HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.679 OF 2018

ORDER:

This Criminal Petition is filed under Section 482 Cr.P.C by the petitioner, who is A1 in C.C.No.270 of 2017 pending on the file of the I Special Magistrate, Nuzvid, Krishna District, where taken cognizance for the offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act'), which is an outcome of the private complaint of the 2nd respondent, after dishonour of the cheque bearing No.247348, dated 21.06.2016 issued in favour of the complainant by M/s.Theja Sri Sai Agro Farms, represented by its Managing Partner signed as drawer, stated dishonoured as per the bank dishonour intimation from the statutory notice issued only to the accused, filed the private complaint against two accused including the petitioner as A1 and one Parupalli Bhupathi as A2.

2. The sum and substance of the accusation is that A1 and A2 are managing partner and partner of M/s.Theja Sri Sai Agro Farms and towards part payment of the maize purchased amount due to the complainant, issued the cheque bearing No.247348 dated 21.06.2016 drawn on Andhra Bank, Sattupally Branch, for Rs.30,15,000/- and the same when presented returned dishonoured for funds insufficient vide bank intimation memo dated 22.06.2016 and registered notice

issued to A1 and A2 on 05.07.2016 but they failed to pay and the notices cause returned by A2, though A1 received on 09.07.2016.

3. Admittedly, the firm, M/s.Theja Sri Sai Agro Farms is not impleaded as accused. The cheque in question filed with the material papers was not issued by the petitioner herein, Movva Satyanarayana in his individual capacity but for the firm issued, signed by him on behalf of the firm as its managing partner and there is also signature of the other partner at best as partner of the entity i.e. A2. Once such is the case, even notice not issued to the firm, partners of the firm received at least by one, taken as sufficient for accrual of cause of action to file a complaint. Basically, under Section 141 of the Act, the firm must be impleaded as prime accused, as the cheque issued by the firm and signed by the partners as it is drawers to say out of the firm and if at all vicariously liable, the firm must be the prime accused to fasten on them the vicarious liability. When the firm itself is not impleaded as accused, the question of their vicarious liability does not arise.

4. The 2nd respondent/complainant even served with registered post notice, failed to attend. Heard the learned counsel for the petitioner with reference to the contentions supra and the learned Public Prosecutor representing the State and taken as heard the 2nd respondent.

5. Law is fairly settled from the expression of this Court in Narendra Urangi v. M/s.Greenmint India Agritech Pvt. Ltdz (Crl.P.No.11336 of 2014 and batch dated 11.09.2015) referring to the Constitution Bench expression of the Apex Court in *Aneeta Hada (II) V. Godfather Travels & Tours (P) Ltd*[1], held in this regard 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 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,

[1] (2012)5 SCC 661
[2] (2005)4 SCC 530
[3] (2011)1 SCC 74

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 maliciolus 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, charman 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 *Sunil Bharti Mittal* supra it also referred the three Judge bench expression of the Apex Court in *S.M.S.Pharmaceuticals Ltd.*

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

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 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. <u>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,</u>

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

<u>arraying of a Company as an accused is imperative</u>. 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 incharge 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 incharge 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 incharge of and responsible for conduct of the business of the company. A director cannot be deemed to be incharge 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

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

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 incharge 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 incharge 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 incharge 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. 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]

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[12] (2007)3 SCC 693
[13] (2010)3 SCC 330
[14] 2010(2) ALD (Crl.) 564 (SC)
[15] 2013(2) ALD (Crl.) 331 (AP)
[16] AIR 2015 SC 675

> reiterates the same reliance upon *National Small Industries Corporation* supra.
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> 6) Having regard to the above propositions which are in one line speak that a bald averment in complaint is not even sufficient but for a specific allegation as to how a Director of a company who stands in a different footing to the Managing Director by his status liable or to be made liable for the offences punishable under Section 138 of the N.I.Act."

6. Having regard to the above and from the three-Judge Bench expression of the Apex Court in Aneeta Hada (supra), for the firm is not impleaded as accused, the question of liability of the partners against whom the complaint filed, no way sustainable and thereby, the cognizance order of the learned Magistrate is liable to be set aside. Needless to say, remedy of the complainant if at all is open otherwise including to invoke Section 142(1)(b) proviso, if at all to file a fresh complaint with delay condonation to decide on own merits, subject to any legal bar including if at all under Section 142 of the Act.

7. Accordingly, the Criminal Petition is allowed by quashing the proceedings against the petitioner/A1 relating to C.C.No.270 of 2017 on the file of the I Special Magistrate, Nuzvid, Krishna District.

8. Miscellaneous petitions pending if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 27.11.2018
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