THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NOs.1887 & 1890 OF 2018

COMMON ORDER:

Crl.P.No.1887 of 2018 is filed under Section 482 Cr.P.C to quash the proceedings in C.C.No.576 of 2017 pending on the file of XV Special Magistrate at Hyderabad, registered for the offences punishable under 138 of Negotiable Instruments Act. (for short 'the Act'.)

Similarly, Crl.P.No.1890 of 2018 is filed under Section 482 Cr.P.C to quash the proceedings in C.C.No.368 of 2013 pending on the file of XX Additional Chief Metropolitan Magistrate at Hyderabad, registered for the offences punishable under 138 of the Act.

The petitioner/A-3 and the second respondent are one and the same in both the criminal petitions and I deem it expedient to decide both the cases by a common order.

In the facts of the case in Crl.P.No.1887 of 2018, the second respondent filed a private complaint against the petitioner before the Magistrate, for the offence punishable under Section 138 of the Act, alleging that the petitioner/A-3 and one K. Ravi Kiran/A-2, who is the husband of the petitioner are the Directors of Sree NGR Media Private Limited/A-1 and they issued two cheques bearing Nos.362514 dated 16.01.2013 and cheque No.362515 dated 31.12.2012, each for Rs.13 lakhs, which is the subject matter of C.C.No.368 of 2013, pending on the file of XX Additional Chief Metropolitan Magistrate at Hyderabad.

In the facts of the case in Crl.P.No.1890 of 2018, the second respondent filed a private complaint against the petitioner before the Magistrate, for the offence punishable under Section 138 of the Act alleging that the petitioner/A-3 and one K. Ravi Kiran/A-2, who is the husband of the petitioner are the Directors of Sree NGR Media Private Limited/A-1 and they issued five cheques bearing Nos.362508 dated 20.03.2013, 221438 dated 20.03.2013, 221438 dated 15.03.2013, 221437 dated 15.03.2013 each for Rs.13 lakhs and 221440 dated 11.03.2013 for Rs.10 lakhs, which is the subject matter of C.C.No.367 of 2013, pending on the file of XV Special Magistrate at Hyderabad.

On presentation of those cheques, they were returned unpaid by the payee bank and thereupon, a notice was issued calling upon the accused to pay the amount covered by the dishonoured cheques within fifteen days time. But, the petitioner along with other accused failed to pay the amount covered by the cheques and issued contentious legal notice to second respondent. Hence, the second respondent/complainant filed complaint.

It is alleged in paragraph 6 of the complaint that A-1 represented by A-2 have issued the above said cheques without keeping sufficient funds which is indicating a deliberate intention to cheat and defraud the complainant for the legitimate dues which are to be paid to the complainant. The complainant states that accused action of issuing above cheques without sufficient funds indicate accused's malafide intentions to defraud the complainant thereby causing wrongful loss to the complainant and wrongful gain to the accused. In paragraph 7 of the complainant it is stated as follows:

> "It is submitted that accused No.1 is a company, incorporated and registered under the Companies Act, 1956 and being represented by the Accused No.2 to 6. The complainant further submits that Accused No.2 to 6 are the Directors of Accused No.1 and is incharge of and responsible for day to day affairs of the Accused No.1"

On the strength of this allegation, the second respondent filed complaint against the Directors of A-1 company, including this petitioner/A-3, making them vicariously liable for the offence punishable under Section 138 of the Act.

The first ground is that the allegation made in paragraph 7 of the complaint that the petitioner/A-3 is one of the Director of the company/A-1, who is in-charge of and responsible for day to day affairs of the company is insufficient to fasten with any vicarious liability under Section 141 of the Act. The second ground is that, the complaint is beyond limitation.

During hearing, learned counsel for the petitioner Sri A. Prabhakar Rao reiterated the contentions urged in the grounds of petition, whereas, learned counsel for the second respondent Sri A. Tulsiraj Gokul contended that the complaint was filed within limitation, while contending that the allegation made in paragraph 7 is sufficient to prosecute the petitioner for the offence punishable under Section 138 of the Act.

In "***Ashoke Mal Bafna v. Upper India Steel Mfg. & Engg. Co. Ltd",*** (referred supra) the Apex Court held that "for making a Director of a Company liable for the offences committed by the Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company. More particularly when he is ceased to be the director of the company.

No doubt, the complaint was lodged against the petitioners for the offence punishable under Section 138 of N.I.Act. However, Section 141 of N.I.Act deals with vicarious liability of any person other than the drawer of the cheque.

According to Section 141 of NI Act,

> (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.*
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> *Explanation annexed thereto is clear that company means any body corporate and includes a firm or other association of individuals.*

In view of Section 141 of N.I.Act., it is the duty of the complainant to plead and prove that the petitioners participated actively in day to day affairs of the Company on the date of commission of offence. Making a bald allegation against the petitioners is not sufficient to fasten any criminal liability in view of the law declared by the Apex Court in "***Pooja Ravinder Devidasani v. State of Maharashtra***" (referred supra) and the complaint is liable to be quashed.

In "***Sunil Bharti Mittal v. Central Bureau of Investigation***[1]" the Apex Court while dealing with corporate criminal liability held that criminal intent of person(s) controlling

[1] (2015) 4 SCC 609

company be imputed to company based on principle of 'alter-ego', held that reverse application of principle is not permissible. The Apex Court also held that when company is the accused, its Directors can be roped in only if there is sufficient incriminating evidence against them coupled with criminal intent or the statutory regime attracts the doctrine of vicarious liability.

