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K. SRIKANTH SINGH

v.

M/S. NORTH EAST SECURITIES LTD. AND ANR.

JULY 20, 2007

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[S.B. SINHA AND H.S. BEDI, JJ.]

Negotiable Instruments Act, 1881; Ss. 138 and 141:

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Complaint against a company and its directors for committing offence u/s. 138 of the Act—One of the directors filing a petition u/s. 482 Cr. P.C. for quashing the proceedings—Dismissed by High Court—On appeal, Held: For showing vicarious liability of a Director of a Company, it is incumbent on complainant to plead that the accused was responsible for conducting the business of the company—No such allegation made by the complainant—

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Merely because the accused-director participated in negotiations for obtaining finance from the complainant, it cannot be said that he was responsible for day to day affairs of the company—Further, vicarious liability against accused must be pleaded and proved and it cannot be a subject matter of mere inference—Under the circumstances, impugned judgment cannot be sustained, thus, set aside and the order taking cognizance of the complaint quashed—

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Code of Criminal Procedure, 1973; s. 482.

The question which arose for determination in this appeal was as to whether in the facts and circumstances of the case, the appellant, a director of accused company could be held vicariously liable for committing offence u/s. 138 of the Negotiable Instruments Act.

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Appellant-director contended that at the relevant point of time, he was not the director of the Company; and that no cognizance could be taken on the basis of the allegations made in the complaint petition as the same do not satisfy the requirement of the provisions under Section 141 of the Negotiable Instrument Act.

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Allowing the appeal, the Court

HELD : 1.1. For showing a vicarious liability of a Director of a Company,

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upon the complaint it is incumbent to plead that the accused was responsible to the Company for the conduct of the business of the Company. No such allegation having been made in the complaint petition, the High Court was not correct in passing the impugned judgment. [Para 4] [455-D, E]

1.2. Allegation that all the accused Directors participated in the negotiations for obtaining financial help for accused No. 1 would not give rise to an inference that the appellant was responsible for day-to-day affairs of the Company. [Para 4] [455-E, F]

S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr., [2005] 8 SC 89, relied on.

1.3. Negotiation for obtaining financial assistance on behalf of the Company by its Directors itself is not an ingredient for the purpose of constituting an offence under Section 138 of the Negotiable Instruments Act. Furthermore, a vicarious liability on the part of a person must be pleaded and proved. It cannot be a subject matter of mere inference. [Para 5] [456-E]

Sabitha Ramamurthy & Anr. v. R.B.S. Channabasavaradhya, [2006] 10 SCC 581, relied on.

2. In the facts and circumstances of the case, the impugned judgment cannot be sustained and the same is accordingly set aside. The order taking cognizance is quashed. [Para 7] [457-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 919 of 2007.

From the Judgment & Order dated 12.09.2006 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Petition No. 4084 of 2006.

Anil Kumar Tandale for the Appellant.

The Judgment of the Court was delivered by

S.B. SINHA. J. 1. Leave granted.

2. Appellant has been proceeded against for alleged commission of an offence under Section 138 of the Negotiable Instruments Act. First respondent filed a complaint in the Court of 3rd Additional Chief Metropolitan Magistrate,

A Hyderabad. In regard to the liability of the appellant, which is vicarious in nature, the following statement has been made in paragraph 2 of the complaint petition which reads as under:

B “2. That the accused is a company doing their business in the name and style of M/s. Rishab Alchem India Ltd., having its Registered office at E2, Shantinivas Apartments, Mettuguda, Secunderabad and represented by Accused No. 2 in the capacity of Managing Director of the first accused company and accused no. 3 to 6 are the directors of the company. All the accused persons after negotiation with the Complainant firm had agreed to take financial assistance from the Complainant firm. After executing comprehensive loan documentration they have taken financial assistance to the tune of Rs. 10 lakhs from the Complainant firm. At the time of taking the loan amount accused persons also agreed to pay interest for the principle amount of Rs. 10 lakhs.”

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D 3. The appellant herein contends that at the relevant point of time, he was not the Director of the Company. *Inter alia*, on the ground that no cognizance could be taken on the basis of the allegations made in the complaint petition as the same do not satisfy the requirement of the provisions of Section 141 of the Negotiable Instruments Act, the appellant filed a petition before the High Court of Judicature at Andhra Pradesh at Hyderabad under E Section 482 of the Code of Criminal Procedure praying for quashing of the proceedings initiated against him. The High Court by reason of the impugned judgment stated as under:-

F “3. The learned counsel for the petitioner contended that even if the entire allegations in the complaint are taken as true, they do not make out a *prima facie* case against the present Petitioner, that before issuance of the Cheques, the Petitioner herein resigned as Director of A.1 Company, hence, continuation of the proceedings against him is nothing but abuse of process of court and so he prayed to quash the same.

