

(2020) 10 CHH CK 0007
In the Chhattisgarh High Court
Case No : Criminal Revision No. 1512 Of 2019

Simaiyya Hariramani And Ors

APPELLANT

Vs

Bank Of Baroda

RESPONDENT

Date of Decision : 12-10-2020

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138, 141, 141(1), 147
Partnership Act, 1932 — Section 25
Code Of Civil Procedure 1908 — Order 30 Rule 1

Citation : (2020) 10 CHH CK 0007

Hon'ble Judges : Rajendra Chandra Singh Samant, J

Bench : Single Bench

Advocate : Ankur Agrawal, Ankit Singhal

Final Decision : Dismissed

Judgement

Rajendra Chandra Singh Samant, J

1. This petition has been brought challenging the judgment dated 21.11.2019 passed by the learned Sessions Judge, Balodabazar, District- Balodabazar (C.G.) in Criminal Appeal No. 29/2019 dismissing the appeal filed by the applicants and upholding the judgment of the trial Court by which the applicants have been convicted for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act of 1881'). However, the sentence imposed by the trial Court has been modified to imprisonment till rising of the Court, but quantum of compensation has been enhanced to Rs. 1,20,00,000/-.

2. It is submitted by learned counsel for the applicants, that the finding of conviction of the trial Court as well as the appellate Court against the applicants, is totally erroneous and against the facts and provisions of law. Firstly, the statutory demand notice mandated under Section 138 Proviso (b) of the Act of 1881 was never ever served upon the partnership firm. Secondly, the respondent has arrayed the applicants in their individual capacity despite having knowledge that both the applicants are Partners in M/s Global Packaging, which is a

partnership firm. It was the partnership firm, which had borrowed Rs.6,73,80,000/- from the respondent and the cheque for repayment of loan was issued on behalf of the partnership firm. Section 141 of the Act of 1881 provides, that in case when the offence alleged to have been committed by a company, then every person in-charge and responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty for the commission of offence. It is further submitted, that the PW-1, who is Branch Manager of the bank and witness of the respondent, has admitted in Para-7 of his deposition, that a separate proceeding has been initiated against the applicants under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (henceforth 'the SARFESI Act') for realization of the whole amount due. The present complaint filed against the applicant is separate. This witness has further admitted that the legal notice was not sent in the name of Global Packaging Partnership Firm. These admissions clearly exonerate the applicants from the charge. Even then the Courts below have given adverse finding in the judgments.

It is submitted that in case of Raghu Lakshminarayanan Vs. Fine Tubes, reported in (2007) 5 SCC 103, it was held by the Supreme Court that a partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person, but Order 30 Rule 1 of the Code of Civil Procedure, 1908 enables the partners of a partnership firm to sue or to be sued in the name of the firm. Similarly, in case of Monaben Ketanbhai Shah & another Vs. State of Gujarat & others, reported in (2004) 7 SCC 15, it was held that the requirements of the ingredients of Section 141 of the Act of 1881 are needed to be fulfilled, also reliance has been placed upon the judgment of Vijay Dhanuka & others Vs. Najima Mamtaj & others, reported in (2014) 14 SCC 638. Reliance has also been placed in the judgment of Supreme Court in the matter of Aneeta Hada Vs. Godfather Travels & Tours Private Limited, reported in (2012) 5 SCC 661 and Anita Malhotra Vs. Apparel Export Promotion Council & another, reported in (2012) 1 SCC 520. It is submitted that the applicants are entitled to be acquitted in this case on factual as well as legal grounds, therefore, interference in the impugned order is prayed for.

3. Learned counsel for respondent submits that the applicants are the partners of the firm M/s Global Packaging. It is not denied that it is the applicants, who had issued cheque in favor of the respondents in their capacity as partners of the Firm. Service of notice upon the applicants is not disputed. The point raised that the partnership firm should have been arrayed as a party and that a separate notice was required to be issued, is not the requirement under the law. Reliance has been placed on the judgments of Supreme Court in the cases of C.C. Alabi Hazi Vs. Palapetty Muhammed & another, reported in (2007) 6 SCC 555. Pujnab & Sind Bank Vs. Vinkar Sahakari Bank Ltd. & others, reported in (2001) 7 SCC 721. It is further submitted that the proceedings under SARFAESI Act is an additional one and that cannot be adjusted with the present proceeding, as it is a

criminal proceeding. Recovery from the applicants is yet to be made by the respondents side. It is submitted that in case of partnership firm, the provisions of the Partnership Act, 1932 are applicable, therefore, no case is made out in favour of the applicants and the revision petition is liable to be dismissed.

4. In reply, it is again submitted by learned counsel for the applicants that the partnership firm was a necessary party in the complaint under Section 138 of the Act of 1881.

5. I have heard both the parties and perused the documents on record.

6. In the complaint that has been filed by the respondent against the applicants, these applicants have been arrayed by name, however, in the description given in complaint, they have been shown to be partners of M/s Global Packaging Partnership Firm. Statement in the complaint is this, that a loan of Rs. 6,73,83,000/- was sanctioned in favour of M/s Global Packaging Partnership Firm for which the applicants stood guarantors. Three cheques towards repayment of loan were issued by applicant No.1 in his capacity as 'partner' of the said firm, as well as guarantor of the loan transaction. Upon dishonour of the cheques issued in favour of respondent, a notice was served upon the applicants demanding the amount of cheques and when the demand was not fulfilled, the complaint was then filed against the applicants. Applicant No. 2 has been arrayed as an accused on the ground that he is equally responsible for the business of partnership firm under the provisions of the Partnership Act, 1932.

