(1997) 09 MAD CK 0012

In the Madras High Court

Case No : Criminal O.P. No. 10704 of 1997 and Criminal M.P. No''s. 3662 and 3663 of 1997

Col. R.S. Agarwal and 4 Ohters — APPELLANT

Vs

Ashok Leyland, 86 Chamiers Road, Madras — RESPONDENT

Date of Decision : 30-09-1997

Acts Referred:

Citation : (1997) 09 MAD CK 0012

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : Habibullah Baskar, C. Manishankar and T.M. Pappiah, for the Appellant; V. Padmanabhan, for the Respondent

Final Decision : Allowed

Judgement

K. Govindarajan, J.—The Respondent herein filed a complaint under Sections 138 and 142 of the Negotiable Instruments Act 1881 against

the Petitioners and others. According to the Respondent, the accused M/S. Petrochemicals Limited, indulging in Petrochemicals business. It

approached the complainant/respondent for lending money and executed two Hundies on 4.5.1995. According to the complainant, the accused

issued a cheque on 28.6.1995 for a sum of Rs. 53,13,350/-. The complainant presented the cheque for encashment through its bankers. But the

same was returned unpaid by the bankers on 18.12.1995 with the endorsement ""exceeds arrangement. The same was informed to the complainant

by its bankers on 19.12.1995. Immediately, the complainant issued notice dated 26.12.1995 demanding the amount within 15 days from the date

of receipt of the notice. Though on the date of signing of the complaint, the notice was not served on the accused, in the sworn statement, it is specifically stated that the notice was received on 1.1.1996 by the accused. On the abovesaid pleadings, the Respondent filed the complaint

before the XVIII Metropolitan Magistrate, Saidapet, Chennai. The learned Magistrate took cognizance of the offence. Hence the Accused Nos.

3,4,5,7 and 12 in the complaint have filed the above Crl.O.P. to quash the proceedings in C.C. No. 2070 of 1996.

2. Mr. Habibullah Basha the learned Senior Counsel appearing for the Petitioners has submitted that on a reading of the complaint it will be clear

that even according to the Respondent/complainant, the accused is only a company, namely, the first accused. Nothing has been averred in the

complaint about the participation of the Petitioners herein in the day to day affairs of the first accused-company, which is necessary according to

Section 141 of the Negotiable Instruments Act. He has further submitted that though the Petitioners have been arrayed as parties in the complaint,

the complainant has treated the company alone as the accused and not others. In paragraph 7 of the petition it is stated that the Petitioners 3 to 5

had been holding the post of Directors and lordly attending the Board meetings, and they were not concerned with the day-to-day affairs of the

company. According to the complainant, the Chairman was representing the company. It is stated that the third Petitioner resigned from the

company on 27.3.1996 and the fourth Petitioner resigned on 4.11.1995, and that the fifth Petitioner resigned from the post of director on

27.3.1996. He has also submitted that in the absence of any averments in the complaint in accordance with Section 141 of the said Act, the

learned Magistrate ought not to have taken cognizance of the offence insofar as the Petitioners are concerned. In support of his submission, the

learned Senior Counsel has relied on the decision of this Court and the Apex Court.

3. Mr. V. Padmanabhan, the learned Counsel appearing for the Respondent/ complainant has submitted that the fact that the Petitioners were

directors of the company during the relevant period itself is enough to implead them as accused and that it is for the Petitioners to prove that they

are nothing to do with the offence, during the course of trial. The learned Counsel has relied of Section 191 Code of Criminal Procedure in support

of his submission that all the persons shown as accused should be construed as accused, and, u/s 2(d) of Code of Criminal Procedure, known and unknown persons can also be arrayed as parties to the complaint. The learned Counsel has further submitted that this Court has to exercise the

power u/s 482 Code of Criminal Procedure sparingly, and in the present case, the complaint cannot be quaslyed at this stage, when the issue

raised has to be gone into only at the time of trial. Moreover, the learned Counsel has relied on the decision of Janarthanam,J., reported in N.

Doraisamy and another etc. Vs. M/s. Archana Enterprises and etc., , in support of his submission that merely because specific averments in the

complaint as to the persons responsible to and incharge of the company in relation to the affairs of the company has not been made, the complaint

need not be quashed.

