
(2002) 12 AP CK 0075

In the Andhra Pradesh High Court

Case No : Criminal Petition No's. 1165 and 1166 of 2001

Ganga Industrial Corporation Ltd. and Another

APPELLANT

Vs

Videocon International Ltd. and Another

RESPONDENT

Date of Decision : 17-12-2002

Acts Referred:

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

Citation : (2003) 1 ALD(Cri) 273 : (2003) 2 ALT(Cri) 150 : (2003) 1 APLJ 492 : (2003) 2 BC 342

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : A. Sudershan Reddy, for the Appellant; Milind G. Gokhale and Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Heard Mr. A Sudarshan Reddy and Mrs. Monica Pole, learned Counsel representing the respective parties and also the Addl. Public Prosecutor.

2. In both these criminal petitions, petitioner and respondents are the same.

3. The complainant filed C.C. Nos. 1293 and 1294 of 2000 on the file of XXIII Metropolitan Magistrate, City Criminal Courts, Hyderabad against the petitioners herein u/s 138 of Negotiable Instruments Act, 1881, herein after referred to as "the Act" for the purpose of convenience. The allegations made in these complaints are to the effect that the cheques given by the petitioners were bounced. It is also stated that the first respondent-complainant had alleged that these cheques were given for the liability of M/s Sujana Corporation and M/s Sujana Corporation is a sister concern of the petitioner company. It is further stated that in the entire complaint, there is no averment regarding the liability and -it is also stated that the petitioner company is no-way concerned with M/s Sujana Corporation Limited and hence the complaints and the proceedings in C.C. Nos. 1293 and 1294 of 2000 are liable to be quashed.

4. Mr. Sudarshan Reddy, learned Counsel representing the petitioner with all emphasis had submitted that here is a case where the allegations in the complaints do not disclose any liability at all and there is no question of presuming any liability under the provisions of the Act and in such a case, these complaints u/s 138 of the Act are not maintainable and the same are liable to be quashed. Learned Counsel had placed strong reliance on the decisions reported in U. Mallikarjun v. R. Vimala 1997(2) ALT 342 and in B. Mohan Krishna Vs. Union of India and Others, .

5. On the contrary, Ms. Monica Pole, learned Counsel on behalf of Mr. Milind G. Gokhale representing the first respondent had contended that the question relating to the liability or the absence of liability may not be of any consequence at all and these are questions of fact to be decided at the time of trial and these questions need not be taken into consideration while deciding a criminal petition u/s 482 of the Code of Criminal Procedure, 1973, hereinafter referred to as "Code" for short for the purpose of convenience. Learned Counsel while further elaborating her arguments had also drawn the attention to the decisions reported in M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, and in ATV Projects India Ltd., Mumbai v. Nagarjuna Finance Ltd. 2002(1) ALD 364

6. Heard both the Counsels.

7. I have perused the complaints filed in both these matters. It may be appropriate to have a look at the allegations made in para 4 of the complaint, which reads as hereunder :

It is submitted that the complainant has received the Bank Return Memo of the Bankers of complainant dated 18.9.1999 along with the Memo of the Bankers of the accused dated 16.9.99 and after coming to the knowledge of the complainant that the cheque was bounced due to "Insufficient Funds" immediately approached the accused 1 and 2 as they have agreed to repay the outstanding due by their sister concern i.e. M/s Liberty Corporation Limited formerly known as M/s Sujana Corporation and issued the present cheque promising that the cheque would be honoured when presented; and informed that the cheque had been bounced and requested them to repay the amount of the contents of the cheque to avoid further legal complications. The accused neither responded to the request of the complainant nor complied with the request made by the complainant. Finally, the complainant got issued a legal notice dated 28.9.1999 u/s 138 of N.I. Act to the accused herein and the accused have received the said notice vide Acknowledgements dated 6.10.1999 but till date the accused neither complied with the notice nor replied to the said legal notice. As such, the accused have committed an offence punishable u/s 138 of N.I. Act.

8. From the allegations referred to supra, a contention was advanced by the learned Counsel for the petitioner that there is no liability at all and in the absence of any liability, the question of initiating action u/s 138 of the Negotiable

Instruments Act does not arise at all. The question of liability and the proof of allegations made in relation there to are all questions of fact.

9. In *Mallikarjun v. R. Vimala* (supra) at 343, the Apex Court held:

It is clear that the cheques should be issued by the drawer in discharge of full or part of the liability and if the cheque was dishonoured due to insufficient funds, etc., then only 138 of the Act is attracted, if other conditions are complied. On a perusal of the averments that there is no averment in the discharge of any legally enforceable debt or other liability.

10. The same view was expressed in *Mohan Krishna v. Union of India* (supra).

In *Krishan Bhoopal v. Sanam Jhansi Devi* 2002 (1) ALD 817, it was held:

I am unable to agree with the contention of the learned Counsel for the petitioner that the complaint against the petitioner is not maintainable because the company is not made a party to the proceedings. Section 141 of the Act, strongly relied on by the learned Counsel for the petitioner, lays that the person who has drawn the cheques and as well as the company will be liable for the offence u/s 138 of the Act. Therefore, from Section 141 of the Act, it is clear that part from the company, the person who has drawn the cheque also is liable for punishment u/s 138 of the Act. So merely because the company in which the petitioner was a Director is not shown as an accused in the complaint, it cannot be said that the complaint against the petitioner is not maintainable.

I see no force in the contention of the learned Counsel for the petitioner that since the cheques were issued as security for payment but not in discharge of a legally enforceable debt proceedings u/s 138 of the Act are not maintainable. In view of Section 139 of the Act, the presumption is that the cheques issued in favour of the 1st respondent was in discharge of legally enforceable liability. Since the phrase used in Section 139 of the Act is "shall presume", the burden of proof is on the petitioner to establish that the cheques were not issued in discharge of a legally enforceable debt or liability. The averments in the complaint, prima facie, disclose that the 1st respondent had deposited Rs. 1,00,000/- with the company and the cheques drawn by the petitioner and another was issued towards payment of the said amount. It is for the petitioner to establish that the cheques of Rs. 1,00,000/-, which was dishonoured, was not in fact issued towards the discharge of the legally enforceable debt or liability due to the 1st respondent. The question as to whether there is a legally enforceable debt or liability to 1st respondent or not can be decided only after the parties adduce evidence during the trial, but not at this stage,

11. In *ATV Projects India Ltd., Mumbai v. Nagarjuna Finance Ltd.* (supra) was held that where there is subsisting debtor not is a question of fact and it can be decided in trial only and hence complaint cannot be quashed u/s 482 of the Code.

12. In *M/s MMTC Ltd. v. Medchi Chemical and Pharma Private Limited* (supra), the Apex Court had arrived at the conclusion that the Court in exercise of

inherent powers cannot quash complaint on grounds that cheques were not given for any debt or liability and there is no requirement that complainant must specifically allege in complaint that there is a subsisting liability.

13. In *A.V. Murthy v. B.S. Naga Basavanna*, it was held by the Apex Court that:

"It was alleged that the cheque was drawn to pay back amount advanced by the complaint four years back and dismissal at threshold on the ground that as amount was advanced four years prior there was no legally enforceable debt, not proper."

14. In the light of the facts and circumstances referred to supra, the questions which had been raised and argued elaborately by the learned Counsel for the petitioners in these Criminal Petitions, in my considered opinion, are questions of fact to be decided at the time of trial and such questions of fact used not be decided while deciding the criminal petitions u/s 482 of the Code.

15. Viewed from any angle, these criminal petitions are devoid of merits and accordingly these criminal petitions are dismissed.