IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:03.09.2018 Delivered on:01.02.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

Crl.OP.No.6053 of 2013
and
M.P.No.2 of 2013

1. S. Thamarai
2. S. Ramesh Prabhu
3. S. Kavitha ... Petitioners/Accused Nos.3 to 5

Vs.

P.S. Moorthy ...Respondent/complainant

PRAYER: Criminal Original Petition is filed under Section 482 of Cr.P.C., to call for the records relating to the proceedings in STC.No.719 of 2012 now pending on the file of the Judicial Magistrate No.7, Coimbatore, and to quash the same, in so far as the petitioner/accused 3 to 5 are concerned.

For Petitioners : Mr.S.Subbiah
Senior counsel
for M/s.P. Raja and D. Prabavathi

For Respondent : Mr.G. Hari Haran

O R D E R

This Criminal Original Petition has been filed by the Accused Nos.3 to 5 to quash the proceedings against them in STC.No.719 of 2012 on the file of the Judicial Magistrate No.7, Coimbatore.

2. The respondent herein has filed a private complaint stating that the second accused viz., S.Subramaniam borrowed a sum of Rs.25 lakhs from him agreeing to repay the sum with interest at the rate of 18% p.a., in the first week of October, 2005. Subsequently in the first week of April, 2006, the second accused again requested him to grant further loan of Rs.50 lakhs. Accordingly, he paid a sum of Rs.50 lakhs by way of a demand draft dated 03.04.2006. As per the accounts maintained by the respondent, as on 31.03.2008, the accused are liable to pay a sum of Rs.1,07,50,290/- including interest for the aforesaid two loans. On 20.03.2008, the second accused through

his Proprietory concern viz., M/s.Shree Maruthi Textiles paid a sum of Rs.7 lakhs towards interest and paid a sum of Rs.56,290/- by way of cash towards interest. As on 01.04.2008, the second accused was liable to pay a sum of Rs.1 Crore towards balance principal and interest. Subsequently, a sum of Rs.10 lakhs was paid by the second accused through the first accused account. As on 30.10.2011, the total outstanding amount was Rs.1,68,42,470/-. As per the understanding and settlement arrived between the second accused and the complainant, the second accused with a view to discharge a portion of the aforesaid debt, issued a post-dated cheque in the last week of September, 2011 bearing No.015486 dated 09.11.2011 drawn in the first accused account for Rs.1 Crore. The respondent herein has presented the said cheque in the bank for encashment on 11.11.2011. The said cheque was dishonoured and returned on 12.11.2011 by stating the reason as account closed. The first accused is a partnership firm, in which, the second accused is the Managing partner and the accused Nos.3 to 5 are the partners of the said firm who are in-charge for the day-to-day affairs of the said firm. Knowing fully well about the consequences of the dishonouring of cheque, purposely issued the aforesaid cheque and therefore, the accused Nos.1 to 5 are liable to be punished under sections 138 and 142 of the Negotiable Instruments Act. With regard to the dishonour of the cheque, the respondent has issued a lawyer's notice dated 07.12.2011 calling upon the Accused Nos.1 to 5 demanding the amount due on the said cheque. Further on 09.12.2011, he has sent a correction notice to the accused Nos.1 to 5 mentioning about the typographical error in the month mentioned in page-3 of the notice dated 07.12.2011. The accused Nos.1 to 4 have received the said notice and sent a reply through their counsel with false averments. The notice which was sent to the fifth accused has returned as 'no such person' in the said M/s.Shree Balaji Textiles. The respondent has sent a rejoinder and even thereafter, the accused person did not come forward to pay the amount. Hence the respondent has filed a private complaint.

3. Based on the said complaint, the learned Judicial Magistrate, No.7, Coimbatore, has taken the case on file in STC.No.719 of 2012 and issued summons to the accused persons. After receipt of the summons, the Accused Nos.3 to 5 have filed the present petition under Section 482 Cr.P.C., to quash the proceedings against them in STC.No.719 of 2012 on the file of the Judicial Magistrate No.7, Coimbatore .

4. Mr.S.Subbiah, learned senior counsel for the petitioners, assisted by M/s.P.Raja and D.Prabavathi, has submitted that the petitioners 2 and 3 are son and daughter of the first petitioner respectively. He further submitted that the third petitioner is not at all a partner in the first accused firm. He further

submitted that as per the averments made in the complaint, the second accused alone borrowed the amount from the respondent and in such a case, the petitioners herein cannot be mulcted with any criminal liability. He further submitted that in the complaint, nothing has been stated that the second accused had borrowed the amount only with the consent of the petitioners herein and he issued a cheque only with the consent of the petitioners herein. He further submitted that in the complaint, the respondent has simply stated that the Accused No.2 is the managing partner and the Accused Nos.3 to 5 are the partners of the first accused firm who are in-charge for the day-to-day affairs of the said firm, but he has not specifically averred that how and in what manner the petitioners herein were responsible for the conduct of the business of the first respondent firm or otherwise responsible to its functioning and therefore, he prayed to quash the proceedings against the petitioners herein.

