

(2015) 08 BOM CK 0333

In the Bombay High Court

Case No : Criminal Application (APL) No. 335 of 2014

Gaurav Vijay Bhatia

APPELLANT

Vs

Ramnath P. Subramaniam and Others

RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2015) 4 BomCR(Cri) 485

Hon'ble Judges : V.L. Achliya, J.

Bench : Single Bench

Advocate : Manoj S. Mohite, i/b. Amol J. Phoujdar, for the Appellant

Judgement

V.L. Achliya, J.—Rule. Rule made returnable forthwith. By consent, taken up for final disposal at the stage of admission. The applicant/accused No. 3 in the complaint has filed this application under section 482 of Code of Criminal Procedure (Cr.P.C.) to set aside the order of issuance of process dt. 12/8/2013 passed in Criminal Complaint Case No. 2916/SS/2013, by Metropolitan Magistrate, 7th Court at Dadar, Mumbai and further to quash the said criminal proceedings to the extent of applicant.

2. Few facts leading to filing of the present application are as under:

The complainant (respondent No. 1) herein filed criminal complaint under section 138 r/w. 141 of the Negotiable Instruments Act, 1881 (in short "N.I. Act") as against accused No. 1-Managing Director of M/s. Tricom India Limited and three others, which include the present applicant as Director of accused No. 4-Company. In the complaint filed, the complainant has alleged that in discharge of liabilities of legitimate dues on account of the interest accrued against the LCD. Loan/re-payment of the loan given by him to the original accused No. 4-Company, a cheque bearing No. 015420 dt. 3/3/2013 for an amount of Rs. 54,000/- was issued by accused No. 4-Company. Towards the repayment of loan, accused issued one cheque bearing No. 015420 for an amount of Rs. 54,000/-

payable on 3/3/2013 and drawn and payable from the account of accused with the State Bank of India, IND FIN Branch, Andheri (East), Snehal Chambers, Telli Galli Andheri (East), Mumbai. The cheque was issued on behalf of accused No. 1 under the signature of authorized signatory. The said cheque when presented for realization on 31/5/2013 with HDFC Bank Ltd., same was dishonoured by bankers of accused with endorsement "funds insufficient" and was communicated vide memo dt. 1/6/2013. According to the complainant though he has given considerable time, the amount was not paid. Therefore he issued notice on 20/6/2013 to all the accused through his Advocate. The notice was duly served upon accused on 1/7/2013. It appears from the complaint that, accused No. 3 in the complaint sent reply dt. 23/7/2013 through his Advocate denying his liability as Exh. H to complaint. Since the payment towards the cheque dishonoured was not made by the accused, the complainant has filed complaint. The complaint appears to be filed on 12/8/2013. Learned Metropolitan Magistrate on consideration of the complaint documents filed on record pleased to issue process under section 138 r/w. 141 of the N.I. Act, against the accused persons making it returnable on 16/11/2013. Being aggrieved by the said order, the applicant/accused No. 3 has filed the present application under section 482 of the Code of Criminal Procedure to set aside the order passed by Ld. Metropolitan Magistrate and further to quash the criminal proceedings to the extent of the applicant.

3. I have heard the submissions advanced by Mr. Manoj S. Mohite, learned Counsel appearing on behalf of the applicant and Mrs. Mane, learned APP for respondent/State. Respondent No. 1 in-person has not caused his presence, though served.

4. By referring the contents of the complaint filed by the complainant, the learned Counsel for the applicant has contended that on the face of the complaint filed, no prima facie case has been made out for issuance of process under section 138 r/w. 141 of N.I. Act, as against the applicant/accused No. 3. By referring the provisions of section 141 of N.I. Act, the learned Counsel has submitted that, in order to attract the vicarious liability under section 141 of N.I. Act, it is obligatory on the part of the complainant to specifically plead as to how and in what manner the accused was guilty of commission of offence under section 138 r/w. 141 of the N.I. Act. It is pointed out that the facts pleaded in the complaint nowhere make out any case to attract the vicarious liability of the applicant for the alleged dishonour of cheque and commission of offence under section 138 of N.I. Act. It is submitted that, in order to attract offence under section 138 r/w. 141 of N.I. Act, there must be specific averments. It is not sufficient to make a bald statement in complaint that the Director i.e. accused in the complaint is incharge or/and responsible for the conduct of the business of the Company. In support of the contention that the averments made in the complaint are not sufficient to attract the offence under section 138 r/w. 141 of N.I. Act as against the applicant/accused No. 3, the learned Counsel has relied upon the decision of the Hon'ble Apex Court in the case of (National Small

