

Madras High Court

P.Apparasamy vs Kalaimani on 17 April, 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 17.4.2008.

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THE HON'BLE MR.JUSTICE M.JEYAPPAUL

Crl.O.P.Nos.4403 and 4410 of 2005  
and  
Crl.M.P.Nos.1683 and 1691 of 2005

P.Apparasamy

Petitioner in both the cases

vs.

Kalaimani

Respondent in Crl.O.P.No.4403

of 2005 Ilanchezhian Respondent in Crl.O.P.No.4410 of 2005 Criminal Original Petition filed under section 482 Cr.P.C. seeking to call for the records of the learned Judicial Magistrate, Kallkurichi in C.C.Nos.323 and 321 of 2004 respectively and quash the proceedings as far as the petitioner herein.

For petitioner : Mr.S.Ashok Kumar, Senior Counsel for Mr.A.Sasidaran For respondents: Mr.R.Natarajan COMMON ORDER These petitions are filed seeking to quash the criminal proceedings in C.C.No.323 of 2004 and C.C.No.321 of 2004 on the file of the learned Judicial Magistrate, Kallakurichi.

2. As the parties are same in both the matters and cases under section 138 of the Negotiable Instruments Act have been launched by the respondent on the very same set of facts and circumstances, both the cases are taken up together for common disposal.

3. The petitioner is the third accused in the cases in C.C.Nos.323 and 321 of 2004 launched by the respondent under section 138 of the Negotiable Instruments Act. The respondent, having alleged that the first accused being Managing Partner and the second and third accused, being Partners of the fourth accused partnership firm, were at the helms of affairs of the partnership firm and issued the subject cheques for the subsisting liability. When those cheques were presented for collection, they were returned with an endorsement that there was no sufficient funds in the account of the fourth accused. The respondent, having further alleged that the second and third accused along with the first accused were in charge of conduct of the business of the fourth accused partnership firm

and all of them were liable to answer the charge under section 138 of the Negotiable Instruments Act, laid the complaint for the aforesaid offence.

4. The petitioner, who is the third accused, would contend in the petition seeking quashment that he was not the signatory to the alleged cheques which gave rise to the criminal proceedings under section 138 of the Negotiable Instruments Act. There was no averment that he was in charge of and responsible for the conduct of the business of the partnership firm. No materials are also produced to show that he was responsible for the day to day affairs of the firm. No notice was issued to the petitioner individually prior to launching the complaint under section 138 of the Negotiable Instruments Act. Therefore, the entire criminal proceedings initiated by the respondent under section 138 of the Negotiable Instruments Act are liable to be quashed, it is contended.

5. The points that arise for determination are

i) whether there is necessary and sufficient averment in the complaint under section 138 of the Negotiable Instruments Act laid by the respondent.

ii) whether there shall be a necessary averment to indicate as to how and in what manner, the partners were responsible for the conduct of the business of the partnership firm.

iii) whether the complainant is bound to give individual notice to each and every partner of the partnership firm.

6. It is a settled proposition of law that issuance of a statutory notice to the Managing Partner of the partnership firm is sufficient compliance of the issuance of notice required under law for the purpose of proceeding against all the partners of the firm and no individual notice to each and every partner is required.

7. The Supreme Court in *ASHUTOSH v. STATE OF RAJASTHAN* (AIR 2005 SC 3434) has held referring to sections 24 and 25 of the Indian Partnership Act, 1932 that a partner is an agent in relation to the firm. Therefore, a notice to the agent is tantamount to the notice to the principal and vice versa. As a general rule, notice to a principal is notice to all his agents and notice to an agent of matters connected with his agency is notice to his principal. In view of the aforesaid ratio laid down by the Supreme Court, the court finds that the complaint laid by the respondent under section 138 of the Negotiable Instruments Act after serving statutory notice to the first accused who is the Managing Partner of the fourth accused partnership firm is maintainable though as against the second and third accused, who are admittedly the partners of the partnership firm, no individual statutory notice was issued.

4. Learned Senior Counsel appearing for the petitioner would submit that the Supreme Court has held unambiguously that there shall be a specific averment as to how and in what manner, the partners were responsible for the conduct of the business of the partnership firm. Mere averment in the complaint that they were incharge of and responsible for the conduct of the business of the partnership firm cannot be construed as necessary and sufficient averment required to launch the

prosecution under section 138 of the Negotiable Instruments Act. Even otherwise, the averment as a whole would disclose that there is not even an allegation that the petitioner was in charge of and responsible for the conduct of the business of the fourth accused partnership firm.

5. Learned counsel appearing for the respondent would contend that the reply notice given by the first accused Managing Partner of the fourth accused would give an indication that the third accused was also responsible for the conduct of the business of the partnership firm. The reply notice issued by the first accused forms part of the complaint. The complaint also reflects an averment that the petitioner was incharge of and responsible for the conduct of the business of the partnership firm. The materials annexed along with the complaint cannot be discarded and the complaint alone cannot be read to come to a hasty conclusion that there was no necessary and sufficient averment to lay a complaint under section 138 of the Negotiable Instruments Act as against a partner of the partnership firm.

