HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.9223 OF 2018

ORDER:

This Criminal Petition is filed under Section 482 Cr.P.C by the petitioner/A2, seeking to quash the proceedings in C.C.No.118 of 2017 on the file of the Special Magistrate Court-XII, Hyderabad.

2. The petitioner is A2 among three accused in the private complaint filed under Section 138 of the Negotiable Instruments Act (for short 'N.I.Act') by following the procedure contemplated by Sections 200 to 204 Cr.P.C, taken cognizance by the learned II Metropolitan Magistrate at L.B.Nagar in allotting C.C.No.118 of 2017. It is, the de facto complainant-M/s.Drusya Media Planners Private Ltd, represented by its authorized person, T.Janardhan.

3. The allegations of the complaint is not in dispute to go into any further details. The three accused are 1. M/s.Big Shop in Mall India Pvt. Ltd. represented by its Managing Director, M.S.Prabhakar (since deleted from the array of the accused as per the orders in Crl.MP.No.894 of 2018 dated 22.05.2018), 2. M/s.Big Shop in Mall India Pvt. Ltd. represented by its Director, Gunaranjan Suri who is the

present petitioner and 3. M/s.Big Shop in Mall India Pvt. Ltd. Represented by its Finance Director, K.Sai Ram Murthy.

4. The averments in the private complaint are that in the course of business of advertising and media services of the complainant, the accused approached for business improvement to publish advertisement of their business in front pages of different newspapers like Eenadu, Andhra Jyothi, Saakshi, Hindi Milap and through electronic media such as Big FM, Radio City and Red FM and availed the advertisement benefit during 14.08.2015 to 11.10.2015 and the complainant raised bills for the same of Rs.12,27,615/- against the accused, who issued three cheques drawn on State Bank of Hyderabad, Ramkote, Hyderabad, towards part payment, that were signed by A3-entity, represented by its Finance Director-K.Sai Ram Murthy. The averments further show that at request of accused, complainant presented the three cheques issued by the accused with the banker State Bank of India, Dilsukhnagar Branch, Hyderabad, for clearance, those were dishonoured as 'payment stopped by the drawer'. It is further averred that complainant informed the accused with regard to the above cheque dishonour, for which the accused neither given reply nor paid the amount. It is further averred that A1 to A3 are active partners and have dealt the

business transaction personally, therefore, they are jointly liable to discharge the cheque amounts to the complainant, which is legally enforceable debt. That is the sum and substance of the accusation against three accused indivisibly, though, it is A3, that is the entity, represented by its Finance Director, the drawer.

5. In the entire complaint referred supra, there is no averment specifically of Gunaranjan Suri, the petitioner/A2 herein is responsible for day to day affairs. In the cause title, he was described he was only a mere director not even an Executive Director.

6. Undisputedly, there must be a basic averment, which is a prerequisite to sustain the cognizance taken by the learned Magistrate. Here, there is no such averment as referred supra. That is suffice what the complainant in the counter contest and the additional material of the accused placed reliance on the Certificate of Incorporation of the entity, BIG SHOPIN MALL INDIA PRIVATE LIMITED. There it is mentioned number of Managing Directors or Directors for which the Form is being filed at the column No.(ii), details of Managing Directors or Directors concerned, first name mentioned as 'Sairam Murthy Konduri', who is A3 and the designation as Director and whether Chairman, Executive Director or non-

Executive Director concerned shows as 'Executive Director'. The other name mentioned is that of the petitioner Guna Ranjan Suri, and designation as 'Executive Director', similarly for the column whether Chairman, Executive Director or non-Executive Director. It is to say, practically there from of two Executive Directors. There is no specific Managing Director despite the Company Incorporation, Articles of Association, particularly, para-30 also says as only Directors or First Directors both Sai Ram Murthy Konduri and Guna Ranjan Suri and there is no Managing Director. Even Para-33 clause (a) speaks the Board may appoint one or more directors as Managing Director(s) of the Company and fill in subsequent casual vacancy occurring in these posts. The Managing Director so appointed shall, subject to the applicable provisions of the Act and subject to the superintendence and control of Board of Directors shall have power that may be delegated by the Board from time to time. Even from the composition with reference to paras 30 and 33 of the Articles of Association, there is nothing to show who among them is Managing Director but both referred as Executive Directors. There is nothing even from the Articles of Association to say the Executive Directors are on par as Managing Director or any of them is Managing Director and the other is Joint

Managing Director but for if at all to the argument of the learned counsel for the complainant/2nd respondent referring to page No.1 of the FORM DIR-12, column No.4 speaks of number of Managing Director or Director(s) and it is not even by striking of Directors and mentioning as Managing Directors so to consider or to accept the said contention.

7. The very wording of Section 141 of the N.I.Act no way gives any scope to read the Company Law provisions to infer anything of what is otherwise stated in the Companies Act and fasten the criminal liability under Section 141 of the N.I.Act for nothing even in the savings under the N.I.Act of the provisions and the Companies Act. Leave about Section 147 of the N.I.Act speaks that non-obstante clause anything contained in Cr.P.C. provisions of the N.I.Act shall prevail.

