(2005) 11 BOM CK 0040

In the Bombay High Court

Case No : Criminal W.P. No. 480 of 2005

Shishir B. Desai and Another APPELLANT

Vs

Ceat Financial Services Ltd. and Another RESPONDENT

Date of Decision : 19-11-2005

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142

Citation : (2006) 2 ALD(Cri) 14 : (2007) 3 BC 727 : (2006) CriLJ 1540 : (2006) 2 RCR(Criminal) 693

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : S.V. Marwadi and Sunita Sharma, for the Appellant; D''lima and U. Nikam, A.P.Ps., for the Respondent

Final Decision : Allowed

Judgement

A.M. Khanwilkar, J.—Not on board. Upon mentioning taken on board. By consent heard alongwith the Writ Petitions which are already notified today.

2. Heard counsel for the parties.

3. Rule. As short question is raised, rule made returnable forthwith by consent.

4. Mr. D''Lima waives notice for respondent No. 1 and Mr. Nikam, APP waives notice for respondent-State.

5. By this petition, it is prayed that Criminal Case, No. 889/S/2002 filed against the petitioners/accused No. 4 and 5 pending on the file of 12th Court at Bandra, Mumbai be quashed. It is not in dispute that petitioners are Directors of the Accused No. 1 company. However, the petitioner No. 1 Is a practicing Solicitor and Petitioner No. 2 Chartered Accountant by profession. It is their case that they have no concern with the day to day affairs of the company. It is not in dispute that petitioners are not signatories to the cheques. Relying on the recent decision of the Apex Court in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta

Bhalla and Another, and decision of the High Court in Vijay Mallya v. State of Maharashtra and Anr.. in Criminal Application No. 4827 of 2004, decided on December, 2004, the counsel for the petitioners contends that the criminal action instituted against the petitioners who have been named as Accused No. 4 and 5 respectively will have to be quashed in so far as the petitioners are concerned. This is so because, the only assertion made in the petition so as to indicate complicity of the petitioner can be discerned from paragraph-2 of the complaint. The said para-2 reads thus:

2. That Accused No. 1 is Public Limited Company. Accused Nos. 2 to 7 are its Directors. Accused Nos. 2 to 7 are all in charge of and responsible to the Accused No. 1 for the conduct of the business and functioning of the Accused No. 1. Their office addresses and residential addresses are as shown in the cause title.

There is no other allegation in the complaint and the allegation referred to above are too general and vague, so as to proceed against the petitioners for the alleged offence of dishonour of cheques.

6. Counsel for the respondent No. 1 complainant however, contends that there is clear assertion made in the complaint in paragraph-9 which reads thus:

9. I say that the dishonour of the said cheques has been mala fide, international & deliberate on the part of the Accused. At the time of issuing the cheque, the Accused No. 2 who had signed the cheques, was fully aware of the fact that on account of insufficiency of funds or on account of exceeding the amount arranged for with the Bank, the cheques would be dishonoured. By the said dishonour of the cheques for want of funds, and failure of the Accused to make payment inspite of receipt of the Statutory Notice, all the Accused have committed an offence and therefore liable to be prosecuted Under Section. 138, r/w Sections 141 and 142 of the Negotiable Instrument Act 1881 as amended upto date.

6. Having considered rival submissions and perusing the complaint as filed, I have no hesitation in taking the view that the allegation made in the complaint as against the present petitioners/accused No. 4 and 5 is concerned, is not sufficient to proceed against the petitioners in law. The legal position has been now reiterated by the Apex Court in the recent decision in the case of S.M.S. Pharmaceuticals Ltd. (Supra). Something more is required to be alleged, so as to indicate complicity of directors to proceed for offence u/s 138 read with 141 and 142 of the Negotiable Instrument Act. The argument that the petitioners/accused No. 4 and 5 did not exercise due diligence to prevent commission of offence, as is stated in paragraph-9, also does not commend to me. In the first place, the assertion is too general. In any case, in so far as offence committed by a company, only person who at the time the offence was committed, "was incharge of, and was responsible to, the company for the conduct of the business of the company", is deemed to be guilty of the offence. A priori, merely because the person happens to be one of the director of the Company or that he failed to send reply to the statutory notice or for that matter failed to prevent commission

of the offence inspite of the notice will be of no avail.

7. Be that as it may, for the legal position stated by the Apex court and this Court in the above said decisions, this petition ought to succeed. Accordingly, rule is made absolute.

8. It is made clear that it will be open to the trial court to proceed against the remaining accused 1 to 3, 6 and 7 in accordance with the law.

