
(2008) 03 AHC CK 0183
In the Allahabad High Court

Smt. Brahma Devi

APPELLANT

Vs

State of U.P. and Surya Leasing Ltd.
Sri Madan Mohan
Gulathi and Others Vs State of U.P. and Surya Leasing Ltd.

RESPONDENT

Date of Decision : 29-03-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 141, 142
Penal Code, 1860 (IPC) — Section 420

Citation : (2008) 4 BC 131 : (2008) CriLJ 4082 : (2009) 4 RCR(Criminal) 237

Hon'ble Judges : A.K. Roopanwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.K. Roopanwal, J.—As all the above applications u/s 482, Cr.P.C. arose out of the same set of facts and the common arguments have been advanced in these petitions, hence, these all are being decided by one common order.

2. The facts of the case are that a complaint was filed by O.P. No. 2, M/s. Surya Leasing Ltd through its Special Power of Attorney Shri Pradeep Kumar Agarwal against nine persons namely M/s. Garima Construction Co. (P) Ltd through its Managing Director, Shri Kapil Krishan Sabarwati, Shri Mohit Sabarwal, Smt. Prabha Sabarwal, Sri Madan Mohan Gulathi, Sri Prem Gulathi, Sri Dinesh Gulathi, Sri Chitranjan Gulathi and Smt. Brahma Devi, u/s 138/139, N.I. Act and 420, IPC. The complaint case was that the complainant is a leasing company having its Head Office at New Delhi and Branch Office at Aligarh. Shri Pradeep Kumar Agarwal is the Special Power of Attorney Holder of the complainant company and this power of attorney has been signed and executed in favour of Shri Pradeep Kumar Agarwal by the Managing Director of the company Shri Puran Chand. Opposite Party No. 1 M/s Garima Construction Co. is a Private Ltd. company at Aligarh. Accused No. 2 Shri Kapil Krishan Sabarwati is its Managing Director while all the other accused i.e. accused Nos. 3 to 9 are the Directors in the company. On 3.8.03 accused Nos. 2, 3 and 4 namely Shri Kapil Krishan Sabarwati, Shri

Mohit Sabarwal and Smt. Prabha Sabarwal approached the Managing Director of the complainant company and requested him to grant a loan of Rs.2,50,000/- This request and proposal of these persons was duly considered by the Managing Director of the complainant company and on the same day a cash of Rs.2,50,000/- as loan was given to the above named persons on behalf of the accused No. 1. Accused No. 2 i.e. Shri Kapil Krishan Sabarwati being the Managing Director of accused No. 1 signed and issued an account payee cheque No. 511080 dated 3.9.03 for a sum of Rs.2,50,000/- drawn at Punjab National Bank, Civil Lines, Aligarh from the account of accused No. 1 and an assurance was given with this cheque that this cheque shall be honoured by their bankers on its presentation. When this cheque was presented by the complainant with its banker on 3.9.03 it was dishonoured on 4.9.03 with the remark of the bank "insufficient fund and drawer signature differs". Thereupon a notice was sent by the complainant to the accused persons to pay the amount of the cheque but the amount was not paid within the stipulated period prescribed under the Negotiable Instruments Act, hence, the complainant M/s Surya Leasing Ltd. through its Special Power of Attorney Shri Pradeep Kumar Agarwal filed a complaint against all the above 9 accused persons.

3. The statement of power of attorney holder Shri Pradeep Kukmar Agarwal was recorded by the court concerned u/s 200, Cr.P.C. and thereafter, finding it a case u/s 138/141, N.I. Act the CJM, Aligarh vide its order dated 3.1.04 summoned all the accused mentioned above under these Sections which gave rise to these petitions. I have heard Mr. Amit Daga, learned Counsel for the applicant, Smt. Brahma Devi, Mr. Atul Tej Kulshrestha for all other applicants, Mr. Sudhir Dixit for O.P. No. 2, learned AGA for the State and perused the record. Mr. Daga and Mr. Kulshrestha argued these petitions on the following points only. Firstly, the complaint filed by M/s. Surya Leasing Co. Ltd. is not maintainable under the law as it has been filed through special power of attorney holder Shri Pradeep Kumar Agarwal who had no authority at all to file the complaint for or on behalf of the complainant M/s Surya Leasing Co. Ltd. and secondly, it has not been averred in the complaint that the accused Nos. 2 to 9 were, in any way, incharge of and responsible for the business of the company, hence, neither the complaint was maintainable nor cognizance could have been taken against them.

