IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.03.2016

CORAM

THE HONOURABLE MS.JUSTICE R. MALA

CRL.O.P.No.15360 of 2014
and
M.P.No.1 of 2014

G.Dhinesh Kumar .. Petitioner/Accused No.5

.. Vs ..

S.Eswaramoorthy .. Respondent/Complainant

Prayer:- Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, praying to call for the records in C.C.No.411 of 2013 on the file of the learned Judicial Magistrate, Kangeyam, and quash the same by allowing this quash petition.

For Petitioner : Mr.N.Manokaran
For Respondent : Mr.N.Ponraj

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ORDER

The petitioner, who is A.5, has come forward with this petition seeking to quash the proceedings in C.C.No.411 of 2013 pending on the file of the learned Judicial Magistrate, Kangeyam.

2. The learned counsel for the petitioner would submit that the respondent/complainant has filed a complaint under Section 138 of the Negotiable Instruments Act before the learned Judicial Magistrate, Kangayem, against the petitioner and 4 others alleging that A.1 is a partnership firm and the accused Nos.2 to 5 are the partners of the said partnership firm. All the accused jointly received a sum of Rs.5,00,000/- for and on behalf of A.1 firm on 12.05.2013 towards 1st accused firm's business and to discharge the same, a post dated cheque No.642550, dated 09.07.2013 has been issued by the second accused/Managing Partner of A.1, on behalf of the first accused and the said cheque was presented for encashment on 12.07.2013 and it was returned as unpaid with an endorsement "insufficient funds" on 13.07.2013. After issuance of statutory notice on 16.07.2013 and after receipt of the reply, the respondent/complainant filed a complaint for the offence punishable under Section 138 of the Negotiable Instruments Act.

3. The learned counsel for the petitioner would further submit that the petitioner, who is A.5, has come forward with this petition for quashing the criminal proceedings on the ground of two folds. The first accused partnership firm has resigned from the partnership much before issuance of cheque. The petitioner/A.5, has given a reply, in which, it was specifically mentioned that he retired from the first accused partnership firm on 01.05.2012. But the cheque has been issued on 09.07.2013. The learned counsel also submitted that there is no specific averments against the petitioner and hence, he prays for quashing of the criminal proceedings.

4. To substantiate his arguments, the learned counsel for the petitioner has relied upon a decision of the Hon'ble Supreme Court reported in (2014) 16 SCC page 1 [Pooja Ravinder Devidasani Vs. State of Maharashtra and another] and prays for quashing of the proceedings against the petitioner/A.5.

5. Resisting the same, the learned counsel for the respondent would submit that the petitioner is one of the partners of the first accused firm. Even though the petitioner/A.5 has stated that he has retired from the partnership firm on 01.05.2012, he has not filed any substantiate document to prove the same. The learned counsel for the respondent has relied upon a decision of the Hon'ble Supreme Court reported in (2015) 1 Supreme Court Cases 103 [Gunmala Sales Private Limited Vs. Anu Mehta and others] and submits that a person, who filed a petition for quashing of the complaint filed under Section 138 r/w. 141 of the Negotiable Instruments Act, must produce any incontrovertible or unimpeachable evidence, which is beyond suspicion or doubt or any totally acceptable circumstances. Then only he entitled for quashing the complaint. But even though the petitioner has stated that he has retired from the first accused firm on 01.05.2012, he has not filed any scrap of papers. So, the decision relied upon by the learned counsel for the petitioner reported in (2014) 16 SCC page 1 is not applicable to the facts of the present case and prays for dismissal of the petition.

6. This Court has considered the rival submissions made on both sides and perused the records.

7. On perusal of the typed set of papers, it is seen that the first accused is a partnership firm, wherein, the accused 2 to 5 are the partners. The second accused is a Managing Partner of the first accused firm. It is an admitted fact that the Managing Partner/A.2 alone has signed in the cheque. Now the point that has to be decided is, whether the complaint against the petitioner/A.5 is liable to be quashed, since he was retired from the first accused partnership firm on the date of issuance of cheque.

8. In respect of the first limb of argument is concerned, even though the petitioner, in para No.4 of his grounds, has stated that he has retired from the first accused firm on 01.05.2012, the cheque has been issued on 09.07.2013. So he is not liable and he has also issued a reply for the statutory notice in which it was specifically mentioned that he retired from the first accused firm. But admittedly, no paper has been filed to show that on the date of issuance of cheque, he is not the partner of the first accused firm.

