

THE HON'BLE Dr. JUSTICE CHILLAKUR SUMALATHA

Crl.P.Nos.7851, 7859 and 11823 of 2013

COMMON ORDER :

Criminal Petition No.11823 of 2013 is filed on behalf of Accused No.7, Criminal Petition No.7851 of 2013 is filed on behalf of Accused No.6 and Criminal No.7859 of 2013 is filed on behalf of Accused No.9, all under Section 482 Cr.P.C. seeking to quash the proceedings that are pending against them in C.C.No.332 of 2013 on the file of the Court of XI Special Magistrate, Erramanzil, Hyderabad.

2. Heard the submission of learned counsel for the petitioners, the learned Assistant Public Prosecutor, who is representing respondent No.1, as well as the learned counsel appearing for respondent No.2. Gave anxious consideration to the contents of the decisions that are relied upon by learned counsel for the petitioners in all the three cases and learned counsel for respondent No.2.

3. A complaint was filed by respondent No.2 against Deccan Chronicle Holdings Limited, which is arrayed as Accused No.1, and 8 others, of whom the petitioners herein are also arrayed as Accused, alleging that they committed offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The said complaint was taken on file and initially it was numbered as C.C.No.1588 of 2012. Thereafter a new number was assigned vide C.C.No.332 of 2013. Seeking to quash the proceedings that are pending against the petitioners, three Criminal Petitions are filed before this Court.

4. Thus, in the light of the aforementioned details and the relief sought for, the point that evolves for consideration is :

Whether there exist any justifiable grounds to quash the proceedings that are initiated against the petitioners/Accused Nos.6, 7 and 9 through C.C.No.332 of 2013 on the file of the Court of XI Special Magistrate, Erramanzil, Hyderabad, as prayed for.

5. Before advertng to and analysing the contentions raised by the respective parties to these Criminal Petitions,

a brief narration of contents of the complaint is felt essential. Respondent No.2 (hereinafter be referred as the “Complainant” for the sake of convenience of discussion) is a Company incorporated under the Companies Act, 1954. Accused No.1 is a Limited Liability Company, which is also incorporated under the Companies Act. Accused Nos.2 to 9 are the Directors of Accused No.1 – Company. They were in charge of the day-to-day business activities of Accused No.1. In the month of June, 2011, Accused No.1 came out with an issue of 11.25% Redeemable Non-convertible Debentures of Rs.10-00 Lakhs each. The issue was offered to institutional investors by private placement through Industrial Development Finance Company Limited. The complainant was approached for subscribing to the said issue. The complainant purchased 300 Debentures for a sum of Rs.30-00 Crores. The maturity amount was payable on 26.06.2012. However, Accused No.1 addressed a letter to the complainant stating that due to tight liquidity conditions and market scenario, it is unable to repay the amount. Thirty days time was sought for payment. In the meeting of Debenture Holders, Accused No.1 undertook to

repay the principal amount in three instalments along with interest by issuance of post-dated cheques. As per the commitment letter, Accused No.1 issued a cheque bearing No.001234, dated 01.08.2012 for a sum of Rs.3,73,59,762/- drawn on ICICI Bank Limited, Secunderabad Branch. The said cheque was deposited by the complainant. However, it was returned with an endorsement "Insufficient Funds". The complainant issued a legal Notice demanding the Accused to pay the value of the dishonoured cheque, but they failed to do so.

6. With the averments, as mentioned above, the complainant laid prosecution against Accused Nos.1 to 9. As earlier detailed, Accused Nos.6, 7 and 9 are before this Court seeking to quash the proceedings initiated against them.

7. Making his submission, learned counsel for the petitioners contended that the contents of the complaint does not disclose commission of offence by the petitioners herein. He further contends that the contents of the complaint themselves go to show that the cheque in

question was given towards security and not for discharge of any debt or liability and, therefore, the proceedings against the petitioners through the complaint is invalid. The learned counsel also stated that there were no direct transactions between the Accused and the complainant and, indeed, the Debentures were issued through Industrial Development Finance Company Limited and thus Accused have no role to play. Learned counsel further contended that it is not the petitioners or Accused No.1, who have to pay the amount and all payments have to be made by the Industrial Development Finance Company Limited, but the proceedings are laid against the petitioners herein and other Accused only with an intention to harass them. The learned counsel also contended that except a stray statement that the petitioners are involved in the day-to-day business activities of Accused No.1, their role is not specified in the complaint in specific terms and, therefore, neither Section 138 of Negotiable Instruments Act, 1881 (for brevity "the N.I. Act") nor Section 141 of the said Act applies to the facts of the case.

