(2000) 07 AP CK 0088

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 4858 of 1999

Smt. K. Janaki Manoharan and Another — APPELLANT

Vs

Gayatri Sugar Complex Limited and Another — RESPONDENT

Date of Decision : 24-07-2000

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2000) 2 ALD(Cri) 283 : (2000) 4 ALT 325 : (2000) 3 CivCC 566 : (2002) 108 CompCas 899 : (2001) CriLJ 52 : (2000) 4 RCR(Criminal) 160

Hon'ble Judges : B. Sudershan Reddy, J

Bench : Single Bench

Advocate : B. Nalin Kumar, for the Appellant; S. Ravi and Public Prosecutor, for the Respondent

Judgement

B. Sudershan Reddy, J.—This is a petition filed u/s 482 of the Code of Criminal Procedure, 1973, to quash the proceedings in C. C. No. 484 of 1999 on the file of the learned IVth Metropolitan Magistrate, Hyderabad. The petitioners herein are arrayed as accused Nos. 4 and 5 respectively in the said C. C.

2. Gayatri Sugar Complex Limited filed C. C. No. 484 of 1999 on the file of the learned IVth Metropolitan Magistrate, Hyderabad, against Suryatronics Private Limited represented by its chairman and managing director in person and its other directors for the offence punishable u/s 138 of the Negotiable Instruments Act, 1881 (for short "the Act"). The petitioners herein are arrayed as accused Nos. 4 and 5 in their capacity as directors of Suryatronics Private Limited.

3. It is the case of the complainant that it had invited tenders for design, engineering, manufacturing and supply of clarification plant, evaporation and boiling plants, cooling and part of curing equipment for their sugar plant in Nellore district. The first accused company responded to the tender and pursuant to the discussion, the contract has been awarded to the first accused company for the said purpose of designing, engineering, manufacturing, supplying the machinery in terms of the contract. The agreement was entered into on March

15, 1995. In terms of the agreement, the contract price was agreed to be a sum of Rs. 624 lakhs. In addition to the said agreement, the complainant entered into a second agreement with accused No. 1-company on March 15, 1995, relating to procurement of certain items of equipment and machinery required for the establishment of the sugar plant. The contract price as per the said agreement was Rs. 356 lakhs.

4. It is alleged that the complainant gave purchase order dated May 10, 1998, for supply of certain additional equipment at a cost of Rs. 80 lakhs subject to certain terms and conditions. The complainant accordingly entered into a third agreement with Suryapowertromcs Private Limited, a sister concern of accused No. 1 herein. It is the case of the complainant that in terms of the said agreement Suryapowertromcs Private Limited had been appointed as agents for handling the sugar machinery at site and for erecting the same to make it ready for commissioning. In terms of the agreement the scope of the work of Suryapowertromcs Private Limited included the supervision of handling machinery, erecting of machinery, application of final paint and filling of lubricants before trials etc., and carrying out certain tests. The total consideration payable under this agreement was Rs. 50 lakhs.

5. Under the first agreement for the purpose of fabrication of the machinery, accused No. 1 was required to provide a guarantee from a nationalized/ reputed bank equal to 5 per cent. of the contract price to cover the liability before commencement of dispatch of machinery. The guarantee was to be valid up to March 31, 1996. It is stated that from time to time, the dates for execution of these guarantees were being extended by accused No. 1. Accused No. 1 is alleged to have addressed a letter dated July 10, 1998, indicating the fact that the contract was being extended up to December 31, 1998.

6. It is alleged that right from the beginning accused No. 1 has been diverting the funds provided by the complainant for the execution of the work for other purposes and has not complied with the terms of the contract.

7. Accused No. 1 gave three cheques bearing Nos. 890519, 890520 and 890529 dated April 1, 1999, drawn on State Bank of Hyderabad, Cherlapally branch, for Rs. 5,00,000, Rs. 2,50,000 and Rs. 7,50,000, respectively. It is the case of the complainant that the said cheques were given in lieu of the performance guarantees that are required to be given by accused No. 1 in terms of the first agreement and also the agreement for supplies. The complainant presented the cheques to its bank of April 3, 1999. They were returned by the bank on April 7, 1999, with an endorsement "payment stopped by drawer". The complainant got issued notice dated April 16, 1999, to all the accused informing them about the factum of dishonour of the cheques. Accused No. 1 has not made the payment within the period of fifteen days from the date of receipt of the legal notice. On the contrary, accused No. 1 has caused the reply notice to be issued raising certain untenable and unfounded allegations and also making false claims against the complainant.

