

(2008) 06 KL CK 0025

In the High Court Of Kerala

Case No : Criminal R.P. No. 1636 of 2004-D

Green Sea Marine and Others

APPELLANT

Vs

V.A. Anty and Another

RESPONDENT

Date of Decision : 20-06-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1)
Partnership Act, 1932 — Section 10, 11(1), 12, 2(a), 4

Citation : (2008) 4 CivCC 460 : (2008) 3 ILR (Ker) 255 : (2008) 2 KLJ 780 :
(2008) 3 KLT 290 : (2008) 4 RCR(Civil) 362 : (2008) 4 RCR(Criminal) 302

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : Peeyus A. Kottam and Ashik K. Mohammed Ali, for the Appellant;
Shaijan C. George, John Vipin, S.A. Sherly and Sajitha George, for the
Respondent

Judgement

Thottathil B. Radhakrishnan, J.—This revision is by the three accused in a complaint filed alleging commission of offence punishable u/s 138 of the Negotiable Instruments Act, 1881, hereinafter referred to as the "NI Act". The allegations are that the complainant does the business of seafood supply; the first accused is the firm, the second and third accused are its partners, the accused firm deals with seafood, the complainant had business relationship with the accused: as par of the transactions between the accused firm and the complainant, two cheques were issued, of which the first cheque was honoured on presentation, however that the second cheque was dishonoured showing the reason "funds insufficient though it was presented on the instructions of the accused; the first accused firm received the notice intimating the dishonour; the notices issued to the other two accused were returned as "not claimed", the accused did not pay even after such demand and have, therefore, committed the offence punishable u/s 138 of the NI Act.

2. The Judicial Magistrate of the First Class took cognizance and issued process.

At trial, the complainant deposed as P.W. 1. The cheque was marked as Ext. P1. The dishonour memo was marked as Ext. P2. Ext. P3 proved the intimation and Exts. P4 to P8 proved service of notice on the first accused and the fact that the postal articles addressed to accused 2 and 3 were returned as unclaimed. Ext. P9 is the extract of the accounts of the accused.

3. Accused persons 2 and 3, but for the admission that they are partners of the first accused firm, denial all other questions put u/s 313 Cr.P.C.

4. No defence evidence was adduced though the accused filed a list of defence witnesses and summons were issued. In spite of coercive steps, those witnesses were not available for examination. The Court of first instance took the view that the purpose of examining the defence witnesses was to show that the cheque was given only as a security and not in discharge of any liability and that therefore, the attempt of the accused persons is only to drag on the case.

5. The trial court found that since accused persons 2 and 3 are partners of the first accused and because they had signed Ext. P1 cheque as the managing partner and partner respectively, they are carrying on the day-to-day affairs of the firm and therefore, they are also liable in terms of Section 141 of the NI Act.

6. The trial court sentenced the first accused firm to pay fine of Rs. 5,000/- and imposed the sentence of simple imprisonment for six months each on accused 2 and 3. There was a further direction to pay Rs. 8 lacs as compensation and in default, to undergo simple imprisonment for two months. The Court of Session, in appeal, sustained the conviction, sentence and the order for compensation.

7. By order dated 7-9-2004, this court allowed this revision in part upholding the conviction but modifying the sentence imposed on accused persons 2 and 3 by reducing it to be for imprisonment till rising of court for one day and directing them to pay an amount of Rs. 4,10,000/- each as compensation and in default, to undergo simple imprisonment for a period of 60 days. The amount realised was to be released to the complainant as compensation. The accused persons were directed to appear before the Magistrate's Court on 8-11-2004 to suffer the sentence. It was been duly certified that the revision petitioners 2 and 3 suffered the sentence of imprisonment and also the default sentence of 60 days in terms of that order of this Court.

8. In 2005, the complainant filed SLP (Crl.) No. 4155/2005 before the Hon'ble Supreme Court. That led to Criminal Appeal No. 1476/2007, which was allowed on 26th October, 2007 holding that the aforesaid order of this Court was an ex parte order. Hence, it was set aside, restoring this revision to file for decision in accordance with law.

9. I have heard the learned counsel for the revision petitioners and the learned counsel for the complainant.

10. The learned counsel for the revision petitioners argued that the learned Magistrate ought not to have taken cognizance, at least, as against accused

persons 2 and 3 in as much as there is no pleading in the complaint that the said persons, at the time the offence was committed, were in charge of, and were responsible to the firm for the conduct of business of the firm. It is argued that in the absence of such clear pleading in the complaint, the decisions of the Apex Court in *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, (three-judge Bench) and (2007) 2 SCC (Crl.) 192 (two-Judge Bench)] squarely applies to the facts of the case and the complaint, at least, as against accused persons 2 and 3 is liable to be dismissed vacating the conviction and sentence imposed on them. It is pointed out that though the said decision and the decision in *K.P.G. Nair Vs. Jindal Menthol India Ltd.*, related to companies, *Monaben Ketanbhai Shah and Another Vs. State of Gujarat and Others*, was a case relating to a partnership firm, in which decision, the same principle was applied and still further, that in view of the inclusive definition of the word "company" in Explanation (a) to Section 141 of the NI Act, the same yardsticks as are applied to companies have also to be applied in the case of firms. In fact, this is the main argument in support of the defence, though it was also attempted to be pointed out that the entire transaction would show that the cheques were given only as a security and not in discharge of any debt and still further, that accused 2 and 3, having already undergone conviction for 61 days, it would be unjust to subject them to further penalty, even if their conviction is sustained.

