(2009) 10 MAD CK 0187

In the Madras High Court

Case No : Criminal O.P. No. 26735 of 2006 and M.P. No. 1 of 2006

Banumathy Sampathkumar and Another APPELLANT

Vs

TVS Finance and Services Ltd. RESPONDENT

Date of Decision : 29-10-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 406, 409, 415, 420
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16

Citation : (2010) 154 CompCas 142

Hon'ble Judges : Aruna Jagadeesan, J

Bench : Single Bench

Advocate : C.S. Dhanasekaran, for the Appellant; Abdul Saleem, for Anand Abdul and Vinodh, for the Respondent

Final Decision : Dismissed

Judgement

Aruna Jagadeesan, J.—Accused Nos. 3 and 4, who are facing criminal prosecution for offences under Sections 406, 409 and 420 of the Indian Penal Code, 1860, in C.C. No. 10818 of 2006 on the file of the learned III Metropolitan Magistrate, G.T., Chennai, seek to quash the proceedings.

2. The brief facts are as follows:

The first accused-company had entered into a valid agreement dated March 15, 1998, with M/s. Haritha Finance Ltd., for hiring the machinery and the petitioners stood guarantee for the first accused-company and executed a letter of guarantee dated March 15, 1998. The amount financed was for a total value of Rs. 20,61,052. Under a scheme of amalgamation, the company came to be amalgamated with M/s. Harita Finance Ltd., and came to be known as M/s. Harita Srinivasa Finance P. Ltd., and the same was approved by this Court vide its order dated July 31, 1998, made in C.P. No. 142 of 1998. Later the name of M/s. Harita Srinivasa Finance P. Ltd., was changed to M/s. Harita Finance Ltd., and now presently known as M/s. TVS Finance and Services Ltd.

3. The first accused-company has become liable to pay the hire charges and additional finance charges and the complainant-company issued a notice dated February 24, 2003, to the accused calling upon them to pay the outstanding amount of Rs. 39,03,368. In reply to that, the accused issued a reply notice dated March 17, 2003, through their counsel stating that the first accused-company is before the BIFR.

4. Upon expiry of the period for which the machinery was given on hire, the complainant-company had sought for re-delivery of the machinery, but the first accused-company have not re-delivered the same, besides payment of hire charges towards the use of machinery. When the complainant-company visited the premises of the first accused-company to ascertain the status of the machinery, they had come to know that a part of the said machinery had been removed and sold by the accused to the third parties without the knowledge and consent of the complainant. It is alleged that the accused with dishonest intention had cheated and played fraud upon the complainant and had caused wrongful loss. It is further alleged that by removing the machinery and selling it to the third parties, the accused had misappropriated the sum so collected and caused wrongful loss to the complainant. Hence, the complaint has been filed.

5. It is the submission of the petitioners that they are simply the guarantors and they have nothing to do with the day-to-day affairs of the company. Further, the first accused-company had already approached the BIFR for rehabilitation and an enquiry u/s 16 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "the Act") was conducted, but the same was negatived as barred by limitation. As against the said order, an appeal is pending before the AAIFR (Appellate Authority for Industrial and Financial Reconstruction).

6. That apart, the complainant-company initiated civil proceedings against the first accused-company on the file of the 2nd Assistant Judge, City Civil Court, Chennai in O.S. No. 4839 of 2003 for permanent injunction, restraining the first accused-company from in any manner interfering with the complainant''s right in enforcing the legal rights under the hire purchase agreement dated March 15, 1998. It appears that the said suit has been dismissed. The petitioners further submitted that the first accused-company had already paid a sum of Rs. 9,78,711 out of Rs. 14,20,300 thus substantial amount has been discharged.

7. Mr. C.S. Danasekaran, learned Counsel for the petitioners would submit that mere failure to pay the amounts guaranteed to the complainant cannot constitute the offence of cheating and the petitioners as guarantors have nothing to do with the alleged removal and sale of the machinery. Further, the take over of the M/s. Harita Finance by the complainant-company was not intimated to the accused and no notice was served on them. Hence, the transactions are void and it follows that the guarantee cannot be a continuing guarantee.

8. Learned Counsel for the petitioners would further contend that on the face of the allegations made in the complaint, it does not show any fraudulent and

dishonest intention on the part of the petitioners and mere failure to keep the promise at a subsequent stage, the offence of cheating has not been made out. Learned Counsel placed reliance on the decision of the honourable Supreme Court rendered in the case of Anil Mahajan v. Bhor Industries Ltd. [2005] 10 SCC 228 and Alpic Finance Ltd. Vs. P. Sadasivan and Another, , in support of his above said submissions.

9. Per contra, learned Counsel for the respondent would contend that mens rea to cheat the complainant cannot be gone into at the initial stage and it is a matter for evidence. He placed reliance on the decision of this Court rendered in the case of Meena R. Sampath v. State [2005] 5 CTC 533, wherein it was observed that if the contention of the petitioner''s side that they had no mens rea to cheat the complainant is accepted, then in all the cases, where the deposits are made and subsequently the parties are cheated, the defence would come forward with a plan stating that they had no intention to cheat and therefore, the criminal proceedings could not be proceeded with.

10. In yet another decision, this Court in the case of Terry Gold India Ltd. v. TVS Finance and Services Ltd. [2008] 1 MLJ Crl. 782, has held that merely because the allegation in the complaint apparently shows the dispute as one of civil nature, it cannot be quashed and the test applied is to ascertain as to whether the allegations made out a criminal offence or not.

11. In the complaint, the respondent has made allegations against the petitioners making factual foundations for the offences as alleged in the complaint. The honourable Supreme Court in Rajesh Bajaj Vs. State NCT of Delhi and Others, , has observed (page 263 of 3 SCC):

It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But, that is hardly a reason for holding that the offence of cheating would elude from such a transaction.

12. In fact, many cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out u/s 415 of the IPC (illustration "b") is worthy of notice now, which reads as under:

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z, into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

13. The crux of the postulate is the intention of a person who induces the victim of his representation and not the nature of transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that it was induced to believe that the petitioners would honour payment and that the complainant realised later that the intention of the petitioners and other accused were not clear. It is also mentioned that the accused have sold them to third parties without the knowledge and consent of the complainant-company and such

averments would certainly prima facie make out a case.

14. Right from the case of R.P. Kapur Vs. The State of Punjab, , the honourable Supreme Court had held that the revisional or inherent powers for quashing the proceedings at the initial stage can be exercised only where the allegations in the complaint or the FIR, even if taken at their face value and accepted in their entirety do not prima facie disclose the commission of an offence, or where the uncontroverted allegations made in the FIR or complaint do not disclose the commission of any offence against the accused or the allegations are so absurd and inherently improper that on the basis of which no prudent person could have reached a just conclusion that there were sufficient grounds in proceeding against the accused or there is an express legal bar engrafted in any provisions of the code or any other statute to the institution and continuance of the criminal proceedings or where a criminal proceeding is manifestly activated with mala fides and has been initiated maliciously with the ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge.

15. Applying the aforesaid test, it cannot be said that the complaint filed by the respondent did not disclose the commission of offences as stated or there existed any other circumstances which can be made the basis for quashing the proceedings. In fact, the allegations made in the complaint required adjudication and the complaint could not be quashed at the threshold. The contentions raised by the petitioners may be canvassed before the learned Magistrate.

16. In view of the aforesaid discussions and reasons, the impugned complaint cannot be quashed and this criminal original petition is liable to be dismissed and accordingly, it is dismissed. Consequently, the connected MP is closed.