

(2015) 08 BOM CK 0130

In the Bombay High Court

Case No : Criminal Application (APL) No. 333 of 2014

Vijay Khairatilal Bhatia

APPELLANT

Vs

Ashwin Ramesh Mittal and Others

RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 138, 204, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2015) 08 BOM CK 0130

Hon'ble Judges : V.L. Achliya, J

Bench : Single Bench

Advocate : Manoj S. Mohite, Advocate i/b Amol J. Phoujdar, for the Appellant

Final Decision : Allowed

Judgement

V.L. Achliya, J—Rule. Rule made returnable forthwith. By consent, taken up for final disposal at the stage of admission.

2. The applicant/accused No. 5 in the complaint has filed this application u/s 482 of Code of Criminal Procedure (Cr.P.C.) to set aside the order of issuance of process dt. 17/10/2013 passed in Criminal Complaint Case No. 603/SS/2013, by Metropolitan Magistrate, 14th Court at Girgaon, Mumbai and further to quash the said criminal proceedings to the extent of applicant.

3. Few facts leading to filing of the present application are as under :

The complainant (respondent No. 1) herein filed criminal complaint u/s 138 r/w 141 of the Negotiable Instruments Act, 1881 (in short "NI Act") as against accused No. 1 -Tricom Indian Limited and five other persons, which include the present applicant as Director of accused No. 1 -Company. In the complaint filed, the complainant has alleged that on account of acquaintance with the accused Nos. 2 and 3, the complainant provided financial assistance as a friendly loan of Rs. 25.00 Lakhs to accused No. 1-Company. Accused Nos. 2 and 3 induced the complainant to disburse the said loan. In acknowledgement of the loan amount

received, accused No. 2 executed Bill of Exchange on behalf of accused No. 1 - Company. According to the complainant, Bill of Exchange has been signed by accused Nos. 2 and 3. Towards the repayment of loan, accused No. 2 with consent, connivance collusion and knowledge of accused Nos. 3 to 4 for and behalf of accused No. 1 issued one post-dated cheque bearing No. 011278 for an amount of Rs. 25.00 Lakhs payable on 15/7/2013 and drawn and payable from the account of accused with the Axis Bank, Vile Parle (E) Branch, Mumbai. The cheque was issued on behalf of accused No. 1 under the signature of accused No. 2. The said cheque when presented for realization on 15/7/2013 with ICICI Bank, Andheri (E) Branch, Mumbai, same was dishonoured by bankers of accused No. 1 -Company with endorsement "funds insufficient" and was communicated vide memo dt. 16/7/2013. According to the complainant though he has given considerable time, the amount was not paid. Therefore he issued notice on 27/7/2013 to all the accused through his Advocate. The notice was duly served upon accused No. 1 on 30/7/2013. However, the notice sent to accused Nos. 2 to 6 returned with remark "left". Vide reply sent on 3/8/2013, accused No. 1 raised false and frivolous grounds that the other accused are not the Directors of the Company and they have resigned. Since the payment towards the cheque dishonoured was not made by the accused, the complainant has filed complaint. The complaint appears to be filed on 7/9/2013. Learned Metropolitan Magistrate on consideration of the complaint documents filed on record pleased to issue process u/s 138 r/w 141 of the NI Act, against the accused persons making it returnable on 4/1/2014. Being aggrieved by the said order, the applicant/accused No. 5 has filed the present application u/s 482 of the Code of Criminal Procedure to set aside the order passed by Ld. Metropolitan Magistrate and further to quash the criminal proceedings to the extent of the applicant.

4. I have heard the submissions advanced by Mr. Manoj S. Mohite, learned Counsel appearing on behalf of the applicant and Mrs. Mane, learned APP for respondent/State. None appeared on behalf of respondent No. 1/complainant, though served.

5. By referring the contents of the complaint filed by the complainant, the learned Counsel for the applicant has contended that on the face of the complaint filed, no prima facie case has been made out for issuance of process u/s 138 r/w 141 of NI Act, as against the applicant/accused No. 5. By referring the provisions of Section 141 of NI Act, the learned Counsel has submitted that, in order to attract the vicarious liability u/s 141 of NI Act, it is obligatory on the part of the complainant to specifically plead as to how and in what manner the accused was guilty of commission of offence u/s 138 r/w 141 of the NI Act. It is pointed out that the facts pleaded in the complaint nowhere make out any case to attract the vicarious liability of the applicant for the alleged dishonour of cheque and commission of offence u/s 138 of NI Act. It is submitted that, in order to attract offence u/s 138 r/w 141 of NI Act, there must be specific averments. It is not sufficient to make a bald statement in complaint that the Director i.e. accused in the complaint is incharge or/and responsible for the

