
(2011) 12 AP CK 0015

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 2634 of 2010

Sri Shivashankar Taparia

APPELLANT

Vs

State of A.P. and Others

RESPONDENT

Date of Decision : 30-12-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2012) 3 BC 731

Hon'ble Judges : Samudrala Govindarajulu, J

Bench : Single Bench

Advocate : V. Dyumani, for the Appellant; R. Raghunandan, Advocate for the Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Sri Justice Samudrala Govindarajulu

1. Common question of law arises for consideration in these three criminal petitions.

2. The petitioner/A4 is accused of offence punishable u/s 138/141 of the Negotiable Instruments Act (in short "the Act") along with A1 to A3. A2 to A4 are directors of A1 company. There is no dispute of the fact that A4 is one of the directors of A1 and that A1 had drawn the dishonored cheques in question in favour of the second respondent/complainant. It is contended by the petitioner's counsel that since no notice u/s 138(b) is served on A4, A4 cannot be mulcted with criminal liability in these cases. It is contended that service of notice by the complainant to the petitioner/A4 demanding the amount covered by the dishonored cheques and failure of the petitioner to make payment thereof within the prescribed time will bring the liability on the petitioner and that without service of notice no criminal liability can be attached to A4.

3. On the other hand, it is contended by the second respondent's counsel that

Section 138(b) of the Act contemplates issue of notice in writing to the drawer of cheque only and that liability of A4 arises in view of Section 141 of the Act by which in case the offence was committed by a company, every person who was incharge of and was responsible for the conduct of business of the company becomes liable along with the company. In these cases, the dishonored cheques were drawn on account of A1 company and they were signed by A2 as Director/ Managing Director. The notices u/s 138(b) of the Act were issued to A1 to A3 and not to A4. It is contended for the second respondent that service of notice u/s 138(b) is mandatory to A1 company only and there is no legal requirement for service of notice to any of the directors of the company as drawer of the cheque was only the company. The second respondent's counsel placed reliance on two precedents rendered by this court.

4. In *Suraj Theatre and Others Vs. Kakarla Bhorathe and Another*, this Court held that no notice is necessary as prescribed in the case of liability arising out of, Section 141 of the Act. Relevant reasoning and finding of this court therein are to the following effect:

Thus the liability of the persons incharge of the company with regard to the dishonour of the cheque issued on behalf of the company is fastened by virtue of Sec. 141 of the Act. The notice contemplated u/s 138(b) is the notice to be issued to the drawer of the cheque only but not to others.

It is significant to note that Sec. 141 of the Negotiable Instruments Act does not prescribe that notice need be given to the persons who are incharge and responsible for the conduct of the business with regard to the dishonour of the cheque issued on behalf of the company before filing of the complaint, in view of the fact as they were incharge of the day to day business of the firm, as the notice was received on behalf of the firm or the company with regard to the issuance and dishonour of the cheque and also demanding the payment of the said amount payable under the cheque and necessarily follows, that they are fully aware and must have knowledge of the said aspects and hence, deemed to be guilty of the said offence and liable to be proceeded against and punished accordingly. Therefore, in the aforesaid circumstances," the Legislature in its wisdom has not prescribed the issuance of individual notice to all the partners or the persons who are incharge of the day to day conduct of the business of the firm or company, as the case may be, before filing the complaint as provided u/s 138 of the Negotiable Instruments Act relating to issue of notice to the drawer of the cheque. I think it is difficult to accept the contention of the learned counsel for the petitioner that complaint is not maintainable as no individual notices were issued to the partners or persons incharge and responsible for the conduct of the day to day business of the company or the firm. The explanation appended to Sec. 141 of the Act clearly shows that the company means any body corporate and includes a firm or other association of individuals and a "Director" in relation to a firm means a partner in the firm. Therefore, it follows, in view of the foregoing discussion that no individual notices need be given to all the partners

who are incharge and responsible for the conduct of the day to day business of the firm before filing a complaint with regard to the dishonour of cheque issued on behalf of the firm particularly when a notice contemplated u/s 138(b) of the Act was complied with. The same view was taken by the Delhi High Court in a decision Smt. Renu Vohra V. Shreyans Paper Mills Limited, 1993 (2) Cri 1145 and also by the Punjab and Haryana High Court in a decision Anita v. Anilk Mehra, 1996(1) Crimes 412.

