

(2008) 12 BOM CK 0087

In the Bombay High Court

Case No : Criminal W.P. No's. 1444 and 1445 of 2008

Amarnath Baijnath Gupta and Another

APPELLANT

Vs

Mohini Organics Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 11-12-2008

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 192, 200, 397, 482

Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1), 142, 145

Citation : (2010) 2 BC 140 : (2009) 3 BomCR 258 : (2009) CriLJ 995

Hon'ble Judges : A.S. Oka, J

Bench : Single Bench

Advocate : S.R. Chitnis and Sameer M. Mangaonkar, for the Appellant; Anil Agarwal, for the Respondent

Judgement

A.S. Oka, J.—On 17th July 2008, in these two petitions, this Court issued notice for final disposal at the admission stage. Further submissions were heard by this Court on 21st August 2008 and 8th September 2008.

2. When the petitions were placed before this Court (Coram: V.K. Tahilramani, J.) on 8th October 2008, the registry was directed to place these petitions before the Hon'ble the Chief Justice for appropriate orders as a contention was raised that the petitions have been substantially argued before this Court. Accordingly, by an administrative order dated 20th October 2008 passed by the Hon'ble the Chief Justice, these petitions have been assigned to this Court. Accordingly, the petitions were taken up for final hearing on 21st November 2008.

3. It is not in dispute that the facts leading to filing of these two petitions are more or less identical. Therefore, a reference is made to the facts of the case in Criminal Writ Petition No. 1444 of 2008. The first respondent filed a private complaint against the petitioners and four others alleging commission of an offence u/s 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the said Act"). The complaint is based on eight

cheques issued by M/s. Premier Explochem Limited (the first accused) in favour of the first respondent in discharge of the alleged liability of the said M/s. Premier Explochem Limited (hereinafter referred to as "the said Company"). The petitioners have been arranged as fifth and sixth accused in the said complaint. As stated earlier, the first accused is the said company. The case of the first respondent made out in the complaint is that the petitioners along with second to fourth accused are the Directors of the said company. The fifth accused (the first petitioner) is alleged to be the Chairman of the said company. It is stated that second and third accused are the Directors of the said company and also signatories to the cheques subject matter of the complaint. It is alleged that the petitioners and second to fourth accused have from time to time negotiated with the first respondent and placed orders for supply of goods. It is alleged that the petitioners and second to fourth accused from time to time promised that the dues of the first respondent will be paid. It is alleged that the petitioners and second to fourth respondents are in-charge and in control of the day to day affairs and management of the said company and they have issued the concerned cheques in consultation with each other. It is alleged that the petitioners and the second to fourth accused take decisions of day to day working of the said company and they are responsible for the conduct of the business of the said company. Further allegation made in the complaint is that the dishonoured cheques were not deposited for some time by the first respondent on instructions of the first petitioner. The first respondent alleged that subsequently on instructions being received from the first petitioner and the second and third accused, the first respondent deposited the cheques and the same were dishonoured.

4. Verification statement of one Mr. Shyam Manglunia was recorded by the learned Metropolitan Magistrate, 43rd Court, at Borivali, Mumbai and process was issued against all the accused including the petitioners on 2nd September 2007 for an offence punishable u/s 138 of the said Act.

5. The petitioners filed a Revision Application u/s 397 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code") before the Court of Sessions for Greater Mumbai, at Dindoshi (Borivali Division) for challenging the order passed by the Magistrate of issuing the process on the private complaint of the first respondent. The learned Additional Sessions Judge dismissed the said revision application by Judgment and order dated 17th June 2008.

6. By these petitions under Article 227 of the Constitution of India, the petitioners have challenged the order passed by the learned magistrate of issuing process as well as the order passed by the Additional Sessions Judge by which the revision application was rejected.