conduct of the business of the Company. In support of the contention that the averments made in the complaint are not sufficient to attract the offence u/s 138 r/w 141 of NI Act as against the applicant/accused No. 5, the learned Counsel has relied upon the decision of the Hon'ble Apex Court in the case of National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, (2010) 1 BC 674 : (2010) 2 CompLJ 304 : (2010) CriLJ 1907 : (2010) 2 JT 161 : (2010) 2 SCALE 372 : (2010) 3 SCC 330 : (2010) 98 SCL 407 : (2010) 2 SCR 805 and further relied upon the decision of the Hon'ble Apex Court in the case of Pooja Ravinder Devidasani Vs. State of Maharashtra, (2015) 2 AD 270 : (2015) 1 BC 208 : (2015) 1 CCR 48 : (2015) 124 CLA 162 : (2015) 1 RCR(Civil) 287 : (2015) 1 RCR(Criminal) 271 : (2015) 129 SCL 393 . Learned Counsel for the applicant has further assailed the order passed by the learned Metropolitan Magistrate with contention that the order has been passed in a gross non-application of mind and without any material available on record. Learned Counsel has submitted that, neither the complaint nor the documents filed by the complainant remotely disclose that the applicant was concerned with the day-to-day affairs of the Company or anyway responsible for the conduct of the business of the Company. In the entire complaint, the complainant has not attributed any role to the applicant except alleging that he is one of the Directors. The learned Counsel submitted that the accused No. 1 -Company has responded to the notice. In the notice sent by respondent No. 1, it has been specifically informed that the present applicant is no more Director of the Company, still the process was issued against the applicant / accused No. 5.

6. In order to appreciate the submissions advanced, I have thoroughly perused the averments made in the complaint so as to attract the vicarious liability of the applicant / accused No. 5 in commission of offence u/s 138 r/w 141 of NI Act. In my view, on the face of the complaint, no case for issuance of process u/s 138 r/w 141 of NI Act have been made out against the applicant / accused No. 5. In this context, it is useful to refer to the averments made in para Nos. 3, 4, 7, 8, 12 and 15.

"3. I say that accused No. 1 is a company incorporated under the Companies Act 1956. I say that accused No. 2 & 3 are also Majority Shareholders of Accused No. 1. I say that Accused No. 6 is the office of Company i.e. Company Secretary of Accused No. 1.

4. I say that accused No. 2 to 6 are individually / jointly and severally responsible for the day-to-day management/administration and smooth running conducting of the business of the company Accused No. 1. All Accused are also individually/jointly and severally responsible for repayments of the loans, debt/liability of the company.

7. I say that accordingly in consideration of the loan, Accused No. 2 & 3 with consent connivance and knowledge of other Accused gave demand bill of exchange dt. 09.06.2011 of Rs. 25,00,000/- duly executed by Accused No. 2 for you No. 1, and the same is accepted for payment by Accused NO.3. I say that

the contents of the Bill of Exchange true and correct. I identify the signature of Accused No. 2 & 3 on the said Bill of Exchange. I say that the said Bill of Exchange bears the stamp of the Accused No. 1 Company. Hereto annexed and marked is the copy of Bill of Exchange as "Exhibit-B".

CHEQUE:

8. I say that in consideration for repayment of the above financial assistance friendly loan Accused No. 2 with consent, connivance, collusion and knowledge of Accused No. 3 to 4 for and behalf of Accused No. 1 have issued one post-dated cheque detailed as follows:

I say that contents of the said cheques are true and correct. I identify the signature of the accused No. 2 on the said cheques as the same was signed in my presence.

DISHONoured CHEQUE & MEMO:

8. I say that as per the instructions, assurance of clearance and after informing all the accused, the above said cheque was deposited on 15/07/2013 for realisation through ICICI Bank Ltd. Andheri (E) Branch Mumbai, but was dishonoured by your bankers Axis Bank, Service Branch Mumbai vide its memo dt. 16.07.2013 with remarks "FUNDS INSUFFICIENT". I say that the contents of the said memo are true and correct. I say that the same is signed by the authorized person of the same and issued in the normal course of transaction of the business of the Bank. Hereto annexed and marked are the copies of dishonoured cheques as "Exhibit-C/Colly and Memo"s as Exhibit-D/Colly".

8. I say that I immediately informed all the accused about the said dishonoured cheques but in spite of number of personal visits, reminders and granting reasonable time, all of Accused have not taken any steps to make the payment.

