(2007) 01 MAD CK 0049

In the Madras High Court

Case No : Criminal A. No. 134 of 2000

Elgi Finance Limited — APPELLANT

Vs

R. Prabakaran, Ms. R.P. Sudha and C. Dhanasekaran — RESPONDENT

Date of Decision : 22-01-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 207
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2009) 1 ALD(Cri) 7 : (2007) 136 CompCas 543

Hon'ble Judges : A.C. Arumugaperumal Adityan, J

Bench : Single Bench

Advocate : T.S. Ramarathinam, for the Appellant; AR.L. Sundaresan for A.L. Gandhimathi, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Arumugaperumal Adityan, J.—This appeal has been preferred by the complainant in C.C. No. 448 of 2000 on the file of the Court of Judicial Magistrate No. VI, Coimbatore, against A2, A4 & A5. The private complaint was preferred by the defacto-complainant, P.W.1, on behalf of the de jure complainant viz. M/s ELGI Finance Limited.

2. The short facts as narrated in the private complaint which was preferred against the accused u/s 200 of Cr.P.C for an offence punishable u/s 138 of the NI Act relevant for the purpose of deciding this appeal are as follows:

The Assistant Manager of the de jure Complainant has preferred this complaint. The de jure complainant viz. M/s ELGI Finance Limited, is a finance company carrying on business such as hire purchase, Leasing, Bill Discounting, Merchant Banking and Collecting Fixed Deposits from their customers. The accused introduced themselves to the complainant and requested the complainant to extend revolving purchase bill discounting facility. A2 to A5 are the Directors of A1-company. As per the requisition made by the accused the complainant had extended revolving purchase bill discounting facility to the accused vide hundi

Nos. 11, 12, 13 & 14 amounting to Rs. 1,00,00,849/-. As per the said bill discounting facility, if the accused fails to make the repayment on the due date, the accused will be liable to pay 42% penal interest. The maturity date of hundi Nos. 11, 12, 13 & 14 was on 25.06.1996. The accused are liable to pay an additional factoring charge of Rs. 5,75,391.31 as on 13.08.1996. The accused issued three cheques, dated 14.08.1996, bearing cheque No. 119413 for a sum of Rs. 24,99,219/-, cheque No. 119416 for a sum of Rs. 25,02,231/-, cheque No. 119415 for a sum of Rs. 24,99,855/-, drawn in favour of the complainant in Tamilnadu Mercantile Bank Limited, towards repayment of bills discounted and towards part payment of additional factoring charges. The accused had requested the complainant to present the aforementioned three cheques for encashment on 14.08.1996. As per the requisition made by the accued, the complainant presented the aforementioned three cheques for encashment on 14.08.1996 through the banker of the complainant, Canara Bank, Alagapuram, Salem. On presentation, the cheques were dishonoured by the banker of the accsued due to "Funds Insufficient" and the complainant was in receipt of the memorandum dated 14.08.1996 issued by the banker of the accused through the banker of the complainant along with the debit advice datd 16.08.1996 issued by the banker of the complainant. The factum of dishonouring of the cheques was immediately informed to the accused to a registered notice dated 23.8.1996 demanding the accused to pay the total amount of the cheques thereon, within 15 days from the date of receipt of the said notice by the accused. The A1 to A5 were in receipt of the said notice on 24.08.1996 and after receipt of the said notice, the accused has not cared to pay the amount demanded by the complainant within the stipulated time given. The accused were fully aware that they have no funds in their account with their banker at the time of issuing the said cheques and then requested the complainant to present the same for encashment. Hence the complaint.

3. After taking the sworn statement of the defacto complainant, P.W.1, the learned Judicial Magistrate has taken the complaint on file in C.C. No. 448 of 1996. On appearance of the accused copies u/s 207 of Cr.P.C were furnished to the accused. When the offence u/s 138 of NI Act charge against the accused was explained to the accused, they pleaded not guilty. On the side of the complainant, P.W.1 was examined and Exs.P.1 to P.12 were marked. On the side of the accused neither oral nor documentary evidence was let in.

4. P.W.1, defacto complainant, in his evidence would depose that Ex.P.1 is the power of attorney deed executed in favour of him by the de jure complainant viz. M/s ELGI Finance Limited and that he is working as an Assistant Manager under the De jure complainant. The first accused is a private limited company and A2 to A5 are the Directors of A1-company. A2 to A5 are looking after the day to day affairs of the company. De jure Complainant had offered bill discounting fecility to the first accused-company to the tune of Rs. 1,00,00,849/-. For the purpose of availing the said bill discounting fecility the accused had executed hundi Nos. 11, 12, 13 & 14 and the said amount under the respective hundials are to be

paid to the de jure complainant on or before 20.6.1996. Since no payment was made towards the above debt by the accused in spite of several demands, third accused on behalf of the first accused has executed three cheques dated 14.08.1996 drawn from Tamil Nadu Mercantile Bank, Salem Branch, for a sum of Rs. 24,99,219/-, for a sum of Rs. 25,02,231/- and for a sum of Rs. 24,99,855/-. The said cheques are exhibited as Exs.P.2 to 4. When the above said cheques were presented in Canara Bank for encashment they were returned with an endorsement "insufficient funds" and Ex.P.3 is the memo issued by the Bank to that effect. Debit advice is Ex.P.6. Ex.P.7 is the notice sent to the accused, wherein the accused were requested to repay the debt amount within 15 days from the date of receipt of the said notice. The accused have received the said notice on 24.08.1996. Ex.P.8(series) is the first acknowlegments.

