

*** THE HON'BLE SRI JUSTICE N.BALAYOGI**

+ CRIMINAL PETITION No. 4020 OF 2011

% 23.03.2018

Between:

Mr.Nagarjun Valluripalli, Director,
Surya Ray Elixiris Private Limited,
Office at : Plot No.40, Road No.7,
Jubilee Hills, Hyderabad-500 003 & 2 Others ... Petitioners.
AND

The State of Andhra Pradesh,
rep. by its Public Prosecutor,
High Court Buildings, Hyderabad & another
.... Respondents.

! Counsel for Petitioner : Sri Mavidi Rama Rao

^ Counsel for Respondents : G.P.For Services.

Sri P.Sri Ram.

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> Head Note:

? Cases referred:

1. 2014 SCC Online Ker 12702
2. (2005) 8 SCC 89
3. 2010 (1) ALT (CrL.) 363 (AP)
4. AIR 2012 SC 31
5. AIR 2010 SC 2835
6. AIR 2005 SC 3512
7. (2007) 9 SCC 481
8. 2002 (2) Arbitration Law Report, 341

HONOURABLE SRI JUSTICE N. BALAYOGI**CRIMINAL PETITION No.4020 of 2011****ORDER:**

This Criminal Petition is filed by the petitioners under section 482 of Cr.P.C., to quash the proceedings in C.C. No.1851 of 2010, on the file of the XVII Additional Chief Metropolitan Magistrate, at Nampally, Hyderabad.

2. The contention of the petitioners/accused is that the petitioners' Company paid rents and also maintenance till August, 2009. Thereafter, due to slack in business, rents could not be paid and on several occasions petitioners' company requested the respondent / complainant to permit them to pay dues in installments. But the complainant threatened the accused company that they will stop supplying electricity/water and other services, if the dues with regard to payment of rents and maintenance are not cleared immediately. Having no other option, Sri Dheeraj Doulat Keswani, one of the Directors of accused company, who negotiated with the complainant, was forced to hand over post dated blank cheques (personal cheques) to the complainant under security. In spite of receiving post dated personal cheques and contrary to the oral understanding arrived between the complainant and Dheeraj Doulat Keswani, without any prior notice, respondent / complainant stopped supplying electricity/water and other services to the accused company and thereby the accused company was forced to close the business due to heavy loss.

3. It is the further contention of the petitioners that one of the Directors of M/s. Surya Ray Elixirs Private Limited, issued personal cheque bearing No.286482, dated:15.9.2010 for a sum of Rs.10,00,000/- drawn on UCO Bank, to the complainant as security for the outstanding dues and also not to discontinue supply of electricity/water and other services. But the said cheque was deposited by the complainant in their bank and the same was dishonoured. Complainant issued notice on 21.10.2010. To this, reply notice dated:29-11-2010 was issued denying the allegations in the notice.

It is the further contention of the petitioners that cheque was not issued either by the company or by the petitioners, but the same was issued by Mr. Dheeraj Doulat Keswani, the authorized signatory and one of the Directors of M/s. Surya Ray Elixirs Private Limited, in his individual capacity, as advised by the complainant. The complainant is at liberty to recover the outstanding dues, if any, from the accused company strictly in accordance with the terms and conditions of the lease deed dated:11-2-2009. The complainant, without invoking clause 24 of the lease deed dated:11-2-2009, filed a private complaint. The allegations in the complaint are totally incorrect and baseless. It is the further contention of petitioners that inherent power should be exercised by this Court when the Court comes to the conclusion, that there would be manifest injustice or there would be abuse of process of court. That the petitioner Nos.4 and 5 were retired as Directors from the accused company, as per form No.32. No

specific allegations are attributed against the petitioners. In the absence of allegation that the said Director was incharge and was responsible for the conduct of the business of the firm, no case is made out against such Director. Petitioners were not in-charge of day-to-day affairs of the company.

