IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.07.2018

Coram:

The Honourable Mrs. Justice R. HEMALATHA

Crl.O.P.Nos.10712 to 10715 of 2011
and
M.P.Nos.1 & 2 of 2011 in Crl.O.P.Nos.10712 to 10715 of 2011

1.Tambu
2.Kandasamy
...Petitioners in all Crl.O.Ps

Versus

M/s.Sakthi Textiles
Rep. by its Manager,
Mr.Mahesh Kumar Agarwal
S/o. Mr.Banwarilal,
No.9, Ramalinga Nagar,
Saibaba Colony,
Coimbatore - 641 002.
...Respondent/Complainant in all Crl.O.Ps

Prayer in Crl.O.P.Nos.10712 to 10715 of 2011:
These Criminal Original Petitions are filed under Section 482 of Cr.P.C praying to call for the records relating to S.T.C.Nos.412/2010, 415/2010, 413/2010, & 414/2010 on the file of Judicial Magistrate No.I, Coimbatore and quash the same.

For Petitioners in both Crl.O.Ps : Mr.Su.Srinivasan for Mr.V.Ashok Kumar

For Respondent in both Crl.O.Ps : Mr.T.Balaji

COMMON ORDER

In these petitions, the petitioners are shown as accused Nos.2 & 3 in S.T.C.Nos.412/2010, 415/2010, 413/2010, & 414/2010 on the file of the Judicial Magistrate - I, Coimbatore.

2. The respondent/complainant had filed a private complaint under Section 200 Cr.P.C against the present petitioners as well as two others for the offences punishable under Sections 138, 141 & 142 of the Negotiable Instruments Act before the Court of the Judicial Magistrate - I, Coimbatore.

3. The brief facts of the case of the respondent/complainant are as follows:

The accused used to purchase yarn from the respondent/complainant and in the course of said business transaction, there was an outstanding amount of Rs.13,62,778/- due and payable by the accused for which a cheque bearing No.713154 dated 26.11.2007 drawn on Canara Bank, Perumanallur Road, Tirupur – 641 602, Coimbatore district for a sum of Rs.1,57,000/- was issued by the accused. When the cheque was presented for encashment by the respondent/complainant with their bankers, viz., the Tamil Nadu Mercantile Bank, D.B.Road, R.S.Puram, Coimbatore, the same was returned for the reason, "Account Closed". Thereafter, the respondent/complainant issued notice dated 25.01.2008, calling upon the accused to make good the payment within 15 days from the date of receipt of the said notice. According to the respondent/complainant, notice sent to A1 to A3 returned with an endorsement, "Not Claimed" and the fourth accused received the notice. Since no amount was forthcoming, he filed a private complaint before the Judicial Magistrate-I, Coimbatore.

4. In the present petitions, the petitioners have contended that they are not partners in A.R.K Fashions and that they are not connected with the business activities of the said partnership firm.

5. The learned counsel appearing for the petitioners would contend that the petitioners are only employees in A.R.K Fashions and that they cannot be prosecuted for the offences punishable under Sections 138, 141 & 142 of the Negotiable Instruments Act.

6. Per contra, Mr.T.Balaji, the learned counsel appearing for the respondent/complainant contended that the petitioners are partners in ARK Fashions and since they were incharge of day-to-day affairs of the company, they are liable to pay the amount due under the cheque. It is relevant to extract Sections 138 & 141 of the Negotiable Instruments Act which reads as follows:

> "138. Dishonour of cheque for insufficiency, etc, of funds in the account. - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-
(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.
Explanation.- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

141. Offences by companies:- (1) If the person committing an offence under Section 138 is a company, every person who, at the time of 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:

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government of State Government of a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.] (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by 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 of other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section,-
(a)"company" means any body corporate and includes a

firm or other association of individuals; and
(b)"director", in relation to a firm, means a partner in the firm."

7. A full Bench Judgment of the Honourable Apex Court in SMS Pharmaceuticals Limited Vs. Neeta Bhalla, (2005) 8 SCC 89 has held thus:

"10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

"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, etc."

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will beliable for criminal action. It follows from this that if a director of a company 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 under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status;. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every director, manager or secretary in a company is liable"......, etc, The legislature is award that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any director, manager, secretary or other officer of a company in the commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for directors, managers, secretaries and other officers of a company to cover them in cases of their proved involvement.

12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable."

8. The learned counsel appearing for the respondent/complainant would contend that in paragraph No.2 of the complaint, it is clearly mentioned that A2 to A4 are partners in A.R.K Fashions and that they are involved in the day-to-day affairs of the said partnership firm and therefore, it is for the petitioners to prove at the time of trial that they are not partners in the said firm.

9. It is almost unanimous judicial opinion that necessary averments ought to have been contained in a complaint before a person can be subjected to criminal process. When a liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself, a clear case should be spelt out in the complaint against the person sought to be made liable and the Magistrate, in the first instance, on the basis of the averments contained in the complaint, should satisfy himself that there are averments which would bring the case within Section 141 of the Negotiable Instruments Act before issuing process to the accused. Merely describing a person as a partner in a partnership firm is not sufficient to satisfy the requirements of Section 141 of the Negotiable Instruments Act. In the instant case, a bald and a vague averment is made in the complaint that the petitioners are involved in the day to day affairs of the company. The role played by them in the company is totally missing in the complaint. Therefore, an interference under Section 482 Cr.P.C is warranted. Accordingly, STC.Nos. 412/2010, 415/2010, 413/2010, & 414/2010 are quashed, as far as the present petitioners are concerned. However, the learned Judicial Magistrate - I, Coimbatore is directed to dispose of STC.Nos.412/2010, 415/2010, 413/2010, & 414/2010 within a period

of three months from the date of receipt of a copy of this order as regards A1 & A4.

10. With the above observations, the present petitions are disposed of. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (CS-VII)

// True Copy//

Sub Assistant Registrar

To

1.The Judicial Magistrate No.I,
Coimbatore.

2.The Public Prosecutor,
High Court,
Madras.

3 The Sub Assistant Registrar,
Criminal Section,
High Court, Madras

+1cc to Mr.A.Thiyagarajan, Advocate SR.No.43477

Crl.O.P.Nos.10712 to 10715 of 2011

CP(CO)
SMI/21.08.2018