

(2006) 07 KL CK 0060

In the High Court Of Kerala

Case No : Criminal R.P. No's. 320 and 360 of 2001

Mohandas

APPELLANT

Vs

Jayasamudri Trading Co.

RESPONDENT

Date of Decision : 21-07-2006

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1), 141(2)
Penal Code, 1860 (IPC) — Section 138, 141

Citation : (2007) 4 BC 38 : (2006) 3 ILR (Ker) 486 : (2006) 3 KLT 776

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : T.G. Rajendran and Sunny Mathew, for the Appellant; C.P. Saji, V. Surendran and P.A. Harish, for the Respondent

Judgement

R. Basant, J.—Does the mere fact that a partner earns share of profits of the business of the firm expose him to culpable liability u/s 141 of the Negotiable Instruments Act ? This is the only contentious issue of relevance raised in these Revision Petitions.

2. These revision petitions are preferred by accused 1 to 3 in a prosecution u/s 138 of the N.I Act. Accused No. 1 is a firm and accused Nos. 2 & 3 are partners of the said firm. Accused 1 & 2 together have preferred CrI.RP 363/2001, whereas the 3rd accused has preferred CrI.R.P.320 of 2001. Petitioners 2 & 3 face a sentence of imprisonment for 6 months. They are further directed to pay an amount of Rs. 60,000/-each as compensation and in default to undergo simple imprisonment for a period of 3 months each. No sentence or direction to pay compensation is imposed on the 1st accused firm, which allegedly stood dissolved by the time the impugned appellate judgment was passed.

3. The complainant alleged that offence u/s 138 of the N.I Act was committed in respect of two cheques - Exts.P6 & P7, for Rs. 70,000/- and Rs. 30,000/- respectively. Of course, Ext.P3 cheque is also seen produced. But it is the common case that the said cheque stood superceded by Ext.P7 cheque after a

cash payment of Rs. 40,000/- was made. So the indictment refers to two cheques - Exts.P6 & P7, only.

4. It is the admitted case that these two cheques are signed by the 2nd accused on behalf of the 1st accused firm. Before me, there is no dispute about the validity of the verdict of guilty and conviction of the 1st and 2nd accused in respect of Ext.P7 cheque. Regarding that cheque, the prayer is only that leniency may be shown to the 2nd accused on the question of sentence.

5. The trial court in para.13 of the judgment came to the specific conclusion that prosecution in respect of Ext.P6 is not legal and valid in as much as the said cheque was not presented for encashment within a period of 6 months as insisted by Section 138 proviso (a). But the trial court found that in respect of Ext.P7, the prosecution is valid.

6. The appellate court in para. 15 of the judgment made an observation that prosecution in respect of Exts.P6 & P7 is valid and proper. However I find that there has been no specific discussion on this aspect - as to whether proviso (a) to Section 138 would bar the prosecution in respect of Ext.P6 or not. That sweeping statement made by the appellate court notwithstanding, I am satisfied that the complainant cannot, in the appeal or in this revision preferred by the accused, be permitted, in the absence of a specific challenge, to contend that the prosecution must succeed in respect of Ext.P6 cheque also. That finding was not challenged. No revision petition was filed against the specific finding in para.13 of the judgment of the trial court that prosecution in respect of Ext.P6 is not sustainable. The sweeping observations made in para. 15 of the appellate judgment without specifically referring to the finding in para. 13 or proviso a to Section 138 cannot in these circumstances enable the complainant to advance the contention before me that the prosecution in respect of Ext.P6 was held to be valid and sustainable by the appellate court.

7. The controversy thus can be reduced to two short points. That is

i) Whether the verdict of guilty, conviction and sentence imposed on the 3rd accused is valid and correct? and

ii) Whether the sentence imposed on the 2nd accused deserves modification ?

8. It is not disputed at all that the 3rd accused was a partner of the 1st accused firm on the date of commission of the offence. The 3rd accused himself took the witness stand and admitted this fact. He was examined as DW1. He proved Exts.D1 to D3. Exts.D1 is the partnership deed. It was admittedly in force on the date when the cheque was drawn, on the date when the cheque was dishonoured and on all the relevant dates, till the prosecution was launched. The 3rd accused raised a contention that he was only a sleeping partner and was not in charge of and responsible to the 1st accused firm for the conduct of business of the 1st accused firm. Clauses 4, 5, 6, 7, 8, 9, 10, 11 & 14 of the deed of partnership appear to be of crucial relevance, which I extract below. The 3rd accused is the

first partner.

