

(2014) 10 KL CK 0296

High Court Of Kerala

Case No: Crl. MC. No. 3711 of 2012

Mohammedkutty

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Oct. 17, 2014

Acts Referred:

- Companies Act, 1956 - Section 2, 291, 5
- Copyright Act, 1957 - Section 63, 65, 68, 69
- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Drugs and Cosmetics Act, 1940 - Section 34
- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 14A
- Negotiable Instruments Act, 1881 (NI) - Section 141, 141(1), 141(2)
- Penal Code, 1860 (IPC) - Section 109, 120B, 34, 379, 417

Citation: (2014) 10 KL CK 0296

Hon'ble Judges: A. Hariprasad, J

Bench: Single Bench

Advocate: S. Rajeev and K.K. Dheerendrakrishnan, Advocate for the Appellant; Philip T. Varghese, Thomas T. Varghese, Achu Subhaabraham Advocates and N. Suresh, Public Prosecutor, Advocate for the Respondent

Judgement

@JUDGMENTTAG-ORDER

A. Hariprasad, J.

4th accused in C.C. No. 85 of 2006 pending before the Chief Judicial Magistrate Court, Ernakulam has approached this Court under Section 482 of the Code of Criminal Procedure (in short, "Cr.P.C.") with the following prayer:

"For these and other grounds to be raised at the time of hearing it is most humbly prayed that this Hon'ble Court may be pleased to quash all further proceedings in CC No. 85/2006 pending on the file of the Chief Judicial Magistrate Court, Ernakulam, as it is an

abuse of process of court."

2. Averments, in brief, are as follows: Petitioner is the Chairman of M/s. Kairali TV, a unit of M/s. Malayalam Communications Limited, incorporated under the provisions of the Companies Act, 1956. Annexure-I is the complaint. The original complainant died pending the proceedings. His son is continuing the prosecution. It is alleged in the complaint that the original complainant was the proprietor of M/s. Vinodh Movies, a concern engaged in the production and distribution of feature films in various languages. Original complainant was the producer, negative right holder and original copy right owner of various rights of the Malayalam feature film by name, "Thekkekara Super Fast". The original complainant purchased the title of the film by a valid assignment. Thereafter, the original complainant assigned exclusive copy right in respect of world satellite television broadcast, direct satellite broadcast, terrestrial televisions broadcast, etc. to M/s. Gee Bee Videos, Flat No. B/I C, Garden Court Apartments, Alinchuvadu, Palarivattom, Kochi-24 for valid consideration. The original complainant saw an advertisement in the 3rd accused channel regarding the telecasting of the film "Thekkekara Super Fast" on 14.04.2005, Vishu day. Immediately, he contacted the assignee of the satellite channel rights, M/s. Gee Bee Videos and enquired about the matter. It was informed that they did not sell the rights to any of the accused. The original complainant immediately contacted accused 2, 4 and 5 and informed the true facts. They were requested not to telecast the said film through 3rd accused channel. But, they in utter disregard to the request of the original complainant, telecasted the film. It is also alleged in the complaint that the accused have created false documents and, therefore, they are liable under various provisions of the Indian Penal Code. Accused persons, including the petitioner, have violated the provisions of the Copyright Act, 1957. Hence, they are liable to be prosecuted under Sections 109, 465, 468, 471, 474, 417, 420, 379 and 120B read with Section 34 of the Indian Penal Code and under Sections 63, 65, 68 and 69 of the Copyright Act.

3. Heard the learned counsel for the petitioner and the learned counsel for the complainant. Learned Public Prosecutor is also heard.

4. Learned counsel for the petitioner submitted that the entire allegations in the complaint, even if accepted as correct, would not show that the petitioner was in-charge of and was responsible for the conduct of business of the company. Further, there is no averment in the complaint that the petitioner was responsible for falsely creating any document. Hence, the prosecution against the petitioner is an abuse of the process of the court.

5. Per contra, learned counsel for the complainant submitted that the petitioner is coming up for the second time before this Court for the same relief under Section 482 Cr.P.C. In the first round of litigation, it was reported before this Court that the original complainant died. Considering that fact, the petition was not entertained on merit. Of course, there is a mistake crept in the earlier order, wherein it is observed that CrI. M.C. was abated. Learned counsel for the petitioner submitted that since the original complainant died during the pendency of CrI. M.C. No. 2060 of 2006 before this Court and it was not known

to them whether his successor would take forward the complaint, they could not appear before the court below and do the needful. It is also submitted that the earlier observation by this Court will not take away the legal right of the accused persons to approach this Court, if the complaint is continued in accordance with law.

