

Steel Authority of India Ltd. Vs. State and Ors.

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Court : Delhi

Decided On : Nov-25-2014

Judge : S. Muralidhar

Appellant : Steel Authority of India Ltd.

Respondent : State and Ors.

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

19. h November 2014 Decision on:

25. h November 2014 CRL.A. No.147 of 2009 STEEL AUTHORITY OF INDIA LTD. Appellant Through: Mr. H.S. Phoolka, Senior Advocate with Mr. Sharat Kapoor, Ms. Shilpa Dewan and Mr. Sunny Verma, Advocates. versus STATE & ORS. Respondents Through: Ms. Isha Khanna, APP for State. Mr. D.S. Kohli with Mr. Aashneet Singh Anand, Advocates for Respondent No.2. CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

2511.2014 1. This appeal by the Steel Authority of India Limited (SAIL) is against the impugned judgment dated 6th August 2008 passed by the learned Metropolitan Magistrate (MM) in Complaint Case No.199 of 2003 acquitting the Respondent No.2 of the offence under Section 138 of the Negotiable Instruments Act, 1881 (NI Act). The complaint 2. In its complaint before the learned MM, SAIL

stated that M/s. Capital Industries, Respondent No.3 partnership firm, of which Mr. Dinesh Vij, (Respondent No.2 herein) and Mr. Prakash Vij, (arraigned as Accused No.2 A-2 in the complaint) were partners, had been supplied 14.89 metric tons of steel material under a delivery order dated 24th June 1997. According to SAIL, the above delivery was acknowledged by the Respondents against challan and invoice both dated 25th June 1997. It was further stated that in discharge of the liability for the goods received, the Respondents had issued a cheque No.150180 dated 8th August 1997 for a sum of Rs.5,54,696. It was acknowledged that the said cheque was signed on behalf of the firm by Mr.Prakash Vij (A-2).

3. The cheque when presented for payment was returned dishonoured with the remarks Account Closed. SAIL stated that a legal demand notice dated 23rd August 1997 was issued to the Respondents through registered post and was duly served upon all of them. When no payment was forthcoming, the complaint was filed.

4. The record of the trial Court reveals that it was reported to the trial Court that despite a proclamation issued in respect of Mr. Prakash Vij, A-2, his whereabouts were not known. A-2 was accordingly declared a proclaimed offender (PO) by an order dated 13th May 2003. Subsequently on 4th July 2003 Mr. Dinesh Vij, Respondent No.2 herein, appeared. The order reads as under:

P: AR of the complainant with counsel. Accused Mr. Dinesh Vij on bail with counsel. Notice under Section 251 Cr.P.C in respect of offence U/s 138 read with 141 NI Act given to the accused to which he pleads not guilty and claims trial. Let evidence be adduced by way of affidavit with advance copy at least a week before the date of hearing to the counsel for accused. Put up for CE on 26.8.03 as also for cross examination of the person whose affidavit is filed on record.

5. Consequently, it appears that no notice as such was specifically served on the firm M/s. Capital Industries, Respondent No.3 herein in. The trial, therefore, proceeded only against Respondent No.2.

6. It further requires to be noticed that the complaint on behalf of SAIL was filed by Mr. A.K. Sood, Chief (Marketing), SAIL. Although the complaint itself did not

mention that he was duly authorised to file a complaint on its behalf it appears that along with the documents filed with the complaint, a photocopy of the General Power of Attorney (GPA) dated 6th June 1994 executed by SAIL in favour of Mr. J.S. Charlu, Executive Director (Marketing) and the photocopy of the GPA dated 17th July 1994 executed by Mr. J.S. Charlu in favour of Mr. A.K. Sood was filed.

7. Mr. Dinesh Vij in response to the notice under Section 251 Cr PC pleaded not guilty and claimed trial. In the notice under Section 251 Cr PC, the question put was:

Show cause as to why you Mr. Dinesh Vij should not be punished for he said offence.

He then was asked whether he pleaded guilty or not. It is, therefore, clear that the trial for all practical purposes proceeded only against Mr. Dinesh Vij who was arraigned as Accused No.3 (A-3) and who has been impleaded in the present Appeal as Respondent No.2.

