

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.835 & 1160 OF 2017

COMMON ORDER:

These two petitions are filed, under Section 482 of the Criminal Procedure Code (for brevity, 'Cr.P.C.'), to quash the proceedings in C.C.No.121 of 2016, pending on the file of the XXI Special Magistrate Court, Erramanzil, Hyderabad, for the offence registered under Section 138 of the Negotiable Instruments Act, 1881 (for brevity, 'the Act').

Petitioner in CrI.P.No.835 of 2017 is A6 and petitioners in CrI.P.No.1160 of 2017 are A3, A4 and A8 in the said C.C., whereas respondent No.2 is the complainant. The second respondent M/s Omni Enterprises filed a private complaint under Section 200 Cr.P.C. against these petitioners and other accused for the offences punishable under Section 138 r/w 141 of the Act.

The complainant is a proprietary concern, represented by Sri K.Srihari Babu, who is dealing with purchase and sale of Iron, TMT bars etc., whereas the first accused-M/s Sujana Metal Products Limited is a company registered under the Companies Act, 2013 having manufacturing unit and registered office at the address given in the cause title and it is being represented by the Managing Director-A2 in C.C.No.121 of 2016.

A2 is the Managing Director, A3 is the Chairman of A1 and A4 to 8 are Directors and are in-charge, responsible for the day-to-day affairs, business, administration and accounts of A1. A9 and A10 are the authorized signatories, authorized to make payments, issue cheques and to look after the financial and day-to-day business affairs of A1. As such, A2 and A3, being the Managing Director and Chairman, and the other accused, being the Executive Directors and authorized signatories, are responsible for the day-to-day affairs of the business and liable for prosecution for the offence punishable under Section 138 of the Act.

There were credit transactions between A1 and the complainant and, on settling the accounts, the amount due to the complainant by A1 came to Rs.8,00,70,480/- as on 19.02.2016 and the same is confirmed by the accused vide letter, dated 18.04.2016. Towards the discharge of the debt due to the complainant, A9 and A10, representing A1, with the consent, connivance and knowledge of A2 to A8, issued the following cheques:

S.No.	Date	Cheque No.	Amount	Drawn on
1	18.03.2016	001128	Rs.50,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
2	25.03.2016	001129	Rs.50,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
3	31.03.2016	001130	Rs.50,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.

4	02.04.2016	001398	Rs.8,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
5	04.04.2016	001399	Rs.8,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
6	06.04.2016	001400	Rs.8,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
7	08.04.2016	001401	Rs.8,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
8	11.04.2016	001402	Rs.8,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
9	13.04.2016	001403	Rs.8,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
10	15.04.2016	001404	Rs.9,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
11	18.04.2018	001405	Rs.9,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.
12	20.04.2016	001406	Rs.9,00,000/-	Lakshmi Vilas Bank, Panjagutta, Hyderabad.

On presentation of the above cheques for collection, on the dates given in the above table, the HDFC Bank Limited, S.R.Nagar Branch dishonoured the cheque for the reason 'payment stopped by the drawer' and returned the cheques vide Cheque Return Memos, dated 16.06.2016, for the cheque bearing No.001128, and dated 21.06.2016, for the cheques bearing Nos.001129 & 001130, and dated 28.06.2016 for cheques bearing Nos.001398 to 001406. Thus A1 to A9, being the Chief Managing Director, Chairman, Directors and authorized signatories, are liable for payment of the amount covered by above mentioned cheques but when the same were presented for collection they were dishonoured and returned

vide Cheque Return Memos, referred to supra. Thereafter, notice, in compliance of the proviso (b) of Section 138 of the Act, was issued calling upon the accused, including the petitioners herein, to pay the amount covered by the unpaid or dishonoured cheques, within the time stipulated therein, but the accused failed to pay the amount covered by the dishonoured or unpaid cheques. Hence, the complaint.

