
(2013) 07 KL CK 0178

In the High Court Of Kerala

Case No : Criminal M.C. No. 3747 of 2012

Briji Gopal Daga and Others

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 11-07-2013

Acts Referred:

Companies Act, 1956 — Section 2(13), 303, 303(2)
Criminal Procedure Code, 1973 (CrPC) — Section 482
Evidence Act, 1872 — Section 74
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1)

Citation : (2013) 181 CompCas 320 : (2014) 1 CompLJ 550 : (2013) 3 KHC
167 : (2013) 3 KLJ 440

Hon'ble Judges : A. Hariprasad, J

Bench : Single Bench

Advocate : Sasthamangalam S. Ajithkumar and V.S. Thoshin, for the Appellant;
T.K. Koshy, K.P. Paulose, V.V. Risani and Muhammed Sathique, PP, for the
Respondent

Judgement

A. Hariprasad, J.—Petitions filed u/s 482 of the Code of Criminal Procedure ("Cr.P.C.", for short) seeking quashment of complaints. In all these cases, parties and issues cropping up for decision are the same. Hence they are heard together and disposed by this common order. Petitioners are accused 3 to 5 in the complaints pending on the file of the Chief Judicial Magistrate's Court, Kollam. They are implicated in these cases on the alleged vicarious criminal liability u/s 138 read with Section 141 of the Negotiable Instruments Act, 1881 ("NI Act", for short). Petitioners contended that their arraignment in the cases is frivolous and vexatious. Prosecution launched against them in each case is a sheer abuse of the process of court.

2. The issue arising for consideration is pertaining to the extent and magnitude of vicarious-criminal liability of independent Directors of a public limited company, registered under the Companies Act, 1956 ("Act of 1956", for short), for the dishonour of cheques.

3. Allegations in the complaint, in nut shell, are the following:

Complainant/2nd respondent is a public limited company engaged in the business of foreign exchange transactions. 1st accused is also a public limited company engaged in the same business. 2nd accused is the whole time Director of 1st accused company. Petitioners (accused 3 to 5) are the Directors of the 1st accused company. They are directly responsible for the day today affairs, conduct of business and management of the 1st accused company. 6th accused is the Branch Manager of the 1st accused company. He was in charge and was responsible for the day today affairs and conduct of the business.

4. As the complainant and the 1st accused companies are engaged in foreign exchange trading, the complainant used to buy and sell foreign currency from the 1st accused company. 1st accused company, in the course of the transaction, incurred a liability payable to the complainant. In discharge of that liability, certain cheques were issued. Those cheques were dishonored on presentment. Hence a statutory notice was issued for which a reply was caused to be sent at the instance of the accused. Even thereafter the amounts were not paid. Hence the prosecutions were launched.

5. Heard the learned counsel for the petitioners and the learned counsel appearing for the 2nd respondent.

6. Petitioners would contend that they are independent Directors of the 1st accused company. They are not involved in the day today affairs of the company. 1st petitioner is a Company Secretary with vast experience and extensive knowledge in the fields of finance, investment, etc. 2nd petitioner is a Lawyer by profession and an expert in the field of Corporate legal matters. She resigned the post of Director with effect from 13.08.2011. 3rd petitioner has been a Corporate Consultant since his retirement as General Manager of Foreign Exchange Department in the Reserve Bank of India. It is their submission that they happened to be in the Director Board of the 1st accused company as independent Directors purely on account of their professional backgrounds and skills.

7. Learned counsel for the petitioners submitted that law regarding the vicarious criminal liability of a Director of a company, emanating from Section 141 of the N.I. Act, is well settled. Judicial pronouncements in this matter will show that by no stretch of reasoning the petitioners can be mulcted with any criminal liability. So much so, their prosecution is nothing but an abuse of process of the court.

8. Learned counsel for the complainant/2nd respondent would submit that the legal requirements for prosecuting the petitioners along with others in the matter have been well laid and there is no infirmity in the proceedings before the court below.

