(2017) 03 GUJ CK 0007

In the Gujarat High Court

Case No : Criminal Misc. Application No. 1568 of 2011

Anil Kumar APPELLANT

Vs

Abhishek Enterprise-Thro RESPONDENT

Date of Decision : 24-03-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, Section 141

Citation : (2017) 1 DCR 653 : (2017) 1 NIJ 805

Hon'ble Judges : Mr. A.J. Shastri, J.

Bench : Single Bench

Advocate : Mr. Ajaykumar Choksi and Mr. Vaibhav A. Vyas, Advocates, for the Applicant; Dipak N. Maisuriya, Advocate, for the Respondent No. 1; Mr. L.R. Poojari, APP, for the Respondent No. 2

Final Decision : Allowed

Judgement

Mr. A.J. Shastri, J.(Oral) - The present petition is filed by the original accused no.5 for seeking quashment of the Criminal Case No.668 of 2009 pending before the learned Judicial Magistrate, First Class, Gandhidham, District : Kachchh-Bhuj and the process issued upon.

2. The case of the applicant is that a complaint came to be filed in the form of Criminal Case No.668 of 2009 essentially against M/s. Advantage Global BPO Pvt. Limited, a Company registered under the provisions of the Companies Act. The main allegation levelled in the complaint that the accused Company along with four other persons in their capacity as Director issued a cheque towards outstanding amount of Rs.3,56,000/- and in response thereto a cheque bearing no.160076 dated 31.12.2008 of HDFC Bank Ahmedabad Branch came to be issued in favour of the complaint in discharging of their dues and liabilities with respect to the supply of computer hardware by the complainant.

2.1. It is further the case of the prosecution that when the said cheque, which has been signed by Managing Director, came to be presented on 17.01.2009. The complainant received a return memo from HDFC Bank with a remark "fund is insufficient" and resultantly through an advocate the complainant issued its statutory notice through Register Post A.D., on 30.01.2009 as well as through U.P.C. as well.

2.2. It is further the case of the complainant that the said notice though having been received and acknowledged, has not been complied with. Resultantly within a stipulated period a complaint came to be filed before the learned Judicial Magistrate, First Class at Gandhidham, District : Kachchh-Bhuj for the offences punishable under Section 138 read with Section 142 of Negotiable Instrument Act, 1881. It appears from the record that the said complaint came to be filed on 19.02.2009 and on receipt of the same straightway a process came to be issued against the present applicant as well as other accused persons mentioned in the complaint. The record indicates that pursuant to the issuance of summons and filing of the complaint, the present applicant, who is one of the Directors of the Company, approached this Court by way of present application under Section 482 of the Code of Criminal procedure and on the basis of averments contained in the petition initially this Court was pleased to issue notice by granting ad interim relief in terms of paragraph no.18(c) vide order dated 18.02.2009. It further appears from the record that in the month of December 2013, the matter appears to have been admitted and interim relief granted earlier was ordered to be continued which has now come up for final disposal before this Court.

3. Learned advocate Mr. Aditya Choksi, for Mr. Ajaykumar Choksi, an advocate representing the applicant, has vehemently contended that complaint which has been filed is nothing, but an arm twisting method in so far as applicant is concerned. It has been contended that applicant is merely a director and had nothing to do with day to day affairs of the Company. He is not a signatory to the cheque in question nor is completely unaware of the fact as to for which dues the cheque came to be issued by one of the Directors.

4. Mr. Choksi has further contended that a bare assertion of the complaint would clearly indicate that there is no specific case made out against the present applicant, in so far as it relates to an offence of Section 138 of the Negotiable Instrument Act, is concerned. The concept of vicarious liability can be pressed into service with specific accusation against the person concerned and the said essential requirement is completely missing looking to the reading of the complaint and therefore, simply because applicant is one of the directors cannot be dragged into prosecution.

5. Mr. Choksi has further contended that even the notice, which has been issued against the Company as well as other directors, there appears to be no clear assertion with regard to the role played by the present applicant and, therefore, in absence of any specific allegation contained in the notice as well as complaint no offence automatically can be inferred to have been committed by the applicant.