8. It is the case of the complainant that the cheques were issued in lieu of bank guarantee and in discharge of an existing and legally enforceable debt. May be so.

9. In the complaint, it is clearly alleged that the notice dated April 16, 1999, issued to the first accused company was separately sent to accused Nos. 2, 3, 4 and 5. It is alleged that apart from the first accused company, the principal officers who are in charge of the day-to-day functioning of the company are also liable. It is stated that the second accused is the chairman and managing director and also the signatory of the cheques in question. Accused No. 3 is the joint managing director, who was dealing with the complainant at all relevant points of time on behalf of accused No. 1. It may be significant to notice the allegations levelled in so far as the petitioners are concerned, as is evident from the complaint and which are to the following effect :

"Accused Nos. 4 and 5 are the directors of accused No. 1 and hence are liable u/s 141 of the Negotiable Instruments Act."

10. That is all what is stated against the petitioners who are arrayed as accused Nos. 4 and 5 in the complaint. Nothing more is stated about the role of the petitioners.

11. It is the case of the complainant that accused No. 1 is guilty of committing the offence u/s 138 of the Act, accused Nos. 2, 3, 4 and 5 are guilty of the same offence u/s 138 read with Section 141 of the Act.

12. Sri B. Nalin Kumar, learned counsel for the petitioners, contends that the averments made in the complaint do not disclose any cause whatsoever as against the petitioners. The petitioners have not committed any offence whatsoever punishable u/s 138 of the Act. The complaint, if read as a whole, does not disclose commission of any offence by the petitioners. Nothing is stated in the complaint as to how the petitioners could be made responsible for the offence, if any, committed by accused No. 1-company.

13. Sri Ravi S. appearing on behalf of the respondent-complainant submits that the power of this court u/s 482 of the Criminal Procedure Code may have to be exercised in a very cautious manner and sparingly and only to prevent miscarriage of justice. It is submitted that the petitioners herein are equally liable to be punished for the offence committed by accused No. 1-company, inasmuch as they are also responsible for the day-to-day affairs and management of accused No. 1-company. It is submitted that it cannot be decided by this court at this stage as to whether the petitioners are also responsible in the management and affairs of the company and the same has to be decided by the trial court after inquiry. Evidence need not be disclosed in the complaint, is the submission made by learned counsel for the respondent-complainant.

14. We have already noticed the allegations made in the complaint in so far as the petitioners are concerned. There is no specific allegation as such levelled

against the petitioners herein except a bald statement that "accused Nos. 4 and 5 are the directors of accused No. 1 and hence are liable u/s 141 of the Negotiable Instruments Act". Admittedly, the cheques in question were signed by the managing director for and on behalf of accused No. 1-company. The joint managing director (A-3) was actually dealing with the accused-company. No role as such is alleged to have been played by the petitioners herein, though they are the directors of the company. In the complaint it is not alleged that at the relevant time when the cheques were issued by accused No. 1-company these petitioners were also in charge of and were responsible to the company for the conduct of the business of the company. It is not even suggested in the complaint that the cheques were issued by accused No. 1-company with the knowledge of the petitioners herein and with the consent and connivance of the petitioners. Nothing is attributed to these petitioners herein who are the directors of the company.

15. It is pertinent to notice that so far as these petitioner-directors are concerned, there is not even a whisper, nor anything to show that there is any act as such committed by them from which any inference can be drawn and by which they could also be held vicariously liable.

