Sunny V.L. Vs A.P. Venugopal and Others

Court: High Court Of Kerala

Date of Decision: Oct. 29, 2008

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 378(4), 482
Negotiable Instruments Act, 1881 (NI) â€" Section 138, 141, 141(2)

Citation: (2008) 4 ILR (Ker) 589 : (2008) 3 KLJ 751 : (2008) 4 KLT 811

Hon'ble Judges: R. Basant, J

Bench: Single Bench

Advocate: K.B. Mohandas, for the Appellant; Gikku Jacob (PP), for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

R. Basant, J.
Does the mere fact that an indictee is a Director of a Company attract culpability u/s 138 read with 141 of the Negotiable

Instruments Act (for short the Act)? On whom does the burden lie to prove that such indictee director was (or was not) in charge of and

responsible to the company for the conduct of its affairs? Does N. Rangachari Vs. Bharat Sanchar Nigam Ltd., lay down a proposition that at the

stage of evidence/trial, it must be presumed that every director is in charge of and responsible to the company for the conduct of its affairs? These

interesting questions are raised in this case. This application for leave u/s 378(4) Cr.P.C. is to prefer an appeal against a judgment of acquittal in a

prosecution u/s 138 of the Negotiable Instruments Act.

2. The petitioner herein filed a complaint alleging commission of offences u/s 138 read with 141 of the Negotiable instruments Act, Altogether there

were nine accused persons. First accused is a company. Second accused is the Managing Director of the Company. Accused 3 to 8 are the

directors of the company. Accused 9 is the Manager of the Company. Accused 2 and 9 have allegedly signed the cheque in question on behalf of

the first accused. Accused No. 8 had expired and the allegations against him had abated. Accused 3 to 7 alone were available for trial. The only

allegation against them is that they were the directors of the company and that they were in charge of and responsible to the company for the

conduct of its affairs. Accused 3 to 7 denied the offences alleged against them. Accused 1, 2 and 9 were not available for trial. The complainant

examined PW1 and proved Exts.P1 to P11. The accused examined DWs 1 to 7 and proved Exts. D1 to D11. The learned Magistrate, on an

anxious consideration of all the relevant inputs, entered the verdict of not guilty in favour of accused 3 to 7 and acquitted them. The relevant

discussion appears in paragraph 8 under point No. 3. The question whether accused 3 to 7 were in charge of and responsible to the first accused

for the conduct of business were considered. I extract below paragraph 8 in which the crucial findings appear. The discussion is of course

continued in paragraph 9 and 10 also and it is finally answered that Accused 3 to 7 were not in charge of and responsible to the company for the

conduct of its affairs at the relevant time. Paragraph 8 reads as follows:

8. Point No. 3: The only averment in the affidavit is that A3 to A8 were directors, and A2 was the Managing Director and A9 was the Manager of

the 1st accused during alleged period. According to PW1, A2 and A9 are the signatories to Ext.P1. To fix vicarious liability on A3 to A7 there

should be clear evidence either oral or documentary, that A3 to A7 were incharge of and responsible for the conduct of the business of the

company at the relevant time. Mere averment in the complaint is not enough to satisfy this requirement of Sec. 141. There should be evidence also

to that effect. Neither any oral evidence nor any documentary evidence was adduced by PW1. Merely being a Director of a company one cannot

be held liable under Sec. 141.

3. The learned counsel for the petitioner prays that leave may be granted u/s 378(4) Cr.P.C. to appeal against the impugned judgment. The learned

counsel contends that there were specific averments in the complaint that Accused 3 to 7 were in charge of and responsible to the company for the

conduct of its affairs. Such specific allegations having been raised (notwithstanding the fact that no specific evidence was tendered to substantiate

the contention that they were not only directors of the company; but were also in such a capacity in charge of and responsible to the company for

the conduct of its affairs) the acquittal is bad for the reason that Accused 3 to 7 have not shown that they were not in charge of and responsible to

the company for the conduct of its affairs, contends the learned counsel for the petitioner. The learned counsel for the petitioner relies on the

decision of the Supreme Court in Rangachari (Supra).

4. Coming to facts first, it is not disputed that no specific material has been placed before court by the complainant to show that Accused 3 to 7

were in charge of and responsible to the company for the conduct of its affairs. As noted by the learned Magistrate, there is not even an assertion

in the chief affidavit that they were in charge of and responsible to the company for the conduct of its affairs. In S.M.S. Pharmaceuticals Ltd. Vs.

Neeta Bhalla and Another, the three judges Bench of the Supreme Court has very clearly held-going by the eloquent language of Section 141 of

the N.I. Act, that the mere fact that a person is director of a company will not attract culpable liability and it must be shown that such person is not

only a director of the company but is at the relevant time in charge of and responsible to the company for the conduct of its affairs. A reading of

Section 141 of the N.I. Act can leave absolutely no doubt on this aspect. I extract the same below:

S. 141: Offences by companies:- (1) If the person committing an offence u/s 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.

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.

(emphasis supplied)

5. A conjoint reading of sub sections (1) and (2) must leave no doubt in the mind that merely being a director does not attract culpable liability. To

attract culpability such director must either be in charge of and responsible to the company for the conduct of its affairs or the offence must be

proved to have been committed with the consent or connivance by such director or the same must be attributable to his neglect. If there can be a

fiction that every director must be deemed to be in charge of and responsible to the company for the conduct of its affairs then sub section (2)

would become incongruent arid superfluous. In S.M.S. Pharmaceuticals (Supra) the three judges Bench addressed itself to 3 specific issues. The

second issue posed is vitally relevant to us. I extract the relevant question here which appears in paragraph 1(b).

