HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CRIMINAL PETITION No. 6870 of 2013

ORDER:

This petition is filed under Section 482 Cr.P.C., seeking to quash the proceedings in C.C.No.28 of 2013 on the file of IV Special Magistrate, Kukatpally, at Miyapur. The petitioner is accused No.3 in C.C.No.28 of 2013. Originally, the 1st respondent has filed a complaint under Section 200 Cr.P.C., against the accused Nos.1 to 3 under Section 138 of the Negotiable Instruments Act, 1881 (for short, the NI Act) read with Section 142 of the NI Act.

2. Brief facts of the complaint lodged by the 1st respondent are that the complainant is a Proprietorship concern, a Wholesale dealer and supplier of PVC Resin and its allied items. Accused Nos.2 and 3 representing accused No.1 company approached the complainant and represented that accused No.1 is a Private Limited Company and accused Nos.2 and 3 are its responsible persons for the day to day affairs as being its directors; and accused Nos.2 and 3 are running the Rubber and PVC Unit and require the huge quantity of PVC Resin and other chemicals as such requested the Complainant to supply the same on credit basis and agreed to pay the amount within 10 days from the date of supply. Accused Nos.2 and 3 have also agreed to

pay the dues jointly and severally, in case of failure on the part of accused No.1 Company. The complainant, believing the said representations and assurances of the accused persons to be true, agreed to supply the same on credit basis. Accordingly, the complainant supplied PVC Resin as required by the accused under different invoices under a running account. On verification of the account, it was found that the accused No.1 represented by accused No.2 and 3 are liable to pay a sum of Rs.86,09,003.50p. The said amount is due for a long time and all the accused are intentionally not paying the amount. On persuasion and reminders of complainant's representatives, accused Nos.2 and 3 represented by accused No.1 have issued four different cheques towards their liability with a promise to honour the same as on being presented for payment on respective dates. The complainant has presented the cheque bearing No.042512, dated 03.12.2012 for an amount of Rs.4,45,839.50 p and No.042514 dated 03.12.2012 for an amount of Rs.70,68,781, both drawn on State Bank of Hyderabad, Shapur Nagar Branch, Hyderabad. When the cheques were presented for collection, they were returned unpaid with the endorsement "Insufficient funds" on 04.12.2012. The fact of the dishonour of the cheques was intimated to the accused persons but they have failed to pay the amount under the dishonoured cheque. The complainant got issued legal notice dated 01.01.2013 through his counsel to the accused Nos.1 to 3 demanding them to pay the amount under the dishonoured cheques within 15 days from the date of receipt of the said notice. The accused have received the notice and gave evasive reply with false contents. Since the accused Nos.2 and 3 representing accused No.1 have issued the above cheques for discharge of legally enforceable debt, they are liable to pay the amount under the cheques. Since the cheques issued by them were returned unpaid due to non-availability of sufficient funds in their account, they are liable for prosecution under Section 138 of the NI Act and under Section 420 IPC. It is further stated that the dishonour of the cheque was intimated to the complainants by its Bank on 04.12.2012 and the legal notice was sent to the accused on 01.01.2013 and the accused have also issued reply notice dated 18.01.2013, the complainant sought for prosecution against accused Nos.1 and 2 under Section 141(2)(b) of NI Act for committed under Section 138 of the NI Act.

3. Heard the arguments of Sri V.R. Machavaram, learned counsel for the petitioner/A3, and Sri R. Satyanaranana Reddy, learned counsel for respondent No.1-complainant,

and the learned Public Prosecutor representing the 2nd respondent-State.

4. Learned counsel for the petitioner submits that the petitioner/A3 is the wife of accused No.2. The petitioner has never participated in the day to day affairs as such she is not liable for the alleged debt and that she has not issued any cheque in favour of the complainant and, therefore, she is not liable for prosecution under Section 138 of the NI Act. It is further submitted that the petitioner has stated in her reply notice dated 18.01.2013 that she has not acting as Director of the petitioner-company and as such she is not liable under Section 138 of the NI Act. Leaned counsel for the petitioner placed reliance on the judgment reported in the case of **Mrs. Aparna A. Shah v. M/s Sheth Developers Pvt. Ltd.**[1], paragraph 22 of which reads as under:

> "22. In the light of the above discussion, we hold that under Section 138 of the Act, it is only the drawer of the cheque who can be prosecuted. In the case on hand, admittedly, the appellant is not a drawer of the cheque and she has not signed the same. A copy of the cheque was brought to our notice, though it contains name of the appellant and her husband, the fact remains that her husband alone put his signature. In addition to the same, a bare reading of the complaint as also the affidavit of examination-in-chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque."

[1] AIR 2013 SC (Criminal) 1724

5. Learned counsel for the respondent submits that the decision referred by the learned counsel for the petitioner in **Aparna A. Shah** is not applicable to the facts of the present case. In the present case, the cheque was issued by the petitioner as one of the Directors of the company. Section 141 of the NI Act reads as under:

"*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.

