(2003) 01 RAJ CK 0013

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 261 of 2001

World Tex Limited and Others — APPELLANT

Vs

State of Rajasthan and Another — RESPONDENT

Date of Decision : 29-01-2003

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 22A

Citation : (2003) 2 BC 261 : (2004) CriLJ 420 : (2004) 2 RCR(Criminal) 903 : (2003) 2 RLW 855 : (2003) 1 WLC 775 : (2003) 1 WLN 614

Hon'ble Judges : A.C. Goyal, J

Bench : Single Bench

Advocate : Neeraj Chaudhary and Ashvin Garg, for the Appellant; Rekha Dhakad, Pubnlic Prosecutor and Mahendra Singh, for the Respondent

Judgement

Goyal, J.—This S.B. Cr. Misc. Petition u/s 482 Cr.P.C. is directed against the order dated 20.1.2001 whereby the learned Judicial Magistrate (Behror), District Alwar took cognizance for an offence u/s 138 of the Negotiable Instruments Act, 1881 (in short the Act, 1881) against the accused petitioners.

2. The relevant facts in brief are that the complainant- respondent No. 2 filed a complaint on 4.10.2000 in the Court of learned Judicial Magistrate, Behror against the accused petitioner company and its Managing Director and other directors with the averments that the accused company had business dealings with the complainant-respondent-company. During the course of the business three post dated cheques respectively for Rs. 2,12,104/-, Rs.4,85,105/- and Rs. 2,91,062/- were issued on 30.4.2000. These cheques were issued for payment of outstanding balance of the amount.

3. When the complainant presented these cheques in the bank, they were dishonoured on 16.8.2000 with the remark of ''insufficient funds''. The complainant issued notice on 30.8.2000 but the accused petitioners failed to make payment within the period of 15 days as stipulated under the Act, 1881.

4. Learned Magistrate having conducted an inquiry as provided u/s 200 and 202 Cr.P.C. took cognizance against the accused petitioners vide impugned order as stated here-in-above.

5. 1 have heard learned counsel for the parties and learned Public Prosecutor. A preliminary objection was raised by learned counsel for the respondent No. 2 that the accused petitioners have not appeared before the trial court and the grounds taken in this petition may be taken before the trial court, thus, this petition is not maintainable. Learned counsel for the petitioners relying upon G. Sagar Suri and Anr. v. State of U.P. and Ors. (1), Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors. (2), and Ashok Chaturvedi and Ors. v. Shitui H. Chanchani and Anr. (3) contended that even if the allegations made in the complaint and the statement of the complainant and his witnesses are taken on their face value, no offence is made but, the complaint should be quashed in exercise of powers u/s 482 Cr.P.C. so as to prevent the abuse of the process of the law. Jn view of these judgments of Hon''bie the Apex Court, this petition is maintainable.

6. The next question for consideration is whether the allegations made in the complaint and the statement of the complainant do not disclose the offence u/s 138 of the Act, 1881?

7. On perusal of the allegations made in the complaint and the statement of the complainant it is prima facie made out that three cheques as mentioned in para 5 of the complaint were issued in favour of the complainant-respondent on behalf of the accused company to discharge its liability and these cheques when presented in the bank were dishonoured and thereafter no payment was made within the stipulated period after receipt of the notice by the accused petitioners and thus prima facie there are ingredients of the offence u/s 138 of the Act, 1881.

8. The main contention of learned counsel for the accused petitioners is that the accused company was already declared sick by Board For Industrial And Financial Reconstruction (in short the BIFR) on 31.3.2000 prior to issuance of these cheques, hence criminal proceedings u/s 138 of the Act, 1881 are liable to be quashed. Reliance is placed upon Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd and Ors. (4). It was also contended that Clause (j) of para 10 of the order of B1FR dated 31.3.2000, the accused company has been prevented to dispose of its assets and thus these criminal proceedings should be quashed. Learned counsel for the complainant/respondent No. 2 also relying upon the judgment delivered in Kusum Ingots & Alloys Ltd.''s case (supra) contended that the BIFR did not put a complete ban on the accused company to transfer the assets. It was also contended that the accused petitioners have no where stated that they applied for approval of the BIFR to dispose of or alienate any of its fixed assets for repayment and unless and until all the facts regarding fixed assets and current assets and other alike matters, the trial would continue.

