(2009) 04 KAR CK 0046

In the Karnataka High Court

Case No : Criminal Petition No. 1467 of 2006

B.P.L. Ltd. and BPL Works APPELLANT

Vs

Infrastructure Leasing and Financial Services Limited RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Companies Act, 1956 — Section 391, 391 (5), 391 (6)

Citation : (2009) 04 KAR CK 0046

Hon'ble Judges : Ashok B. Hinchigeri, J

Bench : Single Bench

Advocate : K.G. Raghavan. for M.V. Kini and Co, for the Appellant; Amit Desai, for Ashok B. Patil, for the Respondent

Final Decision : Allowed

Judgement

Ashok B. Hinchigeri, J.—Crl. P. No. 1467/2006 is filed by M/s. B.P.L. Ltd., (Company for short) and Crl. P. No. 1465/2006 is filed by the persons who are said to have been incharge of and responsible to the Company for the conduct of its business seeking the relief of quashing the proceedings in C.C. No. 25149/2005, Similarly, Crl. P. No. 1464/2006 is filed by the Company and Crl. P. No. 1463/2006 is filed by the persons who are said to have been incharge of and responsible to the Company for the conduct of its business seeking the relief of quashing the proceedings in C.C. No. 2688/2003. M/s. Infrastructure Leasing and Financial Services Limited is the common respondent in all the four petitions.

2. The facts of the case in brief are that the petitioning Company is a public limited Company incorporated under the Companies Act, 1956. The respondent gave short-term loans to the Company. The cheques dt 10.07.2002, 10.07.2002, 27.06.2002, 10.07.2002, 10.07.2002 and 27.06.2002 for Rs. 41,83,319/-, 50,00,000/-, 45,45,455/-, 50,00,000/-, 41,83,319/- and 44,59,714/- respectively were issued by the Company to the respondent towards the discharge of its debt. However on their presentation, they were not honoured by the Company''s bankers. The respondent, on the failure of the Company to

honour the demand contained in the statutory notice, filed C.C. No. 2688/2003.

3. In respect of other loan transactions, the respondent resorted to the initiation of the arbitration proceedings to recover its outstanding dues. The arbitration proceedings culminated in the consent award, by virtue of which the Company was to pay a sum of Rs. 3,63,60,000/- (rupees three crores sixty three lakhs sixty thousand only) out of the total outstanding amount of Rs. 4,86,83,710/- (rupees four crores eighty six lakhs eighty three thousand seven hundred and ten only) towards the full and final settlement of the Company''s outstanding dues.

4. As the first instalment, the Company issued a post dated cheque for a sum of Rs. 1,75,00,000/- (rupees one crore seventy five lakhs only) on 30.09.2004. As the Company''s bankers did not honour the cheque and the Company did not comply with the demand contained in the statutory notice, the respondent filed C.C. No. 25149/2005.

5. Sri K.G. Raghavan, the learned Senior Counsel appearing for M/s. M.V. Kini and Company for the petitioners submits that the existence of the debt for whose discharge the cheques were issued has ceased to exist subsequently. If, at any time after the issuance of the cheque and before delivery of the judgment on a complaint u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter called the ''NI Act''), the debt or liability ceases to exist, then no offence can be said to have been committed u/s 138 of the NI Act. The Company filed Company Petition No. 13/2005 before the Company''s Court (Kerala High Court). The respondent herein was one of the respondents in the said company petition. The Company also filed the scheme of arrangement u/s 391 of the Companies Act. This was resisted by the respondent on the following among other grounds "the third contention in opposition, that the scheme is in violation of public policy; since the arrangement if sanctioned, would result in depriving the objector of its right to prosecute the Complaints u/s 138 of the Negotiable Instruments Act also does not stand."