4. Place of Business:--The principal place of business shall be at Door No. 11/318 Convent Road, Calicut. The partners may by mutual agreement open branch or branches of the firm or shift the principal place of business at such other place or places as may be decided upon. The tenancy right of the premises No. 11/318-Convent Road, Calicut shall belong to and be the entire property of first partner namely K.K. Mohandas. The other partners shall not have any title whatsoever over the tenancy right of such premises where the partnership business is carried on. In the event of the dissolution of the firm or retirement of partner of the First partner K.K.Mohandas from the firm, the first partner shall be entitled to get vacant possession of premises No. 11/318-Convent Road, Calicut, over and above his other claims from the partnership firm. In the event of the death of the first partner, the said premises shall be vacated by the other partners in favour of his legal heirs or representatives.

5. Capital :-- The capital of the firm shall be such amount as disclosed by the books of accounts. It is mutually agreed that the first partner K.K. Mohandas need not contribute anything towards capital.

6. Object:-- The object of the firm shall be to do business in Copra and other connected business. The partners may by mutual agreement carry on any other business or businesses which they may decide to carry on in addition or in substitution of the aforesaid business.

7. Profit & Loss distribution :-- The profit and loss of the firm shall belong-to and borne by the partners in the following proportion:

K.K. Mohandas - 10% K.Balakrishnan - 45% K.V.Baburaj - 45%

8. Management :-- The second partner K. Balakrishnan shall be the managing partner of the firm. The third partner K.V. Baburaj shall be acting working partner and he shall assist the Managing Partner in the day today affairs of the firm. The Managing Partner shall represent the firm before all authorities including judicial and quasi judicial ones and he shall be responsible to make, to enter into agreement and contracts on behalf of the firm with all the inside and outside agencies, Governments, local authorities or any other authorities or organizations. He shall be responsible for the day today conduct of the affairs of the firm diligently and systematically.

9. Interest on capital.--Interest on capital shall be paid to partners subject to a maximum of 18% per annum. However, no interest shall be paid on capital in case of loss.

10. Remuneration to partners:-- The second and third partners shall be active working partners and they are eligible for remuneration as per the details given below:

First Rs. 75,000/- of the Book profit = Rs. 50000/-or 90% of the Book profit

whichever is higher. Next Rs. 75,000/- = 60% Balance = 40%

The above remuneration shall be paid to second and third partners equally.

11. Bank accounts :-- The partners may open account or accounts in the name of the firm in such bank or banks as may be decided upon by the partners and the same shall be operated by the second or third partners by their individual signature.

14. Loans & Advances: The partners may take loan or make borrowings for the purpose of the business of the firm from banks, bankers, agencies and individuals on such terms and conditions as may be decided upon by the partners. All such loan taken or borrowing made for the purpose of the business of the firm shall be truly reflected in the books of accounts maintained by the firm.

9. The evidence of DW1 only confirms the stipulations in the partnership deed DI, As stated earlier, admittedly the 3rd accused has not signed in the cheque. He admittedly receives amounts towards the profit. He is also liable to suffer loss. There is no dispute on this aspect.

10. The short question to be considered is whether these stipulations in the partnership deed, which have been confirmed in the oral evidence also, are sufficient to saddle criminal liability on the 3rd accused u/s 138 of the N.I Act with the aid of Section 141. It will be apposite now to extract Section 141 of the N.I Act.

Section 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.

(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.

11. The 1st accused is a company as contemplated u/s 141. Sub-section 2 of Section 141 does not admittedly have any application. u/s 141 (1) only such a partner is culpably liable who at the time when the offence had taken place, was

in charge of and responsible to the company for the conduct of its business.

12. The question boils down to this. Can the 3rd accused be said to be in charge and responsible to the company for the conduct of its business ?