6. Learned counsel for the respondent, placing reliance on the provision of Section 141 of the NI Act in **Standard Chartered Bank v. State of Maharashtra**[2], submits that persons who work as Directors are liable unless there is material to show that they are not participating in day to day affairs of the company. Learned counsel for the respondent placed reliance on paragraphs 26, 31 and 32 of the **Standard Chartered Bank (2 supra)** which read as under:

> *26. In **Gunmala Sales (P) Ltd. v. Anu Mehta**[3], the Court was concerned with Directors who issued the cheques. This authority, as we notice, has to be appositely understood. The two-Judge Bench referred to **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla**[4] and other earlier decisions, and came to hold that:*
>
> > *30. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that the basic averment is sufficient, that it makes out a case against the Director; that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time and therefore making him stand the trial would be abuse of the process of court as no offence is made out against him.*
> >
> > *31. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the*

[2] (2016) 6 Supreme Court Cases 62
[3] (2015) 1 SCC 103
[4] (2005) 8 SCC 89

cheque, he must in order to persuade the High Court to quash the process either furnish some sterling uncontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be abuse of the process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director.

31. Now, is the time to scan the complaint. Mr. Divan, learned Senior Counsel appearing for the appellant Bank, has drawn our attention to Paras 2, 4 and 10 of the complaint petition. They read as follows:

2. I further say that I know the accused abovenamed. Accused 1 is a company incorporated under the Companies Act, 1956 having its registered address as mentioned in the cause-title. Accused 2 to are the Chairman, Managing Director, Executive Director and whole-time Director and authorized signatories of Accused 1, respectively. As such being the Chairman, Managing Director, Executive Director and whole-time Director were and are the persons responsible and in charge of day-to-day business of Accused 1 viz., when the offence was committed. Accused 6 and 7 being signatories of the cheque are aware of the transaction and therefore Accused 2 to 7 are liable to be prosecuted jointly or severally for having consented and/or connived in the commission of present offence in their capacity as the Chairman, Managing Director, Executive Director and whole-time Director and authorized signatories of Accused 1, further the offence is attributable to Accused 2 to 7 on account of their neglect to ensure and make adequate arrangements to honour the cheque issued by Accused 1 and further on account of the neglect of Accused 1 to 7 to comply with the requisition made in the demand notice issued under the provisions of Section 138(c) of the Negotiable Instruments Act within the stipulated period. The accused are therefore liable to be proceeded.

4. I say that Accused 1 through Accused 2 and 3 approached the complainant Bank at its branch situated at Mumbai for a short-term loan facility for a sum of Rs.200 crores to meet the expenditure of four ORV vessels being built at ABG Shipyard. After verifying the documents submitted the complainant Bank vide its sanction letter dated 28-4-2012 sanctioned the said

> *facility for the purpose mentioned therein. The said terms and conditions mentioned in the sanction letter dated 28-4-2012 were duly accepted by Accused 1 by signing the same. Accused 1 also agreed to pay interest at the negotiated rate by the complainant Bank. Hereto annexed the marked as Ext.'B' is a copy of the said sanction letter dated 28-4-2012.*
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> *10. I say that Accused 1 to 7 were aware that th aforesaid cheque would be dishonoured for being "account blocked" and all the accused in active connivance mischievously and intentionally issued the aforesaid cheque in favour of the complainant Bank.*

32. The aforesaid averments, as we find, clearly meet the requisite test. It is apt to mention here that there are seven accused persons. Accused 1 is the Company, Accused 2 and 3 are the Chairman and Managing Director respectively and Accused 6 and 7 were signatory to the cheques. As far as Accused 4 and 5 were concerned, they were whole-time Directors and the assertion is that they were in charge of day-to-day business of the Company and all of them had with active connivance, mischievously and intentionally issued the cheques in question."

7. The question in this matter is whether the petitioner herein (accused No.3) has actively participated in the day-to-day business of the Company.

8. Learned counsel for the petitioner submits that in reply notice dated 18.01.2013, the petitioner-A3 denied participating in day to day affairs of the company. Learned counsel relied on paragraph 1 of the said reply notice which reads as under:

"1. That the averment made in para 1 of your notice that No.2 and 3 of our clients representing No.1 of our client approached your client and represented that No.1 of our client is Private Limited Company and No.2 and 3 of our clients are the responsible persons for the day to day affairs of No.1 of our client and that they represented your client requesting for supply of PVC resin to our clients and that they have agreed to pay the dues jointly

> *and severally in respect of the PVC resin and other chemicals supplied by your client on credit basis etc., is all false. We have been instructed to state that Nos.3, of our clients is not at all an active director of No.1 of our client company."*

9. Learned counsel for the petitioner, placing reliance on the reply notice with regard to the non-participation of the petitioner/A3 in the day to day transactions of the company, submitted that the petitioner is not liable for prosecution and therefore the proceedings against the petitioner in C.C.No.28 of 2013 are liable to be quashed.

10. It is pertinent to note that whether the petitioner participated in the day to day affairs of the Company is a question of fact which cannot be decided by this Court exercising jurisdiction under Section 482 Cr.P.C. The complainant-M/s Mangalam Polymers (rep. by its Prop. Ankit Bhutoria) has stated in the complaint and also in its legal notice dated 01.01.2013 at paragraph No.1 that the accused Nos.1 to 3 are responsible persons for the day to day affairs of the Company as being its Directors. The petitioner herein is accused No.3 before the trial Court.

11. In the light of the above decisions, it is obvious that the defences taken by the accused are questions of fact which cannot be decided in a petition filed under Section

482 Cr.P.C. Therefore, this petition is liable to be dismissed.

12. **IN THE RESULT,** the criminal petition is dismissed. However, the presence of the petitioner/A3 is dispensed with, except on the occasions when her presence is required by the trial Court. Miscellaneous petitions, if any pending, shall also stand dismissed.

GUDISEVA SHYAM PRASAD, J

12th April, 2018

KSM

HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CRIMINAL PETITION No. 6870 of 2013

12th April, 2018

KSM