B.L. Boolani Vs. Vasanth Kumar Bangera

B.L. Boolani Vs. Vasanth Kumar Bangera

SooperKanoon Citation : sooperkanoon.com/953061

Court : Karnataka

Decided On : Nov-06-2012

Judge : A.N. Venugopala Gowda

Appeal No. : Criminal Revision Petition No. 236 of 2012

Appellant : B.L. Boolani

Respondent : Vasanth Kumar Bangera

Judgement :
(Prayer: This Cri.R.P. is filed under S.397 r/w 401 Cr.P.C. praying to set aside the order dated 30.11.2011 passed by the Fast Track (Sessions) Court - XVII, Bangalore in Crl.A.No.577/2011 confirming the order dated 6.7.2011 passed by the XVI Addl. CMM., Bangalore in C.C.No.15622/2008, convicting him for the offences p/u/S.138 of N.I. Act and sentencing the appellant to pay a fine of Rs.4,02,000/- and in default to undergo S.1 of four months and acquit the petitioner.)

1. The XVI Additional Chief Metropolitan Magistrate, Bangalore City, on 06.07.2011, convicted both the accused in C.C.No.15622/2008, a case related to the dishonour of cheque/s, under S.138 of Negotiable Instruments Act, 1881 (for short ‘the Act’) and sentenced the accused to pay fine of Rs.4,02,000/-, Rs.4,00,000/-, from the fine amount, when realized, was ordered to be paid to the complainant as compensation. In default of payment of the compensation amount, the accused were ordered to undergo S.1 for a period of 4 months.

Crl.A.No.577/2011 filed, thereagainst, in the City Civil and Sessions Court, Bangalore City, assigned to the Fast Track (Sessions) Court-XVII, was dismissed by a Judgment dated 30.11.2011. Assailing the said Judgments and Orders, petitioner/accused No.2, has filed this criminal revision petition.

2. The respondent filed a private complaint against one N.Bharat Shetty and the petitioner, Managing Director and Director respectively of a company, M/s Canara Polypack ltd., (for short 'company') for the offence punishable under S.138 of the Act, alleging that, for the purpose of the company, the accused borrowed Rs.4,00,000/- and towards repayment of the loan, issued in his favour two cheques, dated 30.11.2007, each for Rs.2,00,000/-, drawn on Vijaya Bank, Vijayanagar Branch, Bangalore - 40. The said cheques when presented for encashment, came to be dishonoured and returned with endorsements 'account recalled'. By a notice dated 24.02.2008, the complainant called upon the accused to pay the cheque amount within 15 days of the receipt of notice. The notice sent to N. Bharath Shetty/accused No.1, was returned with postal shara 'left'. The notice sent to the petitioner was served. The petitioner, disowning the liability to pay the demanded amount, sent a reply dated 12.03.2008. As the accused failed to pay the cheque amount, a private complaint was filed. Learned Magistrate took cognizance. Case was ordered to be registered and process was issued against the accused. Both the accused appeared and were released on bail. The accused denied the charge. During trial, the complainant got himself examined as PW-1 and marked Exs.P1 to P10. The accused were examined under S.313 Cr.P.C. Accused No.1 got himself examined as Dw-1. Accused No.2 was examined as DW-3. Exs.D1 to D19 was marked. The learned Magistrate having found that, 'there existed a legally enforceable debt as on the date the cheques in question were issued and the cheques so issued having been returned unpaid because of non availability of fund in the account of the company - Canara Polypack Ltd., held that the complainant has proved beyond all shadow of doubt that the accused have committed the offence under S.138 of the Act'. As a result, the Judgment of conviction and Order of sentence, noticed supra, was passed. The same was questioned on various grounds in an appeal filed by the petitioner. It was pointed out that the alleged transaction being of the company and the cheques in question having been issued on behalf of the company, and M/s. Canara Polypack Ltd., the

company, having not been arraigned as accused, the complaint being not maintainable, ought to have been dismissed. The Appellate Judge, without considering the said material contention, concurring with the findings recorded by the Magistrate, dismissed the appeal.

3. Appearing for the petitioner, Sri V.B. Shiva Kumar, learned advocate, by placing reliance on the decision in the case of Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd. 2012 AIR SCW 2693, contended that the offence, if any, having been committed by the company, without the company being arraigned as an accused in the case, the prosecution of the petitioner - a director of the company, is impermissible. He submitted that the Courts below, without examining the defence putforth, by keeping in view the correct position of law, have found the petitioner guilty of the offence under S.138 of the Act. He submitted that the impugned Judgments/Orders are illegal and hence, interference is warranted.

