(2012) 04 CHH CK 0016

In the Chhattisgarh High Court

Case No : Misc. Criminal Case No. 144 of 2004 with Misc. Case No. 1004 to 1011 of 2004

Narendra Goel and Another APPELLANT

Vs

Alok Farro Alloys Ltd. and Others RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 138(1), 138(c), 141

Citation : (2012) 3 Crimes 379 : (2012) 3 MPHT 92

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Advocate : P.K.C. Tiwary, with Mr. Shashi Bhushan, for the Appellant;

Final Decision : Dismissed

Judgement

T.P. Sharma, J.—Since all the above petitions are involving following common question, they are being disposed of by this common order: Whether in absence of allegation of their responsibility for carrying out the business of the Company against the petitioners/members of the Board of Directors in the complaint filed u/s 138 of the Negotiable Instruments Act, 1881 (for short ''the Act''), at the instance of the complainant/respondent No. 1, the complaint is maintainable?

By filing above petitions u/s 482 of the Cr.P.C., the petitioners have challenged legality and propriety of the orders passed by the Additional Sessions Judge and the Chief Judicial Magistrate described as below:

2. As per complaint, the petitioners are the members of the Board of Directors of M/s Haryana Steel and Allies Limited, which is a Company having Registered Office at 48 K.M.G.T. Road, PO Engineering College, Murthaal, Sonepat. The petitioners and other accused persons are Managing Directors and Directors of the said Company. Respondent No. 1/complainant M/s Alok Ferro Alloys Limited and M/s Haryana Steel and Allies Limited, had commercial transactions. M/s Haryana Steel and Allies Limited was regular customer of the complainant

Company. The aforesaid accused Company through its Managing Director and other Directors had issued cheque for payment of dues and liability legally recoverable, same was presented before the Bank which was dishonoured, then notice has been issued to the petitioners and other co-accused persons in terms of Section138 of the Act which was not complied, thereafter, complaint u/s 138 of the Act has been filed by the complainant. The complainant has examined its witnesses under Chapter XV of the Cr.P.C. After hearing the parties, the Chief Judicial Magistrate, Raipur has taken cognizance of the offence punishable u/s 138 of the Act against the petitioners and other co-accused persons and has issued process.

3. As per claim of the Petitioners, the petitioners have not signed the cheque, they are not responsible for conduct of business of the Company and only on the ground that they are the members of the Board of Directors of the Company they are not liable for commission of the offence punishable u/s 138 of the Act. The complainant has not made any allegation against the petitioners that they were responsible for conduct of business of the Company. Therefore, in absence of such allegation, criminal prosecution before the trial Court was not competent. But the trial Court has illegally denied the claim of the petitioners.

4. I have heard learned Senior Advocate appearing on behalf of the petitioners, perused the orders impugned and copies of other documents.

5. Learned Senior Advocate appearing on behalf of the petitioners vehemently argued that in order to prosecute the members of the Board of Directors of a Company, the complainant is required to make specific averment as to how the accused Director was guilty of commission of the offence and that whether he was responsible for carrying out the business of the Company. In absence of such allegation in the complaint, criminal prosecution against the petitioners for the offence punishable u/s 138 of the Act is not sustainable under the law. While denying the claim of the petitioners and dismissing revisions, both the Courts below have committed illegality.

6. Learned Senior Advocate placed reliance in the matter of National Small Industries Corporation Ltd. v. Harmeet Singh Paintal and Anr, 2010 AIR SCW 1508, in which the Supreme Court has held that it is the primary responsibility of 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. Learned Senior Advocate further placed reliance in the matter of Monaben Ketanbhai Shah and another v. State of Gujarat and others 2004 AIR SCW 4716, in which the Supreme Court has held that in absence of averments in complaint that accused at relevant time were in-charge of and responsible to firm for conduct of its business, criminal prosecution for the offence punishable u/s 138 of the Act against the members of the Board of Directors is not maintainable.

7. In all the cases, the complainant has made allegation against the members of

the Board of Directors and the Managing Director of the Company in para 3 of the complaint which reads thus:

The accused company through its Managing Director, and other Directors given a Cheque No. 285278 dated 14.2.98 for Rs. 2,17,350 (Rs. Two lac seventeen thousand three hundred fifty) only drawn on Punjab National Bank, Daryaganj Branch, New Delhi, to the complainant at Raipur (M.P.) towards part payment of the outstanding dues against the accused company.

8. It has been further alleged that after dishonour of the cheque, the complainant has served notice in terms of Section 138(c) of the Act and demanded money from the petitioners and other accused persons, but the petitioners and other accused persons have failed to pay such dues. Further, it has also been alleged that at the time of issuing cheque, the petitioners and other co-accused persons have assured the complainant that they are making valid payment through cheque.

9. On examination of the witnesses under Chapter XV of the Cr.P.C., the witnesses have supported the allegation made in the complaint.

10. As per Section 141 of the Act, in case of company, the person in charge of and was responsible to the company for the conduct of the business of the company, as well as the company are liable for commission of the offence punishable u/s 138 of the Act. Section 141 of the Act reads as follows:

141. Offences by companies--(1) If the person committing an offence u/s 158 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:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(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.

Explanation--For the purposes of this section:

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

11. While dealing with the question of requirement of averments in complaint, the Supreme Court in Monaben''s case (supra) has held that the complainant is required to make specific allegation in complaint that accused were in-charge of and responsible for conduct of business, mere filing at belated stage, copy of partnership deed to show that accused were active in business is not sufficient allegation/averment. In Harmeet Singh''s case (supra), the Supreme Court has held that the complainant is required to make specific averment as to how the accused/Director is guilty for commission of the offence and how he was responsible. Para 25 of the said judgment reads as follows:

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

(vii) 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.

12. In the present case, the complainant has not made the members of the Board of Directors as accused on the ground that they are members of the Board of Directors, but has specifically alleged in the complaint that they have issued cheque, they had assured for payment and notice has been served upon them, but they have failed to pay the amount. The petitioners have not alleged that they have not received notice or that they have replied the notice. Although in the complaint, the complainant has not made comprehensive and detailed allegation against each of the accused, but the allegation made against the accused persons is not insufficient.

13. As held by the Supreme Court in Monaben''s case (supra), the complainant is required to make allegation relating to the act attributed to the accused persons. The allegation made in the complaint is prima facie, sufficient to show that the petitioners along with other co-accused who are members of the Board of Directors have issued cheque and have assured the complainant for payment, and had received notice u/s 138(c) of the Act, however, they have not paid the dues legally recoverable. If these allegations are unrebutted, same may be sufficient for convicting all the petitioners.

14. In the present case, the complainant has made necessary allegation against the petitioners and other co-accused persons which was sufficient for taking cognizance of the offence punishable u/s 138 of the Act against the petitioners and for issuance of notice. The complainant has made allegation necessary for taking cognizance and issuing process against the petitioners, in its complaint. Therefore, by denying the claim of the petitioners and dismissing the revisions both the Courts below have not committed any illegality requiring any interference in exercise of extraordinary inherent jurisdiction in terms of Section 482 of the Cr.P.C. Consequently, M.Cr.C. Nos. 144/2004, 1004/2004, 1005/2004, 1006/2004, 1007/2004, 1008/2004, 1009/2004, 1010/2004 & 1011/2004 are liable to be dismissed and they are hereby dismissed.