6. The Supreme Court in *S.M.S. PHARMACEUTICALS LIMITED v. NEETA BHALLA AND ANOTHER* (AIR 2005 SC 3512) has categorically held that it is necessary to specifically aver in the complaint that the person accused of was in charge of and responsible for the conduct of the business of the company. Such an averment is an essential requirement of section 141 of the Negotiable Instruments Act and therefore, the same has to be averred in the complaint. Without such an averment being made in the complaint, the requirement of section 141 of the Negotiable Instruments Act cannot be said to be satisfied. Here in this case, on a careful perusal of the complaint, it is found that the respondent has categorically stated that the second and third accused along with the first accused were in the administration of the partnership firm and that they have been carrying on the business of the partnership firm.

7. The Supreme Court in *SABITHA RAMAMURTHY v. R.B.S. CHANNABASAVARADHYA* ((2007) 1 SCC (Cri) 621) has held that it is not necessary to reproduce the wordings of section 141 of the Negotiable Instruments Act specifically in the complaint. What is required is a clear statement of fact to enable the court to arrive at a prima facie opinion that the accused are vicariously liable for the offence alleged to have been committed by the accused.

8. The averment found in the complaint, of course, is not the verbatim reproduction of the requirement under section 141 of the Negotiable Instruments Act. But, on reading the entire averment found in the complaint as a whole, one can easily come to a conclusion that there is sufficient averment to the effect that the third accused also was in charge of and responsible for the conduct of the business of the fourth accused partnership firm. Therefore, it is held that there is necessary averment in the complaint in terms of section 141 of the Negotiable Instruments Act.

9. The Supreme Court in *S.M.S. PHARMACEUTICALS LIMITED v. NEETA BHALLA AND ANOTHER* (AIR 2005 SC 3512) has held in paragraphs 7 and 8 as follows:-

" 7. As the points of reference will show, the question for consideration is what should be the averments in a complaint under Sections 138 and 141. Process on a complaint under Section 138 starts normally on basis of a written complaint which is placed before a Magistrate. The Magistrate

considers the complaint as per the provisions of Sections 200 to 204 of the Code of Criminal Procedure. The question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the Negotiable Instruments Act read in the light of powers of a Magistrate referred to in Sections 200 to 204 of the Code of Criminal Procedure. The fact that a Magistrate has to consider the complaint before issuing process and he has power to reject it at the threshold, suggests that a complaint should make out a case for issue of process.

8. As to what should be the averments in a complaint, assumes importance in view of the fact that at the stage of issuance of process, the Magistrate will have before him only the complaint and the accompanying documents. A person who is sought to be made accused has no right to produce any documents or evidence in defence at that stage. Even at the stage of framing of charge the accused has no such right and a Magistrate cannot be asked to look into the documents produced by an accused at that stage."

10. It is found from the above ratio that the Magistrate has to consider the complaint before issuing the process and he has the power to reject the complaint at the threshold itself if necessary and sufficient averment required under section 141 of the Negotiable Instruments Act have not been found in the complaint. But, at the same time, the complaint cannot be read in isolation. The complaint includes the documents annexed therewith. In the instant case, the Managing Partner of the fourth accused partnership firm has issued reply to the statutory notice as follows:-

"That my client and his brother-in-law in the normal course were in the habit of signing of the cheque leaves in the entire cheque books without being filled up in order to meet any emergent situation as may require."

The above averment found in the reply given by the Managing Partner of the fourth accused partnership firm would go to show that the third accused, who is none other than the brother-in-law of the first accused, was in charge of and responsible for the conduct of the business of the partnership firm. The aforesaid reply notice given by the first accused has been annexed along with the complaint launched under sections 138 and 141 of the Negotiable Instruments Act by the respondent. The stand taken by the first accused on behalf of the partnership firm and the partners therein would go to show, prima facie, that the third accused also has played a vital role in the administration of the fourth accused partnership firm.

11. In view of the ratio laid down by the Supreme Court referred to above, the submission made by the learned counsel appearing for the petitioner that the complaint should be separately scanned and analysed by the court without any reference to the reply notice given by the first accused is rejected outright. Further, the Managing Partner has given the reply notice not in his individual capacity but in his capacity as the Managing Partner of the partnership firm. His stand in the reply notice shall be construed as the stand of the other partners in the partnership firm. An agent cannot take a different stand from that of the partnership firm. Therefore, the further submission made on the side of the petitioner that the stand taken by the Managing Partner in the reply notice is not the stand of the third accused does not merit consideration.

12. In SABITHA RAMAMURTHY v. R.B.S.CHANNABASAVARADHYA ((2007) 1 SCC (Cri) 621) it has been held as follows:-

"A bare perusal of the complaint petitions demonstrates that the statutory requirements contained in Section 141 of the Negotiable Instruments Act had not been complied with. It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted. Not only the averments made in para 7 of the complaint petitions do not meet the said statutory requirements, the sworn statement of the witness made by the son of the respondent herein, does not contain any statement that the appellants were in charge of the business of the Company. In a case where the court is required to issue summons which would put the accused to some sort of harassment, the court should insist strict compliance with the statutory requirements. In terms of Section 200 of the Code of Criminal Procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefor. In the event, ultimately, the prosecution is found to be frivolous or otherwise mala fide, the court may direct registration of case against the complainant for mala fide prosecution of the accused. The accused would also be entitled to file a suit for damages. The relevant provisions of the Code of Criminal Procedure are required to be construed from the aforementioned point of view."