6. Mr. Choksi has further contended that entire concept of principle of vicarious liability is by now well settled by catena of decision delivered by the Apex Court on true interpretation of Section 138 and 141 of Negotiable Instrument Act and therefore, looking to such proposition led down by the Apex Court and various Courts, it cannot be said in any manner that the background of the present fact even prima facie establish any commission of crime as alleged.

7. Mr. Choksi has further contended that in similar situation with respect to applicant, coordinate Bench of this Court in group of petitions has also specifically opined that concept of vicarious liability cannot be pressed into service looking to the statutory provisions contained under Negotiable Instrument Act and therefore, by placing reliance upon this decision as well Mr. Choksi has contended that no case is made out, whereby complaint and the process issued upon it, can be sustained in the eyes of law.

8. Mr. Choksi has further contended that there is legal duty cast upon the learned Magistrate on receipt of the complaint to apply the mind and whether offence is made out or not, is to be evaluated and only thereafter the process is required to be issued and here in the case on hand the bare reading of the order of issuance of process clearly indicates that there are no reasons assigned, but there appears to be clear non application of mind on the part of the learned Magistrate while issuing process.

9. Mr. Choksi has further contended that from the entire material on record, the essential requisite of Section 138 are not prima facie even attracted not only looking to the averments contained in the complaint, but also there is no assertion whether the applicant was authorised Director or not to issue the cheque. It has also been contended that on the contrary huge amount has been invested by the applicant and for that purpose he was made a Director of the Company. It has categorically asserted by Mr. Choksi from the pleadings that there is no role played of any nature in day to day affairs of the Company or dealing with any transaction related to it and, therefore, in the background of these facts the concept of vicarious liability cannot be pressed into service to drag the applicant in the prosecution. The applicant is a reputed medical practitioner having good image in the society and if this kind of prosecution is allowed to be continued against him not only his image will be tarnished, but same will result into miscarriage of justice and, therefore, looking to the entire situation prevailing on record, the counsel for the applicant requested and prayed the Court to quash the complaint and the process issued upon it.

10. To oppose the stand taken by the learned counsel for the applicant though, the counsel Mr. Dipak N. Maisuriya is representing the original complainant, but looking to the entire fact on record of the case at no point of time he has chosen to co-operate with hearing and even today also in the 3rd call, nobody has either mentioned, sought time or assisted the Court and as such in view of this fact, when there seems to be a total non co-operation on the part of the respondent no.1, the Court has deemed it proper to hear and dispose of the main proceeding

finally, as the same is hanging on board since long and while dealing with this, the Court has an assistance of the learned APP, Mr. Poojari, as he is ready with the matter.

11. Mr. Poojari, the learned APP, has also drawn the attention of the Court that from the assertion made in the notice attached to the petition compilation at page 40, there are no specific independent allegation against the applicant visible. Not only that, it appears that cheque has not been signed by the present applicant and looking to the averments contained in the complaint it is hardly possible to believe that any vital role is played by the present applicant being Director and therefore, while assisting the Court learned Additional Public Prosecutor has fairly stated before the Court that in the background of present fact appropriate order in the interest of justice be passed by the Court.

12. Having heard learned counsel appearing for the respective sides and having gone through the material on record, following circumstances are not possible to be ignored while passing the present order:

(i) From the bare reading of the complaint, which is at Annexure-A to the petition compilation while going through the averments contained in the complaint there appears to be no specific accusation mentioned against the present applicant, who is respondent no.5 - accused, shown in the complaint. In addition thereto, it appears from the record that while issuing the process for offence under Section 138 of the Negotiable Instrument Act, no reasons are reflecting while exercising jurisdiction as is visible from page no. 17 petition compilation.

(ii) On further examination of the record, it prima facie indicates that a substantial amount has been invested by applicant in the Company, but when the averments contained in the notice at page 40 are seen, a brief notice is not in any way indicative either the name of the applicant nor any of the Directors about specific accusation and therefore, in the background of these facts it appears in essential form the complaint under Section 148 is filed against the Company by joining of the directors in a routine manner.