8. Basing on the said pleas, learned counsel also submitted that the petitioners are individual Directors and thus their role in the day-to-day business activities of Accused No.1 or in its financial transactions is nil/minimal.

9. Vehemently, opposing the stand taken, learned counsel for respondent No.2 contended that the cheque in question was issued for discharge of liability and the same is clearly averred in the complaint and the cheque was issued not by the Industrial Development Finance Company Limited, but by Accused No.1 and, therefore, the contention of learned counsel for the petitioners in this regard does not hold water.

10. As rightly contended, nowhere in the complaint it is contended that the cheque in question does not pertain to Accused No.1 or that it was not issued by Accused No.1. If at all there was no liability on the part of Accused No.1, it can be inferred *prima facie* that the cheque would not have been issued by Accused No.1. However, the core question

that requires discussion is, whether the liability can be fastened upon the petitioners herein, who are independent Directors of Accused No.1. When a cheque drawn by a person on the Account maintained by him with the Banker for payment of any amount of money towards discharge of either in whole or in part of any debt or liability is returned by the Bank unpaid, either because the amount of money standing to the credit of that Account is insufficient to honour the cheque or that exceeds the amount arranged to be paid, such person, as per Section 138 of the N.I. Act is deemed to have committed the offence mentioned therein.

11. Section 141 of the N.I. Act deals with the offences committed by the Company. For fruitfulness of discussion and to proceed further, the said provision is extracted as under :

“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 subsection 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: ²²

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 subsection (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 anybody corporate and includes a firm or other association of individuals; and

(b) “Director”, in relation to a firm, means a partner in the firm.”

12. It is not in dispute that Accused No.1 is a Company incorporated under the Companies Act. Further, it is also not in dispute that Accused Nos.6, 7 and 9 are

independent Directors of Accused No.1. By the wording of Section 141 of the N.I. Act, it is clear that the said provision engulfs the liability of the Directors or others mentioned therein only if any of them or all of them, at the time of commission of offence, were/was incharge of the company and were/was responsible to the company for conduct of the business of the company. Also liability vests, in case it is proved that the offence has been committed with the consent or connivance or neglect on the part of any or all such persons. It is also mentioned that those persons may include the Directors, Managers, Secretaries or other officers of the Company.

13. Thus, in the light of the said legal position, which is in operation, it has to be seen, whether the liability on the part of the Accused herein arises either on account of their conduct through acts or omissions; or whether they can be held liable merely on account of holding the position as Directors in the Company.

14. Submitting that, in the circumstances like this, liability cannot be fastened, the learned counsel for the

petitioners relied upon the decision of the Hon'ble Apex Court in the case between K.K. AHUJA vs. V.K. VORA AND ANOTHER¹. The case facts in the said case as mentioned at para-3 are as under :

3. In the complaint, the complainant averred that "at the time of the commission of offence, Accused 2 to 9 were in charge of and responsible for the conduct of the day-to-day business of Accused 1" and that therefore they were deemed to be guilty of the offence under Section 138 read with Section 141 of the Act and Section 420 of the Penal Code, 1860. The appellant also alleged that Respondents 2 to 9 were directly and actively involved in financial dealings of the Company and that the accused had failed to make payment of the cheques which were dishonoured. In the presuming evidence, the appellant reiterated that Accused Nos.2 to 9 were responsible for the conduct of day-to-day business of the first accused Company at the time of commission of offence. The learned Magistrate by order dated 03.10.2001 directed issue of summons to all the accused.

15. Thus, as rightly submitted by learned counsel for the petitioners, those case facts are similar to that of the present case.

¹ (2009) 10 SCC 48

16. Discussing various judgments, in detail, on the law governing the field, their Lordships at paras-22 to 25 of the judgment held as follows :

“22. Section 141 uses the words “was in charge of, and was responsible to the company for the conduct of the business of the company”. It is evident that a person who can be made vicariously liable under sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and in *addition* is also in charge of the business of the company. There may be many Directors and secretaries who are not in charge of the business of the company at all. The meaning of the words “person in charge of the business of the company” was considered by this Court in *Giridhari Lal Gupta v. D.H. Mehta* – (1971) 3 SCC 189 – followed in *Sate of Karnataka v. Pratap Chand* – (1981) 2 SCC 335 – and *Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd.* – (2002) 7 SCC 655. This Court held that the words refer to a person who is in overall control of the day-to-day business of the company. This Court pointed out that a person may be a Director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

23. Therefore, if a person does not meet the first requirement, that is, being a person who is responsible to the company for the conduct of business of the company, neither the question of his meeting the second requirement (being a person in charge of the business of the company), nor the question of such person being liable under

sub-section (1) of Section 141 arises. To put it differently, to be vicariously liable under sub-section (1) of Section 141, a person should fulfil the “legal requirement” of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfil the “factual requirement” of being a person in charge of the business of the company.