7. The learned Senior Counsel appearing for the petitioners invited my attention to the averments made in the complaint as well as to the verification statement of the authorised representative of the first respondent recorded by the learned Magistrate. He submitted that on plain reading of the averments made in the

complaint the process could not have been issued against the petitioners as material averments in terms of Section 141 of the said Act have not been made in the complaint. Reliance was placed on a decision of the Apex Court in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, . The learned Senior Counsel appearing for the petitioners also relied upon the decision of the Apex Court in the case of Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, . He submitted that in view of the mandate of Section 200 of the said Code, the first respondent-complainant was bound to make statements on oath as to how the offence has been committed and how the petitioners and other accused are responsible therefore. He also relied upon a decision of this Court in the case of Kapal Mehra Vs. Indusind Enterprises and Finance Ltd. and Another, and submitted that the persons sought to be made criminally liable u/s 141 must be in-charge of and responsible for the conduct of the business of the accused company. Inviting my attention to paragraphs 25 and 26 of the said decision of this Court, he submitted that the learned Magistrate while issuing the process cannot act casually. He submitted that before issuing the process the learned Magistrate is under an obligation to scrutinise the averments made in the complaint as well as in verification statement. He submitted that the verification statement is totally silent about the existence of ingredients of the Section 141 of the said Act.

8. He submitted that the petitioners in their alleged capacity as Directors could have been prosecuted only by invoking Section 141 of the said Act. He pointed out that the process has been issued only u/s 138 of the said Act and in the order issuing the process there is no reference to Section 141 of the said Act. He submitted that the order of the learned Magistrate shows that the learned Magistrate was not satisfied that a case u/s 141 of the said Act was made out. He submitted that the process u/s 138 could have been issued only against the company and not against its Directors especially when Section 141 of the said Act is not invoked.

9. The learned Senior Counsel further submitted that in paragraph 6 of the verification statement the authorised signatory of the first respondent-complainant has made a false statement that there was no reply issued by the accused to the statutory notice sent by the first respondent. He submitted that on 16th August 2007, a separate reply was sent by the advocate for the petitioners on behalf of the petitioners. He pointed out that copies thereof have been annexed to the petitions. He pointed out that the first petitioner has stated in the reply that till 29th June 2007 he was never in-charge of and in the control of the day to day affairs of the company and in fact he was not involved in the decisions of the day to day working of the company and especially the financial matters. He pointed out that similar contention has been raised in the reply of the second petitioner.

10. The submission made by the learned Senior Counsel for the petitioners is that the order passed by the learned Magistrate of issuing the process against

the petitioners is patently illegal and the same deserves to be quashed.

11. The learned Counsel appearing for the first respondent submitted that there is no suppression of the facts in the verification statement as the reply forwarded by the petitioners on 16th August 2007 was not received before the complaint was filed and, therefore, there was no reference to the said reply of both the petitioners in the complaint as well as in the verification statement. He submitted that the material averments in terms of Section 141 of the said Act have been made in the complaint. He submitted that the Income Tax Returns of the said company of the relevant years have been signed by the first petitioner in his capacity as the Chairman of the said company.

12. He submitted that the learned Magistrates in the city of Mumbai who are dealing with the complaints u/s 138 of the said Act have been following a practice of recording the verification statement of the complainants in complaints u/s 138 of the said Act in a particular format. In fact, he has placed on record verification statements recorded by different Magistrates in the city in particular formats. His submission is that if the learned Magistrate has not recorded a detailed verification statement of the authorised representative of the first respondent though the said representative was willing to make a detailed statement, the first respondent-complainant cannot be allowed to suffer. He submitted that at the highest this Court may send back the matter to the learned Magistrate for recording the verification statement afresh. He pointed out that the material averments as required by the decision of the Apex Court have been incorporated in the complaint. He submitted that the issues raised in these petitions by the petitioners are purely matters of trial and the same can be gone into only after evidence is adduced.

13. The learned Senior Counsel appearing for the petitioners submitted that as the process could not have been issued on the basis of such cryptic verification statement, the complaint deserves to be dismissed and there is no question of sending back the complaint for recording a fresh verification statement.

14. I have carefully considered the submissions. I have perused the complaint and other annexures to the petitions. At this stage the question which will have to be considered is whether a case is made out for issuing process as against the petitioners on the private complaint filed by the first respondent. In paragraph 4 of the complaint there is a specific averment made that the second to sixth accused are all in-charge of and control of the day to day affairs and management of the accused No. 1 company. It is stated in paragraph 2 of the complaint that the accused No. 5 (the first petitioner) is the Chairman of the said company. In paragraph 4 of the complaint there is a further averment that the second to sixth accused are responsible for the conduct of the business of the accused No. 1 company. Thus insofar as the complaint is concerned, there are sufficient averments made in compliance with Section 141 of the said Act. There is a substantial compliance with the requirements laid down by the Apex Court in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, .