4. Section 141 of the Negotiable Instruments Act deals with the offences by Companies which includes the firm or the other association of the

individuals, 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 the offence was committed, was incharge of and was

responsible to, the Company, for the conduct of the business of the Company, as well as the Company, shall be deemed to be the 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.

(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 connivances of, or is attributable to, any neglect on the part of, any director, manager,

secretary of 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

It will be clear from a reading of the abovesaid Section that if any body corporate or a firm or other association of individuals commit an offence

u/s 138 of the said Act, every person who at the time of the offence was incharge of and responsible to the said body corporate, the firm or the

other association of individuals for conduct of its business as well as the said body corporate, or the firm or the association of individuals shall be

deemed to be guilty of the offence. If any person proves that the offence was committed without his knowledge or that in spite of his due diligence

to prevent the commission of such offence, such persons are not liable to punishment. A reading of Sub-Section 2 to Section 141 of the said Act

shows that if the complainant is able to prove that the offence has been committed with the consent or connivance or is attributable to any neglect

on the part of any director, manager, secretary or other officer of the company, they also shall be liable to be proceeded against and punished

accordingly.

5. The Apex Court and various High Courts had an occasion to deal with the scope of similar provisions to Section 141 of the said Act 1881

regarding the liability of the partners of a firm or Directors of a company for the offence alleged to have been committed by a firm or company and

necessity for making specific allegation in the complaints.

6. In the decision reported in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , the Apex Court has held as follows.-

So far as the Manager is concerned we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be

vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not

even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant that there is any act

committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable; in these circumstances,

therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors accused Nos. 4 to 7(1)

has been made out ex facie on the allegations made in the complainant and the proceedings against them were rightly quashed"".

7. The Apex Court has further held in the decision reported in Sham Sunder and Others Vs. State of Haryana, as follows:-

But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the

first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for

such liability. It does not make all the partners liable for the offence whether they do business or not.

It is, therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not

even be knowing what is going on day to day in the firm. There may be partners, better known as sleeping partners who are not required to take

part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything

about the business of the firm. It would be travesty of justice to prosecute all partners and ask them to prove under the proviso to Sub-section (1)

that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that

the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution

establishes that the requisite condition mentioned in Sub-section(1) is established. The requisite condition is that the partner was responsible for

carrying on the business and was during the relevant time incharge of the business. In the absence of any such proof, no partner could be

convicted. We, therefore, reject the contention urged by counsel for the State"".

8. While considering the necessity to make allegation in the complaint so as to bring the Directors of a company within the mischief of Section 17

of the Prevention of Food Adulteration Act 1957 (similar to Section 141 of the Negotiable Instruments Act), the Apex Court in the decision

reported in 1992 S.C. 1168 (R. Banerjee v. H.D. Dubey) has held as follows:-

It will thus be seen that there is no allegation in the complaint which would bring the case within the mischief of Section 17(4) of the Act. There is

no allegation in the complaint that the offence was committed with the consent/ connivance/negligence of the Directors, other than the nominated person, who were impleaded as co-accused. We are, therefore, satisfied that the allegations in the complaint do not make out a case under Sub-

section (4) of Section 17 of the Act. That being so, the inclusion of the co-accused other than the company and the nominated person as the

persons liable to be proceeded against and punished cannot be justified"".

9. Similarly, the learned Judge of the Patna High Court while considering the scope of Section 10 of the Essential Commodities Act 1955 in the

decision reported in In Re: Gopalakrishna Naidu and Others, has held that neither in the report of the Magistrate nor anywhere it was alleged that

the Petitioner was incharge of the firm or was responsible for conducting the business of the firm and so the Petitioner cannot be prosecuted for

contravention of an order under the Act.

10. The Division Bench of the Calcutta High Court, while dealing with the liability of the partners of the firm under the abovesaid provision, in the

decision reported in 1989 Cri.L.J. 31 (Shrilal Bajoria and Ors. v. The State) has held that where there was no whisper in the First Information

Report or the charge-sheet or in the statements of witnesses recorded u/s 161 Code of Criminal Procedure that the two partners of a firm who

were aged 75 years and 73 years respectively at the material time were in any way in charge of and were responsible to, the firm for the conduct

of the business of the firm at the time when the contravention of para 3(2) of W.B. Order was alleged to have been committed nor there was any

averment that the contravention was committed with their consent or connivance or was attributable to any neglect on their part it could be said

that no case against them had been made out ex facie and the proceeding against them were liable to be quashed.

