



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 2ND DAY OF AUGUST 2023 / 11TH SRAVANA, 1945

CRL.REV.PET NO. 664 OF 2016

AGAINST THE JUDGMENT DATED 29.02.2016 IN CRL.APPEAL NO.436/2012
PASSED BY THE IV ADDITIONAL SESSIONS JUDGE, THRISSUR, CONFIRMING
THE JUDGMENT DATED 13.07.2011 IN C.C.NO.511/2010 DISPOSED BY THE
JUDICIAL FIRST CLASS MAGISTRATE, KODUNGALLUR

REVISION PETITIONER/APPELLANT/ACCUSED:

BINU
AGED 40 YEARS, S/O.CHANDRAN, MALA DESOM,
ALATHOOR VILLAGE, MUKUNDAPURAM TALUK,
MANAGING PARTNER - GANGA MARBLES
BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY

RESPONDENTS/COMPLAINANT/STATE:

- 1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682031
- 2 SUGAMYA CHITS (P) LTD.
POONITHURA DESOM, KANAYANNUR TALUK,
REPRESENTED BY ITS MANAGING DIRECTOR,
CHINNAPPAN, S/O.PAILY, MANAKKAL HOUSE,
MADAPLATHURUTH DESOM, MOOTHAKUNNAM VILLAGE,
PARAVUR TALUK - 682513
BY ADVS.
SRI.SUNIL N.SHENOI
SRI.P.VISWANATHAN
PP - M P PRASANTH

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION
ON 02.08.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**"C.R"****ORDER****Dated this the 2nd day of August, 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.511/2010 on the files of the Judicial First Class Magistrate Court, Kodungallur and the appellant in Crl.A.No.439/2012 on the files of the Additional Sessions Judge-IV, Thrissur. 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.2,40,000/- dated 15.05.2010 issued by the accused in favour of the complainant got dishonored for the reason "exceeds arrangement", 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, PW1 was examined and Exts.P1 to P15 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 till rising of the Court and to pay fine of Rs.2,24,000/-. 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 by the trial court.

9. While assailing the veracity of the concurrent verdicts, the learned counsel for the accused/revision petitioner, submitted that Ext.P1 cheque in this matter is a cheque in the name of "Ganga Marbles and Granites", 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 submitted that this Court has considered this legal question as per the order in Crl.R.P. No.39/2016 dated 10.07.2023 reported in ***P.I. Moideen kutty v. Abdul Rasheed V. and Another [2023 ICO 894]*** and held as under:

"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 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.”*



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 gone through in ***P.I. Moideen kutty***'s case (supra). 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 "Ganga Marbles and Granites" by the Managing Partner. On perusal of the copy of the complaint, it could be gathered that one Mr. Binu 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, "Ganga Marbles and Granites" 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. However, the learned counsel for the complainant/2nd respondent would urge that, even though the debate on Section 141 of the N.I. Act is never ending as found by the Apex Court, when the cheque of a firm was issued purely for a personal transaction, there is no need to consider the said complaint under Section 141 of the N.I. Act. It is also submitted by the learned counsel for the complainant that in the decision reported in ***S.P. Mani and Mohan Dairy v. Dr. Snehalatha Elangovan [2022 (6)***



KHC 215], the Apex Court enumerated the principles governing vicarious liability and also considered the failure on the part of the accused to sent reply notice. The learned counsel for the complainant read paragraph No.44 of the decision and the same is extracted hereunder:

"Held: The person concerned is expected to clarify his or her stance. If the person concerned has some unimpeachable and incontrovertible material to establish that he or she has no role to play in the affairs of the company/firm, then such material should be highlighted in the reply to the notice as a foundation. If any such foundation is laid, the picture would be more clear before the eyes of the complainant. The complainant would come to know as to why the person to whom he has issued notice says that he is not responsible for the dishonour of the cheque. Had the respondent herein given appropriate reply highlighting whatever she has sought to highlight before us then probably the complainant would have undertaken further enquiry and would have tried to find out what was the legal status of the firm on the date of the commission of the offence and what was the status of the respondent in the firm. The object of notice before the filing of the complaint is not just to give a chance to the drawer of the cheque to rectify his omission to make his stance clear so far as his



liability under S.138 of the NI Act is concerned. Once the necessary averments are made in the statutory notice issued by the complainant in regard to the vicarious liability of the partners and upon receipt of such notice, if the partner keeps quiet and does not say anything in reply to the same, then the complainant has all the reasons to believe that what he has stated in the notice has been accepted by the noticee. In such circumstances what more is expected of the complainant to say in the complaint"

16. In **S.P. Mani and Mohan Dairy's** case (supra), the Apex Court enunciated the principles regarding vicarious liability of a company within the ambit of Section 141 of the N.I. Act, when dealing with challenge against quashment of a complaint by the High Court merely on the ground that there was nothing to show in what manner the accused in the said case was at the relevant point of time in charge and responsible for the conduct of the business of the firm. After analyzing the principles, the Apex Court set aside the quashment and it has been held that while considering quashment of a complaint, the Court concerned would owe a duty to look into what has been stated in the complaint and after construing the correctness of the allegations made



therein liberally in favour of the complainant and the ingredients of the offence are altogether lacking, then quashment can be resorted to otherwise quashment cannot be.

17. In the present case, the trial court tried a case against the accused where the cheque belongs to a firm. In fact, in the present case, the firm Ganga Marbles and Granites, should have been arrayed as an accused as the principal offender and then the accused/revision petitioner herein should have been arrayed as the offender under principles of vicarious liability to succeed a prosecution. Since no such complaint lodged following the ratio discussed in the decision reported in **P.I. Moideen kutty's** case (supra) and other decisions of the Apex Court, the contention raised by the learned counsel for the accused/revision petitioner appears to be convincing.

18. 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.

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 canceled.

Sd/-

**A. BADHARUDEEN
JUDGE**

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