It is the further contention of the petitioners that the complainant filed two private complaints against the petitioners and the company before the learned Judicial I Class Magistrate, Gurgaon, Haryana. Complaints are being filed in multiple jurisdiction in a vexatious manner which cause tremendous harassment and prejudice to the drawers of the cheque.

4. Per contra, the respondents contended that the petitioners and two others issued cheque dated:15.09.2010 for Rs.10,00,000/- towards partial discharge of the liability. The cheque was presented on 22-09-2010 by the complainant in HSBC bank at New Delhi, the same was dishonoured by the UCO bank and returned back with memo dated:25-09-2010 with endorsement as "funds insufficient ". It is further contended by the respondents that the petitioners being in-charge of and responsible to accused No.1 company, intentionally issued the said cheque to avoid payment owed to complainant and to cheat the complainant with mala fide intention. The petitioners and two others issued cheque with full knowledge that it would be dishonoured upon presentation. Notice dated:21-10-2010 was issued by the complainant to the accused, to which reply

dated:28-11-2010 was issued by petitioners/accused 1 and 2 and notice dated:29-11-2010 was issued by petitioner No.3 and two others by making false allegations. The dishonoured cheque being drawn by petitioners/accused they are liable under law to make payment to the complainant. The said cheque was issued towards discharge of legally enforceable dues which was dishonoured, even then, they do not choose to make payment.

5. Now, the point that arises for determination is:

“Whether there is any prima facie material to prosecute the petitioners?”

6. The undisputed facts are that, A1 is the company, A2 to A5 are the Directors. Petitioners also admit in the petition that there are dues to be paid. The main contention of the petitioners is that Dheeraj Doulat Keswani being one of the Directors signed and issued the cheque. But, according to the petitioners, it is a personal cheque issued on the threat of disconnection of electricity / water and other services. Thus, issuance of cheque dated:15-09-2010 for a sum of Rs.10,00,000/- in favour of the complainant was not in dispute. It is also a fact that the said cheque was dishonoured by the UCO bank and returned under Memo dated:25.9.2010 showing as “funds insufficient”.

7. The further contention of the petitioners is that the complainant without invoking arbitration clause 24 of the lease

deed dated:11-2-2009 filed the complaint which is not maintainable.

8. The learned Counsel for petitioners placed reliance on the judgment in **REJIMOL THOMAS v. ROBERT MARTIN** reported in 2014 SCC OnLine Ker 12702, wherein the Apex Court held at para No.14, as follows:

“14. The question as to whether merely because there is an arbitration clause will take away the right of the complainant to move for criminal prosecution has been dealt with by the Honourable Supreme Court in the decision reported in S.W. Palanitkar v. State of Bihar [(2002) 1 SCC 241] and held that merely because there is an arbitration clause in a commercial transaction agreement is not a bar for instituting criminal prosecution if such breach even prima facie constituted a criminal offence. Further, in the decision reported in 2002 (2) Arbitration Law Reporter 341 Atlaz Degi-Tel Pvt. Ltd. v. Atlaz Technology Pvt. Ltd., the Bombay bench of the High Court held that an arbitration clause in an agreement in respect of a business transaction is not a bar for filing a criminal complaint under Section 138 of the Negotiable Instruments Act for dishonour of cheque. It is also settled law that merely because there is a civil remedy available is not a ground to quash criminal proceedings, if the allegations prima facie made out a criminal offence as well. In a case under Section 138 of the Negotiable Instruments Act, the ingredients to be proved are that a cheque was issued in discharge of any partial or whole liability which when presented was dishonoured and in spite of notice issued if the amount is not paid, then, it will attract the penal provision under Section 138 of the Negotiable Instruments Act. The ultimate liability as to how much amount is payable is a matter to be considered in arbitration proceedings and that will not de-bar the complainant from filing a complaint for prosecution under Section 138 of the Negotiable Instruments Act if the complainant had a case that the cheque was issued in partial discharge of an admitted liability by the accused. The question as to whether it is an admitted liability

and whether there is any legally enforceable debt for which the cheque was issued etc. are matters to be considered by the court on appreciation of evidence adduced on both sides. All these questions are to be considered by the Trial Court on the basis of evidence and the defence to be taken by the accused. So, the petitioner is not entitled to get the relief of quashing the proceedings invoking the power under Section 482 of Code of Criminal Procedure.”

