(2015) 03 KL CK 0326

In the High Court Of Kerala

Case No : Criminal M.C. Nos. 4044, 2873 and 2874 of 2014

Poly K. Ayyampally and Others APPELLANT

Vs

A. Pradeep Kumar and Others RESPONDENT

Date of Decision : 03-03-2015

Acts Referred:

Companies Act, 1956 — Section 233, 262, 391, 446
Companies Act, 2013 — Section 279, 280
Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 145(2)

Citation : (2015) 129 CLA 36 : (2015) 191 CompCas 99 : (2015) 132 SCL 269

Hon'ble Judges : K. Ramakrishnan, J

Bench : Single Bench

Advocate : K.V. Sohan, Sreeja Sohan K. and Rovin Rodrigues, for the Appellant; A. Ranjith Naraynan, A. Simi and S.K. Saju, Advocates for the Respondent

Final Decision : Dismissed

Judgement

K. Ramakrishnan, J—Accused Nos. 2 and 3 in criminal proceedings under section 138 of the Negotiable Instruments Act, 1881, who are the managing director and director of the company facing liquidation have challenged the proceedings by filing these petitions under section 482 of the Code of Criminal Procedure, 1973. In Crl. M.C. No. 4044 of 2014, the petitioners are accused Nos. 2 and 3 in S.T. No. 162 of 2013 on the file of the Judicial First Class Magistrate Court-II, Koyilandy. That case was taken on file on the basis of a private complaint filed by the first respondent herein against the company by name Pen Properties and Builders P. Ltd., Aluva, who is arrayed as the second respondent herein with the petitioners as managing director and director of the company, alleging commission of the offence under section 138 of the Negotiable Instruments Act. Earlier the case was taken on file as C.C. No. 583 of 2008 on the file of the Judicial First Class Magistrate Court, Koyilandy. Since the present petitioners did not appear, the case against them was split up and refilled as C.C. No. 863 of 2013 as against the first petitioner, which is pending before the Judicial First

Class Magistrate Court-I, Koyilandy, and as S.T. No. 162 of 2013 as against the second petitioner and now pending before the Judicial First Class Magistrate Court-II, Koyilandy.

2. Crl. M.C. No. 2873 of 2014 was filed by accused Nos. 2 and 3 in S.T. No. 1405 of 2009, on the file of the Judicial First Class Magistrate Court, Perambra-II, which was taken on file on the basis of a private complaint filed by the second respondent against the third respondent-company and the present petitioners as accused Nos. 1 to 3 alleging offence under section 138 of the Negotiable Instruments Act.

3. Crl. M.C. No. 2874 of 2014 was filed by accused Nos. 2 and 3 in S.T. No. 276 of 2009 of the Judicial First Class Magistrate Court, Perambra-I, which was taken on file on the basis of a private complaint filed by the second respondent against the third respondent-company and the petitioners as accused Nos. 1 to 3 alleging offence under section 138 of the Negotiable Instruments Act.

4. In all these cases, the case of the complainant was that, the first accused-company represented by accused Nos. 2 and 3 owed certain amounts and in discharge of that liability accused Nos. 2 and 3 had issued the disputed cheques on behalf of the company from the account maintained by the first accused-company in their banks at Aluva.

5. According to the petitioners, by virtue of section 446 of the Companies Act, 1956 and present sections 279 and 280 of the Companies Act, 2013, no proceedings can be initiated against the company or proceeded with against the company without the leave of the company court and the magistrate has no jurisdiction to entertain the complaints, as the allegation is that, the company has committed the offence and they are only acting as representatives of the company and they want to quash the proceedings on that ground by filing the above respective petitions.

6. Heard counsel for the petitioners in these cases, advocate Sri. K.V. Sohan and counsel appearing for the respondents representing the liquidator Sri K. Money, A. Renjith Narayanan and learned public prosecutor.

7. Counsel for the petitioners in all these cases submitted that, by virtue of section 446 of the Companies Act, 1956, which is now replaced by section 279 of the Companies Act, 2013, no proceedings shall be allowed to continue in respect of winding up company without the leave of the company courts. Counsel for the petitioner relied on the decision reported in Prof. P. Narayanan Kutty v. Official Liquidator [1998] KHC 99 : [1998] 1 KLT 525 : [1999] 96 Comp Cas 418 (Ker.) in support of his case.

8. Counsel for the respondents submitted that, suit or other proceedings mentioned in section 446 of the Companies Act, 1956, or present section 279 of the Companies Act, 2013, will not take in criminal proceedings under section 138 of the Negotiable Instruments Act. Counsel for the respondent relied on the

decision reported in Jose Antony Kakkad Vs. Official Liquidator, High Court of Kerala and Another, (2000) 100 CompCas 811 : (2008) 3 CompLJ 503 : (2008) 3 CompLJ 502 : (2000) 2 ILR (Ker) 557 .

9. The common question that arises for consideration in these case is whether proceedings under section 138 of the Negotiable Instruments Act has to be stayed under section 446 of the Companies Act, 1956, which is replaced by sections 279 and 280 of the Companies Act, 2013.

10. Section 446 of the Companies Act, 1956 and sections 279 and 280 of the Companies Act, 2013, reads as follows:

"446. Suits stayed on winding up order.--(1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Tribunal and subject to such terms as the Tribunal may impose.

(2) The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of--

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under section 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or rise in course of the winding up of the company;

whether such suit or, proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960)...

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

279. Stay of suits, etc., on winding up order.--(1) When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:

Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.

(2) Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

280. Jurisdiction of Tribunal.--The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,--

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company, including claims by or against any of its branches in India ;

(c) any application made under section 233;

(d) any scheme submitted under section 262;

(e) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company,

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made."

