
(2005) 05 RAJ CK 0077

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 144 of 2005

Jaipur Syntex Ltd. and Others

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 31-05-2005

Acts Referred:

Companies Act, 1956 — Section 536(2)
Criminal Procedure Code, 1973 (CrPC) — Section 397(3), 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 140, 141, 142
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22A

Citation : (2006) 1 BC 435 : (2005) CriLJ 3429 : (2005) 4 RCR(Criminal) 593 :
(2005) 4 RLW 2344 : (2005) 4 WLC 321

Hon'ble Judges : K.C. Sharma, J

Bench : Single Bench

Advocate : Kamalakar Sharma and S.K. Sharma, for the Appellant; Ashivin Sharma, Public Prosecutor, A.K. Bhandari, Rizwan Ahmed and Sanjay Rahar, for the Respondent

Final Decision : Allowed

Judgement

K.C. Sharma, J.—Succinctly stated the facts in brief are that the complainant-respondent No. 2 filed a criminal complaint in the Court of learned Chief Judicial Magistrate against the petitioner-company and its directors, under Sub-section 138 and 142 of the Negotiable Instruments Act (hereinafter to be referred to as "the Act") in the month of May, 1999. On 9-6-1999, the learned Magistrate took cognizance of the offence u/s 138 of the Act against the petitioner-company. Feeling aggrieved by the order taking cognizance, the petitioner-company and respondent No. 2 both challenged the order of cognizance dated 9-6-1999 before this Court by filing a petition u/s 482, Cr. P.C. and a revision-petition u/s 397(3), Cr. P.C, respectively. This Court vide order dated 24-4-2002 remanded the matter to the trial Court with the direction to pass fresh order in accordance with law.

2. Thereafter, the learned Chief Judicial Magistrate vide its order dated 1 -5-2004 took cognizance of the offence in respect of all the petitioners. The petitioner

challenged the above said order in revision petition before the learned Sessions Judge, Jaipur City, Jaipur, which came to be heard and decided by the Special Court (Fake Currency Matters), Jaipur City, Jaipur. The learned revisional Court vide its order dated 5-8-2004 dismissed the revision-petition and affirmed the order passed by the learned Chief Judicial Magistrate. Hence the present petition u/s 482, Cr. P.C. seeking to quash the order passed by the learned trial Court and affirmed by the revisional Court.

3. The main thrust of the argument of Mr. Kamalakar Sharma, learned counsel for the petitioner is that the petitioner-company was declared to be a sick company. According to him, an order u/s 22A of the Sick Industrial Companies (Special Provisions) Act (hereinafter to be referred to as "SICA") was passed on 17-2-1998 by the BIFR, thereby restraining the Company from alienating any of its assets and, therefore, the petitioner-company was not in a position to honour the cheques issued on 25-12-1998 and 15-1-1999. In this background learned counsel submitted that it cannot be said that offence u/s 138 of the Act was completed. In support of his argument, learned counsel has relied upon a decision of the Apex Court in *Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others*, .

4. Per contra, Mr. A. K. Bhandari learned counsel for the complainant-respondent strenuously argued that it is well settled that at the time of taking cognizance of offence, only the material produced by the prosecution can be taken into consideration and an accused cannot be permitted to produce any document/material in defence to prove his innocence. In the case at hand, the main defence of the accused rested on the order dated 17-2-1998 passed by the BIFR and the accused-petitioners cannot be allowed to put forth their defence at the stage of taking cognizance. In support of his argument, learned counsel has relied upon a decision of the Apex Court in *State of Orissa Vs. Debendra Nath Padhi*, .

5. I have given my anxious consideration to the above argument. Suffice it to observe that the document, on which much emphasis is led by Mr. Bhandari, appearing for the respondent, was already available before the learned trial Court at the time of taking cognizance of the offence and the learned trial Court has considered the issue concerning the document at considerable length. The revisional Court has also considered this very aspect. Therefore, it cannot be said that the accused-petitioners intended to produce any document at the time of taking cognizance, with a view to prove their innocence.

6. Learned counsel for the complainant respondent further contended that the learned trial Court on the basis of evidence and material placed on behalf of prosecution after having satisfied as to the commission of offence on the basis of such evidence and material has taken cognizance of the offence, which should not be interfered with in exercise of inherent powers. Learned counsel further argued that the order passed u/s 22A of the Sick Industrial Companies (Special Provisions) Act passed by the BIFR does not mean that offence u/s 138 of the

Act has not been committed by the petitioners.

7. It is not in dispute that the cheques were issued after the order u/s 22A of the Act was passed by the BIFR. It is also not in dispute that the cheques were dishonoured by the Bank on the ground of insufficiency of funds. Further, on receiving the above information, the respondent No. 2 issued notice on 9-4-1999 within the statutory period. It is also not in dispute that during statutory period of notice, the aforesaid order u/s 22A of the Act was in force.

