

M. Moncharan Vs. C. Venkatesh

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Court : Chennai

Decided On : Mar-18-2003

Reported in : 2004CriLJ4326

Judge : V. Kanagaraj, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 141(1) and 141(2)

Appeal No. : Crl. C.P. No. 1649 of 2003 and Cri. MP Nos. 597 and 598 of 2003

Appellant : M. Moncharan

Respondent : C. Venkatesh

Advocate for Pet/Ap. : Mayilvahana Rajendran, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

V. Kanagaraj, J.

1. The petitioner Who is the fourth accused in C.C. No. 656 of 2002 on the file of the Court of Judicial Magistrate No. I, Tiruppur has come forward to file the above Criminal Original Petition seeking to call for the records in the said calendar case and quash the same on averments such as that the first accused in the complaint

filed by the respondent before the Magistrate is a partnership firm of which the petitioner and accused Nos. 2 and 3 in the complaint are partners; that the firm was constituted in 1991; that clauses 8, 9 and 10 of the partnership deed contemplated that M. Rajendran and M. Baskaran shall be the Managing partners; that the managing partners have powers to open bank accounts; that they have also got powers to borrow additional funds required for the purposes of the business; that partnership firm is carried on in accordance with the partnership deed; that the right from the constitution of the firm, the second and the third accused are in charge of the financial dealings of the firm.

2. The petitioner would further submit that the second accused in the complaint is said to have borrowed a sum of Rs. 2.5 lakhs from the respondent repayable with interest at 12% per annum and a cheque for Rs. 3.05 lakhs had been issued in favour of the respondent which have been dishonoured and on compliance of the requirements of the Negotiable Instruments Act, the respondent has filed the complaint for an offence under Sections 138 and 142 of the said Act and the same has been taken on file in the above calendar case by the above mentioned Court. Aggrieved against taking the said complaint on file by the said Magistrate, the petitioner has come forward to file the above quash petition on certain grounds as brought forth in the criminal original petition.

3. When the above criminal original petition came up for admission, the learned counsel for the petitioner would not only lay emphasis on the averments of the petition, but also would cite the following judgments in support of his case :

- (i) : 1999(3)CTC143 (Modern Denim Ltd. v. Lucas TVS Ltd.);
- (ii) 2001 (2) Crimes 307 (Ashok Muthanna v. Wipro Finance Ltd.);
- (iii) : 1997(2)CTC534 (Agrotech Hatching v. Valuable Steel India Ltd.);
- (iv) : (2001)10SCC218 (K.P.G. Nair v. Jindal Menthol India Ltd.);
- (v) (M. Chockalingam v. Sundaram Finance Service Ltd.).

In the first judgment cited above, the learned single Judge of this Court has held that the 'First accused is the company and the second accused personally guaranteed payment under cheque -- Against other accused who are Directors of company except for bald averments there was no evidence to show that they were in-charge of and responsible for the conduct of business of company' and therefore the prosecution against the Directors of the company was quashed.

In the second judgment cited above also the learned single Judge of this Court has held that

'It is contended by the learned counsel for the petitioners that mere reproduction of the words used in the Section is not sufficient. But, in this case, it is only stated that the petitioners were incharge and responsible for the day to day affairs of the company, but also stated that only on the instructions given by the petitioners, the cheques were issued by A.6 on behalf of the company. Therefore, as per the complaint, they had also taken a vital role in the act of issuance of the cheques.'

In the third judgment cited above, yet another single Judge of this Court has held that 'On a reading of the above provisions, it would be clear that only the person who was in-charge of and was responsible to the company for the conduct of the business of the company at the time of the commission of offence should be deemed as guilty of the offence and liable to be proceeded against and punished for such offence. The use of the words 'such person' in Section 138 of the Act would clearly indicate that the person who had drawn the cheque is the person to commit the offence. Section 141 of the Act is not relatable to penal aspect, but only evidence aspect relating to the offence committed under Section 138 of the Act.'

In the fourth judgment cited above, the Honourable Apex Court has held that 'From a perusal of Section 141, it is evident that in a case where a company committed offence under Section 138, then not only the company but also every person who at the time when the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly. 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.'

In the last judgment cited above, the learned single Judge of this Court has held that :

'.....The petitioner herein was a Director of the company and from 20-3-1997 he ceased to be a Director of the company. The cheque was issued later i.e., on 27-12-1997, and there is no averment in the complaint filed by the respondent herein that at the time when the offence was committed, the petitioner was in charge of or was responsible to the company for the conduct of the business of the company.

The Apex Court in *Sham Sunder v. State of Haryana*, : 1989 CriLJ2201 held :

'It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to Sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in Sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be convicted.'