11. Our High Court, while discussing the importance of the allegations in the complaint, in the order in Crl.M.P. No. 3319 of 1986, dated

21.12.1990, Janarthanam,J., has held as follows:-

Leave alone allegations, no material worth the name is available on record on such aspect of the matter. The sordid factor is that even the

allegations in the complaint would point out that accused 9 is the Managing Director of accused 8 - firm, thereby suggesting that he is incharge of

and responsible for the conduct of the business of accused 8 - firm. Sub-section (1) Section 34 of the Act prescribes that where an offence under this Act had been committed by the company and every person, who at the time the offence was committed, was incharge of and 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. There is also an explanation appended to this section defining ''company'' and according to this

Explanation, ''company'' means a body corporate and includes a firm or other association of individuals. On the face of the definition of ''company''

there cannot be any doubt that accused 8 - firm is a company. In such state of affairs to say that the Petitioners, who were described simply as

partners of the firm without stating anything expressly in the complaint as to their having been incharge of and were responsible for the conduct of

the business of accused 8-firm that they are liable for the alleged acts of commissions and omissions of accused 8-firm is not at all substainable. As

such, the Petitioner deserves to be allowed.

12. In the case of C. Balasundaram v. Prakash M/s. Rasi Financing Corporation (Crl.M.P. No. 13898 of 1989, order dated 21.11.1990), in

which, Padmini Jesudurai,J., had an occasion to deal with the requirement of allegations in the complaint as required u/s 141 of the Negotiable

Instruments Act, and has held as follows:-

It is obvious therefore, that this Petitioner has not signed the cheque. To be made liable, the complaint must first show that the Petitioner was

incharge of and responsible to the firm at the time when the offence was committed. In the complaint, this averment is lacking. It is merely stated

that the accused are liable to pay the dues towards the amount borrowed by them. Chapter XVII of the Act does not deal with the liability of the

accused to pay the dues. Whatever be the liability of this Petitioner to pay the amounts under the cheque, in the absence of any averment in the

complaint, that this Petitioner was incharge of and responsible to the partnership firm at the time when the offence committed the complaint cannot

be legally sustained as against the present Petitioner.

13. Further, C. Shivappa,J., in the order dated 14.2.1995 in Crl.M.P. No. l1238 of 1988 while dealing with the scope of Section 47 of Water

(Prevention and Control of Pollution) Act 1974, has held as follows:-

In the present complaint, there is no material to indicate even remotely that the partners - 2 to 8 were doing the business of the firm and no

materials were placed in that behalf. The complaint is taken in toto and in the absence of any whisper against the Respondents -2 to 8, I see no

justification to continue the prosecution as against the Petitioners 2 to 8 and it will be an abuse of the process of Court. So far as Petitioners -1 and

9, one being incharge of the affairs of the and another being the company, are liable to be proceeded with. The other contentions regarding

sanction, ingredients and violations of the conditions of the consent order are all matters of evidence. Thus, the petition is partly allowed.

Proceeding as against the Petitioners 2 to 8 is quashed.

14. The learned Judge of the Allahabad High Court while dealing with the offence committed by company u/s 138 of the Negotiable Instruments

Act, in the decision reported in 1992 Crl.L.J. 1442 (Sharda Agarwal v. Addl.Chief Metropolitan Magistrate II, Kanpur) has held as follows:-

There is no allegation in the complaint that the Directors, i.e., the applicants were incharge of and responsible to the company for the conduct of

the business of the company. Therefore, as it is, the complaint cannot proceed against the Directors only"".