REPLY OF ACCUSED NO. 1 dt. 03.08.2013 :

12. I say that after the receipt of the demand notice Accused No. 1 has sent a reply to the same. I say that the Accused No. 1 has raised false and frivolous grounds that other accused are not the director of the company and have resigned, without any documentary evidence of the same. The said reply is on Letter head of Accused No. 1 and also bears the seal of the company. Hereto annexed and marked is the copy of reply dt. 03.08.2013 as "Exhibit-H".

15. I say that by the subsequent conduct of All accused it appears that all accused had approached me with malafide intention and ulterior motives and have fraudulently and dishonestly induced me to part with his money by making false representation. By the said act all accused have caused wrongful loss to my company and wrongful gain to themselves. Thus all accused have cheated my company.

7. Thus, bare perusal of the aforesaid averments no way satisfy the ingredients of Section 141 of NI Act, to attract the vicarious liability of the applicant/accused

No. 5. The entire averments made in the complaint if read in its totality, then at the most the role attributed to the applicant in commission of offence is that he was one of the Directors of the Company at the time of alleged transaction. In the instant case, the fact is not in dispute that the cheque in question as well as the Bill of Exchange have not been signed by applicant / accused No. 5. So also the applicant / accused No. 5 has not been described as Managing Director or person in-charge of and responsible for the conduct of business and affairs of accused No. 1-Company. According to the complainant, the applicant was Non-executive Director and he has resigned way back in the year 2012 i.e. on 4/9/2012, much before the cause of action arose for filing of the complaint. Section 141 of NI Act, being a penal provision creating vicarious liability needs to be strictly construed. In this context, it is useful to refer the decision of the Hon"ble Apex Court in the case of Pooja Ravinder Devidasani (supra) and in particular paragraph 17 thereof, wherein it is held as under:

"17..... To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N.I. Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the N.I. Act. In National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, (2010) 1 BC 674 : (2010) 2 CompLJ 304 : (2010) CriLJ 1907 : (2010) 2 JT 161 : (2010) 2 SCALE 372 : (2010) 3 SCC 330 : (2010) 98 SCL 407 : (2010) 2 SCR 805 this Court observed:

"Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141.

8. In paragraph 28 and 30 of the judgment in the case of Pooja (supra), the Apex Court has held as under :

"28. In the entire complaint, neither the role of the appellant in the affairs of the Company was explained nor in what manner the appellant is responsible for the conduct of business of the Company, was explained. From the record it appears that the trade finance facility was extended by the Respondent No. 2 to the default Company during the period from 13th April, 2008 to 14th October, 2008, against which the Cheque were issued by the Company which stood dishonoured. Much before that on 17th December, 2005 the appellant resigned from the Board of Directors. Hence, we have no hesitation to hold that continuation of the criminal proceedings against the appellant under Section 138 read with Section 141 of the N.I. Act is a pure abuse of process of law and it has to be interdicted at the threshold.

30. Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and Courts cannot be a mere spectator to it. Before a Magistrate taking cognizance of an offence under Section 138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the complaint against the appellant which is nothing but a pure abuse of process of law."

9. In the light of discussion made in foregoing paras, I am of the view that the complaint filed by the complainant makes out no case for issuance of process u/s 138 r/w 141 of N.I. Act, against the applicant/accused No. 5. Ld. Metropolitan Magistrate appears to have passed the order mechanically. Learned Metropolitan Magistrate has not taken any pains to read the complaint and the documents relied on to find out as to whether a prima facie case has been made out or not to attract the vicarious liability of the applicant as contemplated u/s 138 r/w 141 of NI Act. No doubt, the detailed enquiry is not contemplated at the stage of exercise of powers under Section 204 of Cr.P.C., but, certainly the magistrate is bound to consider as to whether the facts averred in the complaint and the documents, if any, relied make out a prima facie case for issuance of process u/s 138 r/w 141 of NI Act. It is pertinent to note that in the instant case, there are specific averments made in the complaint itself in paragraph 15 that the accused No. 1 had replied the notice in which the false and frivolous grounds have been raised that the Directors of the Company have resigned. The copy of that reply appears to have been produced along with the complaint as Exh. H. However, the Magistrate has not taken any pains to go through the contents of the said notice. It is the say of the applicant that, the notice was duly replied by him through his Advocate on 16/8/2013. In reply sent to the notice, the applicant has specifically stated that the applicant was appointed as Non-executive Director and he had

resigned from the Company on 4/9/2012, which was accepted by the Board of Directors and also intimated in prescribed proforma i.e. Form No. 32 to the Registrar of the Company. Not only this, the applicant has also informed about recording of this fact in the 20th Annual Report of accused No. 1 -Company for the financial year 2011-12. While filing complaint, the complainant appears to have suppressed the fact regarding the reply notice sent on 16/8/2013. However, the complainant has disclosed the fact regarding the reply sent from respondent No. 1/complainant stating therein that the Directors of the Company have resigned. In spite of that the learned magistrate has passed the order of issuance of process as against the applicant / accused No. 5. The order passed by learned Metropolitan Magistrate, which is impugned in this petition, reads as under:

