

(2005) 10 KAR CK 0038

In the Karnataka High Court

Case No : Criminal Petition No. 2344, 3555 to 3557, 3560, 3562 to 3571, 3585 to 3588, 3612 to 3619, 3628 to 3632, 3634 to 3637, 3639 to 3643, 3645 to 3669, 3671, 3673, 3675 to 3685 and 3687 to 3695 of 2005

M.S. Zahed and Another

APPELLANT

Vs

Cosmos Co-operative Bank Ltd.

RESPONDENT

Date of Decision : 06-10-2005

Acts Referred:

Companies Act, 1956 — Section 482

Criminal Procedure Code, 1973 (CrPC) — Section 293

Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141 (2)

Citation : (2006) 3 BC 449

Hon'ble Judges : Mohan Shantanagoudar, J

Bench : Single Bench

Advocate : Joshua H. Samuel, for Cariappa and Co, for the Appellant; N.V. Srinivasan, for N.V.S. and Associates, for the Respondent

Final Decision : Dismissed

Judgement

Mohan Shantanagoudar, J.—Heard Mr. Joshua H. Samuel of M/s Cariappa and Co., learned Counsel appearing for the petitioners, Mr. M.V. Srinivasan learned Counsel appearing on behalf of the respondent-bank and perused the material on record. As the common facts and questions of law are involved in all these matters, they are heard together and disposed of by this common order by consent of both the Advocates.

2. Based on the eighty eight (88) complaints lodged by respondent herein viz., Cosmos Co-operative Bank Ltd., Pune ("Bank" for short), eighty-eight criminal cases are registered against petitioners herein and others in the Court of the XVI Additional Chief Metropolitan Magistrate, Bangalore for the offence punishable u/s 138 of the Negotiable Instruments Act ("N.I. Act" for short). The petitioners herein who have been arrayed as accused Nos. 2 and 4 in all the cases have sought for quashing the said proceedings pending in 88 criminal cases by filing petitions.

3. The only contention raised in these petitions by Sri. Joshua H. Samuel, learned Counsel appearing for the petitioners is that the petitioners herein are not responsible or in-charge of day-to-day affairs of business of the first petitioner company viz., M/s. HMT Watches Ltd., which is a subsidiary company and that the averments made in the complaints do not disclose that the petitioners herein are in-charge and are responsible for conducting the business of the company and. consequently, the proceedings initiated against them arc not maintainable and hence are liable to be quashed. In support of his contentions, he placed reliance upon recent judgment of the Apex Court dated 20.9.2005 rendered in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, and Ors. connected matters.

4. Per contra, Mr. N.V. Sreenivasan, learned Counsel appearing on behalf of the respondent-bank vehemently contended that the complaints have been lodged against the 1st accused company and against the officials who arc incharge of or responsible for the day-to-day affairs of the said company that none of the other directors, who are not incharge of the company are not made as accused; that statutory notice has been issued before initiating the proceedings to these petitioners and that there is no denial of the liability of the petitioners in the reply notice; that Section 293 of the Companies Act makes it clear that the petitioners herein are responsible for the day-to-day affairs of the company; that in the balance-sheet of the company to which petitioners are the signatories, there is an admission regarding liability of the debt due by the company to the respondent-bank and that petitioners cannot plead ignorance about the same; that the material on record, if read in toto would clearly disclose that the petitioners herein are in-charge of and responsible for the day-to-day affairs of the subsidiary company as well; that the plea of not having knowledge or that they arc not responsible for the day-to-day affairs/business of the company is a pure question of fact, which cannot be gone into at this stage of the proceedings. On these, amongst other grounds, he prays for dismissal of the petitions.

