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Madras High Court

Case No: Criminal R.C. No. 866 of 2006

M/s. Sterling Holiday Resorts (India) Ltd., Mr. Vivek N. Pai and Mr. P.N. Mohan, Directors	APPELLANT
Vs	
M/s. Bharat Cargill Holdings Pvt. Ltd.	RESPONDENT

Date of Decision: Oct. 29, 2012

Acts Referred:

- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 200, 357(3)
- Negotiable Instruments Act, 1881 (NI) - Section 138, 138(b), 141, 141(1)

Citation: (2013) 2 LW(Cri) 217

Hon'ble Judges: C.S. Karnan, J

Bench: Single Bench

Advocate: A. Ramesh, for Mr. G. Sundaram, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

C.S. Karnan, J.
The respondent herein/complainant had arranged inter-corporate loan of a sum of Rs. 5 Crores to the accused firm. In order to discharge the said loan, the revision petitioner herein/accused issued a cheque for a sum of Rs. 15 Lakhs, dated 10.11.1997, as a part payment of the said loan, drawn on Syndicate Bank. Teynampet Branch, Chennai to and in favour of the complainant firm. The said cheque was presented by the complainant for collection in their bank, viz., Hongkong Bank, Kasthuri Bai Gandhi Marg Branch, New Delhi, the same was returned with an endorsement stating "insufficiency of funds" on 12.12.1997. Hence, the complainant firm had issued a legal notice on 20.12.1997 and the same was served on the first accused company on 27.12.1997. The notices to the

second, third and fourth accused were returned un-served. Thereafter, the complainant had filed a case against the accused for an offence u/s 138 of Negotiable Instruments Act. On the side of the complainant three witnesses had been examined as P.W.1 to P.W.3 and fifteen documents were marked as Exs.P1 to P15, viz., Ex.P1-Board of resolution letter granted to P.W. 1. Ex.P2-Loan agreement, Ex.P3-pronote, Ex.P4-receipt issued by the company, Ex.P5-letter sent by the accused company to the complainant''s company, Ex.P6-dishonoured cheque, Ex.P7-return memo, Ex.P8-advocate notice, Ex.P9-acknowledgment card, Ex.P10-returned cover (3 in series), Ex.P11-confirmation letter, Ex.P12-general power of attorney given in favour of P.W.2 to adduce evidence, Ex.P13-bank account statement of the accused, Ex.P14-general power of attorney given to P.W.3 to adduce evidence and Ex.P15-bank account statement of complainant.

2. On the side of the accused, one witness was examined as R.W.1 and six documents were marked, viz., Ex.R1-general power of attorney given to R.W.1, Ex.R2-application form, Ex.R3-a xerox copy of the letter regarding the shares handed over, Ex.R4-stock exchange certificate, Ex.R5-permission letter for transferring the shares and Ex.R6-letter sent by the accused company to the complainant company.

3. P.W.1 had adduced evidence that the first accused firm had approached the complainant company in the year 1996 for a working capital loan. Accused 2, 3 and 4 are Directors of the first accused company. The complainant company had paid a sum of Rs. 5 Crores payable within a period of 180 days. P.W.1 further stated that the accused company has to pay the interest on the said amount once in three months. Regarding the loan transaction, a loan agreement was made and this document was marked as Ex.P2. The pronote executed by the accused company in favour of the complainant company has been marked as Ex.P3. The receipt given by the accused for receiving loan amount has been marked as Ex.P4. Subsequently, the accused stopped making payment midway during the period and had requested for rescheduling of the loan. Based on the request, a reschedule agreement was drawn, wherein, it was agreed that the accused has to pay Rs. 3,37,33,855/- on or before 10.04.1998. This reschedule agreement was marked as Ex.P5. Thereafter, the accused company had issued a cheque for a sum of Rs. 15 Lakhs, dated 10.11.1997. The said cheque was presented for collection at HSBC Bank, New Delhi, the same was returned as unpaid with an endorsement of "insufficiency of funds". The dishonoured cheque, return memo and advocate notice were marked as Ex.P6, P7 and P8. P.W. 1 further stated that the complainant company had issued a legal notice to the first accused on 20.12.1997, the same was served on the first accused company on 27.12.1997. The accused 2 to 4 were not served with the said notice and the notices sent to them were returned. Thereafter, the accused neither paid the amount nor sent a reply.

