
(2003) 12 MAD CK 0014

In the Madras High Court

Case No : Criminal R.C. No. 1389 of 2003 and Criminal M.P. No. 8639 of 2003

D. Philomina

APPELLANT

Vs

P. Velusamy

RESPONDENT

Date of Decision : 15-12-2003

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2004) 2 BC 109 : (2004) 1 CTC 170 : (2004) 1 LW(Cri) 106 : (2004) 1 RCR(Criminal) 899

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : C. Krishnan, for the Appellant; N. Manoharan, for the Respondent

Final Decision : Dismissed

Judgement

S. Ashok Kumar, J.—This revision has been filed by one Mrs. Philomina, one of the directors of M/s. Shanmugaraja Spinning Mills (P)

Ltd., Bhavani Chithodu NH Road, Chithodu, Erode-2 against the order of the Learned Judicial Magistrate No. 2, Sankari in CrI.M.P.No. 175 of

2003 in C.C.No. 329 of 2002 of the said Court.

2. The brief facts of the case are as follows:

One Velusamy filed a complaint against M/s. Shanmugaraja Spinning Mills (P) Ltd and 11 others. A2 in the case is the Managing Director of the

said Company. According to the complainant, the company purchased cotton from the complainant to the value of Rs. 2,40,275 on 12.9.2000

and two cheques for a sum of Rs. 1,20,000 and another cheque for a sum of Rs. 1,20,275 drawn in favour of the complainant on the Syndicate

Bank, Shevapet, Salem-2 were issued by the accused. When the said two cheques were presented for collection from the complainant's Indian

Bank, Konganapuram Branch on 15.10.2002 both the cheques were returned on 21.10.2002 as unpaid with a memo containing an endorsement

Account Closed". The first accused has issued the cheques knowing the insufficiency of funds in the bank account and consequently purposely the

account was closed. The account was closed without any intimation to the complainant. The complainant sent a registered notice dated 28.10.2002

through his advocate to all the accused for the payment of the said amount. Accused Nos. 2, 3, 6, 7, 8, 10 and 11 received the notice on

29.10.2002, accused Nos. 1 & 4 on 31.10.2002 and the 7th accused evaded to receive the notice. In their reply notice issued through their

counsel, the accused admitted the entire facts and their liability and sought time for payment whereas A3 and A12 sent a reply notice through their

advocate containing false allegations. Therefore, the complainant filed the complaint against A1 to A12 under Sections 138 and 141 of the

Negotiable Instruments Act.

3. The revision petitioner is one of the directors of A1 company. She filed a petition u/s 245 of Cr.P.C., on the ground that the cheques were

issued in the name of "M/s. P. Velusamy" and not in the personal name of a person called "P. Velusamy". According to them, "M/s. P. Velusamy

may be a company or a firm and it is not known to the petitioner whether the said "M/S.P. Velusamy" is a public or private limited company or a

partnership or proprietorship firm, etc. The petitioner further contended that she is not responsible for the conduct of the business of the company,

that merely because she is a director, she was not in charge of the overall control of the day to day affairs of the company and she has been

unnecessarily impleaded in the complaint and she should be discharged from the above case as per Section 141(1) of the Negotiable Instruments

Act. It is also further contended that the complaint has been instituted with the active connivance of the 2nd accused who was the Managing

Director. She also contended that she absolutely had no knowledge about the closer of the account and the reply notice dated 6.11.2002.

According to her there is no allegation against the petitioner that when the alleged offence was committed , the petitioner was in charge of or

responsible to the company for the conduct of the business of the company.

4. Learned Judicial Magistrate-II Sankari has dismissed the petition filed by the

petitioner on the ground that there is specific allegation in the complaint that the other directors of the company were in charge of the day to day affairs of the company and manage the business of the company and the question whether the petitioner and the other directors were in charge of the affairs of the company, has to be decided at the time of trial and the petition has been filed only to protract the proceedings. Aggrieved against the said order, the present revision has been filed.