15. The learned Senior Counsel appearing for the petitioners submitted that the learned Magistrate has not issued process u/s 141 of the said Act and, therefore, the complaint cannot proceed against the second to sixth accused and in particular against the petitioners. He pointed out that the process has been issued only u/s 138 of the said Act. The submission is that if the learned Magistrate was satisfied that a case to proceed against the petitioners was made out, the process ought to have been issued u/s 138 read with Section 141 of the said Act. For dealing with this submission, a reference will have to be made to Sections 138 and 141 of the said Act. The Section 138 introduces a legal fiction which provides that in case of dishonor of a cheque in the situations provided for in the Section, the drawer of the cheque shall be deemed to have committed an offence. The said Section provides for a punishment for the said offence. Section 141 of the said Act reads thus:

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:

(Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.)

(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.

16. Section 141 does not create or define an offence. It only provides that 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 company, shall be deemed to be guilty of the offence u/s 138 and shall be liable to be proceeded against and punished accordingly. The legal effect of Section 141 is that the persons referred to in Sub-section (1) thereof shall be deemed to be

guilty of the offence u/s 138 of the said Act which is committed by a company. Thus, if a case is established u/s 141, the persons referred to in Sub-section (1) thereof will be punished u/s 138 of the said Act. Thus, if Section 141 is applicable, the person concerned can be punished u/s 138 of the said Act. While issuing the process, the Court is required to mention the Section under which the accused can be punished and/or the Section which defines the offence. If the learned Magistrate on the basis of the averments made in the complaint as well as the verification of the complainant is satisfied that the complainant has made out a case u/s 141, he can issue process for the offence punishable u/s 138 of the said Act against the company as well as the Directors or the persons referred to in Sub-section (1) of Section 141. In the circumstances, there is no merit in the said grievance made by the petitioners.

17. The main submissions have been made on the verification statement of one Shyam Manglunia which is annexed at page 32 of the petition. The said statement contains numbered paragraphs having titles such as the cheque number, the cheque date, the cheque amount, the name of the drawer's bank, the name of the drawee's bank, the date of presentation of the cheque, the date of receiving the intimation from the bank of dishonour of the cheque, the date of notice of demand, the date of service of notice to the drawer, the date of receipt of reply if any of the drawer and the date of filing the complaint. In the verification statement necessary particulars have been filled in against the item numbers referred to above. Thus, the verification statement recorded in these two cases is in a pre-conceived format in which necessary particulars referred to above are filled in.

18. Before dealing with the effect of such a verification statement, it will be necessary to consider the object of the statement u/s 200. Section 200 of the said Code reads thus:

Section 200. Examination of complainant.-

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate;

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate u/s 192;

Provided further that if the Magistrate makes over the case to another Magistrate u/s 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

19. The Apex Court in the case of Nirmaljit Singh Hoon Vs. The State of West Bengal and Another, had an occasion to consider the provisions of Section 200 of the said Code. It will be necessary to refer to what is held by the Apex Court in paragraph No. 22:

22. ...Where a complaint is presented before him, he can u/s 200 take cognizance of the offence made out therein and has then to examine the complaint and his witnesses. The object of such examination is to ascertain whether there is a prima facie case against the person accused of the offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such a person such examination is provided therefore to find out whether there is or not sufficient ground for proceeding.