The learned Counsel for the petitioners further relied upon the judgment of the Apex Court in **S.M.S. PHARMACEUTICALS LTD. V. NEETA BHALLA AND ANOTHER** (2005) 8 Supreme Court Cases 89, where the Apex Court held as under:

“A liability under [Section 141](#) of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. [Section 141](#) of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of [Section 141](#) has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within [Section 141](#) he would issue the process.

Merely being described as a director in a company is not sufficient to satisfy the requirement of [Section 141](#). Even a non director can be liable under [Section 141](#) of the Act. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under [Section 141](#) that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of [Section 141](#) and has to be made in a

complaint. Without this averment being made in a complaint, the requirements of [Section 141](#) cannot be said to be satisfied.

So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of [Section 141](#).

Further, the learned Counsel for the petitioner placed reliance in **SHANMUGHA SUNDERA RAJA AND ANOTHER v. STATE OF A.P., REP. BY PUBLIC PROSECUTOR AND ANOTHER** IN 2010 (1) ALT (Cr.) 363 (A.P.), the High Court held that,

“A3 and A4 who are only partners and not managing partners of A1 firm cannot be mulcted with any penal liability, particularly when they did not place any order for supply of boiled rice and when they did not issue cheques in question. It was A2 who issued both the cheques as managing partner of A1, A3 and A4 are not privies to the bounced cheque. Accordingly, held that there is no prima facie case made out by the complainant against A3 and A4 who are petitioners and quashed the proceedings.”

In the case of **Mrs. ANITHA MALHOTRA Vs. APPAREL EXPORT PROMOTION COUNCIL AND ANOTHER** (AIR 2012 SC 31) the Apex Court held that in case of a Director, complaint should specifically spell out as to how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. Similarly in the case of **CENTRAL BANK OF INDIA Vs. ASIAN GLOBAL LTD AND ORS** {AIR 2010 SC 2835}, having regard to the decision

in *SMS PHARMACEUTICALS LTD Vs. NEETA BHALLA AND ANOTHER* (AIR 2005 SC 3512) which was later followed in *N.K. WAHI Vs. SHEKHAR SINGH AND ORS* {(2007) 9 SCC 481} the Apex Court while considering the question of vicarious liability of a Director of a Company, reiterated the sentiments expressed in *SMS PHARMACEUTICALS LTDs* case (supra) that merely being a Director would not make a person liable for an offence that may have been committed by the Company. For launching a prosecution against the Directors of a Company under Section 138 read with Section 141 of the NI Act 1881, there had to be a specific allegation in the complaint in regard to the part played by them in the transaction in question. It was also laid down that the allegations had to be clear and unambiguous showing that the Directors were in charge of and responsible for the business of the Company. This was done to discourage frivolous litigation and to prevent abuse of the process of Court and from embarking on a fishing expedition to try and unearth material against the Director concerned.

9. The settled law enumerated from the above decisions is that an arbitration clause in an agreement in respect of a business transaction is not a bar for filing a criminal complaint under Section 138 of the Negotiable Instruments Act on account of dishonour of cheque. In a case under Section 138 of the NI Act, the ingredients to be proved are that a cheque was issued in discharge of any partial or whole liability which when presented was dishonoured and in spite of notice issued if the amount is not

paid, then, it will attract the penal provision under Section 138 of the NI Act. The question as to whether it is an admitted liability and whether there is any legally enforceable debt for which the cheque was issued etc., are matters to be considered by the Court on appreciation of evidence adduced on both sides. Further to make the liability under Section 141 of the NI Act, a clear case should be spelled out in the complaint against the person sought to be made liable. The Magistrate has to examine the complaint in the first instance on the basis of averments contained in the complaint. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141 of the NI Act.

