
(2013) 09 MAD CK 0060

In the Madras High Court

Case No : Criminal O.P. No. 11195 of 2010 and M.P. No. 1 of 2010

Mr. K. Saravanan, Ms. Thilagavathi Saravanan, Mr. V.
Kannappan and Mr. K.K. Govindamoorthy

APPELLANT

Vs

M/s. ICICI Bank Limited

RESPONDENT

Date of Decision : 30-09-2013

Acts Referred:

Citation : (2013) 4 MLJ(Cri) 462

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : I. Alvin, for the Appellant; S. Vasudevan, for the Respondent

Final Decision : Dismissed

Judgement

R. Subbiah, J.—This petition has been filed by the petitioners seeking to quash the complaint filed against the petitioners herein and the other

accused u/s 138 of Negotiable Instruments Act, which is pending in C.C. No. 1593 of 2010 on the file of the learned VII Metropolitan

Magistrate, George Town, Chennai. The petitioners herein have been arrayed as A3, A6, A4, A5 respectively in C.C. No. 1593 of 2010 pending

on the file of the learned VII Metropolitan Magistrate, George Town, Chennai.

2(1). The averments in the complaint are as follows:-

The respondent/complainant is a Scheduled Bank constituted under the Banking Companies Act. During the course of its business, one M/s. Asian

Health & Nutri Foods Ltd. approached the Complainant bank for a Line of Credit (Short Term Loan) on the terms and conditions set out in

Master Facility Agreement executed by the said Company in favour of the Complainant. For the purpose of availing the said facility by M/s. Asian

Health & Nutri Foods Ltd. the 1st accused M/s. Cosmopolis Properties Private Limited stood as "Guarantor" and has executed a Corporate

Guarantee guaranteeing the due repayment of the amount by M/s. Asian Health & Nutri Foods Ltd. The over all limit of loan was fixed at Rs. 15

crore. After availing the loan, the principal borrower viz., M/s. Asian Health & Nutri Foods Ltd. was highly irregular in repaying the loan amount

lent by the complainant. Hence, with a view to discharge of the debt outstanding in the account of M/s. Asian Health & Nutri Foods Ltd. the 1st

accused viz., M/s. Cosmopolis Properties Private Limited issued a cheque bearing No. 089858, dated 30.11.2009 for a sum of Rs. 2 crore in

favour of the complainant. The said cheque was drawn on Indian Overseas Bank, Suramangalam Branch, Subramania Nagar, Salem. When the

complainant presented the said cheque for collection through its Armenian Street Branch, Chennai, the same was dishonoured and returned with a

cheque return memo confirming Exceeds Arrangement on 03.12.2009 in the account of the 1st accused. The 1st accused had issued the said

cheque duly signed by the Managing Director of the company viz., Mr. S. Sidesh Kumar (2nd accused). Hence, the complainant/respondent

herein issued statutory notice dated 15.12.2009 through registered post informing all the accused about the fact of dishonour of cheque and calling

upon them to make full payment.

2(2). It has been further stated in the complaint that the accused 1, 2 & 5 have received the notice on 17.12.2009 and the accused 3, 4 & 6 have

deliberately evaded the receipt of the notice and the notices were returned to the Complainant by the Postal Department with an endorsement left.

All the accused have sufficient and adequate knowledge of the service of notice. Further, it is averred in the complaint that the 1st accused

Company issued the above said cheque knowing fully well that it did not have sufficient funds in the bank account to pay amount to the

respondent/complainant. The accused 2 to 6 being the Directors of the 1st accused-company, who are in control and management of the day-to-

day affairs of the company, have deliberately allowed the complainant to present the cheque on the due date and having allowed the same to be

dishonoured without providing sufficient funds, they are all liable to be prosecuted u/s 138 of Negotiable Instruments Act.

3. Hence, the complaint was lodged by the respondent/complainant and the same was taken on file as C.C. No. 1593 of 2010 on the file of the VII

Metropolitan Magistrate, George Town, Chennai. Aggrieved over the same, now the petitioner herein, who have been arrayed as A3, A6, A4 &

A5 respectively have come forward with the present petition before this Court seeking to quash the complaint.

