
(2004) 08 GAU CK 0031
In the Gauhati High Court
Case No : Criminal Revision No. 262 of 2003

Nilam Devi Bagaria

APPELLANT

Vs

Vimal Kr. Todi

RESPONDENT

Date of Decision : 27-08-2004

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Penal Code, 1860 (IPC) — Section 420
Powers of Attorney Act, 1882 — Section 2

Citation : (2005) 2 GLR 600

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : G.N. Sahewala, A.K. Goswami, M. Goswami and Md. Aslam, for the Appellant; J.K. Choudhury and B.M. Choudhury, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—By the impugned order dated 30.10.2003, passed in Complaint Case No. 26/2003, the learned Chief Judicial Magistrate, Sonitpur, Tezpur, while taking cognizance of offences u/s 138 read with Section 142 of the Negotiable Instruments Act (hereinafter referred to as "the NI Act") against the accused-petitioner and one Pawan Kumar More, directed issuance of summons to the accused-petitioner. With the help of the revision present, the petitioner, who is an accused in the said Complaint Case, has sought for setting aside the impugned order and also for quashing the entire proceeding of the Complaint Case No. 26/2003 aforementioned.

2. I have heard Mr. P Bora, learned counsel for the accused-petitioner, and Mr. JM Choudhury, learned senior counsel, assisted by Mr. BM Choudhury, learned counsel for the opposite party. I have also heard Mr. FH Laskar, learned Additional Public Prosecutor, Assam.

3. The material facts, as emerge from the record, and the various stages, which have led to the present revision, may, in brief, be set out as follows:

(i) The opposite party herein, namely, Vimal Kumar Todi, a partner of M/s Sunrise Traders, instituted the Complaint Case No. 26/2003 aforementioned, the case of the complainant being, in brief, thus : The accused-petitioner No. 2, namely, Pawan Kumar More is the duly constituted attorney of M/s Nav Durga Bhandar, situated at Guwahati, of which the accused-petitioner No. 1, namely, Nilam Devi Begum (i.e., the present revision petitioner) is the proprietress. The complainant firm had business deals of supply of rice with M/s Nav Durga Bhandar aforementioned. The said proprietary business concern of the accused No. 1 received through cheques, between 19-2-2001 and 23-3-2001, advance payments of diverse sums of money from the complainant firm on the basis of assurance given by the said proprietary concern of the accused No. 1 to supply rice to the complainant firm at Tezpur. Though, in terms of the assurance so given and advance payments received, M/s Nav Durga Bhandar aforementioned supplied rice, during the year 2001, by issuing credit memo and road challans to the complainant firm, it failed to supply the rice for the entire amount, which it had received, in advance, from the complainant firm by cheques. Against the total sum of Rs. 38,42,000 received, between 19-2-2001 and 23-3-2001, by the said business concern of accused No. 1, it supplied rice worth Rs. 19,44,250 and also returned, through cheques, a sum of Rs. 5,92,000 out of the total amount of Rs. 38,42,000 aforementioned already received. Thus, a sum of Rs. 13,05,750 remained due and payable by the said business concern of the accused No. 1 to the complainant firm. The transactions, which had so taken place between the parties concerned, are duly reflected in the books of account of the complainant firm, which stands audited by Chartered Accountant. On repeated demands made by the complainant firm to repay the balance amount of Rs. 13,03,750, the accused No. 2, in order to refund the excess advance amount received from the complainant firm, drew and issued, in the name of the complainant firm, a postdated account payee cheque bearing No. 936216, dated 27-11-2002, for Rs. 13 lakh, at State Bank of India, Tezpur Branch, from the account belong to M/s Nav Durga Bhandar, the said post-dated cheque having been delivered by the accused No. 2 to the complainant firm, at Tezpur, in the month of November 2001. When the complainant firm deposited the said cheque for collection, the same was dishonoured and returned unpaid by the SBI, Tezpur Branch, along with a memorandum, dated 27-11-2002, showing that the cheque was dishonoured due to insufficiency of fund. The complainant, once again, presented on 4-12-2002, the said cheque for collection at the said bank , but the same was, once again, dishonoured and returned unpaid by the said bank with a memorandum dated 4-12-2004, on the ground of insufficiency of fund. The complainant firm, then, sent statutory notices by registered post with AD, on 12-12-2002, to the accused-petitioners demanding payment for the said amount of Rs. 13 lakh with interest accruing thereon. The said notice was received by the accused No. 1 on 24-12-2002, but the notice issued to the accused No. 2 was