Industries Corp. Ltd. Vs. Harmeet Singh Patntal & anr.) reported in 2010 (1) Bom. C.R. (Cri.) 798 (S.C.) 2010 All. M.R. (Cri.) 921 (S.C.) and further relied upon the decision of the Hon"ble Apex Court in the case of Pooja Ravinder Devidasani Vs. State of Maharashtra, . Learned Counsel for the applicant has further assailed the order passed by the learned Metropolitan Magistrate with contention that the order has been passed in a gross non-application of mind and without any material available on record. Learned Counsel has submitted that, neither the complaint nor the documents filed by the complainant remotely disclose that the applicant was concerned with the day-to-day affairs of the Company or anyway responsible for the conduct of the business of the Company. In the entire complaint, the complainant has not attributed any role to the applicant except alleging that he is one of the Directors. The learned Counsel submitted that the accused No. 3 has responded to the notice. In the notice sent by applicant to respondent No. 1, it has been specifically informed that the present applicant is no more Director of the Company, still the process was issued against the applicant/accused No. 3.

5. In order to appreciate the submissions advanced, I have thoroughly perused the averments made in the complaint so as to attract the vicarious liability of the applicant/accused No. 3 in commission of offence under section 138 r/w. 141 of N.I. Act. In my view, on the face of the complaint, no case for issuance of process under section 138 r/w. 141 of N.I. Act have been made out against the applicant/accused No. 3. In this context, it is useful to refer to the averments made in para Nos. 2, 3, 4, 6 and 7.

"2) I say that pursuant to valuable consideration and in discharge of liabilities of legitimate dues on account of the interest accrued against the LCD. Loan/ Repayment of Loan by the accused to me the complainant That towards the payment of the said interest dues, accused are liable to pay a sum of Rs. 54,000/- being the interest accrued therein, the Accused above issued Cheque in discharge of debts in favour of me drawn on State Bank of India, IND FIN Branch, Andheri (East), Snehal Chambers, Telli Galli Andheri (East), Mumbai-400 001, the details whereof is set hereunder:-

Copy of the above Cheque bearing No. 015420 dated 3.3.2013 for Rs. 54,000/- are annexed as Exhibit-A with this Complaint.

3) I say that the aforesaid Cheque was deposited on 31.5.2013 for realization with Banker HDFC Bank Ltd. which is annexed as exhibit-B and the same was returned dishonoured by the Banker for want of funds for the reason "Funds Insufficient", as the Accused had not arranged for the funds in his Account Hereto annexed the copy of the Cheque Return Memo dated 1.6.2013 issued by State Bank of India CCPC Mumbai to HDFC Bank Ltd. & the cheque return memo dated 1.6.2013 of HDFC Bank Ltd., Mumbai clearing branch to me through my banker H.D.F.C. Bank Ltd. which are exhibits-C & D respectively.

4) I say that after receipt of dishonoured Cheque from the Banker, my Advocate

by his Notice dated 20.6.2013 recorded all the aforesaid facts and called upon the Accused to pay the amount of the said dishonoured Cheques within the statutory period. Hereto annexed and marked as Exhibit-E the copy of said Advocates Notice dated 20.06.2013.

6) I say that the said Speed post & Registered A/D Packets addressed to the Accused at the above address was received by the accused and given the postal acknowledgement on 1.7.2013. Hereto to annexed and marked as Exhibit-G to G-3, the copies of Speed post/Registered Postal Acknowledgement dated 1.7.2013 by the accused. I say that the Accused No. 3 sent the reply dated 23.7.2013 through his Advocate and denied (without furnishing) his liability in the present matter which reply is annexed at Exhibit-H.

