(2004) 02 BOM CK 0031

In the Bombay High Court

Case No : Criminal Writ Petition No''s. 548 and 549 of 1998

Chaitan M. Maniar APPELLANT

Vs

State of Maharashtra and Another RESPONDENT

Date of Decision : 17-02-2004

Acts Referred:

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

Citation : (2004) 4 BC 584 : (2004) 2 CivCC 418 : (2004) CriLJ 2343 : (2004) 2 MhLj 1035 : (2004) 4 RCR(Criminal) 152

Hon'ble Judges : Ranjana Desai, J

Bench : Single Bench

Advocate : S.R. Chitnis, S.V. Kotwal and Raje, for the Appellant; D.S. Mhaispurkar, Assistant Public Prosecutor, for the Respondent

Judgement

Ranjana Desai, J.—These two criminal writ petitions can be conveniently disposed of by a common judgment as the facts involved in these two petitions are similar and the law points involved are identical. Both the petitions are filed by the same petitioner. The decision in Criminal writ Petition No. 548 of 1998 will decide the fate of Criminal Writ Petition No. 549 of 1998.

2. The facts, on the basis of which Criminal writ Petition No. 548 of 1998 came to be filed may be shortly stated. The petitioner is an advocate enrolled in the Bar Council of Maharashtra and he is also a Solicitor and a Member of the Bombay Incorporated Law Society since 1965. He is a partner in the firm Messrs Crawford Bayley & Co., Solicitors & Advocates. He is fully engaged in the practice of the profession of law with the said firm since over three decades. In this petition, the petitioner has inter alia prayed that the proceedings arising out of Criminal Case No. 206/S of 1998 pending before the Metropolitan Magistrate, 40th Court at Girgaum, Mumbai, be quashed and set aside in so far as they relate to the petitioner herein.

3. The firm of Messrs Crawford Bayley & Co. used to act as Solicitors and Advocates for the REPL Engineering Limited, a company incorporated under the

Companies Act, 1956 ("the said Company" for short). The petitioner has appointed as one of the Non-Executive Directors of the said Company. The petitioner was taken on the Board of Directors of the said Company as a qualified Advocate and Solicitor. It is the case of the petitioner that he has ceased to be a director of the said Company from 28/8/1997.

4. Respondent 2 is the original complainant in rise. Complaint No. 681/M of 1997, which is subsequently converted into Case No. 206/S of 1998. Respondent 2 filed a complaint through one Banwari Lal Poddar as her Constituted Attorney in the Metropolitan Magistrate with Court at Girgaum, Mumbai, u/s 138 of the Negotiable Instruments Act in which the said Company is arraigned as accused 1. The petitioner herein is arraigned as accused 6. Along with the petitioner, four other directors of the said Company are also arraigned as accused. One Homi R. Patel is arraigned as accused 2. He is the Managing Director of the said Company. In short, the grievance of the complainant is that the said Company through accused 2 issued cheque of Rs. 2,69,307/-. The said cheque was signed by accused 2 for and on behalf of accused 1. The cheque was given from the account maintained by the said Company with the Union Bank of India, Home Street, Mumbai. The cheque when presented for encashment, returned as dishonoured for reasons "insufficient funds in the account". It is on these facts that the complaint u/s 138 at the Negotiable Instruments Act, came to be filed. So far as the present petitioner, who is arraigned as accuses 6 is concerned, in the complaint it is stated that he was the director of the said Company and that he, along with the other directors, was in charge of and responsible to the said Company for the conduct of the business of the said Company and the offences contemplated in the said complaint were committed with the consent or connivance of and was committed on account of neglect on the part of the petitioner and other directors and, therefore, they are also guilty of the offence and liable to be proceeded against, in accordance with law.

5. On this complaint, process, came to be issued and the petitioner has approached this court for quashing of the said pending proceedings.

6. I have heard, at some length, Mr. Chitnis, learned senior counsel appearing for the petitioner. Mr. Chitnis submitted that admittedly the complainant has not issued any notice to the petitioner as required by Sub-clause (b) of the proviso to Section 133 of the Negotiable Instruments Act. In this connection, he crew my attention to paragraph 4 of the complaint filed by respondent 2. In paragraph 4, it is stated that "on receipt of the said cheques back on 13/11/1997, the Complainant through her Advocates sent Statutory Notice of Demand dated 17/11/1997, addressed to the Accused Nos. 1 & 2. The Accused Nos. l & 2 received the said Notice of Demand on 21/11/1997." My attention is also drawn to a copy of the notice which is annexed to the petition. It appears that the notice is not addressed to the present petitioner. Mr. Chitnis submitted that inasmuch as the notice is not sent to the petitioner as required under the proviso to Sub-section (b) of Section 133 of the Negotiable Instruments Act, the entire

proceedings would get vitiated. In this connection, he relied upon the decision of the learned single judge of this court in Bipin J. Shah v. Smt. Niru B. Mehta and Anr., 2001 (2) M.L.J. 632

