

(2013) 04 BOM CK 0089

In the Bombay High Court

Case No : Criminal Writ Petition No. 3327 of 2011

Harshad Jayprasad Bakshi

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:

Companies Act, 1956 — Section 16, 17, 18, 25
Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 138(b), 141, 15(1), 18
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 16, 17, 18, 20

Citation : (2013) 5 ABR 480 : (2013) 4 BC 441 : (2013) 3 BomCR(Cri) 502 : (2014) 2 MhLj 95

Hon'ble Judges : S.C. Dharmadhikari, J

Bench : Single Bench

Advocate : Niranjana Mundargi, for the Appellant; S.S. Pednekar, APP for State and Ms. Mallika Ingale for respondent Nos. 2 to 4, for the Respondent

Final Decision : Allowed

Judgement

S.C. Dharmadhikari, J.

Heard. Rule. By consent rule made returnable forthwith. Respondents waive service.

1. This criminal writ petition has been placed before me as it seeks to question the order passed by the learned Metropolitan Magistrate, 12th Court in C.C. No. 585/SS/08. By the order dated 21st January 2011, a copy of which is at page 69 of the paperbook, the learned Metropolitan Magistrate has allowed the application filed by the accused Nos. 1 to 3 and discharged them of the offences punishable u/s 138 read with 141 of the Negotiable Instruments Act, 1881.

2. Mr. Mundargi, learned Counsel appearing for the original complainant -

petitioner before me submitted that the trial court has misconstrued and misapplied the ratio of the judgment of the Supreme Court in the case of Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, . He submits that the learned Single Judge of this Court in the case of Aefloat Textiles (India) Ltd. and Another Vs. Boghara Polyfab Pvt. Ltd., has held that mere passing of an order by Board for Industrial and Financial Reconstruction (BIFR) u/s 22 of the Sick Industries (Special Provisions) Act, 1985 (for short SICA) cannot be a reason to quash the proceedings in criminal case filed u/s 138 of the Negotiable Instruments Act, 1881 (for short NI Act). He submits that the learned Trial Judge has in the judgment delivered and impugned in this petition held that the cheques were admittedly presented after 19th December 2007 i.e. the date of the order passed by the BIFR. That order was effective for a period of eight weeks. The demand has been issued on 21st January 2008 which was received by accused Nos. 1 and 3 on 24th January 2008. The statutory period expired on 8th February 2008. The finding that the offences can be said to be committed only after 9th February 2008 is, therefore, erroneous, according to Mr. Mundargi. He submits that the reference to BIFR proceedings and the orders of BIFR cannot be a reason to straight away discharge the accused from the criminal case. He submits that the trial court has failed to note that the accused are the company and two directors. In these circumstances discharging them from the criminal case has caused serious prejudice to the petitioner - original complainant. The order has resulted in miscarriage of justice and, therefore, should be set aside. The material at the prima facie stage was enough to frame charges and to proceed against the accused. This is not a case where the complaint does not disclose commission of any offence or the materials produced by the complainant would show that no offence is committed at all.

3. On the other hand, Mrs. Ingale, learned Counsel appearing for accused supported this impugned order by urging that the judgment of the Supreme Court in the case of Kusum Ingots and M/s. Aefloat has been followed in a later decision of that very court and hence, it is good law. In this case, the trial Judge's attention was invited to the order of the BIFR dated 25th September 2007. That order of the BIFR very categorically records that the company shall not dispose off, lease out, encumber or alienate in any way its fixed or current assets without specific prior approval of BIFR. However, if the unit is working, the current assets could be utilised for running day to day operations, subject to keeping proper records thereof and routing all transactions through the account with the company's financing bank/s only. She submits that these are guidelines for preparation of the rehabilitation scheme and they are annexures to the order of the BIFR. In these circumstances, she submits that the learned trial Judge was in no error in discharging the accused from the case. The order in that behalf does not suffer from any illegality or perversity warranting interference in writ jurisdiction. The petition be, therefore, dismissed.