In both these petitions, A6, one of the Directors, A3, being the Chairman, and A4 and A8, being the Directors, contended that they, being the Chairman and Directors of the company, are not liable for prosecution for the offence punishable under Section 138 of the Act as vicarious liability cannot be fastened to them on the ground that they are the Directors of the company. Unless there is material to show that they are participating in the day-to-day affairs of the company regularly, the allegation made in paragraph No.3 of the complaint is not sufficient to fasten the vicarious liability against these petitioners and requested to quash the proceedings against the petitioners for the offence punishable under Section 138 of the Act.

The specific contention of A6-petitioner in Crl.P.No.835 of 2017, who is no more a Director, is that he was not the Director on the date of commission of the offence as he retired from the company as a Director, with effect from 30.05.2016, and, in such a case, he will not be liable for prosecution for

the offence punishable under Section 138 of the Act. Similarly, A3, A4 and A8-petitioners in Crl.P.No.1160 of 2017, also raised the same contention that they are not liable for payment of the amount since they are neither drawer nor maker of the instrument, as defined under Section 7 of the Act, and, apart from that, unless there is a specific material to establish that they are responsible for payment of the amount and involved in the day-to-day affairs of the company and responsible for the acts of the company, they cannot be prosecuted for the offence punishable under Section 138 of the Act and prayed to quash the proceedings against them.

The second respondent filed counter denying the material allegations *inter alia* contending that the allegations made in paragraph No.3 of the complaint are sufficient to fasten the liability against the petitioners since A3 is the Chairman and other accused are the Directors of the company, who are directly participating in the day-to-day affairs of the company, and a cheque was issued by the company and returned unpaid or dishonoured by the payee bank and that the Directors, who are actively participating in the day-to-day affairs of the company, were also liable to be prosecuted for the offence punishable under Section 138 of the Act.

During hearing, learned counsel for the petitioners, Sri A.Hanumantha Reddy, while reiterating the contentions,

would draw the attention of this Court to various judgments of the Honourable Apex Court reported in **GUNMALA SALES PRIVATE LIMITED v. ANU MEHTA AND OTHERS¹**, **NATIONAL SMALL INDUSTRIES CORPORATION LIMITED v. HARMEET SINGH PAINTAL AND ANOTHER²**, **ASHOKE MAL BAFNA v. M/S UPPER INDIA STEEL MANUFACTURING & ENGINEERING COMPANY LIMITED³**, **STANDARD CHARTERED BANK v. STATE OF MAHARASHTRA AND OTHERS⁴**, **TAMILNADU NEWS PRINT AND PAPERS LIMITED v. D.KARUNAKAR AND OTHERS⁵** and **RAMRAJSINGH v. STATE OF M.P. AND ANOTHER⁶**.

On the other hand, learned counsel for the second respondent/complainant contended that the allegations made in paragraph No.3 of the complaint are sufficient to proceed against the petitioners for the offence punishable under Section 138 of the Act. In support of his contention, he placed reliance on the judgment in **GUNMALA SALES PRIVATE LIMITED** (first cited supra) and another judgment reported in **HARSHENDRA KUMAR D. v. REBATILATA KOLEY AND OTHERS⁷**.

¹ 2015 (1) ALT (CrL.) 129 (SC)

² (2010) 3 SCC 330

³ 2017 (4) Crimes 346 (SC)

⁴ (2016) 6 SCC 62

⁵ (2016) 2 SCC (Cri) 519

⁶ AIR 2009 SC (Supp) 1726

⁷ (2011) 3 SCC 351

Having heard the learned counsel on either side, and in view of the contentions raised by the learned counsel, now the points that arise for consideration in these two petitions are:

- 1) *Whether A6-petitioner in Crl.P.No.835 of 2017, ceased to be a Director by the date of commission of the offence, is liable to be proceeded for the offence punishable under Section 138 of the Act? and*
- 2) *Whether the petitioners, in both the petitions, are actively participating in the day-to-day affairs of the business of A1 and, if not, whether they are liable to be prosecuted for the offence punishable under Section 138 of the Act?*