5. Learned counsel for the revision petitioner would contend that the petitioner is the wife of Ex-Member of Parliament and she is not in anyway in-charge of the day-to-day affairs of the company and there is no proof provided by the complainant to show that the petitioner herein was in any way concerned with the management of the Company A-1 and that therefore she should be discharged. In support of such contention, learned counsel for the revision petitioner relied on the following decisions:

I. Prakash Industries Limited and Ors. v. Bajaj Auto Finance Limited, JDC-Del. 554, wherein it has been held thus: (Para-8)

In Mahendra Pratap Singh Ratra and Anr. v. N.K. Metals 1998 (75) DLT 155, I had the occasion to consider the purport and scope of Section

141 of the Act. Observing that the Section being penal in nature, has to be construed strictly, the initial onus to prove that a person was incharge of

and was responsible to the company for the conduct of its business at the relevant time is obviously on the complainant and even if the complaint

discharges the initial onus, as per proviso to Section 141 of the Act, the person accused can still prove that the offence committed by the company

was without his knowledge or that he had exercised due diligence to prevent the commission of such offence. I had said that till the complainant

pleads the basic facts with regard to that person's role in the day to day affairs of the company, it will neither be possible nor permissible to the

complainant to bring home the charge of vicarious liability under the said Section, Applying the broad principle of law laid down in the said decision

on the facts in hand, I am of the view that petitioners No. 3 to 9 cannot be roped in u/s 141 of the Act. I find that neither in the complaint nor in the

pre-summoning evidence there is any averment or allegation which may even obliquely suggest that the said petitioners were at any point of time

directly or indirectly incharge of and responsible to the accused company for the

conduct of its day-today business. There is no material on record

which may suggest that the alleged offence was committed with the consent or connivance of or was attributable to any neglect on the part of the

said petitioners.

II. Nucor Wires Ltd. v. HMT International, JDC (Karnataka High Court) 1047- wherein it has been held thus:

From the above discussion it is abundantly clear that to launch a prosecution against the directors of the company, there must be specific allegation

in the complaint as to the part played by them in the transactions. There must be clear and unambiguous allegations as to how all the partners are in

charge of and responsible for the conduct of the business of the company.The Court should also make attempt to find out whether the

available allegation that the offence was committed with the consent or connivance or is attributable to any negligence on the part of the directors

or partners of members of any association or a group of persons.

III. Sham Sunder and Others Vs. State of Haryana, -wherein it has been held thus: (Para-9)

It is, therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not

even be knowing of what is going on day to day in the firm. There may be partners, better known as sleeping partners who are not required to take

part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything

about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to Sub-section

(1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso

that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution

establishes that the requisite condition mentioned in Sub-section (1) is established. The requisite condition is that the partner was responsible for

carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be

convicted. We, therefore, reject the contention urged by counsel for the State.

In all the above said three cases with regard to the director or partner of the

company in question, there was no specific pleading that they were in-charge of the day-to-day affairs of the company or overall control of the company or in anyway responsible for carrying on the business of the company and therefore the facts of the above cases are not similar to the facts of the case on hand.

6. But, the facts of the case on hand are totally different. In para-2 of the complaint it is specifically mentioned as follows:

The 1st accused is the private limited company and Nos. 2 to 12 are the directors of the 1st accused. The 2nd accused is the Managing Director

of the 1st accused and the 8th accused is the director and General Manager of the company. The 2nd accused is the Managing Director and the

accused 3 to 12 are the Directors and all of them Managing maintaining and Administering and control over the day to day affairs of the 1st

accused company. The accused 2 to 12 are maintaining, managing and they are in charge of and are responsible for the conduct of the business of

the 1st accused.