"ORDER BELOW EX-1

Perused complaint, documents filed on record. Heard Learned Counsel appearing on behalf of Complainant. It appears that there is prima facie case against Accused for proceeding U/sec. 138 r/w 141 Negotiable Instruments Act. Hence, issue process against Accused persons under above mentioned section on payment of process fee. R/o. 04/01/2014.

Sd/- (K.K. Patil) Metropolitan Magistrate, 14th Court Girgaon, Mumbai.

Date : 17/10/2013."

Thus, the bare perusal of order passed by Metropolitan Magistrate leads to conclusion that the order has been passed without perusing the contents of complaint and documents relied in support of complaint. It is a glaring case of non-application of mind. Hence, in my view, the order is not sustainable in law.

10. In the light of the discussion made in the foregoing paragraphs, I have no hesitation to hold that, on the face of the complaint, no case was made out for issuance of process u/s 138 r/w 141 of the NI Act as against the applicant/accused No. 5. The order passed by the learned Magistrate appears to be passed without application of mind and due consideration of averments made in the complaint. The averments made in the complaint make out no case to attract the vicarious liability of the applicant / accused No. 5 for commission of offence u/s 138 r/w 141 of NI Act.

11. The applicant has approached with a case that he was Non-executive Director of the Company. He has resigned as a Director of the Company on 4/9/2012. The resignation of the applicant was accepted in the Board of Directors meeting held on 16/09/2012. The fact in respect of the resignation of the applicant was duly intimated in a prescribed proforma i.e. Form No. 32, to the Registrar of the Company on 16/10/2012. This was also reflected in the 20th Annual Report of the Company for the fiscal year 2011-12 published on 24/11/2012. In support of this submission, the applicant has produced on record the following documents.

(i) Copy of resignation.

(ii) Copy of Resolution dt. 16/10/2012 passed in the meeting of Board of Directors.

(iii) Copy of notice given to the Registrar of the Company in a prescribed proforma i.e. Form No. 32.

(iv) Copy of 20th Annual Report of the Company for the financial year 2011-12.

(v) Copy of reply notice dt. 16/8/2013 sent to complainant through his Advocate by the applicant.

12. As per the complaint, the cause of action for filing of the complaint arose on 14/8/2013. There is no dispute as to the fact that the cheque in question was issued on 15/7/2013. It was dishonoured on 16/7/2013. The notice of demand was issued on 27/7/2013 and cause of action for filing of complaint arose on 14/8/2013. Thus, the act of issuance of cheque as well as dishonour of cheque has taken place much after the resignation tendered by the applicant / accused No. 5. Learned Counsel for the applicant has placed reliance upon the decision of the Hon''ble Apex Court in the case of Anita Malhotra Vs. Apparel Export Promotion Council and Another, (2011) 4 RCR(Civil) 930 : (2011) 12 SCALE 471 : (2011) 6 UJ 3765 . In a case based upon similar facts, the Apex Court has held that in exercise of jurisdiction u/s 482 of Cr.P.C., if on the face of documents relied upon by accused which are beyond suspicion of doubt, if it is considered that accusation against accused cannot stand, the High Court can consider such documents in exercise of jurisdiction u/s 482 of Cr.P.C. In paragraph 20 of the said Judgment, the Hon''ble Apex Court has observed as under :

"20. As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merits of the accusation, but if on the face of the document which is beyond suspicion or doubt, placed by the accused and if it is considered that the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/ documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction under Section 482 of the Code."

13. Thus, in view of the fact that the document placed on record by the applicant, the genuineness of which is not in doubt and disputed by respondent No. 1, clear case has been made out that the applicant has resigned as a Director of accused No. 1 -Company much prior to dishonour of cheque and cause of action for filing of the criminal complaint. The defence of the applicant is duly supported with the documentary evidence. Therefore, the order of issuance of process u/s 138 r/w 141 of NI Act, deserves to be set aside and proceeding is liable to be quashed to the extent of applicant.

14. I am, therefore, inclined to allow the application in terms of prayer clause "A"

to the extent of applicant / accused No. 5 and same is accordingly allowed.

15. Rule made absolute in above terms with no order as to costs.