

RAGHU LAKSHMINARAYANAN.

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v.

M/S. FINE TUBES

APRIL 5, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

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Negotiable Instruments Act, 1881—ss.141 & 138:

Dishonour of cheque issued by proprietorship firm—Complaint against its employee—Held: Proprietary concern is not a company within meaning of s.141—Hence employee of such a concern cannot be proceeded against—Code of Criminal Procedure, 1973—s.482.

C

Officence by company—Vicarious liability of the Director.

Code of Civil Procedure, 1908—Order XXX, Rules 1 and 10—Partnership firm and proprietorship firm—Distinction between—Re-iterated.

D

Respondent No. 1 filed complaint petition alleging commission of offence under Section 138 of the Negotiable Instruments Act. It was alleged that a cheque was issued by accused nos.2 to 6 for a sum of Rs. 2 Lakhs which on presentation was dishonoured. Accused no.1 was described as a business concern. Appellant arrayed as accused no. 3 was described as In charge, Manager, Director of accused no. 1. The Metropolitan Magistrate issued summons to the accused persons. Appellant filed application before High Court u/s. 482 CrPC for quashing the summons issued to him. The application was dismissed. Hence the present appeal.

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Allowing the appeal, the Court

HELD: 1. The concept of vicarious liability was introduced in penal statutes like Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the Company or otherwise responsible for its affairs; the Company itself being a juristic person. [Para 8] [889-D]

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2. A bare perusal of the complaint petition would show that the accused

A No. 1 was described therein as ‘a business concern’. It was not described as Company or a partnership firm or an Association of Persons. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a Company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Indian Partnership Act, 1932 or an association of persons which ordinarily would

B mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a Company. Company in terms of the explanation

C appended to Section 141 of the Negotiable Instruments Act, means any body-corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a Company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come

D within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Indian Partnership Act. In view of the said description of “Director”, other than a person who comes within the purview thereof, nobody else can be prosecuted by way of his vicarious liability in such a capacity. If the offence has not been committed by a Company, the question of there being a Director or his being vicariously

E liable, therefore, would not arise. [Paras 7, 9 and 10] [889-C; E-G; 890-A]

3. Appellant categorically contended that accused No. 1 was a proprietary concern of the accused No. 2 and he was merely an employee thereof. If accused No. 1 was not a Company within the meaning of Section 141 of the Negotiable Instruments Act, the question of an employee being

F proceeded against in terms thereof would not arise. Respondent was aware of the difference between a ‘partnership firm’ and a ‘business concern’ as would be evident from the fact that it described itself as a partnership firm and the accused No. 1, as a business concern. Significantly, Respondent deliberately or otherwise did not state as to in which capacity the appellant had been serving the said business concern. It described him as in charge, Manager and

G Director of the accused No. 1. A person ordinarily cannot serve both in the capacity of a Manager and a Director of a Company.

[Paras 11 and 12] [890-B-D]

H 4. The distinction between partnership firm and a proprietary concern is well known. It is evident from Order XXX Rule 1 and Order XXX Rule 10

of the Code of Civil Procedure. It is trite that a proprietary concern would not answer the description of either a Company incorporated under the Indian Companies Act or a firm within the meaning of the provisions of Section 4 of the Indian Partnership Act. [Paras 13 and 14] [890-E; 891-D] A

S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, A.I.R. (2005) SC 3512, followed. B

Sahitha Ramamurthy & Anr. v. R.B.S. Channabasavaradhya, A.I.R. (2006) SC 3086 and *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, (2007) 3 SCALE 245, relied on.

M/s. Ashok Transport Agency v. Awadhesh Kumar and Anr., [1998] 5 SCC 567, referred to. C

5. For the reasons aforementioned, this Court is unable to agree with the High Court that no case had been made out for exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure. The complaint case against the appellants is quashed. [Paras 16 and 17] [891-F] D

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 485 of 2007.

From the Judgment and Order dated 07.08.2006 of the High Court of Delhi at New Delhi in Criminal M.C. No. 3626 of 2005. E

G. Sivabalamurugan, Y. Arvnagiri and L.K. Pandey for the Appellant.

Tatini Basu (for Sudhir Nandrajog) for the Respondent.

The Judgment of the Court was delivered by F

S.B. SINHA, J. 1. Leave granted.

2. Appellant before us was arrayed as accused No. 3 in the Complaint Petition filed by the first respondent herein, before the Chief Metropolitan Magistrate, Delhi which was registered as a Complaint Case No. 379/1/2003. G
The said complaint petition was filed for trying the accused persons named therein for commission of an offence under Section 138 of the Negotiable Instruments Act alleging that a cheque dated 15.8.2002 was issued by the accused Nos. 2 to 6 for a sum of Rs. 2 lacs drawn at Canara Bank which on presentation was dishonored and the accused despite notice, did not pay the H

A said amount.

3. The status of the accused No. 1 was not disclosed in the array of the accused persons.

B 4. It was sought to be represented through Director(s)/Chairman/Managing Director, Proprietor(s), Incharge(s). Appellant herein was also described in similar capacity viz. "in charge, manager, director of the accused No. 1". So were the other respondents.