16. It is true that the entire evidence, upon which the complainant may rely to establish its case, need not be disclosed in the complaint itself. But the law requires that there must be clear, unambiguous and specific allegations against the directors of a company who are arrayed as accused and such allegations should reveal that they were responsible to the company for the conduct of its business at the material time when the offence was committed by the company. Simply because a person is the director of the company at the relevant time, it does not necessarily mean that he was in change of and was responsible to the company for the conduct of its business. It may be apposite to notice Section 141 of the Act.

"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.

(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."

17. An analysis of the said provision would make it clear that every person who, at the time the offence was committed by any company, was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly along with the company. Such person or persons need not be the director of the company. All those persons whether they are directors, secretary or other officers, are also liable and shall be deemed to be guilty of the offence committed by the company, provided they are in charge of and were responsible to the company for the conduct of its business. The requirement in law is that such person or persons who are in charge of and were responsible to the company for the conduct of its business alone are liable to be proceeded against, in the case of an offence committed by the company. Therefore, mere fact that a person was a director at the time when the offence was committed by the company cannot be automatically roped in as an accused in a case filed against the company. Persons who are not actually in charge of and were responsible to the company for the conduct of its business when the offence was committed shall also be deemed to be guilty of that offence u/s 138 of the Act, provided the offence has been committed with their consent or connivance or is attributable to any negligence on their part and such persons could be a director, manager, secretary or other officers of the company. It is thus obvious that only such of those directors and officers of the company, such as, secretary, manager shall be deemed to be guilty of the offence punishable u/s 138 of the Act in the case of an offence by a company, provided they have played some part in the commission of an offence by a company.

18. In Jord Engineers India Limited and Others Vs. Nagarjuna Finance Limited and Another, , a learned single judge of this court observed that "the prosecution against a director in the absence of a specific allegation as to what role he has played in the commission of an offence u/s 138 of the Negotiable Instruments Act is not being maintainable." It is observed (page 693) :

"In the complaint there is a specific averment made by the complainant that A-l is a firm. There is no doubt that A-l firm is liable for prosecution. A-2 is the chief managing director and signatory. A-2 is liable for prosecution. A-3 is the director and authorised signatory. Therefore, A-3 is liable for prosecution. A-4 is a director. The prosecution against A-4 may not be maintainable because no qualification is attached to A-4 as to what role he had played in the commission of the offence u/s 138 of the Negotiable Instruments Act. Therefore, A-4 will not be liable to be prosecuted u/s 138 of the Negotiable Instruments Act."

19. The Karnataka High Court in Nucor Wires Ltd. v. HMT International Ltd. [1998] 91 Comp Cas 850 : [1998] 1 ISJ (Ban) 202, after an elaborate survey of the judicial opinion, held (page 856) :

"... that to launch a prosecution against the directors of the company, there must be specific allegation in the complaint as to the part played by them in the transactions. There must be clear and unambiguous allegations as to how all the partners are in charge of and responsible for the conduct of the business of the company. There should be clear description and also allegations that the offence was committed with their knowledge and that they had not exercised due diligence to prevent the commission of such offence. The court should also make attempt to find out whether on the available allegation the offence was committed with the consent or connivance or is attributable to any negligence on the part of the directors or partners or members of any association or a group of persons."

20. In State of Haryana v. Brij Lal Mittal [1998] 93 Comp Cas 329 , the Supreme Court held that "unless there is an averment in the complaint in terms of Section 141 of the Act a person who is merely a director of the company cannot be held liable for the offence u/s 138 of the Act."

21. This court in B. Manipal Reddy v. State of A. P. [2000] 1 ALT (Cri.) 217 : [2001] 103 Comp Cas 158, held that (page 160) "every director of a company may not be in charge of and responsible to the company. Sometimes, even a person other than a director may be in charge of and responsible to the company, but the question is whether they can apply to a managing director of a company normally, by definition a managing director is supposed to be in charge of managing the company and would obviously be responsible to the Company."

22. It is held (page 160) "... mere absence of an averment in the complaint that the petitioner-accused was in charge of and was responsible to the company does not justify quashing of the proceedings in these cases inasmuch as the petitioner-accused has been shown to be the managing director of the company." This court obviously took the view that in case of a managing director, there need not be an averment in the complaint that he was in charge of and was responsible to the company. The principle cannot be made applicable in the case of a director, as it is common knowledge that some of the directors may not even be knowing as to what is going on day-to-day in the company, they may not do anything in the business of the company.

