

Karnataka High Court Nucor Wires Limited, Bangalore ... vs Hmt (International) Limited, ... on 23 July, 1997 Equivalent citations: 1998 (1) ALT Cri 340, 1998 91 CompCas 850 Kar, ILR 1997 KAR 3239 Bench: M Chinnappa ORDER

1. The short question that arises for consideration in this petition is whether it was permissible to launch a prosecution under Section 138 of the Negotiable Instruments Act against all the Directors of the Company notwithstanding the nomination made by the Company. In order to appreciate the arguments advanced for and against the contention of the petitioners and respondent it is necessary to succinctly refer to the facts of the case. 2. The respondent lodged a complaint under Section 200 of the Cr. P.C., against these petitioners alleging that on 22-2-1996, A-2 executed an agreement on behalf of A-1. In connection with the transaction, the 1st petitioner A-1 on behalf of all the accused issued in favour of the complainant a cheque dated 31-10-1996 bearing No. 865657 drawn on Canara Bank, Industrial Finance Branch, Bangalore, for a sum of Rs. 35,00,000/- lakhs in part payment of the advance received in that transaction. Subsequently, on 11-11-1996 after informing the petitioners the respondent presented the cheque for encashment. However on 13-11-1996 the said cheque was returned dishonoured with an endorsement "not arranged for". Thereafter, the respondent got issued statutory notice to the petitioners and lodged the complaint against the Company, Joint Managing Director, Managing Director and all the Directors. The Magistrate has taken cognizance and directed to issue notice to the petitioners which order is questioned in this petition. 3. Heard. 4. The learned Counsel for the petitioners in support of his arguments placed reliance on a catena of decisions which came to be rendered under Section 10 of Essential Commodities Act, Section 17(4) of the Prevention of Food Adulteration Act and Section 141 of the Negotiable Instruments Act. 5. In the case of Sham Sunder and Others v State of Haryana, their Lordships of the Supreme Court had an occasion to deal with a case in which a complaint was lodged against the company, its Directors and Managers. In those circumstances their Lordships have held that no clear allegation against the Manager and Directors that they were responsible for conduct of business of disputed sample was made. Under the circumstances, it was held that the proceedings could be quashed against the Directors but not against the Manager. In that case it was observed: "More often it is common that some of the partners of a firm may not even be knowing of what is going on day-to-day in the firm. There may be partners, better known as sleeping partners who are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) of Section 10 that the offence was committed without their knowledge. The obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of

any such proof, no partner could be convicted". That was a case in which their Lordships have dealt with the matter while considering the scope and purpose of Section 10 of the Essential Commodities Act. 6. It is also held in *Kishore Lal and Others v State of Karnataka*, while dealing with Section 10 of the Essential Commodities Act that the partner cannot be proceeded against simply on the ground that he is the Director of that Company. The prosecution must first show that partner of the firm to be prosecuted, was in charge of and responsible for the conduct of the business of the Company. 7. In *Bakridan Bibi and Others v State of Bihar*, the High Court has held that mere giving the names of the persons of the firm in the complaint does not warrant institution of criminal proceedings against them. For violation of the provisions of the Bonus Act it was the Managing Partner or Manager who were entrusted with the business of the firm and responsible for the conduct of the business. Hence, in the absence of such description cognizance against them cannot be taken. 8. Similarly, this Court has considered Section 29 of the Payment of Bonus Act wherein it is held that the prosecution lies against the partners without impleading the firm as an accused. Complaint against alleged partner arraigned as accused was in charge of and responsible for conduct of business at the time of the commission of the offence. These judgments came to be delivered with reference to Section 10 of the Essential Commodities Act and Section 29 of the Payment of Bonus Act which are similar to Section 141 of the Negotiable Instruments Act which reads: "Section 141. Offences by Companies.—(1) If the person committing an offence under Section 138 is a Company, 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, 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. (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. Explanation.—For the purposes of this section.— (a) "company" means any body corporate and includes a firm or other association of individuals; and (b) "director" in relation to a firm, means a partner in the firm". This provision of law also was discussed and the Allahabad High Court has held in *Smt. Sharada Agarwal and Others v Additional C.M.M. II, Kanpur and Others*, that no allegation in complaint that Directors were in charge of and responsible to the Company for the business of the Company – Cheque in fact issued by Managing Director and not by Directors named in the complaint and it was held that Directors could not be held responsible for dishonour of cheques. 9. In *M/s. Ess Bee Food Specialities and Others v M/s. Kapoor Brothers*, the Punjab and Haryana High

