
(2016) 03 KL CK 0133

In the High Court Of Kerala

Case No : Crl. M.C. Nos. 1573 and 1777 of 2013

P. Rajagopalan

APPELLANT

Vs

P.C. Jose and Others

RESPONDENT

Date of Decision : 21-03-2016

Acts Referred:

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

Citation : (2017) ACD 59 : (2016) 2 DCR 746 : (2016) 2 KerLJ 301 : (2016) 2 KHC 559 : (2016) 2 KLT 25 : (2016) 1 MadWNCri 187 : (2016) 2 NIJ 464

Hon'ble Judges : Raja Vijayaraghavan V., J.

Bench : Single Bench

Advocate : S. Rajeev, Advocate, for the Appellant; Vijai Mathews, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Raja Vijayaraghavan V., J.—1. The accused Nos. 4 to 6 in S.T. No. 1099/2012 on the files of the Judicial First Class Magistrate Court- I, Cherthala have filed these petitions praying that powers under S.482 of the Code be invoked for bringing the criminal proceedings to a premature termination.

2. The essence of the contention raised by the learned counsel appearing for the petitioners is that in so far as the petitioners are concerned, the prosecution initiated by the 1st respondent against the petitioners under S. 138 of the Negotiable Instruments Act, 1881 (NI Act for brevity) is nothing but an abuse of process of court.

3. For appreciating the rival contentions it would be apposite to briefly note the averments in the complaint:--

"The 1st accused is a company registered under the Companies Act. The accused No. 2 is the Managing Director, the accused No. 3 is the Director in Charge and Accused Nos. 4 to 6 (the petitioners herein) are the directors. All of them are responsible for the day to day affairs of the 1st accused Company. The 1st

accused is engaged in the business of currency trading, forex trading, commodity trading etc. The 1st respondent deposited various amounts with the company and on final settlement a sum of Rs. 5,60,000/- was found due. In discharge of the said debt the accused Nos. 2 & 3 issued a cheque for a sum of Rs. 5,60,000/- on 15.01.2011 on an account maintained by the first accused company. The efforts made by the 1st respondent to obtain payment of the money covered under the cheque failed as the cheque was dishonored on its presentation before the Bank. It was in the aforesaid circumstance that the prosecution was launched."

4. The role of the petitioners has been stated in para No. 1 of the complaint which reads as follows:

"The accused No. 4 to 6 are the directors of the 1st accused company. Accused No. 2 to 6 are responsible for the day-to-day affairs of the 1st accused company."

5. The learned counsel appearing for the petitioners, relying on a catena of Judgments of the Apex Court as well as this Court would submit that in case of non signatory director, it is for the complainant to specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he was responsible for the day to day affairs will not suffice. According to the learned counsel, the complainant has failed to even aver the basic and minimum averment in the complainant in terms of S.141 of the N.I. Act. The failure of the complainant to specifically elaborate the role of the appellant in the day to day affairs of the Company is fatal according to the learned counsel, and in that fact situation, it would result in travesty of justice to force the petitioners to stand trial.

6. Refuting the contentions of the learned counsel, the counsel for the respondent would submit that there is no requirement under law to state the exact role of the accused and it would suffice to aver specifically that the accused are the persons responsible for the day to day business which has been done in the instant case. According to the learned counsel, the fact that the accused was one of the directors of the company by itself will emphatically reveal his role and it is for the trial court to adjudicate the matter on the basis of the materials placed before court by the parties.

7. In the light of rival submissions, it is necessary to remind oneself of the law laid down by the Apex Court interpreting the relevant provisions of the Negotiable Instruments Act. In *S.M.S Pharmaceuticals Ltd., v. Neeta Bhalla and Anr.*, (2005) 8 SCC 89], it was laid down as follows:

"While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words " 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 etc." What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"....etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action."

8. In paragraph No. 16 of the above judgment, the Apex court had answered the reference made to the three judge bench in the following lines:

"16. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 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. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for 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 a fact as there is no deemed liability

of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Subsection (2) of Section 141."

9. Subsequently in *National Small Industries Corporation Ltd. v. Harmeet Singh Paintal and Anr.* [, (2010) 3 SCC 330], the Apex Court after surveying a wealth of decisions had laid down the following principles:

"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 accused therein vicariously liable for offence committed by company along with averments in the petition containing that 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 a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or 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 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 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."

10. In *Anita Malhotra v. Apparel Export Promotion Council and Anr.* [, AIR 2012 SC 31], it was held as follows:

"This Court has repeatedly held that in case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. (Vide *National Small Industries Corporation Limited v. Harmeet Singh Paintal and Anr.* , (2010) 3 SCC 330)."

11. The same view was taken by the Hon'ble Supreme Court in *A.K. Singhania V Gujarat State Fertilizer Co. Ltd. and Another* (, AIR 2014 SC 71), wherein also the Apex Court had held that mere passing averments, which did not precisely bring out the role of the prosecuted accused in a proceeding under section 138 of the Act will not satisfy the mandate of the statute. Though in *Tamil Nadu News Print and Papers Ltd. V D. Karunakar and Others* [, 2015 (8) SCALE 733; 2015 (2) KLD 476] a different view was taken, it appears that it was taken in the fact situation of that case.

12. A comprehensive analysis of the above judgments would reveal that the deemed liability under S.138 read with S.141 of the Act will extent to a director of a company and he can be prosecuted only if at the time of the commission of the offence, he was in charge of and responsible to the company for the conduct of the business of the company. Further as per S 141 (2), any director, manager, secretary or other officer of the Company can be proceeded against if it is proved that the offence under the Act has been committed by a Company and it was committed with the consent or connivance or is attributable to, any neglect on the part of any of the aforesaid officers. It is not enough if a innocuous averment is made that the accused is in charge of the day to day affairs of the 1st accused company especially in a case of this nature where the signatories of the cheque are the accused Nos. 2 and 3. Vicarious liability can be inferred against the petitioners only if the requisite averments are made in the complaint. There is absence of even the basic averment, not to mention of any specific averment as to how and in what manner the petitioners were vicariously responsible. It cannot therefore be said with certainty as to the part played by them in the transaction. Though it is not necessary to reproduce the exact words in the statute, the absence of specific averment as regards the part played by the petitioners, in the facts of the instant case, is clearly fatal.

13. In *Pooja Ravinder Devidasani V State of Maharashtra and Another* [, AIR 2015 SC 675], the Apex Court had observed as follows:--

"Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and Courts

cannot be a mere spectator to it. Before a Magistrate taking cognizance of an offence under S.138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the complaint against the appellant which is nothing but a pure abuse of process of law."

14. In conclusion, I am of the view that this is a fit case where the extraordinary inherent powers can be exercised as it is felt that the substratum of the prosecution case as against the petitioners herein is on a very weak edifice and continuance of the prosecution is nothing but an abuse of the process of Court.

15. The petition is therefore allowed. All further proceedings against the petitioners in S.T. No. 1099/2012 on the files of the Judicial First Class Magistrate Court- I, Cherthala are quashed.