23. It is thus clear that no person could be prosecuted in the absence of a specific, clear and unambiguous assertion in the complaint against such persons impleaded as accused that they were in charge of and were responsible to the company for the conduct of the business at the material time when the offence was committed by the company. The complainant is bound to share that information in the complaint. The contents of the complaint are required to be meticulously scrutinised by the magistrate before taking the same on file. Further proceedings in a complaint where there is no such averment and clear allegation would be an abuse of the judicial process. The requirement of specific, clear and unambiguous allegation in the complaint before the same is taken on file by a magistrate cannot be relaxed. No doubt could be allowed to be prosecuted on

imaginary grounds.

24. We have already noticed that in the complaint, it is stated that the petitioners herein are the directors of accused No. 1-company and "hence are liable u/s 141 of the Negotiable Instruments Act." According to the respondent-complainant, the petitioners are also liable for prosecution not because they were in charge of and were responsible to the company for the conduct of its business, but for the reason that they were the directors at the relevant time. In my considered opinion, the averment in the complaint does not satisfy the ingredients of Section 141 of the Act. Every director is not liable for the offence committed by a company punishable u/s 138 of the Act. Further proceedings against the petitioners, therefore, cannot be allowed to go on, as it would result in an abuse of the legal process.

25. Sri S. Ravi, learned counsel appearing on behalf of the respondent-complainant however, would submit that the averments and allegations made in the complaint cannot be read in isolation, but have to be read along with the sworn statement recorded at the time of taking the complaint on file and also the allied documents, such as, notice, reply notice, and it would be enough that a cumulative reading reveals the commission of the offence punishable u/s 138 of the Act. Such documents filed along with the complaint and sworn statement forms an integral part of the complaint. I find it difficult to accept the submission. The complaint itself is taken cognizance of by the learned magistrate u/s 200 of Criminal Procedure Code. What is the complaint ? The word complaint has been defined in Section 2(d) of the Criminal Procedure Code, and it means, any allegation made orally or in writing to a magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include a police report. Section 190 of the Code empowers the magistrate to take cognizance of any offence (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; (c) upon information received from any person other than a police officer. Section 200 of the Code mandates that a magistrate shall examine upon oath the complainant and the witnesses present before taking cognizance of an offence. The Code provides different procedures for different cases arising u/s 190 of the Code and also in relation to the seriousness of the offence. Chapter XVI deals with commencement of proceedings before magistrates. Chapter XVII deals with trial before a Court of Session and Chapter XIX deals with trial of warrant cases by magistrates, where Chapter XX deals with trial of summons cases by magistrate. Section 204(3) of the Code mandates that in a proceeding instituted upon a complaint made in writing, every summons or warrant issued under Sub-section (1) shall be accompanied by a copy of such complaint. In contradistinction in a case where the proceeding has been instituted on a public report, the magistrate shall without delay furnish to the accused, free of cost, a copy of (i) the police report, (ii) the first information report recorded u/s 154; (iii) the statements recorded under Sub-section (3) of Section 161 of all the persons whom the prosecution proposes to examine as its