returned by the post office with remark made thereon, "Addressee long time out of station and return to sender". The accused persons, thus, failed to make payment of the said amount of Rs. 13 lakh to the complainant firm despite the notice having been received by the accused No. 1, who is the proprietress of M/s Nav Durga Bhandar aforementioned and also the person, who had appointed the accused No. 2, as the attorney. Instead of making payment of the dues, the accused No. 1 sent a reply, dated 1-1-2003, to the said notice of the complainant firm. In her reply, the accused No. 1, with dishonest intention and ulterior motive, denied that the cheque, in question, had been drawn and issued by her said constituted attorney, i.e., the accused No. 2, in favour of the complainant firm and falsely claimed, inter alia, that her said attorney had lost the cheque book with leaves, some of which stood signed by the said attorney without, however, putting any amount as the said attorney had to do so, at times, for the sake of business convenience during his absence from station. It was also claimed by the accused No. 1 that immediately after losing the said cheque, her said attorney had lodged an FIR with the police at Tinsukia Police Station and the same was registered vide GD Entry No. 716, dated 21-12-2001, and that her said attorney had also informed vide letter, dated 24-12-2002, his bank of the loss of his said cheque book with advice not to honour any of the cheques from the said cheque book bearing leave Nos. 936201 to 936300. It was further alleged, in her said reply by the accused No. 1, that the accused No. 1 had come to learn from the notice of the complainant firm that the complainant firm had stolen away the said cheque book from the said attorney of the accused No. 1. The allegations, so made, against the complainant firm by the accused are wholly false and it can be discerned from the fact that the relevant records of the bank and other connected papers falsify the plea of the accused inasmuch as the bank's statement will reveal that several cheques of the cheque book, in question, alleged to have been lost, were, in fact, utilised by the said proprietary concern of the accused No. 1, operated by the accused No. 2. Despite having detected the alleged loss of cheque as early as on 21-12-2001, the accused have closed their bank account after more than one year, i.e. 24-12-2002. This delay clearly shows that the plea of the accused are not bona fide and made with ulterior motive. The accused have not only committed thereby offences u/s 138 read with Section 142 of the NI Act, but also u/s 420, IPC.

(ii) After examining the complainant u/s 200 Cr.P.C. and upon perusal of the materials on record, the learned Court below passed an order, on 30-1-2003, stating to the effect that there was a prima facie case made out against the accused persons u/s 138/142 of the NI Act and directed, as indicated hereinabove, issuance of summons accordingly to them. It is this order, which stands impugned in the present revision by the accused No. 1, i.e., Nilam Devi Begum.

4. Though, in tune with their reply to the notices, demanding payment of Rs. 13 lakh raised by the complainant firm, the present petitioner has agitated in the present revision petition to the effect that the allegations levelled against the

accused-petitioner, in the complaint, are false, mala fide and malicious and no prima facie case for taking cognizance u/s 138/142 in the NI Act was made out enabling the learned Court below to take cognizance of the said offence and/or to issue summons to the accused-petitioner, this aspect of the matter has not been agitated at the time of hearing of the present revision.

5. Be that as it may, it needs to be noted that when the contents of the complaint, read as a whole, disclose commission of an offence, the Court cannot refuse to take cognizance of such an offence except when the allegations, contained in the complaint, are inherently improbable or manifestly mala fide or lodged with ulterior motive. It is only when the allegations made in the complaint, even if taken at their face value and accepted in their entirety as true, do not prima facie constitute any offence or make out a case against the accused that one can say that no case for taking cognizance of any offence has been made by the complainant.

