

CASE DETAILS

SIBY THOMAS

v.

M/S. SOMANY CERAMICS LTD.

(Criminal Appeal No. 3139 of 2023)

OCTOBER 10, 2023

[C. T. RAVIKUMAR AND SANJAY KUMAR, JJ.]

HEADNOTES

Issue for consideration: In the impugned order, the High Court declined to quash the complaint u/s.138 r/w. s.141 of the Negotiable Instruments Act, 1881 qua the appellant-accused no.4 in exercise of the power u/s. 482 of the Cr.P.C.

Negotiable Instruments Act, 1881 – s. 138 r/w. s.141 – Respondent filed complaint u/s. 138 r/w. s.141 of the NI Act – Appellant set up twin grounds to seek quashment of the complaint against him; firstly, that he had resigned from the partnership firm on 28.05.2013 whereas the cheque in question was issued on 21.08.2015 and secondly, that the complaint is devoid of mandatory averments required to be made in terms of sub-Section 1 of s.141 of the NI Act, as relates him:

Held: It is not averred anywhere in the complaint that the appellant-accused no.4 was in charge of the conduct of the business of the company at the relevant time when the offence was committed – What is stated in the complaint is only that the accused Nos. 2 to 6 being the partners are responsible for the day-to-day conduct and business of the company – It is also relevant to note that an overall reading of the complaint would not disclose any clear and specific role of the appellant-accused no.4 – In the complaint, it was alleged that accused No.1 through accused No.2 had purchased the goods from the complainant on credit basis through proper sales invoices and, in paragraph 6 it was alleged that for liquidation of legal liability outstanding accused Nos. 2 and 3 issued cheque in favour of the complainant from the account of accused No.1 – The averments in the complaint filed by the respondent are not sufficient to satisfy the mandatory

requirements u/s. 141(1) of the NI Act – Since the averments in the complaint are insufficient to attract the provisions u/s. 141(1) of the NI Act, to create vicarious liability upon the appellant, he is entitled to succeed in this appeal. [Paras 12, 13, 17]

Negotiable Instruments Act, 1881 – Ingredients of s.141 – Vicarious liability:

Held: A vicarious liability would be attracted only when the ingredients of s.141(1) of the NI Act, are satisfied – It would also reveal that merely because somebody is managing the affairs of the company, per se, he would not become in charge of the conduct of the business of the company or the person responsible to the company for the conduct of the business of the company – A bare perusal of s.141(1) of the NI Act, would reveal that only that 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 alone shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished. [Para 16]

Negotiable Instruments Act, 1881 – Specific averments in the complaint to make the accused vicariously liable:

Held: In the decision in S.P. Mani's case in paragraph 47 (a) it was held that the primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. [Para 11]

LIST OF CITATIONS AND OTHER REFERENCES

S.P. Mani and Mohan Dairy v. Dr. Snehalatha Elangovan 2022 SCC OnLine SC 1238; *Gunmala Sales Private Limited v. Anu Mehta* (2015) 1 SCC 103 : [2014] 10 SCR 1117; *Ashok Shewakramani & Ors. v. State of Andhra Pradesh & Anr.* 2023 INSC 692 – relied on.

Anita Malhotra v. Apparel Export Promotion Council & Anr. (2012) 1 SCC 520 : 2011 [13] SCR 76 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3139 of 2023

From the Judgment and Order dated 06.12.2019 of the High Court of Punjab & Haryana at Chandigarh in CRM-M No. 52299 of 2019.

Appearances:

Wills Mathews, Karthik S. D., Paul John Edison, Dhanesh M. Nair, Manu Prakash Upadhyay, Ms. Shweta Garg, Advs. for the Appellant.

Vipin Kumar Jai, Adv. for the Respondent.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

C.T. RAVIKUMAR, J.

1. Leave granted.

2. This Appeal by accused No.4 in the complaint filed by the respondent herein under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (for short ‘the NI Act’) is directed against the order dated 06.12.2019 in CRM-M No.52299 of 2019 passed by the High Court of Punjab and Haryana at Chandigarh. As per the impugned order the High Court declined to quash the complaint qua the appellant in exercise of the power under Section 482 of the Code of Criminal Procedure (for short ‘Cr. PC’).