4. With the assistance of the learned Counsel appearing for parties, I have perused the petition and all annexures thereto.

5. The complaint in this case is filed by the petitioner complainant alleging that the accused No. 1 is a company. That accused No. 1 company purchased stainless steel seamless tubes/ pipes of the description given in para 2 of the complaint and the invoices mentioned therein and accepted delivery challans. The invoices were raised. The accused No. 1 company requested the complainant petitioner before me to discount the bills. The bills of exchange were, therefore, drawn and accepted by accused No. 1. The bills were discounted as requested by accused No. 1 and with the knowledge of the accused Nos. 2 and 3 - Directors. They were accepted by other accused as Directors. The accused company issued three cheques of the denominations and the amounts mentioned in para 2 of the complaint. These cheques were dated 20th August 2001, 27th January 2002, 4th December 2002 and 25th October 2002. The cheques were presented for payment, in the circumstances which have been set out in para 2 of the complaint, but the cheques were returned unpaid. Therefore and when the endorsement of the Bank in the cheque return memo was "funds insufficient" that the statutory demand notice was issued on 21st January 2008. This demand notice was issued and duly served. There has been no compliance with the requisitions contained therein namely there has been no payment made. It is in such circumstances that a complaint was filed on 28th February 2008 alleging offences punishable u/s 138 read with 141 of NI Act.

6. The application for discharge was filed and in which the contention raised is that the accused No. 1 company had made a reference to the BIFR u/s 15(1) of the SICA. That reference was taken up for consideration on 26th February 2007. After the submissions were made, the material on record perused and considered, the bench of BIFR, passed an order that the reference be registered. It is stated that after the reference was registered, no steps could have been taken including to demand the monies. It has been stated that the BIFR passed an order in this case on 19th December 2007 declaring the company to be sick industrial company within the meaning of section 3(O) of the SICA. In such circumstances, the learned Judge has rightly taken into account the order of the BIFR and concluded that the offence has not been committed. If the offence is not committed, then, the complaint cannot proceed. In these circumstances, the order of discharge impugned in this case need not be interfered with.

7. The order of discharging the accused in this case is based only on the footing that the Supreme Court in the case of Kusum Ingots has held that the complaint u/s 138 of the NI Act cannot be proceeded, once there is a restraint order passed u/s 22-A of the SICA. The learned Judge in paras 25 and 26 of the impugned order has held as under:-

25. The observation of para 19 of the judgment in the case of Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, states that in a case in which BIFR has submitted its report declaring a company as "sick" and has also issued a direction u/s 22-A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the

contention raised on behalf of the appellants that criminal case for the alleged offence u/s 138 of N.I. Act cannot be instituted during the period in which the restraint order passed by BIFR remains operative cannot be rejected outright.

It is also further observed that, whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of BIFR u/s 22-A was passed against the company then it cannot be said that the offence u/s 138 of N.I. Act was completed. In such a case, it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reason beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by BIFR. In such circumstances, it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case.

26. As such on plain reading of the aforesaid observations of the Hon'ble Apex Court it becomes manifestly clear that in a case where restraint order has been passed by the BIFR u/s 22-A and declared a sick company has failed to make the payment of the amount either to itself or through its director for the reasons beyond the control of the said declared sick company it is for the reasons beyond their control to arrange for the payments and in view of the company order passed by BIFR the amount claimed by the complainant is not recoverable from the assets of the company. The said observations are squarely applicable to the instant case in view of the facts that the subject cheques were admittedly presented after 19th December 2007 i.e. order passed by BIFR and the said order was operative for a period of eight weeks. The complainant in the instant case has issued statutory demand notice on 21st January 2008 which was received by the accused No. 1 and 3 on 24th January 2008. The statutory period of 15 days prescribed in the notice as per Section 138(b) of repayment is expired on 8th February 2008. The alleged offence, if any, can be said to be committed only after 9th February 2008. The accused have replied the statutory notice of the complainant vide reply dated 12th February 2008 intimating protection granted in their favour by BIFR vide order dated 19th December 2007. Therefore, these circumstances clearly demonstrate that the accused No. 1 company and the directors were protected by the orders passed by BIFR dated 19th December 2007, therefore, in the light of the observations of the Hon'ble Supreme Court in the case of Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, the charge against the accused cannot be said to be lawful. With these observations I proceed to pass the following order:-