6. Learned counsel for the complainant relied on paragraphs 2 and 5 of the complaint to contend that the role of the petitioner has been specifically mentioned therein and he cannot claim any relief stating that he is not in-charge of and is responsible for the conduct of business of the company. In paragraph 2, it is mentioned that the 1st accused channel is under the management, control and supervision of accused 2 and 4. It is also mentioned in paragraph 2 that the 5th accused is the Programme Coordinator of the 3rd accused channel, who is responsible for the selection and telecast of various programmes through the said channel. In paragraph 5 of the complaint, it is mentioned that the original complainant contacted accused 2, 4 and 5 and requested not to telecast the film. For these reasons, it is contended by the learned counsel for the complainant that the petitioner was fully aware of the rights of the complainant and disregarding his request, the film was telecasted.

7. In answer to this argument, learned counsel for the petitioner relied on the provisions in Section 69 of the Copyright Act. It reads as follows:

"Offences by companies.- (1) Where any offence under this Act has been committed by 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 such 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 any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company, and it is proved that the offence was committed with the consent or connivance of, or is attributable to any negligence 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 persons; and

(b) "director" in relation to a firm means a partner in the firm."

It is clearly mentioned in the above Section that when the offender is a company, every person, who at the time the offence was committed was in-charge of and was responsible for the conduct of business of the company as well as the company shall be deemed to be guilty of such offence. Similar expression can be seen in Section 141 of the Negotiable Instruments Act, Section 34 of the Drugs and Cosmetics Act, 1940 and Section 14A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, etc. The Supreme Court in [S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another](#), had occasion to consider the liability of a Director of an accused company. The Apex Court therein held as follows:

"The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent 1 herein was a party to a purported resolution dated 15-2-1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day-to-day affairs of the Company and, thus, are not responsible for the conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was in charge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefor must be satisfied."

This decision was followed by the Supreme Court in [National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another](#), . The dictum reads as follows:

"A company, though a legal entity, can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in-charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other Directors are concerned, they can be prosecuted only if they were in-charge of and responsible for the conduct of the business of the company. A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in clauses 24, 26, 30, 31 and 45 of Section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company: (a) the Managing Director/s; (b) the whole-time Director/s; (c) the Manager; (d) the Secretary; (e) any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; (f) any person charged by the Board of Directors with the responsibility of complying with that provision; Provided that the person so charged has given his consent in this behalf to the Board; (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors: Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form. But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for

the conduct of the business of the company" then merely by stating that "he was in-charge of the business of the company" or by stating that "he was in-charge of the day-to-day management of the company" or by stating that "he was in-charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act. From the above discussion, the following principles emerge: (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction. (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company. (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with. (iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred. (v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with. (vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint. (vii) 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."

The decision reported in [Paresh P. Rajda Vs. State of Maharashtra and Another](#), is also relevant in this context. The dictum reads as follows:

"It is necessary to specifically aver in a complaint under S. 141 that at the time offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averments is an essential requirement of S. 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of S. 141 cannot be said to be satisfied."

8. Learned counsel for the petitioner submitted that there is no averment in the complaint that the petitioner was in-charge of and was responsible to the company for the conduct of the business. Further, there is no allegation that the petitioner was responsible for the alleged creation of false documents. In the absence of any such averment, the petitioner

cannot be legally implicated in the case. Reliance is placed on the decision of the Supreme Court in [State of Haryana and others Vs. Ch. Bhajan Lal and others](#), to contend a proposition that this Court under Section 482 Cr.P.C. shall terminate a criminal prosecution, if it is found to be an abuse of the process of court.

9. Considering the entire facts and circumstances of the case, I find that the averments in the complaint are highly insufficient to rope in the petitioner in the alleged offence. The case may be different in respect of other accused, who are legally presumed to be in charge of and responsible to the company for the conduct of business of the company. I find that the prosecution against the petitioner is legally unsustainable.

In the result, the petition is allowed. The complaint in C.C. No. 85 of 2006 on the file of Chief Judicial Magistrate Court, Ernakulam, insofar as the petitioner is concerned, is hereby quashed.

All pending interlocutory applications will stand dismissed.