
Shankar Menon Vs State of West Bengal

C.R.R. 1940 of 2010

Court: Calcutta High Court

Date of Decision: July 14, 2011

Acts Referred:

Companies Act, 1956 " Section 141(1), 141(2), 2(24), 5#Negotiable Instruments Act, 1881 (NI) " Section 138, 141

Citation: (2012) CriLJ 104 : (2012) 3 RCR(Civil) 571

Hon'ble Judges: Kanchan Chakraborty, J

Bench: Single Bench

Advocate: Subhamoy Bhattacharjee, Mrs. Basabdupta Pal, for the Appellant; Ayan Bhattacharya, A.K. Chanbey and M. Saha, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Kanchan Chakraborty, J.

All the revision applications mentioned in this caption above are directed against proceedings u/s 138 of

Negotiable Instruments Act initiated by the opposite party No. 2 M/s. Prithvi Energy Ltd. and M/s. Garkot (India) Pvt. Ltd. wherein the petitioner

has been made accused No. 5. Since all the proceedings are identical and same legal issue arises, they are being disposed of by this common

judgment.

2. A short but important question as to whether the petitioner, being a Director of a company simpliciter, can be prosecuted for committing an

offence u/s 138 read with Section 141 of the Negotiable Instruments Act, has been raised in these revision applications.

3. The Director Shankar Menon (shown as accused No. 5) claimed that he was not vicariously liable for act of the principle offender i.e., the

company M/s. Carritt Moran Company (P. Ltd.) for commission of alleged offence u/s 138 read with Section 141 of the Negotiable Instruments

Act. He has prayed for quashing of the proceedings initiated against him by the opposite party No. 2 M/s. Prithvi Energy Ltd. and M/s. Garkot

(India) Pvt. Ltd. against M/s. Carritt Moran Company (P. Ltd.) together with five others including himself.

4. Reference to the factual aspects, in details, is not required to be given as the specific question of law has been raised at the Bar is what would be

the necessary averment one must make in a petition of complaint to fasten a director of a private ltd. company besides the company, Managing

Director and others in view of Section 141 of the Negotiable Instruments Act (hereinafter referred to as the Act).

5. The specific averment made in the petitions of complaint against the present petitioner Shankar Menon goes like this -

That the accused No. 1 is a private limited company and incorporated under the provisions of the Companies Act, 1956 and the accused Nos. 2

& 3 are the Managing Directors of the accused No. 1 and the accused Nos. 4, 5 & 6 are the directors of the accused No. 1 and the accused

Nos. 2 to 6 are controlling the day to day affairs of the business of the accused No. 1 and also liable for the affairs of the accused No. 1 at the

relevant point of time the offence for which the present complaint is being filed.

6. The question is whether the averments mentioned above in the petitions of complaint fulfill the requirements of Section 141 of the Act or not.

7. The following decisions of the Hon"ble Apex Court have been referred to from the Bar:-

i) S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another,

ii) K.K. Ahuja Vs. V.K. Vora and Another,

iii) Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others,

iv) N. Rangachari v. BSNL - 2007 (2) E Cr. Notes 568.

v) National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another,

vi) S. M. S. Pharmaceuticals Limited (2) - 2007 (2) Supreme 459.

8. Mr. Ayan Bhattacharya, learned Counsel appearing for the opposite party has also referred to a decision of this Court in Manoj Jalan v. State

of West Bengal and Anr. - E. Cr. N 2010(1) (Cal) 38.

9. This Court also has ventured to look at the following decisions of the Hon"ble Apex Court :-

a) Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another,

b) Rajesh Bajaj Vs. State NCT of Delhi and Others,

c) S.V. Muzumdar and Others Vs. Gujarat State Fertilizer Co. Ltd. and Another,

d) Paresh P. Rajda Vs. State of Maharashtra and Another,

10. Mr. Subhamoy Bhattacharjee, learned Counsel on behalf of the petitioner contended that true it is the proposition of law enunciated in S.M.S.

Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, has not been declared per incuriam but that view has undergone a change altogether in

subsequent decisions, such as, Ram Raj Singh v. State of M. P. and Anr. - 2009 (3) SCC (Cri) 23 : (AIR 2009 SC (Supp) 1726), N.K. Wahi

Vs. Shekhar Singh and Others, Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, , K.K. Ahuja Vs. V.K. Vora and Another, and

lastly, in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, . He contended further that, no doubt, there should be

specific averment in the petition of complaint that the Director concerned is in charge and/ or responsible to the accused company for its day to

day business and/or affairs and he is enjoying the overall control over the management of the company, in view of Section 141 of the Act and as

viewed by the Apex Court in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, But, nowhere it has been discussed as to what would

be the extent of such an averment. In S.M.S. Pharmaceuticals Limited (First and Second) (supra), the Apex Court, however, has not laid down

that a stereo typed routine re-production of the language of the Section 141 of the Act is enough to fasten one director, for merely being a Director

of a Company. He contended that the question is set at rest in National Small Industries. Limited : (AIR 2010 SC 569) (supra) where the Hon"ble

Court held :

(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 the accused therein vicariously liable for offence committed by

the company along with averments in the petition containing that the 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 the accused is a Managing Director or a 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 the 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 the 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.

11. While dismissing the appeals the Hon"ble Court held :

In the light of the above discussion and legal principles, we are in agreement with the conclusion arrived at by the High Court and in the absence of

specific averment as to the role of the respondents and particularly in view of the acceptable materials that at the relevant time they were in no way

connected with the affairs of the Companies, we reject all the contentions raised by the learned Counsel for the appellants.

12. Mr. Ayan Bhattacharya, learned Counsel appearing on behalf of the opposite party/ de facto complainant contended that in Ram Raj Singh

(supra) it was not held that it has to be disclosed in the complaint as to how the Director is responsible for the conduct of the business of the

company or part played by him in the transaction.

13. Mr. Bhattacharya contended that in Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, the view of the Court in S.M.S.

Pharmaceuticals Limited (supra) was not disputed. Mr. Bhattacharya contended that the decision in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla

and Another, is the law laid down by the Hon"ble Apex Court in this regard.

14. In S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, it was held :

To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be sought

to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in

criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141

of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of section

141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the

Magistrate is satisfied that there are averments which bring the case within section 141, he would issue the process. We have seen that merely

being described as a Director in a company is not sufficient to satisfy the requirement of section 141. Even a non-Director can be liable u/s 141 of

the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which

is alleged against him. This will enable him to meet the case at the trial.

15. In second S.M.S. Pharmaceuticals Limited - 2007 (2) Supreme 459, the same principle has been reiterated and it was held :

Section 141 of the Act does not say that a Director of a company shall autocratically be vicariously liable for commission of an offence on behalf of

the company and what is necessary sufficient averment should be made to show that the person who is sought to be proceeded against on the

premise of his being vicariously liable for commission of an alleged offence by the company must be incharge and shall also be responsible to the

company in the conduct of its business. The decision in Saroj Kumar Poddar (supra) which is banked upon by the petitioner has been referred to

in second SMS case where in the same Hon"ble Judge who spoke in Saroj Kr. Poddar case wrote the following lines;

A faint suggestion was made that this Court in *Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another*, has laid down the law that the

complaint petition not only must contain averments satisfying the requirements of section 141 of the Act but must also show as to how and in what

manner the appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning. A

plain reading of the said judgment would show that no such general law was laid down therein. The observation that although no direct averment

was made as against the appellant of the said case fulfilling the requirements of section 141 of the Act, but there were other averments which would

show that the appellant therein was liable therefore.