6. In the case of R.S. Raghunath Vs. State of Karnataka and another, the Apex Court gave a note of caution of the exercise of power of quashing of criminal proceedings in the following words :

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice." (Emphasis is added)

7. It is clear from a close reading of the principles laid down in the case of R.P. Kapur Vs. The State of Punjab, and Bhajanlal (supra) that broadly speaking, quashing of the First Information Report or the complaint is possible (a) when the allegations made in the First Information Report or the complaint, even if taken at their face value and accepted in their entirety as true, do not prima facie constitute any offence or make out a case against the accused ; (b) when the uncontroverted allegations made in the FIR or complaint and evidence collected in support of the same do not disclose the commission of any offence and/or make out a case against the accused ; and (c) when the allegations made in the FIR or complaint are so absurd and inherently improbable that on the basis of such absurd and inherently improbable allegations, no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

8. In other words, when the allegations made in a complaint disclose commission of an offence, such a complaint cannot be quashed by relying upon some other materials on which will depend the defence of the accused, for, in such cases, truthfulness or otherwise of the allegations contained in the complaint or the probability of the defence plea can be determined only by effective investigation

or at the trial.

9. When the complaint, in the present case, is read as a whole, it discloses prima facie commission of offences u/s 138 read with Section 142 of the NI Act. The learned Court below was, at the stage of taking cognizance, required to assume that the contents of the complaint were true. Had the contents of the complaint taken at their face value not disclosed and commission of the offence, the situation would have been different. Whether the allegations made in the complaint are true or false and/or whether the counter-allegations made by the accused-petitioners are true or believable is an aspect of the matter, which can be determined only at the trial and not in a quashing proceeding u/s 482 Cr.P.C. and/or under Article 227 of the Constitution of India.

10. At the time of hearing of the present revision petition, the only grievance, which has been raised, on behalf of the accused-petitioner, is that since the cheque, in question, is said to have been drawn and issued by the accused No. 2, the accused No. 1 cannot be held responsible for the offence, if any, committed by the accused No. 2. This submission is sought to be strengthened by drawing attention of this Court to the fact that in the complaint, it has not been alleged that the accused No. 1 is responsible for the day-to-day affairs of the accused firm, namely, M/s Nav Durga Bhawan. Reliance in support of this submission is placed by Mr. Bora on the case of Smt. Katta Sujatha Vs. Fertilizers and Chem. Travancore Ltd. and Another, This is decision of two-Judge Bench.

11. In all fairness, however, Mr. Bora, has also drawn the attention of this Court to the case of Raj Lakshmi Mills v. Shakti Bhakoo, reported in (2002) 8 SCC 236, wherein it has been held that at the stage of summoning an accused, the High Court cannot quash a proceeding u/s 482 Cr.P.C. on the ground that the person concerned was not in-charge of, or responsible for, the conduct of the business, for this is an aspect of the matter, which is to be decided on the basis of the evidence to be led by the parties. This decision is a decision of three-Judge Bench.

12. Controverting the submissions made, on behalf of the petitioner, that the accused No. 1 cannot be criminally made liable for the acts of her attorney. Mr. JM Choudhury has submitted that in terms of Section 2 of the Powers of Attorney Act, 1882, an act committed by the holder of the power of attorney would be presumed to be an act committed by the person, who gives the power of attorney, and, hence, in view of the fact that the accused No. 2 issued the said cheque as an attorney of the said business concerned of the accused No. 1, the accused No. 1 shall be presumed to have signed the cheque in terms of Section 2 of the Powers of Attorney Act, 1882. Reference, in this regard, is made by Mr. Choudhury to the case of Anil G. Shah Vs. J. Chittranjan Co. and Another,

13. It is also pointed out by Mr. Choudhury that the case of Katta Sujatha (supra), relied upon by Mr. Bora, is a case relating to partnership firm, where one of the partners may or may not be in-charge of, and/or responsible for, the

conduct of the business of the firm; whereas in the present case, the accused No. 1 is not a partner but the proprietress and, hence, she is fully responsible for the conduct of business of M/s Nav Durga Bhandar and for the acts of her said attorney, hence, the law laid down in Katta Sujara (supra) does not, contends Mr. Choudhury, apply to the facts of the present case.

14. While dealing with the rival submission made before this Court, it is important to bear in mind that the case of Raj Lakshmi Mills (supra) is a decision by a larger Bench and, therefore, binding on this Court. The case of Raj Lakshmi Mills (supra) clearly shows that the question as to whether a person is or is not in-charge of, and/or responsible for, the conduct of the business of a firm is a question, which cannot be decided at the stage of summoning of the accused, but on the basis of the evidence to be adduced by the parties concerned.

