

(2018) 09 BOM CK 0075

In the Bombay High Court

Case No : Criminal Application No. 813 Of 2017

Baba Chandrashekhar Radhakrishnan And Others

APPELLANT

Vs

State Of Maharashtra And Anr

RESPONDENT

Date of Decision : 25-09-2018

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138, 141
Companies Act, 2013 — Section 399

Citation : (2018) 09 BOM CK 0075

Hon'ble Judges : K. L. Wadane, J

Bench : Single Bench

Advocate : S. G. Chapalgaonkar, A. D. Namde, K. J. Suryawanshi

Final Decision : Disposed Off

Judgement

1. Rule.Â Rule made returnable forthwith.Â With the consent of the parties, the application is taken up for final hearing.Â

2. The applicant Nos. 1 to 3 â?" original accused Nos. 2 to 4, have challenged the order passed by the learned trial Court dated 18.06.2016, by which

the process is issued against the applicants for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.Â

3. The original complainant â?" respondent No. 2 herein, filed a complaint under Section 138 of the Negotiable Instruments Act, against the applicants

and the accused No. 1. Â It is alleged that on 18.03.2014 and 19.03.2014 the accused No. 1, through its Managing Director, had issued cheques

bearing No. 410898 and 410899 for Rs.22,43,960/Â and Rs.22,68,097/Â respectively towards the payment of Cotton purchased by the accused No. 1

company.Â It is further alleged that the said cheques were dishonored.Â Notice of demand was also served upon the accused however, it was not

complied, hence all the accused are liable for the punishment under the provision of Section 138 of the Negotiable Instruments Act, 1881.Â

4. On 07.08.2014 the complaint was presented before the Judicial Magistrate First Class at Gangapur, vide SCC No.595/2014.Â The said complaint was returned for want of territorial jurisdiction vide order dated 12.12.2014.

5. On 16.10.2015, the complaint was again presented before the Judicial Magistrate First Class, Gangapur and after its presentation, the Judicial Magistrate, First Class Gangapur issued the process against accused persons.Â Hence, the order of issuance of process dated 18.06.2018 and the proceeding under Section 138 of Negotiable Instruments Act against accused Nos. 2 to 4 are under challenged.Â

6. Heard Mr. S. G. Chapalgaonkar, learned counsel for the applicants, Mr. A. D. Namde, learned APP for the State and Mr. K. J. Suryawanshi learned counsel for the original complainant â?" respondent No. 2. 7. Mr. Chapalgaonkar, learned counsel for the applicants has advanced his arguments mainly on the following points:

(i) Due to the return of the complaint and its presentation again before the same Court, there was no limitation for filing the complaint;

(ii) The cheque is not signed by the present applicant, it was signed by the accused No. 1.

(iii) There are no allegation against the applicants that they were looking after and responsible for day today affairs of the company i.e. accused Nos.

1; iv) The present applicants have already resigned from the post of directors before issuance of the cheques or its presentation in the concerned bank.

8. As against this, the learned counsel for the respondent No. 2 has argued that in the complaint itself there is specific allegation against the accused

Nos. 1 to 4 that they are the directors of V. R. Textiles, Private Limited and looking after all affairs and therefore, are responsible for textiles. He

further submits that the allegations against the applicants are sufficient to attract the provision of Section 141 of Negotiable Instruments Act, therefore, the proceedings against them cannot be quashed.Â

9. With the help of the learned counsel for the parties, I have gone through the documents produced on record as well as the affidavitÂinÂreply of

respondent No. 2, in which the respondent No. 2 has specifically contended that

the respondent No. 2 supplied the cotton bales of accused No. 1

company.Â In para No. 5, it has been specifically mentioned that the applicants have not denied the notice on the ground that they are not the

directors.Â On perusal of the aforesaid contents of the affidavit, it appears that from the beginning the stand of the present applicants is that they

have already resigned from the post of directors therefore, they have not denied the notice, in such circumstances, it was for the respondent No. 2 to

plead specifically how and in what manner, the present applicants were responsible for day today affairs of the company, on the background that

cheque is issued and signed by the accused No. 1 i.e. Radhakrishnan Naidu.Â When the present applicants have not denied the notice on the ground

that they have already resigned from the post, in such circumstances, it was for the complainant to plead that on the day of issuance of the cheque or

its representation before the bank, the petitioners were directors and they were looking after the day today business of the company i.e. V. R.

