

(2000) 03 BOM CK 0008

In the Bombay High Court

Case No : Criminal Writ Petition No. 2186 of 1999

Scan Organics Ltd. and Others

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 08-03-2000

Acts Referred:

COMPANIES ACT, 1956 — Section 433, 434
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 18, 20, 22, 22A
State Financial Corporations Act, 1951 — Section 29, 31

Citation : (2000) 102 BOMLR 905 : (2001) 1 MhLj 295

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

T.K. Chandrashekhara Das, J.

Rule. Returnable forthwith. By consent heard both sides.

1. This writ petition is filed for quashing the proceedings in Case Nos. 739/S/98, 740/S/98 and 741/S/98 on the file of Addl. Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay. The aforesaid cases were filed on account of dishonouring of three cheques issued by the petitioner Company in favour of the respondents for Rs. 1,01,155/- each. The cheques were drawn on 29th June, 29th July, and 29th August, 1997 respectively, on the Oriental Bank of Commerce, Ghatkopar (W) Branch, Bombay. Even after the statutory notice as envisaged u/s 138 of the Negotiable Instruments Act, the respondent did not pay the amount covered by the cheques. Therefore the complaint was filed before the Chief Metropolitan Magistrate by the respondent No. 2.

2. The petitioner in this writ petition inter alia has contended that the first petitioner Company has been registered before the Board for Industrial Financial Reconstruction, u/s 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 and therefore no prosecution against the petitioner Company and Directors

are maintainable.

3. The Supreme Court had examined this question in two of its recent decisions. In *BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc.*, has examined the first facet and held that if the offence is proved to be committed by the Company, its Directors are liable. In para 19, the Supreme Court held thus:

19. The said contention is also devoid of merits. The word "suit" envisaged in Section 22(1) cannot be stretched to criminal prosecutions. The suit mentioned therein is restricted to "recovery of money or for enforcement of any security against the Industrial Company or of any guarantee in respect of any loans or advance granted to the Industrial Company". As the suit is clearly delineated in the provision itself, the context would not admit of any other stretching process.

20. A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the N.I. Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. Once the offence u/s 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to the penal liability. What was considered in *Maharashtra Tubes Ltd, (supra)* is whether the remedy provided in Section 29 or 31 of the State Finance Corporation Act, 1951 could be pursued notwithstanding the ban contained in Section 22 of the S. I, C.A. Hence the legal principle adumbrated in the said decision is of no avail to the appellants.

21. In the above context, it is pertinent to point out that Section 138 of the N.I. Act was introduced in 1988 when S.I.C.A. was already in vogue. Even when the amplitude of the word "Company" mentioned in Section 141 of the N.I. Act was widened through the Explanation added to the Section, Parliament, did not think it necessary to exclude Companies falling u/s 22 of the S.I.C.A. from the operation thereof. If Parliament intended to exempt Sick Companies from prosecution proceeding, necessary provision would have been included in Section 141 of the N.I. Act. More significantly, when Section 22(1) of the S.I.C.A. was amended in 1994 by inserting the words "and no suit for the recovery of money or for enforcement of any security against Industrial Company or of any guarantee in respect of any loans or advance granted to Industrial Company" Parliament did not specifically include prosecution proceedings within the ambit of the said ban.

22. The conclusion which we have to draw is that if commission of the offence u/s 138 of the N.I. Act was completed before the commencement of proceedings u/s 22(1) of the S.I.C.A. there is no hurdle in any of the provisions of S.I.C.A. against the maintainability and prosecution of a criminal complaint duly instituted u/s 142 of the N.I. Act. The decisions rendered by the High Courts, which are assailed before us in this batch of appeals, are therefore not liable to be interfered with. Appeals are accordingly dismissed. Special Leave Petitions heard along with the above appeals are also hence dismissed.

4. In Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, the Supreme Court held thus:

19. The question that remains to be considered is whether Section 22A of the S.I.C.A. affects a criminal case for an offence u/s 138 of the N.I. Act. In the said section provision is made enabling the Board to make an order in writing to direct the Sick Industrial Company not to dispose of, except with the consent of the Board, any of its assets - (a) during the period of preparation or consideration of the scheme u/s 18, and (b) during the period beginning with the recording of opinion by the Board for winding-up of the Company under Sub-section (1) of Section 20 and upto commencement of the proceedings relating to the winding-up before the concerned High Court. This exercise of the power by the Board is condition by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the Sick Industrial Company or its creditors or shareholders or in the public interest. In a case in which the B.I.F.R. has submitted its report declaring a Company as "sick" and has also issued a direction u/s 22A restraining the Company or its Directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence u/s 138 of the N.I. Act cannot be instituted during the period in which the restraint order passed by the B.I.F.R. remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the B.I.F.R. u/s 22A was passed against the Company then it cannot be said that the offence u/s 138 of the N.I. Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the Company and or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the Company in view of the ban order passed by the B.I.F.R. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case.

5. In this case it Is not the case of the petitioners that an offence is complete after the petitioner company is declared by the B.I.F.R. as Sick Industries and declaration to that effect is made u/s 22(A) of the S.I.C.A. In the light of the above decisions of the Supreme Court the first point to be found against the petitioner.