That was a case where there was virtually no averment in terms of section 141 of the Negotiable Instruments Act to the effect that the Directors of the Company were in charge of and responsible for the conduct of the business of the company. It has been averred to therein that the accused being the Directors are bound to answer the claim under section 138 read with 141 of the Negotiable Instruments Act. The son of the complainant, who filed a sworn statement, also has not stated anything about the role of the Directors of the Company in the day to day administration of the business of the company. In such circumstances, the Supreme Court has held that the complainant should have atleast come out with some statement on oath as to how the offence was committed and how the accused persons were responsible therefor.

13. In the case on hand, there is a clear averment to satisfy the requirement under section 141 of the Negotiable Instruments Act. Further, the reply notice issued by the Managing Partner of the partnership firm unambiguously reflects the major role played by the third accused in the day to day administration of the partnership firm. When the complaint read along with the documents produced satisfies the necessary and sufficient averment as contemplated under section 141 of the Negotiable Instruments Act, the lack of averment in the sworn statement of the de facto complainant in this case as to the specific role of the petitioner herein does not go to the root of the case.

14. In N.K.WAHI v. SHEKHAR SINGH ((2007) 2 MLJ (Cri) 241 (SC)), the Supreme Court has held in para 8 as follows:-

"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."

In the said judgment, it has been laid down that there should be a clear and unambiguous allegation as to how the Directors were in charge of and responsible for the conduct of the business of the company in the complaint laid under section 138 read with 141 of the Negotiable Instruments Act.

15. Relying on the aforesaid ratio laid down by the Supreme Court, this court in CAPT.D.KARUNAKAR, ETC. & OTHERS v. TAMILNADU NEWS PRINT & PAPERS LIMITED (2007-2-LW (Crl.) 806) has held that a complaint under section 138 and 141 of the Negotiable Instruments Act, without an allegation in the complaint to indicate as to how and in what manner a Director of the Company was responsible for the conduct of the business of the Company, is liable to be quashed.

15. But, in the later judgment pronounced by the Supreme Court, in RANGACHARI, N. v. BHARAT SANCHAR NIGAM LIMITED (2007(3) CTC 495), it has been held in paragraphs 19, 24 and 25 as follows:-

" 19. 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.

...

24. 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.

25. 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."

In the aforesaid subsequent authority pronounced by the Supreme Court, it has been held that a complainant is supposed to know only generally as to who were in charge of the affairs of the company. The other administrative matters would be within the special knowledge of the Company and those who are in charge of it. Therefore, the complainant is expected to allege that the persons named in the complaint are in charge of the the affairs of the company. The Supreme Court has gone a step further and observed that it is only the Directors of the Company who have special knowledge about the role they had played in the company to show before the court that at the relevant point of time they were not in charge of the affairs of the company. In the said case, it has been simply averred to that the Directors of the Company were in charge of and responsible for the conduct of the business of the company. The Supreme Court, in the aforesaid judgment, has held that the said allegation is sufficient averment as required under sections 138 and 141 of the Negotiable Instruments Act.

16. In view of the clarification found in the aforesaid authority reported in 2007 (3) CTC 495, the court holds that if the complainant, who is the payee or holder in due course, who may not be aware of the indoor administration of a company or the partnership firm, lodges a complaint under section 138 and 141 of the Negotiable Instruments Act with the averment that the Director or the Partners concerned were in charge of and responsible for the conduct of the business of the partnership firm concerned, then it will have to be construed that such an averment is a necessary and sufficient one as contemplated under section 141 of the Negotiable Instruments Act. Then the burden is shifted to the Partner or the Director of the Company, who has got thorough knowledge about the indoor management of the company or partnership firm, to prove that he was not in charge of and responsible for the conduct of the business of the company at the relevant point of time. Therefore, I reject, without any hesitation, the submission made by the learned Senior Counsel appearing for the petitioner that the complaint which does not whisper any averment as to how and in what manner, the Partners of the partnership firm played a role is not maintainable. Even otherwise, the reply

notice issued by the Managing Partner which forms part of the complaint, prima facie, shows that the petitioner herein had actually played a role in the day to day administration of the fourth accused partnership firm. Therefore, the court has to hold that the complainant has come out with a prima facie material to convince the learned Judicial Magistrate that the third accused was also in charge of and responsible for the conduct of the business of the fourth accused partnership firm.

17. The petitioner has not made out a case for quashment of the criminal proceedings. All the contentions made in the petitions seeking quashment are not at all sustainable in the eye of law. Therefore, both the petitions seeking quashment stand dismissed. The connected Miscellaneous Petitions also stand dismissed.

ssk.

To The Judicial Magistrate, Kallkurichi.