
(2018) 03 OHC CK 0077
In the Orissa High Court
Case No : CRLMC No. 2997 Of 2003

Bibhuti Bhushan Patra

APPELLANT

Vs

Orissa Small Industries Corporation Ltd.

RESPONDENT

Date of Decision : 26-03-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482
Negotiable Instruments Act, 1881 — Section 138, 141(2)

Citation : (2018) 03 OHC CK 0077

Hon'ble Judges : S.K. SAHOO

Bench : Single Bench

Advocate : Jaydeep Pal, M. Basu

Final Decision : Allowed

Judgement

S. K. SAHOO, J.

1. This is an application under section 482 of the Code of Criminal Procedure filed by the petitioner Bibhuti Bhushan Patra for quashing the impugned

order dated 25.02.1997 passed by the learned Sub-divisional Judicial Magistrate, Sadar, Cuttack in I.C.C. Case No.04 of 1997 in taking cognizance of

offence under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred as "N.I. Act") and issuance of process against him.

2. The complaint petition was filed by the opposite party-Orissa Small Industries Corporation Ltd. (hereinafter referred as "OSIC Ltd.") against

the Company, namely M/s. Vogue Garments (Pvt.) Ltd., Mukul Kumar Verma, Managing Director of the company as well as the petitioner. It is the

case of the complainant that the complainant-OSIC Ltd. is a Government of Orissa Undertaking having its registered office at Industrial Estate,

Madhupatna, Cuttack-10 and the accused No.1 is a Private Limited Company

registered under the Companies Act, 1956 and accused No.2 was the Managing Director of the Company and accused No.3 (petitioner) was the Director of the said Company and the accused Nos.1 to 3 are jointly and severally responsible for the offence committed under section 138 of the Negotiable Instruments Act, 1881. It is the further case of the complainant that the accused No.1 represented by its Managing Director, accused No.2 requested the complainant for financial assistance to the tune of Rs.31,17,042/- (Rupees thirty one lakh seventeen thousand forty two only) for executing the export order arranged by them from M/s. Fashion Booming Inc.1407 and accordingly, an agreement was executed on 11.09.1996 between the complainant and the accused No.2, who was representing the company. It is the further case of the complainant that the accused No.1 requested the complainant to allow them Rs.10,00,000/- (Rupees ten lakh only) initially since the execution of export order was a time bound programme. On the basis of the letter of accused No.1, the complainant disbursed rupees ten lakh in favour of accused No.1 and made a draft of Rs.9,71,181/- in favour of M/s Harsha Fashions, New Delhi as desired by accused No.1. After disbursement of the aforesaid rupees ten lakh, accused No.1 again requested the complainant to disburse Rs.14,00,000/- (Rupees fourteen lakh only) only to him, out of which Rs.4,00,000/- to be paid to M/s Harsha Fashions, New Delhi for supply of raw materials and the same was done and in this process, a total sum of Rs.30,27,900/- (Rupees thirty lakh twenty seven thousand nine hundred only) was disbursed in favour of accused No.1. The complainant asked the accused No.1 to deposit four cheques towards the loan amount availed and accordingly, the same was done. The complainant deposited all the four cheques on 02.12.1996 with its banker, State Bank of India, Industrial Estate Branch, Bhubaneswar for realization of the amount. The banker of the complainant intimated the complainant that those cheques have been returned because money was not arranged for. After receiving such intimation from the banker, registered letter was sent to the accused for repaying the entire dues of the aforesaid cheques within seven days from the date of receipt of the letter. Even after receipt of the registered letter of the complainant, since no reply was given, the complaint petition was filed.

3. The learned Magistrate perusing the complaint petition, initial statement of the

complainant and the documents filed on behalf of the complainant has been pleased to hold that prima facie case under section 138 of the N.I. Act is made out against the accused persons and accordingly, took cognizance of such offence and issued process against the accused persons. 4. Mr. Jaydeep Pal, learned counsel appearing for the petitioner contended that the petitioner was working as Employee Director of M/s. Vogue Garments Pvt. Ltd. and the Managing Director, Sri Mukul Kumar Verma executed an agreement on behalf of the Company with the complainant on 11.06.1996 and after considering the application, the complainant sanctioned the financial assistance with certain terms and conditions. It is further contended that the complainant disbursed the total loan amount of Rs.30,27,900/in favour of the company and in lieu of that the company gave four numbers of post dated cheques for payment of the aforesaid loan dues. The cheques were under the signature of accused No.2, Mukul Kumar Verma.

It is further contended that since the cheques were dishonoured and demand notice was given and the Company did not pay back the cheque amount, the complaint petition was filed. It is further contended that the petitioner joined the company as Project Executive in the month of March 1989 and from July 1992, the promoter Director of the Company selected the petitioner as Employee-Director and accordingly, by way of a resolution, the petitioner was appointed as Director to represent the employees under the Board of Director and the petitioner resigned from the Directorship on 23.03.1998 and the company submitted Form No.32 before the Registrar of Companies, which would be clear from Annexures-1 and 2 of CRLMC application. It is further contended by the learned counsel for the petitioner that as per sub-section (2) of section 141 of the N.I. Act, the presumption of guilt can be inferred against the director only if the offence under the Act has been committed with the consent or connivance of the said director or is attributable to any neglect on his part and there must be specific averments and materials to show that the person accused as director of the company, was in charge and was responsible to the company for the conduct of the business of the company and since such averments are conspicuously absent in the complaint petition, therefore, the prosecution against the petitioner is not maintainable.