10. From the above decisions, it is further clear that the partners of firm cannot be mulcted with penal liability particularly when they did not place any order for supply of goods and when they did not issue cheque in question. The Director who was not in charge of and was not responsible for conduct of the business of the Company at the relevant time will not be liable under Section 138 NI Act; Thus, a Director of a company cannot be prosecuted for an offence under Section 138 of the Act in the absence of a specific allegation in the complaint that he was in charge of and responsible to the company in the conduct of its business at the relevant time or that the offence was committed with his consent or connivance.

11. Keeping in view the above said principles of law, I can now proceed with the instant case. In the case on hand, the undisputed fact is that the petitioners were the Directors of M/s. Surya Ray Elixirs Private Limited who are arrayed as Accused Nos. 3 to 5 in CC.No.1851 of 2010. The said company entered into two lease deeds on 11.2.2009 with the Respondent No.2 company for the purpose of business.

12. It is further alleged that the petitioners' Company conducted business in the premises in question from 1.11.2008 till August, 2009 by paying rents and also maintenance charges regularly till August, 2009. Admittedly due to slack in business, it committed default in payment of rent and maintenance charges. In spite of repeated requests by the petitioners' Company to permit them to pay the rent and maintenance charges in instalments, the complainant-R.2 orally threatened the petitioners company that they will stop supplying electricity/air condition/water and other services if the dues with regard to payment of rents and maintenance charges are not cleared immediately.

13. The petitioners admit in the criminal petition that having no other alternative, one of the Directors of their Company who negotiated with the complainant, was forced to hand over post dated blank cheques to the complainant-R.2 as security. Despite the same, the second respondent without any notice highhandedly stopped supplying electricity/air condition/water and other services to the accused company and thereby the petitioners/accused company was forced to close its business and incurred heavy loss.

14. In regard thereto, the petitioners admit that one of the directors of M/s. Surya Ray Elixirs Private Limited issued a personal cheque bearing No.286482 dated 15.09.2010 for a sum of Rs.10,00,000/- drawn on UCO bank to the second respondent company as a security for the outstanding dues and for not discontinuing the supply of electricity/air condition/water and other services . However, the said cheque was dishonoured.

15. In the complaint as well as in the charge sheet, there is a allegation that petitioners' company in partial discharge of liability towards the complainant company and to pay their outstanding dues, issued a cheque bearing No. 286482, dated 15.09.2010 for a sum of Rs.10,00,000/- drawn on UCO bank at Plot No.490, Jubilee Hills, Hyderabad and that the said cheque was presented on 22.09.2010 by the complainant in its bank i.e. HSBC bank at Ashok Estate, 24 Barakhamba Road, New Delhi- 110 001 for realization of the amount. The said cheque was dishonoured by the UCO bank and returned vide return memo report dated 25.09.2010 by the complainant's bank saying the reason for dishonour as '*funds insufficient*'.

It is further alleged that the accused No.1 M/s. Surya Ray Elixirs Private Limited and Accused Nos. 2 to 5, Directors of Accused No.1 Company being persons in charge of and responsible to the said company for the conduct of business, have intentionally issued the said cheque to avoid the payment of

money owed by them to the complainant and to cheat the complainant with mala fide intention.

16. As can be seen from the averments, personal cheque bearing No.286482 was issued by Mr.Dheeraj Doulat Keswani, one of the Directors of A1 company, for a sum of Rs.10,00,000/- drawn on UCO bank to the complainant company as security for the outstanding dues and not to discontinuing the supply of electricity, air condition and water and other services. From the very plea itself it is very clear that the cheque bearing No.286482 for a sum of Rs.10,00,000/- is a personal cheque issued by one of the Directors not representing A1 company or the said cheque was issued by the person who is conducting the business and looking after day-to-day management of A1.