16. In *N. Rangachari v. BSNL* 2007 (2) Law Herald SC 1379. The Apex Court observed :

A person normally having a business or commercial dealing with a company, would satisfy himself about its creditworthiness and reliability by

looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Articles of Association. Other

than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque

issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not

reasonable to expect him to know whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters

peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of cheque that is dishonoured can be expected to

allege is that the persons named in the complaint are in charge of its affairs. The Directors are *prima facie* in that position.

17. In *K. K. Ahuja v. V. K. Vora & Anr.* (supra) it was held :

The position u/s 141 of the Act can be summarised thus:

i) If the accused is the Managing Director or a Joint Managing Director it is not necessary to make an averment in the complaint that he is in charge

of, and is responsible to, the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was

the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear

that they were in charge of, and are responsible to, the company, for the conduct of the business of the company.

ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific

averment that he was in charge of, and was responsible to, the company, for the conduct of the business of the company or make any specific

allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would

give rise to responsibility under sub-section (2) of section 141.

iii) In the case of a Director Secretary or Manager (as defined in section 2 (24) of the Companies Act) or a person referred to in clauses (e) and

(f) of section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to, the company for the conduct of

the business of the company is necessary to bring the case u/s 141(1). No further averment would be necessary in the complaint, though some

particulars will be desirable. They can also be made liable u/s 141 (2) by making necessary averments relating to consent and connivance or

negligence in the complaint, to bring the matter under that sub-section.

iv) Other officers of a company can not be made liable under sub-section (1) of section 141. Other officers of a company can be made liable only

under sub section (2w) of section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and

dishonour of the cheque, disclosing consent, connivance or negligence.

17A. In S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, N. Rangachari as well as in K. K. Ahuja it has not been categorically held

that there has to be a specific averment as to how a particular director is responsible or of the exact role was played by him in the prosecution.

18. To appreciate Section 141 of the Act, it would be pertinent to set out the same. Section 141 of the act runs as follows :

141. Offences by companies.-(1) if the 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:

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.

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.

19. It is very clear from the provision u/s 141 of the Act that what is required is that the persons who are sought to be made vicariously liable for a

criminal offence u/s 138 read with 141 should be, at the time the offence was committed, was incharge of and was responsible to the company for

the conduct of the business of the company. Every person connected with the company does not fall within the ambit of the provision. The liability

arises from being in charged of and responsible for the conduct of the business of the company at the relevant time when the offence was

committed and not on the basis of merely holding a designation or office in a company.

20. In K. K. Ahuja (supra), the Hon"ble Apex Court taken into consideration the decision of S. M. S. Pharmaceuticals Ltd. (supra) and observed

that a mere reproduction of the wordings of section 141(1) in the complaint is not sufficient to make a person liable to face prosecution. Virtually

every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the

offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. That would be

absurd and not intended by the Act. The Hon"ble Court held further that a Deputy General Manager is not a person who is responsible to the

company for the conduct of the business of the company. He does not fall under any of the categories (a) to (g) listed in Section 5 of the

Companies Act. Therefore, the question whether he was in charge of the business of the company or not, is irrelevant. He cannot be made

vicariously liable u/s 141 (1) of the Act. If he has to be made liable u/s 141(2), the necessary averments relating to consent/connivance/negligence

should have been made. When no such averment is made, the Deputy General Manger could not be prosecuted either under sub-section (1) or

under sub-section (2) of Section 141 of the Act.

21. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not

sufficient to make a bald cursory statement in a complaint that a director (arrayed as an accused) is in-charge of and responsible to the company

for the conduct of the business of the company without anything more as to the role of the director. But the complaint should spell out as to how

and in what manner the petitioner was incharge of and was responsible to the accused company for the conduct of his business. This is in

consonance with strict interpretation of statute specially, where such statutes create vicarious liability.

22. In National Small Industries Limited: (AIR 2010 SC 569) (supra), the Hon"ble Court after discussing its earlier decisions on the point,

observed :

A company may have a number of directors and to make any or all the directors as accused in a complaint merely on the basis of a statement that

they are in charge of and responsible for the conduct of the business of the company without anything more is not sufficient or adequate fulfillment

of the requirements u/s 141.