9. Before delving inside the facts, we shall examine the legal position relevant for determination of the disputes. Sec. 138 of the NI Act speaks about the statutory

criminal liability arising out of dishonour of a cheque for insufficiency, etc. of funds in the account of the drawer of the cheque. Sec. 141 of the NI Act deals with the offences by companies. Relevant part of Sec. 141 of the NI Act is excerpted hereunder:

141. Offences by companies.- (1) If the person committing an offence u/s 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:

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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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10. In a prosecution launched against a company by invoking Sec. 141(1) of the NI Act, the principal accused will be the company itself. The liability of the person who was in charge of, and was responsible to the company for the conduct of its business is only having a vicarious criminal liability. Sub-sec. (2) of Sec. 141 of the NI Act says that notwithstanding anything contained in Sub-sec. (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 person shall also be deemed to be guilty of that offence and shall liable to be proceeded against.

11. In the realm of criminal law, normally vicarious criminal liability will not be readily inferred, unless the relevant statute says so. Sec. 141 of the NI Act is a departure from the normal rule in criminal law against vicarious liability. Catena of decisions have made it clear that a vivid case should be spelled out in the complaint against the person sought to be made liable. Sec. 141 of the NI Act prescribes certain conditions which have to be satisfied before mulcting criminal liability on the officers of a company. It goes without saying that since this provision creates a statutory criminal liability, the conditions will have to be meticulously pleaded and strictly proved. Wordings employed in Sec. 141 of the

NI Act clearly show that the vicarious criminal liability arises only if it is established that at the time of committing the offence by the company, the particular officer against whom the proceedings have been initiated was in charge of, and was responsible to the company for the conduct of the business of the company. To attract Sub-sec. (2) of Sec. 141 of the NI Act, it has to be further established that the offence was committed by the company with the consent, or connivance of or it is attributable to, any neglect on the part of such person. It is now well settled that there must be a specific pleading in the complaint regarding the involvement of the director, manager, secretary or other officer in the accused company for prosecuting him along with the company.

12. Learned counsel for the petitioners heavily relied on *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, . A reference was made by a Division of two Judges of the Supreme Court to a larger Bench for determination of certain questions. After considering the legal aspects threadbare, the three issues posed were answered by a Bench of three learned Judges of the Supreme Court. Various provisions of the Act of 1956 were also considered elaborately. Following quotation from that decision will be useful for our purpose:

While analysing S. 141 of the Act, it will be seen that it operates in cases where an offence under S. 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words "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 etc." What is required is that the persons who are sought to be made criminally liable under S. 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 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 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 from being in charge of and responsible for 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 in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays 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.

13. It is further held in the above case that in order to bring a case within Sec. 141 of the NI Act, the complainant must disclose necessary facts which make a person liable. It is also held that there must be clear, unambiguous and specific allegations against the persons who are impleaded as accused that they were in charge of and responsible to the company for the conduct of its business at the material time when the offence was committed. While answering the questions posed for determination, it is specifically held by the Supreme Court that merely being a Director of a company is not sufficient to make a person liable under Sec. 141 of the NI 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 Sec. 141 of the NI Act is that the persons 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. This decision was followed by later decisions of the Apex Court.

14. Learned counsel for the 2nd respondent submitted that there are sufficient averments in Annexure-A complaint. Attention of this Court is drawn to paragraph 2 of Annexure-A complaint wherein it is mentioned by the complaint/2nd respondent that petitioners are the Directors of the 1st accused company and are directly responsible for the day today affairs and conduct of business. According to the learned counsel for the 2nd respondent, all the requirements regarding pleading have been satisfied in this case.

15. To answer this contention, learned counsel for the petitioners submitted that the above pleading is without any basis and without ascertaining the true facts. It is submitted that relevant provisions in the Act of 1956 will show the role played by each Director and it is available in public domain. No effort has been made by the complainant to find out whether the petitioners were in charge of and responsible for the conduct of the business of the 1st accused company. Callousness and unmindfulness on the part of the complainant is writ large, if the specific contentions raised in the reply notice sent by the petitioners are considered, contended the learned counsel. Learned counsel for the petitioners drew my attention to Annexure-C reply notice sent in response to Annexure-B lawyer notice. It is specifically mentioned that the petitioners are independent Directors of the 1st accused company. It is also mentioned that as independent Directors, they were not in any manner involved in the business operation or management of the company. They were not in a position to directly oversee, manage or control all the commercial transactions entered into by the company. It is contended by the learned counsel for the petitioners that in spite of raising such a contention, the complainant without any factual or legal basis arraigned them as accused. In order to establish that the petitioners are independent Directors, certain documents are also produced in this proceedings, which I shall

refer to later.