Point No.1: The first and foremost contention raised by the learned counsel for the petitioners is that A6-petitioner in Crl.P.No.835 of 2017, is ceased to be a Director of the company and he placed on record Form No.DIR-12 to substantiate his contention that he ceased to be the Director of the company. The said Form No.DIR-12 was submitted to the Registrar of Companies subsequent to filing of the complaint but A6 is deemed to have been retired as a Director of the company with effect from 30.05.2016. Therefore, the submission of an application for resignation on 03.01.2017 with effect from 30.05.2016 will not exonerate this petitioner-A6 to claim exemption from prosecution for the offence punishable under Section 138 of the Act. Even the resolution passed by the Board of Directors, dated 30.05.2016,

establishes that A6 ceased to be the Director only with effect from 30.05.2016. On the basis of the subsequent application submitted to the Registrar of Companies on the ground that A6 ceased to be a Director of the company with effect from 30.05.2016 and, based on the application submitted subsequent to the filing of the complaint, i.e. on 03.01.2017, A6 cannot be exonerated from the criminal liability for the offence punishable under Section 138 of the Act, as the cheques presented were dishonoured in the year 2016 and the complaint was filed on 24.08.2016.

One of the contentions raised by the learned counsel for the respondents was that, by the date of the offence, the petitioner in Crl.P.No.835 of 2017 was continuing as a Director but application was made subsequent to filing of the complaint. However, to substantiate the contention of the learned counsel for the petitioner-A6, he placed reliance on Form-DIR-12 and the resolution passed by the Board of Directors of the company, dated 30.05.2016, whereby they resolved to retire Smt.D.Sandhya, petitioner-A6 in Crl.P.No.835 of 2017 with effect from 30.05.2016 but there is delay in submitting the form and it was submitted on 03.01.2017, after filing of the complaint, but in **HARSHENDRA KUMAR** (seventh cited supra), the Apex Court held that Ex-Director cannot be made accountable and fastened with the liability for anything done by the company.

On facts, the resignation of the petitioner, as Director of the company, was accepted and sent to the Registrar of Companies by the company in Form-DIR.32 on the day when the offence was committed. The petitioner was neither the Director of the company nor had anything to do with the affairs of the company. Hence, the Apex Court, in **HARSHENDRA KUMAR** (seventh cited supra), held that, if criminal complaints are lodged to proceed against the petitioner, it would be abuse of process of Court and quashed the proceedings but this principle cannot be applied to the present facts of the case for the reason that as on the date of the alleged commission of offence in the month of May, 2016, the petitioner's resignation was not accepted by the Registrar of companies and the Form-DIR.32 was not submitted as on that date. In such a case, based on the contention that she ceased to be a Director of the company, the proceedings against her cannot be quashed and, hence, on this ground, the proceedings against the petitioner-A6 in Crl.P.No.835 of 2017 cannot be quashed. Accordingly, the point is held against A6-petitioner in Crl.P.No.835 of 2017, and in favour of the second respondent/complainant.

Point No.2: The general contention raised in both the petitions is that, unless there is material to establish that these petitioners are participating in the day-to-day affairs of the company, being the Directors, they cannot be prosecuted

for the offence punishable under Section 138 of the Act. Undoubtedly there is an allegation in paragraph No.3 of the complaint that these petitioners are participating in the day-to-day affairs of the company and it is extracted as under:

“It is submitted that the accused No.2 is a Managing Director, the accused No.3, Chairman of accused No.1. The accused Nos.4 to 8 are directors and are in-charge and responsible for the day-to-day affairs, business administration and accounts of accused No.1. The accused Nos.9 and 10 are authorized signatories authorized to make payments, issue cheques and to look after the financial and day-to-day affairs of the accused No.1 company. As such being the Chairman, Managing Director, Executive Directors and authorized signatories were and are the persons responsible and in charge of day to day business of the accused No.1 company. The accused No.9 and 10 being signatories of the cheque are aware of the transaction and therefore the accused 2 to 10 are liable to be prosecuted jointly are severally for having consented and/or connived in the commission of present offence in their capacity as the Chairman, Managing Director, Directors and authorized signatories of accused No.1, further the offence is attributable to accused Nos.2 to 10 on account of their neglect to ensure and make adequate arrangements to honour the cheques issued by accused No.1 and further on account of the neglect of accused No.1 to 10 to comply with the demand made in the notice within stipulated period. Therefore the accused are liable to be prosecuted”.

