AshwIn C. Muthiah and ors. Vs. Multipack

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Court : Chennai

Decided On : Feb-02-2001

Reported in : [2002]108CompCas563(Mad)

Judge : A. Ramamurthi, J.

Acts : Negotiable Instruments Act, 1881 - Sections 138 and 141

Appeal No. : Crl. R.C. No. 1004 of 1999 and Crl. M.P. No. 8124 of 1999

Appellant : AshwIn C. Muthiah and ors.

Respondent : Multipack

Advocate for Def. : B. Sriramulu, Adv. for ;M.N. Mani, Adv.

Advocate for Pet/Ap. : Gita Asokan, Adv. for ;G. Rangarajan, Adv.

Judgement :

A. Ramamurthi, J.

1. The petitioners/A-2 to A-4 in STC No. 509 of 1999 on the file of the J. M. No. 5, Coimbatore, have preferred the revision aggrieved against the orders passed in Crl. M. P. No. 5059 of 1999 dated August 23, 1999.

2. The case in brief is as follows :

The respondent filed a complaint against the petitioner as well as others for offences under Section 138 of the Negotiable Instruments Act, 1881. The complainant is a proprietary concern. The first accused is a public limited company, in which accused Nos. 2 to 4 are directors and they are in charge of the day-to-day affairs of the first accused-company. A-5 is employed as general manager at the Coimbatore branch of the first accused-company. A-1-company represented by A-5 issued the cheque in question dated October 28, 1998, and the cheque was dishonoured and the factum of dishonour was informed on November 27, 1998. The complainant issued a notice dated December 2, 1998, to all the accused calling upon the accused to pay the value of the cheque within 15 days. A-l to A-3 received the notice on December 4, 1998, and the notice issued to A-4 was returned unanswered with the endorsement 'not claimed'. They have not sent any reply to the notice also. The accused have issued the cheque towards discharge of liability, which is a legally enforceable debt. The factum of dishonour and the act of the accused amounts to an offence under Section 138 of the Negotiable Instruments Act and as such they are liable to be punished.

3. Petitioners Nos. A-2 to A-4 filed Crl. M. P. No. 5059 of 1999 to drop the proceedings against them and discharge them from the case and also to recall and cancel the summons issued to them. They contended that they are impleaded in the capacity as directors. A-2 and A-4 had resigned from the board of directors with effect from November 19, 1998. The necessary form had also been filed with* the Registrar of Companies, Chennai. The alleged notice under Section 138 was issued on December 2, 1998, and the cause of action for the complaint had arisen only after the expiry of 15 days and at that the petitioners were not the directors of the company and they cannot said to be responsible. Petitioners Nos. 1 and 2 were not served with the summons issued by this court in accordance with the provisions of the Criminal Procedure Code. Service of summons ought to have been effected in strict accordance with law. There is also no averment in the complaint to the effect that these petitioners are in charge of the day-to-day affairs of the company and on all these grounds further proceedings have to be dropped.

4. The respondent/complainant opposed the application and the learned magistrate, after hearing the parties dismissed the application and aggrieved

against this, the present revision has been filed.

5. Heard learned counsel for all the parties.

6. The points that arise for consideration are :

(i) Whether the order passed by the court below is proper and correct ?

(ii) To what relief

7. It is not in dispute that the respondent/complainant filed a complaint under Sections 138, 141 and 142 of the Negotiable Instruments Act, 1881. The petitioners are A-2 to A-4 in the case. They filed a petition to discharge them from the case on various grounds. Learned counsel for the petitioners contended that summons was not served on them in accordance with law. They had resigned from the board of directors of the A-1-company with effect from November 19, 1998, much before the cause of action for filing the complaint. The cause of action if any would have arisen only after December 2,1998, demanding the money. The learned magistrate wrongly interpreted the sections and drew his own conclusions relating to Section 141 of the Negotiable Instruments Act. Moreover, the petitioners were not the persons in charge of the day-to-day affairs and management of A-1-company and nowhere in the complaint, is the involvement of the petitioners in the day-to-day affairs and management of the A-1-company narrated excepting a bald allegation in para. 1 of the complaint. The petitioners are the erstwhile directors in the company. The learned magistrate also failed to appreciate that Form No. 32 was filed under the Companies Act, which indicates that A-2 and A-4 had already resigned on November 19, 1998.

8. The first contention raised by learned counsel for the revision petitioners is that A-2 and A-4 have resigned from the board of directors as early as November 19, 1998. The statutory notice was issued only on December 2, 1998, and as such at the relevant point of time they were not directors and hence, they cannot be proceeded against further in the case. It is necessary to state that on behalf of the A-1-company A-5 had issued the cheque. Admittedly, the cheque was also dishonoured for want of funds. No doubt, A-2 and A-4 have filed a copy of Form

No. 32 to show that they have resigned from the post of directors on November 19, 1998. But, it is proper to keep in mind that the cheque in question was issued on October 28, 1998, and on the relevant date admittedly, the petitioners continued to be directors. It is not the case of the petitioners that at the time of issue of the cheque, there were funds, but only thereafter there were no funds. Under the circumstances, it is a matter to be considered only in the course of trial. Considering the fact that the petitioners were directors on October 28, 1998, when the cheque in question was issued, there is prima facie material to proceed against them and the resignation on November 19, 1998, will not help them in any way.