4. P.W. 1 further stated that the accused had deposited the share certificate and also promissory note as security. P.W. I further stated that in the instant case 16 cheques were signed by one Krishna Prasad and he was dropped from the criminal case since he was absconding. The second and third accused had not signed in the cheques. P.W.1 had further agreed that the accused had paid a sum of Rs. 1,50,00,000/- (Rupees One

Crore and Fifty Lakhs only) and this was reflected in the income tax particulars. P.W.1 further stated that the accused company had handed over many company share certificates to the complainant company and raised the loan. P.W.1 agreed that the accused had given an authorization letter to transfer the company shares. P.W.1 also agreed that the accused company had given notice not to present the cheques and to transfer the share certificates as a sale deed.

5. P.W.2, Bank Manager had adduced evidence stating that when the said cheque was presented in their bank for collection, the balance in the account of the accused was Rs. 39,483.80/-. Hence, it was returned with the endorsement of insufficient funds.

6. P.W.3, Arun Sowmiya Narayanan had adduced evidence that he is the record clerk in the Hongkong Bank and that the power of attorney granted to him for adducing evidence has been marked as Ex.P15. P.W.3 deposed that the complainant had account in their bank and when the said cheque was presented at their bank for collection, it was returned unpaid due to insufficient funds in the account of the accused. In support of his evidence, he has marked the statement of account of the complainant as Ex.P16.

7. On the side of the accused company, one Indhira Anthony was examined as R.W.1. She had adduced evidence that she is employed as a Divisional Manager with the accused company and she knows that 16 cases had been filed against the accused company. She further stated that the accused company had executed a pronote and had given 85,000 share certificates and also issued post dated cheques. The accused company also executed a power of attorney in favour of the complainant company to arrange the sale of the share certificates and settle the loan. In support of her evidence, she had marked the above mentioned documents. R.W. 1 further stated that the accused company further paid a sum of Rs. 2,90,00,000/- (Rupees Two Crores and Ninety Lakhs only). Supporting her contention, R.W.1 had marked the payment particulars.

8. On verifying the facts and circumstances of the case and on hearing the evidence of both sides and on perusing the exhibits marked on either side and the arguments advanced by the learned counsels on both sides, the learned XVIII Metropolitan Magistrate, Saidapet, Chennai, held that the accused 1 to 3 were guilty of offence u/s 138 of Negotiable Instruments Act and imposed a fine of Rs. 5,000/- on the first accused company payable by the second accused, in default, the second accused was to undergo three months simple imprisonment and the second and third accused were sentenced to undergo simple imprisonment till the raising of the Courts and the second and third accused were directed to pay a compensation of Rs. 15,00,000/- to the complainant within three months from the date of order and in default, the second and third accused were to undergo further period of simple imprisonment for three months.

9. Aggrieved by the said conviction and sentence, fine and compensation, the accused had filed an appeal in C.A. No. 322 of 2003, before the VI Additional Sessions Judge, Chennai. The learned appellate judge after hearing the arguments of learned counsels on

both sides, and upon perusing the exhibits marked by the trial Court and on scrutinizing the learned Magistrate"s judgment and conviction and on study of the appeal grounds, modified the conviction and sentence as follows:--

A-1 to A-3 were imposed a fine of Rs. 15,05,000/-, consisting a fine of Rs. 5,000/- and cheque amount, in default, the accused 2 and 3 shall undergo three months simple imprisonment. Out of the above fine amount, Rs. 15,00,000/- has to be paid to the complainant as compensation for the loss incurred by him. It was ordered accordingly.