It is further contended that bald cursory statement in the complaint petition that the petitioner was the Director and he was jointly and severally

responsible for the offence committed will not be sufficient to prosecute the petitioner. It is further contended that the petitioner was not a Promoter

Director of the company and he was not in charge nor was responsible to the company for conduct of the business of the company at the time when

the offence was committed and there is no specific averments against the petitioner in the complaint petition that on what basis and in what manner he

was responsible for conduct of the business of the company and therefore, he cannot be held responsible for the offence under section 138 of the

Negotiable Instruments Act, 1881. Learned counsel for the petitioner placed reliance in the cases of National Small Industries Corp. Ltd. -Vrs.-

Harmeet Singh Paintal reported in (2010) 45 Orissa Criminal Reports (SC) 777, Sarav Investment -Vrs.- Llyods reported in (2008) 39 Orissa Criminal

Reports (SC) 67, S.M.S. Pharmaceutical Ltd. -Vrs.- Neeta Bhalla reported in (2007) 37 Orissa Criminal Reports (SC) 45, Everest Advertising Pvt.

Ltd. -Vrs.- State Government of NCT of Delhi reported in (2007) 37 Orissa Criminal Reports (SC) 645, Smt. Laxmidevi Ram -Vrs.-Tirupati reported

in (2010) 46 Orissa Criminal Reports 620. Mr. M. Basu, learned counsel for the opposite party on the other hand contended the basic averments

relating to the role played by the petitioner in the alleged offence which are there in the complaint petition is sufficient to make out a prima facie case

against the petitioner to send him to trial and in view of the decision of the Honâ??ble Supreme Court in case of Standard Chartered Bank -Vrs.-

State of Maharashtra and others reported in (2016) 64 Orissa Criminal Reports (SC) 114, no fault can be found with the impugned order passed by the

learned Magistrate and therefore, the CRLMC application should be dismissed.

5. In case of Standard Chartered Bank (supra) which was relied upon by the learned counsel for the opposite party, the Honâ??ble Supreme Court

quoted the specific averments taken in paragraphs 2, 4 and 10 of the complaint petition. After quoting the same, it was held that the averments clearly

meet the requisite test and there are seven accused persons, accused No.1 is the company, accused Nos. 2 and 3 are the Chairman and Managing

Director respectively and accused Nos. 6 and 7 were signatories to the cheque and accused Nos. 4 and 5 were the whole-time Directors and the

assertion is that they were in charge of day to day business of the company and all of them had with active connivance, mischievously and

intentionally issued cheques in question. It is pertinent to note that in the case in hand, there is no such averments in the complaint petition as was

mentioned by their Lordships in case of Standard Chartered Bank (supra).

6. Coming to the citations placed by the learned counsel for the petitioner, in case of National Small Industries Corp. Ltd. -Vrs.- Harmeet Singh

Paintal reported in (2010) 45 Orissa Criminal Reports (SC) 777, it is held as follows:-

25. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the

accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the

commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements,

which are required to be averred in the complaint/ petition, are made so as to make accused therein vicariously liable for offence committed by

company along with averments in the petition containing that accused were in charge of and responsible for the business of the company and by virtue

of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred. (v) If accused is Managing Director or Joint Managing

Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary make specific

averments in complaint.

(vii) The person sought to be made liable should be in-charge of and responsible for the conduct of the business of the company at the relevant time.

This has to be averred as a fact as there is no deemed liability of a Director in

such cases.â? In case of Sarav Investment -Vrs.- Llyods reported in (2008) 39 Orissa Criminal Reports (SC) 67, it is held as follows:-

â??21. Appellant No.2 is a Director of Appellant No.1-Company. He is merely vicariously liable for the acts of the company. He could be prosecuted

only if the ingredients laid down in Section 141 of the Act are satisfied.

24. Submission of the learned counsel for the respondent in regard to the conduct of the appellant is besides the point. The allegations made in the

complaint petition, if did not subserve the requirements of law was not maintainable and, thus, the same could not have been entertained. Proper

application of mind was necessary in that behalf by the learned Magistrate.â? In case of S.M.S. Pharmaceutical Ltd. -Vrs.- Neeta Bhalla reported in

(2007) 37 Orissa Criminal Reports (SC) 45, it is held as follows:-

Â??20. The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent No.1 herein was a

party to a purported resolution dated 15.02.1995 by itself does not lead to an inference that she was actively associated with the management of the

affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not

associate themselves in the management of the day to day affairs of the company and, thus are not responsible for conduct of the business of the

Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was incharge of and

was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When

a legal fiction is raised, the ingredients therefor must be satisfied.