6. The Company Court, by its order, dated 14.3.2005 allowed the said application. While passing the final order on 23.8.2005 the Company Court observed as follows:

Any legal or other proceedings pending against the petitioners'' Company, in India or abroad, relating to any of the outstanding debts of the petitioners'' Company to the secured creditors and preference shareholders shall on the effectiveness of the Scheme of Arrangement be terminated and the rights, obligations and liabilities: of the parties shall be governed by the terms of the Scheme of Arrangement.

7. The respondent challenged the same by filing Company Appeal No. 5/05. The Division Bench by its order, dated 17.1.2006 dismissed the appeal. Against the dismissal of the said appeal by the Division Bench, the respondent has filled the SLP which is pending consideration before the Hon''ble Supreme Court of India.

8. In compliance with the sanctioned scheme of arrangement, the Company sent a demand draft for a sum of Rs. 1,27,80,713/- (Rupees one crore twenty seven lakh eighty thousand seven hundred thirteen only). The same is received by the respondent under protest. Further, it has not been encashed till date.

9. Sri Raghavan submits that the debt towards the discharge of which the cheques were issued, has ceased to exist in the wake of the Scheme of Arrangement, sanctioned by the Company Court (Kerala High Court); the right to continue the proceedings u/s 138 of N.I. Act has ceased to exist. According to him, the Scheme of Arrangement has a binding force; it is binding on all creditors and shareholders including the Company. Relying on the judgment of the Hon''ble Supreme Court in the case of Central Bureau of Investigation, SPE, SIU (X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta, , he submits that once the suits are compromised on receiving the payments, it amounts to compounding of the offence of cheating. It is his emphatic case that if the civil debt itself has been compromised, the criminal complaint cannot be proceeded with.

10. The Senior Counsel contends that with the sanctioning of the scheme of restructuring, the original debt becomes unenforceable. He has also relied on a judgment of Gujarat High Court in the case of H.C. Ras Kapoor and Ors. v. Jaferbhai Mohmedbhai Chhatpar (Gujarat) reported in 1989 65 Comp Cas 163 to buttress his submission that the word ''proceedings'' used in Section 391 of the Companies Act is a term of wide import and includes within its sweep criminal proceedings also.

11. The next submission of Sri Raghavan is that the plain reading of the complaint does not make out any offence as against the non-executive Directors, nominee Directors and the employees of the Company. The averments made in the complaints fall short of the requirements of Section 141 of NI Act, as they are merely parrot-like recitals or reproductions of Section 141 of N.I. Act. In this regard, he brought to my notice the Hon''ble Supreme Court''s decision in the case of N.K. Wahi Vs. Shekhar Singh and Others, . The relevant paragraphs of the said judgment are extracted herein below:

7. This provision dearly shows that so far as the companies are concerned if any offence is committed by it then every person who is a Director or employee of the company is not liable. Only such persons would be held liable if at the time when offence is committed he was in-charge and was responsible to the company for the conduct of the business of the company as well as the company. Merely being a Director of the company in the absence of above factors will not make him liable.

8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the port played by them in the transaction. There should be dear and unambiguous allegation as to how the directors are incharge and responsible for the conduct of the business of the

company. The description should be dear. It is true that precise words from the provisions of the Act need not be reproduced and the Court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.

12. Sri Raghavan submits that a clear case has to be spelt out in the complaint against the person sought to be made liable. In support of his submission, he has relied on a judgment of the Hon''ble Supreme Court in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, . The relevant paragraph of the said judgment is extracted hereinbelow:

5. In the present case, we are concerned with criminal liability an account of dishonour of cheque, It primarily folls on the drawer company and is extended to officers of the Company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence u/s 138 is committed by a Company, extends criminal liability for dishonour of cheque to officers of the Company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company Since the provision creates criminal liability, the conditions have to he strictly complied with. The conditions are intended to ensure that a person who is sought to he made incuriously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persona who had nothing to do with the matter need not he roped in. A company being a juristic person, all its deeds and functions are result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the Company are sought to be made personally liable for acts which result in criminal action being taken against the Company. It makes every person who. at the time the offence was committed, was incharge of and was responsible to the Company for the conduct of business of the Company, as well as the Company, liable for the offence. The Proviso to the subsection contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

13. He also takes exception to the signatories of the cheque not being made parties. Bringing to my notice the judgment of the Hon''ble Supreme Court in the case of Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, , he contends that only those persons who can be said to be connected with the commission of crime at the relevant time can be subjected to action. With a view to make the Director of a Company vicariously liable for the acts of the Company, it was obligatory for the complainant to make specific allegations as are required in law.