(1) Application filed by the accused is hereby allowed;

(2) Accused Nos. 1 to 3 are discharged of the offence u/s 138 r.w. 141 of Negotiable Instruments Act, 1881.

8. For properly appreciating the contentions before me, a reference will have to be made to the judgment in the case of Kusum Ingots. In that case the Supreme Court was considering the question as to whether the company and its directors can be proceeded against for committing offence u/s 138 of the NI Act after the company has been declared sick under the SICA, before expiry of the period for payment of cheque amount.

9. The factual position before the Supreme Court was that the post dated cheques were issued on behalf of the company in favour of the complainant in course of business. When the complainant presented cheques to the bank, they were returned without payment. Notice of demand was issued and the complaint came to be filed. Before the cheques were presented in the bank or after the bank declined to honour the cheques, the drawer company was declared sick. On receipt of summons from the court in criminal case, the company before the Supreme Court filed petitions u/s 482 of Code of Criminal Procedure or under Article 227 of the Constitution of India, seeking quashing of complaint/proceedings in the criminal case. The only argument was that in view of section 22 of SICA, the criminal case alleging offence punishable u/s 138 of NI Act is misconceived and compelling accused to face trial will amount to abuse of the process of the Court. Because this argument was declined and relief was refused the matter was carried to Supreme Court.

10. After noting rival contentions and reproducing the relevant provisions of the NI Act and SICA, what the Supreme Court held is that in the case of BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., , the Hon"ble Supreme Court ruled that pendency of proceedings u/s 22(1) of SICA alone is not sufficient to get absolved from the liability u/s 138 of NI Act.

11. Thereafter, the contention was raised that if the criminal case is proceeded with and the appellants are convicted and sentenced to fine, then, it will be necessary to realise the amount of fine from the assets of the company and which would be impermissible in view of the provisions of section 22 of SICA. Even that argument was rejected as is clear from para 16 of the judgment in the case of Kusum Ingots. Then, the contention was raised that if the Directors of the company are being convicted and arrested and kept in jail, the efforts of BIFR for reconstruction/ revival of the company will not be possible and in that event the very purpose of approaching BIFR will be rendered futile. Even that contention is rejected in para 17.

12. Then come paras 18 and 19 which read as under:-

18. In our considered view Section 22 SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of an offence u/s 138 of the NI Act against a company or its directors. The section as we read it only creates an embargo against disposal of assets of the company for recovery of its debts. The purpose of such an embargo is to preserve the assets of the company from being attached or sold for realisation of

dues of the creditors. The section does not bar payment of money by the company or its directors to other persons for satisfaction of their legally enforceable dues.

19. The question that remains to be considered is whether section 22-A of SICA affects a criminal case for an offence u/s 138 of NI Act. In the said section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets - (a) during the period of preparation or consideration of the scheme u/s 18; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and upto commencement of the proceedings relating to the winding up before the High Court concerned. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the Sick Industrial Company or its creditors or shareholders or in the public interest. In a case in which BIFR has submitted its report declaring a company as "sick" and has also issued a direction u/s 22-A restraining the company or its Directors not to dispose of any of its assets except with consent of the board then the contention raised on behalf of the appellants that a criminal case for alleged offence u/s 138 NI Act cannot be instituted during the period in which the restraint order passed by BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of BIFR u/s 22-A was passed against the company, then, it cannot be said that the offence u/s 138 of NI Act was completed. In such a case, it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by BIFR. In such circumstances, it would be unjust and unfair and against the intent and purpose of the statute to hold that the directors should be compelled to face trial in a criminal case.

