THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.8032 OF 2015

ORDER:

This criminal petition is filed by the petitioners/accused Nos.3 and 6 under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.85 of 2009 pending on the file of I Additional Judicial Magistrate of First Class, Proddatur, Kadapa District, registered for the offence punishable under Section 138 of Negotiable Instruments Act (for short "N.I.Act").

Respondent No.1 filed a private complaint against the petitioners herein and other accused in C.C.No.85 of 2009 for the offence punishable under Section 138 of N.I.Act alleging that the complainant/respondent No.1 herein viz. Kamakshi Extractions is carrying on business in cotton and the firm is situated in D.V.C. compound, Korrapadu Road, Proddutur Town, Kadapa District. Accused No.1 is a partnership firm represented by accused No.2 – Managing Partner, accused No.3/petitioner herein is the partner of accused No.1 firm. Accused No.4 is the Prakathi Spinners Limited, represented by its Managing Director, accused No.5. Petitioner No.2/accused No.6 is the director of accused No.4. It is also alleged that accused Nos.2 and 3 are busy with day to day affairs of accused No.1 and that they are managing the accused No.1 firm. Hence, accused Nos.2 and 3 are liable for the acts of accused No.1 firm, whereas accused Nos.5 and 6 are managing day-to-day affairs of accused No.4 Company. Therefore, accused Nos.5 and 6 are liable for the acts of accused No.4 Company.

It is also alleged that the respondent No.1 supplied cotton bales as per the orders placed by accused Nos.1 to 3 on 6 occasions and total value of cotton bales supplied was Rs.35,22,902/-, the receipt of the cotton bales was acknowledged by accused Nos.1 to 3. It is alleged that in cotton field, the buyer has to send cotton bales amount within grace period as per custom, trade and usage agreement. But the accused failed to pay the said amount within stipulated grace period. Thus, the respondent No.1 sustained huge loss. Despite repeated requests, accused Nos.1 to 3 did not pay the amount due to the respondent No.1. However, accused Nos.1 to 3 paid an amount of Rs.2,37,342/- up to 09.03.2005 and became indebted to a tune of Rs.32,85,560/- towards principle amount and Rs.12,65,048/- towards interest. Thus, total amount due was Rs.45,50,608/-. When the complainant insisted for payment of amount, accused No.5, who is the Managing Director of accused No.4, issued two cheques bearing Nos.705415 and 705416 dated 10.11.2005 each for Rs.10,00,000/- with the consent and direction of accused Nos.3 and 6 on behalf of accused Nos.1 and 4 as the accused No.1 is the sister concern of accused No.4. When the complainant presented the said two cheques in Karoor Vysya Bank Limited on 30.04.2006 for collection, they were returned for the reason "exceeds arrangements" by the payee bank - State Bank of India, Coimbattore. After return of the said cheques, the respondent No.1 by notice dated 03.06.2006 called upon the petitioners and other accused to pay the amount covered by dishonoured cheques within the stipulated time. Accused Nos.1 and 4 received notice on 10.06.2006, but the accused Nos.2, 3, 5 and 6 avoided the receipt of the notice and those notices were returned un-served. Neither of the accused paid any amount nor issued any reply.

The present petition is filed on the ground that there was no legally enforceable debt between accused No.6 and the respondent No.1, complainant and the transaction was with accused No.1 alone, not with accused No.4, though accused No.1 is the sister concern of accused No.4, it is having separate entity since the accused No.1 is the firm governed by Indian Partnership Firm and accused No.4 is the limited company, governed by Companies Act. Therefore, they cannot be treated as one and the same. Consequently, the proceedings against the petitioners herein, who are not the maker or drawer of the cheque cannot be proceeded for the offence punishable under Section 138 of N.I.Act. It is also contended that the accused No.3 is the partner of accused No.1 and the accused No.6 is the director of accused No.4 only and they are actively participating in day to day affairs of the company, but in the absence of any allegation that they are directly participating in day to day affairs of the company having control over the affairs of the accused Nos.1 and 4, the petitioners cannot be saddled with any criminal liability based on vicarious liability and prayed to quash the proceedings.