9. At this juncture, it is appropriate to extract paragraph No.34.3 of the decision reported in (2015) 1 Supreme Court Cases 103 [Gunmala Sales Private Limited Vs. Anu Mehta and others], which reads as follows:-

> "34.3. In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about the role of the Director in the complaint. It may do so having come across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed."

10. In the above said decision, the Hon'ble Supreme Court has held that a person, who filed the petition for quashing the complaint, must produce the evidence. In the present case, the petitioner has not produced any document to prove that he is not the partner of the first accused firm on the date of issuance of cheque. In such circumstances, I am of the view that the petitioner has failed to prove that he is not a partner of the first accused firm on the date of issuance of cheque. So this ground fails.

11. Now, this Court has to consider whether the averment in the complaint is sufficient to prosecute the petitioner. It is appropriate to consider the decision reported in (2014) 16 SCC page 1 [Pooja Ravinder Devidasani Vs. State of Maharashtra and another], wherein, at paragraph Nos.16, 17 and 27, the Hon'ble Supreme Court has held as follows:-

> "16. Before delving into the merits of the case, it would be apt to take note of relevant portions of the complaints filed by Respondent 2 which read thus:
>
> "I say that Accused 2 to 5 on behalf of Accused 1 have approached us with request for trade finance facility and accordingly the said facility has been granted by us to the accused as per their request and requirement.
>
> I say that Accused 1 is a private limited company of which Accused 2, 3 and 5 are Directors and Accused 4 is the Director and authorised signatory of Accused 1 M/s Elite International (P) Ltd.—Imprest. At all material time relevant and relating to the complaint, Accused 2 to 5 were and are in charge of and responsible for the conduct of business of Accused 1 and are also looking after the day-to-day affairs of Accused 1. 9 It is further submitted that Accused 2 to 5 with Accused 1 are liable to be prosecuted and/or connived in the commission of the present offence, in their capacity as a Director/signatory of the said private limited company.
>
> I say that as narrated in para 4 Accused 2 to 5 being responsible for the affairs of Accused 1 i.e. private limited company are liable to be prosecuted for having committed a criminal offence in the event of failure on their part to comply with the requisitions contained in the statutory notice dated 3-11-2008, which was sent to them both under RPAD and UPC on 6-11-2008. I say that notice was received by all the accused on or about 8-11-2008 and notice sent through UPC are deemed to have

been served. However, the accused have failed and neglected to make our payment under the abovesaid dishonoured cheques."

17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company—M/s Elite International (P) Ltd. on 1-7-2004 and had also executed a letter of guarantee on 19-1-2005. The cheques in question were issued during April 2008 to September 2008. So far as the dishonour of cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the company but is not involved in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the company and is particularly responsible for the conduct of its business. Simply because a person is a Director of a company, does not make him liable under the NI Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the NI Act. In National Small Industries Corpn.[2] this Court observed: (SCC p. 336, paras 13-14)

> "13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the

company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under Section 141."

18. to 26. ....

27. Unfortunately, the High Court did not deal the issue in a proper perspective and committed error in dismissing the writ petitions by holding that in the complaints filed by Respondent 2, specific averments were made against the appellant. But on the contrary, taking the complaint as a whole, it can be inferred that in the entire complaint, no specific role is attributed to the appellant in the commission of offence. It is settled law that to attract a case under Section 141 of the NI Act a specific role must have been played by a Director of the company for fastening vicarious liability. But in this case, the appellant was neither a Director of the accused Company nor in charge of or involved in the day-to-day affairs of the Company at the time of commission of the alleged offence. There is not even a whisper or shred of evidence on record to show that there is any act committed by the appellant from which a reasonable inference can be drawn that the appellant could be vicariously held liable for the offence with which she is charged."

12. Considering the facts and circumstances of the case, this Court is of the view that it is a fit case to quash the proceedings by applying the principles laid down by the Hon'ble Supreme Court reported in (2014) 16 SCC page 1 [Pooja Ravinder Devidasani Vs. State of Maharashtra and another]. Accordingly,

the entire proceedings in C.C.No.411 of 2013 pending on the file of the learned Judicial Magistrate, Kangeyam, in respect of the petitioner alone is, hereby, quashed and this Criminal Original Petition is allowed accordingly. Consequently, the connected miscellaneous petition is closed.

Jrl

s/d-
Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

To

1. The Judicial Magistrate,
   Kangeyam.

2. do thro the Chief Judicial Magistrate
   Tiruppur.

+ 1 cc to Mr.N.Manokaran, Advocate Sr 19788

+ 1 cc to Mr.N.Ponraj, Advocate SR 19758

rsy(co)
prk26/4

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