
(2013) 11 BOM CK 0023

In the Bombay High Court

Case No : Criminal Application No. 4003 of 2013

Mala Umesh Mehta

APPELLANT

Vs

AVR Logistic Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 20-11-2013

Acts Referred:

Citation : (2013) 11 BOM CK 0023

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : P.K. Lakhotiya, for the Appellant; S.R. Palnitkar APP and Mr. A.S. Gandhi Advocate for R/1, for the Respondent

Final Decision : Disposed Off

Judgement

Abhay M. Thipsay, J.—By consent of the learned counsel for the parties, heard finally. The applicant is one of the accused-accused No. 4- in SCC No. 232/2012 pending before the Judicial Magistrate First Class, at Aurangabad. The said case is in respect of an offence punishable u/s 138 of the Negotiable Instruments Act and arises on a complaint filed by the respondent no. 1 herein. The respondent nos. 3, 4 and 5 herein are the other accused- accused nos. 1, 2 and 3 respectively, in the said SCC No. 232/2012. The applicant is aggrieved by the order issuing process against her as passed by the Magistrate and has approached this Court invoking its inherent powers and praying that the order issuing process against her be quashed and set aside.

2. I have heard Mr. P.K. Lakhotiya, the learned counsel for the applicant. I have heard Mr. Amol Gandhi the learned counsel for the respondent no. 1. I have heard Mr. P.N. Muley, the learned APP for the respondent no. 2.

3. It is the contention of the learned counsel for the applicant, that the applicant, though a director of the accused company, is only a nominal director and does not participate in the affairs or business of the accused company. It is submitted that averments made in the complaint are insufficient for proceeding against the

applicant. Reliance has been placed on some reported decisions of the Apex Court in support of the contention that the averments made in the complaint are insufficient for proceeding against the applicant. Reliance is also placed on certain documents which are annexed to the petition, to contradict the version given in the complaint.

4. I have considered the matter.

5. It may be appropriate to examine what are the averments in the complaint against the present applicant. In paragraph No. 1 of the complaint it is averred as follows:-

Accused nos. 3 and 4 (applicant) are the directors of the accused no. 1 and are actively involved in the day to day business of the company and are fully aware about the transaction done with the complainant Company.

6. In paragraph No. 5 of the complaint it is averred that:-

The complainant says that as the accused nos. 3 and 4 being Director of accused No. 1 are actively involved in the business of the company are fully aware about the transaction done with the complainant company and only on their approval cheque was issued to the complainant and the same was duly signed by accused no. 2.

7. Thus, there are categorical averments to the effect that the applicant is one of the Directors and is actively involved in the business of the company and is fully aware of the transaction between the complainant company and accused company.

8. The learned counsel for the applicant submitted that these averments are not sufficient and a complainant must show how a particular Director is responsible for the alleged offence. He placed reliance on a decision of the Supreme Court of India in the case of Anita Malhotra Vs. Apparel Export Promotion Council and Another, to support such a contention. He relied upon the observations made in paragraph No. 15 of the Reported Judgment which were based on a previous judgment delivered by Their Lordships of the Supreme Court of India in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, .

9. I have gone through the decision delivered by the Supreme Court of India in the aforesaid case of National Small Industries Corporation (supra). In my opinion, the contention advanced by the learned counsel for the applicant is not supported by any of the observations made by Their Lordships in the case of National Small Industries (cited supra) and/or in the case of Mrs. Anita Malhotra.

10. In fact, the question of vicarious liability of the Directors of a company with respect to an offence punishable u/s 138 of the Negotiable Instruments Act was specifically dealt with by the Supreme Court of India in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, . The matter arose from a reference made by a two Judge Bench of the Supreme Court of India for determination of the

following questions by a Larger Bench.

(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881 it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in charge of and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against.

The Larger Bench of Three Judges after considering the matter from all the angles, answered the questions posed as follows:-

(a) It is necessary to specifically aver in a complaint u/s 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b). The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable u/s 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c). The answer to Question (c) has to be in the affirmative. The question notes that the managing director or a joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable u/s 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered u/s 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

11. Thus, it is clear that though merely being a director of a company would not

make a person liable for an offence punishable u/s 138 of the Negotiable Instruments Act read with Section 141 of the Act and though a director cannot be deemed to be in charge of, and responsible to the company for the conduct of its business only because he is a director, when that a particular director was in charge of and responsible for the conduct of the business of the company is averred as a fact, he would be liable to be prosecuted.

12. Clearly, as per the law laid down in the aforesaid judgment, the (only) requirement to make a director liable for prosecuting/proceeding with respect to the offence punishable u/s 138 of the Negotiable Instruments Act by virtue of section 141 of the said Act is that, that, such director was in charge of, and was responsible to the conduct of the business of the company should be averred as a fact. The question is whether this proposition can be stretched further to claim "that precise duties of the director must be averred in the complaint; and that without such specific averments about the nature of the duties and what was the precise act/acts performed by such director towards the commission of offence, he cannot be made liable for the alleged offence."

