(2007) 09 BOM CK 0023

In the Bombay High Court

Case No : Criminal Miscellaneous Application No. 416 of 2006

M/s. Atreya Shipping Pvt. Ltd. APPELLANT

Vs

Shri A. Castellino, Director/Authorised Signatory, M/s. R.C. Coastal Exports Pvt. Ltd. and State RESPONDENT

Date of Decision : 13-09-2007

Acts Referred:
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2007) 09 BOM CK 0023

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : Arun Bras De Sa, for the Appellant; Edwin de Monte Furtado, Advocate, Respondent No. 1. Mr. C.A Ferreira, Public Prosecutor, Respondent No. 2, for the Respondent

Judgement

N.A. Britto, J.—Heard learned Counsel on behalf of both parties. Complainant seeks special leave to appeal against the acquittal of the accused u/s 138 of the Negotiable Instruments Act, 1881 (Act, for short), by judgment dated 13/09/2006 of the learned JMFC, Vasco-da-Gama.

2. As can be seen from the cause title of the complaint, the complainant and the accused are two companies and the complainant''s vessel was chartered by the accused under a memorandum of understanding dated 01/06/1999 and towards the part payment of outstanding dues, the accused by letter dated 23/01/2001, had sent three cheques to the complainant/company bearing nos. 691151 dated 23/01/2001 for Rs. 17,81,760/-, 691152 dated 03/02/2001 for Rs. 3,00,000/- and 691153 dated 10/02/2001 for Rs. 3,00,0000/-. There is no dispute that the amount due on the last two cheques was paid subsequently by the accused to the complainant. The subject matter of this case was the first cheque for Rs. 17,81,760/-and which admittedly represented one month''s charter hire charges.

3. The said letter dated 23/01/2001 stipulated that as per the discussions, the subject cheque ought not to be deposited till the bank guarantee was sent to the

complainant. The other two cheques, the complainant was requested to deposit and inform the accused. The complainant in the last week of July, 2001 deposited the said cheque for its realization with HDFC Bank Ltd. at Vasco-da-Gama but was informed by memorandum dated 23/07/2001 that the said cheque was dishonoured for want of sufficient funds to the account of the accused with his banker. The complainant then issued notice dated 4/08/2001 informing the accused about the dishonour of the cheque and calling upon the accused to pay the amount due on the cheque within a period of fifteen days of the receipt of the notice which the accused received on 8/08/2001 but sent the reply dated 9/08/2001 and in the said reply the accused, inter alia, stated that the subject cheque was issued as a security along with other two cheques for Rs. 3,00,000/- each towards part payment of the dues of the accused in favour of the complainant. On behalf of the accused it was also stated that as per the understanding reached between the complainant and the accused, the cheque which was the subject matter of the notice was to be treated as security only and was not to be deposited until the accused forwarded bank guarantee to the complainant and that was clear from the covering letter dated 23/01/2001 which was received by the complainant. On behalf of the accused, it was also stated that the depositing of the cheque was against all principles of fair trade/business and was in complete breach of trust with the intention to cheat the accused or to blackmail/extort the said amount which was not due to the complainant.

4. After filing of the complaint, the complainant examined its Director Shri P.N. Sawant and produced the relevant documents. The complainant also examined three different Officers from HDFC Bank, two of them from HDFC''s Branch at Vasco-da-Gama and one from HDFC''s Branch at Mumbai. The accused also examined himself and produced on record some documents.

The accused also examined another officer from the said HDFC Bank at Mumbai. It also appears that the dispute between the complainant and the accused in relation to the said charter of the vessel was referred to arbitration and ended by award dated 3/02/2006 in favour of the complainant in the sum of Rs. 1,03,20,325.30 with interest @ 7% p.a., against the claim of the complainant for Rs. 2,52,82,454.56 with interest @ 12%.

5. The learned Magistrate acquitted the accused, inter alia, holding that the subject cheque was issued by the accused to the complainant not in discharge of any debt or other liability but as security till such time the bank guarantee document was signed between the complainant-company and the accused-company. The learned Magistrate also held that the cheque was therefore not a negotiable instrument as the accused nor the company of the accused owed the said amount of Rs. 17,81,760/- to the complainant.