In the recent judgment in "***Pooja Ravinder Devidasani v. State of Maharashtra***" (referred supra), the Apex Court succinctly held in paragraph 27 as follows:

> *"27.Unfortunately, the High Court did not deal the issue in a proper perspective and committed error in dismissing the writ petitions by holding that in the complaints filed by the Respondent No.2, specific averments were made against the appellant. But on the contrary, taking the complaint as a whole, it can be inferred that in the entire complaint, no specific role is attributed to the appellant in the commission of offence. It is settled law that to attract a case under Section 141 of the N.I. Act a specific role must have been played by a Director of the Company for fastening vicarious liability. But in this case, the appellant was neither a Director of the acused Company nor in charge of or involved in the day to day affairs of the company at the time of commission of the alleged offence. There is not even a whisper or shred of evidence on record to show that there is any act committed by the appellant from which a reasonable inference can be drawn that the appellant could be vicariously held liable for the offence with which she is charged"*

The principle that emerged from the authoritative pronouncements of the Apex Court is that, when the company is the accused and to fasten liability to other Directors of the company, in view of vicariously liability the complaint must necessarily disclose the details as to how the other directors are participating in the day to day affairs of the company. Mere making a bald allegation that the Directors are participating in day-to-day affairs of the company is of no use and in the absence of such details, the Directors cannot be fastened with any vicarious liability and the proceedings against the petitioners are liable to be quashed.

In "***Ashoke Mal Bafna v. Upper India Steel Mfg. & Engg. Co. Ltd",*** (referred supra) the Apex court again considered the vicarious liability of the Director of the company and reiterated the principle laid down in "***Pooja Ravinder Devidasani v. State of Maharashtra***" (referred supra), and this Court took a similar view in "***Nusun Genetic Research Ltd., and others v. State of Telangana and another***[2]

in "***National Small Industries Corporation Limited v. Harmeet Singh Paintal***[3]" it was made clear 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 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

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[2] 2016 (2) ALT (Crl.)35 (A.P.)
[3] (2010) 3 SCC 330

committed and not on the basis of merely holding a designation or office in a company.

It was further made it clear that Section 141 of N.I. Act 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 the petitioners are actively participating in day-to-day affairs of the company. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

Similarly, in "***N.K.Wahi v. Shekhar Singh and others***[4]" , "***S.M.S. Pharmaceuticals Ltd., v. Neeta Bhalla and Another***[5]", "***Central Bank of India v. Asian Global Limited and others***[6]", the law laid down by the Apex Court is consistent that mere making bald allegations that the Directors are also participated in day-to-day affairs of the firm is not sufficient, there must be some material as to how the said Directors participated in the day-to-day affairs of the company.

In "***K.Shrikant Singh v. North East Security Ltd., and others***[7]" the Apex Court observed that vicarious liability on the part of a person must be pleaded and proved and not inferred.

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[4] (2007)9 SCC 481
[5] (2005) 8 SCC 89
[6] (2010) 11 SCC 203
[7] J.T. 2007(9) SC 449

Similarly, in "***Aparna A. Shaha v. Sheth Developers Pvt. Ltd.***[8]**"** the Apex Court took a view that Joint Account holder cannot be prosecuted unless cheque is signed by each and every person who is Joint Account Holder.

In the latter judgment, in "***Shushantna J. Sarkar & Other v. State of Maharashtra***[9]**"** the Apex Court held that it is necessary for the complainant to make specific averments disclosing role of Directors in the alleged offence. Criminal offence, criminal liability can be fastened only in those who at the time of commission of offence were in charge of and were responsible for conduct of business of company. It is obligatory on the part of complainant to state in brief as to how and in what manner the directors, who are sought to be made accused were responsible for the conduct of business of company at relevant time.

Therefore, every person, who at the time of offence was committed, was in charge of and responsible to the company for the conduct of the business of the company, is liable to be prosecuted for the offence punishable under Section 138 of N.I. Act in view of vicarious liability and the statute regime attached to the person other than the person who issued a cheque i.e. maker or drawer of the cheque.

It is an undisputed fact that the allegation made in paragraph 7 of the complaint is to the effect that, A-2 & A-3 are the Directors of A-1 company and they are in-charge and responsible for the day-to-day affairs of A-1/company. Whether this allegation is sufficient or not is the question in the present petition.

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[8] 2014(1) Mh L.J.
[9] 2014(1)Mh L.J. 214

As per the settled law declared by the Supreme Court and this Court in the long line of perspective judgments referred supra, the allegations made in paragraph 7 of the complaint is insufficient to fasten criminal or vicarious liability to the petitioner to attract Section 141 of the Act. On this ground, the proceedings against this petitioner who is not a drawee of the cheque, as per Section 7 of the Act cannot be prosecuted for the offence punishable under Section 138 of the Act, and the proceedings against the petitioner are liable to be quashed. Further, the other ground with regard to limitation needs no adjudication in this petition, in view of the findings recorded in the earlier paragraphs.

In view of the law laid down by the Apex Court in the judgments (referred supra) unless there is an allegation with details as to how the petitioner has participated in the day-to-day affairs of the Company as Director, the proceedings against the petitioner cannot be continued. Therefore, I find that it is a fit case to quash the proceedings against the petitioner.

In the result, both the criminal petitions are allowed and the proceedings in C.C.No.576 of 2017 pending on the file of XV Special Magistrate at Hyderabad and C.C.No.368 of 2013 pending on the file of XX Additional Chief Metropolitan Magistrate at Hyderabad, are hereby quashed.

Consequently, miscellaneous petitions pending, if any, shall also stand closed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:08.08.2018

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