THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.7008 and 7256 of 2018

COMMON ORDER:

These two Criminal Petitions, under Section 482 Cr.P.C., are filed by A.3 and A.5 to quash the proceedings in C.C.No.168 of 2018 on the file of III Special Metropolitan Magistrate, Cyberabad, Kukatpally, registered for the offence under Section 138 of NI Act.

Respondent No.2 filed Private Complaint under Section 200 Cr.P.C. for the offence punishable under Section 138 of NI Act against the accused. First Accused is Devarakonda Educational Society, represented by its Vice President; Accused No.2 is D.K.Sridhar, Vice President of the Society and petitioners herein are only the members of the Devarakonda Educational Society/Accused No.1. A cheque bearing No.163958 dt. 21.11.2016 was issued by A.1 represented by A.2 for an amount of Rs.53,15,000/- drawn on State Bank of India, Main Road, Medak towards part payment of the amount due to the complainant, but on its presentation, the same was returned unpaid. Thereupon, a Notice dt. 09.12.2016 in compliance of Section 138(B) of NI Act was issued and the receipt of the same was acknowledged by accused, but failed to pay the amount covered by the dishonoured cheque. Hence, the complaint.

The only allegation against these petitioners are that they are members of the Society and they have participated in day to day affairs of the society.

These two petitions are filed on the ground that merely they are members of the Society, the proceedings against the petitioners for the offence under Section 138 cannot be continued as the question of vicarious liability under Section 142 of NI Act does not arise unless there is material to show that they are directly involved in day to day affairs of the Society and requested this Court to quash the proceedings against these petitioners.

As seen from the allegations made in the complaint, except a bald allegation that they are also involved in day to day affairs of the Society, no details as to how they were participated in day to day affairs were mentioned. However, the learned counsel for the respondent/s contended that in view of the Orders in I.A.No.1146 of 2018 in I.A.No.950 of in O.P.No.1570 of 2016, the petitioners are liable for prosecution for the offence under Section 138 of NI Act.

The cause of action arise for the offence under Section 138 of NI Act on the day when the cheque amount covered was not paid within one month from the date of receipt of the legal notice, but it was served and reply was issued by Accused Nos. 1 and 2. Therefore, by the date of service of notice and failure to pay the amount covered by dishonoured cheque, the Order in I.A.No.1146 of 2017 was not passed. Only by virtue of this

Order, the other accused became liable, but by the date of the alleged commission of offence, the petitioners were not liable and they are not participated in day to day affairs of the society.

No doubt, the complaint was lodged against the petitioners for the offence punishable under Section 138 of N.I.Act. However, Section 141 of N.I.Act deals with vicarious liability of any person other than the drawer of the cheque.

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.***

***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 N.I.Act., it is the duty of the complainant to plead and prove that the petitioners participated actively in day to day affairs of the Company on the date of commission of offence. Making a bald allegation against the petitioners is not sufficient to fasten any criminal liability in view of the law declared by the Apex Court in "*Pooja Ravinder Devidasani v. State of Maharashtra*" (referred supra) and the complaint is liable to be quashed.

In "*Sunil Bharti Mittal v. Central Bureau of Investigation*[1]" 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 v. State of Maharashtra*" (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

[1] (2015) 4 SCC 609

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 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*", (referred supra) 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*" (referred supra), and this Court took a similar view in "*Nusun Genetic Research Ltd., and others v. State of Telangana and another*[2]

in "*National Small Industries Corporation Limited v. Harmeet Singh Paintal*[3]" 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

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

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 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 the petitioners are actively participating in day-to-day affairs of the company. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

Similarly, in "*N.K.Wahi v. Shekhar Singh and others*[4]", "*S.M.S. Pharmaceuticals Ltd., v. Neeta Bhalla and Another*[5]", "*Central Bank of India v. Asian Global Limited*

[4] (2007)9 SCC 481
[5] (2005) 8 SCC 89

*and others*[6]", 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*[7]" the Apex Court observed that vicarious liability on the part of a person must be pleaded and proved and not inferred.

In the latter judgment, in "*Shushantna J. Sarkar & Other v. State of Maharashtra*[8]" 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 society for the conduct of the business of the society, 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

[6] (2010) 11 SCC 203
[7] J.T. 2007(9) SC 449
[8] 2014(1)Mh L.J. 214

to the person other than the person who issued a cheque i.e. maker or drawer of the cheque.

In view of the law laid down by the Apex Court in the judgments (referred supra) unless there is an allegation with details as to how the petitioners participated in day to day affairs of the society as members, the proceedings against the petitioners cannot be continued. Therefore, I find that it is a fit case to quash the proceedings against the petitioners.

In the result, the criminal petition is allowed. The proceedings in C.C.No.168 of 2018 on the file of III Special Metropolitan Magistrate, Cyberabad, Kukatpally, are hereby quashed against the petitioners herein. No costs.

Miscellaneous Petition, if any pending, in this case, shall stand dismissed.

M. SATYANARAYANA MURTHY, J

Date: 02-08-2018
eha

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.7008 and 7256 of 2018

Dt. 02-08-2018

eha