8. An additional affidavit dated 26th August 2003 was filed as evidence on behalf of SAIL by Mr. Sudhir Kumar Garg, who was the Assistant General Manager (Marketing). In the said affidavit again nothing was stated about Mr. Garg being authorised to the affidavit on behalf of the Appellant. In other words, the affidavit was more or less a reproduction of the complaint itself. It stated that Mr. Dinesh Vij and Mr. Prakash Vij were partners of M/s Capital Industries, and were in charge and responsible for the conduct of the affairs of the business of accused No.1. The proceedings in the trial 9. Mr. Garg was examined as CW-2 and was cross-examined on 2nd September 2003. However, at that stage no authorisation was produced.

10. On 3rd September 2003, the trial Court recorded the statement of the counsel for the Complainant and asked whether he would like to examine if any further evidence is required to be led. This led to Mr. Garg filing a further affidavit dated 19th September 2003 enclosing further documents. These did not include any authorisation of Mr. Garg who deposed on behalf of the Complainant.

11. On behalf of Mr. Dinesh Vij, Mr. Rajinder Tamar was examined as DW-1. He was employed with M/s Capital Industries, Respondent No.3, from 1994 to February 1997. According to him, since the beginning of 1995 there were disputes between Mr. Prakash Vij and his brother Mr. Dinesh Vij, the two partners. He stated Around Diwali in the year 1995 Mr. Dinesh Vij stopped coming to the firm's office owing to the dispute with his brother Mr. Prakash Vij. Till 1997 Mr. Dinesh Vij did not join the office of the firm. Although I have no personal knowledge regarding the dissolution of the partnership deed however, I did not see him in the firm after Diwali in the year 1995.

12. Mr. Kapil Dev Sharma, Manager, Punjab & Sind Bank, Rajouri Garden was examined as DW-3. He stated that they could not locate any cheque signed by Mr. Dinesh Vij from January 1997 onwards. He had with him certain cheques signed by Mr. Prakash Vij on behalf of the firm in the year 1996. In his cross-examination he clarified that there might be a possibility that there could be records in the bank of 1997 although the same might not have been located. He added that We have thoroughly checked the bank record after October 1995 so as to bring the summoned record. The above two witnesses were basically examined by Mr. Dinesh Vij to demonstrate that he was not associated with the affairs of the firm from Diwali 1995 onwards.

13. The complaint was adjourned from time to time at the instance of the counsel for the Complainant and a last opportunity was granted to it to proceed with the arguments by an order dated 20th July 2005.

14. At that stage, on 28th July 2005 an application was filed by the Complainant under Section 296(2) read with Section 311 Cr PC and a notice was issued in the said application. The said application was allowed by a detailed order passed by the learned MM on 5th August 2005. It was noticed that there had been no examination-in-chief of Mr. Garg and even the material documents had not been exhibited. Accordingly, the previous affidavit dated 26th August 2003 by Mr. Garg could not be taken into consideration. Another opportunity was given to the Complainant to put Mr. Garg into the witness box to lead evidence by tendering the affidavits etc. This was subject to the costs of Rs.3,000 which was required to

be paid by SAIL to Mr. Dinesh Vij.

15. On 12th November 2007 Mr. Garg was again cross examined by the counsel for Mr.Dinesh Vij. He admitted that since the end of the year 1995 he had been transferred to the Gwalior office and rejoined the Delhi office in the year 2000 and that he had deposed in the case on the basis of the record available. He denied that he did not have any personal knowledge of the matter or that he was not authorized to represent the Complainant.

16. On 1st December 2007 the statement of Mr. Dinesh Vij under Section 313 Cr PC was recorded. In response to question Nos.2, 5, 8 and 10 he reiterated that he was not responsible for the affairs of the firm and that although initially he was a partner he resigned in October 1995. When asked as to whether he had anything else to say, he again reiterated that although he was a partner he had no role to play in the day to day affairs of the firm and that it was Mr. Prakash Vij who single handedly discharging the affairs of the firm. He stated that I have neither any personal knowledge about the transaction nor have any idea about the liability of the firm.

17. In response to question No.12, whether he wanted to lead any evidence in defence, he replied No.Since defence evidence has already been examined and I adopt the same.

