
(2013) 11 CAL CK 0069
In the Calcutta High Court
Case No : C.R.R. No. 4174 of 2012

Nopany Education Trust and Another	Vs	APPELLANT
State and Another		RESPONDENT

Date of Decision : 25-11-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 268 : (2014) 1 CALLT 140

Hon'ble Judges : Joymalya Bagchi, J

Bench : Single Bench

Advocate : Ayan Bhattacharyya, for the Appellant; Somopriyo Choudhury for the Opposite Party No. 2, for the Respondent

Final Decision : Allowed

Judgement

Joymalya Bagchi, J.—Judgment and order dated 17th July, 2012 passed in Criminal Revision No. 48 of 2012 passed by the Additional Sessions Judge, Fast Track, 5th Court, Calcutta affirming the order dated 2nd February, 2012 passed by the learned Metropolitan, Magistrate, Calcutta 16th Court, Calcutta in case No. 17483 of 2010 u/s 138 of the Negotiable Instrument Act has been assailed. The allegation in the petition of complaint is to the effect that the dishonoured cheque in question was issued by accused No. 3, namely, M/s. Paramout Properties and Estate Development Limited. Upon dishonour, notice was issued but the amount of the cheque was not paid within the stipulated time, prima facie constituting an offence u/s 138 of the Negotiable Instrument Act. It is further alleged that the said cheque had been issued in respect of a transaction entered into by and between the petitioners, that is, the accused Nos. 1 and 2 therein and the opposite party/complainant. Process was issued upon the petitioners as well as the accused No. 3 company u/s 138 read with section 141 of the Negotiable Instruments Act. Such process was unsuccessfully assailed before the learned Sessions Judge. Hence, the present application has been filed. Mr. Bhattacharyya, learned counsel appearing for the petitioner submitted that section 138 of the Negotiable Instrument Act creates an offence of strict liability

wherein the drawer of the cheque alone can be punished. Constructive liability in respect of such offence is specifically provided u/s 141 thereof. He further submitted that none of the petitioners can be said to be persons who were in charge and responsible to the accused No. 3-company for the running of its day to day business at the time of commission of the offence. He, therefore, prayed that the proceeding to be quashed so far as the petitioners are concerned. He relied on a decision of P.J. Agro Tech Limited and Others Vs. Water Base Limited, and Mrs. Aparna A. Shah Vs. Sheth Developers Pvt. Ltd. and Another,

2. Mr. Choudhury, appearing for the opposite party No. 2 submitted that the principle of constructive liability is not alien to the penal law. In fact, the petitioners' liability was sought to be liquidated by the issuance of cheque in question and hence the petitioners ought to be held liable for prosecuted upon dishonour of such instrument. He relied on I.C.D.S. Ltd. Vs. Beena Shabeer and Another,

3. The short point which, therefore, falls for decision is whether the petitioners whose liability is sought to be discharged by issuance of the cheque in question can be prosecuted on dishonour of such instalment under the provisions of section 138 read with section 141 of the Negotiable Instruments Act, 1881. Section 138 of the Act reads as follows:

138. 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 provisions of this Act, be punished with imprisonment for (a term which may be extended to two years), 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 30 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 15 days of the receipt of the said notice.

4. A perusal of the said provision would show that penal liability for dishonour of a cheque which remains unpaid within the stipulated time upon receipt of a notice under sub-section (2) thereof is of the drawer of the cheque alone. Constructive liability in respect of dishonour of negotiable instrument issued by a juristic entity is created by a legal fiction provided u/s 141 of the Act. Section 141 reads as follows:

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 sub-section 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.

5. Section 141(1) creates a deeming legal fiction whereby when a cheque issued by a juristic entity is dishonoured, every person in charge of and responsible to the accused company at the time of commission of the offence is liable for prosecution in addition to such accused company. Sub-section (2) provides a defence available to such person during trial. Apart from the aforesaid provision of law, there is no other provision in the said Act which extends constructive liability/vicarious liability in respect of dishonoured cheque.

6. In P.J. Agro Tech Limited and Others Vs. Water Base Limited, the Apex Court inter alia, held that when a cheque was issued from the personal account of an employee of a company in respect of liability of the company itself, the directors of the said company cannot be made liable u/s 141 of the Negotiable Instrument Act. In Mrs. Aparna A. Shah Vs. Sheth Developers Pvt. Ltd. and Another, , the Apex Court had the occasion of dealing with the extent of criminal liability of a

joint account holder in respect of a dishonoured cheque drawn on such joint account and held as follows:--

.... Considering the language used in section 138 and taking note of background agreement pursuant to which a cheque is issued by more than one person, we are of the view that it is only the "drawer" of the cheque who can be made liable for the penal action under the provisions of the N.I. Act. It is settled law that strict interpretation is required to be given to penal statutes.

7. Interpreting section 141 of the Negotiable Instrument Act, the Apex Court held as follows:

13. In the case on hand, we are concerned with criminal liability on account of dishonour of a cheque. It primarily falls on the drawer, if it is a Company, then Drawer Company and is extended to the officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability. To put it clear, 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 statutes extending liability to others. For example, section 141 of the N.I. Act is an instance of specific provision that in case an offence u/s 138 is committed by a company, the criminal liability for dishonour of a cheque will extend to the officers of the company. As a matter of fact, section 141 contains conditions which have to be satisfied before the liability can be extended. Inasmuch as the provision creates a criminal liability, the conditions have to be strictly complied with. In other words, the persons who had nothing to do with the matter, need not be roped in. A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, the officers of the company, who are responsible for the acts done in the name of the company, are sought to be made personally liable for the acts which result in criminal action being taken against the company. In other words, 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. It is true that the proviso to sub-section enables certain persons to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence. The liability u/s 141 of the N.I. Act is sought to be fastened vicariously on a person connected with the company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability.

8. Reliance has been placed by the opposite party on I.C.D.S. Ltd. Vs. Beena Shabeer and Another, . The aforesaid issue did not fall for consideration in the said case. In the aforesaid case the question which fell for decision was whether a cheque which had been kept as collateral security could be a subject matter of prosecution u/s 138 of the Act or not. The question of prosecution of an individual on the premise of vicarious liability for dishonour of cheque in the light of section 141 of the Negotiable Instruments Act did not fall for decision at all and the said judgment is, therefore, of no assistance to the opposite party No. 2.

9. On an analysis of the law, as aforesaid, it is clear that the Apex Court has consistently held that the principle of constructive/vicarious liability so far as an offence u/s 138 of the Negotiable Instruments Act is concerned, is to be restricted to the limited scope as laid down in section 141 of the said Act and not beyond that. More so, such provisions being penal in nature, are subject to strict interpretation.

10. In the instant case, the petitioners are admittedly neither the drawer of the cheque nor are they in charge of and responsible to the accused company who had drawn the cheque for its day to day affairs. There is no such averment in the petition of complaint. Merely because liability of the petitioners were sought to be discharged by issuance of the cheque, they cannot be held to be vicariously liable u/s 141 of the Negotiable Instruments Act for dishonour of such cheque.

11. I am of the view that the petitioners cannot be prosecuted either u/s 138 of the Negotiable Instrument Act or under the principles of vicarious liability as laid down u/s 141 of the Act. For the aforesaid reasons, the revisional application is allowed. The impugned order dated 17th July, 2012 is set aside. The proceedings in case No. 17483 of 2010 pending before the learned Metropolitan Magistrate, 16th Court, Calcutta be quashed so far as the petitioners are concerned. Trial against other accused persons shall continue in accordance with law.

Criminal section is directed to supply photostat certified copy of the order, if applied for, to the petitioner on urgent basis.