HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.11330 of 2017

ORDER :

The petitioners to the quash petition are A.2 and A.3 among four accused in C.C.No.3454 of 2016 initially on the file of the XI Additional Chief Metropolitan Magistrate, Secunderabad, re-numbered as C.C.No.230 of 2017 pending on the file of the XVIII Additional Chief Metropolitan Magistrate, Secunderabad. It is a private complaint case from the complaint of the 2nd respondent-complainant entity for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the NI Act') issued by A.4 in his individual capacity though he was arrayed in the private complaint case as by name and referred as Managing Director of A.1 M/s.G.E. Godavari Engineering Limited (M/s.GEGEL) by showing A.1 as M/s.GEGEL, represented by its Managing Director-Balakrishna Kallappa Karande and A.2 and A.3/Bommi Reddy Vidyanath Reddy and Mr.Visanathan Srinivasan both referred as directors of M/s.GEGEL. In the complaint, it is averred that there were business dealings with A.1 company by the complainant entity and A.1 is represented by its Managing Director/A.4, A.2 and A.3 are the Directors of A.1 company and it is on credit basis the material at their request supplied for which fallen due by 05.12.2015 Rs.33,05,806/- and for the outstanding for the demands, Managing Director/A.4 of A.1 company approached the complainant along with A.2 and A.3/Directors and issued his personal cheque bearing

No.000066 dated 07.10.2016, for Rs.33,04,814/- drawn on HDFC belongs to A.4 towards part payment of the said outstanding and it is at the request of the accused persons. The complainant when presented for collection on 07.10.2016 same was returned dishonoured on 10.10.2016 as per intimation of funds insufficient and for the statutory notice issued with rectification notice in correction of the wrongly mentioned earlier, accused received and failed to pay, thereby claimed liable.

2. The learned Magistrate has taken cognizance. Now the impugnment is even taken on face value, A.1 company is not a drawer of the cheque much less, represented by A.4 to make A.2 and A.3 liable, leave about no specific allegations to make every director responsible in the absence of pleading required of responsible for day-to-day affairs as per the letter and spirit of Section 141 of the NI Act and thereby the proceedings are liable to be quashed.

3. Whereas, learned counsel for the 2nd respondent-complainant supported the cognizance order saying if at all there is anything, it is left open for raising any defence for the Court to try and having waited all through from the cognizance taken in the year 2016, the quash petition filed in 2017 is liable to be dismissed.

4. Heard and perused the material on record.

5. Section 141 of the NI Act reads as follows:

141 Offences by companies. —

(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:

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any 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 and shall be liable to be proceeded against and punished accordingly.

Explanation.— For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.]

6. Section 138 of the NI Act particularly 138(b) reads as follows:

138 Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [6] [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) <u>the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [20] [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and</u>

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

7. Coming to the facts, a perusal of the cheque in question from the account stands in the individual name of A.4 Balakrishna Kallappa Karande. Merely because A.4 is Managing Director of A.1 company, it cannot be said that the cheque was issued by the company from his signature when the cheque issued from his individual account and not in the company account. Once the cheque is not issued in the company account by any of the Directors or Managing Director, as the case may be, the company cannot be the drawer. Once the company cannot be drawer, the question of vicarious liability of its directors, particularly A.2 and A.3, leave about without even specific allegation as to they are responsible for day-to-day affairs of the company to be made vicariously liable the array of them by fastening liability for the offence under Section 138 NI Act does not arise. That is also the law laid down by the Apex Court in **Aparna S.Shah v. Sheth Developers Private Limited and another**[1], particularly from the paras 15 to 18 for more clarity reproduced hereunder:

> 15) Mr. Mukul Rohtagi, learned senior counsel for respondent No.1, by drawing our attention to the definition of "person" in Section 3(42) of the General Clauses Act, 1897 submitted that in view of various circumstances mentioned, the appellant herein being wife, is liable for criminal prosecution. He also submitted that in view of the explanation in Section 141(2) of the N.I. Act, the appellant wife is being prosecuted as an association of individual. In our view, all the above contentions are unacceptable since it was never the case of respondent No.1 in the complaint filed before learned Magistrate that the appellant

[1] (2013) 8 SCC 71

wife is being prosecuted as an association of individuals and, therefore, on this ground alone, the above submission is liable to be rejected. Since, this expression has not been defined, the same has to be interpreted ejusdem generis having regard to the purpose of the principle of vicarious liability incorporated in Section 141. The terms "complaint", "persons" "association of persons" "company" and "directors" have been explained by this Court in Raghu Lakshminarayan vs. Fine Tubes, (2007) 5 SCC 103.

16) The above discussion with reference to Section 138 and the materials culled out from the statutory notice, reply, copy of the complaint, order, issuance of process etc., clearly show that only the drawer of the cheque being responsible for the same.

17) In addition to our conclusion, it is useful to refer some of the decisions rendered by various High Courts on this issue.

18) Learned Single Judge of the Madras High Court in Devendra Pundir vs. Rajendra Prasad Maurya, Proprietor, Satyamev Exports S/o. Sri Rama Shankar Maurya, 2008 Criminal Law Journal 777, following decisions of this Court, has concluded thus:

> "7. This Court is of the considered view that the above proposition of law laid down by the Hon'ble Apex Court in the decision cited supra is squarely applicable to the facts of the instant case. Even in this case, as already pointed out, the first accused is admittedly the sole proprietrix of the concern namely, "Kamakshi Enterprises" and as such, the question of the second accused to be vicariously held liable for the offence said to have been committed by the first accused under Section 138 of the Negotiable Instruments Act not at all arise."
> After saying so, learned Single Judge, quashed the proceedings initiated against the petitioner therein and

permitted the Judicial Magistrate to proceed and expedite the trial in respect of others.

8. Having regard to the above, it is drawer of the cheque A.4 in his individual capacity liable for what he issued for the amounts due by A.1 company even undertaken to bear the liability by him individually and even any allegations of the credit transactions with company or for the demands of A.1 to A.4, A.4 issued the cheque from his account and the cheque presented after intimation to A.2 to A.4, will not make A.2 and A.3 liable along with A.4, much less of the company, as any civil liability for the credit purchases by the company and their Directors including A.1 to A.4 for that civil liability is different from the criminal liability for the dishonour of the cheque as the cheque was drawn only by A.4 in his individual capacity and not by the company, much less from the company account.

9. Having regard to the above the criminal petition is allowed, quashing the proceedings against the petitioners/A.2 and A.3 in C.C.No.230 of 2017 on the file of the XVIII Additional Chief Metropolitan Magistrate, Secunderabad. The bail bonds of the petitioners/A.2 and A.3 shall stand cancelled.

Miscellaneous petitions pending, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

2nd November 2018.

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