4. I will take up the above arguments one by one. Regarding the first argument the reliance has been placed on S.P. Sampathy Vs. Smt. Manju Gupta and Another, . In this case complaint was made in the name of the complainant but it was not signed by him. It was signed by his power of attorney holder and therefore, it was held by the High Court of Andhra Pradesh that the complaint was not maintainable as the power of attorney holder would not be a holder in due course of the cheque. I feel that this ruling cannot be made applicable where the complainant is a company. This ruling can be made applicable only when the complainant is a Corporeal person and is able to sign the complaint. If the complainant is not a corporeal person and is unable to append signature or thumb impression on the complaint, then, the complaint can be filed by an

authorised natural person representing the complainant.

5. Section 142 of the N.I. Act provides that a complaint u/s 138, N.I. Act can be made by the payee or the holder in due course of the said cheque. Now, it is to be seen as to whether the complaint in question filed by M/s. Surya Leasing Ltd. through its power of attorney holder can be said to be a complaint made by the payee or holder in due course of the said cheque or not. In this regard, it would be pertinent to refer the ruling reported in 1998(36)ACC 275 (S.C.), Associated Cement Co. Ltd. v. Keshvanand. In this case it was held by the Apex Court that in order to maintain the complaint the complainant has to be a corporeal person who is capable of making physical appearance in the court. If the complaint is made in the name of an incorporeal person (like a company or corporation), it is necessary that a natural person represents such juristic person in the court. When the complaint is filed through a natural person, then the court shall treat that natural person to be a complainant for all practical purposes. Thus, it is very much clear that for maintaining a complaint on behalf of the complainant company only this much is required that the natural person who has filed the complaint for or on behalf of the company is an authorised person to represent the company on its behalf. In view of the above legal position, it is established that the complaint in the present case was well maintainable and could not be thrown on the ground that it has been filed through special power of attorney. When the company had authorised special power of attorney to file a complaint, then for all purposes that special power of attorney would be treated to be the complainant and the complaint shall well be maintainable by him. Now comes the second point.

6. It has been contended by the learned Counsel for the applicants that to maintain a complaint under the N.I. Act and to satisfy the requirement of Section 141 of this Act it is necessary that the complainant must aver in the complaint that the person sought to be made liable was incharge of and responsible for the conduct of the business of the company at the time when the cheque was issued. If such averment is not made, then, the complaint shall not be maintainable in the court of law. In support of the argument reliance has been placed on S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, Smt. Katta Sujatha Vs. Fertilizers and Chem. Travancore Ltd. and Another, K.P.G. Nair Vs. Jindal Menthol India Ltd., , K.P.G. Nair v. Jindal Menthol India Ltd.

7. To the above argument, it was replied by Mr. Dixit that the question as to whether the accused was incharge of and responsible for the business of the company or not is a question to be taken note of by the trial court and cannot be adjudicated in the proceedings u/s 482, Cr.P.C. In support of this argument reliance has been placed on 2005 (52) ACC 474 , S.V. Muzumdar and Ors. v. Gujarat State Fertilizer Co. Ltd. and Anr.

8. I have gone through the rulings of both the sides. It comes out from these rulings that under the provisions of Section 141, N.I. Act it has been incorporated that if a company has been made an accused in the complaint under the N.I. Act,

then, any person who, at the time the offence was committed, was incharge 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 but this provision nowhere absolves the complainant to aver in the complaint that which of the several accused was/were incharge of and was/were responsible to the company for the conduct of its business at the relevant time. If such an averment is made in the complaint and it appears to be prima facie true, then, naturally the High Court in exercise of the powers u/s 482, Cr.P.C. will not adjudicate as to whether the averment was right or wrong and the matter shall be left for final adjudication by the trial court but if the main requirement to aver the above particulars in the complaint has not been complied with, then the basic foundation of the complaint would be bad and the complaint would not be maintainable.