7. Mr. Chitnis then contended that the present petitioner was merely a Non-Executive Director of the said Company. Besides, he has resigned from the Board of Directors of the said Company on 28/8/1997 and the cheque in question was drawn on 1/10/1997 much after the petitioner resigned from the Board of Directors of the said Company. He submitted that the petitioner was not concerned with the management of the said Company. He was not in charge of the day-to-day affairs of the said Company. In this connection) he drew my attention to the notice dated 17/11/1997 addressed to the said Company and the Managing Director of the said Company. In this notice, in paragraph 1, it is categorically stated that the said cheque is signed by accused 2 as the director of the said Company and accused 2 is in sole management and charge of the day-to-day affairs of the sales Company. Mr. Chitnis submitted that this is sufficient to substantiate the contention of the petitioner that he was never in charge of the day-to-day affairs of the said Company. He was merely a Non-Executive Director. Mr. Chitnis further contended that if the petitioner was not concerned with the management of the said Company then, no complaint could have been filed against him u/s 138 of the Negotiable Instruments Act for dishonour of the cheque issued by the said Company which was signed by the Managing Director of the said Company. Mr. Chitnis contended that there is merely a bald allegation in the complaint that the petitioner was in charge of and responsible to the said company for the conduct of its business. There are no specific allegation in the complaint as regards the part played by the petitioner and hence the learned Magistrate could not have issued process thereon. In this connection, he relied upon the decision of the Supreme Court in. K.P.6. Nair v. Jindal Menthol India Ltd., (2001) 10 SC 218. Mr. Chitnis also relied upon the decision of the Karnataka High Court in Nucor Mires Ltd. and of citers v. H.M.T. International Ltd., 1998 91 Comp Cas 856 to contend that to launch a prosecution against the directors or partners of a company or firm, there must be specific allegation in the complaint as to the part played by them in the transactions. If there is no specific allegation that the offence was committed with the knowledge of the person concerned, the complaint would be liable to be dismissed. Mr. Chitnis therefore, submitted that the proceedings pending in the court of 40th Metropolitan Magistrate at Girgaum, Mumbai, be quashed.

8. Sub-clause (b) of the proviso to Section 138 of the Negotiable Instruments Act requires that the payee or the holder in due course of the cheque, as the case may be, must make a demand for the amount due by giving a notice, in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. This notice is an essential pre-requisite of action u/s 138 of the Negotiable Instruments Act. It is an essential pre-requisite because Sub-section (c) of Section 138 of the Negotiable Instruments Act makes it clear that if the drawer of such cheque fails

to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within 15 days of the receipt of the said notice, the liability u/s 138 will be attracted. It is clear from the complaint itself that no notice is given to the petitioner. There is no clear statement that notice was sent to the petitioner. It is only stated that the petitioner had knowledge of the said cheque and receipt of the notice. A copy of the notice annexed to the petition also makes it clear that it was not addressed to the petitioner. Besides the petitioner has not drawn the said cheque. It is not signed by him. This case, therefore, would be covered by the judgment of this court in Bipin Shah''s case (supra.) Therefore, in my opinion, on this ground alone, the process issued against the petitioner deserves to be quashed.

9. I also find substance in Mr. Chitnis''s contention that in the facts of this case, the petitioner being merely a Non-Executive Director of the said Company cannot be proceeded against u/s 138 of the Negotiable Instruments Act. It must in fact the shown that he was in charge of the affairs of the said Company.

10. In K.P.G. Nair''s case (supra), the Supreme Court was dealing with somewhat similar fact situation. In that case the accused therein had also not signed the dishonoured cheque. He was also the director of the Company at one point of time. The Supreme Court considered certain extracts of the complaint therein. The Supreme Court observed that nowhere it was stated that on the date when the offence was alleged to have been committed, the appellant was in charge of or was responsible to the accused Company for the conduct of its business. The Supreme Court considered Sub-section (1) of Section 141 of the Negotiable Instruments Act and observed that from the perusal of Section 141 of the Negotiable Instruments Act, it is evident that in a case where a company committed offence u/s 138 of the Negotiable Instruments Act, then not only the company but also every person, who at the time when the offence was committed 5 was in charge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly. It was further observed that it follows that a person other than the company can be proceeded against under those provisions only if that person was in charge of and was responsible to the company for the conduct of its business. The Supreme Court then observed that though the words of Section 141(1) need not be incorporated in a complaint as magic words but it cannot also be disputed that substance of the allegations read as a whole should answer and fulfil the requirements of the ingredients of the said provision for being proceeded against for an offence which a person is alleged to have committed. In the facts of the case before it, the Supreme Court observed that the allegations made in the complaint do not either in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence the appellant was in charge of and was responsible to the company for the conduct of its business. In the circumstances, the Supreme Court quashed the complaint.