14. The petitioners'' side also sought to draw support from the judgment of the Hon''ble Supreme Court in the case of Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, . The relevant paragraph of the said judgment is extracted hereinbelow:

7. A bare perusal of the complaint petitions demonstrates that the statutory requirements contained in Section 141 of the Negotiable Instruments 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 dear 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 therefore 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 of the statutory requirements would be insisted. Not only the averments made in paragraph 7 of the complaint petitions does not meet the said statutory requirements, the sworn statement of the. witness made by the son of Respondent herein, does not contain any statement that 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 of 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 foe frivolous or otherwise mala fide, the court may direct registration of case against the complainant for male fide prosecution of the accused The accused would also he 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.

15. The learned Senior Counsel submits that if the complaint is bereft of details of specific roles assigned to each of the Directors of the Company, then the complaint as against them is liable to be dismissed. In support of his submissions, he has relied on a judgment of this Court in the case of V.G. Sreeram and etc. Vs. Smt. Indumati B. Chandachal and Others, . The relevant paragraph of the said judgment is extracted hereinbelow:

20. Having regard to the above settled position in law as regards the Directors of the Company is concerned, in the case on hand a perusal of the complaint averments does not make any specific allegations against the petitioner-Directors herein and it is not stated anywhere in the complaint that petitioners herein who are the Directors were actually responsible for the day-to-day affairs of the Company or for that matter in what manner the petitioners-Directors are

accountable to the Company insofar as the complaint allegations are concerned Therefore, in the case before us as the complaint is bereft of the details of the specific role assigned to each of the Directors of the Company and in the absence of there being any averment to show in what manner are the Directors before this Court are responsible for the day-to-day affairs of the company, a mere allegation in the complaint that A-2 to A-7 being Directors are also responsible for the default committed by the Company will not be sufficient to take the view that the petitioner Directors have committed the alleged offences....

16. Relying on the judgment of the Hon''ble Supreme Court in the case of DCM Financial Services Ltd. v. J.N. Sareen and Anr. reported in 2008 AIR SCW 4034, Sri Raghavan submits that the making of averment to satisfy the requirement of Section 141 of N.I. Act is imperative for attracting the harsh provisions of constructive liability.

17. Per contra, Sri Amit Desai the learned Senior Counsel appearing for Sri Ashok B. Patil for the respondent submits that the necessary averments have indeed been made in both the complaints - C.C No. 2688/03, C.C No. 25149/05. He brings to my notice the following averments in C.C. No. 2688/2003:

6. To the best of the complainant''s knowledge and information, accused No. 2 is the Chairman and Managing Director of the first accused Company Accused No. 3 to 8, 10 and 11 are its Directors, accused No. 9 is its Chief Executive Officer, and accused No. 12 is the Company Secretary. Accused 2 to 12 were,, at the relevant time, and are in-charge of the first accused Company, and are responsible to the Company for the conduct of the business of the Company. It is learnt that the accused 2 to 12 are, in one or the other way, connected with and are actively involved in the business activities of the first accused Company. These facts are reflected in the Corporate Information provided by the accused which is produced as Document-C.

18. The relevant averments in C.C. No. 25149/2005 are as follows:

12. The complainant further stated that, the accused Nos. 2 to 76 are the officers in-charge of and were responsible to the company for the conduct of the business of the accused company As such, all the accused have committed the offence punishable u/s 138 of the Negotiable Instrument Act, 1881.