(Emphasis supplied)

This Court had an occasion to consider Section 200 of the said Code in the case of Captain Lance Irwin Lobo v. Ismail D'Souza @ Angelo Ismail de Souza and Anr. 2007 All MR (Cri) 623 : 2008 (6) AIR Bom R (NOC) 1078. It will be necessary to refer paragraph 16 of the said judgment in which this Court has held thus:

16. ...The recording of the statement on oath of the complainant u/s 200 Cr.P.C. is not an empty formality. Commonly it is nicknamed as verification. To verify means to establish the truth. In other words, verification is done in order to ascertain as to what is pleaded by foe compliant is true or not, It is with a view to separate chaff from the grain as many a times complaints do contain unfounded allegations and it is the duty of the Court to ensure that what is stated in the complaint is also stated by the complainant on oath and it is only then that based on such statement that process can be issued. The corollary of this would be that unless offences are disclosed from the statement on oath, no process can be issued only based on averments in the complaint. The complainant is bound to make a statement on oath as to how the offence was committed and how the accused persons are responsible therefore. After the statement on oath is recorded, a Magistrate is required to apply his judicial mind to the facts of the case and the law applicable thereto and find out what of-fence/s is made out, notwithstanding that the other party at that stage is unrepresented. As observed by the Apex Court time and again, summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course. A Magistrate is required to examine the nature of the allegations made in the complaint and the evidence both oral and documentary to see if it is sufficient for the complainant to succeed in bringing charge home to the accused. In other words, the examination of the complainant on oath is for the purpose of ascertaining whether a prima facie case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass.

(Emphasis supplied)

20. The learned Senior Counsel appearing for the petitioners has relied upon a decision of the Apex Court in the case of Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, . In the said judgment the Apex Court has dealt with the requirements of Section 141 of the said Act. The Apex Court followed its earlier decision in the case of S.M.S. Pharmaceuticals (supra) to hold that before a person can be held vicariously liable u/s 141 of the said Act, the complaint must demonstrate that the statutory requirements contained in Section 141 of the said Act have been complied with. The Apex Court held that it may not be necessary for the complainant to specifically reproduce the wordings of the Section but what is required is a clear statement of fact so as to enable the Court to arrive at a prima facie opinion that the accused are vicariously liable. The Apex Court thereafter dealt with the statement u/s 200 of the said Code. In paragraph 7 the Apex Court observed thus:

...In terms of Section 200 of the Code of Criminal Procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefore...

Relying upon the said decision of the Apex Court in the case of Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, the learned single Judge of this Court in the case of Kapal Mehra 2008 (1) AIR Bom R 757 (supra) construed the provisions of Sections 138 and 141 of the said Act and in paragraph 25 observed as under:

25. A magistrate issuing process is expected to act meticulously and examine the averments made in the complaint and verification of statement in such or similar cases more carefully, when the prosecution is under special legislation. It is true that the evidence is not required to be pleaded but there has to be a basic averment as to how one is involved in the alleged crime.

21. The statement contemplated by Section 200 of the said Code is the first statement of the complainant on oath recorded by the Court. The requirement of recording a statement on oath of the complainant is not an empty formality. Before a Division Bench of this Court in the case of Maharaja Developers and Another Vs. Udaysingh Pratapsinghrao Bhonsle and Another, an issue arose whether in the light of non obstante Clause in Sections 142 and 145 of the said Act is it mandatory for the Magistrate before issue of process to examine the complainant in a complaint alleging an offence u/s 138 of who has filed the complaint with affirmation as regards truthfulness of the facts mentioned in the complaint. One of the submissions made before the Division Bench was that if the complaint alleging offence u/s 138 is affirmed by the complainant reiterating the truthfulness of the averments made therein, there may not be any requirement of recording a statement u/s 200 of the said Code. The Division Bench held that the Magistrate is obliged and duty bound to examine upon oath the complainant before issuance of process though there is a solemn affirmation

at the foot of the complaint by the complainant.

22. On plain, reading of Section 200 of the said Code it, appears that It is the obligation of the Magistrate to examine the complainant which means that the learned Magistrate is obliged to put questions to the complainant for eliciting the truth from him. The said provision enjoins a judicial duty to be performed by the Judicial Magistrate which requires an application of judicial mind. The said work of recording the statement cannot be done mechanically by simply filling details such as the date of cheque, name of the bank, date of intimation of dishonour of the cheque etc; in a format which is already kept ready. Generally, the complaints are drafted by the lawyers as per the instructions of the complainants. Thus, a complaint is the translated version or a formulated version made by the advocate on the instructions received from the complainant. Therefore, the examination of the complainant u/s 200 by the learned Magistrate is very important. During the course of such examination the complainant tells the truth. In fact, the object of the learned Magistrate recording such statement is of eliciting the truth from the complainant. Therefore, while recording a statement u/s 200 of the said Code in such a complaint, the learned Magistrate cannot merely reproduce the data in a pre-conceived format. He must give an opportunity to the complainant to state and describe the role played by the accused especially when directors/officers of a company are sought to be held vicariously liable. The object of examination is that a true version on oath of the complainant is brought on record.