17. As held in *Mrs. ANITHA MALHOTRA'S CASE* (supra) the complaint of R2 did not specifically spell out as to how and in what manner Mr.Dheeraj Doulat Keswani, one of the Directors of the A1 company, was in charge of or was responsible to the A1 Company for conduct of its business. The mere allegation in the complaint that the Director and petitioners herein, who are A3 to A5 were in charge of and responsible to the company for conduct of its business is not sufficient. The Apex Court while considering the question of vicarious liability of a Director of a Company, reiterated the sentiments expressed in *SMS PHARMACEUTICALS LTDs* case (supra) that merely being a Director would not make a person liable for an offence that may have been committed by the Company. To make a Director of the company liable under Section

138 read with Section 141 of the NI Act 1881, there should be a specific allegation in the complaint in regard to the part played by the Director in the transaction in question. The complaint is silent with regard to the part played by petitioners herein in issuing the dishonoured cheque by Mr.Dheeraj Doulat Keswani. Absolutely there is no specific allegation which had to be clear and unambiguous showing that petitioners were in-charge of and responsible for the business of A1 company.

18. Further, the allegations in the complaint and charge sheet are that the complainant company issued notice dated 21.10.2010 to the first accused company as well as Accused Nos. 2 to 5, i.e. Directors of Accused No.1 company demanding payment. Accused Nos. 1 and 2 issued their reply notices dated 28.11.2010 and Accused Nos. 3,4 and 5 issued a separate reply notice dated 29.11.2010 making various false allegations to avoid the payment. In the complaint the second respondent admits issuance of above notice dated 21.10.2010 and reply notices by the petitioners dated 28.11.2010 and 29.11.2010.

19. A perusal of lease deeds goes to suggest that as per Clause 24 thereof, any and all disputes or differences between the lessor and lessee arising out of or in connection with the agreement or its performance shall be settled amicably within 15 days through consultation between the parties. Thereafter, if the parties have failed to reach an amicable settlement on any or all disputes or differences arising out of or in connection with this agreement or its performance, such disputes or difference shall be

submitted to Arbitration for final adjudication. Accordingly there is an arbitration clause in the lease deeds. In ***REJIMOL THOMAS Vs. ROBERT MARTIN*** (supra), on considering the decision in ***ALTAZ DEGI TEL PVT LTD Vs. ALTAZ TECHNOLOGY PVT LTD*** {2002 (2) ARBITRATION LAW REPORT, 341} the Bombay Bench of High Court held that an arbitration clause in an agreement in respect of a business transaction is not a bar for filing a criminal complaint under Section 138 of the Negotiable Instruments Act on account of dishonour of cheque. It is also settled law that merely because there is a civil remedy available is not a ground to quash criminal proceedings, if the allegations prima facie made out a criminal offence as well. In a case under Section 138 of the NI Act, the ingredients to be proved are that a cheque was issued in discharge of partial or whole liability which when presented was dishonoured and in spite of notice issued, if the amount is not paid, then it will attract the penal provision under Section 138 of the NI Act.

20. As already discussed hereinabove, Mr. Dheeraj Doulat Keswani had issued cheque bearing No. 286482, dt 15.9.2010 for an amount of Rs.10,00,000/- in discharge of partial payment of outstanding dues towards rent/maintenance charges relating to supply of electricity/air condition/water and other services, which when presented on 22.09.2010 was dishonoured with an endorsement '*funds insufficient*'. Thereafter, the second respondent/complainant issued notice dated 21.10.2010, for which, Accused Nos. 1 and 2 issued reply notice dated 28.11.2010

and Accused Nos. 3, 4 and 5 issued a separate reply notice on 29.11.2010. Having not satisfied with the reply notices, the second respondent came to know that A2 with mala fide intention issued cheque while knowing fully well that the same would be dishonoured upon presented which is indicative of his dishonest and fraudulent intention. Therefore, ingredients of Section 138 of NI Act are attracted so far as Mr.Dheeraj Doulat Keswani, one of the Directors of A1 company is concerned, as he issued the dishonoured cheque.

21. Despite the arbitration clause, the complaint under Section 138 of NI Act is maintainable since it prima facie made out a criminal offence as well against the concerned, but not petitioners/A3 to A5, who have nothing to do with the dishonoured cheque. Accordingly, there is no specific overt act attributed to petitioners/A3 to A5.