4. It is the main submission of the learned counsel for the petitioners that absolutely there is no allegation in the complaint that the offence was

committed only with the consent, connivance or attributable knowledge of the petitioners. It is further submitted by the learned counsel for the

petitioner that the averments made in the complaint to the effect that the accused 2 to 6 being the Directors, who are in control and management as

well as the day-to-day affairs of the company and have deliberately allowed the complainant to present the cheque on the due date is bald in nature

and the said averment is not sufficient to maintain the complaint as against the petitioners u/s 138 of Negotiable Instruments Act. There should be a

specific allegation in the complaint as to how these petitioners are responsible for the conduct of the business of the first accused-company. Hence,

the complaint is liable to be quashed. In support of his contention, the learned counsel for the petitioners relied upon the judgments of the Hon"ble

Apex Court reported in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, and Anita Malhotra Vs. Apparel Export

Promotion Council and Another, .

5. Per contra, the learned counsel for the respondent/complainant submitted that in the complaint specific allegation has been made to the effect

that the Accused No. 2 to 6 being the Directors are in control and management as well as the day-to-day affairs of the company. The said

allegation is sufficient to maintain the complaint as against the petitioners herein. In this regard, the learned counsel for the respondent/complainant

has drawn the attention of this Court to Section 141(1) of the Negotiable Instruments act and submitted that if the person committing the offence

u/s 138 of Negotiable Instruments Act is a company, every person who was in-charge of and responsible to the company for the conduct of the

business of the company at the time the offence was committed shall be deemed to be guilty of the offence and liable to be proceeded against and

punished accordingly. Only if the offence has been committed by a company 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, as defined u/s 141(2) of the Negotiable Instruments Act and the said persons are not one of the persons, who fall under the category of persons who are responsible to the company for the conduct of the business of the company, then only a detailed averment is necessary with regard to the role of the said accused persons in committing the offence. So far as the present case is concerned, the accused 2 to 6 are the persons, who fall under the category of the persons who are in charge of and responsible to the company for the conduct of the business of the company at the time the offence was committed. Therefore, the averment made in the complaint to the effect that the petitioners herein are in control and management as well as the day-to-day affairs of the company itself is sufficient to maintain the complaint as against the petitioners. Thus, the learned counsel for the respondent opposed the prayer of the petitioners.

6. Keeping the submissions made on either side, I have carefully gone through the materials available on record.

7. According to the averments made in the complaint, the 2nd accused Mr. S. Sidesh Kumar is the Managing Director of the 1st accused-

Company viz., M/s. Cosmopolis Properties Private Ltd. The complaint has been filed u/s 138 of Negotiable Instruments Act by the respondent

herein stating that the petitioners herein are the Directors of the 1st accused-company, who are in charge and responsible for the conduct of the

business of the company. The relevant averment found the in the complaint as against the petitioners herein is as follows:--

The Accused 2 to 6 being the Directors who are in control and management as well as the day-to-day affairs of the company have deliberately

allowed the Complainant to present the cheque on the due date and having allowed the same to be dishonoured without providing sufficient funds,

are all liable to be prosecuted u/s 138 of the Negotiable Instruments Act.

8. But, according to the petitioners, the above said statement made in the complaint is very bald in nature and the complaint should specifically spell

out as to how and in what manner the Directors are in charge and responsible for the conduct of the business of the company-1st accused. It is the

submission of the learned counsel for the petitioners that a detailed averment is necessary with regard to the role of each accused as to how they are responsible for the offence u/s 138 of Negotiable Instruments Act committed by the company.

9. Before dealing with the submissions made by the learned counsel on either side, I am of the opinion that it would be appropriate to extract

Section 141 of Negotiable Instruments Act. Section 141 of the Act runs 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 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;

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central

Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case

may be, he shall not be liable for prosecution under this Chapter.

(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.

The above said provision contains two parts. First part 141(1) deals with 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. Second part 141(2) deals with the person, who is not one

of the persons who falls under the category of "persons who are responsible to

the company for the conduct of the business of the company".

10. If the offence is committed by the company 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, and if the said person falls u/s 141(2) of the Act i.e., the person, who is not one of the

persons, who falls under the category of persons who are responsible to the company for the conduct of the business of the company and then

only, a detailed averment is necessary with regard to the role of each of the accused in commission of the offence by the company u/s 138 of the

Negotiable Instruments Act.

