



2023 PLRonline 0105 (Kar.)

HIGH COURT OF KERALA AT ERNAKULAM

Before: Mr. Justice a. Badharudeen

P.I.MOIDEEN KUTTY v. ABDUL RASHEED V

CRL.REV.PET NO. 39 OF 2016

10th July 2023

Negotiable Instruments Act, 1881 S. 138 - Complaint filed against a partner without arraying the firm as an accused would not sustain - Since the cheque was one belonged to the firm, the complainant should have arrayed the firm as an accused and the directors, if any, by disclosing their complicity in detail so as to warrant conviction and sentence provided under Section 138 of the N.I. Act. [Para 17]

BY ADVS. SRI.AVM.SALAHUDIN,
SMT.A.D.DIVYA , SMT.EMIL STANLEY , BY
ADV SRI.BABU S. NAIR, SR PP - P G MANU

ORDER

A. Badharudeen - (10.07.2023) - This revision petition has been filed under Sections 397 and 401 of Code of Criminal Procedure (hereinafter referred as Cr.P.C. for convenience). The revision petitioner is the sole accused in C.C.No.128/2008 on the files of the Judicial First Class Magistrate Court, Malappuram and the appellant in Crl.A.No.119/2011 on the files of the Special Court for SC/ST (POA) Act Cases, Manjeri. The respondents herein are the original complainant as well as State of Kerala.

2. I would like to refer the parties in this

revision petition as 'accused' and 'complainant', for convenience.

3. Heard both sides.

4. In this matter, prosecution case runs on the premise that a cheque for Rs.5,00,000/- issued by the accused in favour of the complainant got dishonored for want of funds, when the same was presented for collection. Soon after the dishonor, legal notice was issued demanding the said amount. Since the amount was not paid, the complainant launched prosecution against the accused alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred as N.I.Act for convenience).

5. The trial court secured the presence of accused and complainant for trial and finally tried the matter. During trial, PWs 1 and 2 were examined and Exts.P1 to P7 marked on the side of the complainant.

6. Although opportunity was given to the accused to adduce defence evidence after questioning the accused under Section 313(1)(b) of the Cr.P.C., no witnesses examined and Exhibits marked on the side of the defence.

7. On appreciation of evidence, the learned Magistrate found that the accused committed the offence punishable under Section 138 of the N.I. Act and accordingly, the accused was sentenced to undergo simple imprisonment for a period of four months and to pay fine of Rs.5,00,000/-. The amount of fine was ordered to be paid as compensation to the complainant. In default of payment of fine, simple imprisonment for two months also was imposed.

8. When the matter was taken in appeal, the learned Special Judge confirmed the conviction as well as the sentence imposed

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by the trial court.

9. While impeaching the veracity of the concurrent verdicts, a pertinent legal question being argued by the learned counsel for the accused/revision petitioner. It is submitted that Ext.P1 cheque in this matter is a cheque in the name of "Thennala Enterprise", a partnership firm and the cheque was signed by the Managing partner. Therefore, in order to succeed a prosecution under Section 138 of the N.I. Act, the firm must be arrayed as a party and otherwise the entire prosecution is vitiated. In this connection, the learned counsel for the accused/revision petitioner pointed out Section 141 of the N.I. Act and relevant citations on this point. It is submitted that this Court has considered this legal question in a decision reported in **Babu v. State of Kerala [2017 (4) KLT SN 33 (C.No.34)]** and held as under:

"If the person committing the offence is a firm, the firm as well as the categories of persons in charge and responsible for the conduct of the business of the firm shall be deemed to be guilty of the offence under S.138 of the Act. It is only because of the deeming provision that the vicarious liability is fixed on the company as well as the persons in charge and responsible for the conduct of the company. In view of the legal fiction brought in under S.141 of the Act, it has to be held that if a firm commits the offence under S.138 of the Act, the firm as well as the persons referred to in S.141 shall be deemed to be guilty of the offence. Therefore, for maintaining the prosecution under S.141 of the Act, the arraigning of the firm as an accused is imperative."

10. The decision of the Apex Court reported in **Aneeta Hada and Others v. M/s. Godfather Travels and Tours Pvt.Ltd and Another** [2012 KHC 4244 : 2012 (2) KLD 16 : 2012 (2) KHC SN 36 : 2012 (4) SCALE 644 : 2012 (2) KLJ 456 : 2012 (2) KLT

736 : 2012 (5) SCC 661 : AIR 2012 SC 2795 : 2012 CriLJ 2525] also has been placed to substantiate the said contention. In the said decision, the Apex Court held as under:

"Facts of the case

Appellant, an authorised signatory of a Company issued a cheque in favour of the respondent. The cheque was dishonoured. Respondent filed a complaint under S.138 of the Negotiable Instruments Act. In the said complaint, the Company was arraigned as an accused. The learned Magistrate took cognizance of the offence against the accused/appellant under S.138 of the Negotiable Instruments Act. Appellant filed a petition under S.482 of the Criminal Procedure Code for quashing the prosecution. High Court dismissed the petition. An appeal was preferred to the Supreme Court wherein there arose difference of opinion between two Judges of the Supreme Court on interpretation of S.138 and S.141 of the Negotiable Instruments Act. Hon'ble Mr. Justice S. B. Sinha held that prosecution of the Company is a sine qua non for prosecution of other persons. However, Hon'ble Mr. Justice V. S. Sirpurkar opined that even if liability against the appellants is vicarious, non-arraigning of the Company would be of no consequence. Therefore the matter was referred to a Bench of three Judges.

Answering the reference, the Court held:

We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this backdrop, S.141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons

in charge as well as the company would be deemed to be liable for the offences under S.138. Thus, the statutory intendment is absolutely plain. It is to be borne in mind that S.141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in S.141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under S.141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C. V. Parekh (supra) which is a three- Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove."

11. In order to appraise the contention, I have perused the copy of Ext.P1 cheque. The same would go to show that the cheque was issued for and on behalf of "Thennala Enterprise" by the Managing Partner. On perusal of the copy of the complaint, it could be gathered that one P.I.Moitheenkutty alone is arrayed as the accused and the firm is not arrayed as an

accused.

12. Section 141 of the N.I. Act deals with offences by companies and it has been provided as under:

"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:

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.

(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.*

(1) 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."

13. The explanation to Section 141 of the N.I. Act provides that for the purpose of this Section, "company" means any body corporate and includes a firm or other association of Individuals; and "director", in relation to a firm, means a partner in the firm. Therefore, "Thennala Enterprise" a partnership firm come within the definition of Company as defined under Section 141 of the N.I. Act, shall be deemed to be guilty of the offence and shall be liable to be proceeded and punished accordingly. In the decision reported in **Pawan Kumar Goel v. State of Uttar Pradesh** [2022 (7) KHC 377 : 2022 KHC OnLine 7209 : 2022 SCC OnLine SC 1598 : AIROnLine 2022 SC 904 : 2022 (6) KLT SN 39 : 2022 (6) KLT OnLine 1016] the Apex Court considered the impact of Sections 138 and 141 of the N.I. Act by considering four questions and answering the same.

14. The first question was; whether Company can be impleaded as an accused in a prosecution under Section 138 of the N.I. Act subsequently? The second question was; if complainant fails to make specific averments against company in the complaint alleging commission of an offence under Section 138 of the N.I. Act, can the same be rectified by taking recourse to general principles of criminal jurisprudence? Thirdly, whether it is necessary to array the company as an accused in a prosecution under Section 138 of the N.I. Act? And the fourth question was; whether the director of a

company can be proceeded under Section 138 of the N.I. Act, without there being any averments in the complaint that the director arrayed as an accused who was in charge of and responsible for the conduct and business of the company during the relevant time?

15. While answering the above questions, the Apex Court held that the company cannot be impleaded as an additional accused subsequent to the filing of the complaint, once limitation prescribed for taking cognizance of the offence under Section 142 has expired. Similarly, it has been held that if the complainant fails to make specific averments against the company in the complaint alleging commission of offence punishable under Section 138 of the N.I. Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. It has been held further that unless the company or firm has committed an offence punishable under Section 138 of the N.I. Act as a principal accused, persons mentioned in sub-section (1) and (2) of Section 141 of the N.I. Act would not be liable to be convicted on the basis of the principles of vicarious liability. Further, it has been held that in a prosecution alleging commission of offence punishable under Section 138 of the N.I. Act, the director of a company would not be liable to be proceeded without there being any averments in the complaint that the director arrayed as an accused was in charge of and responsible for the conduct and business of the company.

16. On evaluation of the legal position, the present complaint filed by the complainant against the accused/revision petitioner without arraying the firm as an accused would not sustain. Since the cheque was one belonged to the firm, the complainant should have arrayed the firm as an

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accused and the directors, if any, by disclosing their complicity in detail so as to warrant conviction and sentence provided under Section 138 of the N.I. Act.

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17. In view of the matter, the contentions raised by the learned counsel for the accused/revision petitioner appears to be convincing. Therefore, without adverting to the other contentions, I am inclined to hold that the entire prosecution is vitiated. Accordingly, the concurrent finding of conviction as well as the sentence imposed by the trial court as well as the Appellate Court are found to be unsustainable and the same are liable to be set aside.

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18. In the result, the revision succeeds and the same stands allowed. Consequently, the concurrent finding of conviction and sentence imposed by the trial court as well as the Appellate Court stand set aside. The accused/revision petitioner stands acquitted and he is set at liberty forthwith. His bail bond, if any, shall stand cancelled.

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