11. I may also refer to the decision of this court in H.M. Dave v. Gitanjali Shah and Anr., 1998 (IV) LLJ 830 where the learned single judge of this court has considered the similar question and held that merely because a person is the director that by itself would not make him answerable. If a cheque issued by the company is dishonoured, Section 138 of the Negotiable Instruments Act would not be attracted if the person concerned is not shown to be either in charge of the affairs of the company or responsible for its day-to-day affairs. It was observed that in the absence of any indication as to how he can be said to be responsible for the day-to-day affairs of the company, it will not be possible to proceed for an offence u/s 138 of the Negotiable Instruments Act against him. In the facts of that case, the Court found that the averments made in the complaint against the petitioner therein were insufficient to attract the proviso to Section 138 of the Negotiable Instruments Act. The proceedings were therefore quashed.

12. Reference may also be made to Nucor Wires Ltd.''s case (supra) where the learned single judge of the Karnataka High Court has considered a similar question. The relevant portion of the judgment of the Karnataka High Court may be quoted.

"To launch a prosecution against the directors or partners of a company or firm, there must be specific allegation in the complaint as to the part played by them in the transactions. There must be clear and unambiguous allegations as to how all the directors or partners are in charge of and responsible for the conduct of the business of the company or firm. There should be clear description and also allegations that the offence was committed with their knowledge and that they had not exercised due diligence to prevent the commission of such offence. The court should also make an attempt to find out whether on the available allegation the offence was committed with the consent or connivance or is attributable to any negligence on the part of the directors or partners or members of any association or a group of persons.

In the case of an offence u/s 138 of the Negotiable Instruments Act, 1881, if the cheque is issued by the managing director who represents the company, then the case can be proceeded with only against the company and the managing director who has signed the cheque. Similarly, the managing partner of a firm and the person who represents the association can be prosecuted along with the firm or association respectively. All the partners of the firm or members of the association need not be arraigned as accused persons."

13. If the present complaint is viewed in the light of the above judgment it will have to be quashed. Notice dated 17/11/1997 sent to the said Company itself makes it clear that it was accused 2, who was in sole management and in charge of the day-to-day affairs of the said Company. In fact, it is perhaps because of this reason that no notice is given to the petitioner. It is also significant to note that whereas the cheque in question was issued on 1/10/1997 the petitioner has resigned from the Board of the Directors of the said Company on 28/8/1997. It can, by no stretch of imagination, be said that the petitioner was in charge of the

Company or that he was managing the affairs of the said Company. It is also significant to note that though in the complaint a bald statement is made that the offence contemplated therein is committed with the consent or connivance of, and is committed on account of neglect on the part of accused 2 to 6 and they are also guilty of the offence and liable to be proceeded in accordance with law, no particulars of the alleged connivance or neglect is given in the said complaint. If on the basis of such stereotype statements without there being any other indication in the complaint of actual participation of the director in the affairs of the company, he is roped in, that would be disastrous. For the acts of some unscrupulous persons, the directors who are not even remotely concerned with the issuance of cheque, who are not concerned with the day-to-day functioning of the company cannot be held responsible unless the active participation of the director is substantiated in the complaint itself by concrete material or instances or particulars. Not only that there must be specific averments but there must be description and particulars of the role played by such non-executive directors. The court issuing process must take care and issue process after examining this aspect because issuance of process is not a light matter. For the reasons which I have noted above, I am of the considered opinion that issuance of process on the instant complaint indicates non-application of mind.

14. In view of the above, the proceedings of Criminal Case No. 206/S of 1998 pending before the learner Metropolitan Magistrate 40th Court at Girgaum, Mumbai, need to be quashed as against the petitioner. For the same reasons, the proceedings of Criminal Case No. 206/S of 1998 pending before the 40th Metropolitan Magistrate Court at Girgaum, Mumbai, which are the subject matter of Criminal Writ Petition No. 549 of 1998 also need to be quashed as against the petitioner. Hence the following orders

ORDER

The proceedings arising out of the Criminal Case No. 206/S of 1998 and Criminal Case No. 208/S of 1998 pending before the learned Metropolitan Magistrate, 40th Court at Girgaum, Mumbai, are quashed and set aside only so far as they relate to the present petitioner. It is clarified that the proceedings of the said cases can proceed as against the rest of the accused. Interim stay granted by this court is vacated. Writ of this court to go to the trial court immediately.

15. Criminal Writ Petition No. 548 of 1998 and Criminal Writ Petition No. 549 of 1998 are disposed of in the aforestated terms.