3. Heard the learned counsel appearing for the petitioner and learned counsel appearing for the respondent.

4. Virtually, the appellant set up twin grounds to seek quashment of the complaint against him; firstly, that he had resigned from the partnership firm on 28.05.2013 whereas the cheque in question was issued on 21.08.2015 and secondly, that the complaint is devoid of mandatory averments required to be made in terms of sub-Section 1 of Section 141 of the NI Act, as relates him. The High Court found that the contention in regard to the maintainability of the complaint against the appellant, owing to his retirement from the partnership firm prior to the issuance of the cheque in question, is a matter of evidence and ultimately, the appellant would have to lead evidence and prove that fact. Consequently, it was held that the complaint could not be rejected qua the appellant at the initial stage in exercise of the powers under Section 482 Cr.PC.

5. The learned counsel appearing for the petitioner contended that even if it is taken that the factum of his retirement from the partnership firm on 28.5.2013 was prior to the cheque in question on 21.8.2015 is a matter of evidence, the complaint as against the appellant is liable to be quashed owing to the absence of mandatory averments required to be made in terms of Section 141 (1) of the NI Act, in the complaint. In other words, it is submitted that though the respondent had specified or elaborated the role of some of the accused in the complaint as relates the appellant averments elaborating/specifying his role in the day-to-day affairs of the partnership firm much-less mandatorily required averments for his prosecution are conspicuously absent in the complaint. To drive home the contentions that the learned counsel for the appellant drew our attention to paragraphs 3 to 6 of the complaint. Learned counsel for the appellant relied on the decisions of this Court in *Anita Malhotra v. Apparel Export Promotion Council & Anr.*¹ and a decision of Two-Judge Bench of this Court in Criminal Appeal No. 879 of 2023 titled *Ashok Shewakramani & Ors. v. State of Andhra Pradesh & Anr.*² and connected cases dated 03.08.2023 to buttress the said contentions.

6. Per Contra, learned counsel appearing for the respondent would submit that paragraphs 3 and 4 of the complaint would reveal that the averments thereunder are sufficient to satisfy the mandatory requirement in terms of Section 141 of the NI Act, qua the appellant as well. In order to support his contention the learned counsel relied on the decision of a two-Judge Bench of this Court in *S.P. Mani and Mohan Dairy v. Dr. Snehalatha Elangovan*³.

7. In view of the rival contentions as above it is apposite to refer to the averments in paragraph 3 and 4 of the complaint, which is annexed to the SLP. They read thus:

“3. That the accused No.1 is a partnership-firm with the name and style of M/s Tile Store, having its office at 5-654/B, Jyothis Complex, By-pass Road, Eranhipalam, Calicut-673006 (Kerala), while accused

¹ (2012) 1 SCC 520

² 2023 INSC 692

³ 2022 SCC OnLine SC 1238

No.2 to 6 are the partners of the accused No.1. The accused No.2 to 6 being the partners are responsible for the day to day conduct and business of the accused No. 1.

4. That the accused No.1 through its partners i.e. accused No.2 to 6, on the basis of the authority vested in them approached to the complainant for purchasing the ceramic tiles, sanitary wares and bath fitting from the complainant on credit basis. The request of the accused No.1 was accepted by the complainant and the accused agreed to pay the amount of the goods purchased by them to the complainant within one month and it was also agreed that if the accused failed to make the payment within one month in that case they shall also be liable to pay interest @ 24% per annum on the balance sale consideration till its full realization.”

(Underline supplied)

8. As noticed hereinbefore, the parties are at issue over the question as to whether the averments in the complaint satisfy the requirements under Section 141 (1) of the N.I. Act. True that in paragraph 3 it is stated that accused No.1 is a partnership firm and accused Nos.2 to 6 are the partners of accused No.1 and they, being the partners, are responsible for the day-to-day contact and business of accused No.1. In paragraph 4 what is stated is that accused No.1 through its partners i.e., accused Nos. 2 to 6, on the basis of the authority vested in them approached the complainant for purchasing the ceramic tiles, sanitary-wares and bath fittings from the complainant on credit basis. Indubitably, besides the aforesaid averments no other averments are made in the complaint in regard to the appellant's role. Therefore, the question is whether the averments referred to hereinbefore are sufficient to prosecute the appellant under Section 138 of the NI Act, on the afore-extracted averments. We are not oblivious of the fact that the appellant has also got a contention that he retired from the partnership firm much prior to the issuance of the cheque in question. It is only proper and profitable to refer to sub-section (1) of Section 141 of the N.I. Act in view of the rival contentions. It reads thus:-

