THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.9359 and 9888 OF 2017

COMMON ORDER:

The criminal petition No.9359 of 2017 is filed by the petitioner/accused No.4 under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.1616 of 2016 pending on the file of the XVIII Additional Chief Metropolitan Magistrate, Erramanzil, Hyderabad, registered for the offence punishable under Section 138 of Negotiable Instruments Act (for short "N.I.Act")

The criminal petition No.9888 of 2017 is filed by the petitioner/accused No.4 under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.1479 of 2016 pending on the file of the XVIII Additional Chief Metropolitan Magistrate, Erramanzil, Hyderabad, registered for the offence punishable under Section 138 of N.I.Act.

The petitioner is one and the same in both the petitions and the allegations in both the petitions are almost identical, hence it is expedient to decide both the petitions by common order.

For convenience sake, I would like to advert to the facts as narrated in Crl.P.No.9359 of 2018.

Crl.P.No.9359 of 2017:

The respondent No.2 herein filed private complaint under Section 200 of Cr.P.C. against M/sVizInfra Consultants Private Limited and 4 others for the offence punishable under Section 138 of N.I.Act. The petitioner herein is accused No.4. The petitioner herein is the alleged director of the accused No.1 company and the cheque was issued by the Managing Director (accused No.2) of the accused No.1 company. When the same was presented in the bank for collection, it was dishonoured on the ground of 'insufficient funds'. Thereupon, in compliance of clause (b) to Section 138 of N.I.Act, respondent No.2 issued a legal notice dated 19.08.2016 calling upon the petitioner herein to pay the amount covered by the dishonoured cheque within 15 days of the receipt of the notice, but the accused failed to make the payment. Therefore, a complaint was filed before the Magistrate.

The petitioner herein urged that except arraying him as one of the directors, no specific allegation is made about his participation in day to day affairs of the company. But, in paragraph No.5 of the complaint, it is alleged that "the alleged cheque was issued by accused in discharge of legal liability towards IFCI dues as agreed upon by accused. The accused Nos.2 to 5 are the directors of accused No.1 and are actively involved in day to day affairs of accused No.1 and as such are actively involved in the day to day affairs of the accused No.1 Company. Hence, all the accused are jointly and severally liable for the offence committed by the accused."

The main ground urged in the petition is that mere allegation that the petitioner is director of the Company and actively participated in day to day affairs of the company is not sufficient as he was ceased to be the director of the company since 30.03.2015, whereas the offence allegedly took place on 15.07.2016. Therefore, by the date of alleged offence, the petitioner was not the director of the accused No.1 company, consequently, the petitioner is not liable to be prosecuted for the offence punishable under Section 138 of N.I.Act.

Sri K.V.Siva Prasad, learned counsel for the petitioner, reiterated the grounds urged in the petition and contended that the petitioner was not the director of the company as on the date of commission of alleged offence, thereby he is not liable for the acts of the Company, apart from that the complaint is bereft of any details as required under Section 141 of N.I.Act to saddle the petitioner with criminal liability and prayed to quash the proceedings.

Learned counsel for the petitioner relied on the decisions of Apex Court rendered in "***Pooja Ravinder Devidasani v. State of Maharashtra***[1]" "***Ashoke Mal Bafna v. Upper India Steel Mfg. & Engg. Co. Ltd***[2]" "***National Small Industries Corporation Limited v. Harmeet Singh Paintal***[3]" "***Harshendra Kumar.D v. Rebatilata Koley***[4]" "***DCM Financial Services Limited v. J.N.Sareen***[5]"

On the strength of the principles laid down by the Apex Court in the above judgments, learned counsel for the petitioner contended that when the petitioner ceased to be the director of the Company as on the date of commission of offence, he is not liable to be prosecuted for any offence and that in the absence of specific allegation against the petitioner, the proceedings are liable to be quashed.

Learned counsel for the respondent No.2 contended that the allegations made in the paragraph No.5 of the complaint are

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[1] AIR 2015 SC 675
[2] AIR 2017 SC 2854
[3] (2010) 3 SCC 330
[4] (2011) 3 SCC 351
[5] (2008) 8 SCC 1

sufficient to make the petitioner vicariously liable for the acts of the accused No.1 company and prayed for dismissal of the petition.

Considering rival contentions and perusing the material on record, the points that arise for consideration are:

(1) Whether the petitioner/accused No.4 is ceased to be director of the Company by 30.03.2015? If so, whether the petitioner is liable to be proceeded for the offence punishable under Section 138 of Negotiable Instruments Act?