5. When the incriminating circumstances were put to the accused, the accused denied their complicity with the crime. On the basis of the available evidence, the learned Judicial Magistrate has come to the conclusion that Ex.A1 and the signatory in Ex.P.2-cheque dated 14.08.1996 i.e. Ex.A.3 alone are guilty of the offence u/s 138 of the NI Act and consequently convicted and sentenced A1 & A3 to pay the fine of Rs2,500/- each with default sentence and acquitted A2, A4 & A5. Aggrieved by the findings of the learned trial Judge against A2, A4 & A5 this appeal has been preferred by the complainant.

6. Now the point for determination in this appeal is whether A2, A4 & A5 are also guilty u/s 138 of the NI Act?

7. I have heard the submissions of Mr. T.S. Ramarathinam, learned Counsel for the appellant and Mr. AR.L. Sundaresan, learned Senior Counsel, appearing for the respondents and considered their respective submissions.

8. The Point:

8(a) Against the conviction against them, A1 and A3 have preferred an appeal in C.A. No. 70/1999 before the Additional Sessions Judge, Coimbatore, but the same was dismissed on 1.10.1999. Against that no appeal was preferred.

8(b) The learned Counsel appearing for the appellant would contend that A2, A4 & A5 are all the other Directors of A1-company and only at their request they were given bill discounting facility to the tune of Rs. 1,00,00,849/- and after availing the said bill discounting facility, they have executed Ex.P.9 to P.12 hundials and hence there are also to be held guilty u/s 138 of NI Act. Section 138 of NI Act runs as follows:

Dishonour of cheque for insufficiency, etc., of funds in the account -

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two year, or with fine which may extend to twice the amount of the cheque, or with both

Provided that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation - For the purpose of this section, ''debt or other liability'' means a legally enforceable debt or other liability.

The learned Counsel also drawn the attention of this Court to Section 141 of the NI Act and contended that 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.

8(c) On the other hand learned senior counsel appearing for the respondents/ accused 2, 4 & 5 would contend that even the complaint was preferred against the accused only u/s 138 of the NI Act and except at para 2 of the complaint that A2, A4 & A5 are directors of the company, there is no specific averment in the complaint regarding the overtact of A2, A4 & A5. The trial Court has held that A3 guilty on the ground that he as one of the Directors who has signed in Ex.P.2 to 4-cheques dated 14.8.1996. The learned senior counsel for the respondent relying on 2005 SCC (Cri) 1975 (S.M.S. Pharamaceuticlas Ltd., v. Neeta Bhalla and Anr.), contended that it is necessary to aver in the complaint 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 and without averment being made in the complaint the requirements of Section 141 cannot be said to be satisfied. The exact observation in the above said judgment runs as follows:

The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence u/s 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing do with the mater need not be roped in. A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence.

So it is clear from the above said dictum that it is to be proved by the complainant that every person who at the time when the offence was committed was in charge of the company, and was responsible to the company for the conduct of business of the company as well as the company, to rope into the offence. Even a perusal of hundials in the case on hand viz. Ex.P.9 to P.12, would go to show that A3 has signed in each of those hundials and not the other Directors viz. A2, A4 & A5.

8(d) The learned senior counsel for the respondents relied on 2006 (4) CTC 489 (Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya), and contended that the averments in the complaint must be to show that all the Directors are responsible to clear liability under dishonoured instrument and if the complaint has not satisfied the requirements of law, the complaint is to be quashed. The exact observation in the above said judgment runs as follows:

Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned 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 the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted.

In the case on hand also there is absolutely no averment in the complaint against A2, A4 & A5 regarding their involvement in the offence u/s 138 of the NI Act.

8(e) While deciding an appeal against acquittal, as per the ratio decidendi laid down in 2003 SCC (Cri) 161 (C. Antony v. K.G. Raghavannair), we have to see whether the findings of the trial Court is perverse or contrary to the materials on record. The exact observation of the Honourable Apex Court in the above said dictum runs as follows:

The High Court had lost sight of the fact that it was sitting as an appellate court against a judgment of acquittal passed by the trial Court, therefore, there was an obligation on the part of the High Curt to come to a definite conclusion that the findings of the trial Court are either perverse or the same are contrary to the material on record because the High Court could not have substituted its finding merely because another contrary opinion was possible based on the material on record. It was the duty of the High Court to have first come to the conclusion that the conclusions arrived at by the trial Court for good reasons are either unreasonable or as stated above, contrary to the material on record. In the absence of any such finding in our opinion, the High Court was in error in taking a contra-view merely because another view was possible on the material on record.

In view of the above discussion, I am of the considered opinion that it cannot be said that A2, A4 & A5 are also guilty u/s 138 of the NI Act. The learned trial Judge has considered all those point and has come to a correct conclusion that the other Directors except A3 are in no way connected with the offence and rightly dismissed the complaint against A2, A4 & A5, which does not warrant any interference from this Court. Point is answered accordingly.

11. In the result, the appeal is dismissed confirming the judgment in C.C. No. 448 of 1996 on the file of the Judicial Magistrate No. VI, Coimbatore.