16. Learned counsel for the 2nd respondent submitted that the documents produced cannot be taken into account at this stage of the proceedings. According to him, all these documents can only be considered at the time of trial and not in proceedings of this nature. To fortify that contention, decision of the Supreme Court in *N. Rangachari Vs. Bharat Sanchar Nigam Ltd.*, is pressed into service. Supreme Court, after considering the entire matter and reading the complaint as a whole, held that there were sufficient indications to prima facie establish that the appellant therein and another person were the Directors of the company and were in charge of the affairs of the company. In that context, it was held that it was not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole were insufficient to show that the appellant therein was not in charge of the affairs of the company. In the factual matrix of that case, the Apex Court confirmed the decision of the High Court refusing to quash a complaint u/s 482 Cr.P.C. Learned counsel for the petitioners submitted that the facts in *N. Rangachari's* case (supra) are different altogether from those in this case. Further, the complainant without any bonafides or legal basis implicated the independent Directors, who had no role in the day today affairs of the company. The real facts were intimated to the complainant, but still it did not make proper enquiry to verify the same, contended the counsel for petitioners. Certainly the essential differences in facts will have to be considered while appreciating the principles in *N. Rangachari's* case (supra). Moreover, the power of this Court, while exercising jurisdiction under Sec. 482 Cr.P.C., to consider materials for preventing abuse of process of the court or doing things to secure the ends of justice is beyond a pale of dispute.

17. Learned counsel for the complainant/2nd respondent submitted that the Act of 1956 makes no distinction between a full time Director and an independent Director. Sec. 2(13) of the Act of 1956 defines the term "Director". It reads as follows:

"director" includes any person occupying the position of director, by whatever name called.

Hence it is argued that the theory of designating a Director as independent Director gets no support from the Act of 1956. To meet this argument, learned counsel for the petitioners relied on Sec. 303 of the Act of 1956. It deals with keeping of register of Directors. Annexure-E series are copies of Form 32 maintained pursuant to Sec. 303(2) and other provisions of the Act of 1956. It shows the particulars of appointment of Managing Director, Directors, Manager and Secretary, the changes among them, etc. It is shown in Annexure-E that the petitioners are designated as independent and non-executive Directors. It is also contended by the learned counsel for the petitioners that these documents are public documents. In spite of raising specific contention in the reply notice that petitioners are not responsible for the day today management of the company, the complainant did not take any step to ascertain nature of the functions of the

petitioners in the company. To canvass a position that Form No. 32 submitted by the company to the authorities is a public document, learned counsel for the petitioners relied on *Anita Malhotra Vs. Apparel Export Promotion Council and Another*, : *Anita Malhotra Vs. Apparel Export Promotion Council and Another*, . The Supreme Court in that decision approved the finding of the High Court that Form No. 32 submitted before the Registrar of Companies is an authentic document. However, in that decision the thrust was on the nature of annual return of a public limited company, which is found to be a public document.

18. Annexure-E series documents would show that the petitioners are shown as independent Directors and they are also designated as non-executive Directors. Annexure-F series are the documents produced to show that there are other Directors in the company, who have been described as additional Directors and Executive Directors. These two sets of documents, contended by the learned counsel for the petitioners, would show that there is a clear distinction between the Directors who are involved in the day today management of the company and those who are not. It is true that in a prosecution of this nature, vicarious criminal liability cannot be extended to all the Directors of the company irrespective of their duty and function in the company.

19. The Supreme Court in *National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another*, : *National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another*, reiterated the principles in *S.M.S. Pharmaceuticals Ltd.'s case (supra)*. The point laid down in *National Small Industries Corporation Ltd.'s case (supra)* is the following:

S. 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent No. 1 was in-charge of or was responsible to the accused company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in-charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under S. 141.

