

(2008) 07 KL CK 0020

In the High Court Of Kerala

Case No : Criminal M.C. No"s. 3009 and 3084 of 2005

Vijayakumar and Others

APPELLANT

Vs

Lab and General Exports Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 04-07-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 204, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2008) 07 KL CK 0020

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : Joby Jacob Pulickeedy, Anil George, P. Vijaya Bhanu and Anil George, for the Appellant; Amjad Ali, Public Prosecutor, Thambi Jacob and Tony Pettah, for the Respondent

Final Decision : Dismissed

Judgement

R. Basant, J.—Are the averments made in the complaint filed by the Respondent/complainant u/s 138 of the Negotiable Instruments Act sufficient to justify the issue of process against the Petitioners-accused 3, 4 and 5? This is the short question to be considered in these cases.

2. It is important to ascertain the precise factual matrix. To my mind, there appears no confusion about the law applicable though in the application of the law doubts and confusion appear to linger. The 1st accused is a company. The 2nd accused is its Chairman and Managing Director. He is the sole signatory on behalf of the 1st accused in the cheque in question. Accused 3, 4 and 5, the Petitioners herein are Directors of the Company. The following are the crucial averments in paras 2 to 6 and 7:

2. The 1st accused is a Public Ltd. Company having its office at Door No. 35/1442, Kochanath Building, Janatha Junction, Palarivattom, Kochi-682 025. 2nd accused is the Chairman and Managing Director of the company. Accused 3 to 5 are its Directors. Accused 2 to 5 were in-charge of and was responsible to

the company for the conduct of the business of the company at the time when the offence was committed.

3. ...A meeting of the Board of Directors of the accused Company held on 21-5-1999 passed a resolution to borrow the said sum of 5 lakhs from the complainant for a period of 4 months from 22-5-1999. Accused 2 to 5 had participated in the said meeting. The amount carried interest at the rate of 14% per annum. The interest was payable on monthly basis.

4. As per letter of authorisation dated 23-5-1999 the 2nd accused was authorised to receive the Demand Draft for Rs. 4 lakhs from the complainant. Accused 3 to 5 are signatories in the letter of authorisation. The signature of accused 2 to 5 were attested by the respective Managers of the Bank where the accused had maintained accounts. On the basis of the resolution passed by the company and the letter of authorisation, an amount of Rs. 5 lakhs was given to the 2nd accused as per Demand Draft dated 24-5-1999 payable at Syndicate Bank, Shanmugham Road Branch, Ernakulam.

5. ...As per letter dated 29-11-1999, the 2nd accused had made a request on behalf of the company and the Director Board to give two months time to repay the loan. Along with the said letter two cheques each for Rs. 5,933/- and a Demand Draft for Rs. 6,033/- were forwarded to the complainant requesting to adjust the said amounts towards interest.

6. On 19-4-2000 the complainant issued notice to all the accused requesting them to pay the amount with interest. However there was no response from any of the accused. Therefore the Managing Director of the complainant came to Ernakulam and made personal requests to each and every one of the accused to repay the amount with arrears of interest.

7. During 1st week of October, 2000 the Managing Director of the complainant again approached the accused and as agreed by all of the accused, the complainant presented the cheque for encashment on 25-10-2000 through the account maintained by the complainant with H.D.F.C. Bank, Ernakulam ... Accused 2 to 5 are the Directors and are in-charge of and responsible to the company in the conduct of the business of the company and as such each accused are liable to pay the amount.

(emphasis supplied)

3. The learned Counsel for the Petitioners contend that these averments in the complaint are not sufficient to justify the course adopted by the learned Magistrate of issuing process to the Petitioners.

4. First of all, it is contended that all the three Petitioners had resigned as Directors of the Company with effect from 6-3-2000. Heavy reliance is placed on Annexure A-5 in support of this contention. The learned Counsel for the complainant repels this contention with the argument that the cheque in the instant case is dated 25-10-2000 and was dishonoured as per memo dated

27-10-2000. On that day, all the Petitioners, according to the prosecution, were the Directors of the Company. Annexure A-5, contends the learned Counsel for the complainant, will not, in any way, help the accused to claim absolution from liability as the same was admittedly registered with the Registrar of Companies only on 14-11-2000. Annexure A-5 shows that a demand draft dated 14-11-2000 accompanied the said statement. That again clearly shows that though Annexure A-5 statement is dated 13-3-2000, the same was not delivered to the Registrar of Companies till 14-11-2000. The learned Counsel for the complainant is correct in his submission that a subsequent return filed showing an anterior date of resignation cannot, at any rate, entitle the Petitioners/accused to claim absolution from liability in respect of a cheque which is issued and dishonoured prior to the date on which such statement is received by the Registrar of Companies. I find force in this contention. The real date of resignation of the Petitioners from the Director Board of the Company will certainly have to be established in the course of trial and Annexure A-5 produced now cannot be reckoned as evidence of "sterling quality" which can justify the invocation of the jurisdiction u/s 482 of the Code of Criminal Procedure.