13. A bare perusal of the same would reveal that the Supreme Court clarified that section 22 does not create any legal impediment for instituting and proceeding with the criminal case on the allegations of the offences u/s 138 of NI Act against a company or its directors. The section creates an embargo for recovery of its debts. The purpose of such an embargo is to preserve assets of the company from being attached or sealed for realisation of the dues of the creditors. The section does not bar payment of money by company or its directors to other persons for satisfaction of their legally enforceable liability.

14. Then, the Supreme Court considered the question whether section 22-A affects the criminal case for offences u/s 138 NI Act. In that light the Supreme

Court held that proceedings u/s 138 of the NI Act do not get obliterated or are not wiped out and criminal case can be instituted during the period for which the restraint order was passed u/s 22-A by BIFR. The Supreme Court only gave a hypothetical example that if before the date on which the cheque was drawn or before expiry of statutory period of 15 days after notice, a restraint order u/s 22-A was passed against the company, then, it cannot be said that the offence u/s 138 of the N.I. Act was completed. In such case, it may reasonably be said that the dishonour of the cheque by bank and failure to make payment by company is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order by BIFR. In such circumstances, it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial of criminal case. It is material to note that these observations were made only while dealing with the contention that an order u/s 22-A restraining the company or its directors not to dispose of any assets could be reason enough to urge that the criminal case alleging offences u/s 138 of NI Act cannot be instituted. Beyond that the Supreme Court has not held that a complaint cannot be continued. It only clarified that there could be a reasonable and possible conclusion, if a cheque was drawn after the restraint order or before the expiry of statutory period of fifteen days after notice, the restraint order was passed.

15. Assuming all this in favour of the accused in this case, although, subsequently the Supreme Court has clarified the legal position, what one finds is that the learned Magistrate has not held that there was any order u/s 22-A of SICA. He has merely referred to para 19 of the Kusum Ingots case. In the entire order passed by the Magistrate, I do not find any reference to an order u/s 22-A of the SICA.

16. It is in that light, Ms. Ingale produced before me some documents stating to be documents produced before the Magistrate and in which there is a reference to the order u/s 22-A of SICA.

17. A copy of the application filed on behalf of the accused seeking discharge from criminal case was placed before me. What has been urged in that application is that the complainant could not have filed the present complaint on 28th February 2008 and no process could have been issued as accused No. 1 company was under BIFR, much prior to the said order and also had protection u/s 22 and 22-A of the SICA. Upon repeated questioning what the learned Counsel has produced before me is a copy of summary of the proceedings stated to have taken place before BIFR. She states that these are referred to in the application for discharge dated 10th August 2009. She submitted that the proceedings that are referred to in discharge application, include a copy of the order in Appeal No. 77 of 2007 passed by the appellate authority for Industrial and Financial Reconstruction (AAIFR), New Delhi.

18. This appeal was challenging the order of BIFR dated 26th February 2007 by

which the BIFR held that the reference u/s 15(1) in this case abates because of the action taken by secured creditors u/s 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short SARFAESI Act). By the order passed on 25th September 2007, the AAIFR set aside the order of the BIFR and directed the BIFR to decide the question of sickness of the appellant company after hearing all concerned.

19. Then what is placed before me is a summary or record of proceedings of hearing held before BIFR on 19th December 2007. That summary shows that the BIFR passed an order in terms of para 4(i) and (ii).

20. It is stated that annexures to this order are the guidelines and the bench has formed an opinion that the company would not be able to revive on its own and it was necessary in the public interest to take measures u/s 18 of SICA. Accordingly, State Bank of India was appointed as operating agency to examine the viability of the company and formulate a rehabilitation scheme based on the company's proposal for revival, if it is found viable.