9. The learned senior counsel next contended that even assuming that the petitioners were directors, there is no averment in the complaint and it is also not explained that they were in charge of the day-to-day affairs of the company and in what manner they have participated. He further stated that mere verbatim words of Section 141 of the Negotiable Instruments Act and repeating magic words alone are not sufficient to proceed further against them. As adverted to in para. 1 of the complaint it is stated as follows : 'the first accused is a public limited company in which A-2 to A-4 are directors and they are in charge of the day-to-day affairs of A-1-company'. This averment is sufficient prima facie to proceed against the petitioners. It is not necessary that in the complaint what is the actual part played by each director has to be mentioned, because it is a matter of evidence. There are sufficient averments in the complaint to implicate the petitioners.

10. The next contention raised by the learned senior counsel for the petitioners is that the statutory notice has not been sent in accordance with law. It is necessary to state that notice was served and no reply has been sent by them. When the statutory notice has been sent and the same having been received, they have not chosen to send any reply thereby indicating that they have admitted the liability. Moreover, after the expiry of the period only, the complaint has been laid by the complainant in the case. It is, therefore, evidently clear that the objection raised by the petitioners has no force and the matter which requires evidence cannot be taken into consideration for the purpose of dropping the proceedings.

11. The learned senior counsel for the revision petitioner relied on Alfred Borg and Co. India (P.) Ltd. v. Antox India (P.) Ltd. [1992] LW (Crl.) 120 wherein it is observed that in a catena of cases, the apex court has held that initiating prosecution against sleeping partners or women, when the company is the main offender, cannot be sustained unless there was basic material to show that such partners or directors were also in charge of and responsible for the conduct of the business of the company. Merely, by alleging that directors are in charge of the company, as is found in para. 11 of the complaint petitioners Nos. 2 to 6 cannot be prosecuted. There is no dispute about this principle. But, there are clear averments in the complaint that these petitioners are also in charge of the day-to-day affairs of the company.

12. Reliance is also placed on Col. R.S. Aggarwal, M.D., Haryana Petrochemicals ltd. v. Ashok Leyland Finance Ltd. [1998] 1 LW (CrI.) 24; [1998] 1 MWN (Cr.) 40 wherein it is observed that in the body of the complaint, the respondent has mentioned only company, represented by its chairman as the accused. The notice is also served only on the company. Though the petitioners have been arrayed as parties, in the body of the complaint, they have not been mentioned as accused. Evidently, this decision is not applicable to the case on hand, because in the present case, the directors of the company have been impleaded as accused and there are necessary averments also to proceed against them.

13. The learned senior counsel for the petitioners also relied on Sham Sunder v. State of Haryana [1989] SCC (Crl.) 783 ; [1990] 67 Comp Cas 1 for the proposition that persons entrusted with business of the firm and responsible for the conduct of business alone, are liable to be prosecuted and not all partners. The initial burden lies on the prosecution to prove that the accused was responsible for carrying on business and was during the relevant time in charge of business. There is no dispute about this principle and I am of the view that the complainant has to be given an opportunity to let in evidence to prove as to in what manner the directors are responsible for carrying on the business.

14. They also relied on K.P.G. Nair v. Jindal Menthol India Ltd. wherein the apex court observed that it follows that a person other than the company can be

proceeded against under those provisions only if that person was in charge of and was responsible to the company for the conduct of its business. It is further stated that from a perusal of the excerpts of the complaint it is seen that nowhere it is stated that on the date when the offence is alleged to have been committed, the appellant was in charge of or was responsible to the accused-company for the conduct of its business. There is no dispute about this principle. But, it has no application to the case on hand, in view of the specific averments made in para. I of the complaint.

15. The learned senior counsel for the respondents also relied on T. Barai v. Henry Ah Hoe, : that in prosecution of directors of a sugar mill for manufacturing adulterated milk toffee the complaint averments giving complete details of the role played by the directors and the extent of their liability, the complaint against accused could not be said to be vague and not implicating directors. The High Court was not justified in exercising its discretion under Section 482 of the Criminal Procedure Code to quash the proceedings against them.

16. They also relied on Electronics Trade and Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electricals) P. Ltd. [1996] 86 Comp Cas 30; [1996] SCC (Crl.) 454 that the object of Section 138 is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 is intended to prevent dishonesty on the part of the drawer of a negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it.

17. It is, therefore, clear from the aforesaid discussions and decisions that there is no force in the objections raised by the revision petitioners. When the contentions raised by the petitioners consist of a mixed question of fact and law, an opportunity has to be given to the complainant to let in evidence to prove his case. Moreover, there are prima facie averments in the complaint to proceed further against the petitioners. When the petitioners were directors at the relevant point of time, when the cheque was issued and apart from that there are clear averments in para. 1 of the complaint, I am of the view that the order passed by the court below is proper

and correct and no interference is called for. Hence, the point is answered accordingly.

18. For the reasons stated above, the revision petition fails and is dismissed. The trial court is directed to complete the trial and dispose of the case as early as possible. Consequently criminal miscellaneous petition is closed.