(iii) This Court and the Apex Court time and again has directed the learned Magistrate that issuance of process is a serious matter and cannot be issued in mechanical exercise of power and while accepting the complaint on hand whether the averments are reflecting any offence against the accused persons or not, will have to be prima facie examined and the co-ordinate Bench of this Court way back in 2007 in case of Dr. Rajan Sanatkumar Joshi v. Rajnikant Govindlal Shah and Anr., reported in 2007 CRI. L.J. 2318, has categorically mentioned that on receipt of the complaint what caution is to be maintained by the learned Magistrate before taking cognizance or issuance of summons. Paragraph No.15 of the said decision is amply made it clear that while receiving complaint under section 138 of Negotiable Instrument Act, proper verification on oath by the complainant coupled with necessary averments, whether making out a case or not, are to be examined and only after making such verification, the process can be issued and this Court in the aforesaid decision has taken note of various decisions and propositions of Hon''ble Apex Court as contained in paragraph no.15 and therefore, this proposition is on the contrary circulated to all the Courts below including the Court, which has issued the summons of the case. It reflects on the order dated 19.02.2009 at page no.17 that such guidelines which have been issued by this Court has not been maintained and therefore resultantly on this ground alone inherent jurisdiction deserves to be exercised. The relevant extract of the said decision contained in paragraph no.15 is reproduced hereinunder:

"15. The trial Court shall, therefore, carry out proper verification before issuing summons in a criminal case under Section 138 of the Negotiable Instruments Act. While registering the complaint, the following verifications are required;

(1) The verification of a complaint on oath by the complainant is the first important step in the process of taking cognizance by the Court upon the complaint. The verification is not an empty formality but, when a complaint is verified by the complainant on oath, then the verification would attach authenticity to the averments made in the complaint, and if found or proved false, then even cost can be imposed upon such complainant. Therefore, verification has to be in a proper manner, i.e. all the facts necessary to constitute the offence must be borne out from the verification and the factual aspect should also be made very amply clear by the complainant, so that the Court may not be misled by incomplete verification or incomplete details of facts necessary to take cognizance upon the complaint.

(2) If the complaint is by a Company, i.e. by a legal entity, then the Court should verify as to whether the person representing the Company has been duly authorised or not. On the date of the verification of the complaint itself, the Court should peruse the authorization, empowering a particular person to file the complaint on behalf of the legal entity.

(3) Whether the complainant has supplied complete postal address of the complainant as well as the complete postal address''s of the persons named as accused in the complaint or not and whether the said addresses are correct of not.

(4) Shall verify the statement of the complainant that all the accused persons who are named in the complaint are Directors/Partners of the firm/Company in question as on the date of the offence and/or the complaint and, as to whether they are liable under the Negotiable Instruments Act or not. It shall also verify the status of the accused person''s and the extent of involvement of the accused person''s in the commission of the alleged offence. Before a person can be made vicariously liable and is summoned before the Court, strict compliance of the statutory requirements should be insisted. In terms of Section 200 of the Cr.P.C., the Court should take care to see that the complainant makes a statement on oath as to how the offence has been committed and as to how the accused

persons are responsible therefor. On appropriate verification of the complaint, ultimately, if it is found by the Court concerned that the complaint is frivolous or otherwise mala fide, the same may be dismissed under section 203 of the Cr.P.C.

(5) Whether the accused is the signatory to the instrument in question or not.

(6) There must be a specific averment in the complaint itself as regards the fact that the Payee of the cheque had issued the statutory Notice to the Drawer and that the Drawer has received the statutory Notice. The Court should insist for some formal proof in the form of acknowledgment receipt, unless, the complainant, while verifying the complaint on oath, states that the accused has deliberately evaded the service of Notice or otherwise. In the absence of such averment in the complaint as well as the statement on oath during the course of verification, the complaint can straightway be dismissed under section 203 of the Cr.P.C.

(7) Whether the concerned Firm/Company, Society/Institution, Partner/Director or Proprietor are joined as parties or not.

(8) Whether the complaint has been filed within the period of limitation as prescribed under Section 138 of the Act.

(9) Whether there are any specific allegations against each accused or not in accordance with the ratio laid down in the cases of Sabitha Ramamurthy & anr. v. R.B.S. Channabasavaradhya reported in AIR 2006 SC 3086 : 2006(1) SCC 581 : 2006 AIR S.C.W. 4582 : 2006 Cri. LJ 4602 : 2006(9) Scale 212 and Saroj Kumar Poddar v. State (NCT of Delhi) reported in 2007(2) SCALE 36."

