

Alex Vs. Vijayan

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Court : Kerala

Decided On : Jun-09-1993

Reported in : 1993(2)ALT(Cri)350; [1994]81CompCas910(Ker)

Judge : K.T. Thomas, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138, 141 and 141(1)

Appeal No. : Criminal Miscellaneous Case No. 129 of 1993

Appellant : Alex

Respondent : Vijayan

Advocate for Def. : Dinesh Mathew J. Muriken, Adv.

Advocate for Pet/Ap. : Babu Karukapadath, Adv.

Disposition : Petition dismissed

Judgement :

K.T. Thomas, J.

1. The petitioner is indicted for the offence under Section 138 of the [Negotiable Instruments Act, 1881](#). The petitioner describes himself as managing partner of a firm called Southern Transporting Company. The case against the petitioner was instituted on a complaint filed by the respondent. This criminal miscellaneous case

has been filed by the petitioner under Section 482 of the Code of Criminal Procedure for quashing the complaint.

2. The averments in the complaint show that the petitioner issued a cheque for Rs. 13,000 drawn on South Indian Bank, Kalamassery, for discharge of a liability ; the cheque was dishonoured by the drawee bank and the petitioner failed to pay the amount in spite of notice served on him. The learned Magistrate before whom the complaint was filed took cognizance of the offence and issued process to the petitioner.

3. The petitioner seeks to have the complaint quashed mainly on the following contentions. The cheque was issued by the firm and hence the offence was committed by the firm and not the petitioner. Prosecution is not maintainable as the firm is not made an accused in the complaint even if the petitioner was in charge of the business of the firm.

4. Though the cheque was signed by the petitioner for the firm and as its managing partner, the averments in the complaint are to the effect that the cheque was issued by the petitioner. As such, the contention of the defence that the cheque was issued by the firm is not sufficient to throw the complaint overboard at the initial stage itself. Even if it is found that it was the firm which issued the cheque, it has to be decided further whether the notice issued to the petitioner (who is described in the cheque as managing partner of the firm) can be treated as notice sent to the firm.

5. They are, therefore, not good reasons to axe down the complaint at the threshold.

6. The more important question is whether the prosecution is bad without the firm being made an accused in the complaint. Learned counsel contended on the strength of Section 141 of the Negotiable Instruments Act that even if the petitioner was in charge of the business of the firm, his liability is only vicarious since the principal offender is the firm and hence a prosecution without the principal offender as accused is not maintainable. Support for this contention was sought from the decision of a single judge of the Madras High Court in Krishan Bai v. Arti Press

[1992] 2 KLT 40 ; [1994] 80 Comp Cas 750, 754. Padmini Jesudurai J. has held in that case, following the observations of the Supreme Court in U. P. Pollution Control Board v. Modi Distillery [1988] 63 Comp Cas 77 ; AIR 1988 SC 1128, that 'unless the company is made an accused, the person who is in charge of, and responsible to, the company for the conduct of the business of the company, cannot be made an accused'. Learned counsel for the respondent on the other hand contended that the purport of the Supreme Court decision is not what the learned single judge has stated in Krishan Bai's case [1994] 80 Comp Cas 750 (Mad).

7. Section 141 of the Negotiable Instruments Act is extracted below :

'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.'

8. Sub-section (1) makes the company as well as the person in charge of, and is responsible to, the business of the company liable to punishment. Sub-section (2) fastens the officers enumerated therein with liability if it is proved that such officer has either consented or connived or acted negligently. The liability envisaged in Sub-section (1) on the person in charge of, and was responsible to, the business

of the company is fixed by the Legislature because he is directly responsible for the offence. He can escape only if he proves that the offence was committed without his knowledge or that he exercised all diligence to prevent it. No firm or company can act without the help of human agency. The man in charge of the business of the company is, in most cases, responsible for the conduct of such business. Hence Section 141(1) of the Negotiable Instruments Act made it clear that when the offence was committed by the company (firm) the person who was in charge of, and was responsible to, the firm for the conduct of the business of the firm is also liable. Sub-section (3) is enacted to make other officers of the company liable if the officer is guilty of the commission or omission mentioned in the sub-section. Of course, the liability created in Sub-sections (1) and (2) is vicarious in nature but yet there is some difference between the two. When the offence is committed by the company, proceedings can be initiated against either or both the company and the person in charge of the business of the company. The latter person need not have done any specific overt act or omitted to do anything to be fastened with liability. The very fact that the company has committed the offence is sufficient to make the latter also liable unless he proves at least one of the two defences specified in the proviso. But the officer mentioned in Sub-section (2) can be made liable only if the prosecution further proves that the company committed the offence with the consent or connivance of the officer or due to any negligence attributed to him. However, it is not correct to hold that prosecution against the person, in charge of the business of the company, is sustainable only if the company is also made an accused. Either the company can be prosecuted or the person mentioned in Sub-section (1) can be prosecuted, or both can be prosecuted together in the same proceedings. I am not now deciding the other questions as to whether prosecution of an officer mentioned in Sub-section (2) cannot be sustained unless the company is also prosecuted in the same proceedings.