4. Appearing for the respondent, Sri K.A. Ariga, learned advocate, supported the impugned Judgments and submitted that the concurrent findings on the facts, arrived at by the Courts below are based on correct appreciation of evidence, which cannot, normally be interfered with by this Court, in exercise of the revision jurisdiction under S.397 of Cr.P.C. He submitted that in view of the detailed appreciation and re-appreciation of the record of the case by the Courts below, the signatures appearing on the cheques in question having not been disputed and the presumption available under S.139 of the Act having not been rebutted by the accused, there is no scope for interference in the present case.

5. Perused the record. It is unnecessary to take note of several grounds raised in the appeal memorandum filed in the Court below and in this revision and also the reference made by Sri K.A. Ariga to the record of the case i.e., with regard to the merits of the case, since the matter can be decided purely on the short question of law, based on the authority of ‘Aneeta Hada’ (supra). The legal question raised in the matter pertains to the maintainability of the complaint filed against N.Bharath Shetty and B.L. Boolani, Managing Director and Director respectively of the company - M/s Canara Polyback Ltd. In the circumstances, the point for determination is:

Whether the petitioner, a Director of the Company, could have been prosecuted for the offence punishable under the provisions of the Act, without the company also being arraigned as an accused?

6. PW-1/complainant has said that the accused persons took from him Rs.4,00,000/-, for the purpose of their company and towards repayment, issued the cheques, Exs.P2 and P3, which on presentation were returned vide Exs.P4 and P5, for the reason 'account recalled'. Notice vide Ex.P6, to pay the cheque amount was sent. Notice sent to N. Bharat Shetty was returned and notice sent to B.L. Boolani was served (Ex.P7). A reply dated 12.03.2008 vide Ex.P10, disowning the liability, was sent by the company represented by its Chairman, B.L. Boolani. In view of the non payment of cheque amount, the complaint (Ex.P1) was filed. From the evidence brought on record, it is clear that the loan was allegedly availed by the accused for the purposes of the company and the cheques, Exs.P2 and P3, are that of the company, i.e., issued towards repayment of the loan. The cheques were dishonoured and returned vide Exs. P4 and P5, whereafter, the demand notice Ex.P6 was sent to both the accused and in view of the non-payment, the complaint was filed.

7. In the case of ANEETA HADA (supra), the material facts are that, she was an authorized signatory of a company registered under the Companies Act, 1956 and had issued a cheque in favour of the respondent therein, which cheque respondent filed a complaint against Aneeta Hada, under S.138 of the Act. In the complaint petition, the company was not arraigned as an accused. However, the Magistrate took cognizance of the offence against the accused - Aneeta Hada and the said order was questioned in the High Court, by filing a petition filed under S.482 Cr.P.C. The petition having been dismissed, Apex Court was approached for relief, by contending that, as the company was not arraigned as an accused, the legal fiction created by the Legislature in S.141 of the Act would not get attracted. In view of the difference of opinion between the two learned Judges of the Bench, in the matter of interpretation of Ss.138 and 141 of the Act, ((2008) 13 SCC 703), the matter was referred to the larger Bench. The larger Bench found the gravamen of the controversy was that, whether any person who has been mentioned in S.141 of the Act can be prosecuted without the company being

impleaded as an accused? After noticing the relevant provisions of the Act and after survey of earlier decisions, wherein, legal position concerning Ss.138 and 141 of the Act, on the issue was considered, it was held as follows:

"42……. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words as well as the company appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that company is a juristic person and it has its own respectability. If a finding is recoded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicated.

43. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh, AIR (1971 SC 447) (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agrawal. (AIR 1984 SC 1824) (supra) does not correctly lay down the law and, accordingly, in hereby overruled. The decision in Anil Hada (AIR 2000 SC 145: 1999 AIR SCW 4228) (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries, (AIR 1988 SC 1128) (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove."

(emphasis supplied by me)

8. It is to be observed that, in the instant case, both the Courts below have not considered the material contention relating to the non-maintainability of the complaint, in the absence of the company, in which, the accused persons were the Managing Director and the Director respectively. The Courts below were expected

to consider the said contention. The Appellate Judge though has noticed the ground raised in the appeal memorandum relating to the non-maintainability of the criminal complaint, has omitted the same from consideration. The Appellate Judge was dealing with an appeal against judgment of conviction. He was required to deal with all the material grounds/contentions. Since the ground relating to maintainability of the case goes to the root of the matter, the same ought to have been considered and meaningfully answered. Learned Judge has not done so. While dealing with an appeal against judgment of conviction, salutary principles have been overlooked, which has resulted in the filing of this petition for relief.

9. Having considered the matter, in my opinion, the ratio of the Judgment in the case of ANEETA HADA (supra), applies to this case in its entirety. The instant case is squarely covered by the said Judgment. Hence, the impugned Judgments/Orders are liable to be set aside.

In the result, the criminal revision petition is allowed. The Judgments and Orders passed by the Courts below, impugned in this petition, are set aside.