

Prudential Engineers/Builders and Developers and ors. Vs. Kuskoor Bharath Ram

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Court : Karnataka

Decided On : Sep-26-2003

Reported in : 2005(1)ALD(Cri)8; I(2004)BC609; 2004CriLJ672

Judge : S.B. Majage, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 141; [Partnership Act, 1932](#) - Sections 25; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 482

Appeal No. : Crl. Petn. No. 257 of 2003

Appellant : Prudential Engineers/Builders and Developers and ors.

Respondent : Kuskoor Bharath Ram

Advocate for Def. : K.G. Sadashivaiah, Adv. for S and S Associates

Advocate for Pet/Ap. : Narayan Perdalkar, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

S.B. Majage, J.

1. In this petition filed under Section 482 of the Cr.P.C., the petitioners, who are accused in C.C. No. 34601 of 2000 on the file of the Court of XVI Additional Chief Metropolitan Magistrate, Bangalore City, have challenged initiation of said proceedings against them.

2. According to the respondent-complainant, he had agreed to purchase an apartment bearing No. 1001 in 'Prudential Pavan', a property to be developed in 16th 'B' Main, HAL II Stage, Kodihalli, Bangalore City, from the accused (which is a partnership firm with 4 partners) and paid a sum of Rs. 7,10,000/- in that regard on 31.1.1998, but, as the work undertaken by the petitioner-accused was found tardy and substandard and delivery of the possession of the flat was postponed from time-to-time on untenable grounds, he had no alternative except to terminate the agreement to purchase that flat and accordingly terminating the agreement, demanded back Rs. 7,10,000/- paid to the accused and in that connection, he was given three cheques, out of which, one cheque for Rs. 2,50,000/- was honoured i.e., encashed but, when the cheque bearing No. 740855, dated 19.1.2000 for Rs. 2,50,000/- was presented, it was dishonoured vide Banker's memo dated 20.1.2000. So also the cheque bearing No. 740856, dated 24.1.2000 for Rs. 2,10,000/-, when presented on 24.1.2000, was returned dishonoured with endorsement as 'funds insufficient'. Consequently, he sent legal notice dated 30.1.2000 calling upon the accused to pay, within fifteen days from the date of receipt of the notice, the amount of Rs. 4,60,000/-, the amount of said two cheques. It was served on all the petitioners-accused. For that, the second petitioner, third accused, sent an untenable reply under letter dated 14.2.2000 and did not comply the demand made. Hence, he filed complaint under Section 200 of the Cr.P.C. against the firm and all its partners for an offence punishable under Section 138 of the Negotiable Instruments Act. After taking cognizance, process was issued to the petitioners-accused by the concerned Court and dismissed the application filed by them under Section 258 of the Cr.P.C. Hence, the petitioners-accused are before this Court.

3. Heard the learned Counsels for the parties. It is vehemently argued for the petitioner-accused that in the absence of any averment in the complaint as per under Section 141 of the [Negotiable Instruments Act, 1881](#) (hereinafter referred to

as 'Act'), the proceedings initiated against the petitioner-firm and all its partners, is not at all proper. On the other hand, it is submitted for the respondent-complainant that the petitioners 2 to 5, being the partners of the first petitioner-accused, are liable to face the prosecution and in that connection, placed reliance on Section 25 of the Indian [Partnership Act, 1932](#) and, in any event, it is not a case where the proceedings can be quashed under Section 482 of the Cr.P.C. when not made out a case for that. Perused the records carefully.

4. In this case, most of the facts are not in dispute in that, the transaction between the complainant and accused regarding flat, issue of cheques, return of cheques by the Bank for want of sufficient fund, issue of legal notice and reply to that notice, are admitted. What is in dispute is, whether said admitted facts constitute an offence punishable under Section 138 of the Negotiable Instruments Act against all the partners of the firm or not?

5. Section 25 of the Partnership Act, on which the complainant relies, is as under:

'25. Liability of a partner for acts of the firm.--Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner'.

6. Section 141 of the Negotiable Instruments Act, which is relevant and relied on for the accused, runs as under:

'141. Offences by companies.-

(1) If the person committing an offence under Section 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'.

7. Now, reference can be had to the explanation to Section 141(2) of the Act wherein, it is explained that for the purpose of Section 141, 'company' means any body corporate and includes a firm or other association of individuals and, 'director', in relation to a firm, means a partner in the firm. So, while reading Section 141 of the Act, wherever the words 'company' and 'director' are found, they have to be read and understood as explained above.

8. In the present matter, so far as impleading first petitioner-firm as accused is concerned, there is no dispute whatsoever between the parties. In fact, rightly, it has not been canvassed before this Court that it was impleaded wrongly or unnecessarily. That being so, quashing entire proceedings or against the first petitioner-accused firm does not arise at all, though the request is for that also. What is in question is, whether other petitioners could be proceeded with or not?

