IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.06.2018
Pronounced on : 27.07.2018

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.2165 of 2011
and
M.P.Nos.1 & 2 of 2011

M.K.Bajoria,
Director,
M/s. Marshall Sons and
Co (Mfg) Ltd.,
No.3, Netaji Subash Road,
Mc Load House,
Kokattal 700 001. ... Petitioner/Accused No.3

Vs.

Birla tyres,
Represented by its Accounts Officer,
Sarojkumar Padby,
Sun Plaza, No.1, 3rd Floor,
No.19, G.N.Chetty Road,
Chennai - 600 006. ... Respondent/Complainant

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.C.No.3506 of 2003 pending on the file of the V Metropolitan Magistrate Court, Egmore, Chennai - 600 008 and quash the same.

For Petitioner : Mr.G.Ravikumar
For Respondent : No appearance

ORDER

This Criminal Original Petition is filed to call for the records in C.C.No.3506 of 2003 pending on the file of the V Metropolitan Magistrate Court, Egmore, Chennai - 600 008 and quash the same.

2.The petitioner herein, who has been arrayed as an accused No.3 under Section 319 of the Code of Criminal Procedure in C.C.No.3506 of 2003, which is pending on the file of V Metropolitan Magistrate Egmore, Chennai. On a private complaint instituted by the respondent complainant for the offence under Section 138 of the Negotiable Instruments Act.

3.Notice was taken for the appearance of the respondent, the respondent had failed to appear in the above case despite private notice dated 09-06-2018 being received on 12-06-2018. A copy of the notice has been served to the learned counsel on 11.06.2018, who is appearing for the respondent/complainant in the trial court. Despite service of the notice and printing the name of the respondent, none appeared. Absence of the respondent and adjourning the case would be of no use. Hence. I proceeded to dispose of the case on merits on the submissions of the petitioner, typed set of papers and on the available materials.

4.The contention of the learned counsel for the petitioner is that the respondent had filed the private complaint against two accused namely Marshal Sons and Co., (MFG) Ltd., and G.Ramesh as accused Nos.1 and 2 respectively. On the entire reading of the complaint, there is no whisper against the petitioner in the complaint. While so, on conclusion of the evidence by the respondent, the accused G.Ramesh had filed a petition under Section 319 of the Code of Criminal Procedure to implead the petitioner and two others as accused in the case. The lower court allowed the petition filed by A2 G.Ramesh and made this petitioner as Accused No.3. The said Ramesh had implicated the petitioner, while answering the question under Section 313 of the Code of Criminal Procedure in the trial Court. Aggrieved against the same, the petitioner had filed the above quash petition.

5.On going through the complaint, it is seen that in the complaint, the 1st accused, is a company and the 2nd accused G.Ramesh, is the Senior Manager/Operation of the 1st accused company and the signatory to the cheque. The further averment in the complaint is that the complainant were engaged in the business of manufacturing and selling of tyres and tubes etc., and by invoice dated 31-07-2001, the accused had to pay a sum of Rs.3,22,714/- towards the discharge of the above said liability, the accused had issued a cheque of Dena bank, Aminjikarai, bearing No.686009 dated 12-02-2002 for Rs.3,22,714/-. When the same was presented the cheque was dishonored for the reason "Exceeds arrangements" with bank memo date 03-04-2002.

6.Statutory notice dated 09-04-2002 was issued to the accused the notice was received by the accused on 11-04-2002, thereafter, no payments were received. Hence, complying with the statutory condition the complainant had lodged the complaint.

7.The further contention of the learned counsel for the petitioner is that no statutory notice was issued by the respondent to the petitioner herein, which is a clear bar to initiate any prosecution against the petitioner. The learned counsel for the petitioner submits that the lower court erred in law interpreting Section 319 of the Code of Criminal Procedure. The trial court invented a new case and issued summons against the petitioner.

8.It could be seen that in the complaint and the sworn statement there is no mentioning about the petitioner. The 138 Negotiable Instruments Act case in which the petitioner has been arrayed as an accused under Section 319 of the Code of Criminal Procedure, on the strength of the petition filed by accused No.2. The lower Court failed to look into the fact that the offence under Section 138 of the Negotiable Instruments Act, is a deeming provision, fulfilling the condition as stipulated under section 138 and 142 of the Negotiable Instruments Act are imperative and at no point of time could be dispensed with.

9.The further contention of the learned counsel for the petitioner is that the petition under Section 319 of the Code of Criminal Procedure is not maintainable under the scheme of prosecution under Section 138 of Negotiable Instruments Act. The co-accused Ramesh namely A2, who has filed this petition at the stage of proceeding against him under Section 319 of the Code of Criminal Procedure is not maintainable, which is in violation of sections 138 and 142 of Negotiable Instruments Act.

10.Further, on reading the entire complaint, sworn statement of the complainant would clearly establish that the petitioner is not involved and connected in the respondent’s transactions. Further, there is no cause of action to initiate proceedings against the petitioner, further relied upon the citations of the Hon’ble Supreme Court reported in 2017(10) Scale 417 in the case of N. HARIKRISHNA VS. J. THOMAS.

11.In the typed set the petitioner had filed the copy of the complaint, sworn statement of the complainant, impleading petition in M.P.No.3931 of 2009 filed on 19-08-2008 under Section 319 of the Code of Criminal Procedure filed before the lower Court and its order dated 13-11-2009 of the lower Court.