6. Counsel on behalf of the complainant pointing out to the said letter dated 23/01/2001 and to the admission of the accused that the word ''security'' was not reflected in the said letter dated 23/01/2001-Exhibit 43 submits that the very fact that the subsequent award was passed in favour of the complainant dated

3/02/2006 shows that the accused owed the said sum of Rs. 17,81,760/-to the complainant and the said cheque was issued only towards the part payment of the amount which was due to the complainant towards the hire of the said vessel.

7. On the other hand, Counsel on behalf of the accused, contends that the complaint was filed on behalf of the complainant which was a company and the complaint was signed by its director Shri P.N. Sawant who had not produced any resolution passed by the said company authorizing him to file the complaint and in this context, learned Counsel has placed reliance on a judgment of this Court in Shri Ashok Bampto Pagui Vs. Agencia Real Canacona Pvt. Ltd. and State, wherein this Court held that when a complaint is filed without the resolution of the Board of Directors and without a statement in the complaint as regards the authority to lodge the complaint, on such a complaint no process can be issued much less a conviction imposed and that a complaint cannot be filed by a Director of company, on behalf of the company, merely in his capacity of the Director of a company. Learned counsel on behalf of the accused also submits that the subject cheque was given as a security and in this regard has referred to the affidavit of the said Shri P.N. Sawant filed before the Arbitrator wherein the said Shri P.N. Sawant had admitted that the subject cheque was sent by the accused (respondent) with instructions that it was not to be deposited till the bank guarantee was sent and that the accused (respondent) had not specified as to when they would be sending the bank guarantee. Learned Counsel on behalf of the accused also contends that who has been prosecuted in the complaint was the accused who was one of the Directors of M/s. R.C. Coastal Exports Pvt. Ltd. on whose behalf the accused had signed the subject cheque as its Director/ authorized signatory and therefore the accused could not have been convicted without there having been an averment in the complaint and evidence thereafter that the accused was in charge of and responsible to for the affairs of the said company M/s. R.C. Coastal Exports Pvt. Ltd.

8. It is not necessary to deal in details with all the submissions made on behalf of the accused; for the purpose of this application.

9. One of the conclusions arrived at by the learned Magistrate in acquitting the accused is that the subject cheque was not issued by the complainant in discharge of any debt or other liability but it was given to the complainant as security till such time the bank guarantee was given by the accused to the complainant. This conclusion, in my view, could not be faulted. The learned Magistrate has observed that bank guarantee was to be given by the accused to the complainant as security in terms of memorandum of understanding and time charter agreement, and, there is no dispute about the same raised before this Court. The letter dated 23/01/2001 might have not specifically stated that the subject cheque was being sent as security but the reading of the letter made that position abundantly clear, and, subsequently that the subject cheque was sent to the complainant as a security, was again made clear by the accused in their reply to the statutory notice sent by the complainant to the accused and an admission

to the effect, that the subject cheque was to be withheld until the bank guarantee was given by the accused, was also secured from the complainant''s witness. The complainant''s witness had also admitted that there was no time limit stipulated in the said memorandum of understanding as well as the time charter agreement for giving the bank guarantee and he had also admitted that there was no request in writing made by the complainant to the accused for giving the said bank guarantee. Thus, there was overhelming evidence to show that the subject cheque was not sent by way of payment of any debt but as security till the bank guarantee was given. It may be reiterated that the very letter by which the subject cheque was sent to the complainant abundantly made clear that it was sent by the accused/company as security till such time the accused sent the bank guarantee to the complainant. It is also not the case of the complainant that the complainant had informed the accused that in case the said bank guarantee was not forthcoming by any particular date, the complainant would be compelled to realize the said security.

10. The Apex Court in M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, has stated that once the defence that the cheque was issued by way of security is accepted as probable, the cheque, cannot be held to have been issued in discharge of a debt and the same would not come within the purview of Section 138 of the Act. The said ratio laid down by the Apex Court was followed in Karekar Finance Pvt. Ltd. V/s. Shri M.N. Bashyam & anr. (unreported decision of this court dated 22/08/2007 in Criminal Appeal No. 63 of 2005).

11. In view of the above finding, it is not necessary to go into the correctness of the finding given by the learned Magistrate that no prosecution would lie against the accused because the amount of the cheque was subsequently covered by award dated 3/03/2006. In the above view of the matter, this is not a fit case to grant special leave to appeal. Application rejected.

