N. Rangachari vs Bharat Sanchar Nigam Ltd on 19 April, 2007

Equivalent citations: AIR 2007 SUPREME COURT 1682, 2007 AIR SCW 2591, 2007 (3) AIR JHAR R 145, 2007 CLC 860 (SC), (2007) 53 ALLINDCAS 12 (SC), 2007 (2) SCC(CRI) 460, (2007) 2 CRILR(RAJ) 689, (2007) 3 CTC 495 (SC), 2007 CRILR(SC&MP) 689, (2007) 3 ICC 525, 2007 (5) SCALE 821, 2007 (5) SCC 108, 2007 ALL MR(CRI) 1437, (2007) ILR(KER) 3 SC 473, 2007 (53) ALLINDCAS 12, (2007) 2 CRIMES 668, (2007) 2 CRILR(RAJ) 949, (2007) 2 ALLCRIR 2188, (2007) 1 NIJ 474, (2007) 137 COMCAS 198, (2007) 1 MAD LJ(CRI) 1231, (2007) 2 RAJ CRI C 694, (2007) 2 BOMCR(CRI) 433, (2007) 2 BANKJ 241, (2007) 3 CIVILCOURTC 206, (2007) 2 KER LT 1030, (2008) 1 MADLW(CRI) 371, (2007) 5 MAH LJ 375, (2007) 4 MPLJ 375, (2007) 3 PAT LJR 16, (2007) 2 RECCRIR 875, (2007) 78 CORLA 313, (2007) 4 BANKCAS 516, (2007) 3 SUPREME 626, (2007) 5 SCALE 821, (2007) 3 JLJR 16, (2007) 58 ALLCRIC 356, (2007) 3 ALLCRILR 429, (2007) 4 CIVLJ 7, (2007) 2 CRIMES 455, (2007) 2 CURCC 350, (2007) 4 RAJ LW 3363, (2007) 6 WLC (RAJ) 786, 2007 CRILR(SC MAH GUJ) 689, (2007) 55 ALLINDCAS 753 (RAJ), (2007) 3 EASTCRIC 110, 2007 (2) ALD(CRL) 112, 2007 (3) ANDHLT(CRI) 32 SC, (2007) 2 BANKCLR 241

Author: P.K. Balasubramanyan

Bench: Tarun Chatterjee, P.K. Balasubramanyan

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           CASE NO.:
Writ Petition (crl.)  592 of 2007

PETITIONER:
N. RANGACHARI

RESPONDENT:
BHARAT SANCHAR NIGAM LTD

DATE OF JUDGMENT: 19/04/2007

BENCH:
TARUN CHATTERJEE & P.K. BALASUBRAMANYAN

JUDGMENT:
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J U D G M E N T CRIMINAL APPEAL NO 592 OF 2007 (Arising out of SLP (Cri.) No. 1844 of 2006) P.K. BALASUBRAMANYAN, J.

1. Leave granted.

2. Heard both sides.

3. On behalf of the Data Access (India) Limited, two cheques were issued to the respondent Bharat Sanchar Nigam Limited (hereinafter referred to as, "B.S.N.L."). The cheques were dated 31.8.2004. The cheques were duly presented by the B.S.N.L. but were dishonoured for insufficiency of funds. B.S.N.L. thereupon issued requisite notices calling upon the Data Access (India) Limited to pay the amounts due under the cheques. The payments not having been made, B.S.N.L. filed a compliant under Section 138 of the Negotiable Instruments Act.

4. In the complaint, B.S.N.L. alleged that the cheques were issued to it by the Data Access (India) Limited in discharge of a pre-existing liability based on the business transactions between the companies. The appellant herein and respondent No. 2 in the complaint were the Directors of respondent No. 1 Company and they were in charge of and responsible for the conduct of the business of Data Access (India) Limited. The relevant statement in the complaint read:

> "That accused No. 1 is a company incorporated under the Companies Act. Accused Nos. 2 and 3 are its Directors. They are incharge of and responsible to accused No.1 for conduct of business of accused No. 1 Company. They are jointly and severally liable for the acts of accused No. 1."