5. In the complaint petition, however, it was alleged ;

C "1. The complainant is a partnership duly registered with the Registrar of firms at Delhi, and Mohit Gupta is one of its partner and duly authorized and empowered to file this complaint for and on behalf of the complainant.

D 2. That the respondent No. 1 is a business concern and the respondent Nos. 2 and 6, alongwith other officer(s) etc., are its disclosed in charges, Managers, Director (s) and partners as they have through out been dealings with the complainant by representing themselves to be so responsible for the dealings and day to day working of the respondent No. 1."

E 6. The learned Chief Metropolitan Magistrate issued summons on the other accused persons relying or on the basis of the averments made in the said complaint petition filed by the respondent herein. An application filed by the appellant herein for quashing the summons issued to him in an application filed before the High Court under Section 482 of the Code of Criminal Procedure was dismissed stating;

F "....After the pre-summoning evidence was recorded the learned MM found that *prima facie* case was made out against all the accused persons and, therefore, summoned these accused. Challenging these summoning orders accused No. 3 has filed this petition under Section 482 Cr. P.C. it is *inter alia*, contended that he was never the director of the said accused No. 1: cheque in question was not signed by him and that he was not responsible for the conduct of business of accused No. 1 it is the case of the petitioner that he was an employee of the accused No. 1. In support appointment letter dated 15.7.2000 is enclosed as per which petitioner was appointed as "Director-Production". In this capacity he was to be responsible for entire

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production, including machine selection as well as labour, process and material management. Thereafter, vide letter dated 21.10.2001, which is also produced by the petitioner, he was asked to head the marketing department and was given the designation "Director-Marketing". *Prima facie*, as Director-Marketing the petitioner was in-charge of the marketing division of the accused No. 1. I find that there are specific averment made in the complaint that the petitioner in that capacity was dealing with the complainant and was handling day-to-day affairs of the accused No. 1. Therefore, what the petitioner contends are the disputed questions of fact and it forms his defence which is to be led before the Trial Court. Such questions cannot be entertained in this petition under Section 482 Cr.P.C."

7. A bare perusal of the complaint petition would show that the accused No. 1 was described therein as 'a business concern'. It was not described as a Company or a partnership firm or an Association of Persons.

8. The concept of vicarious liability was introduced in penal statutes like Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the Company or otherwise responsible for its affairs; the Company itself being a juristic person.

9. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a Company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Indian Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a Company. Company in terms of the explanation appended to Section 141 of the Negotiable Instruments Act, means any body- corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a Company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Indian Partnership Act.

10. It is interesting to note that the term "Director" has been defined.

A It is of some significance to note that in view of the said description of "Director", other than a person who comes within the purview thereof, nobody else can be prosecuted by way of his vicarious liability in such a capacity. If the offence has not been committed by a Company, the question of there being a Director or his being vicariously liable, therefore, would not arise.

B 11. Appellant herein categorically contended that accused No. 1 was a proprietary concern of the accused No. 2 and he was merely an employee thereof.

C 12. If accused No. 1 was not a Company within the meaning of Section 141 of the Negotiable Instruments Act, the question of an employee being preceded against in terms thereof would not arise. Respondent was aware of the difference between a 'partnership firm' and a 'business concern' as would be evident from the fact that it described itself as a partnership firm and the accused No. 1, as a business concern. Significantly, Respondent deliberately or otherwise did not state as to in which capacity the appellant had been D serving the said business concern. It, as noticed hereinbefore, described him as in charge, Manager and Director of the accused No. 1. A person ordinarily cannot serve both in the capacity of a Manager and a Director of a Company.

E 13. The distinction between partnership firm and a proprietary concern is well known. It is evident from Order XXX Rule 1 and Order XXX Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in *M/s. Ashok Transport Agency v. Awadhesh Kumar and Anr.*, [1998] 5 SCC 567] wherein this Court stated the law in the following terms:-

F "6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX, Rule 1, CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is G by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX, which make applicable the provisions of Order XXX to H a proprietary concern enable the proprietor of a proprietary business

to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX, Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "in so far as the nature of such case permits." This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case." A
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14. We, keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a 'Company' or a 'Partnership Firm' as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Indian Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a Company incorporated under the Indian Companies Act or a firm within the meaning of the provisions of the Section 4 of the Indian Partnership Act. C
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15. A Constitution Bench of this Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, A.I.R. (2005) SC 3512] furthermore categorically stated that the complaint petition must contain the requisite averments to bring about a case within the purview of Section 141 of the Act so as to make some persons other than company vicariously liable therefor. [See also *Sabitha Ramamurthy & Anr. v. R.B.S. Channabasavaradhya*, A.I.R. (2006) SC 3086 and *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, (2007) 3 SCALE 245]. E

16. For the reasons aforementioned, we are unable to agree with the High Court that no case had been made out for exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure. F

17. The impugned judgment is set aside. Appeal is allowed. The complaint case against the appellant is quashed.

B.B.B.

Appeal allowed.