24. Therefore, the averment in a complaint that an accused is a Director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But if the accused is not one of the persons who falls under the category of “persons who are responsible to the company for the conduct of the business of the company” (listed in para 21 above), then merely by stating that “he was in charge of the business of the company” or by stating that “he was in charge of the day-to-day management of the company” or by stating that “he was in charge of, and was responsible to the company for the conduct of the business of the company”, he cannot be made vicariously liable under Section 141(1) of the Act.

25. It should, however, be kept in view that even an officer who was not in charge of and was responsible to the company for the conduct of the business of the company can be made liable under sub-section (2) of Section 141. For making person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act”

17. Further, discussing the aspect whether the liability to face prosecution vests only because the Accused arrayed therein holds a position in the office, their Lordships at paras-28 and 29 held as follows :

“28. If a mere reproduction of the wording of Section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act.

29. As the trauma, harassment and hardship of criminal proceedings in such cases, may be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of Section 138 read with Section 141 of the Act are not fulfilled.”

18. In this regard, learned counsel for the petitioners also relied upon a decision of the Hon’ble Apex Court between S.M.S. PHARMACEUTICALS LTD. vs. NEETA BHALLA

AND ANOTHER², wherein the Hon'ble Apex Court at para-

16 observed as under :

“16. Section 141 of the Act does not say that a Director of a Company shall automatically be vicariously liable for commission of an offence on behalf of the Company. What is necessary is that sufficient averments should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an offence by the Company must be in charge and shall also be responsible to the Company for the conduct of its business.”

19. Further, at para-20 of the said judgment the Apex

Court held as follows :

“The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent No. 1 herein was a party to a purported resolution dated 15.02.1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day to day affairs of the Company and, thus, are not responsible for conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was incharge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefor must be satisfied.”

² (2007) 4 SCC 70

20. Thus, by the above decision, it is abundantly clear that the persons, who are sought to be vicariously liable for the offence punishable under Section 138 of Negotiable Instruments Act should be shown that, at the time of commission of the offence, they were incharge or were responsible for the conduct of the business activities of the company. Their participation should be specifically averred in the complaint, besides narrating their role. Further, it has to be mentioned that except by their participation, the issuance of cheque by the company would not have taken place and, therefore, through the role played by them, they are liable for criminal prosecution along with the company, as envisaged under Section 141 of the Negotiable Instruments Act.

21. In the case on hand, such averments are not made and the participation of each of the Accused is not narrated, though not in detail, at least through material contentions.

22. Justifying the stand taken by him, learned counsel respondent No.2 relied upon a decision of the Hon'ble Apex Court in the case between G. RAMESH v. KANIKE HARISH KUMAR UJWAL AND ANOTHER³, wherein discussing the same provision of law i.e. Section 141 of the Negotiable Instruments Act, their Lordships at para-14, observed that while laying down the general principles which must apply to this provision of law, A two-Judge Bench of the same Court in *Gunmala Sales Private Limited (AIR 2015 SC 1072)*, at para-31 held as follows :

31. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be an abuse of process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be

³ AIR 2019 SC 2595

quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director.”

23. This decision is rendered indicating that when the basic averments were made, the quashing of the proceedings is undesirable. But, as earlier discussed, when no averments are made about the clear participation of the Directors in the process of issuance of cheque, this Court is of the view that continuation of proceedings against the petitioners would be nothing but abuse of process of law. Such a move is required to be prevented and that is the mandate of law as provided under Section 482 Cr.P.C.

24. Therefore, this Court holds that the relief sought for in all the three Criminal Petitions is justifiable and, therefore, it has to be granted.

25. Resultantly, all the three Criminal Petitions are allowed. The proceedings that are pending against the petitioners i.e. Accused Nos.6, 7 and 9 in C.C.No.332 of 2013 on the file of the Court of XI Special Magistrate, Erramanzil, Hyderabad, are hereby quashed.

26. As a sequel, miscellaneous applications pending, if any, shall stand closed.

Dr. JUSTICE CHILLAKUR SUMALATHA

23.02.2022.

NOTE : .L.R. Coy be marked.

(B/O
Msr

THE HON'BLE Dr. JUSTICE CHILLAKUR SUMALATHA

Crl.P.Nos.7851, 7859 and 11823 of 2013

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(Msr)