THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRL.P.Nos.8038, 8044 AND 8045 OF 2015
&
CRL.P.Nos.1726 and 1727 OF 2016

COMMON ORDER

These criminal petitions are filed under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') to quash the proceedings against the petitioners, who were arrayed as accused in C.C.Nos.85, 87, 83, 86, 88 and 84 of 2009 pending on the file of I Additional Judicial Magistrate of First Class, Kadapa District.

The petitioners and the *de facto* complainant in all these criminal petitions are one and the same. The chronological order of the accused in calendar cases is as under:

Sl.No.	Crl.P.No.	C.C. No.	Accused
01.	8038 of 2015	87 of 2009	A.3
02.	8044 of 2015	83 of 2009	A.5
03.	8045 of 2015	86 of 2009	A.3
04.	1726 of 2016	88 of 2009	A.3
05.	1727 of 2016	84 of 2009	A.3

The petitioners in all these criminal petitions are the partners of the firm Maksen Spinners and Prakathi Spinners Limited. The *de facto* complainant filed the above referred complaints under Section 138 of Negotiable Instrument Act, 1881 (for short 'N.I. Act') alleging that the petitioners along with A.1 issued cheques on different occasions in connection with the business transaction, but they were dishonoured on their presentation for collection and even after service of notice in compliance of the procedure provided under the proviso (b) to

Section 138 of N.I. Act, the Managing Directors, and directors, who are the petitioners herein, failed to pay the amount covered by dishonoured cheques. Hence, the complaints.

The main contention, which is common, in all these petitions is that the petitioners are only Directors of the firm/ A.1, hence no criminal liability can be fastened to them being the partners, in view of bar under the proviso to Section 141 of N.I. Act and prayed to quash the proceedings.

During hearing, Sri Raja Reddy Koneti and Sri D.Purna Chandra Reddy, learned counsel for the petitioners contended that making bald allegations in the complaints that these petitioners being the partners participating in day-to-day business of the firm is not sufficient and there must be some details to attach or fasten criminal liability under Section 138 of N.I. Act i.e., as to how they are participating in the business of the firm. But in the absence of any details, the complainant cannot proceed against the petitioners for the offence punishable under Section 138 of N.I. Act.

Whereas Sri G.Ram Gopal, learned counsel for the *de facto* complainant asserted that the petitioners being the partners of the firm/ A.1 issued different cheques on different occasions in connection with business transaction, which were dishonoured on their presentation for collection. Therefore, the partners who are participating in day to day business of the firm are also liable for payment of the amount covered by dishonour cheques and drawn the attention of this Court to the allegations made in the complaints pending before the Judicial Magistrate of First Class, Kadapa and thereby the proceedings against the petitioners cannot be quashed.

It is an undisputed fact that the complaints were filed by the Kamakshi Extractions/ *de facto* complainant against Managing Directors of Maksen Spinners and Prakathi Spinners Limited and its partners, who are allegedly participated in the business of the company.

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 Act, it is the duty of the complainant to plead and prove that the petitioners actively participated in day-to-day business affairs of the firm on the date of commission of offence. But, here except making bald allegations that the petitioners also participated in day-to-day business affairs of the firm in all these complaints, nothing is averred as to how they participated in business affairs and no material is produced before the Court. Based on the said contention, the counsel for the petitioners requested this Court to quash the proceedings against the petitioners, since the petitioners are only partners not Managing Partners of the firm/A.1 and placed reliance on the judgment of the Apex Court in **Pooja Ravinder Devidasani v. State of Maharashtra and another**[1].

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 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***

[1] AIR 2015 SC 675
[2] (2015) 4 SCC 609

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**

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[3] 2017 Law Suit (SC) 1035

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.

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

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[4] 2016 (2) ALT (Crl.)35 (A.P.)
[5] (2010) 3 SCC 330

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.

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.

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[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.

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.

In **K.K.Ahuja v. V.K.Vora & Anr.**[12] Even in **S.M.S. Pharmaceuticals Ltd.** (referred supra) the Apex Court held that, the position under Section 141 of N.I. Act can be summarized thus:

> ***(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix `Managing' to the word `Director' makes it clear that they***

[11] 2014(1)Mh L.J. 214
[12] (2009)10 SCC 48

were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager (as defined in Sec. 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other Officers of a company can not be made liable under sub-section (1) of section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

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 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 Directors, 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 respondents are not entitled to proceed against the petitioners for the offence punishable under Section 138 of N.I. Act.

Accordingly, these criminal petitions are allowed, quashing the proceedings against the petitioners, who were arrayed as A.3 and A.6 in C.C.Nos.87, 83, 86, 88, 84 of 2009 pending before the I Additional Judicial Magistrate of First Class, Kadapa.

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

M. SATYANARAYANA MURTHY, J

19.06.2018
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THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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<u>Date:19.06.2018</u>

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