21. If the complaint petition is read in its entirety, the same would show that the only person who was actively associated in the matter of obtaining

loan, signing cheques and other affairs of the company which would lead to commission of the alleged offence was the accused No.2. By reason of

the purported resolution dated 15.02.1995, whereupon strong reliance has been placed by Mr. Mishra, only the accused No.2 was authorised to do

certain acts on behalf of the Company. The cheques were issued on 15.08.1996, i.e., after a period of 17 months from the date of the said resolution.

As is evident from the averments made in the complaint petition, the cheques represented the amount of interest payable for a total period of 15 days

only calculated at the rate of 25% per annum on the amount of deposit, viz., rupees two crores.

23. On a plain reading of the averments made in the complaint petition, we are satisfied that the statutory requirements as contemplated under Section

151 of the Act were not satisfied. In case of Everest Advertising Pvt. Ltd. -Vrs.- State Government of NCT of Delhi reported in (2007) 37 Orissa

Criminal Reports (SC) 645, it is held as follows:-

“22 A Chairman of a large Company may or may not be aware of the actual transaction if in a given situation, cheques are issued in ordinary

course of business. The Managing Director or a Deputy Managing Director, in view of S.M.S. Pharmaceuticals Ltd. (supra) would be deemed to be

aware thereof. A Chairman or a Director of a Company need not be. In case of Smt. Laxmidevi Ram -Vrs.- Tirupati reported in (2010) 46 Orissa

Criminal Reports 620, it is held as follows:-

“8. On a reading of Section 141 of the N.I. Act vis-a-vis the complaint made in this application, it would be clear that necessary averments to

implicate a Director such as the present petitioner for having connived or neglected in committing the offence, has not been clearly made. Admittedly,

the Managing Director, Sri Rajendra Prasad Ram had been impleaded as accused No.2 in the complaint petition and it is the said Managing Director

who had issued the cheque in question and the dishonour of such cheque is the subject matter of the complaint. Further I find that in CRLMC

Nos.1051 & 1900 of 2008, Hon’ble Mr. Justice B.K. Patel of this Court had also come to a conclusion that Section 141 of the Act was required to

be strictly complied with and by making ambiguous statement regarding involvement of other Directors other than the Managing Director, the

requirement of Section 141 of the N.I. Act was not complied with and therefore, in the absence of any such statement as required under section 141

of N.I. Act vis-à-vis the present petitioner, there is no scope for her prosecution and therefore, the cognizance order passed against the present

petitioner is quashed.”

7. Keeping in view the ratio laid down in the aforesaid cases and on going through the complaint petition, it appears that the only averment made in the

complaint petition against the petitioner is that the petitioner was the Director of the company and he was jointly and severally responsible for the

offence committed under section 138 of the N.I. Act. The rest part of the averments in the complaint petition which runs to sixteen pages does not

whisper anything against the petitioner, who was the accused No.3 in the complaint petition. There is absence of specific averments as required in the

complaint petition in a case of this nature against the Director like the petitioner in committing the offence in consonance with section 141 of the N.I.

Act. The entire allegation right from making a request for financial assistance, execution of agreement with OSIC, obtaining loan and issuance of

signed cheques are against accused No.1, the company and accused No.2 Mukul Kumar Verma, the Managing Director of the Company. The

averments taken against the petitioner in the complaint petition is vague and will not attract his culpability for the offence under section 138 of the N.I.

Act. In case of Gunmala Sales Private Ltd. -Vrs.- Anu Mehta reported in (2014) 59 Orissa Criminal Reports (SC) 1039, it is held as follows:

“26.....We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not signatories to the

cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the above-

mentioned cases that it is necessary to aver in the complaint filed under Section 138 read with section 141 of the N.I. Act that at the relevant time

when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company. This is a

basic requirement. There is no deemed liability of such Directors.

33. We may summarize our conclusions as follows:

a) Once in a complaint filed under Section 138 read with Section 141 of the N.I. Act, the basic averment is made that the Director was in charge of

and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue

process against such Director;

b) If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular

case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to

make out a case against the Director;

c) In the facts of a given case, on an overall reading of the complaint, the High

Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the Court.

Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed;

d) No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director. In view of the foregoing discussions, on an overall reading of the complaint, I find there is absence of basic averment to constitute the ingredients of the offence against the petitioner and also absence of any role of the petitioner as a Director in the entire transaction and therefore, in the facts and circumstances of the case, in order to prevent abuse of process of the Court, I am inclined to accept the prayer made in this application under section 482 Cr.P.C. and direct quashment of the impugned order dated

25.02.1997 of the learned S.D.J.M., Sadar, Cuttack in I.C.C. Case No.04 of 1997 in taking cognizance of offence under section 138 of the N.I. Act

and issuance of process so far as the present petitioner is concerned. It is made clear that the complaint petition shall proceed against accused No.1,

M/s. Vogue Garments (Pvt.) Ltd. as well as accused No.2, Sri Mukul Kumar Verma. Accordingly, the CRLMC application is allowed.