19. Sri Desai submits that the averment in the criminal petition that the petitioners 2 to 7, 9 and 10 are not the Directors of the Company is false and misleading. He submits that the said parties were indeed the Directors of the Company at the relevant point of time.

20. Sri Amit Desai submits that a payee of a dishonoured cheque is only expected to name the persons who are incharge of the affairs of the Company and that the Directors are prima-facie in that position. In support of his submission he relied upon the judgment of the Hon''ble Supreme Court in the case of N. Rangachari Vs. Bharat Sanchar Nigam Ltd., . The relevant paragraphs

of the said judgment are extracted hereinbelow:

18. In the case on hand, reading the complaint as a whole, it is dear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were incharge of the affairs of the company, It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques mere issued, their presentment, dishonour and failure to pay in spite of notice of dishonour. We have no hesitation in overruling the argument in that behalf by the learned Senior Counsel for the appellant.

19. We think that, in the circumstances, the High Court has rightly come to the conclusion that it is not a fit case for exercise of jurisdiction u/s 482 of the Code of Criminal Procedure for quashing the complaint In fact, an advertence to Sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence u/s 138 being satisfied, the burden is on the Board of Directors or the Officers incharge of the affairs of the company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to shout that at the relevant time they were not incharge of the affairs of the company. Reading the complaint as a whole, we are satisfied that it is a case where the contentions sought to he raised by the appellant can only be dealt with after the conclusion of the trial.

21. The Senior Counsel appearing on behalf of the respondent also brings to my notice the Hon''ble Supreme Court''s judgment in the case of Paresh P. Rajda Vs. State of Maharashtra and Another, . The relevant portion of the said judgment is extracted hereinbelow:

11 ...A perusal of the aforesaid paragraphs would show that Accused 2 is Paresh Rajda, the Chairman of the Company, and as per the impugned judgment of the High Court, the question of his responsibility for the business of the Company has not been seriously challenged, We. nonetheless, find clear allegations against both the appellant-accused to the effect that they were officers and responsible for the affairs of the Company. We are of the opinion that at a stage where the trial has not yet started, it would be inappropriate to quash the proceedings against them in the light of the observations of this Court quoted above We accordingly, find no merit in the appeals. They are dismissed.

22. The learned Senior Counsel appearing on behalf of the respondent submits that the facts of the instant care and of Saroj Kumar Poddar''s case (supra) are entirely different. The accused Director had already resigned from the Directorship of the Company in Saroj Kumar Poddar''s case. In the instant case,

it is not the case of the petitioners that any of them have resigned even before the relevant point of time of the accrual of case of action for filing the complaint. He therefore submits that the judgment in Saroj Kumar Poddar case has no application for the facts of the present case. He also submits that the Hon''ble Supreme Court quashed the criminal complaint in Sabitha Ramamurthy case because neither the complainant nor the sworn statement contained any assertion that the accused were incharge of the business of the Company.

23. Sri Desai submits that the first complaint was filed on 10.2.2003 and the second complaint on 10.12.2004. The scheme was sanctioned by the Company Court (Kerala High Court) only on 23.8.2005. During this period of two years, the petitioners evaded the service of summons. Only on the scheme of arrangement being sanctioned, the petitioners have sought to get the complaint quashed by filing this petition. He further submits that, if the petitioners were only to receive the summons, they would have been convicted long before the sanctioning of the scheme of arrangement.

24. Si Desai submits that it is trite position in law that the power for quashing the criminal proceedings u/s 482 of Code of Criminal Procedure has to be exercised sparingly, with circumspection and that too in of rarest of rare cases. In these petitions, no good grounds are made out for invoking the power u/s 482 of Cr.P.C. In support of this submission he has relied on a judgment in the case of Som Mittal v. Government of Karnataka reported in AIR 3008 SC 1528.