The respondent No.1 filed vacate petition reiterating the contentions raised in the complaint, but no separate counter is filed in the petition.

During hearing, learned counsel for the petitioner reiterated the contentions raised in the petition and placed reliance on the judgment of the Apex Court in "***Pooja Ravinder Devidasani v. State of Maharashtra and another***[1]".

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[1] AIR 2015 SC 675

It is also contended that accused No.6 is one of the directors of accused No.4 Company and he is not the drawer or maker of the cheque as defined under Section 7 of the N.I.Act, thereby initiation of proceedings against petitioner No.2 herein is serious illegality as there was no relationship of debtor and creditor between accused No.4 and complainant, respondent No.1 herein. Consequently, the proceedings against the petitioners herein are liable to be quashed.

Learned counsel for the respondent No.1 contended that accused No.1 is the sister concern of accused No.4 and when a cheque was issued, the directors of the company are liable to pay the amount covered by dishonoured cheque, at least on receipt of notice within the stipulated time. But accused Nos.3 and 6 being the partner of accused No.1 and director of accused No.4 respectively did not respond to the legitimate demand made by the respondent No.1. Therefore, the respondent No.1 is entitled to proceed against accused No.3 being the partner of accused No.1 and accused No.6, director of accused No.4 company on the ground that they are vicariously liable under Section 141 of the N.I.Act.

Considering rival contentions and perusing the material on record, the points that arise for consideration are:

(1) ***Whether the petitioner No.2/accused No.6 being one of the directors of accused No.4 Company is liable to be prosecuted for the offence punishable under Section 138 of Negotiable Instruments Act when the transaction was between accused No.1 firm represented by accused No.2 – V.Sreenivasan being the Managing Partner?***

(2) ***Whether the complaint against petitioner No.1/accused No.3 – V.Mani Vasan and petitioner No.2/accused No.6 – Mrs.Usha Sreenivasan, who are one of the partners and directors of accused Nos.1 and 4 respectively are participating in day to day affairs of the firm and company, if not, based on the allegations made in the complaint, are they liable to be prosecuted for the offence punishable under Section 138 of Negotiable Instruments Act?***

P O I N T No.1:

The first and foremost contention urged before this Court is that the transaction was between accused No.1 – Firm is represented by accused No.2/Managing Partner and the respondent No.1 complainant. Accused No.4 – Company is represented by accused No.5/Managing Director. Accused Nos.1 and 4 having separate legal entity and they cannot be treated as one business concern. The liability of partners of partnership firm is governed by Indian Partnership Act is distinct from the liability of directors of the Company under the Companies Act. When the transaction was between accused No.1 represented by accused No.2, Managing Partner and respondent No.1 complainant, at best the partners of the firm are liable to be prosecuted for the offence punishable under Section 138 of N.I.Act. The director of another company cannot be made liable merely because the Managing Partner of accused No.1 Firm and Managing Director of Accused No.4 Company is one and the same. Accused No.4 represented by accused No.5 though the drawer of the cheque as defined under Section 7 of N.I.Act is not liable to be prosecuted for the offence punishable under Section 138 of N.I.Act as there was no legally enforceable debt between accused No.4 represented by Managing Director – accused No.5 and respondent No.1 complainant herein. The subsisting legally enforceable debt is between accused No.1 represented by accused No.2 Managing Partner and respondent No.1, complainant. The accused No.1 – partnership firm and accused No.4 company are having separate legal entity, the director of the company, who issued a cheque to discharge the liability of accused No.1, cannot be made liable to be prosecuted for the offence punishable under Section 138 of N.I.Act and the petitioner No.2 is not a drawer.