7) I say that the Complaint is not barred by Law of Limitation as the demand notice dated 20.6.2013 sent by Speed post on 28.6.2013 to all the accused after the receipt of the dishonoured cheque on 1.6.2013 by me and the said notice sent by Registered A.D. on 29.6.2013 which received by the accused on 1.7.2013 and this Hon''ble Court has jurisdiction to entertain and try this Complaint against the Accused as the Complainant is residing within the jurisdiction of this Hon''ble Court and the demand notice sent from the residential address of the Complainant demanding the dishonoured cheque amount and the cause of action is within the jurisdiction of this Hon''ble Court

6. Thus, bare perusal of the aforesaid averments no way satisfy the ingredients of section 141 of N.I. Act, to attract the vicarious liability of the applicant/accused No. 3. The entire averments made in the complaint if read in its totality, then at the most the role attributed to the applicant in commission of offence is that he was one of the Directors of the Company at the time of alleged transaction. In the instant case, the fact is not in dispute that the cheque in question has not been signed by applicant/accused No. 3. So also the applicant/accused No. 3 has not been described as Managing Director or person in-charge of and responsible for the conduct of business and affairs of accused No. 4-company. According to the complainant, the applicant was Non-executive Director and he has resigned way back in the year 2012 Le. on 26/3/2012, much before the cause of action arose for filing of the complaint. Section 141 of N.I. Act, being a penal provision creating vicarious liability needs to be strictly construed. In this context, it is useful to refer the decision of the Hon''ble Apex Court in the case of Pooja Ravinder Devidasani (supra) and in particular paragraph 17 thereof, wherein it is held as under:

"17..... 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*, 2010 (1) Bom. C.R. (Cri.) 798 (S.C.) : 2010 All. M.R. (Cri.) 921 (S.C.) (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."

7. In paragraph 28 and 30 of the judgment in the case of *Pooja* (supra), the Apex Court has held as under:

"28. In the entire complaint neither the role of the appellant in the affairs of the company was explained nor in what manner the appellant is responsible for the conduct of business of the company, was explained. From the record it appears that the trade finance facility was extended by the Respondent No. 2 to the default company during the period from 13th April, 2008 to 14th October, 2008, against which the Cheque were issued by the Company which stood dishonoured. Much before that on 17th December, 2005 the appellant resigned from the Board of Directors. Hence, we have no hesitation to hold that continuation of the criminal proceedings against the appellant under section 138 read with section 141 of the N.I. Act is a pure abuse of process of law and it has to be interdicted at the threshold.

30. Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and courts cannot be a mere spectator to it. Before a Magistrate taking cognizance of an offence under section 138 /141 of the N.I. Act making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the complaint against the appellant which is nothing but a pure abuse of process of

law."

8. In the light of discussion made in foregoing paras, I am of the view that the complaint filed by the complainant makes out no case for issuance of process under section 138 r/w. 141 of N.I. Act, against the applicant/accused No. 3. Ld. Metropolitan Magistrate appears to have passed the order mechanically. Learned Metropolitan Magistrate has not taken any pains to read the complaint and the documents relied on to find out as to whether a prima facie case has been made out or not to attract the vicarious liability of the applicant as contemplated under section 138 r/w. 141 of N.I. Act. No doubt, the detailed enquiry is not contemplated at the stage of exercise of powers under section 204 of Cr.P.C., but, certainly the magistrate is bound to consider as to whether the facts averred in the complaint and the documents, if any, relied make out a prima facie case for issuance of process under section 138 r/w. 141 of N.I. Act. It is pertinent to note that in the instant case, there are specific averments made in the complaint itself in paragraph 6 that the accused No. 3 had replied the notice and denied his liability in the matter annexed as Exhibit H to complaint. The copy of that reply appears to have been produced along with the complaint as Exh. H. However, the Magistrate has not taken any pains to go through the contents of the said notice. It is the say of the applicant that, the notice was duly replied by him through his Advocate on 23/7/2013. In reply sent to the notice, the applicant has specifically stated that the applicant was appointed as Non-executive Director and he had resigned from the company on 26/3/2012, which was accepted by the Board of Directors and also intimated in prescribed proforma i.e. Form No. 32 to the Registrar of the Company. Not only this, the applicant has also informed about recording of this fact in the 20th Annual Report of accused No. 4-Company for the financial year 2011-12. In spite of that the learned magistrate has passed the order of issuance of process as against the applicant/accused No. 3. The order passed by learned Metropolitan Magistrate, which is impugned in this petition, reads as under:

"ORDER BELOW EX-J

1. Complainant is present alongwith Counsel Complainant has recorded his statement vide Ex. 3 by way of verification in view of recent judgment delivered by Hon"ble Bombay High Court in a case between Rajesh Bhalchandra Chalke Vs. State of Maharashtra and Emco Dynatorq Pvt. Ltd., .