25. Sri Amit Desai submits that the subsequent event of sanctioning of the scheme of arrangement does not absolve the petitioners of the offence committed by them. He read out the relevant portion of the Hon''ble Supreme Court''s judgment in the case of Vishwa Nath Vs. State of Jammu and Kashmir, , wherein it is held that "the fact that the accused refunded the amount when the act of his defalcation came to be discovered, does not absolve him of the offence committed by him. He has also relied on the Hon''ble Supreme Court''s judgment in the case of Rajneesh Aggarwal v. Amit J. Bhalla reported in 2001 (1) SCC 631, wherein it is held that "So far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereto will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the court trying the offence."

26. He submits that based on the judgment of the Hon''ble Supreme Court in the case of Pankaj Mehra and Another Vs. State of Maharashtra and Others, debt would not become irrecoverable, merely because some body files the winding up petition. The drawer of the cheque can have different explanations for the failure to pay the amount covered by the cheque; but no such explanation would be sufficient to extricate him from the tentacles of the offence. If the explanation is found to be genuine, at the most the quantum of sentence may be reduced; but the offender cannot be given the acquittal as such.

27. Sri Desai contends that compounding of offences is a bilateral act of the

parties and that too of their own volition. As the respondent has not given his consent to the compounding of the offence, there is no legal impediment for the respondent to go on with the criminal cases.

28. The expression ''suit'' or ''proceedings'' used u/s 391(6) of the Company''s Act does not include the criminal proceedings initiated u/s 138 of the NI Act. Citing the Hon''ble Supreme Court judgment in the case of BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., , he submits that the word suit used in Section 22(1) of Sick Industrial Company''s Act 1965 does not include criminal prosecution. He further submits that the Gujarat High Court judgment in the cast'' of Raskapoor (supra) has been overruled sub silentio by the Hon''ble Supreme Court in the case of BSI Ltd., (supra).

29. The learned Senior Counsel appearing on behalf of the respondent submits that there was no agreement whatsoever between the respondent and the Company not to prosecute the Company for the offences committed by the Company u/s 138 of the NI Act. Therefore the question of the offence being compounded ipso facto on the sanction of the scheme of arrangement does not arise. Relying on a judgment of this Court in the case of Ramesh Babulal Baheti and Ors. v. Central Bureau of Investigation and Anr. reported in 2005 126 Comp Cas 497, Sri Desai contends that entering into a compromise for the payment by the debtor in installments does not automatically result in the compounding of the offence.

30. Sri Desai submits that the legal position regarding the discontinuance of proceedings u/s 138 of the NI Act on the sanctioning of the scheme was taken by the other respondents, particularly Ind Sind Bank. According to Sri Desai the resistance of the respondent to the scheme of arrangement was that the respondent is an unsecured creditor.

31. Sri Desai submits that the orders passed by the learned Single Judge and the Division Bench of the Kerala High Court have not attained finality, They are challenged by way of filing the SLP before the Hon''ble Supreme Court. He further submits that the SLP is admitted and that the same is converted into a regular appeal. Further, the Hon''ble Supreme Court has also directed the maintenance of status-quo.

32. The submissions made by the learned Senior Advocates raise the following questions for my determination:

i) Whether the complaint averments against the petitioner Nos. 1 to 11 in Crl. Pet No. 1463/2006 (accused No. 2 to 12 in C.C. No. 2688/2003) and the petitioners 1 to 14 in Crl. Pet. No 1465/2006 (accused No. 2 to 12 and 14 to 16 in C.C. No. 25149/2005) meet the essential requirements of Section 141 of N.I. Act?

ii) Whether the criminal proceedings can be confirmed in the wake of the restructuring of the debt by the Company Court (Kerala High Court)?

33. In Re-Question No. 1: To answer this question, the relevant averments of the complaint are to be considered first. Memorandum of the complaint in C.C. No. 2688/2003 from which Crl. P. No. 1463/2006 has arisen contains, inter alia, the following averments.