9. I have considered the rival submissions, Clause (j) of para 10 of the order of BIFR dated 31.3.2000 is reproduced as under :-

The company shall not dispose of or alienate any of its fixed assets without specific prior approval of the chargeholders and BIFR u/s 22A of the Act. Since the unit is operating, the current assets could be utilised to the extent necessary for maintaining day to day operations, subject to keeping proper records thereof and routing all its transactions through financing bank only.

10. It would also be proper to reproduce para 18, 19 and 20 of the judgment delivered in Kusum Ingots & Alloys Ltd.''s case.

18. In our considered view Section 22 SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of an offence u/s 138 of the NI Act against a company or its directors. The section as we read it only creates an embargo against disposal of assets of the company for recovery of its debts. The purpose of such an embargo is to preserve the assets of the company from being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its directors to other persons for satisfaction of their legally enforceable dues.

19. The question that remains to be considered is whether Section 22A of SICA affects a criminal case for an offence u/s 138 NI 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 8 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 up to commencement of the proceedings relating to the winding up before the High Court concerned. This exercise of the power by the Board is conditioned 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 BIFR 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 NI Act cannot be instituted during the period in which the restraint order passed by BIFR 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 BIFR u/s 22A was passed against the Company then it cannot be said that the offence u/s 138 NI 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 BIFR. 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.

20. Except in the circumstances noted above we do not find any good reason for accepting the contentions raised by the learned counsel for the appellants in favour of the prayer for quashing the criminal proceedings or for keeping the proceedings in abeyance. It will be open to the appellants to place relevant materials in this regard before the learned Magistrate before whom the cases are pending and the learned Magistrate will examine the matter keeping in mind the discussions made in this judgment. We make it clear that we have not considered the question whether in the facts and circumstances of a particular case Section 138 NI Act is attracted or not, for that is a question to be considered by the Court at the appropriate stage of the case in the light of the evidence on record. The appeals are disposed of on the terms aforesaid.

11. Thus Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of an offence u/s 138 of the Act, 1881 against a company or its directors. This Section does not bar payment of money by the company or its directors to other persons for satisfaction of their legally enforceable dues. Of course, the Hon''ble Apex Court held that in a case in which BIFR has submitted its report declaring a company "sick" and has also issued a direction u/s 22A restraining company or its directors not to dispose any of its assets except with the consent of the Board, then the contention that criminal case u/s 138 of the Act, 1881 cannot be instituted during the period in which the restraint order passed by BIFR remains operative cannot be rejected outright. On perusal of the order of BIFR the accused company has been directed not to dispose of or alienate any of its fixed assets without prior approval of the charge holders and BIFR. But it was further observed that since the unit is operating the current assets may be utilised to the extent necessary for maintaining day to day operations. Thus the accused company has not been completely restrained for transfer of the assets. Therefore, the contention of learned counsel for the accused petitioners whether can be accepted or not will depend on the facts and circumstances of the case. In the present case all the material facts have to be placed before the trial court so that the trial court may consider whether in the facts and circumstances of this case Section 138 of the Act, 1881 is attracted or not.

12. Consequently, the criminal proceedings cannot be quashed and it will be open to the accused petitioners to place relevant materials in this regard before the learned Magistrate and the learned Magistrate will examine the matter keeping in mind the discussions made in the judgment as to whether in the facts and circumstances of this case Section 138 of the Act, 1881 is attracted or not, for that is a question to be considered by the Court at the appropriate stage of

the case in the light of the evidence on record. This petition is disposed of on the terms aforesaid.