10. Against the conviction and sentence, the above revision has been filed by the accused.

11. The learned counsel for the revision petitioner submitted that the mandatory notice was not served on accused 2 and 3. For the loan amount, the accused company had handed over 85,000 shares to the complainant company as security. Further, the accused company had executed pronotes, power of attorney to and in favour of the complainant company to transfer the shares or alienate the shares at any moment to suit their convenience for the said loan. Learned counsel further submitted that the accused company had sent a request letter to the complainant stating that the accused company will clear the entire loan on or before 31st December 1997. Instead of that the complainant had presented the cheques before the agreed period. As such, the complaint does not appear to be a bona-fide one. Learned counsel further submitted that in the same letter, the accused company mentioned the repayment schedule. It was pointed out that the revision petitioners/accused company had paid a sum of Rs. 3,37,33,855/-.

12. Learned counsel for the revision petitioner submitted that the accused company had handed over 85,000 shares to the complainant company, the value of which is more than the outstanding amount. These share certificates can be realized for the said balance amount. In order to encash the same, power has also been executed in favour of complainant company. Besides this, the revision petitioner"s company had also handed over three registered sale deeds and executed a pronote in favour of the complainant. All these could be taken as additional security and hence, the complaint levelled against the revision petitioners are not maintainable. The learned counsel further submitted that the cheques had been signed by one Krishna Prasad, who was originally categorized as accused No. 4. Subsequently, he was dropped from the proceedings since he had absconded. Therefore, without hearing the evidence of A-4, the case could not be tried, but even in his absence, the case was decided against the accused 1 to 3 and as such, the interest of the accused Nos. 1 to 3 have been prejudiced. Therefore, the judgment and conviction passed by the trial Court is not sustainable under law since a lacuna arises in the said judgment. The appellate Court also followed this defective judgment and confirmed the conviction, modifying the compensation. As such, the conviction imposed by the Courts below is also not maintainable.

13. Learned counsel for the revision petitioner further submitted that for the offence u/s 138 of Negotiable Instruments Act, sentence, fine and compensation granted is not pertinent in the instant case as it goes against the provisions laid down u/s 357(3) of Criminal Procedure Code. Supporting his contention, the learned counsel has cited the following judgment:--

Mr. B. Raman Vs. M/s. Shasun Chemicals and Drugs, Crl.O.P. No. 5108 of 2002

1. In the absence of individual notice u/s 138(b) of the Negotiable Instruments Act, to be served on the director of a company, can the said director be prosecuted for the offence, committed by the company, u/s 138 of the Act?

28. As a matter of fact, the proviso of Sub-section (1) of Section 141 contains an escape route for persons, who are able to explain their innocence to the complainant, that the act was committed without their knowledge or that they had exercised due diligence to prevent the commission of the said act. This can be done only after service of notice to the persons concerned, who are sought to be prosecuted. To put it differently, since a combined reading of Sections 138(b) and 141(1) make it clear that the company as well as the director, manager, secretary or other officer of the company is deemed to have committed the offence in the contingencies referred to above, the complainant must give an opportunity, by serving a notice to those persons, prior to the lodging of the complaint. Of course, it is the choice of the complainant as to who are all the persons that are to be included in the complaint as the accused. However, those persons must be served with notice in writing. After receipt of reply from the persons concerned, he may decide whom to be prosecuted and whom to be left out. All the more reason, in order to exercise the choice of the complainant in a proper manner, it is his duty to serve notice on all persons, who are concerned with the commission of the act, by giving an opportunity to those persons, in order to enable them to rectify the mistake and avoid the cause of action or explain the situation to the complainant.

