

(2013) 09 BOM CK 0078

In the Bombay High Court

Case No : Criminal Application No. 437 of 2012

M/s. General Detergents, Mumbai

APPELLANT

Vs

Arun H. Merchant, N.D. Shenoy, P.P. Malvankar and State of
Maharashtra

RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2013) 09 BOM CK 0078

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : P.D. Desai, for the Appellant; Rajdeep Samudrala, instructed by
Udaya Sankar Samudrala for Respondent No. 1 and Mr. V.B. Konde Deshmukh,
APP for State, for the Respondent

Judgement

A.H. Joshi, J.—Heard learned Advocates appearing on both sides. Perused impugned judgment and record produced alongwith application.

2. Facts as argued and are narrated in the application for leave to appeal are summarised as follows:-

(a) On 2nd November, 1998, the respondent, issued a cheque in favour of appellant bearing cheque No. 390499 for Rs. 15,02,092.80 drawn on ANZ Grindlays Bank in discharge of their liability.

(b) The said cheque was dishonoured. The statutory notice u/s. 138 of N.I. Act, sent by appellant was served on the Respondent. Since payment was not made, on 17/12/1998, the Appellant filed a complaint u/s. 138 r/w 141 of N.I. Act.

(c) The complainant's witness filed his Affidavit of Examination in Chief. In his further examination in chief, the applicant's witness has produced Exhibit C-16 a letter dated 7th April, 1998, written by the Accused stating therein that Accused Nos. 2, 4 and 5 were authorised by the board of the company to draw, negotiate and accept the cheques, Promissory Notes, Bills of Exchange, etc. on behalf of the Accused No. 1 company. The complainant was cross examined at length.

(d) After completion of the evidence of the Complainant, the statements of Accused were recorded u/s 313 of Cr. P.C., wherein they have denied the liability.

(e) The Accused Nos. 3 & 5 have recorded their evidence and they were cross examined by the advocate for the Complainant.

(f) During the course of the trial, the Accused No. 2 Mr. Umesh Bhatia has expired, and the complaint had abated against him.

3. After going through the Evidence, the Arguments and the Judgments cited by both the parties, learned Metropolitan Magistrate came to the conclusion that the Complainant has proved its case beyond reasonable doubt, and the Accused were found and were held guilty of commissioning of the offence u/s 138 read with section 141 of the Negotiable Instruments Act, 1881, and convicted them.

The learned Metropolitan Magistrate ordered as follows:-

(1) The accused No. 1 Vitara Chemicals Limited, accused No. 3 Shri Vijay M. Bhatia, accused No. 4 Shri Arun H. Merchant, accused No. 5 Shri N.D. Shenoy and accused No. 6 Shri P.P. Malvankar are convicted for the offence punishable u/s 138 r/w Section 141 of the Negotiable Instruments Act, 1881, vide Section 255(2) of the Code of Criminal Procedure.

(2) The accused No. 1 Vitara Chemicals Limited is sentenced to pay a fine of Rs. 3,00,000/- (Rupees three lacs only).

(3) The accused No. 3 Shri Vijay M. Bhatia is sentenced to suffer Simple Imprisonment for 1 (one) month and to pay a fine of Rs. 7,00,000/- (Rupees Seven lacs only), in default to suffer further Simple Imprisonment for 1 (one) month.

(4) The accused No. 4 Shri Arun H. Merchant, accused No. 5 Shri N.D. Shenoy and accused No. 6 P.P. Malvankar are sentenced to suffer simple imprisonment for 6 (six) months each and to pay a fine of Rs. 7 Lakhs each, in default to suffer SI for one month each.

(5) The complainant, that is M/s. General Detergents is awarded the compensation of Rs. 30,00,000/- (Rupees thirty lacs only) out of the total recovered fine amount from the accused Nos. 1 and 3 to 6 and the complainant is entitled to withdraw the same after the period of appeal.

(6) The bail bonds of the accused No. 3 to 5 are cancelled.

4. The convicted accused - respondent nos. 1 to 3 preferred an Appeal against the order of Conviction passed by the Learned Metropolitan Magistrate by filing two separate Appeals being Appeal Nos. 439 of 2010 and 440 of 2010.

5. The said Appeals are allowed by the Learned Additional Sessions Judge, by judgment and order dated 30th January 2012, and the accused have been acquitted.

6. Aggrieved by the aforesaid order of Acquittal, the appellant has preferred this application for leave to Appeal, against the judgment and order of acquittal.

7. Heard both sides, perused the impugned judgment and record annexed to the application.

8. It is seen on perusal of impugned judgment that learned Sessions Judge, found that it is not a fit case for conviction, holding that:-

The copy of board resolution of the company, relied upon by accused only proved authority to sign the cheques and did not extend to being incharge or responsible for the day to day conduct of business of the company.