20. Even though, there are some averments in the complaint that the petitioners were also involved in the day today management of the company, specific averments in the reply notice coupled with the documents would show that the plea raised in the complaints is without verifying the facts. Hence those averments will not satisfy the legal requirement. 21. Apart from this, learned counsel for the petitioners produced additional documents to reinforce his submissions. Annexure-G is the relevant part of annual report of the company.

Annexure-R2(a), produced by the 2nd respondent, is the complete version of the same. In Anita Malhotra's case (supra) Supreme Court considered various provisions of the Act of 1956 and found that annual report is a public document coming within the scope of Sec. 74 of the Evidence Act. Based on this document, it is contended by the petitioners that their position vis-a-vis the company is clearly established. Learned counsel for the 2nd respondent argued that Annexure-G would show that the petitioners were members of various committees like audit committee, shareholders' grievance committee, remuneration committee, etc. which show their thick involvement in the administration of the company. In reply to this contention, learned counsel for the petitioners submitted that mere membership in some committee in the company is highly insufficient to implicate them in a prosecution for dishonour of cheque issued by the company in the course of its business. Following observations made by the Supreme Court in S.M.S. Pharmaceuticals Ltd.'s case (supra) are highlighted by the learned counsel for the petitioners:

.....What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a Director in a company in order to illustrate the point that there is no magic as such in a particular word, be it Director, Manager or Secretary. It all depends upon respective roles assigned to the officers in a company. A company may have Managers or Secretaries for different departments, which means, it may have more than one Manager or Secretary. These officers may also be authorised to issue cheques under their signatures with respect to affairs of their respective departments. Will it be possible to prosecute a Secretary of Department-B regarding a cheque issued by the Secretary of Department-A which is dishonoured? The Secretary of Department-B may not be knowing anything about issuance of the cheque in question. Therefore, mere use of a particular designation of an officer without more, may not be enough by way of an averment in a complaint. When the requirement in S. 141, which extends the liability to officers of a company, is that such a person should be in charge of and responsible to the company for conduct of business of the company, how can a person be subjected to liability of criminal prosecution without it being averred in the complaint that he satisfies those requirements? Not every person connected with a Company is made liable under S. 141. Liability is cast on persons who may have something to do with the transaction complained of.

21. It is contended on behalf of the petitioners that the 1st accused company is a company listed in the Bombay Stock Exchange. Annexure-H is the model listing agreement. Although it does not show the nature of the 1st accused company, learned counsel for the petitioners argued that all the informations regarding companies listed in the stock exchange are available in public domain. In spite of availability of such information, complainant has not taken care to understand the nature of functions of petitioners. It is also submitted that the 2nd petitioner

resigned the directorship of the company before the institution of the complaint and therefore she cannot be prosecuted. But the cheques in question were issued during her stint as Director. Hence the decision relied on by the petitioners in Harshendra Kumar D. Vs. Rebatilata Koley Etc., : Harshendra Kumar D. Vs. Rebatilata Koley Etc., is not of help to them as the principle therein is that a Director cannot be held liable if the company issues cheque after his resignation from the directorship. Legal positions discussed above and the documents produced herein would show that bald averment in the complaint that the petitioners were also involved in the day today administration of the company was made without verifying the facts. Except the allegations in the complaint, there is nothing produced on the side of the complainant/2nd respondent to fortify its contentions. In a proceeding u/s 482 Cr.P.C. if it is established that the substratum of the prosecution case is found to be shaky, then certainly the court has jurisdiction to interfere to prevent a vexatious litigation. It has been repeatedly held that the vicarious criminal liability has to be construed strictly. In the absence of a foundation on which the prosecution can build its edifice, this Court finds that the prosecution against the petitioners is nothing but an abuse of the process of court.

In the result,

i. All Criminal Miscellaneous Cases are allowed.

ii. Annexure-A complaint in each case, in so far as it relates to the petitioners, is hereby quashed. It is made clear that the complainant/2nd respondent can proceed with the complaint in respect of other accused named in the complaint.

All Criminal Miscellaneous applications to accept documents will stand allowed.

All other Criminal Miscellaneous applications will stand disposed of.