1. This matter arises from a reference made by a two Judge Bench of this Court for determination of the following questions by a larger Bench:

(a) ....

(b) Whether a director of a company would be deemed to be in charge of and responsible to, the company for conduct of the business of the

company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) ....

After elaborate discussions, the Bench settled the controversy and answered the issue thus in paragraph 10.

10. In view of the above discussions, our answers to the questions in the Reference are as under:

(a) ....

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person

liable u/s 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its

business. The requirements of S. 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the

business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) ....

6. The decision in Rangachari - (Supra) also unambiguously accepts the dictum in SMS Pharmaceuticals (Supra) and proceeds to observe as

follows in paragraph 13.

But as has already been noticed, the decision in S.M.S. Pharmaceuticals Ltd. (Supra) binding on us, has postulated that a director in a company

cannot be deemed to be in charge of and responsible to the company for the conduct of his business in the context of S. 141 of the Act. Bound as

we are by that decision, no further discussion on this aspect appears to be warranted.

(emphasis supplied)

7. The learned counsel for the petitioner contends relying on the following observations in paragraph 19 of Rangachari (Supra) that once it is

shown that a person is director of the company at the relevant point of time, the burden is on him at the stage of trial to show that he was not in

charge of and responsible to the company for the conduct of its affairs. I extract paragraph 19 below:

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 S.

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 S. 138 being satisfied, the burden is on the Board of Directors or the Officers"" in charge

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 in charge 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.

(emphasis supplied)

8. These observations above in the light of the decision of the larger Bench in S.M.S. Pharmaceuticals (Supra) which has been unambiguously

accepted and declared as the law on the point by their lordships in Rangachari (Supra) cannot in anyway help the petitioner to contend that the

mere fact that a person is a director of the company in the absence of explanation from him would attract culpability u/s 138 read with 141 of the

Negotiable Instruments Act. In the total absence of any evidence specifically to show that accused 3 to 7 were in charge of and responsible to the

company for the conduct of its affairs or that the offence was committed with their consent or connivance or is attributable to their negligence the

mere fact that averments to that effect have been raised in the complaint and accused 3 to 7 have not shown in evidence that they are not in charge

of and responsible to the company for the conduct of its affairs will not absolve the petitioner/complainant of his obligation to prove the crucial

requirement. The challenge raised against the verdict of not guilty and acquittal is thus found to be without any merit.

9. I am unable to understand the observations in Rangachari (Supra) which I have specifically extracted above to mean that in every prosecution

u/s 138 read with 141 of the Negotiable Instruments Act it is sufficient to establish merely that the indictee was a Director of the Company and the

burden would then shift to such indictee to prove that he was not. Such a conclusion appears to be impermissible going by the language of S. 141

of the Act and the unequivocal declaration of the law in S.M.S. Pharmaceuticals (Supra) which is unambiguously accepted in Rangachari (Supra)

also. In Rangachari (Supra) the question that arose was only whether the complaint deserves to be quashed at the threshold in the light of the larger

Bench decision in S.M.S. Pharmaceuticals (Supra). Their Lordships held that the complaint was not liable to be quashed. The averments in the

complaint are not extracted in Rangachari (Supra). I must assume, in the light of the observations extracted above, that on facts the play of S.

141(2) must have arisen for decision in that case and it is hence that their lordships observed that on proof of the ingredients the burden would shift

to such indictee director. I am unable to accept the contentions of the learned counsel for the petitioner that Rangachari (Supra) lays down a

proposition - contrary to S.M.S. Pharmaceuticals (Supra), that at the stage of evidence (unlike at the stage of cognizance at the threshold) it will

have to be assumed and presumed that every director of a company is in charge of and responsible to it for the conduct of its affairs and the

burden rests on the shoulders of such directors to prove that he is not. Rangachari (Supra) does not and cannot lay down such a proposition at all.

It is impermissible to assume that such a presumption which is held to be unavailable at the threshold while taking cognizance would emerge later at

the stage of adjudication of guilt. Rangachari (Supra) does not say so nor is it permissible to assume that it says so in the light of the unequivocal

pronouncement of the larger Bench in S.M.S. Pharmaceuticals (Supra).

10. In a case where leave to appeal is sought, the chances of success in the appeal is certainly a relevant factor which should persuade the court to

take the decision as to whether leave can or need not be granted. In the state of the law as seen from S.M.S. Pharmaceuticals (Supra) and

Rangachari (Supra), I am of the opinion that the chances of success of the challenge raised is virtually non-existent and hence no leave deserves to

be granted.

11. The learned counsel for the petitioner submits that it may be clarified that no observations made in the impugned judgment should weigh with

the court if and when accused 1, 2 and 9 are ultimately apprehended and proceeded against. Needless to say, the charge against them must be

answered on the basis of the materials that will be placed in evidence in such proceedings and no observations in the impugned judgment shall

weigh with the court while considering the charge against accused 1, 2 and 9. Leave need not hence be granted to enable the petitioner to

challenge certain other observations/ findings as the acquittal of the respondents/accused can be sustained solely on the basis of the findings in

paragraph 8, 9 and 10 of the impugned judgment. I make it clear that the acquittal of accused 3 to 7 is being upheld only on those reasons and

other findings shall not bind the petitioner later when accused 1, 2 and 9 are brought to trial. Even assuming that the company (A1) is liable the

acquittal of accused 3 to 7 is absolutely justified and hence leave does not deserve to be granted. With that clarification this application for leave to

appeal can be rejected. This application for leave is, in these circumstances, dismissed with the above observations.