11. This question has been considered by the Division Bench of this court in Jose Antony Kakkad Vs. Official Liquidator, High Court of Kerala and Another, (2000) 100 CompCas 811 : (2008) 3 CompLJ 503 : (2008) 3 CompLJ 502 : (2000) 2 ILR (Ker) 557 and observed that, the proceedings under section 138 of the Negotiable Instruments Act cannot be stayed invoking the power under section 446 of the Companies Act, 1956, in paragraph 9 of the judgment as follows (page 818 of 100 Comp Cas):

"...the expression ''legal proceedings'' in section 446 of the Companies Act is wide enough to include criminal prosecution also, such criminal proceedings must be in relation to the assets of the company, and, as the proceedings under section 138 of the Negotiable Instruments Act are not in respect of the assets of the company, section 446 has no application and the proceedings cannot be stayed invoking section 446 of the Companies Act. A consideration of the above decision would make it clear that the expression ''other legal proceedings'' in section 446 of the Companies Act does not take in all proceedings and the proceedings under the special Act have an overriding effect over the general provisions under the Companies Act. The object of winding up of a company by the court was to facilitate the protection and realisation of its assets with a view to ensure an equitable distribution thereof among those entitled. Once the court has taken the assets of a company under its control or has passed an order for its being wound up, in the ordinary course, it will not be proper to allow proceedings to be started or continued against the company. Section 446 is intended to avoid multiplicity of proceedings and to safeguard the assets of a company against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and effectively by the winding up court itself.

Though the words ''legal proceedings'' in section 446 of the Companies Act is wide enough to take in criminal proceedings also, such criminal proceedings must be in relation to the assets of the company. Criminal proceedings which are not in respect of the assets of the company but end in the conviction or acquittal of the accused cannot be stayed under section 446 of the Companies Act. The proceedings under section 138 of the Negotiable Instruments Act can end only in the conviction or acquittal of the accused in the case and no recovery of any amount covered by the dishonored cheques can be made in the criminal proceedings. As the criminal proceedings under section 138 of the Negotiable Instruments Act are not in respect of the assets of the company, the proceedings pending in the criminal courts cannot be stayed under section 446 of the Companies Act. Hence the proceedings initiated against the appellant under section 138 of the Negotiable Instruments Act before the criminal court cannot be stayed invoking section 446 of the Companies Act."

12. The decision relied on by counsel for the petitioners namely Prof. P. Narayanan Kutty v. Official Liquidator [1998] KHC 99 : [1998] 1 KLT 525 : [1999] 96 Comp Cas 418 (Ker) has been considered by the Division Bench and distinguished the same stating that, the dictum laid down in that decision is not applicable to proceedings under section 138 of the Negotiable Instruments Act. In view of the authoritative pronouncement by the Division Bench in this aspect, the contentions raised by counsel for the petitioners that the proceedings under section 138 of the Negotiable Instruments Act initiated against them cannot be proceeded with has no substance and the same is liable to be rejected. But the question as to whether that court has got jurisdiction to proceed with the case, in view of the dictum laid down in the decision reported in Dashrath Rupsingh Rathod Vs. State of Maharashtra, (2014) AIRSCW 4798 : (2014) 3 BC 513 : (2014) 9 SCALE 97 : (2014) 9 SCC 129 , is applicable or not has to be considered by that court on the basis of the allegations in the complaint, as to whether the drawee bank is situated within the jurisdiction of that court or within the jurisdiction of some other court and also whether the evidence in the case has been started or not as mentioned in paragraph 20 of the judgment, which reads as follows (page 24 of 191 Comp Cas):

"20. We are quite alive to the magnitude of the impact that the present decision shall have to possibly lakhs of cases pending in various courts spanning across the country. One approach could be to declare that this judgment will have only prospective pertinence, i.e., applicability to complaints that may be filed after this pronouncement. However, keeping in perspective the hardship that this will continue to bear on alleged accused/respondents who may have to travel long distances in conducting their defence, and also mindful of the legal implications of proceedings being permitted to continue in a court devoid of jurisdiction, this recourse in entirety does not commend itself to us. Consequent on considerable consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged accused, the recording of evidence has commenced as envisaged in section 145(2) of the Negotiable

Instruments Act, 1881, will proceeding continue at that place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of complaint cases where proceedings have gone to the stage of section 145(2) or beyond shall be deemed to have been transferred by us from the court ordinarily possessing territorial jurisdiction, as now clarified, to the court where it is presently pending. All other complaints (obviously including those where the accused respondent has not been properly served) shall be returned to the complainant for filing in the proper court, in consonance with our exposition of the law. If such complaints are filed refilled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred."

13. It is submitted by counsel for the petitioner in these cases that, the second accused is now totally bed ridden and in coma and he is not able to appear in court and the third accused is his wife. As regards the second accused is concerned, if the petitioner can convince the court below that, he is unable to move on account of his illness and he is unable to understand things, then court below is directed to consider that application and consider the question of jurisdiction, if it is raised in view of Dashrath Rupsingh Rathod Vs. State of Maharashtra, (2014) AIRSCW 4798 : (2014) 3 BC 513 : (2014) 9 SCALE 97 : (2014) 9 SCC 129 , in his absence and he may be permitted to appear through counsel and pass appropriate order on that aspect in accordance with law.

14. As regards the third accused is concerned, if she surrenders before the court below and moves for bail, then court below is directed to recall the warrant and after granting bail, permit her also to represent through counsel and consider the question of maintainability in view of Dashrath Rupsingh Rathod Vs. State of Maharashtra, (2014) AIRSCW 4798 : (2014) 3 BC 513 : (2014) 9 SCALE 97 : (2014) 9 SCC 129 decision of the hon''ble Supreme Court mentioned above. With the above direction and observation, the petitions are dismissed.