5. In K. Pannir Selvam Vs. M.M.T.C. Ltd. and Another, this Court again took the same view and held as follows:

Reading together the provisions in Sections 138 and 141 of the Negotiable Instruments Act, it would be clear that while Section 141 of the Negotiable Instruments Act creates the basis for liability against the employees of the Company if the requirements under the said Section are satisfied, there is no contemplation of notice to be issued in respect of such employees whose liability is based on Section 141 of the Negotiable Instruments Act. As observed above, the requirement of Section 138(b) of the Act is that notice should be sent to the drawer of the cheque and not to all the persons who can be deemed to be liable apart from the drawer of the cheque by virtue of the provisions in Section 141 of the Act.

Thus, in this case, the contention that the prosecution of the petitioner, A-6 is bad for want of notice to him separately cannot be countenanced.

6. The above observations of this court further demonstrate that not only this Court but also the Delhi High court as well as the Punjab & Haryana High Court took the same view as that of this Court. Therefore, failure to give notice to A4 u/s 138(b) of the Act is in no way fatal to the complainant's case.

7. It is further contended by the petitioner's counsel that in order to mulct the director of the company with liability, the complaint should contain the required allegations as contemplated u/s 141 of the Act and also should contain averments as to how and in what manner that particular director of the company had participation in the transaction and as to how he was incharge of day to day business of the company.

8. In S.M.S. Pharmaceuticals vs. Neeta Bhalla 2004 SCC 70 the Supreme Court held that liability of a director must be determined on the date on which the offence was committed. The Supreme Court pointed out that the complaint petition had to be read in its entirety and in case the same would show that the person was actively associated in the matter of obtaining loan, signing cheques and other affairs of the company, then it would lead to the relevant conclusion.

9. In N.K. Wahi Vs. Shekhar Singh and Others, the Supreme Court held that for launching prosecution against a director, there must be specific allegation in the complaint as to the part played by him in the transaction and that the allegations should be clear and unambiguous as to how the director was incharge of and

responsible for conduct of the business of the company.

10. In National Small Industries Corporation Limited vs. Arbit Singh Paintal 15.02.2010-SC the Supreme Court laid down the following principles relating to liability of directors u/s 141 of the Act:

i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

ii) Section 141 does not make all the Directors liable for the offence. The Criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were incharge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

vii) The person sought to be made liable should be incharge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

11. It is contended that since the complainant was not aware that A4 was one of the directors of the company by the time of issue of notice, no notice was given to A4 also; and in such a case it cannot be said that A4 was incharge of and was responsible to the affairs of the company. Relevant allegations in the respective complaints are to the effect that A1 being a private limited company and A2 to A4 being directors and involved in the day to day affairs of the company are all jointly responsible and liable for the dishonored cheque and that the cheque was issued with the knowledge of A2 to A4. The second respondent's counsel further pointed out that as per ground No. IV of the grounds in the criminal petition, it was stated for the petitioner that as per the mandate given to the Cosmos

Cooperative Bank, all the cheques of the company shall be signed by two directors including the petitioner and the cheque in question was not signed by the petitioner and it was signed by only one director and as such no offence is committed by the petitioner/A4 under the Act. The bank did not dishonor the cheque as the cheque was not in accordance with the mandate given by the company. The cheques were dishonored with an endorsement "exceeds arrangements". Therefore, irrespective of the mandate given to the bank by the company, it is an admitted fact on the part of A4 that A4 is one of the authorized signatories of the cheques on behalf of the company. Therefore, at this stage it does not tie in the mouth of the petitioner/A4 to contend that A4 cannot be held with criminal liability by invoking Section 141 of the Act. In spite of it, this Court leaves the question open to the trial Court to decide liability of A4 having regard to the evidence to be let in by both the parties during trial in the lower Court. Suffice it to say that this Court does not find any reasons to exercise its power u/s 482 Cr.P.C. to interdict trial in these cases in the lower Court insofar as petitioner/A4 is concerned.

12. In the result, all the criminal petitions are dismissed.