Court has held that no allegation made by complainant drawee that J who was also partner, was in charge of affairs of firm or liable to firm, hence complaint as against J was quashed. In *Amarnath Prasad and Others v State of Bihar and Another*, the Patna High Court has held that complaint not stating that A, B or C was in charge of or responsible to the Company, prosecution so far as A, B or C not sustainable but prosecution against the firm is not assailable. It is also held that the process cannot be issued if the complaint does not contain any allegations against the accused in respect of the offence charged. Similarly, the Calcutta High Court in *Bhagwati Prasad Khaitan v The Special Director, Enforcement Directorate and Another*, held that in order to be made vicariously liable the person must be shown to have been a person who was in charge of or was responsible to the Company for conduct of the business of the Company. The Director, simpliciter as such cannot be said to be person who was in charge of and was responsible to the Company for the conduct of its business. Hence in the absence of such disclosure cognizance against them cannot be taken. 10. Their Lordships of the Supreme Court in *R. Banerjee and Others v H.D. Dubey and Others*, held while discussing the prosecution of Directors under Section 17(4) of the Prevention of Food Adulteration Act that where the allegations set out in the complaint do not constitute any offence, no process can be issued against the co-accused other than the Company and the nominated person and the High Court would be justified in exercising its inherent jurisdiction under Section 482 of the Cr. P.C., 1973, to quash the order passed by the Magistrate taking cognizance of the offence against such co-accused. In *Banovarilal Tibrewalla v State of Assam and Another*, the Gauhati High Court has held that complaint not disclosing that the partner was in charge of the conduct of business of the firm and no nomination in Form VIII is filed, the prosecution of such partner is illegal under the Prevention of Food Adulteration Act. 11. He also placed reliance on a decision in *Saj Flight Services (Private) Limited v P.T. Gopala Raja*, wherein this Court has held that necessary and proper parties must be added to enforce the legal claim against them for the purpose of proving the offence under Section 138 of the Negotiable Instruments Act. The debt was incurred for and on behalf of the firm. All the persons concerned, inclusive of the other Directors or the partners must be jointly and severally liable, for which every one had to be added as party. This decision appears to be just on the facts of that particular case. 12. From the above discussion it is abundantly clear that to launch a prosecution against the Directors of the Company, there must be specific allegation in the complaint as to the part played by them in the transactions. There must be clear and unambiguous allegations as to how all the partners are in charge of and responsible for the conduct of the business of the company. There should be clear description and also allegations that the offence was committed with their knowledge and that they had not exercised due diligence to prevent the commission of such offence. The Court should also make attempt to find out whether the available allegation that the offence was committed with the consent or connivance or is attributable to any negligence on the part of the directors or partners or members of any association or a group of persons. 13. If the cheque is issued by the Managing Director