12.As rightly contended by the petitioner that there is nothing in the complaint and in the sworn statement with regard to the petitioner. In the 319 of the Code of Criminal Procedure petition filed by A2, he had arrayed the petitioner and two other petitioners as proposed parties and states that the proposed parties are the Directors of the 1st accused company, who had not been arrayed in the complaint filed by the respondent and further makes a bald allegation as though the proposed parties are looking after the day to day affairs of the 1st accused company and this petitioner is the Chairman/Director and hence to be impleaded as parties to the proceedings.

13.On perusal of the order of the lower Court, it is seen that the lower Court had given a finding that as stated by the 2nd accused in the petition that the proposed accused were managing the day-to-day affairs of the 1st accused company and they are also responsible for the management of the accused company, since the counsel for the complainant/respondent herein has not given any objection to implead this petitioner as an accused in this case. The petitioner has been made as accused No.3.

14.Further, the 2nd accused, who is the petitioner in the petition filed under Section 319 of the Code of Criminal Procedure had not pressed with regard to other two proposed accused. The petition as against them has been dismissed. Further, placing reliance on the citation of the Hon'ble Supreme Court reported in 2009(5) CTC 81 in the case of K.K.AHUJA VS. V.K.VOHRA this petitioner has been arrayed as an accused.

15.On considering the submissions of the petitioner and the materials available and on perusal of the lower Court order, it is clear and apparent that the finding of the lower Court is based on the petition filed by the 2nd accused and the lower Court, on a misconception had rendered the order dated 13-11-2009 in Crl.M.P.No.3931 of 2009 in C.C.No.3506 of 2003. The said order is perverse and has to be set aside for the following reasons:

16.The above case is a private complaint summons case, which had been initiated by the respondent, who is the complainant. It is seen from the complaint, sworn statement that there is no overt act as against the petitioner. Further, it is the prerogative of the respondent/complainant to array and against whom to proceed with. Further, as rightly contended by the petitioner in the case filed under Section 138 of Negotiable Instruments Act, as it could be seen in para-21 of the judgment of the Hon'ble Supreme Court in the case of N.HARIHARAKRISHNAN VS. J.THOMAS, wherein it had categorically stated that in the case of 138, the cognizance is only on the offence and no need to take cognizance of accused-wise is an erroneous one. Further, at para-23 & 24, the scheme of prosecution under Section 138 of the Negotiable Instruments Act has been elaborately discussed. In a similar situation the BOMBAY HIGH COURT relying upon citation of the ANEETA HADA CASE and of the HARIKRISHNAN CASE of the Apex Court held in Crl.Appeal No.464 of 2016 by judgment dated 13-10-2017 of A.C.NARAYANAN VS. STATE OF MAHARASHTRA and another that under Section 138 of the Negotiable Instruments Act taking cognizance of offence but not an offender is not appropriate unless a complaint with necessary factual allegations constituting each of the ingredients of the offence under Section 138 of the Negotiable Instruments Act is made out. The Court cannot take cognizance of the offence by resorting to 319 of the Code of Criminal Procedure.

17.Further, the lower Court reliance on K.K.AHUJA CASE is on a misconception, as it could be seen in para-20 and 21 of the citation it had been categorically stated that

> "The settled position is that a Managing Director is prima-facie in charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company but in so far as other directors are concerned, they can be prosecuted only if they were incharge of a responsible for the conduct of the company's business".

18.Further, in para-21 various Provisions of companies Act has been referred to and finally, seven categories of persons namely A to G and the same as stated hereunder:

> A. The Managing Director (S),
> B. The whole time Director (S),
> C. The Manager,
> D. The Secretary,
> E. Any persons in accordance in whose directions or instructions the Board of Directors of the company is accustomed to act.
>
> F. Any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board) and
>
> G. Where any company does not have any of the officers specified in clauses A to C any Director or Directors who may be specified by the Board in this behalf or there no Directors is so specified all the Directors.

19.In the above case, the contention of A.2 in the petition filed under Section 319 of the Code of Criminal Procedure is not that this petitioner is a Managing Director or a Director as specified by the Board, who is looking after the day-to-day affairs of the first accused company. Further, the lower Court on a wrong premise has allowed the petition filed under Section 319 of the Code of Criminal Procedure against the petitioner, when there is no averments and evidence in this case against the petitioner and this petitioner does not fall under the category of Officers of the 1st accused company as held in the case of K.K. AHUJA CASE. The lower Court has given a wrong finding.

20.From the above, it could be seen that the finding of the lower Court is factually and legally not sustainable, perversed. Hence, the order dated 13-11-2009 in Crl.M.P.No.3931 of 2009 in C.C.No.3506 of 2003 passed by the V Metropolitan Magistrate, Egmore, Chennai is quashed.

21.In view of the above, the proceedings against the petitioner/accused No.3 in C.C.No.3506 of 2003 pending on the file of the V Metropolitan Magistrate Court, Egmore, Chennai - 600 008 stands quashed.

22.In the result, the Criminal Original Petition is allowed. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

To

1.The V Metropolitan Magistrate,
Egmore, Chennai - 600 008

2.The Public Prosecutor,
High Court, Madras.

+2cc to Mr.G.Ravikumar, Advocate, S.R.No.51212

ORDER IN
Crl.O.P.No.2165 of 2011

CS(DR)
SMI/02.08.2018