When the cheques issued by the company were presented through the bank for collection, the same were returned unpaid with the memo

containing an endorsement ""Account Closed"". After issue of the cheques the company has closed its account with the bank without any intimation

to the complaint. When notice was issued as per law for the payment of the money liable under the cheques, the reply notice dated 6.11.2002 was

sent by M/s. V. Govindarajan and D. Rajasekaran, Advocates, Salem on behalf of all the 12 accused wherein it is mentioned as follows:

1. I am instructed by my clients M/s. Shanmugharajan Spinning Mills Private Ltd. and its 11 directors mentioned in your notice dated 28.10.2002

issued on behalf of Thiru.P.Velusamy, to say that the claim made by your client of Rs. 2,40,275 is absolutely true as my clients have purchased

cotton from your client of 4,021 kgs as said on 12.9.2000. It is also true that my clients issued 2 cheques dated 17.9.2002 and 3.10.2002 as

indicated in your notice.

2. My clients want your client to know that at the present my clients are not able to discharge the debt within a reasonable time. Your client knows

full well that the mill is not functioning for last 8 months and the workers are giving lot of trouble claiming enormous wages and other emoluments

through union leaders. My clients have been negotiating with them for an amicable settlement, which may be possible in few weeks. If that is settled, there are purchasers to buy out the mill which at present is valued more than 7 crores.

3. Therefore in the circumstances, my clients are not able to discharge your client debts, but they all undertake hereby that they will settle the dues in full within a very reasonable time and in the meantime, they are prepare to secure the repayment of your client's due by offering the security of their valuable properties which they own.

4. Please therefore advice your client not to take further actions in the matter and as amounts are released, my clients will pay your client's due by making part payments within a very reasonable time.

From reply notice referred to above, it is clear that all the accused have not only admitted their liability, but they have also given undertaking to settle the amount. But, it is pertinent to note that the reply was sent by the company on its behalf and on behalf of the 11 directors of the company.

7. A perusal of the Articles of Association of the A-1 company would reveal the following things. In Article 74, 74(a), 74(b), and 74(c) it is mentioned as follows:

74. Subject to the Supervision and control of the Board of Directors of the Company, the Managing Director shall have the General conduct and management of the business and affairs of the Company and the control of the finances and staff of all grades, whatsoever and he shall without prejudice to the general powers conferred hereby have the following powers without in any way restricting or limiting the General powers herein before conferred.

74(a)... To buy, sell, exchange and subject the restrictions containing in Sections 373 and 292 of the Act and subject to the provisions of Section 293 of the Companies Act, 1956 pledge, hypothecate, mortgage, charge, claim and take on lease, all manner of property moveable or immovable belonging to the Company.

74(b). To purchase (with the authority of the Directors and within the limit aforesaid) sell, pledge, endorse, surrender, transfer or otherwise deal with Government promissory Notes, Bonds, Loan, script and other securities of the Government of India or any Local Government or other

securities of any other Public authority in India and to collect and give receipts for interest from time to time due or to become due on any such securities.

74(c). To make, issue, acquire, use, deal in, pledge mortgage, sell or negotiate mercantile documents of every kind and description including

railway receipts, bills of Lading, dock warrants, delivery orders, bonds and other transferable instruments or authorities.

Thus, Article 74 of the Articles of Association clearly shows that the Managing Director who issued the cheque had power subject to the

supervision and control of the Board of Directors of the Company which includes as per Article 74(c) to make, issue, acquire, use, deal in, pledge

mortgage, sell or negotiate mercantile documents of every kind and description including railway receipts, bills of Lading, dock warrants, delivery

orders, bonds and other transferable instruments or authorities. Thus it can be seen that the Managing Director was functioning only subject to the

supervision and control of the other directors of the company. There is specific pleading in the complaint that all the directors are managing,

maintaining and administering and control over the day to day affairs of the 1st accused company and they are in charge of and are responsible for

the conduct of the business of the 1st accused company. In the decision reported in *Natesha Singh and Ors. v. Klen and Marshals of*

Manufacturers and Exporters Pvt. Ltd. 2001 (2) L.W.(Cri.) 611 it has been held as follows:

15. In this context, it would be appropriate to quote the provision u/s 141(1) of the Act.

141. Offences by Companies:-(1) If the person committing an offence u/s 138 is 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. Provided that nothing contained in this

subsection shall render any person liable to punishment if he proves that the offence was committed without his knowledge or that he had exercised

all due diligence to prevent the commission of such offence.

