

(2023) 01 KL CK 0287

In the High Court Of Kerala

Case No : Criminal Miscellaneous Petition No. 8157 Of 2022

M/s PVS Memorial Hospital (Now Demerged)

APPELLANT

Vs

Dr. Satheesh Iype

RESPONDENT

Date of Decision : 05-01-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482

Insolvency and Bankruptcy Code, 2016 — Section 14, 14(1)

Negotiable Instruments Act, 1881 — Section 138, 141, 141(1), 141(2), 142

Citation : (2023) 01 KL CK 0287

Hon'ble Judges : A. Badharudeen, J

Bench : Single Bench

Advocate : V.Krishna Menon, J.Surya, Prinsun Philip, Thomas T.Varghese, G.Sudheer

Final Decision : Disposed Of

Judgement

A. Badharudeen, J.

1. This is a petition filed by accused Nos.1 to 7 in CMP No.3280/2019 on the files of Judicial First Class Magistrate Court (Negotiable Instruments Act Cases), Ernakulam, to quash the above CMP (Annexure-A complaint herein) by invoking power under Section 482 of the Code of Criminal Procedure (hereinafter referred as 'Cr.P.C.' for convenience).

2. Two questions require answer in this matter, are as under:

(i) Is moratorium under Section 14 (1) of the Insolvency and Bankruptcy Code, 2016 would apply to non-corporate debtor/debtors dealt under Section 141 of the Negotiable Instruments Act ?

(ii) How vicarious liability in criminal law, in terms of Section 141 of the Negotiable Instruments Act would emerge ? and what are the essentials to be stated in the complaint to fasten vicarious liability ?

3. Heard the learned counsel for the petitioners as well as the learned Public Prosecutor and the learned counsel appearing for the 1st respondent in detail.

4. I would like to refer the parties in this petition as 'accused' and 'complainant', with reference to their status before the court below.

5. Short facts: the complainant, Dr. Satheesh Iype lodged complaint under Section 142 of the Negotiable Instruments Act (hereinafter referred as 'N.I.Act' for convenience) before the Magistrate Court alleging that the accused Nos.1 to 7 committed offence punishable under Section 138 of the N.I.Act, since the cheque jointly issued by accused Nos. 2 to 7 representing the 1st accused for Rs.37,20,000/- got dishonored for want of funds, when the cheque was presented for collection.

6. While seeking quashment of Annexure-A complaint, learned counsel for the petitioners placed reliance on a three Bench decision of the Apex Court reported in [(2021) 6 SCC 258], P.Mohanraj & Ors. v. M/s Shah Brothers Ispat Pvt. Ltd. to contend that, no prosecution against the corporate debtor and its Directors could be possible after moratorium issued in terms of Section 14 (1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as 'IBC' for convenience). It is specifically pointed out that as per Annexure-B, moratorium order under Section 14 (1) of IBC has been passed in relation to M/s PVS Memorial Hospital Private Ltd., the 1st petitioner herein. Therefore, no prosecution against the petitioners is permissible.

7. In para.101 and 102 of P. Mohanraj & Ors. v. M/s.Shah Brothers Ispat Pvt. Ltd.'s case (supra) the Apex Court held the legal position as under:

"101: As far as the Directors/persons in management or control of the corporate debtor are concerned, a Sections138/141 proceeding against them cannot be initiated or continued without the corporate debtor—see [(2012) 5 SCC 661 : (2012) 3 SCC (Civ) 351 : (2012) 3 SCC (Cri) 241], Aneeta Hada v. Godfather Travels & Tours (P) Ltd. This is because Section 141 of the Negotiable Instruments Act speaks of persons in charge of, and responsible to the Company for the conduct of the business of the Company, as well as the Company. The Court, therefore, in Aneeta Hada held as under: (SCC pp.686-88, paras 51, 56 & 58-59)

"51. We have already opined that the decision [(1984) 4 SCC 352 : 1984 SCC (Cri) 620], Sheoratan Agarwal v. State of M.P runs counter to the ratio laid down in [(1970) 3 SCC 491 : 1971 SCC (Cri) 97], State of Madras v. C.V.Parekh which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in [(2000) 1 SCC 1 : 2001 SCC (Cri) 174], Anil Hada v. Indian Acrylic Ltd. has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the Company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *tex non cogit* and *impossibilia* gets attracted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V.Parekh's case (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal v. State of M.P's case (supra) does not correctly law down the law and, accordingly, is hereby overruled. The decision in Anil Hada's case (supra) is overruled with the qualifier as stated in para.51. The decision in [(1987) 3 SCC 684 : 1987 SCC (Cri) 632], U.P. Pollution Control Board v. Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove.

