(2012) 10 BOM CK 0196

In the Bombay High Court

Case No : Criminal Application No. 2865 of 2008

Hemant Chemicals APPELLANT

Vs

Riverside Industries Ltd. and Others RESPONDENT

Date of Decision : 03-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141
Penal Code, 1860 (IPC) — Section 420

Citation : (2013) 2 ABR 640 : (2013) ALLMR(Cri) 1219 : (2013) BomCR(Cri) 169

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : P.P. Chavan, for the Appellant; Shilpa L. Awchar, Advocate for Respondents No. 1 to 5, for the Respondent

Final Decision : Allowed

Judgement

T.V. Nalawade, J.—Rule. Rule made returnable forthwith. By consent of both the sides, heard for final disposal. The proceeding is filed u/s 482 of the Code of Criminal Procedure to challenge the judgment and order of revision No. 93/2005 which was pending in the Sessions Court, Jalgaon. The revision was filed to challenge the order made by Judicial Magistrate (First Class) on Exh. 33 which was filed for recalling of issue of process order made for offence punishable u/s 138 of Negotiable Instrument Act and section 420 of the Indian Penal Code. The Judicial Magistrate (First Class) had refused to recall order of issue process. Both the sides are heard.

2. Though in view of the ratio of the case reported as Adalat Prasad Vs. Ruplal (2004) SCC (Cri.) 1927, there is no power with Judicial Magistrate (First Class) to recall the order of issue process, the Sessions Court has observed that revision against the order made by Judicial Magistrate (First Class) at Exh. 33, which was filed for recalling the issue process order, is tenable. It can be said that Sessions Court has considered the order of issue process itself and it has set aside the

order of issue process made in respect of offence punishable u/s 138 of the Negotiable Instruments Act.

3. The Sessions Court has considered arguments advanced for the accused that the cheques were not honoured by the Bank as the payment was stopped by the accused. Reliance is placed by Sessions Court on the four cases which are mentioned at para 13 of the judgment and which are as follows.

(i) Bhageerathy Vs. V. Beena and Another XI 1992 (3) Cri. 663.

(ii) Rama Gupta and Others Vs. Bakeman''s Home Products Ltd., .

(iii) S. Ashok and Another Vs. Vasudevan Moosad, .

(iv) Safiq Ahmed Vs. Ahsan Halim and Others, .

The Sessions Court has observed that as payment was stopped and as the cheque was not dis-honoured for insufficiency of funds, the provision of Section 138 of The Negotiable Instruments Act is not attracted. By making such observations the order of issue process made in respect of offence u/s 138 of the Negotiable Instruments Act is set aside by revisional Court.

4. On this point, following three reported cases were cited for the petitioners.

(i) Goaplast Pvt. Ltd. Versus Shri Chico Ursula D Douza and Another 2003 (2) SC 536.

(ii) Goa Plast (P) Ltd. Vs. Chico Ursulu D''Souza 2003 (8) SC 490.

(iii) M/s Modi Cements Ltd. Versus Shri Kuchil Kumar Nandi 1998 (2) SC 471.

In these three reported cases the Apex Court has considered the circumstance like dishonour of cheque by reason of ''stop payment''. Apex Court has laid down that if due to stopping of payment the cheque is dishonoured, that case is also covered u/s 138 of the Negotiable Instruments Act, if other requirements of Section 138 are complied with. This is settled position of law. In view of this position of law, this Court holds that the order made by revisional Court of setting aside order of issue process in respect of offence punishable u/s 138 of the Negotiable Instruments Act can not sustain in law. So, the present proceeding needs to be allowed.

Reliance was placed on two reported cases like -

(i) National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, .

(ii) Harshendra Kumar D. Vs. Rebatilata Koley Etc., .

In these two cases, Apex Court has discussed ingredients of provisions of Section 141 of the Negotiable Instruments Act. It is observed by the Apex Court that in the complaint there should be specific averments as to how the accused Director was guilty of consent or connivance or negligence and so he was responsible for the offence. It is observed that vicarious liability of Director need to be pleaded and proved and it can not be interfered. The position of other persons like Manging Director, Director signing cheque is said to be different and as against them there is no requirements of such pleadings. This position of law also can not be disputed. Sessions Court has considered this defence of the persons who had filed revision and the Sessions Court has held that in view of pleading, this defence is not tenable. Copy of complaint is produced on the record. At para 2 specific contentions are made as against accused Nos. 2 to 4, the Directors that they had approached the complainant for making request of supply of goods. The contentions are made that the complainant had approached these accused afterwards also for requesting them to make the payment. Thus there are contentions that these accused were involved in the conduct of business of the accused No. 1 company. In view of these pleadings and the fact that the decision of the Sessions court on this point is not challenged by the accused, this Court holds that such defence is not open to the accused at this stage. In the result, the petition is allowed. The order made by Sessions Court in Criminal Revision No. 93/2005 is hereby set aside. The complaint filed u/s 138 of the Negotiable Instruments Act stands restored and the Court is to proceed against the accused for both offences for which the process has been issued. Rule made absolute in the aforesaid terms.