

(1997) 06 BOM CK 0050

In the Bombay High Court

Case No : Criminal Application No's. 25 and 26 of 1997

A. Chinnaswami

APPELLANT

Vs

M/s. Bilakchand Gyanchand Company

RESPONDENT

Date of Decision : 26-06-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Essential Commodities Act, 1955 — Section 10, 3
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142
Penal Code, 1860 (IPC) — Section 420

Citation : (1998) 2 ALD(Cri) 748 : (1998) 3 BomCR 120 : (1997) 2 CivCC 505 : (1997) 3 MhLj 335 : (1998) 4 RCR(Criminal) 215

Hon'ble Judges : V.K. Barde, J

Bench : Single Bench

Advocate : R.G. Karmarkar, for the Appellant; R.R. Mantri, for the Respondent

Judgement

V.K. Barde, J.—Rule. Returnable forthwith.

2. These two applications are between the same parties and raise common points for consideration. Hence, those are being disposed of by common judgment.

2A. The present respondent has filed two complaints against the present petitioner in the Court of Judicial Magistrate, First class, Chopada, for offence punishable u/s 138 r/w 142 of the Indian Negotiable Instruments Act being S.C.C. Nos. 155/95 and 156/95.

3. The Summary Criminal Case No. 155/95 is filed in respect of four cheques of Rs. 1,00,000/- each issued on 17-6-1994; 22-6-1994; 27-6-1994 and 5-7-994. The complaint has contended that the accused had purchased cotton bales from the complainant on credit and the cheques were issued towards the consideration of the cotton bales sold. The complainant presented the cheques in the State Bank of India, Chopada. However, on 14-12-1994, he received information from the Bank that cheques were dishonoured. The complainant then sent notice of demand of the amount of the cheques by registered post acknowledgment due

(R.P.A.D.). However, on 27-12-1994, the accused refused to accept the notices. The accused also did not settle the amount under the cheques within the prescribed period. Hence, the complaint is filed on 10-2-1995. The complainant has contended that the transaction took place within the territorial jurisdiction of the Court at Chopada and, therefore, the matter was maintainable before that Court. He alleged that the accused committed the offence punishable u/s 138 r/w 142 of Negotiable Instruments Act and u/s 420 of the Indian Penal Code. The learned Magistrate by his order dated 10-2-1995 issued process against the accused for offence punishable u/s 138 of Negotiable Instruments Act.

4. The present petitioner thereafter filed application for recalling the order of issuance of process before the J.M.F.C., Chopada, but that application was rejected on 19-10-1996. Hence, the present application.

5. The S.C.C. No. 156/95 was filed with respect to two cheques of Rs. 1,75,000/- each issued on 12-5-1994 and 14-5-1994 again towards the price of bales of cotton sold by the complainant to the accused. The cheques were presented by the complaint in State Bank of India, Chopada Branch and on 29-11-1994, he received the information that the cheques were dishonoured. He sent a notice dated 12-12-1994 by R.P.A.D. to the accused and demanded the amount of cheques. However, the accused failed to reply the notice and failed to make the payment. The complainant has contended that the transaction had taken place within the territorial jurisdiction of Court at Chopada and the accused committed the offences punishable u/s 138 r/w 142 of the Negotiable Instruments Act and u/s 420 of the Indian Penal Code. The complaint was lodged on 10-2-1995. The learned Magistrate issued process against the accused for offence punishable u/s 138 of Negotiable Instruments Act. Here also the application was filed by the accused to recall the order of issue of process, but the said application was rejected by the learned Magistrate on 19-10-1996.

6. The two applications are filed on the ground that J.M.F.C., Chopada, has no territorial jurisdiction to entertain the complaint. All transactions had taken place at Coimbatore. The amount was to be paid at Coimbatore. The complainant has a branch at Coimbatore. Only because cheques were presented in the State Bank of India, Branch at Chopada, the complaint cannot be filed before J.M.F.C., Chopada. The Court at Chopada is not having the jurisdiction to entertain the complaint. So the order of issuance of process be quashed.

7. It is also contended in both the applications that separate notices ought to have been issued regarding the separate cheques. However, the complainant has issued one notice regarding two cheques and another notice regarding four cheques and that is improper. The petitioner has also contended that there was no proper service of the notice. The endorsement "not claimed" made on the envelopes by the postal authorities does not mean that the notice was properly served. It is also contended that the complaint should have been filed against the company and not against the petitioner as cheques were issued by the company Shakti Spinners.