Now the question that arises for consideration is that whether the allegation that the petitioners are participating in the day-to-day affairs of the company is sufficient or not and,

if not, what is required to establish that these petitioners are also participating in the day-to-day affairs of the company?.

Learned counsel for the petitioners would draw the attention of this Court to the judgment of the Full Bench of the Apex Court reported in **RAMRAJSINGH** (sixth cited supra). At paragraph No.8 of the said judgment it is held that to launch a prosecution, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the Court can always come to a conclusion on facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable. Following this judgment, a Division Bench of the Apex Court, held that to prosecute the Directors of the company, for the offence punishable under Section 138 of the Act, there must be a specific allegation and the Court also distinguished the judgment in **GUNMALA SALES PRIVATE LIMITED** (first cited supra), relied on by the learned counsel for the petitioners, at paragraph No.26, and finally concluded that to prosecute the Directors of the company there must be allegation that the Directors are full

time employees and they are in-charge of the day-to-day affairs of the business and they all with active connivance misused the said cheques. It is asserted in the facts of the above judgment that considering the totality of the assertions made in the complaint and also taking note of the averments put forth, the petitioner Nos. 2 and 3, the Chairman and Managing Director, as they were whole-time Director and Executive Director and in-charge of the day-to-day affairs of the company, the Court is of the view that the Courts below committed an error in concluding that there are no specific averments in the complaint for issuance of summons against them.

Learned counsel for the second respondent relied on the judgment of the Apex Court in **GUNMALA SALES PRIVATE LIMITED** (first cited supra) and **HARSHENDRA KUMAR** (seventh cited supra). In the judgment of the Division Bench in **GUNMALA SALES PRIVATE LIMITED** (first cited supra) the Court held that an allegation in the complaint that the Directors are participating in the day-to-day affairs of the company is sufficient to proceed against them and the Court cannot quash the proceedings by exercising the inherent powers under Section 482 Cr.P.C. To proceed against the Director of the company, for the offence punishable under Section 138 Cr.P.C., i.e. cheque bounce, it is necessary to aver in the complaint, filed under Section 138 of the Act, that

at the relevant time the Directors were in-charge and responsible for the conduct of the business of the company. The law declared in the above judgment is not in dispute and in similar case, in **HARSHENDRA KUMAR** (seventh cited supra), the Apex Court held that Ex-Director cannot be made accountable and fastened with the liability for anything done by the company. But the principle laid down in **GUNMALA SALES PRIVATE LIMITED** (first cited supra) will not come to the aid of this respondent to conclude that the petitioners are also responsible for the offence.

In a recent judgment reported in **ASHOKE MAL BAFNA** (third cited supra), it is held that there must be some material in addition to making an allegation that they are participating in the day-to-day affairs of the business of the company but, in the present case, there is absolutely nothing except stating that they are participating in the day-to-day affairs of the company.

Coming to the facts of the case, the petitioner No.1 in Crl.P.No.1160 of 2017 is A3-Chairman of the company, who is participating in the day-to-day affairs of the company. The Chairman, being the full time employee of the company, is liable to be prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act, whereas the allegations made against the other Directors i.e. A4, A6 and A8, are formal compliance of requirement to fasten the

liability under Section 141 of the Act. On the basis of such bare allegation, without any material in support of it, it is difficult to accept the contention of the respondents to prosecute the petitioners for the offence punishable under Section 138 of the Act. Therefore, A6-petitioner in Crl.P.No.835 of 2017, and A3, A4 and 8, petitioners in Crl.P.No.1160 of 2017, though being the Directors, are not liable to be prosecuted for the offence since there is nothing to establish *prima facie* that they are also participating in the day-to-day affairs of the company and responsible for the acts of the company.