who represents the Company, then the case can be proceeded only against the Company and the Managing Director who has signed the cheque. Similarly, the Managing Partner of the firm and the person who represents the association can be prosecuted along with the firm or association respectively. All the partners and members of the association need not be arraigned as accused persons. With these principles in mind, it is now necessary to refer to the complaint to find out whether the order passed by the learned Magistrate calls for interference in the light of the arguments advanced by the learned Counsel for the petitioners. 14. From a perusal of the complaint, it is clear that the complainant has specifically stated that A-2 the Joint Director signed the agreement entered into between the complainant and the petitioner 1-Company. Subsequently, the cheque was issued by the Company signed by petitioner 3-the Managing Director. There is no allegation whatsoever with regard to petitioners 4 to 8. It is not stated that they have connived to cheat the complainant or any negligence or active part is played by them in issuing the cheque. It is not a question of policy of the company involved in this complaint. On the other hand, the dispute is only in regard to the dishonour of the cheque issued by the 1st petitioner signed by the 3rd petitioner in their business transaction. Therefore, the learned Counsel for the petitioners submitted that this petition as far as petitioners 1 and 3 are concerned is not pressed. However, there is some allegation in regard to the agreement entered into between the parties and the same was signed by the 2nd petitioner on behalf of the 1st petitioner from which transaction this cheque came to be issued. Under those circumstances, I am of the considered view that the 2nd petitioner also is a necessary party in this proceedings. 15. Coming to petitioners 4 to 8 there is absolutely no allegation made against them and they are arraigned as accused persons only because they are the partners of the 1st petitioner. However, the learned Counsel for the respondent contended that allegations are found in the notice issued by the respondent as contemplated under the Negotiable Instruments Act and that is part and parcel of this complaint. Therefore, the allegations made therein can be made use of to find out as to whether these petitioners 4 to 8 are necessary parties before the Court. This notice was also produced before the Court and the same was marked while recording the sworn statement. Therefore, this Court can look into the said notice, a copy of which is made available to the Court. In that notice, it is stated that the petitioners 4 to 8 are Directors of the Company and that 2nd and 3rd petitioners are Joint Managing Director and Managing Director, respectively. He also referred to the agreement entered into by the 1st petitioner and the complainant. It is further stated that all the petitioners have connived to defraud the complainant from the outstanding sum of Rs. 40,13,056.36 comprising of the principal amount and interest. On these allegations, he has stated in the notice that all the petitioners are therefore, now jointly and severally liable and due in the cheque sum of Rs. 35,00,000/- and the balance of Rs. 5,13,056,36 to the respondent. He also informed that they are all jointly and severally liable to pay the amount. However, in this notice also it is not specifically stated that these petitioners 4 to 8 were in charge of and responsible for the conduct of the business of the firm. On the other hand, it is made clear if reference is

made to the notice and also the complaint that only the first petitioner represented by the Managing Director and the 3rd petitioner were in charge and responsible for the conduct of the business and more so in this transaction as the 3rd petitioner has issued the cheque for and on behalf of the 1st petitioner. The 2nd petitioner is only the Joint Managing Director who had signed the agreement creating transaction leading to issue of cheque. Therefore, I am of the firm view that petitioners 1 to 3 are necessary parties before the Court and they are properly arraigned as accused persons. However, the petition deserves to be allowed insofar as it relates to petitioners 4 to 8. 16. Before parting with this case, it is also necessary to make certain observations for the proper guidance of the learned Trial Courts. In cases where large number of accused persons are arraigned, it is incumbent on the Magistrate and other Criminal Courts to find out as to whether all the accused persons are properly arraigned as accused persons and while passing the order after taking cognizance before issuing process, the order should be passed in regard to the person against whom the summons or warrant will have to be issued. If the Court finds that some of the accused persons are unnecessarily being arraigned it is always open to the Court to discharge them or direct the complainant to delete their names to avoid unnecessary delay, harassment and also causing inconvenience to such persons. This will also lessen the burden on the High Court. It is also noticed in private complaints filed under Section 494 of IPC, in regard to bigamous marriages, the persons who had attended the marriage also are arraigned as accused persons without proper allegations against them. Under those circumstances, it is the duty of the learned Magistrate to properly scrutinise as to whether all the accused are necessary parties and if found unnecessary, the Magistrate can refuse to issue summons against them. 17. For the foregoing reasons, the petition is partly allowed dismissing the complaint as against petitioners 4 to 8 who are accused before the learned Magistrate and they are discharged. To that extent the impugned order is quashed. However, petition as against petitioners 1 to 3 is dismissed directing the Magistrate to proceed against them according to law from the stage at which it is pending.