(2) Whether the allegations made in paragraph No.5 of the complaint are sufficient to make the petitioner liable vicariously for the acts of accused No.1 Company for the offence punishable under Section 138 and 141 of Negotiable Instruments Act?

P O I N T Nos.1 and 2:

The first and foremost contention urged before this Court is that the petitioner herein was ceased to be the director of the accused No.1 company in view of his resignation dated 30.03.2015. As per the letter placed on record, the petitioner resigned to his office of director of accused No.1 company and the same was accepted by the Ministry of Corporate Affairs and issued Form 32. According to Form 32, the petitioner was ceased to be the director of the company with effect from 30.03.2015, whereas the offence allegedly took place on 15.07.2016, by which time the petitioner is not the director of the accused No.1 Company and the said fact is supported by the material on record. The respondent No.2 did not deny the resignation of the petitioner herein as director of the accused No.1 company. Therefore, when the petitioner ceased to be director of the accused No.1 Company, the petitioner cannot be made liable for the offence punishable under Section 138 of N.I.Act.

In "***Ashoke Mal Bafna v. Upper India Steel Mfg. & Engg. Co. Ltd",*** (referred supra) the Apex Court held that "for making a Director of a Company liable for the offences committed by the Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company. More particularly when he is ceased to be the director of the company.

In view of the principle laid down by the Apex Court in "***Ashoke Mal Bafna v. Upper India Steel Mfg. & Engg. Co. Ltd",*** (referred supra), the petitioner who has resigned to his directorship as on the date of offence, he is not liable to be proceeded for the offence punishable under Section 138 of N.I.Act.

The other contention of the learned counsel for the petitioner is that in the absence of any specific allegation about the participation of the petitioner in day to day affairs of the company as on the date of commission of alleged offence, the petitioner is not liable to be prosecuted for the offence punishable under Section 138 of N.I.Act.

No doubt, the complaint was lodged against the petitioner 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 petitioner has participated actively in day to day affairs of the Company on the date of commission of offence. Here, except making bald allegations that the petitioner has participated actively in day to day affairs of the company, no material is produced. Apart from that the petitioner has already resigned to his directorship of the company as per Form 32 and ceased to be the director of the company with effect from 30.03.2015. Making a bald allegation extracted above 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). The main contention of the learned counsel for the petitioner is that Section 141 of N.I.Act attaches liability to the petitioner, only if he is actively participating in day-to-day affairs of the company and to fasten the liability on the director other than the Managing Director, there must be specific allegation as to how they are participated in day-to-day affairs of the company. In the absence of such details, the complaint is liable to be quashed.

In "***Sunil Bharti Mittal v. Central Bureau of Investigation***[6]**"** 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 the accused and to fasten liability to other Directors of the

[6] (2015) 4 SCC 609

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 petitioner 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***[7]

Learned counsel for the petitioner 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"** (referred supra) 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.

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[7] 2016 (2) ALT (Crl.)35 (A.P.)

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 petitioner is 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***[8]" , "***S.M.S. Pharmaceuticals Ltd., v. Neeta Bhalla and Another***[9]", "***Central Bank of India v. Asian Global Limited and others***[10]", 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

[8] (2007)9 SCC 481
[9] (2005) 8 SCC 89
[10] (2010) 11 SCC 203

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***[11]" 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.***[12]" 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.

In the latter judgment, in "***Shushantna J. Sarkar & Other v. State of Maharashtra***[13]" 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.

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[11] J.T. 2007(9) SC 449
[12] 2014(1) Mh L.J.
[13] 2014(1)Mh L.J. 214

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 petitioner is participated in day to day affairs of the accused No.1 – Company as director, the proceedings against the petitioner cannot be continued. Apart from that, the petitioner already resigned to his directorship and he was ceased to be the director with effect from 30.03.2015, whereas the offence allegedly committed by the petitioner is subsequent to his resignation, in such case he cannot be made liable for the offence punishable under Section 138 of N.I.Act. Therefore, I find that it is a fit case to quash the proceedings against the petitioner.

In the result, the criminal petition is allowed. The proceedings in C.C.No.1616 of 2016 pending on the file of the XVIII Additional Chief Metropolitan Magistrate, Erramanzil, Hyderabad, are hereby quashed against the petitioner herein. No costs.

Crl.P.No.9888 of 2017:

In view of the detailed order passed in Crl.P.No.9359 of 2017, this criminal petition is also allowed. The proceedings in C.C.No.1479 of 2016 pending on the file of the XVIII Additional Chief Metropolitan Magistrate, Erramanzil, Hyderabad, are hereby quashed against the petitioner herein. No costs.

The miscellaneous petitions pending in both the petitions, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

17.07.2018
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