13. One has to read the lines and read between the lines while attempting to understand the stipulations in Ext. DI. The 3rd accused was evidently the holder of tenancy rights over a building. If he subleased it to another, he runs the risk of getting evicted from the premises. Instead, if he were a partner, the tenancy laws would protect his right to continue in possession as a tenant. A careful reading of all the provisions extracted above must clearly, unambiguously and unerringly lead us to the conclusion that the 3rd accused along with others was only contemplating an arrangement by which he would be assured of the amount (profit) which he is entitled as consideration for the sub lease ensuring at the same time that he does not run the risk of being evicted on the ground of sub lease. Read each of the above stipulations in detail, this conclusion appears to be inescapable. He has no right whatsoever in the day-to-day running of the business. That will be taken care of by the other two partners. In these circumstances, it appears to me that the stipulations in Ext. DI cannot bring the 3rd accused within the sweep of the expression "person in charge of and responsible" to the 1st accused for the conduct of its business.

14. It is contended that the 3rd accused admittedly earns profit of the business and that is sufficient to attract culpable liability u/s 141(1) of the N.I Act. I am unable to accept this contention. The legislature, when it enacted Section 141(1) must have been aware that every partner must be having some interest in the firm and must be receiving some financial advantage from such status as partner. In spite of that the legislature had insisted that such person must be in charge of and responsible to the firm to the conduct of the business in order to attract culpable liability. The mere fact that the partner has a financial stake in the business of the firm is certainly not sufficient in itself to attract culpable liability u/s 141(1) of the N.I. Act. Those who merely have such financial stake were excluded from culpable liability by the legislature by enacting Section 141(1). This contention cannot succeed.

15. The learned Counsel for the respondent attempts to make much out of Clause 14. It would be unreasonable and myopic to read Clause 14 sitting in an island of its own. It has to be read along with the other stipulations which have been extracted below. The partners can take loans and make borrowings for the purpose of business of the firm but even that, as per the other stipulations, can be done by the other 2 partners. Significantly there is no contention that when the loan in question was availed by the firm from the complainant, the 3rd accused had any specific role to play in such transaction of loan. This would knock the bottom out of the contention that Clause 14 extracted above is sufficient to mulct the 3rd accused with culpable liability u/s 138 read with Section 141 of the N.I Act. I am in these circumstances satisfied that the challenge raised by the 3rd accused in CrI.R.P.320 of 2001 is correct and

sustainable. The challenge on this ground succeeds.

16. The only contention that remains is whether the sentence imposed and the direction to pay compensation is harsh and excessive. The learned Counsel for the 2nd accused prays that leniency may be shown on the question of sentence. I find merit in that prayer. I have already adverted to the principles governing imposition of sentence in a prosecution u/s 138 of the N.I Act in the decision reported in Anilkumar v. Shammi 2002 (3) KLT 852. I am not persuaded to agree that there are any compelling circumstances available in this case which would justify the imposition of any deterrent substantive sentence of imprisonment on the 2nd accused. He is certainly entitled for leniency. But the plight of the complainant cannot be ignored or overlooked. The cheque Ext.P7 in respect of which alone the prosecution is successful, 1 note is for an amount of Rs. 30,000/-. It bears the date 27.5.1996. The complainant has been compelled to fight three rounds of legal battle and to wait from 1996 for the redressal of his grievances. Subject to the requirement of adequately compensating the complainant, leniency can be shown to the 2nd accused.

17. In the result:

a) Crl.R.P.320 of 2001 is allowed and the verdict of guilty, conviction and sentence imposed on the 3rd accused u/s 138 read with Section 141 I.P.C are set aside. He is found entitled to an acquittal and is accordingly found not guilty and acquitted. His bail bond shall stand discharged. He is set at liberty. Needless to say amounts if any deposited by the 3rd accused in compliance with the impugned judgment shall be released to him forthwith.

b) Crl.R.P.360 of 2001 is allowed in part. Verdict of guilty and conviction against accused 1 & 2 are upheld. But the sentence on the 2nd accused is modified and reduced. In supersession of the sentence imposed on the 2nd accused by the courts below, he is sentenced to undergo imprisonment till rising of court. He is further directed to pay an amount of Rs. 47,500/- as compensation and in default to undergo simple imprisonment for a period of 45 days. If realised, the entire amount shall be released to the complainant. Needless to say, credit shall be given to amounts if any deposited before the court below by now. Such amounts shall be released forth with to the complainant.

18. The 2nd accused shall have time till 1.9.06 to appear before the learned Magistrate to serve the modified sentence hereby imposed. If he does not so appear on or before that date, the learned Magistrate shall thereafter take necessary steps to execute the modified sentence hereby imposed.