Jitendra Vora vs Bhavana Y.Shah & Ors on 16 September, 2015

Equivalent citations: 2015 AIR SCW 5383, (2015) 155 ALLINDCAS 161 (SC), (2015) 4 RECCRIR 398, (2015) 4 CRILR(RAJ) 1030, (2015) 9 SCALE 767

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Bench: R.K. Agrawal, Pinkai Chandra Ghose

NON REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1001 OF 2010

JITENDRA VORA …APPELLANT

VERSUS

BHAVANA Y. SHAH & ANR. …RESPONDENTS

JUDGMENT

Pinaki Chandra Ghose, J.

This appeal is directed against the judgment and order dated 1st April, 2009 passed by the High Court of Judicature at Bombay in Criminal Application No.940 of 2008 whereby the High Court has rejected the prayer for leave to appeal against the judgment of the Trial Court.

The brief facts of this case are as follows: The appellant supplied goods to M/s. Shah Agencies. The 1st and 2nd respondents carried their business in the names of M/s. Shah Enterprises and M/s. Shah Agencies. In part discharge of the liability of M/s. Shah Agencies, two cheques for Rs. 5 lakhs each, both dated 20th August, 2000, drawn on the Vysya Bank Ltd., S.P. Road, Secunderabad, signed by Respondent No.2 as Power of Attorney Holder of Respondent No.1, were issued on an account maintained by M/s. Shah Enterprises.

On presentation, both the cheques were dishonoured due to insufficient balance in the account of M/s. Shah Enterprises. A demand notice dated 8th March, 2001 was served upon respondent Nos.1 & 2 which was duly received by them on 13th March, 2001. The respondents failed and neglected to comply with the said notice of demand. Hence, a complaint was lodged before the Metropolitan

Magistrate, 28th Court, Esplanade, Mumbai. The said complaint was numbered as CC No.505/S/01 dated 17th April, 2001. The said complaint was lodged against the accused respondents describing accused No.1 as the Proprietor of M/s. Shah Enterprises and accused No.2 as Power of Attorney Holder of the said M/s. Shah Enterprises. The Trial Court acquitted the respondents on the ground that the appellant did not institute the case against the partnership firm i.e. M/s. Shah Enterprises.

Being aggrieved by the said order passed by the Metropolitan Magistrate, the appellant filed an application for leave to appeal under sub-section (4) of Section 378 of the Code of Criminal Procedure, 1973, before the Bombay High Court. The High Court by its order dated April 1, 2009 held that the applicant has not made out a case for grant of leave to appeal under Section 378(4) Cr.P.C. and rejected the said application for leave to appeal. The High Court held that the case made out in the complaint was that the goods were sold and supplied to M/s. Shah Enterprises and the liability was of M/s. Shah Enterprises. While in the affidavit in lieu of examination-in-chief, the appellant herein came out with a case that the liability was that of M/s. Shah Agencies as goods were sold and supplied to M/s. Shah Agencies and it was not the case of the appellant that the accused had agreed to take over and discharge the liabilities of M/s. Shah Agencies.

The question which arose before us is whether the High Court was correct in coming to such a conclusion. The High Court duly perused the complaint, affidavit in lieu of examination-in-chief of the applicant, his cross- examination and other material documents on record. From these documents it appears that notice of demand had been addressed to the first respondent in her capacity as a Proprietor of M/s. Shah Enterprises, and to the second respondent in his capacity as the Power of Attorney Holder of M/s. Shah Enterprises. In the notice itself it has been stated that the goods were sold and supplied to the Proprietor of M/s. Shah Agencies. In the notice it has been further stated that the appellant is engaged in business of manufacturing and selling of synthetic Polymers/Resins and in response to the orders from the 2nd respondent as Proprietor of Shah Agencies, the applicant has supplied goods from time to time and the disputed cheques were issued in discharge of the liabilities of such supply. The notice was addressed to the Proprietor and the constituted Attorney of M/s. Shah Enterprises, but there is no specific averment that the liability of M/s. Shah Agencies was taken over by M/s. Shah Enterprises. In the complaint, the first respondent was impleaded as Proprietor of M/s. Shah Enterprises and the second respondent was impleaded as a Power of Attorney Holder of M/s. Shah Enterprises.

After perusing the notice and the averments made in the complaint and the examination-in-chief, the High Court found that the case made out by the appellant/applicant in the aforesaid affidavit is that accused No.1 was one of the partners of M/s. Shah Enterprises. It is not asserted that accused No.2 is the partner of the said firm but what is stated is that accused No.2 is the husband of accused No.1 and Power of Attorney Holder of M/s. Shah Enterprises. After perusing the aforesaid facts, the High Court came to the conclusion as follows:

> "It is not the specific case of the applicant made out in the complaint that the first accused in his capacity of proprietor of Shah Enterprises and the second accused in his capacity of power of attorney of Shah Enterprises had agreed to take over and discharge the liability of M/s. Shah Agency. Reliance is placed by the applicant on the

letter at Exh.P-5. Apart from the fact that the said letter is no evidence to show that the liability of Shah Agency was taken over by Shah Enterprises, as stated earlier, the said case was never made out by the applicant in the complaint. The said case made out in the complaint is that the liability is of M/s. Shah Enterprises and not of M/s. Shah Agencies. The letter dated 7th December 2000 at Exh. P-5 is not signed by accused No.1 who according to the applicant is the proprietor or partner of Shah Enterprises. The letter has been sent by accused No.2 in his capacity as constituted attorney of Shah Agencies. Therefore, the letter cannot be termed as a document under which the liability of Shah Agencies was specifically agreed to be taken over by the Shah Enterprises or by the accused Nos.1 and 2." In these circumstances, the High Court held that no case is made out for grant of leave and rejected the application.

