

(1994) 01 BOM CK 0029

In the Bombay High Court

Case No : Criminal Miscellaneous Applications No's. 152 and 153 of 1993

Rajan Kinnerkar

APPELLANT

Vs

Eric Cordeiro and another

RESPONDENT

Date of Decision : 07-01-1994

Acts Referred:

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

Citation : (1994) 3 BomCR 634 : (1994) 2 CivCC 156 : (1994) 80 CompCas 487 : (1994) MhLj 677

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : A.R. Kantak, G.U. Bhobe, for the Appellant; M.S. Joshi, for the Respondent

Judgement

Dr. E.S. Da Silva, J.—This application is directed against the order of the learned J.M.F.C., Panaji, dated August 18, 1993, in Criminal Case No. N.C. 65 of 1993-B, whereby the learned Magistrate, after conducting the verification of the complaint in the aforesaid criminal case, issued process against the petitioner and others for offence u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act").

2. The facts of the case are that the petitioner as one of the authorised signatories of the company, Goa Plast Pvt. Ltd., had signed four cheques favouring the respondent, all allegedly dated July 15, 1992, being three for the sum of Rs. 2,00,000 each bearing Nos. 245964, 245965 and 245966 and the fourth for an amount of Rs. 2,52,809.76 bearing No. 245967. All the cheques were drawn on the Goa Urban Co-operative Bank, Panaji. It is the case of respondent No. 1 that the petitioner was one of the persons in charge of the company and responsible jointly and severally to the said company for the conduct of its business at the relevant time. Thereupon, as per the instructions given to the respondent by the petitioner and the others, the cheques were presented for clearance with the Co-operative Bank at Panaji, on January 8,

1993. The Co-operative Bank, by its letter dated January 8, 1993, informed the respondent that they were unable to honour the cheques. A lawyer's notice dated January 19, 1993, was, therefore, issued to the petitioner and the other accused in the complaint and it was duly received by them. Their attention was drawn to section 138 of the Negotiable Instruments Act and the accused including the petitioner were called upon to pay the said amount within 15 days of the notice. All the accused, including the petitioner, failed to pay the amount within 15 days of the receipt of the notice. However, by letter dated February 2, 1993, the petitioner's advocate alleged that no question of compliance with the notice would arise as far as the business is concerned. According to the respondent, the letter does not disclose any valid and lawful reason for non-compliance with the notice. Since the petitioner and the other accused also failed to pay to him the amount within 15 days of the receipt of the notice, the respondent was compelled to file a complaint.

3. Shri Kantak, learned counsel appearing for the petitioner, has invited my attention to the provisions of sections 141 and 138 of the Act. Section 141, which refers to offences by companies, reads as follows :

"141. Offences by companies. - (1) If the person committing an offence u/s 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

4. Learned counsel then submitted that in view of this provision it is clear that only a person who was in charge of and responsible to the company for the conduct of the business of the company at the time of the commission of the offence could be deemed as guilty of the offence and liable to be proceeded against and punished for such offence. It was urged by learned counsel that the petitioner was not in charge of the company at the time of commission of the offence and, therefore, he could not be found guilty or even proceeded against for non-payment of the sums referred to in the cheques. Shri Kantak has also urged that the cheques were presented by the respondent for encashment not at

the time the same were produced and signed by the petitioner and the other signatories. It is his case that at the time of issue of the cheques there was sufficient provision in the bank to honour the same. The petitioner was not even in charge of the company nor even in its employment at the time of presentation of the cheques. Learned counsel has also alleged that in terms of section 138 of the Act the offence was deemed as incriminating only after a period of 15 days from the notice, which was supposed to be served on the authorised signatories of the cheques, consequent upon the dishonour of the cheques by the bank on presentation by the drawer of the cheque. Learned counsel submitted that when the cheques were presented by the respondent, the bank had failed to honour the same and, thereafter, a competent notice was issued. However, with this learned counsel contends that since the petitioner was not in charge of the company or was not its employee either at the time of the presentation as well as when the period of 15 days' notice was completed, there was no question of the petitioner being saddled with any criminal liability for non-payment of the cheques. The offence being admittedly committed by the company, the liability of the petitioner, who had, according to learned counsel, left the company in August, 1992, would not and could not arise.

5. Shri Joshi, learned counsel for respondent No. 1, has, however, submitted that the petitioner has signed the cheques as one of the company's signatories in his capacity of director of the company. As such, section 141(2) would be applicable to him. Learned counsel has also urged that the circumstance of the petitioner being not in charge or in employment with the company as its director has to be brought on record and this could be done only at the stage of the trial. In the circumstances, it was not open for the petitioner to approach this court in order to challenge the impugned order of the learned Magistrate, who has rightly issued process against the petitioner on the basis of the signature affixed by the petitioner on the cheques on behalf of the company.

6. There is considerable substance in the submission of learned counsel for respondent No. 1. The contention of Shri Kantak that the petitioner is no more in the employment of the company has to be substantiated on record and this can be done only at the stage of the trial. Being so, it is obvious that the present petition appears to be premature. The petitioner is, therefore, free to get the fact of his not being a director of the company on record only at the time of the trial. For this purpose, he has to appear before the court. Shri Kantak has submitted that the petitioner appears to have been unnecessarily dragged to the court for an offence for which he cannot be held responsible since at the time the said offence is alleged to have been committed, the petitioner had already left the company. Therefore, the petitioner has to face unnecessary inconvenience by appearing before the criminal court in order to answer a charge in respect of which in all probability he cannot be held guilty.

7. I am quite sensitive to the submission of learned counsel for the petitioner. Prima facie in view of his submission it seems that the petitioner need not be

held responsible for the offence for which he is already booked before the learned J.M.F. C., Panaji. As rightly pointed out by learned respondent's counsel, the fact of the petitioner being not in charge of the company or at least not being one of its directors has not been brought on record so far. It is, therefore, for the petitioner to bring this fact when the trial starts and only thereafter he may approach the learned Magistrate to quash the proceedings if he is able to obtain an admission on the part of the respondent that he was not either an employee of the company or its director so that section 141 of the Act would be applicable to him. The petitioner has, therefore, to face the trial before the Magistrate. However, he is also free to move the learned Magistrate for exemption if he feels humiliated in appearing in a criminal court. The learned Magistrate, if so moved by the petitioner, may consider sympathetically the prayer of the petitioner, if any, for being exempted before him.

8. In the circumstances, I am of the firm view that this petition being premature is bound to fail. Hence, the same is hereby dismissed. Rule accordingly discharged.