committed, was incharge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly. It follows that a person other than the company can be proceeded against under those provisions only if that person was incharge of and was responsible to the company for the conduct of its business.

9. It is true as submitted by Mr. Arora that the words of [Section 141\(1\)](#) need not be incorporated in a complaint as magic words but it cannot also be disputed that substance of the allegations read as a whole should answer and fulfil the requirements of

⁵ (2001) 10 Supreme Court Cases 218

the ingredients of the said provision (for being proceeded against for an offence which he is alleged to have committed). On the above premise, it is clear that the allegations made in the complaint do not either in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence the appellant was incharge of and was responsible to the company for the conduct of its business.”

9. Referring to the above decisions, the counsel for the petitioner contended that since there is no clear averment in the complaint against the petitioner that he was incharge of and was responsible to the company for conduct of the business of the Company, the present case cannot be proceeded with against him in the light of those decisions and the law enunciated therein.

10. It is settled law that the initial burden is on the complainant to make specific averments as required by law in the complaint so as to make the accused vicariously liable, more particularly, when the accused is a director of Company. To fasten the criminal liability, there is no presumption that every director knows about the day-to-day affairs as well as the management of the Company. Further, Section 141 of the Act, does not make all the directors liable for the offences i.e. the criminal liability can be fastened only on those officers who are in-charge of the Company at the time of the commission of the offence and they were in-charge and were responsible for the conduct of the business of the Company. The vicarious liability against the director of a Company can be inferred only for the offence committed by the Company if the requisite statements in the complaint are made that the director is in-charge of and responsible for the business of the Company. In a way, vicarious liability on the part of a director or a person in-charge of and responsible for the office of the Company must be

specifically pleaded and proved but it cannot be inferred. If the accused is a Managing Director or a Joint Managing Director, it is not necessary to make any specific averment since by virtue of their position, they are liable for the acts committed. Similarly, if an accused is a director or an officer in-charge of the Company who signed the cheque on behalf of the company, then it is not required to make any specific averment in the complaint.

11. In the case on hand, except making a bald statement that the accused Nos.3 to 9 including the petitioner who is accused No.6 are responsible for day to day business affairs of the accused No.1- company and accused Nos.2 to 9 are the persons in charge of the company, the second respondent has not placed any material before the Court that the petitioner is responsible for the conduct of day to day business of the accused No.1-company. The petitioner is not even the signatory on the subject cheques. As such, from the allegations made in the complaint, it is clear that the complaint do not either in express words or with reference to the words contained therein make out a case that at the time of commission of the offence, the petitioner was in-charge of and was responsible for the conduct of the business of the accused No.1-company. The second respondent-complainant should specifically spell out as to how and in what manner, the Director of the company was incharge of or was responsible to the accused No.1-Company for conduct of its day to day business and a mere bald statement that he was incharge of and was responsible to the company for conduct of its business, is not sufficient. Even the allegation of the petitioner that he is not even the Director of 1st

accused-Company is not substantiated by the 2nd respondent since as per the Articles of Association one Akkineni Sethu Rama Rao and one Vadde Rama Krishna Prasad are shown to be the Directors of the 1st accused-Company. Therefore, in the facts and circumstances of the present case, no case is made out against the petitioner for the offence under Sections 138 to 142 of the N.I Act. Therefore, the continuation of the proceedings against the petitioner would amount to abuse of process of the Court. As such, the proceedings initiated against the petitioner for the offence under Sections 138 to 142 of the N.I Act in C.C.No.1476 of 2007 on the file of the Court of XV Metropolitan Magistrate, City Civil Courts, Hyderabad, are liable to be quashed.

12. Accordingly, the Criminal Petition is allowed quashing the C.C.No.1476 of 2007 on the file of the Court of XV Metropolitan Magistrate, City Civil Courts, Hyderabad.

13. Miscellaneous petitions pending consideration, if any, in this Criminal Petition, shall stand closed in consequence.

JUSTICE P. KESHAVA RAO

Date:11-10-2017

Note:- L.R. Copy to be marked.

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mrh