8. In Criminal Application No, 25/97, it is further contended that the notice of dishonour of the cheques is alleged to have been received by the complainant on 29-11-1994. The notice of demand dated 12-12-1994 was sent by R.P.A.D. on 14-12-1994. It is alleged that on 20-12-1994, intimation was given to the petitioner by the postal authority but he did not claim the register. The documents produced on record do show that intimation was given on 20-12-1994. It means that the payment of the amount of the cheques ought to have been made by 4-1-1995 and the complainant on account of non-payment of amount of cheque ought to have been filed within one month from 4-1-1995, that means on or before 4-2-1995. But the complaint is filed on 10-2-1995. So the complaint - S.C.C. No. 156/95 is barred by limitation. The point of limitation is also raised in Criminal Application No. 26/97, but it is not so specifically pleaded.

9. The petitioner, therefore, in both the applications has prayed that order of issuance of process passed in both the criminal cases by J.M.F.C., Chopada, be quashed.

10. Heard Shri R.G. Karmarkar, learned Counsel for the petitioner and Shri R.R. Mantri, learned Counsel for the respondent.

11. The learned Counsel for the petitioner has argued that the entire transaction had taken place at Coimbatore. Admittedly, the complainant is having a branch at Coimbatore and, therefore, the Court at Chopada has no jurisdiction to entertain the complaint,

12. However, the question of jurisdiction has to be decided on the basis of averments made in the complaint. The complainant has contended that the transaction took place within the territorial jurisdiction of Court of J.M.F.C., Chopada. The petitioner-accused may have some defence with respect to these contentions, but the defence of the accused cannot be looked into while considering the application u/s 482 of Cr.P.C. for quashing the proceedings. The petitioner has to show that prima facie, there is some such defect in the complaint of the complainant or the material produced on record by the complainant that no offence is made out and, therefore the proceeding be quashed. The question of jurisdiction is a mixed question of fact and law. The learned Magistrate will have to record evidence with respect to the fact as to at what place the transaction took place and whether the Court of J.M.F.C. at Chopada had jurisdiction or not. So on that ground, the order of issue of process cannot be quashed in either of the complaints filed by the present respondent.

13. In the same way, the question of limitation is a question of fact and law. The learned Counsel for the respondent has argued that the intimation regarding the register letter was given by postal authority to the accused on 20-12-1994. As per the postal rules, the letter is retained with the postal authorities for 7 days and the addressee can claim it at any time within the period of 7 days. If it is not so claimed within 7 days, then the letter is returned to the sender. In these

circumstances, when the intimation was given on 20-12-1994, the post authority retained the letter till 27-12-1994. Till that day, it was not claimed. So it has to be held that the service of the letter was refused on 27-12-1994 and on that day the notice was received by the accused. The period of limitation will start from 27-12-1994 and not from 20-12-1994. This very argument of the learned Counsel shows that the facts will have to be ascertained and then only a finding can be given as to whether the complaint is barred by limitation or not. The accused may have any defence regarding when the notice was refused by him, but on the basis of facts stated in the complaint, it cannot be said that complaint is barred by limitation prima facie and, therefore, the order of issue of process cannot be quashed on that ground.

14. The learned Counsel for the petitioner has further argued that the cheques which are produced on record by the complainant are issued for Shakti Spinners Ltd. and are signed by the Managing Director of Shakti Spinners Ltd. So the drawer of the cheque is Shakti Spinners Ltd. - a company. However, the notices for demand of cheque amount sent by the complainant are addressed to Shri A. Chinnaswami - an individual. A. Chinnaswami might have signed the cheques, but the cheques were not signed by him in his individual capacity. The cheques were signed by him as Managing Director of Shakti Spinners Ltd. The drawer of the cheque being Shakti Spinners Ltd., the notices ought to have been issued to Shakti Spinners Ltd. There is no proper compliance of the provisions of sub-clause (b) of proviso to section 138.

15. The learned Counsel for the petitioner has argued that the offence u/s 138 of Negotiable Instruments Act is committed not at the time of dishonour of the cheque, but it is committed when the drawer of the cheque fails to pay the amount of cheque within 15 days from the date of service of notice of demand of the cheque amount. So unless and until there is proper and legal notice to the drawer of the cheque and the drawer of the cheque is given 15 days time to make the payment of amount of cheque, the complaint cannot be filed alleging that the offence u/s 138 of the Negotiable Instruments Act is committed.