8. No doubt, a two Judge Bench of the Apex Court in National Small Industries Corporation Limited v. Harmeet Singh Paintal[1] at paras-36 and 37 referred to Sections 5 and 291 of the Companies Act, 1956 (for short 'the Act') in saying Section 291 deals with General powers of Board and a company, though, a legal entity can act only through its Board of Directors and Managing Director is prima facie in-charge of and responsible for the company's business and affairs and

[1] 2010(3) SCC 330

can be prosecuted for offences by the company. But insofar as other Directors concerned, they can be prosecuted only if they were in-charge of and responsible for the conduct of the business of the company. So, the observation thereafter with reference to the settled law of the Apex Court including of the earlier Constitution Benches more particularly of S.M.S.Pharmaceuticals Ltd v. Neeta Bhalla[2], subsequent expression in Saroj Kumar Poddar v. State (NCT of Delhi)[3] not to mention several earlier expressions to it. It was also observed referring to Section 2 of the Act that the persons considered to be responsible to the company for conduct of business mentioned as clauses (a) to (g) as the Managing Director(s); the whole-time, Director(s); the Manager; the Secretary; any person in accordance with whose directions or instructions the Board of Directors of the Company is accustomed to act; any person charged by the Board of Directors with the responsibility of complying with that provision; and where any company does not have any of the officers specified in clauses (a) to (c), any Director or Directors who may be specified by the Board in this behalf to the Board; or where any company does not have any of the officers specified in Clauses (a) to (c), any Director or

[2] 2005(8) SCC 89

[3] 2007(3) SCC 693:2007(2) Scc (Cri) 135

Directors who may be specified by the Board in this behalf or where no Director is so specified, all the Directors and referred to Section 2 of the Companies Act to read Section 5 and 291 of the Companies Act in saying if not specified of the Directors are responsible is the purport from those provisions. If at all to accept the contention it has to be co-related with Section 141 of the N.I.Act otherwise merely because it is his responsibility as a Director under the Companies Act cannot be made responsible for the criminal liability for the dishonour of cheque under Section 141 of the N.I.Act. More particularly for the reason under Section 141(1) of the N.I.Act says if the person committing an offence under Section 138 of the Act is a company (like in the case on hand), 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........ The first provision speaks the defence of a person even comes under sub-section (1) of Section 141 of the N.I.Act supra of he has no knowledge and cannot be made liable. Second proviso no way relevant herein, admittedly. No doubt, sub-section (2) of Section 141 of the Act with non-obstante clause specifies as to notwithstanding anything contained of referred supra of

Section 141(1) of where 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.......

9. So far as sub-section (2) of Section 141 of the N.I.Act concerned, there must be a specific averment in this regard to make person other than by virtue of the status as Managing Director or otherwise responsible to the day to day affairs of the company. It no way covers much less from the expression of National Small Industries Corporation Limited (supra) to infer Executive Director is responsible for day to day affairs of the company by virtue of his steps or to be equated with Managing Director or Joint Managing Director be made responsible by virtue of that steps without further averment. In fact, after referring to it in para-38, it is made clear in the expression of necessary averments are must to sustain the accusation for the offence under Sections 138 and 141 of the N.I.Act, particularly, to bring within its fold any person under Section 141 (2) of the N.I.Act. The guidelines given by the Apex Court as principles emerged that speaks of from clause

(ii) to make all directors shall not be made liable, to fasten criminal liability on any person, it must be shown from the very wording 'at the time of the commission of the offence was in-charge'. Undisputedly, that averment is not there in the complaint on hand from what is reproduced the material averments of the complaint supra. Even from clause (v) of the principles in para-39 of the expression in National Small Industries Corporation Limited (supra) what is mentioned is if the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable. Here, it is not the case, as discussed supra and there is no averment to fasten otherwise vicarious liability on the petitioner as discussed supra. It is leave about A1 also referred as Managing Director of the entity. However, he was deleted from the array of accused as stated supra. Leave it as it is. Undisputedly, it is the entity, represented by A3-K.Sai Ram Murthy, the so called Finance Director, that was the drawer of the cheque in question. It is, as held by this Court in the recent past expression in Narendra Urangi and othes v. M/s.Greenmint India Agritech Pvt. Ltd. And another[4] by sum up the law from catena of expressions of the Apex Court upto

---

[4] 2016(1)ALD (Cri) 177=2016(2) ALT (Cri) 410

2015 including the latest expression in Poojari Ravinder Devi Dasani v. State of Maharashtra[5] of a bald averment in complaint is not even sufficient in the absence of specific allegation as to how a Director of a Company, who stands in a different footing to the Managing Director by his status liable or to be made liable for the offence punishable under Section 138 of the N.I.Act.

10. So far as A3 is concerned, no doubt, he is the drawer of the cheque, liable as drawer and so far as A2 is concerned, as referred supra, there is no averment, but for, even from the additional material and counter, he is shown as one of the Executive Directors along with A3. By virtue of the Executive Director, he cannot be made liable in the absence of specific averment to be made under Section 141(2) of the N.I.Act. The same is the sum and substance of the expression supra, more particularly, by placing reliance on the three-Judge Bench expression in S.M.S.Pharmaceuticals Ltd (supra) of 2005.

11. Even coming to the expression of the apex Court in Kirshna Texport and Capital Markets Limited v. Ilaa Agarwal and others[6], what is the principle laid down therein was a Managing Director and the drawer of the cheque, by virtue of the status in the company liable and once it is the company,

[5] AIR 2015 SC 675
[6] (2015 (8) SCC 28

that is liable to be represented by a human agency for day to day affairs like Managing Director or drawer, who signed the cheque on behalf of the company once notice given to the company individually notice not even given no way fatal and cannot be expected as person responsible for day to day affairs must have the endeavour to know and see that the offence shall not be committed after dishonour of the cheque and statutory notice liquidation if any. Even this decision has no way improve the contentions of the complainant to fasten liability on A2, who is the petitioner herein though when the petitioner otherwise shown at the relevant time he is abroad and the endorsement of the learned Public Prosecutor filed shows the same.

12. Having regard to the above, the criminal petition is allowed and the array of A2 is deleted for cannot be made liable for the offence under Section 138 r/w 141 and 142 of the Negotiable Instruments Act.

13. Miscellaneous petitions pending if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 25.10.2018
pab