Learned counsel appearing on behalf of the appellant contended before us that both the Courts below have failed to appreciate that the complaint was essentially filed against the accused in their personal capacities since at the time of filing of the complaint, the appellant believed that M/s. Shah Enterprises was a proprietary concern of respondent No.1. He further contended that respondent No.2 was a signatory of the cheques and he was incharge of the affairs of M/s. Shah Enterprises. According to the learned counsel, both the Courts adopted highly technical view of the matter. It is not in dispute that the cheques were drawn from the account maintained with M/s. Shah Enterprises. When this Court asked the learned counsel for the appellant whether there is any liability of M/s. Shah Agency, then it was submitted that the cheques were drawn by M/s. Shah Enterprises but the liability, as would be evident from the examination-in-chief, is that of M/s. Shah Agency. Learned counsel further submitted that Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the NI Act') has no application because the partnership firm was not arrayed as an accused. He further submitted that respondent No.2 is liable being a signatory of both the cheques and he was incharge of M/s. Shah Enterprises.

On the contrary, it is submitted by the learned counsel appearing on behalf of the respondents that both the Trial Court as well as the High Court rightly came to the conclusion that the complaint was not maintainable against the partnership firm since cheques were issued on behalf of the first respondent. Furthermore M/s. Shah Enterprises was never given any statutory notice nor it was arrayed as an accused before the Metropolitan Magistrate. He further submitted that a three Judge Bench of this Court in the case of Aneetha Hada vs. Godfather Travel and Tours Pvt. Ltd., (2012) 5 SCC 661, held that for maintaining the prosecution under the NI Act, the company should be made a party irrespective of the fact that its Director has been arrayed as an accused. Learned counsel for the respondents further submitted that this appeal should be dismissed since the material facts have been suppressed from the Court. The appellant ceased to be the Proprietor of M/s. Satyen Polymer as per the deed of assignment cum conveyance dated 3.4.2008. The said fact was

deliberately suppressed from the High Court as well as from the Trial Court. The appellant did not make M/s. Shah Enterprises as a party on whose account the cheque was drawn. Furthermore, M/s. Shah Enterprises had no outstanding liabilities. The complainant himself admitted in his cross-examination that nothing was sold to Shah Enterprises and at no point of time Shah Agencies has been prosecuted. The appellant further admits that he has no account with Shah Enterprises and he has running account with Shah Agencies. He also admitted that the transactions and dealings with Shah Agencies are reflected in the books of accounts. He further admitted that Shah Enterprises is not liable to pay any amount M/s. Satyen Polymers, and there were no transactions with Shah Enterprises. Learned counsel for the respondents submitted that in these circumstances, this appeal should be dismissed.

We have heard the learned counsel appearing for the parties and we have perused the evidence placed before us. From a bare reading of Section 138 of the NI Act, the first and foremost essential ingredient for attracting a liability under this Section is that the person who is to be made liable should be the drawer of the cheque and should have drawn the cheque on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for discharge, in whole or part, of any debt or other liability. In this context, this Court in the case of Krishna Texport and Capital Markets Ltd. v. Ila A. Agrawal & Ors, (AIR 2015 SC 2091), has held as under-

"The notice under Section 138 is required to be given to the 'drawer' of the cheque so as to give the drawer an opportunity to make the payment and escape the penal consequences. No other person is contemplated by Section 138 as being entitled to be issued such notice. The plain language of Section 138 is very clear and leaves no room for any doubt or ambiguity.

There is nothing in Section 138 which may even remotely suggest the issuance of notice to anyone other than the drawer." The learned counsel for the respondents has relied upon the case of Anil Hada v. Indian Acrylic Ltd., (2000) 1 SCC 1, wherein this Court held – "Normally an offence can be committed by human beings who are natural persons. Such offence can be tried according to the procedure established by law. But there are offences which could be attributed to juristic person also. If the drawer of a cheque happens to be a juristic person like a body corporate it can be prosecuted for the offence under Section 138 of the Act. Now there is no scope for doubt regarding that aspect in view of the clear language employed in Section 141 of the Act. In the expanded ambit of the word 'company' even firms or any other associations of persons are included and as a necessary adjunct thereof a partner of the firm is treated as director of that company." (Emphasis supplied) "Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase 'as well as' used in Sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words 'shall

also' in Sub- section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons can also become liable for the offence." In our opinion, the High Court has correctly come to the conclusion that the liabilities of M/s. Shah Agencies were never taken over by M/s. Shah Enterprises. Therefore, the reasoning given by the High Court, in our opinion, is absolutely flawless and we find no ground to interfere with the concurrent findings of the Trial Court and the High Court. Therefore, the present appeal is devoid of any merit. Accordingly, this appeal is dismissed.

.....J (Pinkai Chandra Ghose) .....J (R.K. Agrawal) New Delhi;

September 16, 2015