16. The learned Counsel for the respondent has argued that the cheque was signed by the accused A. Chinnaswami and, therefore, he is the drawer of the cheque. Notice was served on him. He is the Managing Director and if he is the Managing Director of Shakti Spinners Ltd., then there is proper notice as contemplated under sub-clause (b) of proviso to section 138. It is further contended that in the F.I.R., it is clearly mentioned that the accused had purchased the cotton bales from the complainant on credit and the accused had issued the cheques. So the notice to the accused is sufficient and proper. It is also argued that if the accused has any defence in this respect, that will be considered only at the time of trial. The proceeding cannot be quashed on the stand taken by the accused.

17. The maintainability of the complaint is to be considered on the basis of the averments in the complaint and the documents filed alongwith the complaint by

the complainant on which he is relying to make out his case. No doubt in both the complaints, it is mentioned that the cotton bales were sold to the accused on credit and the accused issued the cheques. The complainant has not explained how the cheques happened to be signed for Shakti Spinners Ltd. by the Managing Director. If the transaction had been only with the accused in his individual capacity, then the cheques would have been signed by the accused in his individual capacity. The cheques produced on record show that the cheques are drawn on the account of Shakti Spinners Ltd. and not on account of A. Chinnaswami. The drawer of the cheque is Managing Director of Shakti Spinners Ltd. Definitely he had not signed the cheque in his individual capacity, but as Managing Director for Shakti Spinners Ltd. The maker of the cheque is the Managing Director of the Shakti Spinners Ltd. So the cheques are drawn by and for Shakti Spinners Ltd. The drawer of the cheques is Shakti Spinners Ltd.

18. If (that is not the position, then it ought to have been explained by the complainant as to how and where he had sold cotton to the accused in his individual capacity. He accepted the cheques drawn by and for Shakti Spinners Ltd. On going through all the contents of the complaint and the documents filed on record, it is very clear that the drawer of the cheque is Shakti Spinners Ltd. and not the individual accused A. Chinnaswami.

19. While the notice is sent by the complainant to A. Chinnaswami. No doubt the address on the notice is not the residential address of A. Chinnaswami, but his office address. But that does not mean that the notice is sent to the drawer Shakti Spinners Ltd. The notice ought to have been addressed to the Shakti Spinners Ltd. and then it could have been made clear that it be given to the Managing Director A. Chinnaswami. But notice to A. Chinnaswami can not be considered as notice to Shakti Spinners Ltd.

20. When any criminal liability is to be fastened on any person, then the provisions of the law must be interpreted strictly. Section 138 of the Negotiable Instruments Act provides that notice be given to the drawer of the cheque. When the drawer of the cheque is individual, notice will go to the individual and if the drawer of the cheque is company, then the notice will go to company. In the present circumstances, the cheques which are filed on record show that those were drawn by Shakti Spinners Ltd. on the account of Shakti Spinners Ltd. and, therefore, the drawer being Shakti Spinners Ltd., the notice ought to have been given to Shakti Spinners Ltd. The notice is not legal and proper. This fact is apparent on record from the documents which are filed on record by the complainant himself.

21. When the drawer of the cheque has not received the notice as per provisions of sub-Clause (b) of the proviso to section 138, naturally the drawer of the cheque cannot comply with the further condition of making the payment of the amount of cheque within the period of 15 days from the date of receipt of notice as contemplated under sub-Clause (c) of the proviso. When the drawer of the cheque has not received the opportunity of making the payment of amount of

cheque, then it cannot be said that the offence u/s 138 is committed.

22. Here it is not necessary to go into the question whether actually the notice was served on A. Chinnaswami and what is the meaning of the postal endorsement "not claimed". When there is no notice to Shakti Spinners Ltd., any act or omission on the part of A. Chinnaswami cannot make liable Shakti Spinners Ltd. Even if the notice had been actually received by A. Chinnaswami, it could not have been held that the notice was served on the drawer of the cheque. The notice ought to have been given to the drawer of the cheque i.e. Shakti Spinners Ltd., may be to the Managing Director or any other officer of the company. So it has to be held that as there was no legal and proper notice to the drawer of the cheque - Shakti Spinners Ltd., the offence u/s 138 is not committed.

23. There is one more aspect to these matters. In both the complaints filed before the J.M.F.C., Chopada, the complainant has specifically mentioned that accused is director of the firm - Shakti Spinners Ltd. It means that the complainant is well aware that the accused had not acted in his personal capacity, but had acted in his capacity as director of the firm-Shakti Spinners Ltd. The accused is being prosecuted because of the provisions of section 141 of the Negotiable Instruments Act. Section 141 of the Negotiable Instruments Act reads as under :--

"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.