6. Apart from the above points the petitioner also raised a ground that the petitioner is in liquidation and winding-up petition is pending u/s 433 read with 434 of the Companies Act and it also causes an impediment in prosecuting the petitioner Company and its Directors u/s 138 of the N.I. Act, As regards this point raised by the petitioner based on Sections 433 and 434 of the Companies Act, the Supreme Court had occasion to consider in Pankaj Mehra and Another

Vs. State of Maharashtra and Others, wherein it has been held thus:

20. It is difficult to lay down that all dispositions of property made by a Company during the interregnum between the presentation of a petition for winding-up and the passing of the order for winding-up would be null and void. If such a view is taken the business of the Company would be paralyzed, for, the Company may have to deal with very many day-to-day transactions, make payments of salary to the staff and other employees and meet urgent contingencies. An interpretation which could lead to such a catastrophic situation should be averted. That apart, if any such view is adopted, a fraudulent company can deceive any bona fide person transacting business with the company by stage-managing a petition to be presented for winding-up in order to defeat such bona fide customers. This consequence has been correctly voiced by the Division Bench in the impugned judgment.

21. If the payment is not ab initio void the company cannot contend that it is legally forbidden from making payment of the cheque amount when notice was issued by the payee regarding dishonour of the cheque. To circumvent this hurdle an endeavour was made by some of the appellants' counsel to show that the very issuance of a cheque would amount to disposition of property. We are unable to accept the said contention particularly in view of the definition of cheque in the N.I. Act. "A Cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

22. Bill of exchange is "an instrument in writing containing an unconditional order, signed by the maker, directing certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument." The cheque, therefore, can be an order on the banker to pay the amount to the holder thereof and no disposition of property would take place until the payment is made by the banker pursuant thereto. At the most, drawing of a cheque can be considered as a step towards disposition of property, but that is insufficient to amount disposition of property.

23. It was next contended that since one of the conditions to constitute the offence of Section 138 of the N.I. Act is that a cheque should have been drawn for the discharge of a legally enforceable "debt or other liability" no such cheque can possibly be conceived in a situation "Such as this because the creditor would be disabled for legally enforcing the debt with the commencement of winding-up proceedings. Section 138 of the N.I. Act, no doubt, contemplates only when the cheque is drawn by a person "for the discharge, in whole or in part, of any debt or other liability". Explanation to Section 138 says that for the purposes of this Section "debt or other liability" means a legally enforceable debt or liability." Therefore, the first limb of the contention is forceful that for the offence u/s 138 the cheque should have been drawn for discharging a legally enforceable debt or other liability. But the second limb of the contention is tenuous as the debt would not be cease to be legally enforceable merely because somebody has filed a petition for winding-up.

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27. The alternative approach is this : Even assuming that any disposition of the property made by a Company after commencement of the winding-up proceedings is null and void, how that is an escape ground from the offence u/s 138 of the N.I. Act? That section created a statutory offence which on the confluence of the various factors enumerated therein, commencing with the drawing of the cheque and ending with the failure of the drawer of the cheque to pay the amount covered by it within the time stipulated, ripens into a penal liability.

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29. The words "the drawer of such cheque fails to make the payment" are ostensibly different from saying "the drawer refuses to make payment". Failure to make payment can be due to the reasons beyond the control of the drawer. An illustrative case is, if the drawer is not a Company but individual who has become so pauper or so sick as he cannot raise the money to pay the demanded sum, can he contend that since failure to make payment was on account of such conditions he is entitled to be acquitted? The answer cannot be in the affirmative though the aforesaid conditions can be put forth while considering the question of sentence.

30. We therefore feel that legislature has thoughtfully used the word "fails" instead of other expressions as failure can be due to variety of reasons including his disability to pay. But the offence would be complete when the drawer "fails" to make payment within the stipulated time, whatever be the cause for such failure.

The Supreme Court also decided a question which may likely to arise very often as a subsidiary question whether Managing Director or Director of a Company is liable u/s 138. In *Anil Hada Vs. Indian Acrylic Limited*, . It has held in para 12 of the said decision thus:

12. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase "as well as" used in Sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending Company. Similarly the words "shall also" in Sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the Company is the drawer of the cheque such Company is the principal offender u/s 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the

legislature as per the section. Hence the actual offence should have been committed by the Company, and then alone the other two categories of persons can also become liable for the offence.

13. If the offence was committed by a Company it can be punished only if the Company is prosecuted. But instead of prosecuting the Company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the Company. In such a prosecution the accused can show that the Company has not committed the offence, though such Company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the Company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt a finding that the offence was committed by the Company is sine qua non for convicting those other persons. But if a Company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged In Section 141 of the Act.

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21. We therefore, hold that even if the prosecution proceedings against the Company were not taken or could not be continued, it is no bar for proceeding against the other persons falling within the purview of Sub-sections (1) and (2) of Section 141 of the Act. In the light of the aforesaid view we do not consider it necessary to deal with the remaining question whether winding-up order of a Company would render the Company non-existent.

7. What can be deducible from the above observation of Supreme Court is that winding-up petition if ordered by the Court dates back at the filing of the Company petition. Therefore the contention of the petitioner that the winding-up petition is pending at the time of issuing a cheque is not a ground for quashing the proceedings. If such Company is found to have been committed an offence u/s 138 of the N.I. Act, its Directors or any other person as indicated in Section 141 of the said Act is liable to be prosecuted.

8. In view of the aforesaid pronouncement of the Supreme Court, on both the points raised by the petitioners I do not think that the writ petition, to quash the proceedings before the learned Magistrate is sustainable. In view of this, the writ petition is dismissed. But however, I make it clear that all other grounds, which has been taken in the writ petition can be raised by the petitioner at the appropriate stage. Since the matter is of 1998, the Trial Court is directed to expedite the matter.

9. The petitioners are directed to appear before the Magistrate's Court on

10.4.2000.

Rule is discharged accordingly.

No order as to costs.

Writ be sent immediately.

Parties to act on the ordinary copy of this order issued by P.A. and authenticated by the Sheristedar of this Court.