IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.12.2021

DELIVERED ON : 16.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Crl.O.P.Nos.30327, 30326, 29698 of 2015 & 246 of 2016
and M.P.Nos.1, 1, 1 of 2015 and Crl.M.P.No.117 of 2016

1.Timothy Alfred Joseph Moses
2.Mohan Nadaar
..Petitioners/A4 & A5 in Crl.O.P.No.30327/2015.

1.Govinda Prasad Dasu
2.Bomo Kavina Darasha
..Petitioners/A6 & A7 in Crl.O.P.No.30326/2015.

M.S.Subramanian
..Petitioner/A8 in Crl.O.P.No.29698/2015.

Suryaraj Kumar
..Petitioner/A2 in Crl.O.P.No.246/2016.

Vs.

Ad Bureau Advertising Pvt. Ltd.,
Rep. by Managing Director Mr.Abirchand Nahar,
Rayala Towers,
No.78, Mount Road,
Chennai - 600 002.
..Respondent in all Crl.O.Ps.

Prayer in Crl.O.P.No.30327, 30326, 29698 of 2015 and 246 of 2016: Criminal Original Petitions have been filed under Section 482 of Cr.P.C., seeking to call for the records related to C.C.No.3082 of 2015, on the file of the learned XIII Metropolitan Magistrate, Egmore, Chennai and quash the same in so far as the petitioners herein are concerned.

For Petitioners in Crl.O.P. Nos.30327/15 and 246/16 : Mr.M.Kempraj

For Petitioners in Crl.O.P. Nos.30326/15 and 29698/15 : Mr.Sai Krishnan

For Respondent in all the Crl.O.Ps. : Mr.T.N.C.Kaushik

COMMON ORDER

Since the issues and parties involved in all the criminal original petitions are one and the same, all the Criminal Original Petitions are heard together and disposed of by means of this Common Order.

Crl.O.P.Nos.246 of 2016 and 30327, 30326 & 29698 of 2015:-

2. The petitioners herein who are Directors (A2, A4 to A7) and Secretary (A8) of one M/s.Mediaone Global Entertainment Ltd., have filed these petitions to quash the complaint filed by the respondent under Section 138 of the Negotiable Instruments Act, 1881.

3. The case of the complainant before the trial Court is that, the first accused company namely M/s.Mediaone Global Entertainment Ltd., through its directors approached the respondent/complainant for venturing in the post production of one Tamil movie "Kochadaiiyaan" and they were informed that lease rights of the film will fetch a minimum guaranteed return of 12% i.e., Rs.1,20,00,000 on investment of Rs.10,00,00,000/- and 20% on the sale of the movie's lease rights.

4. Based on that, the complainant entered into a Memorandum of Understanding with the accused company and borrowed a sum of Rs.10,00,00,000/- and the amount was also released through RTGS. However, the accused committed breach of terms of the agreement and defaulted in payment of the amount to the tune of Rs.8,20,00,000/- out of the total liability of Rs.16,90,00,000/-.

5. Earlier, they have given a cheque for a sum of Rs.5,00,00,000/- and that was dishonoured due to stop payment notice issued by the accused. Thereafter, another cheque has been issued towards discharge of their liability drawn on Indian Overseas Bank, Chennai on 07.05.2015, for a sum of Rs.3,00,00,000/-. That cheque was presented by the complainant for encashment and the same was returned on 08.05.2015, on the ground of insufficient funds. Thereafter, they issued demand notice to all the accused on 20.05.2015, calling upon them to make payment. After receipt of the notice, they have given a reply stating false and frivolous reasons. Since the accused failed to pay the amount a complaint has been preferred under Section 138 of the Negotiable Instruments Act [hereinafter will be called as “the Act”]. It is alleged in the complaint that all the accused persons are directors of the accused company and are directly involved in the affairs of the company and hence they were all deemed to have committed the offence. The learned Judicial Magistrate took cognizance of offence and issued summons. To quash the said complaint, the present criminal original petitions have been filed.

6. Mr.M.Kempraj and Mr.Sai Krishnan, learned counsel appearing for the petitioners herein would contend that the petitioners are only directors of the company and they are not in charge and responsible for the conduct of the business of the company, that apart, they are not signatories to the cheque and no criminal liability can be fixed on them. It is further stated that even in the complaint, there is no specific averment that the petitioners are in charge of and responsible to the conduct of the day to day business of the company. In the absence of any specific averment in the complaint, which is essential to make the petitioners liable for the offence committed by the company. Hence, according to the learned counsel appearing for the petitioners, the complaint is liable to be quashed.

7. Per contra, Mr.T.N.C.Kaushik, the learned counsel appearing for the respondent would submit that all the petitioners are admittedly directors of the first accused company and all the petitioners are in charge of and responsible for the day to day affairs of the company and they are also deemed to have committed the offence by legal fiction created under Section 141 of the Act. The learned counsel further submitted that it is specifically averred in the complaint that they are directly involved in the affairs of the company and hence it cannot be stated that there is no specific averment in the complaint. Further, the learned Magistrate after considering all the materials and after applying his mind has taken cognizance and issued process and the petitioners cannot escape from their liability.

8. I have considered the rival submissions and also perused the records carefully.

9. Admittedly, the petitioners are the Directors of the first accused company. Now, the contention of the petitioner is that they are not in charge of and responsible for the conduct of the business of the company, merely because they are Directors in the company, it cannot be held that they are deemed to be in charge of and responsible to the conduct of the business of the company. Further, there is no specific averment in the complaint to that effect, a mere bald statement that they are involved directly in the affairs of the company is not sufficient.