Explanation.---For the purposes of this section, ---

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

24. On plain reading of this section, it is clear that when the offence is committed by the company, the company as well as the person who was in-charge of the affairs of the company can be prosecuted as per the provisions of sub-section (1) and as per the provisions of sub-section (2), director, manager, secretary or other officer of the company also can be prosecuted and held guilty if it is proved that the offence was committed with the consent or connivance or neglect on the part of such person.

25. The learned Counsel for the petitioner has argued that director or officer of the company alone cannot be prosecuted. The company also must be prosecuted. While the learned Counsel for the respondent has argued that it is not necessary that the company also be prosecuted. Any of the director or officer of the company alone can be prosecuted without company being arrayed as accused. Section 141 does not make it compulsory that company also must be named as accused. He has, therefore, contended that the complaint as filed is legal and proper.

26. There is similar provision u/s 10 of the Essential Commodities Act which was considered by the Apex Court in the matter between Sheoratan Agarwal and Another Vs. State of Madhya Pradesh, and Their Lordships have referred to the ruling of the Supreme Court in State of Madras Vs. C.V. Parekh and Another, , and have stated the law on this point that any of the officers of the company can be prosecuted without the company being named as accused. However, the Apex Court has specifically observed in this respect as follows:-

"The section appears to our mind to be plain enough. If the contravention of the order made u/s 3 is by a Company, the persons who may be held guilty and punished are (1) the Company itself (2) every person who, at the time the contravention was committed, was in charge of, and was responsible to, the Company for the conduct of the business of the Company whom for short we shall describe as the person-in-charge of the Company, and (3) any director, manager, secretary or other officer of the Company with whose consent or connivance or because of neglect attributable to whom the offence has been committed, whom for short we shall describe as an officer of the Company. Any one or more or all of them may be prosecuted and punished. The company alone may be prosecuted. The person-in-charge only may be prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the person-in-charge or an officer of the Company may not be prosecuted unless he be ranged alongside the Company itself. Section 10 indicates the person who may be prosecuted where the contravention is made by the Company. It does not lay down any condition that the person-in-charge or an officer of the Company may not be separately prosecuted if the Company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the Company. Section 10 lists the person who may be separately prosecuted or along with the Company that contravenes an order made u/s 3 of the Essential Commodities Act.

Naturally, before the person-in-charge or an officer of the Company is held guilty in that capacity, it must be established that there has been a contravention of the order by the Company. That should be axiomatic and that is all that the Court held down in State of Madras Vs. C.V. Parekh and Another, ."

27. So here it is made clear by the Apex Court in that the offence must have been committed by the company. Then only the officer of the company will be liable. If the prosecution is not able to make out the case against the company, the officer of the company cannot be prosecuted. The complainant has choice not to add company as accused, but complainant has no choice to prosecute officer alone without making out the case that company itself has committed an offence. In the present case, it is pointed out that the drawer was the company - Shakti Spinners Ltd. The complainant has made it clear in the complaint that the accused was acting as director of the firm Shakti Spinners Ltd. and in that capacity he had signed the cheques. So the notice ought to have been issued to Shakti Spinners Ltd. as per section 138 and if the Shakti Spinners Ltd. had not paid the amount within 15 days, then Shakti Spinners Ltd. would be considered as the offender. Here notice was not issued to Shakti Spinners Ltd. and, therefore, no offence is committed by Shakti Spinners Ltd. The company itself cannot be considered as offender and, therefore, the officer of the company cannot be prosecuted for the offence which is not committed by the company.

28. Thus, the notice were which is issued by the respondent-complainant on account of dishonour of the cheques were not issued to the drawer of the cheques and, therefore, even if the petitioner-accused had signed the cheques and even if he had refused to accept the notice, he cannot be held guilty for offence punishable u/s 138 of the Negotiable Instruments Act. He was personally not responsible to pay the amount of cheques. Shakti Spinners Ltd. was responsible to pay the cheque amounts. No opportunity was given to Shakti Spinners Ltd. to pay the amount of cheques. So offence u/s 138 is not committed by the company and, therefore, by the accused-petitioner. Both the complaints, therefore, do not disclose any offence u/s 138 of the Negotiable Instruments Act. Both the complaints are, therefore, liable to be quashed.

29. Hence, the applications are allowed. The proceedings of S.C.C. Nos. 155/95 and 156/95 filed by the present-respondent in the Court of J.M.F.C., Chopada, are hereby quashed. Rule made absolute accordingly.

30. Application allowed.