33. Section 138(b) refers to issuance of notice to the drawer. Of course, while interpreting the said section, a notice to the drawer shall mean notice to the drawer, who has drawn the cheque in individual cases. But, when the offence is committed by the company, by virtue of Section 141, every person, who, at the time the offence was committed, was in charge of and responsible for the conduct of the business of the company, is presumed to be guilty of the offence. The word & quot; drawer & quot;, as contained in Section 138(b), cannot be restricted in the sense to the drawer of the cheque alone, but to those, who are presumed to be guilty of the offence, by virtue of Section 141, more particularly when such individuals are liable to be imprisoned for such an offence and their personal liberty is infringed thereon. As such, it is a violation of Article 21 of the Constitution of India.

37. In the light of what is stated above, the answer to the question is, statutory notice to every person, including the director, who is sought to be prosecuted, is mandatory.

14. The above revision has been filed in the year 2006, but the complaint had been filed in the year 1998. Therefore, this Court directs the revision petitioner to send an express notice to the complainant. The same was sent through this Court Registry, but, in spite of this, the respondent has not appeared before this Court. Under such circumstances, this Court is constrained to pass final order after verifying the entire records of the Courts below and on scrutinizing the judgments of the Courts below and on hearing the arguments of the learned counsels for the accused.

(i) From the above foregoing discussions, this Court is of the considered view that the accused paid a sum of Rs. 3,37,33,855/-between the period from 14.09.1997 to 10.04.1998. The disputed cheque was presented on 10.11.1997, i.e., after the said payment was made by the accused.

(ii) The accused had given a request letter on 19.08.1997 and requested the complainant that they will clear the loan amount on or before 31.12.1997, thereafter the accused made payments regularly upto April 1998 and this clearly proves that the accused had taken steps to clear the loan amount.

(iii) The accused had given the power of attorney in favour of the complainant for alienating the share certificates for the said loan amount at any moment.

(iv) Up till now, the 85,000 share certificates are still vested in the control of the complainant. Besides this, the complainant company also possesses three signed documents pertaining to the immovable properties and also possesses pronote which had been executed by the accused in favour of the complainant.

(v) To discharge the legally enforceable debt sufficient security viz., share certificates have been given by the accused which is in possession with the complainant. The same can be encashed at any moment for the realization of the balance of the loan amount. Therefore, the complaint levelled against the accused is inappropriate.

(vi) The accused categorically admitted their legally enforceable debt to the complainant. In order to discharge the legally enforceable debt the complainant can recover the debit amount on the strength of pronote which had been executed by the accused in favour of the complainant or the said sum can be recovered against the release of the three sale deeds which are pertaining to the immovable property of the accused which were deposited with the complainant or the complainant can alienate the share certificates which are handed over to the complainant along with the general power of attorney for instant monetary transaction. Instead of that the complainant had filed a complaint in C.C. No. 385 of 1998 u/s 200 of Criminal Procedure Code for punishing the accused u/s 138 of Negotiable Instruments Act which leads to harassment of the personal right of the accused. In spite of the fact that the accused had given a letter of undertaking that they will clear the balance of the legally enforceable debt on or before 31.12.1998, the complaint has been levelled against the accused prematurely.

15. On verifying the facts and circumstances of the case, arguments advanced by the learned counsel for the revision petitioner and on scrutinizing the judgments and convictions of the Courts below, this Court sets aside the order passed in C.A. No. 322 of 2003, on the file of the learned VI Additional Sessions Judge, Chennai, dated 10.03.2006 modifying the sentence passed in C.C. No. 385 of 1998, on the file of the learned XVIII Metropolitan Magistrate, Saidapet, Chennai, dated 22.09.2003 and acquits the revision petitioners/accused 1, 2 and 3. The fine amount paid by the accused is to be refunded to them. In the ultimate analysis, the above revision is allowed. Consequently, the conviction, sentence and compensation passed in C.A. No. 322 of 2003, on the file of the learned VI Additional Sessions Judge, Chennai, dated 10.03.2006 modifying the sentence passed in C.C. No. 385 of 1998, on the file of learned XVIII Metropolitan Magistrate, Saidapet, Chennai, dated 22.09.2003 is set-aside. Accordingly ordered.