5. Totally six (6) persons have been arrayed as accused in the complainant, of which, 1st accused is the company viz., M/s. HMT Watches Ltd. Accused Nos. 3, 5 and 6 are the Secretary, Deputy Manager (Finance) and Manager (Finance) respectively and these accused Nos. 3, 5 and 6 have not approached his Court. The 1st petitioner is the Chairman of the holding company viz., HMT Ltd., as well as the Chairman of the subsidiary company i.e., M/s. HMT Watches Ltd. The 2nd petitioner is a group General Manager (Watches) of said subsidiary company.

6. The Supreme Court in the case of S.M.S. Pharmaceuticals Ltd., cited supra has laid down the following guidelines to be followed in such matters:

(a) It is necessary to specially aver in a complaint u/s 141 that at the lime the offence was committed, the person accused was incharge 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 question posed in Sub-para (b) has to be in 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 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 affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in-charge of the company and responsible to the company for 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 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.

7. Though the words "at the time of commission of offence the petitioners were incharge of and responsible for conduct of day-to-day business of the company" are not so specifically mentioned in the complainants on hand, the complaints, if read in toto would disclose the gist and meaning of the aforesaid words.

8. It is not in dispute that the petitioner No. 1 herein is not only the Chairman of the holding company but also the Chairman of subsidiary company i.e., M/s. HMT Watches Ltd., which is accused No. 1 in these cases, petitioner No. 2 is the Group General Manager (Watches) of the company. The complaint clearly discloses that these petitioners are the officers of the 1st accused company, which is carrying on the business of manufacturing the watches and spare parts; and that the company is represented by its authorised officers namely, accused Nos. 2 to 6. It further discloses that statutory notices are served on the authorised officers namely, accused Nos. 2 to 6 calling upon these accused to pay the amounts involved in the cheques in question and the said authorised officials have acknowledged the receipt of notices and in spite of the same, those officials have failed to pay the amounts involved in the cheques. Hence, the authorised officers are liable to be prosecuted under the provisions of Section 138 of N.I. Act along with 1st accused company. Thus, if the complaint is read in its entirety, the same makes it clear that these petitioners are the authorised officers of the 1st accused company and they are incharge of and responsible in the day-to-day affairs/business of the 1st accused company.

9. The statutory notices sent by the complainant to these petitioners and other accused were received by them and all the accused including the petitioners

herein have sent a joint reply to the complainant. Nowhere in the said reply, these petitioners have stated that they are not incharge of and responsible for day-to-day affairs/business of the 1st accused company. On the other hand, it is the specific contention of these petitioners that the cheques in question are issued by the company by way of security for the loan borrowed from the respondent-bank. If really these petitioners are not responsible or incharge of the day-to-day affairs/business of the company, they would not have remained silent in that aspect of the matter, in their reply.

Articles of Association of the 1st accused company, if read carefully, would clearly reveal that the company has got Chairman, Managing Directors, full-time directors, alternative directors, nominee directors, additional directors. The word "nominee director" are explained under Article 79 of the Articles of the Association. The petitioners herein being the whole time Chairman and Group General Manager (Watches) respectively will not come within the meaning of "Nominee Directors" as contained in Article 79 of the Articles of Association of the company. Further, Article 90 of the Articles of the Association makes it clear that Managing Director shall be a whole time employee/officer of the company for the conduct of management of the company. The powers of the Directors are explained in Article 89 of Articles of Association which includes acquisition of property, securing and fulfillments of any contracts by mortgage, to bring and defend any action, etc., invest money, to give security by way of indemnity, to sub-delegate powers, etc. The powers of the Chairman of the 1st accused company, are found in Article 96 of the Articles of Association. The same amply discloses that no decision shall be taken on important issues in the absence of the Chairman of the company. Thus, the Articles of Association prima facie makes it clear that these petitioners being the Chairman and Group General Manager are incharge of and responsible for day-to-day affairs and business of the company.