10. Before considering the submissions, it is useful to refer to the relevant avernment in the complaint, which reads as follows:

> "7. The complainant submits that towards the part discharge of the liability to make payment the accused herein issued a cheque bearing number "587788" drawn on Indian Overseas Bank, Near Pondy Bazar Police Station, Chennai - 600 17, dated on 07.05.2015 for a sum of Rs.3,00,00,000/-

(Rupees three crores only). The above cheque was presented in The Lakshmi Vilas Bank, 646, Anna Salai, Chennai for clearance. However, the cheque was again returned on 08.05.2015, with a return memo reasoned as "Insufficient Funds". The complainant further submits that all the accused persons are directors of the accused company and all are involved directly in the affairs of the company."

[Italic Supplied]

11. Now the question is, whether the averment in the complaint that the petitioners who are the directors of the accused company are directly involved in the affairs of the company is sufficient to make them liable for the offence committed by the company under Section 141 of the Negotiable Instruments Act?

12. It is settled law that there is no vicarious liability in criminal jurisprudence, unless the Statue makes them vicariously liable for the offence committed by the company. When the offence is committed by the company, merely because some persons are directors of the company, they cannot be roped into and make them liable for the offence committed by the company.

13. Section 141 of the Negotiable Instruments Act, provides that when the company committed any offence, every person who, at the time the offence was committed, was incharge 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. Section 141 of the Negotiable Instruments Act, reads as follows:

"Section 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.
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> (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.
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> Explanation.— For the purposes of this section,—
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> (a) "company" means any body corporate and includes a firm or other association of individuals; and
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> (b) "director", in relation to a firm, means a partner in the firm."

14. By virtue of the legal fiction created under Section 141 of the Act, every person who are all in charge of and responsible for the day to day affairs of the company are deemed to have committed the offence. For that, there must be a specific averment in the complaint that those persons who are shown as accused are in charge of and responsible for the conduct of the business of the company at the relevant time. Thus, a basic averment has to be made in the complaint, which is an essential requirement under Section 141 of the Negotiable Instruments Act. In the absence of any such specific averment in the complaint merely because the petitioners are being the directors of the company, they cannot be made liable for offence under Section 141 of the Negotiable Instruments Act. The Hon'ble Supreme Court in S.M.S. Pharmaceuticals Ltd Vs. Neeta Bhatla reported in (2005) 8 SCC 89, elaborately considering the issue has held as follows:

> "19.(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct

of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

15. The above judgment has been followed in number of judgments. In Gunmala Sales Private Limited Vs. Anu Mehta and Others reported in (2015) 1 SCC 103, the Hon'ble Supreme Court has held as follows:

"28. We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the above-mentioned cases that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company. This is a basic requirement. There is no deemed liability of such Directors. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in SMS Pharma-(1) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Section 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 of the Code which recognize the Magistrate's discretion to reject the complaint at the threshold if he finds that there is no sufficient ground for proceeding. Thus, if this basic averment is missing the Magistrate is legally justified in not issuing process........."

16. Recently, after considering all the above judgments, the Honourable Supreme Court in Ashutosh Ashok Parasrampuriya and others v. Gharrkul Industries Pvt. Ltd. And others, reported in Manu/SC/0838/2021, has held as follows:-

"25. We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not the signatories to the cheques or ho are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the afore-stated judgment that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company."

17. Keeping the above principles in mind, let us consider the instant case. There is no specific averment in the complaint to the effect that the petitioners who are all the directors of the company are in charge of and responsible for the conduct of the business of the company. Merely saying

that they are directly involved in the affairs of the company is not sufficient. Being a director of the company, he may be involved in the affairs of the company as attending the meeting of the Board of Directors, guiding the company in administrative and policy matters. But, that itself is not sufficient to hold that they are in charge of and responsible to the day to day affairs and the conduct of the business of the company. In such circumstances, unless it is specifically averred that they are all actually in charge of and responsible to the day to day affairs of the company at the relevant period of time, vicarious liability cannot be inferred.

18. Before taking cognizance of an offence, the Judicial Magistrate is expected to consider all the materials available before him and on due application of mind form an opinion that a prima facie case is made out in respect of an offence, then only the learned Judicial Magistrate can proceed further and issue process against the accused.

19. The Hon'ble Supreme Court in Sunil Bharti Mittal v. Central Bureau of Investigation reported in AIR 2015 SC 923, has held as follows:-

> "45. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e., the complaint, examination of the complainant and his witnesses if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.
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> 47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while

> coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

20. In such circumstances, I am of the considered view that averment made in the complaint is not sufficient to fix criminal liability against the petitioners and the learned Magistrate without considering the same has taken cognizance of the offence against the petitioners and has issued summons to them. Hence, the proceedings in C.C.No.3082 of 2015 on the file of the learned XIII Metropolitan Magistrate, Egmore, Chennai is liable to be quashed as against the petitioner herein and accordingly quashed as against the petitioners in Crl.O.P.Nos.30327, 30326 & 29698 of 2015.

21. In the result, the criminal original petitions in Crl.O.P.Nos.30327, 30326 & 29698 of 2015 and 246 of 2016 are allowed. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The XIII Metropolitan Magistrate,
Egmore, Chennai.

2.The Public Prosecutor,
Madras High Court.

+1cc to Mr.M.Kempraj, Advocate SR. No.67292

Crl.O.P.Nos.30327, 30326,
29698 of 2015 & 246 of 2016

SRA (CO)
PR (03/01/2022)