G 4. The allegation in the complaint is that the present Petitioner is one of the directors of A.1 Company. Simply because he is a Director, he cannot be prosecuted for the offence under Section 138 of the Negotiable Instruments Act, 1881 unless his case falls under the provisions of section 141 of the Act. under Section 141 H of the Act, it must be shown that every person, who at the time

of the offence, is responsible to the company for conduct of its business and day-to-day affairs. It is alleged that all the accused persons after negotiations with the Complainant firm agreed to take financial assistance from the Complainant and after executing comprehensive loan documentation, they have taken financial assistance to a tune of Rs. 10, 00 lakhs from the Complainant firm. Since it is alleged that all the Directors-accused participated in the negotiations with regard to the financial help to be taken by the A.1 company from the Complainant firm, it can be inferred that all the Directors were responsible for day-to-day transactions of A.1 Company. Therefore, the allegations in the complaint make out a prima facie case that all the directors are in-charge of, and responsible for, day-to-day affairs of the company.

5. The second contention is that the Petitioner was not a Director of the Company at the time of issuance of the Cheque. It is a question of fact that has to be established before the trial court. Exercising the powers under section 482 Cr. P.C., a question of fact cannot be decided and determined. Hence, there are no grounds to quash the impugned proceedings."

4. It is not in dispute that for showing a vicarious liability of a Director of a Company, upon the complaint it is incumbent to plead that the accused was responsible to the company for the conduct of the business of the Company. No such allegation having been made in the complaint petition, in our opinion, the High Court was not correct in passing the impugned judgment. The allegation contained in the complaint petition was that all the accused Directors participated in the negotiations for obtaining financial help for the accused No. 1, which in our opinion, would not give rise to an inference that the appellants were responsible for day-to-day affairs of the Company. An offence envisaged under Section 138 of the Negotiable Instruments Act contains several ingredients as has been held by a Three-Judge Bench of this Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.*, [2005] 8 SCC 89, in the following terms:-

"What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and 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. It is only those persons who were in charge of and responsible for the

A conduct of business of the company at the time of commission of an
offence. who will be liable for criminal action. It follows from this that
B 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 under the provision. The liability arises
C from being in charge of and responsible for the conduct of 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. Conversely, a person not holding any office or designation
D in a company may be liable if he satisfies the main requirement of
being in charge of and responsible for the conduct of business of a
company at the relevant time. Liability depends on the role one plays
E in the affairs of a company and not on designation or status. If being
a director or manager or secretary was enough to cast criminal liability,
the section would have said so. Instead of "every person" the section
would have said "every director, manager or secretary in a company
is liable"....., etc. The legislature is aware that it is a case of criminal
liability which means serious consequences so far as the person
sought to be made liable is concerned. Therefore, only persons who
can be said to be connected with the commission of a crime at the
relevant time have been subjected to action."

E 5. Negotiation for obtaining financial assistance on behalf of the
Company by its Directors itself is not an ingredient for the purpose of
constituting an offence under Section 138 of the Negotiable Instruments Act.
Furthermore, a vicarious liability on the part of a person must be pleaded and
proved. It cannot be a subject matter of mere inference.

F 6. In *Sabitha Ramamurthy and Anr. v. R.S.S. Channabasavaradhya*,
reported in [2006] 10 SCC 581, this Court opined:-

G "7. A bare perusal of the complaint petitions demonstrates that
the statutory requirements contained in Section 141 of the Negotiable
Instrument Act had not been complied with. It may be true that it is
not necessary for the complainant to specifically reproduce the
wordings of the section but what is required is a clear statement of
fact so as to enable the court to arrive at a prima facie opinion that
the accused are vicariously liable. Section 141 raises a legal fiction.
By reason of the said provision, a person although is not personally
liable for commission of such an offence would be vicariously liable

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therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted. Not only the averments made in para 7 of the complaint petitions do not meet the said statutory requirements, the sworn statement of the witness made by the son of the respondent herein, does not contain any statement that the appellants were in charge of the business of the Company. In a case where the court is required to issue summons which would put the accused to some sort of harassment, the court should insist strict compliance with the statutory requirements. In terms of Section 200 of the Code of Criminal procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefor. In the event, ultimately, the prosecution is found to be frivolous or otherwise mala fide, the court may direct registration of case against the complainant for mala fide prosecution of the accused. The accused would also be entitled to file a suit for damages. The relevant provisions of the code of Criminal Procedure are required to be construed from the aforementioned point of view.”

(See also: *Everest Advertising Pvt. Ltd. v. State Govt. of NCT of Delhi & Ors.*, reported in JT (2007) 5 SC 529 and *Raghu Lakshminarayanan v. M/S. Fines Tubes* reported in JT (2007) 5 SC 552.

7. For the reasons aforementioned, the impugned judgment cannot be sustained and the same is accordingly set aside. The order taking cognizance is quashed. The appeal is allowed.

No costs.

S.K.S.

Appeal allowed.