The complaint also stated that in response to the notice issued by B.S.N.L., a reply had been sent claiming that the appellant was no longer the Chairman or Director of Data Access (India) Limited and accused No. 2 was not aware of the issuance of the cheques. These statements were false and by not keeping sufficient funds in their account and failing to pay the cheque amount on the service of the notice, all the accused committed an offence as contemplated in Section 138 of the Negotiable Instruments Act and they were liable to be proceeded against. The complaint also asserted that all the accused were guilty of the offence in terms of Section 138 of the Negotiable Instruments Act and were liable to be punished therefor.

5. The appellant herein moved the High Court under Section 482 of the Code of Criminal Procedure seeking the quashing of the complaint insofar as it related to him. The appellant pleaded that he was nominated as Honorary Chairman without any remuneration, sitting fee etc. by the investors and promoters of the Company of Data Access (India) Limited on 24.7.2004 and he was designated as Chairman of the Company. Being a nominated Chairman and holding an Honorary post in the Company, he was never assigned with any of the Company's financial or other business activities. He was the Chairman for name sake and was never entrusted with any job or business or constituted a signing authority. He had resigned effectively on 26.8.2004 when problems between the promoters and investors of Data Access (India) Limited started developing. The two cheques that were the subject matter of the complaint, were dated 31.8.2004, after the appellant had effectively resigned. He had not signed those cheques. He was not liable. According to him, the Data Access (India) Limited had two Managing Directors at the relevant time and they were the ones who were invested with substantial powers of management of the Company and as such the Managing directors were involved in the day to day affairs of the Company and not himself, who had only acted for a short period as Honorary Chairman. The complaint did not contain adequate averments to justify

initiation of a criminal proceeding against him and hence the complaint was liable to be quashed.

6. On behalf of B.S.N.L., it was contended that the Petition under Section 482 of the Code of Criminal Procedure was not maintainable and that the questions sought to be raised by the appellant were questions that had to be decided at the trial. The complaint disclosed sufficient materials justifying the commencement of the proceedings against Data Access (India) Limited and the other two accused including the appellant. The appellant who was the Chairman of the Data Access (India) Limited was incharge of and responsible to the Company for the conduct of its business, and no occasion had arisen for quashing the complaint. The question whether a person is incharge of and responsible for the conduct of the business of the Company, is to be adjudged during the trial on the basis of the materials to be placed on record by the parties. That could not be decided at the stage of a motion under Section 482 of the Code of Criminal Procedure.

7. The High Court, on going through the complaint in the context of Sections 138 and 141 of the Negotiable Instruments Act, came to the conclusion that the court could not decide the pleas put forward by the appellant in dealing with a petition filed under Section 482 of the Code of Criminal Procedure and that the defences sought to be put forward by the accused had to be established at the trial. Taking the view that the complaint disclosed adequate material for proceeding against the appellant in terms of Section 138 read with Section 141 of the Negotiable Instruments Act, the High Court refused to accede to the prayer of the appellant and dismissed the application filed under Section 482 of the Code of Criminal Procedure. Challenging the said order of the High Court, this appeal is filed by the appellant.

8. Learned Senior Counsel for the appellant brought to our notice a number of decisions of this Court on what should constitute sufficient allegations in a complaint under Section 138 of the Negotiable Instrument Act when a prosecution is sought against a Company and its officers, in terms of Section 141 of the said Act. Learned counsel placed considerable reliance on the decision of this Court in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr. [(2005) 8 S.C.C. 89]. Therein, this Court observed:

> "In the present case, we are concerned with criminal, liability on account of dishonour of cheque. It primarily falls on the drawer company and is extended to officers of the Company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a Company, extends criminal liability for dishonour of cheque to officers of the Company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what

> is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are result of acts of others. Therefore, officers of a Company who are responsible for acts done in the name of the Company are sought to be made personally liable for acts which result in criminal action being taken against the Company. It makes every person who at the time the offence was committed, was incharge of and was responsible to the Company for the conduct of business of the Company, as well as the Company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence."

After referring to a number of earlier decisions, this Court summed up the legal position and laid down:

> "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."

Dealing with the question whether a Director of a Company would be deemed to be in charge of, or 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, this Court held:

> "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."

Answering the question whether even in the absence of averments the signatory of the cheque or the managing directors could be taken to be in charge of the Company and responsible to the Company for the conduct of its business and could be proceeded against, the answer was as follows:

> "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 Sub-section (2) of Section 141."