“(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:²² [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]”

9. Bearing in mind the averments made in the complaint in relation to the role of the appellant and sub-section (1) of Section 141, we will have to appreciate the rival contentions. Going by the decision relied on by the respondent in **S.P. Mani's case** (supra) it is the primary responsibility of the complainant to make specific averments in the complaint, so as to make the accused vicariously liable. Relying on paragraph 47(b) of the said decision learned counsel appearing for the respondent would also submit that the complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case maybe and he relied on mainly the following recitals thereunder:

“47.....

a.)

b.) The complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstances, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm.”

10. We are of the considered view that the respondent has misread the said decision. Under the sub-caption ‘Specific Averments in the complaint’,

in paragraph 41 and sub-paragraphs (a) and (d) as also in paragraph 42 thereof, it was held in the decision in *S.P. Mani's case* (supra) thus:-

“41. In Gunmala Sales Private Limited (supra), this Court after an exhaustive review of its earlier decisions on Section 141 of the NI Act, summarized its conclusion as under:-

“(a) Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

(b)

(c)

(d) No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent *inter alia* the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary *qua* a particular Director.”

42. The principles of law and the dictum as laid in Gunmala Sales Private Limited (supra), in our opinion, still holds the field and reflects the correct position of law.”

11. In the light of the afore-extracted recitals from the decision in *Gunmala Sales Private Limited v. Anu Mehta*⁴, quoted with agreement in *S.P. Mani's case* (supra) and in view of sub-section (1) of Section 141 of the N.I. Act it cannot be said that in a complaint filed under Section 138

⁴ (2015) 1 SCC 103,

read with Section 141 of the N.I. Act to constitute basic averment it is not required to aver that the accused concerned is a person who was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed. In paragraph 43 of *S.P. Mani's case* (supra) it was held thus:

"43. In the case on hand, we find clear and specific averments not in the complaint but also in the statutory notice issued to the respondent."

It is thereafter that in the decision in *S.P. Mani's case* (supra) in paragraph 47 (a) it was held that the primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable.

12. Bearing in mind the afore-extracted recitals from the decisions in *Gunmala Sales Private Limited's case* (supra) and *S.P. Mani's case* (supra), we have carefully gone through the complaint filed by the respondent. It is not averred anywhere in the complaint that the appellant was in charge of the conduct of the business of the company at the relevant time when the offence was committed. What is stated in the complaint is only that the accused Nos. 2 to 6 being the partners are responsible for the day-to-day conduct and business of the company. It is also relevant to note that an overall reading of the complaint would not disclose any clear and specific role of the appellant. In the statutory notice dated 10.09.2015 (Annexure-P6) at paragraph 3 it was averred thus:-

"3. That for liquidation of the aforesaid legal liability/outstanding, you noticee No. 2 to 6 issued cheque number 005074 dated 21.08.2015, amounting to Rs. 27,46,737/- drawn on Punjab National Bank, Ernhipalam (Kozhikode) branch in favour of my client from the account of noticee No. 1."

In response to that in Annexure- P7 reply the appellant herein stated thus:-

"In this regard, I would like to convey you that, I have retired from M/s Tile store as partner way back on 28-5-2013 and I am not a partner of M/s. Tile Store any more. (Copy of Retirement deed enclosed).

During the time of my retirement, there were no dues to M/s. Somany Ceramics Ltd. from M/s. Tile Store as full payments were made for the consignments taken from them. (Copy of accounts statements up to 31-05-2013 enclosed)"

13. In the light of the aforesaid circumstances the averments of the respondent in paragraphs 5 and 6 of the complaint are also to be seen. In paragraph 5 of the complaint, it was alleged that accused No.1 through accused No.2 had purchased the goods from the complainant on credit basis through proper sales invoices and, in paragraph 6 it was alleged that for liquidation of legal liability outstanding accused Nos. 2 and 3 issued cheque Nos. 005074 dated 21.8.2015 amounting to Rs.27,46,737/- drawn upon Punjab National Bank, Ernhipalam (Kozhikode), in favour of the complainant from the account of accused No.1. The appellant is the accused No. 4 in the complaint.

