IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved On : 28.02.2017

Judgment Pronounced On : 09.11.2018

CORAM

THE HONOURABLE MR.JUSTICE S.BASKARAN

Crl.A.No.834 of 2011

Mohan ..Appellant/Respondent/Complainant

vs.

S.Nagarajan ..Respondent/Appellant/Accused

Criminal Appeal preferred under Section 378 Cr.P.C., against the judgement dated 18.02.2011 made in C.A.No.2 of 2007 passed by the learned Additional Sessions Judge/Fast Track Court No.II, Ranipet, Vellore in reversing the Judgment dated 10.04.2007 made in C.C.No.210 of 2002 passed by the learned District Munsif Cum Judicial Magistrate, Arcot.

For Appellant : Mr.S.Vadivel Murugan

For Respondent: Mr.K.Mohanamurali

JUDGMENT

This criminal appeal has been filed against the order of acquittal passed in Criminal Appeal No.02 of 2007 by the Additional Sessions Judge, Fast Track Court-II, Ranipet, Vellore District, dated 18.02.2011, is being challenged in the present criminal appeal.

2.The appellant herein as complainant has filed a complaint under Section 138 of the Negotiable Instrument Act, wherein, the present respondent has been shown as sole respondent/accused.

3.It is averred in the complaint that the respondent / accused borrowed Rs.2,25,000/- for the purpose of his business. Towards its repayment, the respondent/accused issued a cheque marked as Ex.P.1 dated 01.07.2002 drawn on State Bank of India, Ranipet, for Rs.2,25,000/-. The appellant/complainant presented it for collection to his Bank. The State Bank of India, Arcot, vide memo marked as Ex.P.2, the drawee Bank returned it for the reason “exceeds arrangement” The dishonour of the cheque was intimated to the complainant by the Bank vide its memo dated 04.07.2002. The appellant/complainant issued a demand notice on 08.07.2002-

Ex.P.4, asking the respondent/accused to repay the amount within 15 days. On 22.07.2002, the accused issued a reply, Ex.P.5, alleging theft of the cheque by the complainant. On 12.08.2002, the complainant presented a written complaint to the trial Magistrate under Section 138 of the Negotiable Instruments Act.

4.After giving opportunity to both sides, the trial court held that the cheque in question has been issued by the respondent/accused for discharging the liability and the contention of the respondent/accused that the said cheque leaf had been stolen by the appellant/complainant cannot be sustained. The trial court thus finding the respondent/accused as guilty of offence under Section 138 of the Negotiable Instruments Act, sentenced him to undergo rigorous imprisonment for two years and also directed him to pay Rs.2,25,000/- to the complainant.

5. As against the said conviction, the respondent/accused preferred Criminal Appeal No.02 of 2007 before the Additional Sessions Court, Ranipet, Vellore, on the ground that the accused has signed the cheque in the capacity of one of the partners of M/s.Lakshmi Engineering Works, but the firm was not shown as one of the accused in the complaint and further the complaint does not disclose that the accused is responsible for the day to day affairs and management of the firm. The accused also took a ground that there was no legally enforceable liability towards repayment on such a debt.

6. The Additional Sessions Court, Ranipet, Vellore, after considering the available evidence on record reversed the conclusion of the trial Court and dismissed the complaint by way of holding that even though assuming Ex.P1 has been issued by the accused in his capacity as a partner of the firm, there is no averment either in the complaint or in sworn statement in the complaint that the accused had been in charge of day to day affairs of the firm at the time of issuance of the cheque. It is the duty of the complainant to plead and establish the liability of the accused as a partner of the firm and he was in charge of the day to day affairs of the firm. The first appellate Court further pointed out that the complainant himself concedes that Rs.2,25,000/- constitute aggregate of small amounts borrowed by the accused and neglected to furnish the breakup details. In that view of the matter, the court below, held that the argument of the accused that the presumption under Section 138 of the Act has been rebutted cannot be ignored and as there is no specific averment in the complaint as to the Issues mandated in Section 141 of the Act, ultimately, acquitted the respondent/accused.

7. Against the order of acquittal, the present criminal appeal has been preferred at the instance of the complainant as appellant.

8.The learned counsel for the appellant/complainant would submit that there is a statutory presumption under Section 139 of the Negotiable Instrument Act that the drawee is liable to pay the cheque amount unless the presumption is rebutted, but the lower appellate Court shifted the burden on the complainant/appellant instead of the respondent/accused who claims that the cheque in issue was stolen by the appellant/complainant herein. The respondent has not proved that the cheque was stolen and further the documents produced by the respondent herein does not support his case. The news paper advertisement issued by the respondent herein with regard to the cheques stolen from the office of the respondent herein does not have the number of the cheque in issue. It is also contended by the appellant that non impleading of the company as respondent is not fatal to the case, but the lower appellate Court without considering all these aspects has erroneously acquitted the accused which is against law. Hence, this appeal has been preferred and the appellant seeks to entertain the appeal.

9.Per contra, the learned counsel for the respondent would submit that as per the Section 141 of Negotiable Instrument Act, it is the bounden duty of the complainant to narrate the liability of the respondent herein in the capacity of partner since the respondent herein is not responsible for the day to day affairs of the Firm. With regard to that aspect, the complainant has not whispered anything in the original complaint. The failure on the part of the appellant to do so is fatal to his complaint and in support of the same relied upon the verdict of Apex Court which is reported in 2009 (5) CTC 81 and 2012 (5) CTC 101. Thus, the respondent contended that the lower appellate Court has come to a correct conclusion and there is no infirmity in that finding. Hence the respondent contended that , this appeal is to be dismissed.