21. Then the bench issued directions for compliance by all the concerned Agencies. It is stated that in the guidelines, there is a clause and my attention is invited to clause 9 of the same, which reads as under:-

9. The company shall not dispose of, lease out, encumber or alienate in any way, of its fixed or current assets without specific prior approval of BIFR. However, if the unit is working, the current assets could be utilised for running day to day operations, subject to keeping proper records thereof and routing all transactions through the account with the company's financing bank(s) only.

22. To my mind, it is extremely doubtful whether all this could be considered as an order in terms of section 22-A of the SICA. Section 22 and 22-A to the extent relevant read as under:-

22. Suspension of legal proceedings, contracts etc - (1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof (and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company) shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2) Where the management of the sick industrial company is taken over or

changed (in pursuance of any scheme sanctioned u/s 18), notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law -

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) (Where an inquiry u/s 16 is pending or any scheme referred to in Section 17 is under preparation or during the period) or consideration of any scheme u/s 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adoptions and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under Sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 91 of 1956, or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer of other authority or of any submission, settlement or standing order and accordingly -

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect -

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been

reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

22-A-Direction not to dispose of assets-The Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets -

(a) during the period of preparation or consideration of the scheme u/s 18; and

(b) during the period beginning with the recording of opinion by the Board for winding up of the company under Sub-section (1) of Section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court.

23. A bare perusal of section 22-A shows that the Board has to make a specific order and in terms of the section. Section 22(1) has been clarified by the Supreme Court as not constituting a bar to institute a complaint u/s 138 of NI Act, even against a company. Section 22-A, is the provision referred to in para 19 in the judgment of Kusum Ingots. However, that speaks of direction not to dispose of assets That is a direction after the Board forms an opinion that it is necessary in the interest of sick industrial company or creditors or shareholders or in public interest that the sick company should not dispose of its assets, except with the consent of the Board. However, there ought to be an order in writing which is required so as to constitute a direction not to dispose of the assets. There is no such order in writing which is referred to in the application for discharge or the order passed by the learned Magistrate. A clause in the guidelines which has been reproduced above to my mind definitely falls short of such a direction and which is required to be made or issued by an order in writing by the Board. When this was not produced and the attempt is to justify the conclusion of the Magistrate by now relying upon the guidelines which are annexed to the order passed u/s 22(1) of BIFR, then, the learned Magistrate clearly erred in law in discharging the accused. It is not a case where Bar u/s 22(1) can be pleaded for institution of the complaint. That is clarified by the Supreme Court itself. If there is no bar under SICA to institute a complaint alleging offence punishable u/s 138 of the N.I. Act and proceed with it and only one of the contingencies that is taken care of is of an order u/s 22-A being made and when no such order is made in this case, then, the Magistrate could not have relied upon the judgment in the case of Kusum Ingots to discharge the accused from the criminal complaint u/s 138 of NI Act read with section 141 thereof. He has, therefore, clearly misapplied the judgment and has misconstrued and misinterpreted its ratio completely. The order suffers from total non application of mind, resulting in an error apparent on the face of record. All the materials

that have been produced before me do not enable the Magistrate to discharge the accused applicants before me. His order is, therefore, also vitiated by perversity as he has overlooked the vital materials required to be looked into as stipulated by the Supreme Court in law. The learned Judge has referred to and rather relied upon the defence of the accused to discharge them which is not permissible in law.

24. For all these reasons, the order under challenge cannot be sustained. It is accordingly quashed and set aside. The petition is allowed. Rule is made absolute in the above terms. The Criminal complaint in question will now proceed in accordance with law. However, my observations herein are restricted to the order discharging the accused from the present criminal case. All contentions of the applicant - complainant and equally the accused on the applicability of section 22(1) and 22-A of SICA, in the event, any such orders are available on record are kept open. Parties to appear before the learned Magistrate on 29th April 2013 at 10.30 a.m.