2. Perused the complaint, documents attached thereto and the statement of the complainant on oath. According to the complainant, accused No. 4 is the Company and accused Nos. 1 to 3 are the Directors of accused No. 4 company Le. M/s. Tricom India Ltd. Complainant has reiterated the case as per complaint averments in the verification, statement Exh. 3. The complainant has made out prima facie case against the accused for an offence punishable under section 138 r/w. 141 of Negotiable Instruments Act. Hence issue process against he accused Nos. 1 to 4 for the offence punishable under section 138 r/w. 141 of Negotiable Instruments Act, returnable on 16.11.2013. Complainant to supply all the

documents to the accused. Summons to be serve through R.P.A.D. or Speed Post Case be tried as summons case.

Sd/- (R.B. Bhagwat) Metropolitan Magistrate. 7th Court, Dadar, Mumbai

Mumbai Date: 12.8.2013."

Thus, the bare perusal of order passed by Metropolitan Magistrate leads to conclusion that the order has been passed without perusing the contents of complaint and documents relied in support of complaint particularly the reply notice in reply sent by applicant/accused No. 3 on 23/7/2013, which was produced as Exhibit H to complaint. It is a glaring case of non-application of mind. Hence, in my view, the order is not sustainable in law.

9. In the light of the discussion made in the foregoing paragraphs, I have no hesitation to hold that, on the face of the complaint, no case was made out for issuance of process under section 138 r/w. 141 of the N.I. Act as against the applicant/accused No. 3. The order passed by the learned Magistrate appears to be passed without application of mind and due consideration of averments made in the complaint. The averments made in the complaint make out no case to attract the vicarious liability of the applicant/accused No. 3 for commission of offence under section 138 r/w. 141 of N.I. Act.

10. The applicant has approached with a case that he was Non-executive Director of the Company. He has resigned as a Director of the Company on 26/3/2012. The resignation of the applicant was accepted in the Board of Directors meeting held on 14/5/2012. The fact in respect of the resignation of the applicant was duly intimated in a prescribed proforma i.e. Form No. 32, to the Registrar of the Company on 14/5/2012. This was also reflected in the 20th Annual Report of the Company for the fiscal year 2011-12 published on 24/11/2012. In support of this submission, the applicant has produced on record the following documents.

(i) Copy of resignation.

(ii) Copy of Resolution dt. 14/5/2012 passed in the meeting of Board of Directors.

(iii) Copy of notice given to the Registrar of the Company in a prescribed proforma i.e. Form No. 32.

(iv) Copy of 20th Annual Report of the Company for the financial year 2011-12.

(v) Copy of reply notice dt. 23/7/2013 sent to complainant through his Advocate by the applicant.

11. As per the complaint, the cause of action for filing of the complaint arose on 12/8/2013. There is no dispute as to the fact that the cheque in question was issued on 3/3/2013. It was dishonoured on 31/5/2013. The notice of demand was issued on 20/6/2013 and cause of action for filing of complaint arose on 12/8/2013. Thus, the act of dishonour of cheque has taken place much after the

resignation tendered by the applicant/accused No. 3. Learned Counsel for the applicant has placed reliance upon the decision of the Hon"ble Apex Court in the case of Anita Malhotra Vs. Apparel Export Promotion Council and Another, . In a case based upon similar facts, the Apex Court has held that in exercise of jurisdiction under section 482 of Cr.P.C., if on the face of documents relied upon by accused which are beyond suspicion of doubt, if it is considered that accusation against accused cannot stand, the High Court can consider such documents in exercise of jurisdiction under section 482 of Cr.P.C. In paragraph 20 of the said Judgment, the Hon"ble Apex Court has observed as under:

"20. As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merits of the accusation, but if on the face of the document which is beyond suspicion or doubt, placed by the accused and if it is considered that the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/ documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction under section 482 of the Code."

12. Thus, in view of the fact that the document placed on record by the applicant, the genuineness of which is not in doubt and disputed by respondent No. 1, clear case has been made out that the applicant has resigned as a Director of accused No. 4-Company much prior to dishonour of cheque and cause of action for filing of the criminal complaint. The defence of the applicant is duly supported with the documentary evidence. Therefore, the order of issuance of process under section 138 r/w. 141 of N.I. Act, deserves to be set aside and proceeding is liable to be quashed to the extent of applicant.

13. I am, therefore, inclined to allow the application in terms of prayer Clause "A" to the extent of applicant/accused No. 3 and same is accordingly allowed. Rule made absolute in above terms with no order as to costs.