11. Per contra, the learned counsel for the complainant argued that there are only two partners for the first accused firm and the pleading in the first paragraph of the complaint that the first accused is a firm and the second and third accused are its partners is sufficient pleading because in the absence of, at least, two persons, there cannot be a firm and therefore, in partnerships which have only two partners, it would be superfluous to plead further that the said two partners were in charge and were responsible to the firm at the time the offence was committed and hence, no further pleading is necessary to satisfy the prescriptions of sub-section (1) of Section 141 of the NI Act. It was also stated that Ext. P1 cheque was produced along with the complaint and that the said cheque contains the signatures of accused 2 and 3 as partners, one of the describing himself as the managing partner and the other as partner. It was argued that, so much so, the materials on record had shifted the burden to accused 2 and 3, to take refuge under any of the provisos of Section 141 (1). It was further argued that the nature of transactions between the complainant and the accused are day-to-day commercial transactions in the field of seafood processing and therefore, the accused cannot escape liability by merely saying that the cheque was issued as a security, even as they have no case that the so called amount which they say was secured, had been paid.

12. In *S.M.S. Pharmaceutical Ltd.* (supra) (three - Judge Bench), it was laid down that it is necessary to specifically aver in a complaint u/s 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company; such averment is an essential requirement of Section 141 and has to be made in a complaint and that

without such averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied. In *K.P.G. Nair (supra)*, it was noticed that judicial opinion is almost unanimous, that a complaint ought to contain the necessary averments before a person can be subjected to criminal process. The provision contained in Section 141 whereby the liability is sought to be fastened vicariously on a person connected with a company or a firm, was noticed to be a departure from the rule in criminal law against vicarious liability and a clear case should be spelt out in the complaint against the person sought to be made liable. It was noticed that section 141 contains the requirements to make a person liable under that provision and the complaint should clearly spell out that the accused falls within the parameters of that section. The Apex Court laid down that a complaint has to be examined by the Magistrate in the first instance on the basis of the averments contained therein. Mere description as a director or a partner is insufficient to satisfy the requirement of Section 141.

13. In *Monaben Ketanbhai Shah (supra)*, the Apex Court dealt with a case against a firm Sona Fibres, with five partners, who were arrayed as the accused. Three of them were ladies. The Magistrate discharged them holding that there are no allegations in the complaint, making out an offence against them. The court of Session set aside that order of discharge. That was confirmed by the High Court. Restoring the order of discharge, the Hon''ble Supreme Court laid down as follows:

From the above, it is evident that in the complaint there are no averments against the appellants except stating in the title that they are partners of the firm. Learned counsel for the respondent complainants contended that a copy of the partnership deed was also filed which would show that the appellants were active in the business. No such document was filed with the complaint or made part thereof. The filing of the partnership deed later is of no consequence for determining the point in issue. Section 141 does not make all partners liable for the offence. The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. There may be sleeping partners who are not required to take any part in the business of the firm; there may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint.

14. Dilating on the contents of Sections 138 and 141 of the NI Act, the Hon''ble Supreme Court laid down in *Monaben Ketanbhai Shah (supra)* as follows:

3. Section 138 of the Act makes dishonour of the cheque an offence punishable with imprisonment or fine or both. Section 141 relates to offences by the company. It provides that 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. Thus, vicarious liability has been fastened on those who are in charge of and responsible to the company for the conduct of its business. For the purpose of Section 141, a firm comes within the ambit of a company.

4. It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hyper technical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking.....

As already noticed, it was held therein that the said case, as would be evident from the facts thereof, falls in the category of those requiring discharge of the accused.

15. Explanation (a) to Section 141 provides that for the purpose of that Section, "company" includes a firm or other association of individuals. Explanation (b) provides that in relation to a firm, "direction" means a partner in the firm. In the case in hand, the complainant has pleaded in paragraph I of the complaint that the first accused is the firm and the second and third accused are its partners. The provision in sub-section (1) of Section 141 makes every person who, at the time the offence was committed, was in charge of, and was responsible to the firm for the conduct of the business of the firm, liable for the offence punishable u/s 138. That liability is attracted and accrues by virtue of the legal relationship between the partners in relation to the firm.