Section 138 of N.I.Act limits the criminal liability to the drawer of the cheque alone. Therefore, the drawer of the cheque, subject to exception under Section 141 of N.I.Act, is liable for payment of amount covered by dishonoured cheque. However, in case of firms and companies, the persons, who are actively participated in day to day affairs including directors of the company are also liable to be prosecuted, but here in the present case, there was no legally enforceable debt between accused No.4 and the respondent No.1, whereas legally enforceable debt was subsisting allegedly between accused No.1 represented by accused No.2, Managing Partner and the complainant, respondent No.1. Therefore, the accused No.1 – partnership firm represented by accused No.2 – Managing Partner are liable to be prosecuted for the offence, if accused No.1 issued any cheque towards discharge of whole or part of legally enforceable liability or debt. But this Court need not decide the liability of accused

No.1 and 2 for the offence punishable under Section 138 of N.I.Act since accused No.1 is not a party before this Court. Hence, I find that the petitioner No.2/accused No.6 being the director of accused No.4 is not liable to pay any amount covered by dishonoured cheque as demanded in the notice dated 03.06.2006 as there was no subsisting legally enforceable debt or liability. Accordingly, the point is answered.

P O I N T No.2:

The main contention of the learned counsel for the petitioners is that, Section 141 of NI Act attaches liability on the Directors of the company only when they are actually participating in day-to-day activities of the company. But, the law laid down by the Apex Court is that, to fasten the liability on the Directors other than the Managing Directors, there must be a specific allegation, as to how they participated in the business, in the complaint itself. In the absence of specific details as to how they participated in the business, the complaint against such Directors is liable to be quashed.

In **Sunil Bharti Mittal v. Central Bureau of Investigation**[2] 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

[2] (2015) 4 SCC 609

coupled with criminal intent or the statutory regime attracts the doctrine of vicarious liability.

In the recent judgment in **Pooja Ravinder Devidasani** 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 the 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.,**[3] 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 and another** referred supra, this Court took a similar view in **Nusun Genetic Research Ltd., and others v. State of Telangana and another**[4]

Learned counsel for the petitioners would draw the attention of this Court to the judgment of the Apex Court in **National Small Industries Corporation Limited v. Harmeet Singh Paintal and another**[5]**,** wherein 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.

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[3] 2017 Law Suit (SC) 1035
[4] 2016 (2) ALT (Crl.)35 (A.P.)
[5] (2010) 3 SCC 330

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 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.

Similarly, the counsel also relied on the judgment of the Apex Court 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]. In all these judgments, 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.

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

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 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.

Thus, the partner of the firm or director of the company is liable only in case where there is an averment in the complaint that he directly involved in day-to-day business of the firm or the company. But in the present case, the complaint is bereft of such details and in the absence of the details as to how the petitioners involved in day-to-day affairs of the firm or the company, the

[10] 2014(1) Mh L.J.
[11] 2014(1)Mh L.J. 214

proceedings against them are liable to be quashed in view of the long line perspective pronouncements.

Learned counsel for the respondents contended that the trial was already commenced and some of the witnesses were examined. But that itself is not a ground to prosecute the petitioners, since the question of vicarious liability under statutory regime under Section 141 of N.I. Act would not attract. In the present case the petitioners are only the Partner and Director, they are not drawer or maker of the cheque as defined under Section 7 of the N.I. Act and thereby they are not liable to be proceeded under Section 138 of N.I. Act. Hence, I find that the respondent No.1 is not entitled to proceed against the petitioners for the offence punishable under Section 138 of N.I. Act.

In the result, the criminal petition is allowed and the proceedings against the petitioners, who were arrayed as accused Nos.3 and 6 in C.C.No.85 of 2009 pending on the file of I Additional Judicial Magistrate of First Class, Proddatur, Kadapa District are hereby quashed. No costs.

Miscellaneous petitions, if any, pending in this criminal petition shall stand closed.

M. SATYANARAYANA MURTHY, J

19.06.2018

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