9. It is true that in the case of Smt. Katta Sujatha v. Fertilizers and Chemicals Travancore Limited and Anr., 2003 SCC (Cri.) 151, the Supreme Court has held that, if there is no allegation in the complaint that the partner impleaded as accused was in charge of and was responsible to the firm for the conduct of the business of the firm and, if there is no allegation that the offence was committed with the consent or connivance or that the same was attributable to any negligence on the part of any such partner or partners in the matter of issuance of the cheque in question, such person or persons cannot be proceeded against for an offence under Section 138 of the Negotiable Instruments Act.

So also in the case of Tiruchandoor Muruhan Spinning Mills (Private) Limited and Ors. v. Madanlal Ramkumar Cotton and General Merchants, I (2001) BC 769=ILR 2000 Kar. 5000, a learned Single Judge of this Court has held that, where the

complaint is filed against company, normally the person who was in charge of and responsible for the conduct of the business of the company, is liable for prosecution, and if the complaint makes specific allegations about participation of all the directors in the transaction concerned, then only the question of taking cognizance against all of them arises, otherwise not.

Similarly, in the case of Nucor Wires Limited, Bangalore and Ors. v. HMT (International) Limited, Bangalore, : ILR 1997 KAR3239 , another learned Single Judge of this Court has held that, if the cheque is issued by the Managing Director, who represents the company, then the company and the Managing Director, who has signed the cheque, can be proceeded with and not all the directors.

Further, in the case of Sham Sundar and Ors. v. State of Haryana, : 1989 CriLJ2201 , the Supreme Court has held that, a partner who was responsible for carrying on business and in charge of business during relevant period only can be convicted and not others. From the said decisions, the learned Counsel for petitioners-accused tried to derive support to his argument that in the present case, the petitioners, other than the first petitioner-accused, could not have been proceeded with.

10. However, it may be noted that in the case of U.P. Pollution Control Board v. Modi Distillery and Ors., : 1988 CriLJ1112 , the Supreme Court has held that, where the industrial unit itself wilfully failed to furnish the requisite information to the Board regarding the particulars and names of the Managing Director, Directors and other persons responsible for the conduct of the company resulting in mentioning incorrect name of the company in the complaint, it was not open to them to take advantage of the lapse of their own and claim that the prosecution be quashed against them.

So also in the case of P.A. Verghese v. MAA Communications Private Limited, Bangalore, 1997 Cri. L.J. 4208 (Kar.), a learned Single Judge of this Court has held that, when legal notice was issued to the accused-company calling upon to pay amount covered under cheque but no reply sent by the accused-company denying or admitting their liability or specifying person responsible for its affairs, then complaint filed against all the directors of the company is maintainable.

Similarly, in the case of Smt. Deveeramma and Ors. v. Shivalingappa, II (2002) BC 491 =ILR 2002 Kar. 1026, another learned Single Judge of this Court has declined to quash the proceedings when directors of an association contended that they were not liable for the issuance of cheque, etc., since, according to the learned Single Judge, in such a case, proceedings cannot be quashed because the question that has to be examined was, whether directors were also responsible to repay the loan and that is purely a matter of evidence.

Further, in the case of Hotline Shares and Securities Limited, Hubli and Ors. v. Dinesh Ganeshmal Shah, III (2002) BC 59=ILR 2002 Kar. 3174, a learned Single Judge of this Court has held that, in cases where the cheques are issued on behalf of the company, all the directors need not be arrayed as parties, unless there is specific allegation but the proceedings as against the directors cannot be quashed because the question that has to be examined is, whether the directors are also responsible to repay the loan and that is purely a matter of evidence.

11. What emerges or can be discerned from the said decisions and provisions of law is that, when an offence punishable under Section 138 of the Act was committed in relation to a cheque issued by a company, firm or association of individuals, such company, firm or association of individuals and (1) the person in charge of and responsible for the conduct of its business, and (2) if such offence was committed with the consent or connivance of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer, and (3) where, for such offence committed, negligence of any of the said persons is attributable, such person(s) also shall be liable to be proceeded with, prosecuted and punished.

And, in a complaint for an offence under Section 138 of the Act, persons, other than the said persons, need not be joined as accused. However, it cannot be forgotten that, normally, the complainant, being a stranger to the company, firm or association of individuals, will not be in know of the management or internal affairs or arrangements of such company, firm or association of individuals for the conduct of its business at the time of transaction. So, when legal notice was issued, as required under law, it will be for the persons, who were issued/served

with such notice, to make it clear not only that they were not in charge of and responsible for the conduct of the business of the company, firm or association of individuals, but also to come out specifying the person(s) in charge of and responsible for the conduct of its business/affairs. If not done so and consequently in the circumstances, all of them are arrayed as accused, they cannot subsequently contend that they were not liable to be proceeded with/prosecuted and that they have been unnecessarily impleaded as accused. Of course, from the reply notice, if it can be made out or clear that anyone or more among such persons only is/are liable to be prosecuted and proceeded with and such other person(s) also take up the liability for self and also for and on behalf of the company/firm/ association of individuals, then such other person(s) only to be proceeded with and not any other person(s) even if happens to be director(s) or partner(s) or officer(s) of such company, firm or association of individuals. So also, if the liability under the cheque is disputed or in dispute or not made clear or not admitted and taken by anybody and, for that, evidence is required, then all persons can be proceeded with/prosecuted.