102. Since the corporate debtor would be covered by the moratorium provision contained in Section 14 IBC, by which continuation of Sections 138/141 proceedings against the corporate debtor and initiation of Sections 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paras 51 and 59 in Aneeta Hada would then become applicable. The legal impediment contained in Section 14 IBC would make it impossible for such proceeding to continue or be instituted against the corporate debtor. Thus, for the period of moratorium, since no Sections 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in Sections 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 IBC would apply only to the corporate debtor, the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act."

8. Apart from that, the learned counsel for the petitioners placed two latest decisions of the Apex Court holding the same view reported in [2022 SCC OnLine SC 1383], Lalankumar Sigh and others v. State of Maharashtra and [2022 (3) KLT 373 (SC)], Dilip Hariramani v. Bank of Baroda, holding the same view.

9. Thus the legal position emerges in answer to the first question is that moratorium provision contained in Sec.14(1) of IBC would apply only to corporate debtor and the non-corporate debtor/debtors mentioned in Section 141 of the N.I.Act, continuing to be statutorily liable under Chapter XVII of the N.I Act.

10. In view of the legal position settled by the Three Bench of the Apex Court, in P. Mohanraj's case (supra), holding the view that, moratorium provision contained under Section 14 (1) of IBC would apply only to a corporate debtor and the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the N.I.Act.

Therefore, the complaint against the petitioners (accused Nos.1 to 7) cannot be quashed, simply on the ground of moratorium order as per Annexure-B. However, the prosecution against the 1st petitioner/1st accused being corporate debtor can be kept in abeyance till finalization of the moratorium proceedings, while allowing prosecution against petitioners 2 to 7, natural persons.

11. Secondly, it is argued by the learned counsel for the petitioners that, in order to prosecute the Directors of a company, there shall be narration in the complaint with regard to their specific roles in the affairs of the company and otherwise the prosecution under the principles of vicarious liability cannot be proceeded. In this connection the learned counsel placed decision of the Apex Court reported in [2022 (3) KLT 373 (SC)], *Dilip Hariramani v. Bank of Baroda* and in the said decision, the Apex Court held that:

“the vicarious liability in the criminal law in terms of S.141 of the NI Act cannot be fastened because of the civil liability. Vicarious liability under sub-section (1) to S.141 of the NI Act can be pinned when the person is in overall control of the day-to-day business of the company or firm. Vicarious liability under sub-section (2) to S.141 of the NI Act can arise because of the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day-to-day business of the company when the offence was committed. Vicarious liability under sub-section (2) is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company.”

12. One more decision of the Apex Court reported in Criminal Appeal No.529 of 2017 (Arising out of Special Leave Petition (Crl) No.10899 of 2015), *Ashoke Mal Bafna v. Upper India Steel Mfg. & Engg. Co. Ltd.* also has been placed in this connection.

13. The legal position is not in dispute and the same is as held in *Dilip Hariramani's* case (*supra*). Thus as regards to the application of vicarious liability in terms of criminal law as provided under Section 141 of the N.I. Act is concerned, the same cannot be fastened because of the civil liability. Vicarious liability under sub-section (1) to S.141 of the NI Act can be pinned when the person is in overall control of the day-to-day business of the company or firm. Vicarious liability under sub-section (2) to S.141 of the NI Act can arise because of the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day-to-day business of the company when the offence was committed. Vicarious liability under sub-section (2) is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company.

14. However, in the present case in paragraph No.1 of the complaint, the

complainant specifically alleged that:

"The 1st accused is conducting as multi specialty Hospital at Ernakulam. The 2nd accused is the Managing Director of the 1st accused Company and accused Nos. 3 to 7 are the directors of the 1st accused company. Accused Nos 2 to 7 are persons in charge and responsible to the 1st accused company for the conduct of its business."

15. Similarly, in paragraph No.4, it has been contented that:

"The cheque was executed and issued for and on behalf of the 1st accused by the 2nd accused as per the directions and instructions given by the accused Nos. 3 to 7."

16. Thus, the necessary ingredients as has been held in Dilip Hariramani's case (supra) could be gathered from the averments in the complaint and the rest of the contentions raised by the accused shall be matter of evidence, during trial.

17. To upshot, it is held that, the twin contentions raised by the learned counsel for the petitioners to quash Annexure-A complaint, found to be not sustainable. However, the prosecution against the 1st petitioner, the corporate debtor shall stand deferred subject to the outcome of moratorium proceedings, while allowing continuance of prosecution against petitioners 2 to 7, the non-corporate debtors/ natural persons.

Accordingly, this petition stands disposed of.