(iv) Yet in another decision brought to the notice of the Court by the counsel for the applicant in case of S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla And Another, reported in (2005) 8 Supreme Court Cases 89, in which also the Hon''ble Apex Court has categorically propounded that merely a person being a director of company is not sufficient enough to hold him liable under Section 141 of Negotiable Instrument Act. A director in a company cannot be deemed to be in-charge of and responsible for the Company for day to day affairs of the Company or for its routine business and therefore, by propounding the said proposition on interpretation of Section 141, the Hon''ble Apex Court has also taken note and delivered that every return of cheque will not vicariously make the director responsible. The said proposition is worth to be taken note of as contained in paragraph 19, which is reproduced hereinafter;

"19. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that 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.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

(v) Mr. Choksi, the learned advocate, has further drawn the attention of this Court to yet another decision of the Apex Court in case of National Small Industries Corporation Limited v. Harmeet Singh Paintal And Another, reported in (2010) 3 Supreme Court Cases 330, in which also after considering the principle led down in case of S.M.S. Pharmaceuticals Ltd. (supra), the Hon''ble Apex Court has propounded that there must be the pleadings and proof before holding vicariously liable the director of a company and therefore the averments contained in the complaint are the yardstick whether Section 141 can be resorted to the said decision, is also taken into consideration by this Court while dealing with present order. The relevant principle which has been led down is continued in paragraph no.39, which reads as under:

"39. 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 the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the 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 the accused is a Managing Director or a 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 the 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 the complaint.

(vii) The person sought to be made liable should be in charge of an 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."

13. The aforesaid factual matrix of the case is prima facie clearly suggests that there is no specific role attributed, so far as, the applicant is concerned. The applicant is not even signatory of the cheque and is also undisputably not asserted to have any control over the day to day affairs of the Company as is not reflecting either from the notice or the complaint and therefore, the concept of vicarious liability appears to have not been mechanically attracted and hence, there appears to be a clear non application of mind on the part of the learned Magistrate in issuing summons to the present applicant.

14. It is settled position of law that there are no fetters in exercise of Section 482 of the Code of Criminal Procedure, but yet the same are to be exercised with caution. If the facts and averments contained in the complaint do not constitute any offence and the allegations set out are not attracting any role, then it is always open to the High Court to quash the complaint by exercising powers under Section 482 of the Code of Criminal Procedure. Such recent pronouncement delivered by the Apex Court in case of P.S. Meherhomji v. K.T. Vijay Kumar And Others, reported in (2015) 1 Supreme Court Cases 788. The relevant extract contained in paragraph no.14 is reproduced hereinafter:

"14. It is equally well settled that summoning of an accused in a criminal case is a serious matter and the order taking cognizance by the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent powers to prevent abuse of the process of court and to quash the proceeding instituted on the complaint but such power could be exercised only in cases where the complaint does not disclose any offence or is vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of power under Section 482."

15. Yet another decision delivered by the Apex Court in case of D.P. Gulati, Manager Accounts, Jetking Infotrain Limited, reported in (2015) Supreme Court Cases 730, wherein also while dealing with an offence of Section 138 of Negotiable Instrument Act, upon interpretation of the principle of vicarious liability in the context of Section 141 of the Negotiable Instrument Act, the Hon''ble Court has also maintained the proposition that if averments contained in the complaint do not constitute any role nor any ingredient of offence is prima facie attracted, then simply because a person concerned is Director of the Company ipso facto will not be permitted to drag in prosecution.

16. Therefore, by taking note of aforesaid propositions of law, the Court is of the considered opinion that no case is made out, as is visible from the factual details and therefore, the petition deserves to be allowed and accordingly allowed. The complaint being Criminal Case No.668 of 2009 and issuance of process issued thereon is quashed and set aside only in so far as it relates to the present applicant, who is original accused no.5 only. It is needless to say that the Court has not examined the other aspect of the complaint in any manner, nor with respect to any other accused persons. With these observations, the present petition is allowed. Rule made absolute.