15. While considering Section 27(c) of Drugs and Cosmetics Act 1940, in the decision reported in 1992 L.W. (Cri.) 120 (Alfred Borg &

Company, India(P) Ltd., & 13 Ors. v. Antox Indiaop) Ltd., Arunachalam,J., has held as follows:-

Thus it is apparent that mere extraction of the Section in the complaint would not suffice, and further vague allegations or assumptions, would not

lead anywhere. The complaint must prima facie disclose that there was any act committed by the Directors, from which a reasonable inference can

be drawn of their vicarious liability. Looked at from any angle, on the averments available in the complaint, the pending prosecution cannot be

maintained, insofar as it concerns Petitioners 2 to 6 and 8 to 14. It may be, that Petitioners 1 and 7 many have to be represented, by some person

incharge of the respective companies. On that score it would not be fair to sustain the prosecution against Petitioners 2 to 6, and 8 to 14. It is quite

true that civil litigation is pending in this Court and also in the concerned Court at Baroda"".

16. While dealing with the same issue under the provisions of the Negotiable

Instrument Act, Pratap Singh,J., in the decision reported in 1994 1

L.W. (Cr .) 278 (Senthilkumar Tea Industries, etc. & 3 others v. N. Rajkumar) has held as follows:-

In the instant case, there is no averment whatsoever to implicate them by invoking Section 14(1) of the Act. It is clear from the sworn statement

that accused 2 to 4 are conducting the first accused firm and that it would not be sufficient to bring the case within Section 141 (1) of the Act.

Hence, I am unable to accept the submissions made by Mr. M. Karpagavinayagam, learned Counsel for Respondent.

17. In all these decisions it is held clearly that in the context, a person ''incharge'' must mean that the person should be in overall control of the day-

to-day affairs of the company or firm and so the complaint must contain allegations against those directors or partners to make out a prima facie

case against them.

18. As stated supra, the learned Counsel appearing for the Respondent has relied on the decisions of Janarthanam,J., reported in 1995 Cri.L.J.

2308 : AIR 1988 S.C 1128. The Apex Court in the decision reported in 1988 S.C.-1128 while dealing with the scope of Section 47 of the Water

(Prevention and Control of Pollution) Act 1974 has held as follows:-

On a plain reading of sub-s.(1) of Section 47 of the Act, where an offence has been committed by a company, every person who at the time of

the commission of the offence was ''in charge of and 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. Proviso to Sub-S.(l)

however engrafts an exception in the case of any such person if he were to prove that the offence was committed without his knowledge or that be

exercised all due diligence to prevent the commission of such offence. It would be noticed that Sub-S.(l) of Section 47 is much wider than Sub-S.

(4) of Section 17 of the Prevention of Food Adulteration Act 1954 while feel for consideration in I.K. Nangia''s case. Furthermore, proviso to

Sub-section (1) shifts the burden on the delinquet officer or servant of the company responsible for the commission of the offence. The burden is

on him to prove that he did not know of the offence or connived in it or that he had exercised all due diligence to prevent the commission of such offence. The non obstante clause in Sub-section (2) expressly provides that notwithstanding anything contained in Sub-S.(1), where an offence

under the 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"".

19. On the basis of the above, the learned Counsel appearing for the Respondent has submitted that the complaint in this case need not be

quashed at the instance of the Petitioners, merely on the basis no specific averments have been made with respect to the Petitioners regarding their

involvement in the conduct of the business of the company. It is for the Petitioners to prove before the lower court that the offence had been

committed without their knowledge. The Apex Court accepted to case of the complaint Board on the basis of the specific averments contained in

paragraphs 17,18 and 19 of the complaint. Moreover, in spite of the notice issued by the Board, M/s. Modi Distilleries, deliberately failed to

furnish the information called for regarding the names of the Managing Director, Director and other persons responsible for the conduct of the

business of the company. On that basis the Apex Court has held having wilfully failed to furnish the requisite information to the Board, it is not open

to the Chairman, Vice-Chairman, Managing Director and other members of the Board of Directors to seek the Court''s assistance to derive

advantage from the lapse committed by their own industrial unit. In view of the above, the Apex Court has come to the conclusion in that case that

it should be deemed that the Chairman, Vice-Chairman, Managing Director and the other members of the Board of Directors deemed to be guilty

of the offence. The facts of the present case are different. In this case, admittedly, no averment has been made in the complaint regarding the

Petitioners, except saying that they are directors of the company. Moreover, it is not the case of the Respondent that he could not get particulars

about the persons who are incharge of or responsible to the day-to-day business. Hence the abovesaid decision of the Apex Court will not render

any helping hand to the Respondent to sustain the complaint in question.