15. Coupled with the above, what is imperative to note, in the present case, is that M/s Nav Durga Bhandar is a proprietary concerned of the accused No. 1. As proprietress of M/s Nav Durga Bhandar, the accused-petitioner No. 1 does not stand on the same footing as a partner in a partnership firm, for, while one partner may be in-charge of, and responsible for, the conduct of the business of a firm, another partner of the same firm may neither be in-charge of, nor responsible for, the conduct of the business of the firm. In such a situation, the partner, who is neither in-charge of, nor responsible for, the conduct of the business of the firm may not be criminally liable. Unlike such a partner of a partnership firm, a proprietor or proprietress cannot claim that he or she is not in-charge of, or responsible for, the conduct of his/her proprietary business concern.

16. In the case at hand, what is, however, of utmost importance to note is that to the notices issued by the complainant firm in terms of Section 138 of the NI Act, when the accused-petitioner No. 1 replied thereto, she, nowhere, contended that she was not in-charge of, or responsible for, the conduct of the business of her said proprietary concern nor did she contend, in her said reply, that she was wholly unaware as to what was happening in a conduct of business of her said proprietor concern and/or as to what her attorney, i.e., the accused No. 2, had been doing with regard to the conduct of the said business. Far from this, a bare reading of the contents of the said reply of the accused-petitioner shows that the accused-petitioner was fully aware of, and responsible for, the conduct of the business of the said firm inasmuch in her said reply, she admitted that her said proprietary concern had business deals with the complainant firm. While so admitting her proprietary concern's dealings with the complainant firm, she not only denied that her proprietary concern had received any advance payment from the complainant firm promising future supply of rice as alleged by the complainant, but that the said cheque had been issued by her said attorney in favour of the complainant firm in order to settle their dues. The accused-petitioner further denied that there was any outstanding liability to be paid by her proprietary concern to the complainant and/ or that any cheque was issued by her attorney towards the satisfaction of any liability. The facts admitted by the

accused-petitioner in her said reply as well as her denial contained therein provide ample material to show that the accused-petitioner was in full control of her business and knew what her business concern had been doing.

17. In fact, to a pointed query made by the Court, Mr. Bora grudgingly conceded that the contents of the reply aforementioned clearly indicate that the accused No. 1, (i.e., the present revision petitioner) is in full control of the conduct of business of her said proprietary concern. Hence, the plea taken by the accused-petitioner that she was not in-charge of, or responsible for, the conduct of the business of her said proprietary concern and/or that she was not liable for what her attorney, i.e., the accused No. 2, had done are falsified by the contents of the said reply.

18. Apart from the fact that the law bind the principal for the act of his/ her attorney, what is of paramount importance to note is that the NI Act is a special Act. This Act makes provisions for giving of notices to the persons responsible for making payment of the amount for which a cheque, which get dishonoured for insufficiency of fund, is drawn. The purpose of giving notice is obviously to inform not only the person, who has drawn the cheque, but also the person, who is liable to make payment under such a cheque, that the cheque issued by him or on his behalf has been dishonoured so that he can make good the payment if he is liable to pay the amount for which the cheque has been drawn. If upon receipt of such a notice, the person responsible for making payment fails to do so, an offence u/s 138 of the NI Act is made out and such a person is liable for punishment u/s 142 of the NI Act.

19. The Explanation to Section 138 of the NI Act clearly explains that the expression "debt or other liability" means a legally enforceable debt or other liability. When the proprietary concern is under a debt or other liability, which is enforceable under the law and despite receiving notice u/s 138 of the NI Act, if the proprietor or proprietress does not make good his/her liability or clear his/her debt, he/she cannot escape the criminal liability imposed by Section 138 of the NI Act.

20. Because of what have been discussed and pointed out above, it is abundantly clear that in the face of the facts revealed from the complaint and the materials elicited during the course of the inquiry u/s 202 Cr.P.C., a prima facie case for taking cognizance for prosecution of the accused-petitioner and Pawan Kumar More aforementioned, u/s 138 read with Section 142 of the NI Act had been made out and the learned trial Court was wholly justified in taking cognizance of the same against the two accused persons and in directing issuance of process against them. For the conclusion, so reached, I see no merit in this revision and no reason to interfere with the impugned order and/ or the proceeding of the Complaint Case No. 26/2003 aforementioned.

21. In the result and for the reasons discussed above, this revision fails and the same shall accordingly dismissed.