11. If the persons fall under the category of "persons who are responsible to the company for the conduct of the business of the company" as

stated in Section 141(1) of the Act, then, no detailed averment is necessary with regard to the role played by them in committing the offence u/s

138 of the Act by the Company and in such case, an averment to the effect that the accused persons were in charge of and were responsible to the

company for the conduct of business of the company at the time of committing the offence itself would suffice to make them vicariously liable for

the offence.

12. In the present case, the petitioners are the Directors of the 1st accused-company and they fall u/s 141(1) of the Act and the allegation made in

the complaint to the effect that "the Accused 2 to 6 being the Directors who are in control and management as well as the day-to-day affairs of the

company have deliberately allowed the Complainant to present the cheque on the due date" itself is sufficient to maintain the complaint against

them.

13. In this regard, a reference could be placed in the judgment relied upon by the learned counsel for the respondent/defacto-complainant,

reported in Rallis India Ltd. Vs. Poduru Vidya Bhusan and Others, , wherein it has been held as follows:--

The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For

fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each

and every transaction. On the other hand, proviso to Section 141 of the Act

clearly lays down that if the accused is able to prove to the satisfaction of the court that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence, he will not be liable to punishment. Needless to say, the final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners qua the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquittal.

In the judgment reported in K.K. Ahuja Vs. V.K. Vora and Another, , it has been observed as follows:--

10. This Court in SMS Pharma(I) then proceeded and identified the nature of allegations required to be made against members of Board of

Directors and person signing the cheque as follows:

(i) Managing Director/Joint Managing Director--By virtue of the office they hold, these persons are in charge of and responsible for the conduct of

the business of the company. Therefore, they would fall u/s 141(1), even though there is no specific averment against them.

(ii) Person signing the cheque--The signatory of a cheque which is dishonoured, is clearly responsible for the act and will be covered under sub-

section (2) of Section 141. Therefore, no special averment would be necessary to make him liable.

(iii) Director--The fact that a person is a Director of a company is not by itself sufficient to make him liable u/s 141 of the 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 Section 141 is

that the person 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 there is no deemed liability upon a Director.

14. Even the Judgment relied upon by the learned counsel for the petitioners reported in National Small Industries Corp. Ltd. Vs. Harmeet Singh

Paintal and Another, gives a fitting answer to this issue. The relevant portion in the said judgment reads as follows:--

38. But if the accused is not one of the persons who falls under the category of persons who are responsible to the company for the conduct of the business of the company then merely by stating that he was in charge of the business of the company or by stating that he was in charge of the day-to-day management of the company or by stating that he was in charge of, and was responsible to the company for the conduct of the business of the company, he cannot be made vicariously liable u/s 141(1) of the Act. To put it clear that for making a person liable u/s 141(2), the mechanical repetition of the requirements u/s 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.

39. From the above discussion, the following principles emerge:

- (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
- (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
- (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.
- (iv) Vicarious liability on the part of the person must be pleaded and proved and not inferred.
- (v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by

virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) The person 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.

15. The dictum laid down in the above said Judgments would show that to fasten vicarious liability against the persons, who fall under the category

of persons who are responsible to the company for the conduct of the business of the company the averment to the effect that the accused are in

control and management as well as the day-to-day affairs of the company itself is sufficient. If the person does not fall under the category of

persons who are responsible to the company for the conduct of the business of the company, then merely making a statement to the effect that he

was in charge of the business of the company is not sufficient and only in such cases, a detailed averment has to be made with regard to the role of

each of the accused in the commission of the offence by the Company u/s 138 of the Negotiable Instruments Act. So far as the present case is

concerned, the petitioners herein come u/s 141(1) of the Negotiable Instruments Act and the averment in the complaint to the effect that the

petitioners are in control and management as well as the day-to-day affairs of the company itself is sufficient to maintain the complaint against them.

Hence, I do not find any valid ground to quash the complaint and the present petition is liable to be dismissed.

In the result, the present criminal original petition is dismissed. Consequently, connected Miscellaneous Petition is closed.