23. Now coming back to the facts of the present case, it is obvious that the statement of the complainant has been recorded by the learned Magistrate in a format which was already kept ready before commencement of recording of the statement. In a statement u/s 200, the complainant is required to make out a case against the accused showing their complicity or involvement in the offence. In a given case and especially in case of a complaint u/s 138 of the said Act, the particulars which are incorporated in the verification statement may necessarily form a part of the verification statement, but in a case where the complainant wants to show that the Officers/Directors of a company are vicariously liable, the complainant will have to set out on oath whether the concerned persons were in-charge of at the time of commission of the offence and were responsible to the company for the conduct of its business. If a verification statement is mechanically recorded in a format, it is obvious that a complainant will be deprived of an opportunity to disclose the material particulars of factual aspects on oath.

24. When this petition was heard on 21st August 2008 the learned Counsel appearing for the first respondent stated that many learned Magistrates in the city of Mumbai dealing with complaints u/s 138 of the said Act are recording verification statements only in a pre-conceived format. For the perusal of the Court the learned Counsel appearing for the first respondent has placed on record true copies of verification statements recorded by different Metropolitan

Magistrates in the city of Mumbai in complaints u/s 138 of the said Act. Perusal of the copies of the said statements supports the factual statement made by the learned counsel. The learned Magistrate has to perform his duty u/s 200 of the said Code by putting questions to the complainant so that the complainant can state before the Court as to how the accused named in the complaint are liable.

25. Thus, in the present case, the learned Magistrate has not performed his duty u/s 200 of the said Code. The complainant cannot be allowed to suffer merely because the learned Magistrate has not performed his duty.

26. The learned senior counsel appearing for the petitioners submitted that a false statement has been made by the complainant in item No. 6 of the verification statement by stating that there was no reply to the notice of demand. The response of the learned Counsel for the first respondent was that till the date of filing the complaint, the reply sent by the petitioners was not received by the complainant. The petitioners have not annexed the copies of the acknowledgement showing receipt of the said reply by the advocate for the first respondent-complainant on any date prior to the date of institution of the complaint. Therefore, this aspect is a matter of evidence and the complaint cannot be thrown out on this ground at this stage.

27. As the approach of the learned Magistrate was completely erroneous, while exercising the power under Article 227 of the Constitution of India and u/s 482 of the said Code, this Court will have to ensure that a litigant should not suffer due to lapse on the part of learned Magistrate. The order of process passed without recording proper verification will have to be naturally set aside but the complaint will have to be remanded and relegated to the stage of recording statement u/s 200 of the said Code with a direction to the learned Magistrate to record the statement u/s 200 of the Code afresh in accordance with law. This is a peculiar case where the learned Judge has not performed his duty. Merely because there are defects in the verification statement the aforesaid course cannot be adopted.

28. This course of sending the complainant back to the Magistrate is required to be adopted as the learned Magistrate has acted contrary to Section 200 of the said Code.

29. Hence, I pass following order:

(a) The impugned orders of issue of process dated 7th September 2007 passed by the learned Magistrate are quashed and set aside. Consequently, the judgments and orders dated 17th June 2008 passed by the learned Additional Sessions Judge is quashed and set aside;

(b) The learned Metropolitan Magistrate, 43rd Court, Borivali, Mumbai will record the statement of the complainant u/s 200 of the Code of Criminal Procedure, 1973 afresh in accordance with law in the light of the observations made in this judgment. After recording of the verification statement, the learned Magistrate will pass appropriate order on the complaint in accordance with law. All questions

on merits are kept open;

(c) The Registrar, Judicial (I) will ensure that a copy of this judgment is circulated to all learned Metropolitan Magistrates in the City of Mumbai;

(d) The petitions are partly allowed in the above terms with no orders as to costs.