8. As to when the offence u/s 138 of the Act can be completed, their Lordships in K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, observed that it can be completed only with the concatenation of a number of acts. In the opinion of their Lordships, following are the components of the said offence :

1. Drawing of the cheques;
2. Presentation of the cheque to the bank;
3. Returning the cheque unpaid by the drawee bank;
4. Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, and
5. Failure of the drawer to make payment within 15 days of the receipt of the notice.

9. If the aforementioned ingredients are; satisfied then the person who has drawn the cheque shall be deemed to have committed an offence.

10. As already stated above, undisputedly the order passed u/s 22A of the SICA by the BIFR was in force during the statutory period of notice issued on behalf of respondent No. 2. In the case at hand, the BIFR has submitted its report and declared the company as "sick" and then issued directions u/s 22A of the SICA and restrained the company or its directors from disposing of any of its assets. Thus in view of the restrained order, the petitioner company and its directors were not in a position to make payment of the cheques in question. Since before expiry of the statutory period of 15 days after the notice by the BIFR has passed the order u/s 22A of SICA and has restrained the Company or its directors not to dispose of its asset, it cannot be said that the offence u/s 138 of the Negotiable Instrument Act was completed. I am fortified in my view by a decision of the Apex Court in Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, , wherein their Lordships, after considering the provisions of Sections 138 to 141 N.I. Act, held as under (para 19) :

"Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after the notice, a restrained order of the BIFR u/s 22A 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 the 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".

11. On the other hand, Mr. A. K. Bhandari, learned counsel for the respondent placing reliance on the decision of the Hon'ble Supreme Court in Pankaj Mehra and Another Vs. State of Maharashtra and Others, has contended that the controversy in the instant case stands squarely covered by the observations of their Lordships in para Nos. 27 to 31 of the judgment, which may be quoted below (paras 26 to 30 of Cri LJ) :

"27. The alternative approach is this : even assuming that any disposition of the property made by a company after commencement of the winding-up proceedings is null and void, how is that an escape ground from the offence u/s 138 of the NI Act? That section created a statutory offence which on the confluence of the various factors enumerated therein, commencing with the drawing of the cheque and ending with the failure of the drawer of the cheque to pay the amount covered by it within the time stipulated, ripens into a penal liability.

28. That last factor for constituting the offence u/s 138 of the NI Act is formulated in clause (c) of the proviso to the section which reads thus :

"(c) 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 fifteen days of the receipt of the said notice."

29. The words "the drawer of such cheque fails to make the payment" are ostensibly different from saying "the drawer refuses to make payment". Failure to make payment can be due to the reasons being the control of the drawer. An illustrative case is, if the drawer is not a company but an individual who has become too pauperised or so sick as he cannot raise the money to pay the demanded sum, can he contend that since failure to make payment was on account of such conditions he is entitled to be acquitted? The answer cannot be in affirmative though the aforesaid conditions can be put forth while considering the question of sentence.

30. We therefore feel that the legislature has thoughtfully used the word "fails" instead Of other expressions as failure can be due to a variety of-reasons including disability to pay. But the offence would be complete when the drawer "fails" to make payment within the stipulated time, whatever be the cause for such failure.

31. The drawer of the cheque can have different explanations for the failure to pay the amount covered by the cheque. But no such explanations would be sufficient, to extricate him from the tentacles of the offence contemplated in the

section. Perhaps some kind of explanations would be sufficient to alleviate the rigour of the offence which may be useful to mitigate the quantum of sentence to be imposed. But that is no ground for consideration at this stage".

12. In the above cited case, Hon"ble Apex Court was considering the legal question, "Can a company escape from penal liability u/s 138 of the Act on the premise that a petition for winding up of a company has been presented and was pending during the relevant time?" It was in that context that their Lordships considered the impact of the legislative directions in Section 536(2) of the Companies Act, namely, any disposition of property of the company made after the commencement of the winding up (i.e. after the presentation of petition for winding up) shall be void, and then held that all dispositions of property made by a company during the interregnum between presentation of a petition for winding up and passing of the order of winding up would not be null and void and in that context the observations in para Nos. 27 of 31 as quoted above were made. It may be stated that the provisions of Section 22A of SICA were not under consideration before the Apex Court. In that view of the matter, the Pankaj Mehra and Another Vs. State of Maharashtra and Others, relied upon by the learned counsel for the respondents has no application to the facts of the present case.

13. For the reasons aforesaid, this petition is allowed. The impugned orders of the Courts below are set aside and the proceedings against the petitioners in criminal complaint No. 1942/1999 pending in the trial Court are quashed.