This was obviously in reference to the evidence already recorded. The order sheet of 1st December 2007 of the trial Court, however, states Statement of accused recorded. Accused preferred not to lead any DE. Put up for final arguments on 18.1.08.

The trial Court judgement 18. In the impugned order dated 6th August 2008 the trial Court first held that from the evidence on record it appeared that Mr. Dinesh Vij was not actively involved in the affairs of the firm. The two defence witnesses DW-1 and DW-3 had created a reasonable doubt about him being in charge of the affairs of the firm at the relevant time. The trial Court observed that neither the invoices nor the delivery notes bore the signatures of Mr. Dinesh Vij. The statement of Mr. Garg that Mr. Vij was responsible for the affairs of the firm was

only hearsay because he obviously had no personal knowledge as he was not posted in Delhi at the relevant time. Consequently, the benefit of doubt was granted to Mr. Dinesh Vij and he was acquitted. The file was asked to be revived as and when Mr. Prakash Vij the PO was traced. Submissions of Counsel 19. Mr. H.S. Phoolka, learned senior counsel appearing for the Appellant SAIL, assailed the impugned judgment on the ground that the Complainant had discharged its burden by showing that Mr. Dinesh Vij was one of the partners of the firm. He referred to the list of documents tendered by Mr. Dinesh Vij which included the partnership deed. As far as the dissolution deed tendered by him was concerned it was a photo copy and admittedly the original could not be found. Mr. Phoolka argued that in the absence of Mr. Dinesh Vij proving the dissolution of the partnership, in terms of Section 25 of the Partnership Act, 1932 ('PA') Mr. Dinesh Vij continued to be liable for the affairs of the firm. He added that while it was not open to Mr. Dinesh Vij to rely upon the photocopy of the dissolution deed to show that the partnership had been dissolved, it was certainly open to the Complainant to rely on the documents filed by the accused, particularly the partnership deed which did not differentiate between the partners as regard their liability. Mr. Phoolka relied upon the decisions in *Pratima Sharma v. M/s. Cartel Finance & Investments Pvt. Ltd.*, 2007(4) JCC (NI) 392 (Del) and *Rallis India Limited v. Poduru Vidya Bhushan* (2011) 13 SCC88 to urge that Mr. Dinesh Vij could not escape the liability for the affairs of the firm in terms of Section 141 read with Section 138 of the NI Act.

20. In reply, it was submitted by Mr. D.S. Kohli, learned counsel for Mr. Dinesh Vij, that in the light of the decision of the Supreme Court *Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.* (2012) 5 SCC661 in the absence of the firm being proceeded against, no liability could attach to any of its partners. Secondly, it was submitted that SAIL had, despite an opportunity, failed to produce any authorisation in favour of Mr. Garg. Relying on the decision of *Escorts Ltd. v. Sai Autos Ltd.* 1990 RLR430 he submitted that unless the original minutes of the Board of Directors of SAIL, in terms of Section 194 of the Companies Act 1956 authorizing Mr. Garg to file an affidavit on behalf of SAIL was produced before the trial Court, the evidence of the complaint could not be taken on record. Relying on the decision of the Supreme Court in *DCM Financial Services Ltd., v. J.N.Sareen*

(2008) 8 SCC1 it was submitted that merely being a partner of the firm did not make Mr. Dinesh Vij liable for the conduct of the firm unless the requirement of Section 141 NI Act was satisfied, i.e., it had to be shown that he was in charge of and responsible for the conduct of business of the firm. He submitted that although Section 25 of the Partnership Act may make a continuing partner liable in civil proceedings, the same could not be said to apply to a penal statute or provision having penal consequences which only admitted of a strict interpretation. He submitted that Mr. Dinesh Vij had discharged his burden of rebutting the presumption under Section 139 of the NI Act read with Section 118 thereof by showing that at the relevant time he was not actively involved in the affairs of the firm and was not responsible to it for the conduct of its business. Decision of the Court 21. In the first place, the Court agrees with Mr. Kohli that in view of the authoritative dictum of the Supreme Court in *Aneeta Hada* (supra), which was a decision not available at the time of the pronouncement of the impugned order, a partner of a firm cannot be made liable without the firm itself being proceeded against. As already noticed in the present case, notice was not framed against the firm but only against Mr. Dinesh Vij. The record shows that the trial proceeded only against him and not against the other two accused i.e., the firm and Mr. Prakash Vij.