23. It was held further :

In a catena of decisions, this Court has held that for making Directors liable for the offences committed by the company u/s 141 of the Act, there

must be specific averments against the Directors, showing as to how and in what manner the Directors were responsible for the conduct of the

business of the company.

24. It was held further :

In a subsequent decision in N. K. Wahi v. Sekher Singh while following the precedence of S.M.S. Pharmaceutical (one case), Sabitha

Rangamurti's case and Soroj Kumar Poddar's case this Court reiterate that for launching the prosecution against the alleged Directors, there must

be a specific allegation in the complaint as to the part played by them in the prosecution.

25. In K. K. Ahuja, the Hon"ble Court observed :

When condition-----which prescribed for extending such constructive criminal liability to others., the Court will insist upon strict literal

compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of Section

141 is imperative.

26. The Hon"ble Apex Court quoting that view in K. K. Ahuja observed in National Small Industries Limited (AIR 2010 SC 569) (supra) that

though the Court then said that an averment in the complaint that the accused is Director and in charge and responsible for the conduct of the

business may be sufficient but this would not take away the requirements that a overall reading of the complaint has to be made to see whether the

requirements of Section 141 have been made out against the accused Director or not. Further more, this decision can not be said to have

overruled the various decisions of this Court.

27. In National Small Industries Limited (AIR 2010 SC 569) (supra) the Hon"ble Court held :

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 u/s 141(1) of the Act. To put it clear that for making a person liable u/s 141(2), the

mechanical repetition of the requirements u/s 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.

28. In the instant cases, in fact and in substance, the reproduction of the language of Section 141 has been made in the petition of complaint in

paragraph 2 and thereby the defacto complaint wanted to fasten all the Directors even the petitioner herein who is a man of Bangalore, for the

alleged offence u/s 138 read with Section 141 of the Act. The averment in paragraph 2 in the petition of complaint has already been mentioned

earlier and if the petition of complaint is read as a whole it does not show or indicate the petitioner can be made vicariously liable u/s 141(1) of the

Act. In National Small Industries Limited the specific averment in the complaint was :

that accused No. 2 is the Managing Director and accused No. 3 is the Director of the accused company. Accused Nos. 2 and 3 are in charge and

responsible for the conduct of the business of the company, accused No. 1 and hence are liable of the offence.

29. In the another petition taken up together with National Small Industries Limited, the averment in the petition of complaint was :

that accused No. 1 is a company/firm and accused Nos. 2 to 9 were incharge and were responsible to the accused No. 1 for the conduct of the

business at the time when offence was committed. Hence, accused Nos. 2 to 9 in addition to accused No. 1, are liable to be prosecuted and

punished in accordance with law by this Hon"ble Court as provided of Section 141 of the N.I. Act, 1981. Further the offence has been committed

by the accused No. 1 with the consent and connivance of the accused Nos. 2 to 9.

30. The Hon"ble Court in paragraph 42 dismissed the appeal on the ground that in absence of specific averment as to the role of the respondent

and-----.

31. The facts and circumstances of the cases in hand are similar to that of cases before the Apex Court in National Small Industries Limited (AIR

2010 SC 569) (supra). The averment in the petitions of complaint made against the present petitioner Sekhar Menon can not be said to be specific

averment as to his role in the matter of issuance of the alleged cheques by the accused No. 1 company and the Managing Director of it. He is a

man of Bangalore and can not be said to be in a position to take part in day-to-day affairs of the company and in charge and responsible of the

business of the company by virtue of his position. The bald statement in the petition of complaint does not appear to be sufficient enough to fasten

him for the alleged act committed by the company by invoking the provisions of Section 141 of the N.I. Act.

32. In view of discussion above, I allow the applications. All the prosecution under caption against the petitioner stand quashed. Interim order of

stay, if any, stands vacated.