
(2012) 12 BOM CK 0103

In the Bombay High Court

Case No : Criminal Application No. 1187 of 2011 and Criminal Writ Petition No. 983 of 2012

M/s. Carissa Investment Pvt. Ltd. and Another

APPELLANT

Vs

M/s. Mahabal Realty Pvt. Ltd. and Another
 M/s.
Mahabal Realty Pvt. Ltd. Vs The State of Maharashtra and
Others

RESPONDENT

Date of Decision : 20-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Negotiable Instruments Act, 1881 (NI) — Section 118(a), 138, 139, 141

Citation : (2012) 12 BOM CK 0103

Hon'ble Judges : K.U. Chandiwal, J

Bench : Single Bench

Advocate : Shirish Gupte @ Mr. Ketan Chotani in Criminal application No. 1187 of 2011 and Mr. Jatin P. Shah in Criminal Writ Petition No. 983 of 2012, for the Appellant; Jatin P. Shah and Mr. A.R. Patil, APP for State in Criminal Application No. 1187 of 2011, Mr. A.R. Patil, APP for State and Mr. Ketan Chotani, for Respondent Nos. 2 and 3 Criminal Writ Petition No. 983 of 2012, for the Respondent

Final Decision : Dismissed

Judgement

K.U. Chandiwal, J.—Heard finally. Criminal application no. 1187 of 2011 is moved by the accused nos. 1 & 4-applicants challenging order of process confirmed by the learned Additional Sessions Judge dated 5th October, 2011. Writ petition no. 983 of 2012 is moved by the original complainant questioning quashing of process against respondent nos. 2 and 3 (original accused nos. 2 and 3). The parties are referred as complainant and accused. On the complaint of Mahabal Realty Pvt. Ltd. u/s 138 read with 141 of the Negotiable Instruments Act, the learned Judge issued process after recording verification on 17th December, 2008.

2. The complaint proceeds on the accusation that in discharge of legally

enforceable liability in respect of financial assistance rendered by the complainant to the accused no. 1 from time to time, a cheque of Rs. 10 crores was issued. An agreement was entered into between the parties. The complainant used to send statement of accounts in respect of loan transaction (financial assistance) to accused no. 1. Since there was default in repayment of outstanding dues in terms of the agreement, the complainant company sold shares given to them by way of security for clearing the outstanding legal dues. The sale proceeds of the shares were adjusted towards the outstanding legal dues. The company-complainant asserts that in the month of September, 2009, it had approached all the accused with request to clear balance legal dues, but barring blank assurances nothing fruitful has taken place. The cheque in question was signed by the original accused no. 4, with consent and knowledge and in presence of accused nos. 2 and 3, in discharge of their liability.

3. As on 30th September, 2008, a sum of Rs. 3,57,96,991/- was due and receivable from accused no. 1 to complainant company, and since the amounts were not paid, the cheque of Rs. 10 crores was presented in Kotak Mahindra Bank Ltd. and same is returned to the bank with Cheque Return Memo dated 1.10.2008 of HDFC Bank Ltd. and also Cheque Return Memo dated 1.10.2008 of Kotak Mahindra Bank Ltd. with the endorsement "Funds Insufficient". This was followed by the statutory notice to the accused. The notice was received by accused no. 1 company, however, it was refused by accused nos. 2, 3 and 4.

4. In the statutory notice in paragraph 7, it was specifically informed that as on 30th September, 2008, an amount of Rs. 3,57,96,991/- was due and receivable from the accused and same was demanded, though the cheque was of Rs. 10 crores.

5. The learned Counsel for accused submits that the cheque was as a security and could not have been presented. The liability was reduced as could be seen, therefore, presentation of a cheque for Rs. 10 crores was illegal. The predominant factor in the matter is (a) a cheque was given as security, could it be presented for recovery of dues; (b) The cheque was for a higher amount than due, could it brand drawer with liability.

6. Under the Scheme of the Negotiable Instruments Act, Court has to presume a negotiable instrument to be for consideration unless the existence of consideration is disproved. The Petition is u/s 482 of Cr.P.C. seeking to quash the proceedings, which need not be entertained, unless parties lead evidence. This is more so, for the Petitioners/Accused there is nothing primarily to accelerate and project a travesty of justice or process has dominantly arrested legitimate rights or is a weapon of oppression.

7. Section 138 of the Negotiable Instruments Act does not preclude a Court for considering earlier payments if made. Example quoted by Mr. Shah is eloquent to generate thought process.

8. If a borrower has issued a cheque for amount due to the Creditor,

mischievously deposits paltry sum in later's account, can he be permitted to stall the legal consequences of dishonour of the cheque. I find substance in it.

9. There was no legal bar in the instant case for the complainant to accept part payments and give credits to the Petitioners under a communication. The statutory notice dated 25.10.2008 specified identified amount and it was demanded.

10. Mr. Gupte, Learned Senior Counsel for Petitioners has relied to the judgment of Hon'ble Supreme Court in the matter of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, . It was a matter dealing with presumption u/s 118(a), 139 of effect of Section 138 of the Negotiable Instruments Act. It was observed, onus of proof on accused, is not as heavy as that of the prosecution. In the said case requisite supporting documents in tune with Rules and procedure of Stock-Exchange to establish liability was not placed by the Complainant, since Accused had disputed the nature of transactions. It was seen, all bargains on securities carried on for a period of 14 days is known as Settlement.