Following the above decision, their Lordships of the Supreme Court have rendered one more decision in *State of Haryana v. Brij Lal Mittal* have held :

'Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in-charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufactures, there is no other allegation to indicate; even prima facie, that they were in-charge of the company and also responsible to the company for the conduct of its business.'

'When there is no allegation in the complaint that the present petitioner who is the 4th accused was in-charge of and was responsible to the company, he cannot be held liable for the commission of the alleged offence under Section 138 of the Negotiable Instruments Act.'

4. In consideration of the facts pleaded having regard to the material placed on record and upon hearing the learned counsel for the petitioner, since it is a question of law that awaits decision prior to admitting the above criminal original petition whether Section 141 of the Negotiable Instruments Act could be invoked against all those who are the Directors of the company, so far as it is concerned in the case in hand of whom the petitioner is one or could any classification be made among the Directors to the effect that some of the Directors are liable to be proceeded with, since they were in-charge of and were 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 whether it is up to this Court to classify whether some of the Directors are in-charge of and responsible to the company and some others are not responsible or not in-charge of and not responsible to the company in the conduct of the business.

5. The proviso to this Sub-section (1) of Section 141 is an exception to Section 141(1) which says 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, thus making it clear that any Director or partner of a company or firm is made an accused, the burden of proof lies on such Director or partner to prove to the effect that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of offence thereby meaning that the trial by the trial Court is the answer in such cases and it is not the duty of this Court to cause any interference in the name of interpretation even prima facie on the face of the complaint if any one is made an accused being the Director or partner of the company or firm and there is no denial of his such status in the company or firm.

6. Secondly this Sub-section (1) would further contemplate the offence against the company itself of which he is the Director and therefore when the company itself is mandatorily made liable under Section 141(1), no doubt need be entertained that the Director would automatically become one of the accused since Section 141(1) is mandatory that the single exception of the Director who is made an accused under Section 141(1) is given the liberty to prove that the offence was committed without his knowledge and in spite of exercising all due diligence to prevent the commission of such offence. Therefore, there is absolutely no room left with so far as this Sub-section (1) of Section 141 and the proviso are concerned for this Court to cause its interference under any pretext since it is the proof which is the qualification and the burden of proof is caused on such Director or partner who comes forward pleading that he is not liable for the commission of the offence contemplated under Section 138 of the Negotiable Instruments Act.

7. Coming to Sub-section (2) of Section 141 which speaks of the consent or connivance or neglect on the part of any Director, Manager, Secretary or other Officers of the company, they shall also be deemed to be guilty of the offence. Here also it is the proof which is the qualification and this proof cannot be obtained normally without conducting the trial and therefore it is only desirable particularly so far as it is concerned with the facts of the case in hand to decide the matter whether any or all of the Directors of the company or its other managers have committed the offence complained of could be found out only on an elaborate trial being ordered and not prima facie proof placed before this Court particularly when the burden of such proof is thrown on the accused who comes forward to allege that he is not one who has committed the offence within the meaning of the section.

8. Needless to mention that it is the trial Court which could go into all these facts necessary for the proof whether a Director like the petitioner is liable for the commission of the offence complained of in conducting a thorough trial and not up to this Court to decide the question in an inconsistent manner on the face value.

9. All the judgments cited above are pointed towards Section 141 of the Negotiable Instruments Act which has been vividly discussed in the foregoing

paragraphs. These judgments would lay emphasis on prima facie evidence to show that a Director or partner must be in-charge of or responsible for the conduct of the business of the company at the time of the commission of the offence and even in the event of a Director or partner of the company or firm if he or she was not responsible for either the commission of the offence or the issuance of the cheque which got dishonoured they cannot be prosecuted and punished within the meaning of Section 141(1) of the Negotiable Instruments Act. However, the operation of Section 141(2) should not also be forgotten and in these circumstances since the question for decision is whether the Director or partner was really in-charge of and was responsible for the conduct of the business of the company has to be found out factually. Barely the conclusions arrived at in the above cited judgments cannot become applicable to the case in hand and instead of applying the norms based on those materials which are made available no definite conclusion could be arrived at, since all those facts and circumstances which are necessary for arriving at such a conclusion have not been placed before this Court and hence it is only up to the trial Court to decide this question so far as the facts and circumstances encircling the case in hand are concerned and hence the parameters supplied by those judgments discussed above could be very well applied by the trial Court itself during trial when elaborately these questions are to be dealt with and no subjective conclusion could be arrived at in the above Criminal Original Petition and hence the following order :

In result,

- (i) the above Criminal Original Petition does not merit acceptance and the same is dismissed at the admission stage itself;
- (ii) consequently, Crl. M.P. Nos. 597 and 498 are also dismissed.