5. The 1st accused, the company represented by its Authorised Signatory who is accused No 2 - herein signed the terms and conditions of the Term Loan.

6. To the best of the Complaint''s knowledge and information, accused No. 2 is the Chairman and Managing Director of the first accused Company. Accused No. 3 to 8, 10 and 11 are its Directors, accused No. 9 is its Chief Executive Officer, and accused No 12 is the Company Secretary. Accused No. 2 to 12 were, at the relevant time, and are in-charge of the first accused Company, and are responsible to the Company for the conduct of the business of the Company. It is learnt that the accused 2 to 12 are, in one or the other way connected with and are actively involved in the business activities of the first accused Company. These facts are reflected in the Corporate Information provided by the accused which is produced in Document - C.

34. Accused No. 2 to 12 and 14 to 16 are the petitioners in Crl.P. No. 1465/2006. The averments extracted from the memorandum of the complaint hereinabove are to be examined keeping in view the statutory provisions and the judicial interpretation put on them. The Company is only a juristic person and has therefore no limbs of its own. It has to act only through human limbs. Therefore Section 141 of N.I. Act provides for punishing the persons, who were incharge of and were responsible to the Company for the conduct of its business for on offence committed u/s 138 of the said Act, which reads as follows:

141. Offences by companies - (1) If the person committing an offence, u/s 138 is a company, every person who, at the time of 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.

(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.

35. In Rangachari''s case (supra), the Hon''ble Supreme Court has taken the considered view that it is for the accused Directors or the Officials of the Company to establish at the trial that they were not incharge of the affairs of the company at the relevant point of time; whether or not they were responsible is to be decided upon the conclusion of the trial. Similarly in Paresh P. Rajda (supra), the Hon''ble Supreme Court concurred with the High Court''s decision not to interfere in the matter on finding that the accused persons were the officers and responsible for the affairs of the Company.

36. I find that the averments against all the accused persons are clear and specific. Furthermore, the respondent while naming the accused persons, has only gone by the Corporate Information provided by the Company. I have therefore no hesitation in negativing the submissions urged on behalf of the petitioners, as far as Crl.P. No. 1463/2005 is concerned,

37. However as far as the second complaint, namely, C.C. No. 25149/2005 is concerned, the averments ought to have been little more specific but then the accused 2 to 13 are the Directors of the Company; accused 14 to 16 are the Company Secretary, Deputy General Manager and Vice-President respectively. In Rangachari''s case (supra) it is held that the Directors are prima facie incharge of the affairs of the Company. In view of this judgment, I negative the submission of Sri Raghavan in respect of petitioner Nos. 1 to 13. But I am afraid, the same conclusion cannot be arrived at in respect of the accused Nos. 14, 15 and 16 in C.C. No. 25149/2005 (petitioners No. 12, 13 and 14 in Crl. Petition No. 1465/2006). They are only officers against whom no specific averments are made in the complaint. As held by the apex Court in S.M.S. Pharmaceuticals Ltd., case, the liability u/s 141 of N.I. Act arises from being incharge 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. Persons, who may not have anything to do with the matter, need not be roped in unnecessarily. The conditions precedent laid down in Section 141 of N.I. Act are not satisfied in respect of the said three persons. In the absence of any averment, the complaint would not be entertainable as against them. Therefore the complaint as against them is liable to be dismissed and accordingly it is dismissed.

38. In the result, I answer question No. 1 against all the petitioners except the petitioners, Sriyuts A.R. Rajaram, K. Raghuveeran and P.V.K. Sundaram - Petitioner Nos. 12, 13 and 14 respectively in Crl. P. 1465/2006.

39. In Re-Question No. 2: Now coming to the second and more formidable point raised by Sri Raghavan, it is not in dispute that the Company Court (Kerala High Court) has sanctioned the Scheme of Arrangement vide its orders, dt.