11. In reply to statutory notice, Petitioners did not dispute issue of cheque. There was no response to pay specified sum. Again, Bank statement of Petitioners to show sufficient Credit balance and demanded amount in the account is nowhere projected. Even if so, still it is a matter of evidence. The Agreement dated 7th January, 2008 provides for issuing post dated cheques to the Lender of the due repayment of amount.

12. Hon'ble Supreme Court in K.R. Indira Vs. Dr. G. Adinarayana, in paragraphs 8, 9 and 11 observed as under:-

8. As was observed by this Court in Central Bank of India and Another Vs. M/s Saxons Farms and Others, , the object of the notice is to give a chance to the drawer of the cheque to rectify his omission. The demand in the notice has to be in relation to "said amount of money" as described in the provision. The expression "payment of any amount of money" as appearing in the main portion of Section 138 of the Act goes to show it needs to be established that the cheque was drawn for the purpose of discharging in whole or in part of any debt or any liability, even though the notice as contemplated may involve demands for compensation, costs, interest etc. The drawer of the cheque stands absolved from his liability u/s 138 of the Act if he makes the payment of the amount covered by the cheque of which he was the drawer within 15 days from the date of receipt of notice or before the complaint is filed. Central Bank of India and Another Vs. M/s Saxons Farms and Others, .

9. In Suman Sethi Vs. Ajay K. Churiwal and Another, , it was held that the legislative intent as evident from Section 138 of the Act is that if for the dishonoured cheque the demand is not met within 15 days of the receipt of the notice the drawer is liable for conviction. If the cheque amount is paid within the above period or before the complaint is filed, the legal liability u/s 138 ceases to

be operative and for the recovery of other demands such as compensation, costs, interests etc. separate proceedings would lie. If in a notice any other sum is indicated in addition to the amount covered by the cheque, that does not invalidate the notice. *Suman Sethi Vs. Ajay K. Churiwal and Another*, .

11. Strong reliance was placed by learned Counsel for the appellants in *Suman Sethi's* case (supra) to contend that if the indication in the notice of other amounts than covered by the cheque issued, does not as held by this Court invalidate the notice, there is no reason as to why a consolidated notice for two complaints cannot be issued. The extreme plea as is sought to be raised in this case based upon *Suman Sethi's* case (supra) is clearly untenable. Though no formal notice is prescribed in the provision, the statutory provision indicates in unmistakable terms as to what should be clearly indicated in the notice and what manner of demand it should make. In *Suman Sethi's* case (supra) on considering the contents of the notice, it was observed that there was specific demand in respect of the amount covered by the cheque and the fact that certain additional demands incidental to it, in the form of expenses incurred for clearance and notice charges were also made did not vitiate the notice. In a given case if the consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishonoured, mere fact that it was a consolidated notice, and/or that further demands in addition to the statutorily envisaged demand was also found to have been made may not invalidate the same. This position could not be disputed by learned Counsel for the respondent. However, according to the respondent, the notice in question is not separable in that way and that there was no specific demand made for payment of the amount covered by the cheque. We have perused the contents of the notice. Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made not of the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount; nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. What is necessary in making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice on question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which expose the drawer of being proceeded against u/s 138 of the Act. That being the position, the ultimate conclusion arrived at by the trial Court and the High Court do not call for interference in these appeals, though for different reasons indicated by us. The appeals are accordingly dismissed. *Suman Sethi Vs. Ajay K. Churiwal and Another*, .

13. It is thus clear, validity of notice, as pointed out by Lord Justice Lindley, L.J. in *Sidebotham v. Holland*, (1895) 1 QB 378 "ought not to turn on the splitting of

a straw". It must not be read in a hyper-critical manner, nor must its interpretation be affected by pedagogic pendantism or over refined subtlety, but it must be construed in a common sense way."

14. Security

The defence of cheque issued as a security is succinctly dealt by this Court in "Harshad Shambhulal Sheth Vs. Sangeeta Rajesh Varma & Anr. (2010 All MR (Cri) 1909)" explaining concept of Security. Paragraph 14 reads as under:-

14. The defence of cheques given by way of security necessarily requires the borrower or the drawer of the cheques to show how the main debt is repaid by him so that the security could not be enforced by deposit of the cheques. The defence of security devoid of the evidence of repayment otherwise than by the dishonoured cheque can never be accepted. Security itself shows a debt due. The admission and the case that blank cheques were issued itself shows that at the time of issue there was a debt to be repaid.

Thus the intrinsic defence of cheque to be security is a matter of evidence. Thus, the stand of petitioner as Accused cannot be entertained.

Now turning to writ petition by complainant, if one peruse the recitals in complainant, it does not indicate any active role, participation or negotiation by original Accused nos. 2 and 3. It is said Accused nos. 2 and 3 consented or knew of the cheque, may be correct, but will not bind with vicarious liabilities. Hence, order of Additional Sessions Judge quashing process against Accused no. 2 and Accused no. 3 does not call for interference. Hence, order:-

ORDER

Criminal application no. 1187 of 2011 is dismissed with costs. Writ petition no. 983 of 2012 is dismissed with costs.

Parties to appear before the learned M.M. Andheri on 18th January, 2013. Liberty to apply, if the matter is not taken up for hearing, within three months.