
(2010) 02 MAD CK 0208

In the Madras High Court

Case No : Criminal O.P. No's. 16550, 16750 and 16771 of 2005 and Criminal M.P. No's. 4714, 4785 and 4797 of 2005

Ram Ganesan (Ramesh) and Venkatesan

APPELLANT

Vs

Kothari International Trading Limited

RESPONDENT

Date of Decision : 02-02-2010

Acts Referred:

Companies Act, 1956 — Section 2(24), 5

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

Citation : (2010) 02 MAD CK 0208

Hon'ble Judges : C.T. Selvam, J

Bench : Single Bench

Advocate : C.S. Dhanasekaran, for the Appellant; Krishna Srinivasan, for S. Ramasubramaniam and Associates, for the Respondent

Final Decision : Allowed

Judgement

C.T. Selvam, J.—These petitions seek to quash the proceedings pending against the petitioner herein in C.C. Nos. 5357, 5358 and 5359 of 2000 on the file of the learned XIV Metropolitan Magistrate, Eg more, Chennai.

2. The complaint cases are for alleged offences under Sections 138 and 141 of the Negotiable Instruments Act. The complainant in all three cases are one and the same and so also are the accused 1 to 3 therein. The first accused is a Company, the second accused is the Managing Director of such company and the third accused is a Director thereof.

3. The only ground urged on behalf of the petitioner, who is the third accused in all the cases is that the complaints make no averment against him to the effect that he was in charge of the day to day affairs of the first accused company at the time of commission of the offences. a

4. Placing reliance on the decision of the Honourable Supreme Court reported in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , the learned Counsel

for the petitioner submits that unless the complaint makes a specific averment to the effect that a particular accused was in charge and responsible for the conduct of the business of the company at the time the offence was committed, a person such as the petitioner who was merely a Director of the Company successfully could not be prosecuted. The learned Counsel had drawn the attention of this Court to Paragraphs 10, 18 and 19(a), which read as follows:

10. ...While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence u/s 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 of 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 u/s 141 should be, at the time of 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 the 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 the 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 the 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.

...18.To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability u/s 141 of the Act is sought to be fastend vicariously on a person connected with a company the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the

person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable u/s 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

19(a). ...It is necessary to specifically aver in a complaint u/s 141 that at the time of 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.

5. In response, Mr. Krishna Srinivasan, learned Counsel appearing for the respondent would rely on the decision of the Apex Court in K.K. Ahuja v. V.K. Vora and Anr. (2009) 10 Supreme Court Cases 48 particularly Paragraphs 26 and 27 of such Judgment which read as under:

26. Another aspect that requires to be noticed is that only a Director, manager, secretary or other officer can be made liable under Sub-section (2) of Section 141. But under Sub-section (1) of Section 141, it is theoretically possible to make even a person who is not a Director or officer, liable, as for example, a person falling under Categories (e) and (f) of Section 5 of the Companies Act, 1956. When in SMS Pharma (I) this Court observed that: (SCC P.99, Para10).

10... 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 the conduct of business of a company....

This Court obviously had in mind, persons described in Clauses (e) and (f) of Section 5 of the Companies Act. Be that as it may.

27. The position u/s 141 of the Act can be summarised thus:

(i) and (ii) otiose.

(iii) In the case of a Director, Secretary, or Manager (as defined in Section 2(24) of the Companies Act) or a person referred to in Clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case u/s 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also made liable u/s 141(2) by making necessary averments

relating to consent and connivance or negligence, in the complaint, to bring the matter under that Sub-section.

6. The learned Counsel would submit that in the case cited above the Honourable Apex Court had considered the decision of such Court in the S.M.S. Pharmaceutical case. It is on such consideration that the Apex Court has held that in the case of a Director, an averment in the complaint that he was in charge and responsible to the company, for the conduct of the business of the company is necessary to bring the case under Sections 141(1) of the Act and that "No further averment would be necessary in the complaint, though some particulars will be desirable." The learned Counsel submitted that when the decision in S.M.S. Pharmaceutical case stands duly considered in the later decision of the Apex Court in K.K. Ahuja Vs. V.K. Vora and Another, and a specific finding has been arrived at that it would suffice to aver that a person (Director) was in charge of and responsible to the company, for the conduct of its business and the present complaints contain such averments, then, this Court would follow the later decision of the Apex Court. The question as to whether the petitioner herein was connected with the affairs of the company at the time of the commission of the offence or not would be a matter for consideration by the trial Court.

7. I have considered the rival submissions.

8. Though at first blush, the submissions of the learned Counsel for the respondent seem attractive, this Court finds that the three Judge Bench in S.M.S. Pharmaceutical case specifically has found as follows:

It is only those persons who were in charge of and responsible for the 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 the 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.

and further

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.

Given the categorical finding of the three Judge Bench and specifically to the effect that a Director who was not incharge of and was not responsible for the conduct of the business of the company at the relevant time will not be liable for prosecution, this Court has no option but to follow such decision and finds that the petitioner herein cannot be made to face prosecution as the complaint does not contain the necessary averments as against him. a

9. For the aforesaid reasons, these petitions shall stand allowed and the proceedings in C.C. Nos. 5357, 5358 and 5359 of 2000 on the file of the learned XIV Metropolitan Magistrate, more, Chennai shall stand quashed. Consequently, the connected miscellaneous petitions are closed.