22. Although, the Complainant has been able to prove the chain of documents - photocopies of two GPAs, one executed by SAIL in favour of Mr. Charlu and the second one in favour of Mr. Sood - to substantiate the proper authorisation of Mr. Sood to file the complaint, no document has been placed on record to substantiate the authorisation in favour of Mr. Garg to file an affidavit of evidence on behalf of SAIL. As noticed by the trial Court, Mr. Garg was not conversant with what transpired at the relevant time when the transaction in question took place between SAIL and the firm as he was not in the Delhi office. He was only speaking from the record. As correctly concluded by the trial Court his evidence in this behalf can at best be considered to be hearsay.

23. On the question of liability of the partner of a firm that has issued the dishonoured cheque, no doubt a statutory presumption is attracted in terms of Section 141 of the NI Act. The decision in *Pratima Sharma* (supra) also proceeds

on the footing that as long as it is shown that a person has continued as a partner of the firm then it must be presumed that such a partner would be responsible for the conduct of the business of the firm. However, Section 25 of the Partnership Act has to be read together with Section 141 of the NI Act in the context of dishonour of a cheque. Section 141 of the NI Act spells out penal consequences and requires to be strictly interpreted. The presumption that gets attracted under Section 139 read with Section 141 of the NI Act is a rebuttable presumption. An individual who is arraigned as accused in his capacity as a partner of the firm that issued the dishonoured cheque can rebut the statutory presumption by leading evidence and proving such defence on a preponderance of probabilities.

24. The Court, therefore, agrees with the submission of the learned counsel for Mr. Dinesh Vij that Section 25 of the Partnership Act cannot be applied in isolation to fasten criminal liability on the partner of a firm and that in terms of Section 141 of the NI Act the partner can rebut the statutory presumption. Secondly, although the Supreme Court in its decision in *Rallis India Ltd. (supra)*, observed that the burden will be on the partners to show that they were not in charge of the affairs of the firm, the standard of proof would be on a preponderance of probabilities and not beyond reasonable doubt.

25. Turning to the evidence led by Mr. Dinesh Vij to show that he was not actively involved in the affairs of the firm it must be first noticed that in his statement under Section 313 Cr PC, he stated that he did not separately wish to lead any evidence since the defence evidence had already been led. Although, the trial Court in its proceedings of 1 st December 2007 has recorded that the accused did not wish to lead any defence evidence, the correct picture is that the accused adopted the defence evidence that was already led.

26. The testimony of DW-1 the former employee of the firm shows that Mr. Dinesh Vij indeed was not actively involved in the firms affairs after Diwali of 1995. DW-1 was firm in his version and the questions put to him in cross-examination did not discredit his testimony. Additionally, the Manager of the bank with which the firm had an account testified as DW-3 and stated that no cheque issued between 1995 to 1997 on behalf of the firm was signed by Mr. Dinesh Vij. Although, an answer

was elicited from DW-3 that there might be some other record which might show to the contrary, the fact remains that SAIL was not able to produce any material to show that Mr. Dinesh Vij was in fact in charge of the affairs of the firm. On his part, Mr. Dinesh Vij, on preponderance of probabilities, was able to prove that he was not actively associated with the affairs of the firm during the relevant time when the transaction took place and at the time when the dishonoured cheque was in fact issued. The Court is, therefore, inclined to concur with the view expressed by the trial Court that Mr. Dinesh Vij has been successful in establishing his defence to the above effect and has been able to rebut the statutory presumption under Section 138 read with Section 118 of the NI Act. Conclusion 27. While concurring with the conclusions reached by the trial Court, this Court clarifies that since the trial has not proceeded against the firm and Mr. Prakash Vij, it will be open to SAIL to pursue its complaint against the said two accused in accordance with law.

28. The appeal is accordingly dismissed, but in the circumstances, with no orders as to costs.

29. The trial Court record be sent back forthwith. S. MURALIDHAR, J.

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