12. In the case on hand, the respondent-complainant has neither stated that who was in charge of and responsible for the conduct of the business of the firm nor made any specific allegation against any partner of the firm. So, on this point only, much stress was laid by the learned Counsel for petitioners. However, what is important to note is that before initiation of the proceedings under Section 138 of the Act, when the respondent-complainant got issued a notice as required under law to all the partners of the first petitioner-firm, calling upon them to pay the amount of dishonoured cheques in question, failing which they will be proceeded with/prosecuted for the offence committed, the third petitioner alone (and not the other petitioners), gave reply for the firm as under :

'Dear Sir,Sub : Your notice dated 30.1.2000 addressed to K.K. Suryanarayana Rao, Sandeep S. Rao,Sandhya Ananth, Shubha S. Rao.This is with reference to your notice dated 31.1.2000. Your threat to prosecute usunder Section 138 is illusionary as the instrument given by us is not a cheque in theeye of law. You are fully aware of the circumstances under which we have given thesaid instrument. Without prejudice to this legal stand, we assure you that the amountpayable to you

would be paid as and when we realise the sale proceeds of the sale of the flat that you had agreed to buy. Thanking you, Yours faithfully, for THE PRUDENTIALSd/- (SANDEEP S. RAO) Partner'

13. Under said reply, though liability is admitted, nowhere it is mentioned nor made clear that so and so partner was in charge of and responsible for the conduct of the business of the firm and issued the cheques and as such others cannot be proceeded with/prosecuted. So, in view of what has been noted already, in the facts and circumstances available as on the date of filing of complaint, when the complainant has impleaded all the partners with firm as accused, no fault can be found with it, as he was not at fault nor wrong in impleading all the partners as accused, when kept in mind Section 25 of the Partnership Act. That being so, taking cognizance and issuing process against all the partners of the firm also by the Trial Court was not at all bad in law.

14. Of course, before this Court, in paragraph 3 of the petition filed, the petitioners have pleaded thus:

'3.The 2nd petitioner, the managing partner of the firm, overall looking after the affairs and management of the firm. As per the partnership deed 4th and 5th partners are the Sleeping Partners not at all involved in the affairs and management of the firm'.

So also in paragraph 4, it is stated thus:

'4.the respondent demanded the return of the said sum. To discharge their liabilities, the 3rd petitioner issued two cheques to the respondent for a sum of Rs. 4,60,000/- which was presented through his Bankers at Karnataka Bank, Minerva Circle, Bangalore, the same was dishonoured, with an endorsement as 'Funds Insufficient'.

Similarly, in paragraph 6, it is stated that:

'6. It is submitted that the petitioners 4 and 5 are not at all signatory to the cheques and hence they do not have any liability as on the cheque issued by the 2nd petitioner.'

15. What has been underlined in the above extracted portions show that, at one place, it is stated that the third petitioner has issued the cheques whereas, at other places in other paragraphs, it is stated that cheques were issued by the second petitioner. Thus, the petitioners themselves are not clear on the point as to who has issued the cheques, though it is in their knowledge that who, in fact, issued/signed the cheques and was in charge of and responsible for the conduct of the business of the firm during the relevant period when the cheques were issued. So, even at this stage also, this Court cannot say that who had issued cheques and whether such person, who issued cheques, was in charge of and responsible for the conduct of the business of the firm, first petitioner-accused and fourth and fifth petitioners have been unnecessarily impleaded as accused.

16. It is also to be noted that, according to the petitioners, the third petitioner namely, K.K. Suryanarayana Rao is dead whereas, the second petitioner is alive. This also has significance because, if really the cheques had been issued by third petitioner, it is not stated by the petitioners that he was in charge of and responsible for the conduct of the business of the firm. On the other hand, it is stated that, the second petitioner is the managing partner and overall in charge of the firm. Of course, according to the learned Counsel for the petitioners-accused, due to typographical error, instead of showing second petitioner, at one place, it is shown as third petitioner in paragraph 4 of the petition. Be that as it may, as things stand now, there is no consistency in the case of the petitioners as to who issued the cheques and in what capacity.

17. Under Section 482 of the Cr.P.C., inherent power can be exercised only either for the purpose of preventing abuse of the process of any Court or to secure the ends of justice or to give effect to an order passed under the Code of Criminal Procedure and not otherwise. Further, very recently, in the case of Union of India v. Prakash P. Hinduja and Anr., IV (2003) SLT 335=2003 AIR SCW 3258, the Supreme Court has noted the circumstances under which the power can be invoked under Section 482 of the Cr.P.C. In view of the above and when kept in mind the facts of the case, at this stage, the proceedings initiated against the petitioners cannot be quashed as no such case is made out for that and, consequently, the petition deserves to be dismissed.

In the result, the petition is dismissed. However, it is open to the petitioners to plead before the Trial Court by filing proper memo or application, as the case may be, that the second petitioner (Sundeep S. Rao) alone as the Managing Director was the person in charge of and responsible for the conduct of the business of the firm and taken the responsibility/ liability for the cheques in question and, as such, others need not be proceeded with further and, if such a memo or application is made, the Trial Court to pass an appropriate order on its merits in accordance with law.

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