16. The reading of Section 141(1) would make it clear that the company as well

as the persons in-charge and responsible for the conduct of the business of the company at the time of the commission of offence can be proceeded with, as they shall be deemed to be guilty of the offence.

Therefore, the complainant has to necessarily allege in the complaint that the persons who are the accused in the complaint were in-charge and responsible for the conduct of the business of the company.

17. Admittedly, this sort of allegations as contained in Section 141 are absent in the instant complaints. But, it has to be seen whether that would

save the petitioners from the prosecution, especially when it is alleged in the complaint that they are responsible for the failure to make payment of

the sums claims under the statutory notice and as such, they are the parties to the offence.

18. Section 141(2) of the Negotiable Instruments Act would provide thus:

(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.

19. As laid down by this Court as well as the Apex Court, mere issuance of cheque and the dishonour would not create cause of action warranting

the prosecution. The non-payment of the cheque amount despite the receipt of statutory notice alone would give rise to the cause of action, which

would be the subject-matter of the prosecution. Therefore, when it is alleged in the complaint that they are responsible for the failure to make

payment of the sum despite the service of notice, those allegations would certainly cover Section 141(2).

20. Section 141(2) starts with the non-obstante clause. Under Sub-section (1), the persons in-charge of and responsible to the company shall be

deemed to be guilty of the offence. But, under Sub-section (2), even the persons who are not stated to be in-charge of and responsible to the

company can be prosecuted, if it is alleged and proved that the offence has been committed with the consent or connivance of, or is attributable to

any neglect on the part of any of those persons prosecuted.

21. No doubt, it is true that in a case of prosecution of persons under Sub-section (1), presumption of their guilt can be inferred. But, the said presumption cannot at all be available in Section 141(2) merely by virtue of their positions in the company. If it is merely mentioned in the complaint that they are director, manager, etc., then the case would have been different. But, in the instant case besides stating about the positions they hold it is specifically mentioned in the complaint that they were responsible for the non-payment of the cheque amount after receipt of notice within the statutory period, which alone would create the offence.

22. In the context of those allegations mentioned in the complaint, it cannot be stated that there is no averment that the offence was committed with the consent of the Chairman, Managing Director, Director and General Manager respectively.

23. Section 141(2) clearly provides that director, manager, secretary or other officer of the company shall also be deemed to be guilty of the offence provided there are averments to the effect that the offence was committed with their consent.

The above referred to decision squarely applies to the facts of this case. Normally, in the complaint filed against the company and its directors u/s

138 and 141 of Negotiable Instruments Act, there should be a specific pleading that the directors of the company were in charge of the affairs of

the company or its management, maintain and responsible for the conduct of the business of the company. There may be several directors in a

company. The complainant who has lent money and supplied goods cannot know what is the role played by the different directors in the company.

It is also impossible for the complainant to verify the activities of each director in the management and responsibility in the conduct of the business

of the company and on whose behalf the cheque is issued. The complainant may not be in a position to fish out information from the officers of the

company and nevertheless from the directors themselves. Therefore, it may be practically impossible for the complainant to describe the

responsibility of each director of the company in the complaint itself. Who are all the directors of the company, the role played by them in the

affairs of the company or the management of the company and in the conduct of the company can be established only at the time of trial. As far as

this case is concerned, a specific notice has been issued to all the directors including this petitioner. This petitioner has not sent a reply stating that she is only sleeping director or dormant director and not incharge of management, control or conduct of the business or having any responsibility in the management and administration of the company. On the other hand, the reply has been sent by all the directors through their counsel admitting their liability and promising to settle the same within a reasonable time. After sending such a reply notice, it is unfair on the part of the petitioner now to turn around and say that she is not responsible for the affairs, administration and management of the company. Having issued two cheques and before the cheques were sent for collection closing the account would itself show the criminal intention of all the accused. There is no merit in the revision petition and hence the same deserves to be dismissed. Accordingly the Revision is dismissed with costs of Rs. 3000 to be paid by the petitioner to the complainant. Consequently connected Crl.M.P. is closed.