9. Now, in view of the above legal position we would see as to whether the complaint in the present case was maintainable or not and if it was maintainable, then, against which of the accused it was maintainable. A look at the complaint would reveal that the complainant has not assigned any role to accused Nos. 5 to 9 namely Shri Madan Mohan Gulath, Sri Prem Gulathi, Sri Dinesh Gulathi, Sri Chitranjan Gulathi and Smt. Brahma Devi. Only this much is visible from the complaint that they were the Directors of the Company at the time when the cheque was issued. Merely because they were the Directors in the Company, they cannot be deemed to be guilty under the N.I. Act and proceeded against unless it is averred in the complaint that at the relevant time they were incharge of and were responsible to the company for the conduct of its business and because there is no such averment in the complaint about this fact against these accused persons, hence, they cannot be deemed to be guilty and cannot be proceeded against. My view is fortified by K.P.G. Nair Vs. Jindal Menthol India Ltd., State of Haryana Vs. Brij Lal Mittal and Others, State of Haryana v. Brij Lal Mittal.

10. In State of Haryana Vs. Brij Lal Mittal and Others, it was held by the Supreme Court that vicarious liability of a person for being prosecuted for an offence committed under the Act by a Company arises if at the material time he was incharge of and was also responsible to the company for the conduct of its business. Simply because a person is a Director of a Company, it does not necessarily mean that he fulfils both the above requirement so as to make him liable. Conversely, without being a Director a person can be incharge of and was responsible to the Company for the conduct of its business.

11. In K.P.G. Nair Vs. Jindal Menthol India Ltd., it was held by the Supreme Court that if the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case that at the time of commission of offence, the appellant was incharge of and was responsible to the Company for the conduct of its business, then, the requirement of Section 141,

N.I. Act was not made and the complaint was not maintainable.

12. Similar was the position in Smt. Katta Sujatha Vs. Fertilizers and Chem. Travancore Ltd. and Another, This was a case of partnership. It was found that no allegations were contained in the complaint regarding the fact that the accused was a partner, incharge of and was responsible to the Firm for the conduct of its business nor was there any allegation that the offence was made with the consent and connivance or that it was attributable to any neglect on the part of the accused. It was held that no case was made out against the accused.

13. Thus, in view of the above, the complaint filed by M/s. Surya Leasing Co. Ltd. could not be maintainable against accused Nos. 5 to 9 i.e. Shri Madan Mohan Gulath, Sri Prem Gulathi, Sri Dinesh Gulathi, Sri Chitranjan Gulathi and Smt. Brahma Devi and the cognizance order is bad against them. So far as accused Nos. 2, 3 & 4 namely Shri Sri Mohit Sabarwal, Sri Kapil Krishna Sabarwal and Smt. Prabha Sabarwal is concerned, they can be deemed to be guilty and a complaint can well be maintained against them. It is the clear cut allegation against them in the complaint that they approached the Managing Director of the complainant Company for the loan and received the cheque which was later on bounced. Therefore, against them the requirement of Section 141, N.I. Act that they were incharge of and were responsible for the company for the conduct of its business is very much satisfied and this cannot be said that the complaint is bad against them also.

14. If they agitate against the truthfulness of the allegation made against them in the complaint, then, that would squarely be a question to be taken care of by the trial court and this cannot be the subject matter of a petition u/s 482, Cr.P.C.

15. In the light of the above discussion, I set aside the cognizance order dated 3.1.04 passed in complaint case No. 3749/03 by the CJM, Aligarh against accused Nos. 5 to 9 namely, Shri Madan Mohan Gulath, Sri Prem Gulathi, Sri Dinesh Gulathi, Sri Chitranjan Gulathi and Smt. Brahma Devi. Cognizance taken against accused Nos. 1, 2, 3 & 4 is affirmed and they shall face the trial before the trial court. The objections are, accordingly, decided.