9. A learned single judge of the Madras High Court in Krishan Bai's case [1994] 80 Comp Cas 750 adopted the view on the reasoning that the legal position has been settled by the Supreme Court in U. P. Pollution Control Board v. Modi Distillery [1988] 63 Comp Cas 77 ; AIR 1988 SC 1128. In the latter case prosecution was launched against the chairman, vice-chairman, managing director and members of

the board of directors of a company for an offence under the Water (Prevention and Control of Pollution) Act, 1974 (for short 'the Act 6 of 1974'). Section 47 of the Act ' 6 of 1974 is worded similarly to Section 151 of the Negotiable Instruments Act. A single judge of the Allahabad High Court quashed the process issued to the accused in that case holding that there was no sufficient ground to proceed against them inasmuch as the allegations in the complaint did not constitute an offence under Section 44 of the Act 6 of 1974. The learned judge of the Allahabad High Court relied on the decision of the Supreme Court in State (Delhi Administration) v. I.K. Nangia, AIR 1979 SC 1977, which was rendered in the interpretation of Section 17 of the Prevention of Food Adulteration Act (which sub-section is worded almost identically with Sub-section (2) of Section 141 of the Negotiable Instruments Act). The said decision of the Allahabad High Court was challenged in the Supreme Court and a Bench consisting of A.P. Sen and Natarajan JJ. set aside the judgment and restored the prosecution proceedings. A.P. Sen J. made the following observations (at page 82 of 63 Comp Cas) :

'Although as a pure proposition of law in the abstract, the learned single judge's view that there can be no vicarious liability of the chairman, vice-chairman, managing director and members of the board of directors under Sub-section (1) or (2) of Section 47 of the Act unless there was a prosecution against Modi Industries Limited, the company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation or vacuum but in the conspectus of facts and events.'

10. It was the said observations which Padmini Jesudurai J. in Krishan Bai's case [1994] 80 Comp Cas 750 (Mad) regarded as setting the law on the point. With great respect, I may point out that the Supreme Court made the said observation on the facts of the said case and it cannot be regarded as one of settling a point of law.

11. In the aforesaid context, reference can be made to an earlier decision of the Supreme Court rendered by a Bench, consisting of Chinnappa Reddy and Madon JJ. (vide Sheoratan Agarwal v. State of Madhya Pradesh [1984] 4 SCC 352 ; AIR 1984 SC 1824). The point considered was whether prosecution against the

managing director and manager of a company for an offence under the Essential Commodities Act, 1955, was maintainable without making the company an accused under Section 10(1) of the Essential Commodities Act says that :

' If the person contravening an order made under Section 3 is a company, every person who, at the time the contravention 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 contravention and shall be liable to be proceeded against and punished accordingly.'

(The proviso to the sub-section and also Sub-section (2) of Section 10 of the Essential Commodities Act need not be extracted here as they are identical with the corresponding provisions in Section 141 of the Negotiable Instruments Act).

12. The Supreme Court held that there is no justification for the submission that prosecution of the board of directors, officers and servants of the company is precluded unless the company itself is prosecuted. Chinnappa Reddy J. made the following observations in the said decision in support of the said conclusion (at page 1825) :

'Any one or more or all of them may be prosecuted and punished. The company alone may be prosecuted. The person-in-charge only may be prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the person-in-charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. Section 10 indicates the persons who may be prosecuted where the contravention is made by the company. It does not lay down any condition that the person-in charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the company.'

13. In view of the clear exposition of law, as quoted above, the law stands settled that prosecution proceedings against the person-in-charge or the officer are maintainable in spite of the company not being proceeded against as an accused.

14. The decision of the Calcutta High Court in Ram Briksh v. State of West Bengal [1983] CrL. LJ 39, holding a contrary view regarding Section 10 of the Essential Commodities Act cannot be regarded as correct in the light of the Supreme Court decision in Sheoratan Agarwal v. State of Madhya Pradesh, AIR 1984 SC 1824.

15. For the aforesaid reasons, the petitioner cannot succeed and consequently the criminal miscellaneous case is dismissed.

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