10.Perused the records and considered both side contention. On perusal, it is apparent that the complainant/ appellant in the complaint lodged under Section 200 Cr.P.C. has stated as follows:-

> "The complainant and accused are friend, for the past several years, the accused is running a company in the name of Lakshmi Engineering Works at Ranipet. In view of the urgency, the accused were borrowed hand loan from the complainant time to time for a sum of Rs.2,25,000/- for the purpose of Engineering Works of accused."

11.In the above said complaint in the short cause title, the name of the accused is mentioned as partner of M/s.Lakshmi Engineering Works, but in the above said paragraph of the complaint, the complainant has not stated whether the accused has borrowed the said amount from the complainant in his individual capacity or as a partner of M/s.Lakshmi Engineering Works. Ex.P1 cheque was issued in the capacity of partner of M/s.Lakshmi Engineering Works and the cheque was issued for M/s.Lakshmi Engineering Works and not in the individual capacity. The complainant himself admitted that amount was borrowed for the purpose of engineering works of accused. In such situation, whether the respondent/accused/partner was incharge of the day to day affairs of the M/s.Lakshmi Engineering works or not must be stated by the complainant in the complaint as per Section 141 of Negotiable Instrument Act. The Section 141 of the Negotiable Instrument Act runs as follows:-

> "141. Offences by companies.--(1) If the person committing an offence under section 138is a company, every person 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 and shall be liable to be proceeded against and punished accordingly:
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a 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 or 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."

12.As per the above provision it is clear that to invoke Section 141 of the Negotiable Instrument Act, it is necessary to specifically aver in the complaint under Sections 138 and 141 of the Negotiable Instrument Act that the person accused was in incharge of business of the company at the time of offence. If that averment does not find place in the complaint, what will be the consequences is stated in the Apex Court verdict reported in 2005 (5) CTC 65(SC)(SMS PHARMA 1) IN SMS PHARMACEUTICALS Vs. NEETA BHALLA, which runs as follows:-

> "6. A three-Judge Bench of this Court considered the scope of Section 141 of the Act in SMS Pharma (I) and held that it is necessary to specifically aver in a complaint under Sections 138 and 141 of the Act, that at the time when the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company and that in the absence of such averment section 141cannot be invoked."

13. However, opposing the same, the learned counsel for the appellant relying upon the ruling reported in 2015 (4) CTC 699 contended that the plea of the respondent is un sustainable. On perusal of the entire judgment of the same, it is seen in Para No.25 what are the averments to be made and what are the averment not necessary are narrated which is as follows:-

> "25) From the above discussion, the following principles emerge :
>
> (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
>
> (ii)Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
>
> (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

(vii) The person sought to be made liable should be in- charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

14.It is clear from the above said two verdict of the Apex Court that without proper averments regarding liability of the accused under Section 141 of Negotiable Instrument Act, any complaint is not maintainable against the accused. In the above said ruling reported in 2015 (4) CTC 699 itself it is clearly observed that the accused is the Managing Director or Joint Managing Director or authorised to sign cheques, in such situation the specific averments with regard to vicarious liability need not be averred, but in all other circumstances, it should be specifically averred. In this case, it is contended that the accused issued the cheque in the capacity of a partner of M/s.Lakshmi Engineering Works. The complainant stated in para 2 of his complaint that the amount was borrowed for the company. In such situation whether the accused is liable vicariously or not has not been averred in Para 2 of the complaint. AS such, considering the same, the lower appellate Court reversed the findings of the trial Court. In view of the above said rulings, it is apparent that there is no infirmity in the findings of the first appellate Court as stated above.

15.The next contention relates to the claim of the accused that Ex.P1 cheque was stolen from him by the complainant. On the side of the appellant the learned counsel would submit that the lower appellate Court shifted the burden to the complainant without considering the presumption under Section 139 of Negotiable Instrument Act. How far the argument is tenable have to be analysed. Under the Negotiable Instrument Act, as far as Section 138 is concerned, the initial burden is on with the complainant and only after the initial burden is discharged, the presumption under Section 139 of Negotiable Instrument Act can be invoked. In the case on hand, as stated above, the initial burden with regard to basic averments under Section 141 of Negotiable Instrument Act has not been done by the complainant. In such situation, shifting of burden does not arise and invoking of Section 139 of Negotiable Instrument Act also will not arise. Therefore, the lower appellate Court has correctly come to the conclusion that the complainant miserably failed to prove the averments in the complaint initially and on that basis reversed the finding of the trial Court. For the reasons stated above, the Court does not find any infirmity in that conclusion arrived at by the lower Court. In such situation, this Court find no merits in the appeal and the same has to be fail. The point is answered accordingly.

16.In the result, the Criminal Appeal is dismissed. The Judgment passed by the learned Additional Sessions Judge/Fast Track Court No.II, Ranipet at Vellore, in C.A.No.2 of 2007 dated 18.02.2011 is hereby confirmed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The District Munsif Cum Judicial Magistrate,
Arcot.

2.-do- thro' The Chief Judicial Magistrate, Vellore.

3.The Additional Sessions Judge,
Fast Track Court No.II,
Ranipet at Vellore.

4. The Section Officer,
Criminal Section, High Court, Madras.

+ 1 cc to Mr.Vadivel Murugan, Advocate Sr.76593
+ 1 cc to Mr. Mohanamurali, Advocate Sr.76592

Crl.A.No.834 of 2011

MG(CO)
EU(07/12/2018)