9. It was submitted by learned Senior Counsel for the appellant that the allegations in the complaint against the appellant did not contain sufficient averments to justify the issue of process to the appellant and therefore the complaint ought to be quashed. Learned counsel also relied heavily on the decision in Saroj Kumar Poddar Vs. State (NCT of Delhi) & Anr. [2007 (2) SCALE 36], wherein two learned judges of this Court held that the complaint in that case did not satisfy the requirements of Section 138 read with Section 141 of the Negotiable Instruments Act. Learned counsel referred us to paragraphs 13 to 18 of that decision with particular reference to the allegations in the complaint in that case and submitted that in the case on hand also, the complaint was along the same lines and read in the context of that decision, it must be held that no adequate material was disclosed for proceeding against the appellant on the complaint.

10. Learned counsel for B.S.N.L., on the other hand, submitted that the complaint contained adequate averments justifying the initiation of prosecution against the appellant for the offence under Section 138 of the Negotiable Instruments Act and the High Court was right in refusing to quash the complaint under Section 482 of the Code of Criminal Procedure leaving it to the appellant to establish his defence at the trial. Learned counsel relied on S.V. Muzumdar & Ors. Vs. Gujarat State Fertilizer Co. Ltd. & Anr. [(2005) 4 S.C.C 173] in support. In his reply, learned Senior Counsel for the appellant referred to Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. [(1998) 5 S.C.C. 749] and submitted that an application of mind was needed before the issuance of process and on the averments in the complaint in this case no process could have been issued against the appellant. He therefore reiterated that the complaint was liable to be quashed.

11. The Law Merchant treated negotiable instruments as instruments that oiled the wheels of commerce and facilitated quick and prompt deals and transactions. This continues to be the position as now recognized by legislation, though possibly a change is taking place with the advent of credit cards, debit cards and so on. It was said that negotiable instruments are merely instruments of credit, readily convertible into money and easily passable from one hand to another. With expanding commerce, growing demand for money could not be met by mere supply of coins and the instrument of credit took the function of money which they represented and thus became by degrees, articles of traffic. A man dared not dishonour his own acceptance of a bill of exchange, lest his credit be shaken in the commercial world. The Negotiable Instruments Act, 1881 is understood to be an enactment codifying the law on the subject. A cheque is an acknowledged bill of exchange that is readily accepted in lieu of payment of money and it is negotiable.

12. By the fall in moral standards, even these negotiable instruments like cheques issued, started losing their creditability by not being honoured on presentment. It was found that an action in the civil court for collection of the proceeds of a negotiable instrument like a cheque tarried, thus defeating the very purpose of recognizing a negotiable instrument as a speedy vehicle of commerce. It was in that context that Chapter VII was inserted in the Negotiable Instruments Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988

(Act 66 of 1988) with effect from 1.4.1989. The said Act inserted Sections 138 and 142 in the Negotiable Instruments Act. The objects and reasons for inserting the Chapter was:

> "to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers"

While Section 138 made a person criminally liable on dishonour of a cheque for insufficiency of funds or the circumstances referred to in the Section and on the conditions mentioned therein, Section 141 laid down a special provision in respect of issuance of cheques by companies and commission of offences by companies under Section 138 of the Negotiable Instruments Act. Therein, it was provided that if the person committing an offence under Section 138 of the Act was 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. The scope of Section 141 has been authoritatively discussed in the decision in S.M.S. Pharmaceuticals Ltd. (supra) binding on us and there is no scope for redefining it in this case. Suffice it to say, that a prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. In fact, Section 141 deems such persons to be guilty of such offence, liable to be proceeded against and punished for the offence, leaving it to the person concerned, to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent the commission of the offence. Sub-section (2) of Section 141 also roped in Directors, Managers, Secretaries or other officers of the company, if it was proved that the offence was committed with their consent or connivance.

13. A Company, though a legal entity, cannot act by itself but can only act through its directors. Normally, the Board of Directors act for and on behalf of the company. This is clear from Section 291 of the Companies Act which provides that subject to the provisions of that Act, the Board of Directors of a Company shall be entitled to exercise all such powers and to do all such acts and things as the Company is authorized to exercise and do. Palmer described the position thus:

> "A company can only act by agents, and usually the persons by whom it acts and by whom the business of the company is carried on or superintended are termed directors . "

It is further stated in Palmer that:

> "Directors are, in the eye of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors."