20. The remaining decision relied on by the learned Counsel for the Respondent is that of Janarthanam,J., reported in N. Doraisamy and another

etc. Vs. M/s. Archana Enterprises and etc., wherein the learned Judge while dealing with the scope of Section 141 of the Act has held as follows:-

In the case on hand, here is no pale of controversy that the cheques issued by the companies had been bounced and the demands made by the

aggrieved complainants/payees or holders in due course had not been complied with, resulting in the launching of prosecution by preferring a

private complaint before the competent Court of Jurisdiction. of course, it is true that in these cases, specific averments in the complaints as to the

persons responsible to and incharge of the Company in relation to its business, or persons with whose consent or connivance of, or due to any

neglect on his part, the offence had been committed, have not been specifically mentioned, although certain named officials of the Company had

been arrayed as accused. In view of the discussion, as above, the absence of such averments in the complaints, is of little consequence and such

being the case, it goes without saying that the prosecution launched against those companies and/or other individual officials named therein, cannot

at all be quahsed and the trial must have to proceed further in accordance with law.

21. The decisions of the Apex Court, various other High Courts and the judgments of Pratap Singh,J., Padmini Jesudurai J., on the issue cited

supra were not brought to his notice. In view of the settled principle in those decisions, with great respect to the learned judge I am not able to

accept the principles laid down in the decision reported in N. Doraisamy and another etc. Vs. M/s. Archana Enterprises and etc., . But I follow the

judgment of Pratap Singh,J., reported in 1994 1 L.W.(Crl.) 278 which is based on the decision of the Apex Court. On that basis I hold that the

specific allegation that the directors of partners added as accused in the complaint are incharge of and responsible to the company or firm for the

conduct of the business of the company or firm, is necessary to maintain the complaint against those directors or partners.

22. Moreover, in the body of the complaint, the Respondent has mentioned only the company, represented by its chairman as the accused. The

notice is also served only on the company. Though the Petitioners have been arrayed as parties, in the body of the complaint, they have not been mentioned as accused. The phrase ""accused of an offence'' refers the person against whom a formal allegation relating to the commission of an

offence has been levelled which in the normal course may result in his prosecution.

23. The word ''complaint'' has been defined in Section 2(d) of the Code of Criminal Procedure which reads as follows:-

Complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person,

whether known or unknown, has committed an offence, but does not include a police report"".

Even according to Section 2(d) of Code of Criminal Procedure there must be some allegation either orally or in writing with respect to the persons

mentioned therein to come to a prima facie conclusion that the said individual has committed the offence. Though no form is prescribed in which the

complaint must be given there must be an allegation which prima facie discloses the commission of an offence with respect to the persons shown as

accused, which is necessary fact for the learned Magistrate to take further action.

24. Section 141 of the Negotiable Instruments Act is a deeming provision to bring the Directors or partners to bring within the purvied of Section

138, if they were incharge of and responsible to the company for the conduct of the business at the time of the offence was committed. It does not

make all the directors or partners liable for offence, whether they do business or not. But for the said provision, only the company or the firm or

association of individuals, alone is liable for the offence u/s 138 of the Act. So, to bring the persons within the purview of Section 138 of the Act,

there must be some specific averment against those persons, to take cognizance of the offence by the learned Magistrate with respect to the

persons. As stated earlier in this case in the complaint the Respondent has stated that the company is the accused and nothing is mentioned about

the Petitioners. Merely stating that the Petitioners are directors would not be enough to constitute an offence against them. Moreover, the

Petitioners 3 to 5 have already resigned from the post of directors.

25. In view of the above discussion, no purpose will be served if the Respondent is allowed to proceed with the proceedings against the Petitioners

on the basis of the complaint given. Hence the proceedings in C.C. No. 2070 of

1996, on the file of the XVIII Metropolitan Magistrate, Saidapet,

Chennai, are quashed in so far as the same relates to the Petitioners, and, accordingly this Crl.O.P. is allowed. Consequently, Crl.M.P. Nos. 3662

and 3663 of 1997 are closed.

