THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.2750 OF 2018

ORDER:

This criminal petition is filed under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.389 of 2016 on the file of XIX Additional Chief Metropolitan Magistrate, Secunderabad, registered for the offence punishable under Sections 138, 141 and 142 of Negotiable Instruments Act (for short "N.I.Act.")

Respondent No.2 filed a private complaint under Section 200 of Cr.P.C. against seven accused and the petitioners herein are accused Nos.4 and 5, who are the alleged directors of M/s PS Tech Com Private Limited, accused No.1. Accused No.1 company is represented by its Managing Director.

The allegations made in the complaint are that the complainant – Padmaja Electrical Industries is a partnership firm engaged in the business of manufacturing electrical control panels, distribution boards and all kinds of electrical panel boards with their operations at Visakhapatnam, Hyderabad and Secunderabad and also at other parts of the Country.

It is also further alleged that the accused No.1 is a private limited company and accused No.2 is the Managing Director of the accused No.1 company. Accused No.2 as the Managing Director is responsible for day to day business operations of the accused No.1 company. Accused Nos.3 to 7 being the other directors of accused No.1 company are also liable for the acts of the accused No.1 company and requested this Court to punish the petitioners for the offence punishable under Section 138 of N.I.Act as the accused No.1

had issued cheque bearing No.088297 dated 25.11.2011 for Rs.4,76,658/- drawn in Vijaya Bank, HRBR Layout, Bangalore towards part payment to the complainant. On presentation of the said chque for collection, the same was dishonoured. After compliance of proviso (b) to Section 138 of N.I. Act, the present complaint is filed.

The main grievance of the petitioners before this Court is that the petitioners/accused Nos.4 and 5 are only directors and not the Managing Directors of the company and not participating in day-to-day affairs of the company, therefore, vicarious liability cannot be fastened against the petitioners and prayed to quash the proceedings.

The respondent No.2 filed counter reiterating the allegations made in the complaint and in paragraph No.21, it was contended that for an offence committed by the accused No.1 for which the accused Nos.2 to 7 who are the Directors of the accused No.1 are also responsible and liable to be prosecuted for the offence. Thus, the allegation made in the complaint and in the counter is that the offence committed by the accused No.1 represented by its Managing Director is punishable under Section 138 of N.I.Act. However, the petitioners herein, who are accused Nos.4 and 5 are impleaded as one of the directors. The allegation in paragraph 2 (b) of the complaint and in paragraph No.21 of the counter filed in the present petition are at best disclosed that the offence was committed by accused No.1, but not by the petitioners herein.

Learned counsel for the petitioners relied on the decisions of Apex Court rendered in "***Pooja Ravinder Devidasani v. State of***

Maharashtra[1]" "***Ashoke Mal Bafna v. Upper India Steel Mfg. & Engg. Co. Ltd***[2]***"*** and prayed to allow the petition.

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

The other contention of the learned counsel for the petitioners is that in the absence of any specific allegation about the participation of the petitioners in day to day affairs of the company as on the date of commission of alleged offence, the petitioners are not liable to be prosecuted for the offence punishable under Section 138 of N.I.Act.

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***

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[1] AIR 2015 SC 675
[2] AIR 2017 SC 2854

proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

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***[3]" the Apex Court while dealing with corporate criminal liability held that criminal intent of person(s) controlling 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

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[3] (2015) 4 SCC 609

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***[4]

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[4] 2016 (2) ALT (Crl.)35 (A.P.)

in "***National Small Industries Corporation Limited v. Harmeet Singh Paintal***[5]" 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 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

[5] (2010) 3 SCC 330

interpretation of penal statutes, especially, where such statutes create vicarious liability.

Similarly, in "***N.K.Wahi v. Shekhar Singh and others***[6]" , "***S.M.S. Pharmaceuticals Ltd., v. Neeta Bhalla and Another***[7]", **"*Central Bank of India v. Asian Global Limited and others*[8]",** 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***[9]" the Apex Court observed that vicarious liability on the part of a person must be pleaded and proved and not inferred.

Similarly, in "***Aparna A. Shaha v. Sheth Developers Pvt. Ltd.***[10]" 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***[11]" 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

[6] (2007)9 SCC 481
[7] (2005) 8 SCC 89
[8] (2010) 11 SCC 203
[9] J.T. 2007(9) SC 449
[10] 2014(1) Mh L.J.
[11] 2014(1)Mh L.J. 214

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.

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 petitioners participated in day to day affairs of the accused No.1 – Company as director, the proceedings against the petitioners cannot be continued. Therefore, I find that it is a fit case to quash the proceedings against the petitioner.

In the result, the criminal petition is allowed. The proceedings in C.C.No.389 of 2016 on the file of XIX Additional Chief Metropolitan Magistrate, Secunderabad, are hereby quashed against the petitioners herein. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

20.07.2018
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