5. The learned senior counsel for the petitioners, in support of his contentions, has relied upon the following decisions:

a) Katta Sujatha (Smt) Vs. Fertilizers and Chemicals Travancore Ltd., and another (2002) 7 SCC 655.

b) Sabitha Ramamurthy and Another Vs. R.B.S.Channabasavaradhya (2006) 10 SCC 581

c) Saroj kumar Poddar Vs. State (NCT of Delhi) and another (2007) 3 SCC 693

d) Ramrajsingh Vs. State of Madhya Pradesh and another (2009) 6 SCC 729.

e) National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and another (2010) 3 SCC 330.

f) Anitha Malhotra Vs. Apparel Export Promotion council and another (2012) 1 SCC 520.

6. Per contra, Mr. G. Hariharan, learned counsel for the respondent has submitted that to the knowledge of the respondent, the petitioners herein are partners and the second accused viz., S.Subramaniam is the managing partner of the first accused firm viz., M/s. Shree Balaji Textiles. He further submitted that the first petitioner is the wife, the second petitioner is the son and the third petitioner is the daughter of the second accused and as such, without the knowledge of the petitioners, the second accused could not have borrowed the amount and issued the cheque to discharge the debt which was borrowed by the second accused. He further submitted that in the complaint, the respondent has clearly averred that the petitioners herein are the partners and they are in-charge of the day- to-day affairs of the first accused firm and in such a case, it is for the petitioners to adduce satisfactory evidence before the trial court and establish that the petitioners 1 and

2 are not in-charge for the day-to- day affairs of the said firm and it is for the third petitioner to prove that she is not at all a partner in the first accused firm and therefore, he prayed to dismiss the petition.

7. In Katta Sujatha (Smt) Vs. Fertilizers and Chemicals Travancore Ltd., and another, (supra), the Hon'ble Supreme Court has held that the partner of a firm is liable to be convicted for an offence committed by the firm, if he was in charge of and responsible for the firm for the conduct and business of the firm or if it is proved that the offence was committed with the consent or connivance or was attributable to any negligence or part of the partner concerned.

8. In Sabitha Ramamurthy and Another Vs. R.B.S.Channabasavaradhya (supra), the Hon'ble Supreme Court has held that it may be true that it is not necessary for the complainant to specifically re-produce the wordings of the Section but what is required is the clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously liable.

9. In Saroj kumar Poddar Vs. State (NCT of Delhi) and another (supra), the Hon'ble Supreme Court in paragraph No.16 has observed as follows:

> “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 conduct of business of the company at the time of commission of an offence, who will be liable 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 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 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 aware 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. "

10. In Ramrajsingh Vs. State of Madhya Pradesh and another, (supra), the Hon'ble Supreme Court in paragraph No.8 has observed as follows:

"8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are incharge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable."

11. In National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and another, (supra), the Hon'ble Supreme Court in paragraph No.38 has observed as follows:

"38. But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in-charge of the business of the company" or by stating that "he was in- charge of the day-to-day management of the company" or by stating that "he was in-charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141 (1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and

> in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act. "

12. In Anita Malhotra Vs. Apparel Export Promotion council and another (supra), the Hon'ble Supreme Court in paragraph No.22 has observed as follows:

> "22. This Court has repeatedly held that in case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient.
> [Vide National Small Industries Corporation Limited vs. Harmeet Singh Paintal and Another, (2010) 3 SCC 330]. In the case on hand, particularly, in para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day to day affairs of the Company. We have verified the averments as regard to the same and we agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day to day affairs of the Company. On this ground also, the appellant is entitled to succeed. "

13. From the aforesaid decisions of the Hon'ble Supreme Court, it is clear that the mechanical repetition of the requirements under Section 141 (1) of the Negotiable Instruments Act will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under Section (2) of Section 141 of the said Act. In this case, except re-production of the statutory requirements, the respondent has not specified or elaborated the role of the petitioners herein in the day-to-day affairs of the first accused firm. Further the respondent has not produced any material to show that the third petitioner is also a partner of the first accused firm. Therefore, this court is of the view that the respondent cannot prosecute the petitioners herein merely by saying that they are partners of the first accused firm and they are in charge of the day-to-day affairs of the first accused firm. Hence, this court is inclined to allow this petition.

14. In the result, this petition is allowed. Consequently, connected miscellaneous petition is closed. The proceedings against the petitioners herein in STC.No.719 of 2012 on the file of the Judicial Magistrate No.7, Coimbatore, are quashed. Trial Court is directed to proceed against the Accused Nos.1 and 2 and dispose of the case in accordance with law.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

gv

To

The Judicial Magistrate No.7,
Coimbatore.

+1 cc to Mr.Elizabeth Ravi, Advocate, S.R.No.8684

Judgment made in
Crl.OP.No.6053 of 2013
and
M.P.No.2 of 2013

VBA(CO)
SSM(07/03/2019).