14.03.2005 and 23.08.2005. It is also not in dispute that the respondent resisted the proceedings. When the Company Court order went against it, it also preferred an appeal. which however came to be dismissed. Once the debt and the repayment schedules thereon are restructured in the proceedings before the competent Courts, all the parties to the said proceedings are bound by the same, unless a higher Court sets aside or modifies the Scheme of Arrangement itself. In the instant case, the Division Bench of Kerala High Court has refused to set aside the order sanctioning the Scheme of Arrangement.

40. Whether the sanctioning of the scheme u/s 391 of the Companies Act has to automatically result in the cessation of the criminal proceedings initiated? Section 391(5) of the Companies Act provides for punishing the defaulter for not complying with the order passed under Sub-section (4). Sub-section (6) of Section 391 of the said Act provides for stay of the suit and other proceedings during the pendency of the application for sanctioning the scheme of arrangement. However no express provision of law is brought to my notice by either side regarding the continuation or closure of the criminal proceedings on account of the sanctioning of the Scheme of Arrangement.

41. I find that Sri Raghavan''s submission that the offence stood automatically/ consequently compounded is worthy of acceptance only for one reason; and that is the order passed by the Company Court on 23.08.2005;

Any legal or other proceedings pending against the petitioner Company, in India or abroad, relating to any of the outstanding debt of the petitioner Company to Secured Creditors and preferential Shareholders shall, on the effectiveness of the Scheme of Arrangement be terminated and the rights, obligations and liabilities of the parties shall be governed by the terms of the Scheme of Agreement.

42. In the wake of the order passed by the Company Court, the original debts have become unrecoverable. As they have become unrecoverable, during the pendency of the criminal cases, the criminal proceedings cannot be gone on with. It is also worthwhile to notice the decision of the Gujarat High Court in the case of H.C. Ras Kapoor (supra), to which my attention was drawn by Sri Raghavan. The relevant portion of the said judgment is extracted hereinbelow:

Page 170 - Now, as the wording of Section (6) of Section 391, It appears dear that the phrase "proceeding" as employed by Sub-section (6) is of wide import. It does not include only civil proceedings as submitted by learned advocate for opponent No. 1. The word "proceeding* has not been, defined by the Companies Act. Therefore, we have to refer to the general meaning of the term "proceeding" as gathered from the dictionary and as understood in common parlance.

43. While there can be no quarrel with the submission made by Sri Desai that the power u/s 432 of the Cr.P.C has to be exercised sparingly, with circumspection and in the rarest of the rare cases, when the debt as it stood in the original form becomes unrecoverable, the question of continuing to proceed to bring the accused to the book, based on the cheques in question does not

arise at all. As held by the Hon''ble Supreme Court in C.B.I. case (supra), even if an offence of cheating is prima facie constituted, such offence is compoundable offence and compromise decrees passed in the suits instituted by the Banks, for all intents and purposes, amount to compounding of offence of cheating.

44. Needless to observe that, if the cheques issued pursuant to the sanctioning of the scheme were not honoured, that would give the cause of action for filing a criminal case against the Company and the persons who are incharge of and responsible for the conduct of its business.

45. There may be something wanting on the part of the petitioners; their conduct may not have been without blemish. But the same does not enable the respondent to continue the criminal proceedings against them. This observation is made while considering the submissions of Sri Desai that the petitioners evaded the service of summons in the criminal proceedings. That the criminal proceedings could have come to an end resulting in the conviction of the accused petitioners, if the summons were only served on them on time, is also not a good ground for demanding that the respondent be permitted to continue the criminal proceedings against the petitioners. It is made clear that no view is expressed on the conduct of the petitioners.

46. In the result, these petitions are allowed.

47. The proceedings in C.C. No. 2688/2003 on the file of the XXI ACMM Court, Bangalore and CC No. 25149/2005 on the file of the XV ACMM Court, Bangalore are quashed.

48. No order as to costs.