14. In view of the factual position relating the averments revealed from the complaint as aforesaid it is relevant to refer to the decisions relied on by the learned counsel appearing for the appellant. In the decision in *Anita Malhotra's case* (supra) in paragraph 22 it was held thus:-

"22. This Court has repeatedly held that in case of a Director, the 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 Corpn. Ltd. v. Harmeet Singh Paintal). In the case on hand, particularly, in Para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day-to-day affairs of the Company. We have verified the averments as regards to the same and we agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day-to-day affairs of the Company. On this ground also, the appellant is entitled to succeed."

15. Paragraph 19 of the *Ashok Shewakramani's case* (supra) is also relevant for the purpose of the case and it, in so far as relevant, reads thus:

"19. Section 141 is an exception to the normal rule that there cannot be any vicarious liability when it comes to a penal provision. The vicarious liability is attracted when the ingredients of sub-section 1 of Section 141 are satisfied. The Section provides that every person who at the time the offence was committed was in charge of, and was responsible to the Company for the conduct of business of the company, as well as the company shall be deemed to be guilty of the offence under Section 138 of the NI Act. In the light of sub-section 1 of Section 141, we have perused the averments made in the complaints subject matter of these three appeals. The allegation in paragraph 1 of the complaints is that the appellants are managing the company and are busy with day to day affairs of the company. It is further averred that they are also in charge of the company and are jointly and severally liable for the acts of the accused No.1 company. The requirement of sub-section 1 of Section 141 of the NI Act is something different and higher. Every person who is sought to be roped in by virtue of sub-section 1 of Section 141 NI Act must be a 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. Merely because somebody is managing the affairs of the company, per se, he does not become in charge of the conduct of the business of the company or the person responsible for the company for the conduct of the business of the company. For example, in a given case, a manager of a company may be managing the business of the company. Only on the ground that he is managing the business of the company, he cannot be roped in based on sub-section 1 of Section 141 of the NI Act. The second allegation in the complaint is that the appellants are busy with the day-to-day affairs of the company. This is hardly relevant in the context of subsection 1 of Section 141 of the NI Act. The allegation that they are in charge of the company is neither here nor there and by no stretch of the imagination, on the basis of such averment, one cannot conclude that the allegation of the second respondent is that the appellants were also responsible to the company for the conduct of the business. Only by saying that a person was in charge of the company at the time when the offence was committed is not sufficient to attract sub-section 1 of Section 141 of the NI Act."

16. Thus, in the light of the dictum laid down in *Ashok Shewakramani's case* (supra), it is evident that a vicarious liability would be attracted only when the ingredients of Section 141(1) of the NI Act, are satisfied. It would also reveal that merely because somebody is managing the affairs of the company, per se, he would not become in charge of the conduct of the business of the company or the person responsible to the company for the conduct of the business of the company. A bare perusal of Section 141(1) of the NI Act, would reveal that only that 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 alone shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished. In such circumstances, paragraph 20 in *Ashok Shewakramani's case* (supra) is also relevant. After referring to the Section 141(1) of NI Act, in paragraph 20 it was further held thus:

"20 On a plain reading, it is apparent that the words "was in charge of" and "was responsible to the company for the conduct of the business of the company" cannot be read disjunctively and the same ought to be read conjunctively in view of use of the word "and" in between."

17. The upshot of the aforesaid discussion is that the averments in the complaint filed by the respondent are not sufficient to satisfy the mandatory requirements under Section 141(1) of the NI Act. Since the averments in the complaint are insufficient to attract the provisions under Section 141(1) of the NI Act, to create vicarious liability upon the appellant, he is entitled to succeed in this appeal. We are satisfied that the appellant has made out a case for quashing the criminal complaint in relation to him, in exercise of the jurisdiction under Section 482 of Cr.PC. In the result the impugned order is set aside and the subject Criminal Complaint filed by the respondent and pending before Ld. CJ (JD) JMIC, Bahadurgarh, in the matter titled as M/s. Somany Ceramics v. M/s. Tile Store etc. vide COMA- 321-2015 (CNRNO: HRJRA1004637-2015), stand quashed only in so far as the appellant, who is accused No. 4, is concerned. Appeal stands allowed as above. There will be no order as to costs.