5. Undaunted, the learned Counsel for the Petitioners contend that even assuming that they were Directors on the relevant date, it cannot be held that cognizance taken is justified. The learned Counsel contend that, in any view of the matter, the averments in the complaint are insufficient to satisfy the requirements of Section 141 of the N.I. Act as explained by precedents.

6. A Division Bench of this Court in Mymoonath Beevi Vs. State of Kerala, observed, overruling an earlier decision of a Single Judge, that it is sufficient to consider whether the necessary averments in terms of Section 141 of the N.I. Act are there in the complaint or not. In para 20 the Division Bench observed thus:

20. In a case where the complaint does contain the requisite averments satisfying the requirements of Section 141 of the Act, there is no warrant for insisting on any further material at the threshold stage before taking cognizance on the basis of an unnecessary distinction between "signatory" and "non-signatory" to the cheque. The observations in paragraph 3 of Biju Jacob's case really constitute a well deserved caution to Magistrate while taking cognizance of the offence on a complaint which falls short of the necessary averment in terms of Section 141 of the Act. But paragraph 2 of that decision indicates there was in fact an averment in the complaint in terms of Section 141 of the Act. Hence on the facts of that case, the observations in paragraph 3 were not warranted. With a view to steer clear of any confusion which those observations may create, we make it clear that the observations in paragraph 3 of Biju Jacob's case will apply only in those cases where the complaint on the face of it does not contain an averment in terms of Section 141 of the Act.

7. In S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla(1) [hereinafter referred to as "S.M.S. Pharmaceuticals Ltd. (1)"] the three Judge Bench of the Supreme Court,

on a reference made to it, was called upon to consider the three questions of which Questions (a) and (b) appear to be of crucial relevance to us. I extract below Questions (a) and (b) referred to in para 1 of the three Judge Bench and the answers given by the three Judge Bench in para 10:

(a) whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.

(b) whether a Director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

10. 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 complainant u/s 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 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 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.

8. What the law is, there can be no doubt. Consequent to the decision in S.M.S. Pharmaceuticals Ltd.(1), Anr. two Judge Benches of the Supreme Court were called upon to apply the dictum in S.M.S. Pharmaceuticals Ltd.(1) to the facts of various cases. While applying the facts, observations are made in various decisions and it appears that there is a dispute between the contestants as to what the correct law is in regard to the pleadings that ought to be raised.

9. The learned Counsel for the Petitioners contend that it is not sufficient if the words of Section 141 of the N.I. Act-that "the accused persons are in charge of and responsible to the company for the conduct of its affairs" is extracted from the Statute and included in the pleadings. According to the learned Counsel for the Petitioners, the averments must show clearly how and in what manner the inditees were in charge of and responsible to the company for the conduct of its affairs. The learned Counsel contend that a ritualistic repetition of the words of

the Statute and incorporation of such words in the complaint would be insufficient and inadequate. The learned Counsel contend that the pleadings must show clearly how and in what manner each of the indictees is said to be "in charge of and responsible to the company for the conduct of its affairs."

10. The learned Counsel for the Respondent/complainant, on the contrary, contends that the dictum in S.M.S. Pharmaceuticals Ltd.'s case(1) will be satisfied eminently if there is an averment in the complaint that the concerned indictees were in charge of and responsible to the company for the conduct of its affairs. Nothing more is necessary to be stated in the complaint. Of course, at the later stages of enquiry u/s 200/202 of the Code of criminal Procedure if such enquiry be undertaken or at later stages of trial, this allegation of fact will have to be supported by satisfactory evidence. Ultimately, when the court considers culpability for the purpose of acquittal or conviction it will have to be carefully decided whether this averment that the concerned accused "were in charge of and responsible to the company for the conduct of its affairs" is substantiated or not. Proof need be offered in support of the allegation only at later stages and it cannot be said that the law is that the complaint must narrate in detail the precise evidence that will be made available in the course of the trial.