In the absence of any material, mere making an allegation is not sufficient in view of the law declared by the Full Bench in **RAMRAJ SINGH** (seventh cited supra). Therefore, I find that the prosecution of A6-petitioner in Crl.P.No.835 of 2017, and A4 and A8-petitioner Nos.2 and 3 in Crl.P.No.1160 of 2017, is liable to be quashed, exercising the power under Section 482 Cr.P.C.

The power of this Court, under Section 482 Cr.P.C., is inherent and such power can be exercised only to implement the orders passed, to prevent the abuse of process of law and to meet the ends of justice. Keeping in mind the scope of power, under Section 482 Cr.P.C., the Apex Court in the case of **STATE OF HARYANA** (eighth cited supra) considered in detail the power of the High Court under Section 482 to

quash criminal proceedings or FIR. The Apex Court summarized the legal position by laying down the following guidelines to be followed by High Courts in exercise of their inherent powers to quash a criminal complaint:

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the

concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

In **STATE OF HARYANA** (eighth cited supra) the Apex Court considered in detail the scope of provisions of Section 482 and the power of the High Court to quash criminal proceedings or FIR. The Apex Court summarized the legal position by laying down the guidelines to be followed by the High Courts, in exercise of their inherent powers, to quash a criminal complaint, which are mentioned supra.

If the principles laid down by the Apex Court in **STATE OF HARYANA** (eighth cited supra) are applied to the present facts of the case, coupled with Section 141 of the Act, the question of attachment of vicarious liability to the employees of the company would arise only by way of the principle *alter-ego* i.e. attribution. The allegation made in the complaint is that they are actively participating in the day-to-day affairs of the company. There is nothing *prima facie* to substantiate the allegation that they are participating in the day-to-day affairs of the company. Therefore, the proceedings against these petitioners are liable to be quashed for the offence punishable under Section 138 of the Act.

The Apex Court, in **HARSHENDRA KUMAR D.** (seventh

cited supra), and in **STANDARD CHARTERED BANK** (fourth cited supra), discussed about the scope of Section 482 Cr.P.C., and held that in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of the merits of the accusations. However, in an appropriate case, if on the face of the documents, which are beyond suspicion or doubt, placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at *prima facie* stage.

Applying the principles laid down in the above judgments to the present facts of the case, and, since the allegations made in the complaint do not fasten any liability for the offence punishable under Section 138 Cr.P.C., being Directors of the Company, and, in the absence of any material to establish *prima facie* that all these petitioners are participating in the day-to-day affairs of the company, whereas A3-first petitioner in CrI.P.No.1160 of 2017, who is Chairman of the company, being a Full Time employee, is liable to be prosecuted for the offence, in view of Section 141 of the Act, and by applying the principle of *alter-ego*, I find

that it is a fit case to quash the proceedings against the petitioner-A6 in Crl.P.No.835 of 2017 and petitioner Nos.2 and 3-A4 and A8 in Crl.P.No.1160 of 2017 and, consequently, there are no grounds to quash the proceedings against the first petitioner-A3 in Crl.P.No.1160 of 2017.

In the result, Crl.P.No.835 of 2017 is allowed, while allowing Crl.P.No.1160 of 2017 in part, quashing the proceedings against the petitioner Nos.2 and 3-A4 and A8 in C.C.No.121 of 2016, pending on the file of XXI Special Magistrate Court, Erramanzil, Hyderabad, while dismissing the claim of A3-first petitioner in Crl.P.No.1160 of 2017, permitting the Court to proceed against A3, being the Chairman and Full Time employee of the company.

Miscellaneous petitions pending, if any, in these two petitions shall stand closed.

M.SATYANARAYANA MURTHY,J

October 11th, 2018.
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