The above two passages were quoted with approval in R.K. Dalmia & ors. Vs. The Delhi Administration [(1963) 1 S.C.R. 253 at page 300]. In Guide to the Companies Act by A. Ramaiya (Sixteenth Edition) this position is summed up thus:

> "All the powers of management of the affairs of the company are vested in the Board of Directors. The Board thus becomes the working organ of the company. In their domain of power, there can be no interference, not even by shareholders. The directors as a board are exclusively empowered to manage and are exclusively responsible for that management."

Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the directors of the company are incharge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a company, every person, who at the time when the offence was committed was incharge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence along with the company. It appears to us that an allegation in the complaint that the named accused are directors of the company itself would usher in the element of their acting for and on behalf of the company and of their being incharge of the company. In Gower and Davies' Principles of Modern Company Law (Seventh Edition), the theory behind the idea of identification is traced as follows:

> "It is possible to find in the cases varying formulations of the under-lying principle, and the most recent definitions suggest that the courts are prepared today to give the rule of attribution based on identification a somewhat broader scope. In the original formulation in the Lennard's Carrying Company case Lord Haldane based identification on a person "who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation". Recently, however, such an approach has been castigated by the Privy Council through Lord Hoffmann in the Meridian Global case as a misleading "general metaphysic of companies".

The true question in each case was who as a matter of construction of the statute in question, or presumably other rule of law, is to be regarded as the controller of the company for the purpose of the identification rule."

But as has already been noticed, the decision in S.M.S. Pharmaceuticals Ltd. (supra) binding on us, has postulated that a director in a company cannot be deemed to be incharge of and responsible to the company for the conduct of his business in the context of Section 141 of the Act. Bound as we are by that decision, no further discussion on this aspect appears to be warranted.

14. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Articles of Association. Other than

that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are incharge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.

15. In fact, in an earlier decision in Monaben Ketanbhai Shah & Anr. Vs. State of Gujarat & Ors. [(2004) 7 S.C.C. 15], two learned judges of this Court noticed that:

> "The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind."

16. In the light of the ratio in S.M.S. Pharmaceuticals Ltd. (supra) what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the directors of the company, it is further alleged that they are incharge of and responsible to the company for the conduct of the business of the company. We find that such an allegation is clearly made in the complaint which we have quoted above. Learned Senior Counsel for the appellant argued that in Saroj Kumar Poddar case (supra), this Court had found the complaint unsustainable only for the reason that there was no specific averment that at the time of issuance of the cheque that was dishonoured, the persons named in the complaint were incharge of the affairs of the company. With great respect, we see no warrant for assuming such a position in the context of the binding ratio in S.M.S. Pharmaceuticals Ltd. (supra) and in view of the position of the Directors in a company as explained above.

17. In Rajesh Bajaj Vs. State of NCT of Delhi & Ors. [A.I.R. 1999 S.C. 1216], two learned judges of this Court stated:

> "For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence."

In M/s Bilakchand Gyanchand Co. Vs. A Chinnaswami [A.I.R. 1999 S.C. 2182], this Court held that a complaint under Section 138 of the Act was not liable to be quashed on the ground that the notice as contemplated by Section 138 of the Act was addressed to the Director of the Company at its office address and not to the Company itself. The view was reiterated in Rajneesh Aggarwal Vs. Amit J. Bhalla [A.I.R. 2001 S.C. 518]. These decisions indicate that too technical an approach on the sufficiency of notice and the contents of the complaint is not warranted in the context of the purpose sought to be achieved by the introduction of Sections 138 and 141 of the Act.

18. In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were incharge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour. We have no hesitation in overruling the argument in that behalf by the learned Senior Counsel for the appellant.

19. We think that, in the circumstances, the High Court has rightly come to the conclusion that it is not a fit case for exercise of jurisdiction under Section 482 of the Code of Criminal Procedure for quashing the complaint. In fact, an advertence to Sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the Officers incharge of the affairs of the company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to show that at the relevant time they were not incharge of the affairs of the company. Reading the complaint as a whole, we are satisfied that it is a case where the contentions sought to be raised by the appellant can only be dealt with after the conclusion of the trial.

20. We therefore affirm the decision of the High Court and dismiss this appeal. We make it clear that the case will have to be tried and disposed of in accordance with law on the basis of the evidence that may be adduced.