16. "Partnership" is the relation between the persons who have agreed to share the profits of a business carried on by all or any of them acting for all. See Section 4 of the Indian Partnership Act, 1932, hereinafter, the "IP Act". Section 2

(a) of the IP Act defines an "act of a firm", to mean any act or omission by all the partners, or by any partner or agent of the firm which may give rise to a right enforceable by or against the firm. Section 9 of the IP Act provides that partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm, to any partner or his legal representative. Section 10 thereof provides that every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm. There can be no partnership without a minimum number of two partners. Clause (b) of Section 12 of the IP Act provides that every partner is bound to attend diligently to his duties in the conduct of the business while Clause (a) thereof provides that every partner has a right to take part in the conduct of the business. The mutual rights and duties of the partners of a firm may be determined by contract between the partners See Section 11(1) of the IP Act. Therefore, subject to the terms of the contract between partners, law enjoins that every partner is bound to attend diligently to his duties in the conduct of the business. Any contract between the partners is firstly a matter exclusively within the knowledge of the partners. This is all the more so because, the regulation of the mutual rights and duties of the partners, as already noticed, is to be determined by contract between the partners and in terms of Section 11(1), such contract may be express or may be implied by a course of dealing. Therefore, in the light of Section 4 of the IP Act and having in mind the manner in which the mutual rights and duties are determined qua the liability of every partner to attend diligently to his duties in the conduct of the business, it has to be that in so far as third party rights and liabilities arising out of transactions with third parties, are concerned, the responsibility to conduct the business of the firm which consists only of two partners is with both the partners of that firm. Any further contractual device by which such responsibility is confined only to one among the two partners, has to be treated as exclusively within the knowledge of the partners.

17. As laid down in *Monaben Ketanbhai Shah* (supra), it is not necessary to reproduce the language of Section 141 verbatim. The complaint has to be read as a whole. If the substance of the allegations made in the complaint fulfils the requirements of Section 141, the complaint has to proceed and is required to be tried with. In construing a complaint, a hyper technical approach is not to be adopted. The complaint was filed alleging that the first accused is the firm and the second and third accused are its partners. Ext. P1 cheque produced along with the complaint shows that it is signed by one accused as the managing partner and another accused as a partner. The accused persons have not refuted either by cross-examination of PW 1 or in their statements u/s 313 Cr.P.C. that they are not the partners of the first accused firm. They have not projected any other person as also a partner of the first accused firm. Therefore, following the relationship of the partners and the liabilities of the partners emanating out of the IP Act, it has to be held that in the complaint in hand, which is in relation to

a firm of which there are only two partners, it is sufficient that it is pleaded that the said firm has the two partners who are also arrayed as accused persons.

18. The decision in *Monaben Ketanbhai Shah* (supra), revolved around facts where there were five partners. Therefore, on facts, that precedent does not support the plea of accused persons 2 and 3 in this case. Instead, the said decision is also authority for the position that when the complaint discloses the substance of the allegations, it cannot be rejected on a hyper technical approach.

19. So much so, the plea of accused persons 2 and 3 that there is insufficiency of pleadings in the complaint to attract the provisions of Section 141 of the NI Act is liable to be rejected.

20. On the question of the liability of the accused, the issuance of Ext. P1 cheque from the account of the first accused firm, its presentation in terms of law, dishonour and consequential service of demand on the first accused are proved. That has also been concurrently found by the courts below. The evidence on record leads only to that conclusion. The defence version that the cheque was offered as a security is not coupled with any other plea of discharge. Obviously, therefore, the courts below were justified in concluding that the cheque was issued in discharge of debt or legal liability. Hence, the conviction against the accused stands.

21 On to the question of sentence, the fine of Rs. 5,000/- imposed on the first accused is only to be sustained. As regards accused 2 and 3, having regard to the totality of the facts and circumstances, it would suffice if each of them is sentenced to simple imprisonment for two months with entitlement to set off of imprisonment already suffered by them, following the order dated 7-9-2004 before that order was set aside by the Apex Court in *Crl. A. No. 1476/2007*. The order for compensation imposed by the courts below does not call for any interference, having regard to the amounts covered by Ext. P1 cheque and other attendant circumstances. In the result, this revision is allowed in part as follows:

1. The conviction and sentence imposed on the first accused are confirmed.
2. The conviction of accused 2 and 3 is confirmed.
3. In modification of the sentence imposed on the second accused, he is sentenced to undergo simple imprisonment for two months with entitlement to set off of the imprisonment including default sentence already suffered by him, following the order dated 7-9-2004 before it was set aside by the Apex Court in *Crl. A. No. 1476/2007*.
4. In modification of the sentence imposed on the third accused, he is sentenced to undergo simple imprisonment for two months with entitlement to set off of the imprisonment including default sentence already suffered by him, following the order dated 7-9-2004 before it was set aside by the Apex Court in *Crl. A. No. 1476/2007*.

5. The order of compensation is confirmed.