7. There appears to be no dispute that loan was sanctioned to M/s Global Packaging Partnership Firm and that for repayment of loan the cheques were issued by applicant No.1, total amounting to Rs.75 Lakhs. When the said cheques were presented for payment, the same have been dishonoured and returned by the bank with a remark "insufficient funds" in the account of the firm.

8. Section 141 of the NI Act is reproduced as under:-

"141 Offences by companies. -(1) If the person committing an offence under section 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. Explanation.- For the purposes of this section,-

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

2. "director", in relation to a firm, means a partner in the firm."

9. The provision has been basically drafted for companies, however, it has been made applicable to the partnership firms also by virtue of provision in sub-section 2(a) and (b). A company happens to be a 'juristic person' under the provision of the Companies Act, 1956 but a partnership firm does not have such status. It was held in the case of *Ashok Transport Agency vs Awadhesh Kumar and another*, reported in (1998) 5 SCC 567 that a partnership is governed by the provision of the Partnership Act, 1932. Order 30 Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm.

10. The proceeding under the Act of 1881 is criminal in nature. Section 2 (a) of the Partnership Act defines the words "act of a firm" which means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm. Section 18 of the Act envisages that every partner shall be the agent of the firm for the purpose of the business of the firm. Section 25 of the Act 1932 provides that every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner. Section 26 provides for the liability of wrongful act or omission by a partner acting in the ordinary course of a business of a firm. There is no provision in this Act in this respect that in case one of the partners commits a punishable offence, in that case other partners of the firm shall also be deemed to be guilty of that offence.

11. The Act of 1881 is a special Act which provides as to what act by a person, or a partner of a Firm or a responsible person of the company constitutes 'offence'. Section 141 (1) of the Act of 1881 is enacted for the company but it is applicable to the partnership firm also. Therefore, a partner, who at the time the offence was committed, was in-charge of the firm 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. There is nothing to suggest that the present case is covered under the proviso to Section 141 (1) of the Act, 1881.

(I) In the case of *Aneeta Hada* (supra), the Supreme Court has observed in

paragraph-24 as under:-

"Section 141 uses the term "person" and refers it to a company. There is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attracted to a corporation and company and it is so luminescent from the language employed under Section 141 of the Act. It is apposite to note that the present enactment is one where the company itself and certain categories of officers in certain circumstances are deemed to be guilty of the offence. "

(xiii) The view expressed by a three Judges Bench in the case of Aneeta Hada (supra) is with respect to a company registered under the Companies Act. A partnership Firm is not a company. It is an entity constituted under the provisions of the Partnership Act by the registration of a partnership firm. A partnership firm is not a juristic person. The company being a juristic person becomes necessary party as held in Aneeta Hada's case (supra), but there is no such compulsion to array a partnership firm as a necessary party in a criminal case.

(xiv) The reliance of the applicant in the matter of Raghu Lakshminarayanan (supra), is not applicable, as the case in the matter was different. The accused was not a company or firm, but was a proprietary concern. In Monaben Ketanbhai Shah & another (supra), it was held by the Supreme Court that the liability under the act, shall be only upon the partners, who were responsible for the firm for the conduct of its business. In this case, both the applicants have been found to be directly connected with the business of the firm, as both the applicants took guarantee for the amount borrowed from the respondents. Similarly, the facts in the case of Anita Malhotra (supra) before the Supreme Court, was also not similar to the case in hand at present.

15. The only question raised in this revision petition is that the prosecution of the applicants in personal capacity, was not maintainable, appears to be out of place in view of the discussions, which has been made hereinabove. It is liability of a person as a partner of a firm, that has to be given emphasis. Lapse to make a proper mention in the cause title of the complaint would not by itself dis-entitle, the complainant, who has a claim to make and who has entitlement to file a complaint against the partners of the firm. The cause title of the complaint of course does not mention other description of the applicant, but the body of the plaint clearly mentions that the applicants are the partners of M/s Global Packaging.

16. Section 141 of the Act of 1881 provides as to who shall be deemed as guilty and it mentions the person concerned not a company or the firm. Therefore, the complaint filed against the applicants was not against the provisions of law or against the provision under Section 141 of the Act of 1881.

17. Other submissions made by the applicants' side that initiation of proceedings under the SARFAESI Act for the recoveries that have been claimed to be made by

the respondent in other proceeding dis entitles the respondent to pursue this complaint, does not hold any ground. Section 138 of the Act of 1881 is a penal provision which provides for specific conditions on the occurrence of which act of the person becomes punishable. There are no traces of civil nature in the prosecution of complaint under Section 138 of the Act of 1881, therefore, the proposal made by the applicants' side that other recoveries could be adjusted against the dues of the firm and the applicants can be exonerated from the present criminal process, is out of place. There is no scope of any adjustment etc. under Section 138 of the Act of 1881, except compromise, which is permissible under Section 147 of the Act of 1881 and there is no such proposal of any compromise from the respondent side. Therefore this ground raised on the part of the applicants is without substance.

18. After detailed discussions on the arguments from both the sides and considering on the facts present in this case, I am of this view that this revision petition is without substance, which is liable to be dismissed.

19. Accordingly, this revision petition is dismissed.