11. The learned Counsel for the Petitioners rely on the following decision:

(1) Wahi v. Shekhar Singh [2007 (2) KLT 1021]

(2) Rangachari v. B.S.N.L. [2007 (2) KLT 1030]

(3) Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another,

(4) K. Srikanth Singh v. North East Securities Ltd. [2007 (3) K.H.C. 595]

(5) S.M.S. Pharmaceuticals v. Neeta Bhalla(2) [hereinafter referred to as "S.M.S. Pharmaceuticals(2)"]

(6) Paresh P. Rajda v. State of Maharashtra [2008 (2) KLT 983]

12. I have been taken through the decisions in detail. My attention has been drawn to what is referred to as observations which are not congruent to each other appearing in some of these judgments. We must always note that the two Judge Benches were only applying the dictum in S.M.S. Pharmaceuticals Ltd.'s case(1) which lays down the law in detail. All subsequent Benches were bound by the said decision in S.M.S. Pharmaceuticals Ltd.'s case(1). I shall not advert to the various passages in the decisions cited. But I feel it proper to make a specific reference to the following observations in para 14 of the decision in Saroj Kumar Poddar v. State (NCT of Delhi)(3) and para 8 of the decision in Wahi v. Shekhar Singh(4). They read as follows:

14. Apart from the Company and the Appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The Appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the directorship of the Company. It may be true that as to exactly on what date the

said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the Appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in para 3 thus, in my opinion, do not satisfy the requirements of Section 141 of the Act.

8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the Court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.

13. In a later decision in "S.M.S. Pharmaceuticals's case (2)" reference was again made to the dictum in Saroj Kumar Poddar's case and I extract the same below:

26. A faint suggestion was made that this Court in Saroj Kumar Poddar's case, has laid down the law that the complaint petition not only must contain averments satisfying the requirements of Section 141 of the Act but must also show as to how and in what manner the Appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning. A plain reading of the said judgment would show that no such general law was laid down therein. The observations were made in the context of the said case as it was dealing with a contention that although no direct averment was made as against the Appellant of the said case fulfilling the requirements of Section 141 of the Act but there were other averments which would show that the Appellant therein was liable therefor.

(emphasis supplied)

14. What is the final outcome? A careful consideration of all these decisions appears to make it clear that in the complaint specific assertions must be made to attract the play of Section 141 of the N.I. Act. It has to be pleaded as a fact that the indicted concerned are in charge of and responsible to the company for the conduct of its affairs. Once that allegation is specifically raised, it is for the complainant to adduce evidence in support of such assertion later. A ritualistic incantation of the words of the Statute may not be expected or insisted. But it has got to be effectively conveyed as a matter of fact that the accused persons were in charge of and responsible to the company for the conduct of its affairs on the date of the offence. Such averments, if they are there, they can be attempted to be supported later at the stage of enquiry u/s 200/202 of the Code

of Criminal Procedure or at the later stages of the trial. It is trite in the law of pleadings that what is to be pleaded is the facts and not evidence to be adduced in support of such facts.

15. Having so understood the law, the question is whether the relevant averments in the complaint which I have already extracted above are sufficient or not to justify issue of process u/s 204 Code of Criminal Procedure against the Petitioners. The specific averments in paras 2 and 7 show that it was specifically averred that the Petitioners herein are in charge of and responsible to the company for the conduct of its affairs. The other averments in the complaint which also I have extracted above do eloquently convey that it was not a ritualistic repetition of the words of the Statute in Section 141 of the N.I. Act; but it was an effective plea of facts to attract the assertion that the indictees were in charge of and responsible to the company for the conduct of its affairs.

16. At the end of the day, it appears to be safe to state that the dictum in S.M.S. Pharmaceuticals Ltd.'s case(1) has to be understood and applied carefully to the facts of each case. That exercise appears to have been undertaken by the subsequent two Judge Benches of the Supreme Court. Applying the dictum in S.M.S. Pharmaceuticals Ltd.'s case(1), I am convinced that there are sufficient averments in the complaint to justify the cognizance taken against the Petitioners.

17. The learned Counsel for the Petitioners submit that the interests of the Petitioners would suffer serious prejudice if ritualistic insistence were made on the personal appearance of the Petitioners on all dates of posting. I find no reason why in a prosecution u/s 138 of the N.I. Act such insistence should be made. The Petitioners can certainly apply for exemption from personal appearance and the learned Magistrate must consider such application for exemption on merits, in accordance with law and expeditiously.

18. These Crl.M. Cs. are, in these circumstances, deserve to be and are hence dismissed.