In the oral evidence (on affidavit) the complainant has reiterated the version contained in the complaint that "the accused are incharge of day to day business of the conduct of the company" but said fact is not proved.

Grounds of challenge

9. Amongst various grounds of challenge raised in the application, certain grounds which are crucial are as follows:-

F. The Learned Additional Sessions Judge also erroneously observed that the Affidavit of Evidence in lieu of Examination in Chief of the Complainant, when perused, makes out a repetition of the paragraph from the Complainant, in the improved form of true copy of the Resolution of Accused No. 1 company dated 10th January 1997.

I. The learned Additional Sessions Judge failed to appreciate that in the Board Resolution dated 10th January 1997 of Accused No. 1 company, it was shown that Accused No. 2 was the Managing Director, Accused No. 3 was the Chairman, Accused No. 4 was the Executive Director and Accused Nos. 5 & 6 are the Director (Finance) and Director (Commercial) respectively.

L. The learned Additional Sessions Judge also erroneously observed that the piece of evidence would not sufficient the purpose to fasten the liability on the persons u/s 141 of the Negotiable Instruments Act, 1881.

S. It is submitted that one more aspect the learned Additional Sessions Judge lost sight of is that during the course of the arguments before the Learned Metropolitan Magistrate, a copy of the Application was produced by the Appellant herein. The Accused No. 1 had filed an application before BIFR Authority for the revival of the company. Incidentally, the said application was filed in the year 1999 and in the said Application before the BIFR Authority, it was specifically mentioned that all the Applicants (including the Respondent No. 1 herein) are in charge and responsible to the day to day affairs of the said company. The learned Additional Sessions Judge lost sight of the fact that the said cheque was deposited in November 1998 and accordingly the Notice was given on 13th November 1998. When the notice was received by the said Vitara Chemicals Ltd. it was not replied by the said Vitara Chemicals Ltd. Even though the criminal

jurisprudence is accepted that the burden of the Complainant to prove the case is higher than that of Accused, even then it can be safely assumed by going through the Evidence of the Complainant and various documents produced by him in support of his case that all Accused were in charge and responsible to the day to day affairs and overall business and control of the company.

(quoted from page 12, 13, 14, 17 & 18 of the paperbook)

How the information about day-to-day involvement of officers could have been explored/searched by a complainant.

10. Ordinarily, signatory of cheque would be liable for his act. This situation however does not generate an irrefutable corollary that each person, who signs the cheque could *epso facto* be held liable for criminal act. Therefore, the question which arises and is bound to arise is as to what may be the source of knowledge to complainant to know such facts which pertains to be a matter of internal management of the company.

For an outsider the information about internal management of a company could be a matter of mystery, however, answer it to may not be full of same degree of mystery.

11. It is often seen that:-

(a) The signatory of cheque do and may claim to be excused of any liability under exception due to section 141 by simple denial.

(b) Signatories deny liability without showing to the complainant and without furnishing full information as regards the persons who are in fact involved in the day-to-day business of the accused company.

12. Section 141 carves out license in favour those persons noticed and named as accused that they are not involved in the day to day business and the management of companies. However, any duty is not fastened by any provision of law to section 141 or any other provision duly enacted or by any precedent, that the accused who claim that he or they who claim that he/they is/are not incharge of day-to-day business of company to disclose if they know, who else are the individuals responsible for it.

13. Persons in the field of corporate governance and all their aides in law, have to know that a single individual or group of individuals alone and isolation, may not be incharge and involved in day-to-day activities of administration and management of the business of the company. It is very well known that many personnel are ordinarily engaged in different fields depending on volume, territory and complexion of business. The signatories of cheque could be person other than a person who may be involved in day-to-day business of the company. The day-to-day business may even be divided in various subjects, fields and/or branches depending on speciality, expertise etc.

14. The division of work would always be matters of personal knowledge of the

personnel involved in the day to day business of a company who is accused. In some cases it is likely that the complainant may know all these matters, however, it is just a possibility. Therefore, before naming any individual as accused the complainant ought to collect the information as to details of the names of the persons to be named as accused alongwith the information of exact role of such individuals in the day-to-day business of the company.

15. Therefore, whenever notice of dishonour of the cheque is to be issued it is the primary duty of the payee who has to suffer due to dishonour of the cheque to call from the signatories of cheque, as well from principal officers of company such as the Company Secretary, Managing Director, full time Directors and even other Directors of the company concerned, and call them to furnish information such as:

(i) The details as regards the authority of signatory of cheque, his involvement in day-to-day business of the company and its extent if it can be described.

(ii) The details of authority on which the signatory had signed the cheque and details of his exact entrustment of powers, functions and duties.