10. Added to it, certain documents relating to the transaction between the 1st accused company and complainant-bank which are produced on behalf of the bank before this Court would prima facie disclose that the board meetings have taken place in the presence of these petitioners and these petitioners are also signatories to certain vital documents including the balance sheet, etc. Under such circumstances, the contention of the learned Counsel for the respondent-Bank that 88 cheques involved in these petitions would not have been issued by the 1st accused company without the knowledge of the petitioners, cannot be lightly brushed aside. The material on record prima facie discloses that these petitioners are in-charge of and responsible for the day-to-day affairs/business of both the holding and subsidiary company.

11. There cannot be any dispute in the proposition that the complaint would not lie against a person who is not responsible for day-to-day affairs of the business of the company. In the recent judgment, the Apex Court in the case of S.V. Mazumdar and Ors. v. Gujarat State Fertilizer Co. Ltd. III (2005) BC I : II (2005)

CCR 167 : IV (2005) SLT 58 : 2005 SCR (Cri.) 567, has observed thus:

Para 8--We find that prayers before the Courts below essentially were to drop the proceedings on the ground that the allegations would not constitute a foundation for action in terms of Section 141 of the Act. These questions have to be adjudicated at the trial. Whether a person is in-charge of or is responsible to the company for conduct of business is to be adjudicated on the basis of materials to be placed by the parties. Sub-section (2) of Section 141 is a deeming provision which as noted supra operates in certain specified circumstances. Whether the requirements for the application of the deeming provision exist or not is again a matter for adjudication during trial. Similarly, whether the allegations contained are sufficient to attract culpability is a matter for adjudication at the trial.

Para 9?Under Scheme of the Act, if the person committing an offence u/s 138 of the Act is a company by application of Section 141 it is deemed that every person who is in charge of and responsible to company for conduct of the business of the company as well as the company are guilty of the offence. A person who proves that the offence was committed without his knowledge or that he had exercised all due diligence is exempted from becoming liable by operation of the proviso to Sub-section (1). The burden in this regard has to be discharged by the accused.

Thus, the question as to whether the petitioners were involved in the day-to-day affairs of the business of the company or not is a pure question of fact, which cannot be decided in this petition filed u/s 482 of Cr.P.C. The said question has to be determined based on the material to be collected during the course of the trial and this Court cannot transform itself into a Court of trial to decide such issue at this stage.

12. There may be several directors in a company. The complainant who has lent money and supplied goods cannot know what is the role played by the different directors in the company. It is also impossible for the complainant to verify the activities of each director in the management and responsibility in the conduct of the business of the company and on whose behalf the cheque is issued. The complainant may not be in a position to fish out information from the officers of the company and nevertheless from the directors themselves. Therefore, it may be practically impossible for the complainant to describe the responsibility of each director of the company, the role played by them in the affairs of the company or the management of the company and in the conduct of the company can be established only at the time of trial. As far as this case is concerned, a specific notice has been issued to all the directors including these petitioners. These petitioners have not sent a reply stating that they are only sleeping directors or dormant directors and not in-charge of management, control or conduct of the business or having responsibility in the management and administration of the company. On the other hand, the reply has been sent by all the petitioners through their Counsel within a reasonable time. After sending such a reply notice, it is unfair on the part of the petitioners now to turn around

and say that they are not "responsible for the affairs, administration and management of the company.

13. The criminal proceedings cannot be scuttled at this stage of the proceedings as this Court finds that these petitioners were in-charge of and responsible for the day-to-day business of the company. At this stage, prima facie material is found against the petitioners. In view of my observations made above and in view of the dictum laid down by the Apex Court, I decline to entertain this petition and consequently, the criminal petition is liable to be rejected.

14. Having regard to the nature of offence alleged against the petitioners and as the identity of the petitioners cannot be disputed, the presence of the petitioners may be exempted before the Court below, if they file appropriate application before the trial Court. Hence, the following order is made:

The criminal petitions are dismissed with liberty to the petitioners to file appropriate applications before the Court below for their exemption if need be. If such applications are filed, the Court below is directed to exempt them from their appearance, if their presence is not necessary in the proceedings on that day.