13. It is not possible to hold that the legal propositions laid down by the Larger Bench of the Apex Court stand diluted or modified, or stretched further by the observations made in either the case of Mrs. Anita Malhotra (supra), or National Small Industries Corporation Ltd., (supra). A few sentences, out of the context, cannot be extracted from the reported judgments in these cases, to claim that for proceeding against the Directors of a Company not only a specific averment to the effect that they were incharge of, and responsible to the Company for the conduct of its business should be made, but it should further be stated, as to in what manner they were responsible, which would necessarily involve averments about their duties, the specific role played by them in the alleged offence and as to how they could have prevented the offence from taking place and how they failed to do so, etc. In Anita Malhotra's case (supra), based on a certified copy of the annual return of the accused company, which had been placed on record, it was claimed that the appellant before the Supreme Court, Mrs. Anita Malhotra had ceased to be a director of the accused company before the offence in question came to be committed. The High Court had declined to place reliance on the annual returns of the company on the ground that it was not a public document. Their Lordships of the Supreme Court did not agree with it and held that the certified copy of the annual return of a company would be a public document and as such, could be looked into at that stage, as laid down in some other previous decisions of the Supreme Court of India. It is in the context of the existence of such a document,-which was felt to be beyond suspicion or doubt and which did not show the appellant before the Supreme Court to be a director of the accused company at the material time,-that the averments in the complaint in that case were examined. The observation that "the bald assertions against the appellant were not sufficient," was made in the context of the prima facie disbelief about her involvement in the day to day affairs of the company, generated by the contents of the certified copy of the annual return. These

observations can not be construed so as to mean that even when there are no documents which could be accepted as beyond suspicion or doubt and which would exonerate a particular director, still, the complainant must assert how a particular director is responsible for the offence, which as aforesaid, would necessarily involve elaboration of the duties of that director and the specific act and role played by him in the specific offence. The "bald assertion" about the involvement of the appellant before the Court was held to be insufficient to remove the effect of the contents of the annual return, which indicated the non-involvement of the appellant before the Supreme Court. As a matter of fact, the observations made in para 15 of the reported judgment in the said case clearly indicate that even after considering the contents of the annual returns which exonerated the appellant, Their Lordships felt the necessity of examining the averments made in the complaint; and this indicates that had the role of the appellant in the affairs of the company would have been specified or elaborated, the things could have been different. That the lack of a specific assertion was taken as an additional ground in favour of the appellant before Their Lordships, is clear from paragraph No. 15 of the Reported Judgment.

14. In the case of National Small Industries Corporation Ltd., (supra) also, the conclusions about the legal position arrived at are found in para 25 of the reported judgment. The principles laid down therein state that a director, who is neither the Managing director nor a Joint Managing director nor a signatory to the cheque would be liable for the offence committed by the company only if he would be incharge and responsible to the company for the conduct of its business at the material time. Their Lordships have made it clear that this must be averred as a fact; but Their Lordships have not further stated that there should be any further elaborate averments giving the details as to how such a director was incharge of and responsible for the conduct of the business of the company. To "aver as a fact", is different from stating the evidence by which the fact averred is supported.

15. A perusal of decided authorities, in the light of the legal propositions laid down by Their Lordships in the aforesaid case of S.M.S. Pharmaceuticals Ltd., (supra), shows that the observations about the necessity of showing a specific and precise role performed by a director, showing as to how and in what manner he was liable, have been made in the context of the facts of those cases. Where on the face of the documents, which can be accepted as beyond suspicion or doubt, the very fact that a particular accused was, at the material time, a director, or an active director, is open to doubt it would be necessary to examine the averments in the complaint more closely or minutely. In such cases something more than a mere assertion-which can be properly termed as a bald assertion-would be necessary. However, to deduce a principle that, the assertion that a particular Director was in charge of and responsible to the company for the conduct of its business (or words conveying the same) can, by itself never be sufficient for the purpose of proceeding against a Director; and that there must be some further averments, would be clearly erroneous.

16. In this case, the learned counsel for the applicants has placed reliance on two documents, copies of which are annexed to the application. He placed reliance on a discharge certificate purportedly issued by the Principal, Juhu Parle Education Society's Junior College, where the applicant was supposedly working from the period from 1987 to 1.5.2012. Apparently, this has been produced to show that the applicant could not have been an active or whole time director in the accused company. The other document is a certificate issued by the accused company itself to the effect that the applicant is only a nominal director of the accused company without any authority to act for the company. Both these documents are private documents.

17. So far as the certificate issued by the accused company is concerned, it would be extremely doubtful, in principle, whether the same can be taken into consideration at all, in as much as, it is only a certification by a co-accused about non involvement of another co-accused. As regards the other document, it being a private document would need to be proved in a satisfactory manner and this can be done only if a trial is held. Thus, on the claim of existence of such documents, is not possible to hold that the categorical assertion about the applicant being a Directors, he being actively involved in the business and day to day activities of the accused company; of fully being aware of the transaction; and of the cheque in question having been issued also with the approval of the applicant, etc, is insufficient for proceeding against the applicant; and that the Court should examine the complaint further to see whether further details about the role or duties of the applicant have been mentioned in the complaint.

18. It is not possible to hold that there was no case for proceeding against the applicant on the basis of the averments in the complaint. If the averments made in the complaint are taken at face value, a case for proceeding against the applicant-apart from the other accused-is also made out.

19. No case for quashing the prosecution of the applicant, by exercising the inherent powers of this Court is made out.

20. The learned counsel for the applicant submitted that applicant is a woman and would be subjected to considerable hardship on being required to remain present before the trial court on all dates of hearing. In my opinion, looking to the nature of offence, the personal presence of the applicant would not be necessary before the trial court, and therefore, the applicant can very well be exempted by the Magistrate from remaining present in person before him during the course of trial. It would be in the interest of justice to give appropriate directions in that regard.

21. The application is rejected.

However, it is directed that the learned Magistrate, on an application made by the applicant for that purpose, shall exempt her from personal appearance during the trial and shall permit her to remain present through an advocate, unless her personal presence would be essential at a particular stage of the trial, for making

further progress therein. This indulgence is shown to the applicant on the understanding that no adjournment on the ground of her not being present before the Court in person shall be sought by her, or on her behalf, during the trial; and that she would not require the evidence to be recorded in her personal presence, and permit it to be recorded in the presence of her Advocate.

Application is disposed of in the aforesaid terms.