Textiles, however, the allegations in para No. 2 of the complaint reads as follows:

That the accused Nos. 1 to 4 are directors of V. R. Textiles, Private Limited, and looking after all affairs and therefore are responsible for

textiles.Â Â Â Â Â Â Â Â

10. The allegations in para No. 2 are vague and there is no allegations that at the time of the issuance of cheque or its presentation to the bank the

present applicants were actively participated in the business of accused No. 1 Â? V. R. Textiles.

11. Mr. S. G. Chapalgaonkar, the learned counsel, further argued that since the present applicants have already resigned from the post of directors,

they have nothing to do with the cheques signed and issued by the accused No. 1 and the liability towards the payment of amount as demanded by the

complainant.Â

12. So far the arguments advanced by the S. G. Chapalgaonkar about the limitation is concern, I do not agree with the submission that the complaint is

barred by the limitation as it was not presented within time after return of the complaint by the learned trial court.Â From the record, it appears that

when the complaint was presented before the trial court, it was returned to the complainant for its presentation in the proper court as per the law laid

down by the Hon'ble Supreme Court in case of Dashrat Rathod Vs. State of

Maharashtra.Â Thus from the record, it appears that in view of the law laid down by the Apex Court, in the aforesaid case, the complaint was returned to the complainant for presentation to the proper Court.Â Further record shows that the complaint was then presented before the Court at Coimbatore again due to the change inÂ law.Â It was returned to the complainant for presentation in the proper Court and therefore, for a second time the complaint was presented before the Judicial Magistrate First Class at Gangapur.Â Hence, there was no fault on the part of all complainant.Â The return of the complaint by two Courts was due to change in the law from time to time, in such situation, it cannot be said that the complaint is not before limitation.Â

13. To consider the other aspect, it is material to mention here that from the copies of letter dated 03.12.2013 by the applicant No. 2, it reveals that he has requested the accused No. 1 to accept his resignation likewise the applicant No. 3 also requested the accused No. 1 by letter dated 16.11.2013 to accept his resignation as per letter dated 16.11.2013 same the case of accused No. 4 he has requested the accused No. 1 to accept her resignation by letter dated 05.04.2014.Â Further, from the record it appears that two cheques were issued by the accused No. 1 on 18.03.2014 and 19.03.2014 respectively.Â So from the record, it appears that all the applicants have resign from their respective posts of director before issuance of cheques on 18.03.2014 and 19.03.2014.Â It is material to mention here that a certified copy under Section 399 of the Companies Act, 2013 is placed on record issued and signed by Assistant Registrar, Tamilnadu Coimbatore.Â From the same, it appears that the accused No. 3 cease to be director w.e.f. 06.11.2013 and the accused No. 2 Baba cease to be director of company w.e.f. 03.12.2013.Â

14. The learned counsel for the respondent No. 2 argued that by way of filing the reply affidavit, the respondent No. 2 has specifically denied the resignation given by the applicants and its acceptance.Â However, the applicants have produced on record certified copy issued by Registrar, therefore, the document can not be ignored.

15. Further more, from the letter issued by the applicant No. 3 Vimala Radhakrishnan dated 05.04.2014, it appears that he resigned from the post of the director.Â The aforesaid correspondence was between the present applicants

and the accused No. 1.Â Therefore, at this stage, the respondent No. 2 â?" original complainant cannot dispute the contents of such communication, one can understand, if, the accused No. 1 disputed such contents.Â From the aforesaid circumstances and the certified copy of the documents issued by the registry of companies, it appears that the applicants have already resigned from the post of directors even before issuance of the aforesaid two cheques by the accused No.1.Â

16. The learned counsel for the respondent No. 2 has relied upon the observation of this Court in the case reported in 2017 ALL MR (Cri) 533, wherein, it is observed that the averments in the complaint that the petitioner at the relevant time, was inÂcharge of and responsible for conduct of the business of the accused company are sufficient to make out the case against him.Â Therefore, complaint cannot be quashed.Â It is further observed in the same case that there was no evidence on record to show acceptance of the petitioner's resignation by the Company on date on which it is alleged to be tendered and it is observed that the prosecution cannot be quashed only on the ground of petitioner having ceased to be Director, when last few acts of presentation of cheque to Bank and its dishonour took place.