witnesses, (iv) the confessions and statement, if any, recorded u/s 164, (v) any other document or relevant extract thereof forwarded to the magistrate with the police report under Sub-section (5) of Section 173. Section 208 imposed a legal obligation upon a magistrate to supply copies of statements and documents to the accused in other cases triable by Court of Sessions, if such case is instituted otherwise than on a police report and it appears to the magistrate issuing process u/s 204 that the offence is triable exclusively by the Court of Session. In such cases also, the magistrate is duty-bound to furnish to the accused, free of cost, the statements recorded u/s 200 or 202, of all persons examined by the magistrate; the statement and confessions, if any, recorded u/s 161 or Section 164 ; any document produced before the magistrate on which the prosecution proposes to rely. It is thus clear that where the proceedings are instituted on a police report, the magistrate is duty-bound without any delay to furnish the documents and other material in terms of Section 207 of the Code. The magistrate is also duty-bound to supply the documents and other material to the accused free of cost even in cases instituted otherwise than on a police report but when the offence is triable exclusively by the Court of Session. In contradistinction the magistrate taking cognizance of an offence in a summons case, shall issue his summons for the attendance of the accused and in a proceeding instituted upon a complaint made in writing, such summons shall be accompanied by a copy of such complaint. The law does not require furnishing of any statement or document along with the summons. Therefore, the sworn statement of the complainant and also the witnesses, if any, examined at the time of taking cognizance of a complaint by a magistrate and other documents filed along with the complaint need not be supplied to the accused along with the summons. There is no such requirement in law. The conclusion is thus inescapable that the swom statement and the statements recorded on oath by a magistrate at the time of taking cognizance of an offence on complaint do not form an integral part of the complaint. The submission made by learned counsel for the respondent-complainant is accordingly rejected.

26. It is thus clear that a complaint filed in writing of an offence punishable u/s 138 of the Act shall stand or fall on its own. The averments and allegations made in the complaint must disclose the cause against each of the persons arrayed as accused in the complaint. The facts stated in the complaint must disclose commission of an offence by each one of the accused. The complaint in clear terms should disclose the liability of each one of such persons arrayed as accused. There must be clear factual foundation laid in the complaint itself attracting the ingredients of Section 138 of the Act against every person arrayed as accused in the complaint and in the case of an offence by a company, the ingredients of Section 141 of the Act have also to be met. Factual foundation does not mean a mere whisper in a complaint suggesting the involvement and liability of a person in the case of an offence by his company.

27. Sri S. Ravi, learned counsel however, would contend that the inherent power of the court u/s 482 of the Code may have to be sparingly and cautiously used

for quashing the criminal proceedings. Indeed, learned counsel is absolutely right in saying so. Learned counsel relied upon well-known decisions of the Supreme Court in support of his submission reported in Pratibha Rani Vs. Suraj Kumar and Another, ; State of Haryana v. Bhajan Lal [1992] Suppl 1 SCC 335 and State of Bihar Vs. Rajendra Agrawalla, . It is true that this court may not readily accept the invitation of a person arrayed as an accused in a criminal case to shoot at sight the very prosecution. The higher courts cannot be attributed of any trigger-happiness. It is well settled that the court in a proceeding u/s 482 of the Code cannot make any minute scrutiny of the material available on record. It cannot record any findings or any issue which may be required to be adjudicated by appreciating evidence. Appraisal of evidence is impermissible in a proceeding u/s 482 of the Code. It is well settled that for the purpose of exercising the power u/s 482 of the Code to quash a complaint, this court would have to proceed entirely on the basis of the allegations made in the complaint per se, this court does not undertake to examine the correctness or otherwise of the allegations. But in the case no offence is committed on the allegation and the ingredients of penal provisions are not made out, this court in exercise of power u/s 482 of the Criminal Procedure Code would be well within its limits and be justified in quashing the proceedings. This court is bound to act positively to prevent abuse of the legal process. It is duty-bound to prevent manifest injustice as a result of an abuse of the legal process.

28. In this case the contents of the complaint alone are scrutinized in accordance with the parameters of review in exercise of jurisdiction u/s 482 of the Code as repeatedly laid down by the apex court. We have already adverted to the averments made in the complaint so far as these petitioners are concerned. The averments do not attract the ingredients of Section 138 read with Section 141 of the Act. There is no allegation as such against the petitioners herein suggesting their involvement in any manner whatsoever attracting Section 141 of the Act. May be the offence was committed by the company and others who are in charge of the affairs of the company and responsible in its management. No opinion need be expressed on the question as to whether the other accused are responsible for the offence, if any, committed by the company.

29. For all the aforesaid reasons, the proceedings so far as the petitioners are concerned, are is liable to be quashed and the same are accordingly quashed.

30. This order shall have no bearing whatsoever on the merits so far as it concerns the other accused. The trial court shall proceed with the inquiry and trial in accordance with law uninfluenced by any of the observations made in this order.

31. The petition is accordingly ordered.