(iii) If the signatories claim that they are not involved in the day-to-day business, the information as regards the persons who are involved in the day-to-day business.

(iv) Information as regards exact role of signatory in the day-to-day business of the company and reasons if any on the basis of which the concerned could claim excuse from criminal liability.

16. Information may also be sought from the Registrar of the Companies by conducting search of record and securing certified copies of various returns annual or other periodical statements which may have been filed by the company.

17. Therefore, it is obligatory on the part of complainant, initially to take steps to trace, track, explore and discover the names of the individuals who are involved in running the day to day business of the company. The exercise of search ought to begin no sooner the cheque gets dishonoured, and at the time of and/or simultaneous to issue of notice of dishonour of cheque.

18. Exploring and discover of said information is imperative in view of section 141 of the Negotiable Instruments Act, unless complainant is willing to have the complaint dismissed.

19. After the notice is issued to the signatories to furnish information and it would be possible for the complainant to ascertain whether the signatory of the cheque claims to be excused from criminal liability and as regards names of the person involved in the day-to-day business of the company.

20. Whenever the information which is called for and it is not supplied or even if it is not supplied by the Company Secretary (who is statutory officer and principal advisor of the company) or any Director, who is discharging duties of

Company Secretary, all concerned could also be summoned as witness of complainant for furnishing and bring on record and prove as to who are the persons involved in day to day business of the company even if they be arrayed as accused.

21. Even it would be within the powers of the court to hold enquiry or cause a report u/s 202 of the Code of Criminal Procedure from police by referring the complaint and specific question as regards exact role of particular accused persons in the day to day business of the company, if it is seen that the individuals who know the facts, are suppressing those from the court.

22. After all this exercise is done, then the burden which is on the complainant would shift on the accused, to prove that some other person whose names he may disclose alone are persons who are involved in day-to-day business of the company.

23. Such situation would prevent cases of present nature being defeated on account of deficiency as to lack of information and evidence regarding involvement of person or person responsible for conduct of day-to-day business of the company.

24. It has to be borne in mind that law does not carve out any presumption in favour of the complainant, that the signatory of cheque as a drawer and as company's representative, be declared or be presumed to be incharge and responsible for day to day conduct of business of company to shoulder the burden even of criminal liability.

25. The path of findings is always guided and supported by the factual foundation as led and laid by the complainant.

Laying the foundation begins from issue of notice of dishonour, calling disclosure of the information as regards names of the individuals who may be involved and responsible for day to day business of the company. Searches etc. and ultimately if needed, by summoning all those including the accused to produce documentary evidence about said fact as regards names of persons involved in day-to-day business of the company.

26. Upon issue of such notice and abstinence from disclosure by the officers of the company section 106 of Evidence Act would come into play for a plea of adverse inference due to act of accused in withholding the information in rebuttal of evidence brought against them.

27. The drawee of cheque has to take action against a company and signatories and other individuals, in his own interest. Therefore, the complainant has to know that it had to cross the hurdle or precondition prescribed in section 141 of the Negotiable Instruments Act. Therefore, the complainant has to exert on his own and in advance than waiting for disclosure of a defence and then to be felt denuded and rendered astute and to blame the law.

Discussion on facts of case

28. It is seen that the complainant has relied on certain documents furnished by the accused persons before BIFR. It was urged that the accused had represented before BIFR that the accused persons are incharge of business. It is seen that those documents were tendered at the time of arguments before the Magistrate. Those are not admitted documents nor those were duly proved.

29. Bare production of documents relating to BIFR at the stage of arguments cannot take place of proof of facts sought to be relied upon as a basis of conviction. The documents which are not admitted could not carry any value in support of the complaint and against accused to base a conviction.

30. Entire thrust and reliance before trial Court was on:-

(a) The resolution which expresses authorisation to particular accused persons to sign cheques and other negotiable instrument.

(b) The contention that the accused had acknowledged the debt which in turn revived fresh limitation due to section 18 of Limitation Act.

(c) Admission on the documents filed by accused before BIFR.

31. It is not the case of the appellant that any steps which are illustratively referred in earlier paras of this judgment were resorted to. Any summons was not sought to secure attendance of the Company Secretary or any other principal officer of the company. Such exercise would have helped the complainant to explore and bring before the court. Applicant's efforts to prove that in exclusion to any other or all other individuals in the company, the accused alone or jointly with other individuals, are responsible as incharge of day to day conduct of business of the company.

32. In absence of all these or such steps indicated in foregoing paragraphs 14 to 28, a clamour that the signatory of a cheque is responsible officer entrusted with day to day affairs, is an argument with sheer loud voice than evidence or proof of fact in issue.

33. In the result, the complaint fails on ground that the applicant has failed to discharge his burden which solely rests on the complainant. The application for leave to appeal has no merit and is dismissed.