22. In the facts and circumstances discussed above and conclusions therein, I am of the considered view that A1 is the company, A2 to A5 are Directors of it. Admittedly, there are dues payable by A1 company. The dishonoured cheque dated 15.9.2010 was issued by Mr.Dheeraj Doulat Keswani, one of the Directors of A1 company. In the lease deed there is clause No.24 which postulates that the disputes or differences shall be submitted to the arbitration for final adjudication. The settled law is that arbitration clause in an agreement in respect of business transaction or dispute with regard to tenancy is not a bar for filing a criminal complaint under Section 138 of the Negotiable

Instruments Act. It is also settled law that merely because civil remedy is available that itself is not a ground to quash criminal proceedings, if the allegations *prima facie* made out a criminal offence as well. The ultimate liability as to how much amount has to be payable is a matter to be considered in arbitration proceedings and that will not debar the complainant from filing a complaint for prosecution under Section 138 of the Negotiable Instruments Act, if the complainant had a case that the cheque was issued in partial discharge of an admitted liability by the accused. The question as to whether it is an admitted liability and whether there is any legally enforceable debt for which the cheque was issued etc. are matters to be considered by the court on appreciation of evidence adduced on both sides.

23. No clear case was spell out in the complaint against the petitioners/A3 to A5 and the complaint does not contain allegation against petitioners which fall within the parameters of Section 141 of the Act. The question whether the person who issued the cheque is responsible to the conduct of the business of the company or in-charge of the company are facts to be proved by adducing evidence. More particularly, in the complaint it is stated that the impugned cheque was issued as security for the arrears due to the complainant. Therefore, the signatory of the cheque, which is dishonoured, is clearly responsible for the incriminating act and will be covered under Sub-Section 2 of Section 141 of the Negotiable Instruments Act, but not petitioners/A3 to A5 who are not concerned with the dishonoured cheque. The further question

whether the person who issued the cheque is a member or director or other is to be decided during trial by adducing evidence. No specific allegations are alleged in the complaint as to how and in what manner the Directors were responsible to A1 company for conduct of its business.

24. In such circumstances, I am of the considered view that A2 to A5 were Directors of A1 company and the dishonoured cheque was issued by Mr.Dheeraj Doulat Keswani/A2, towards arrears of rents. The arbitration clause in the rent deed is not a bar for filing a criminal case under Section 138 of Negotiable Instruments Act on account of dishonour of the cheque. The question as to whether the dishonoured cheque was issued towards an admitted liability and whether there is any legally enforceable debt for which the cheque was issued are all matters to be considered by the Court on appreciation of evidence adduced on both sides. There is no *prima facie* material against petitioners/A3 to A5 that they are concerned in any way with the dishonoured cheque and that they being the Directors, in charge of and responsible to the business of A1 company. The complaint is silent about any specific allegation against petitioners as to how and in what manner they were in charge of or responsible to the A1 company for conduct of its business and mere bald statement that they are in charge of and responsible to the company for conduct of its business is not sufficient. The petitioners/A3 to A5 are only Directors and not in-charge of and responsible to the company for conduct of its business and they cannot be mulcted with any penal

liability, particularly when they have nothing to do with the dishonoured cheque as it was issued by Mr.Dheeraj Doulat Keswani, one of the Directors who issued the personal cheque and also not by A1 company. The petitioners/A3 to A5 are not privies to the bounced cheque. Therefore, petitioners do not fall within the parameters of Section 141 of N.I. Act. Accordingly, held that there is no *prima facie* case made out by the complainant R2 against petitioners/A3 to A5 who are Directors.

25. In the result, the criminal petition is allowed while quashing the proceedings in C.C. No.1851 of 2010 on the file of the XVII Additional Chief Metropolitan Magistrate at Nampally, Hyderabad, so far as petitioners/A3 to A5 are concerned.

26. Consequently, miscellaneous petitions pending, if any, shall stand closed.

March, 2018

Msnr/Skmr

JUSTICE N.BALAYOGI