17. The learned counsel for the respondent No. 2, however, relied upon the observation of this Court in the case reported in 2017 ALL MR (Cri) 76 wherein, it is observed that merely because petitioners were appointed as independent and nonÂexecutive directors, in view of their expertise in particular field , it cannot be ground for quashing process issued against them.Â The learned counsel further relied upon the observation in case reported in AIR 2015 SUPREME COURT 1072 wherein, it is observed that complaint containing basic averment that director was inÂcharge of and responsible for conduct of companies business at the relevant time in that event Magistrate can issue process against such directors.Â As against this Mr. Chapalgaonkar, learned counsel for the applicants relied upon the recent case reported in 2017 SCC OnLine SC 705 wherein it is observed that :

10. To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner the accused was responsible.Â Simply because a person is a Director of defaulter Company, does not make him liable under the Act.Â Time and again, it has been asserted

by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action

11. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company

under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was

responsible for the conduct of the business of the Company.Â Â Â Â Â Â

18. The above observation are perfectly applicable to the fact of the present case and therefore, it is duty of the Magistrate before summoning the

accused under Section 138 of the Negotiable Instruments Act, Magistrate is expected to examine the nature of the allegations made in the complaint

and the evidence both orally and documentary in support thereof and than to proceed further with proper application of mind to the legal principles on

the issue.Â It is necessary for the courts to ensure strict compliance to the statutory requirement as well as settle principles of law before making a

person vicariously liable, therefore, simply because a person is a director of a defaulter company does not make him liable under the Act for the

offence committed by the company under Section 141 of the Negotiable Instrument's Act.Â There must be specific averments against direct showing

as to how and in what manner the directors was responsible for the conduct and business of the company.Â The allegations in this complaint are

absolutely short and vague as referred above.Â Mr. Chapalgaonkar also relied upon the observation in case reported in AIR 2015 Supreme Court 675

17.Â There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the CompanyÂM/S Elite

International Pvt. Ltd. on 1st July, 2004 and had also executed a Letter of Guarantee on 19th January, 2005. The cheques in question were issued

during April, 2008 to September, 2008. So far as the dishonor of Cheques is concerned, admittedly the cheques were not signed by the appellant.

There is also no dispute that the appellant was not the Managing Director but only a non-Executive Director of the Company. Non-Executive

Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day affairs of the running of its business and

only monitors the executive activity. To fasten vicarious liability under Section

141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N. I. Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the N.I. Act. In *National Small Industries Corporation* (supra) this Court observed:

“Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141.

19. Mr. Chapalgaonkar further relied upon the observations in case reported in (2001) 10 SCC 218 wherein, the appellant in the aforesaid case had not signed the cheque and he is sought to be prosecuted in view of Section 141 as he happened to be director of the company at one point of time. The allegations in the complaint not making out a case that at the time of commission of the offence, that appellant was in charge of and was responsible to the company for the conduct of the business and it is held by the Apex Court

that requirement under Section 141 of the Negotiable Instruments Act

is not prima facie satisfied hence proceeding under Section 138 of the Negotiable Instrument's Act is quashed and set aside.Â

20. Mr. Chapalgaonkar learned counsel has placed reliance upon the copy of the annual return of the company for the succeeding year of the

resignation of the present applicant and by referring the contents of the annual return, he argued that the names of the present applicants are not

figured as a directors of the same company â?" accused No. 1, Mr. Chapalgaonkar has relied upon the observation in the case reported in (2012)

SCC 520 wherein, it is observed that :

This Court has repeatedly held that in case of a Director, the complaint should specifically spell out how and in what manner the Director was in

charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was

responsible to the company for conduct of its business is not sufficient. (Vide National Small Industries Corporation Limited vs. Harmeet Singh Paintal

and Another,). In the case on hand, particularly, in para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant,

the complainant has not specified her role in the day to day affairs of the Company. We have verified the averments as regard to the same and we

agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the

role of the appellant in the day to day affairs of the Company. On this ground also, the appellant is entitled to succeed.

21. Looking to the facts and circumstances of the case and law laid down by the Supreme Court, I am of the opinion that the present applicants have

already resigned from the posts of directors.Â Secondly there are no specific and sufficient allegation against the applicants that they were looking

after and responsible for day today affairs of the company.Â Thus for the reasons stated above, application is allowed and the relief is granted in

terms of prayer clause B.Â Application is disposed of.

After pronouncement of the order, the learned counsel appearing for the original complainant submits that operation of the judgment and order, be

stayed.Â For the reasons recorded in the judgment, no case is made out to stay the operation of the judgment and order. Hence prayer is rejected.