

(2007) 03 BOM CK 0124

Bombay High Court (Nagpur Bench)

Case No: Criminal Application No. 2580 of 2006

M.V. Khadilkar and Another

APPELLANT

Vs

Goyal Iron and Steel Corpn. and
Others

RESPONDENT

Date of Decision: March 7, 2007

Acts Referred:

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

Citation: (2007) 4 BC 202 : (2007) CriLJ 1764

Hon'ble Judges: A.P. Lavande, J

Bench: Single Bench

Advocate: A.A. Naik, for the Appellant; I.J. Damle and D.B. Patel, Assistant Public
Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

A.P. Lavande, J.

Rule. By consent heard forthwith.

2. All these six applications filed u/s 482 of the Code of Criminal Procedure are being disposed of by common judgment since common question of law is involved and the facts are almost identical in all these matters.

3. Respondent No. 1 filed six private criminal cases bearing Criminal Complaint Nos. 150/03, 151/03, 152/03, 153/03, 154/03 and 155/03 against M/s. Kulkarni Engineering Associates Ltd., a company incorporated under the Companies Act and four others including the present applicants alleging commission of offence punishable u/s 138 of the Negotiable Instruments Act (hereinafter referred to as "the Act"). The complaints were filed for dishonour of cheques issued by M/s.

Kulkarni Engineering Associates Ltd. to respondent No. 1 in the year 2002. Learned Magistrate, after recording the statement of Mr. Suresh Dayaram Dhabekar, duly constituted attorney of respondent No. 1, Issued process against the five accused including the applicants for offence punishable u/s 138 of the Act. Against the order issuing process in all the cases the present applicants who are accused Nos. 3 and 4. preferred six revision applications bearing Nos. 471/05, 472/05. 473/05, 474/05, 475/05 and 476/ 05. Before the Revisional Court the applicants contended that there was absolutely no material placed before the learned Magistrate warranting issuance of process against them. The same did not find favour with the Revisional Court and the 3rd Additional Sessions Judge, Nagpur by common Judgment and order dated 26-3-2006 dismissed the said Revision Applications holding that prima facie case was made out against the applicants in each criminal complaint for offence punishable u/s 138 of the Act. Aggrieved by the said common judgment and order, the applicants have filed the present applications u/s 482 of the Code of Criminal Procedure.

4. Mr. Naik, learned Counsel appearing for the applicants contended that neither in the complaints nor in the statements of constituted attorney examined by the complainant, it has been stated by the complainants that the applicants are the persons in charge of, and were responsible to the company for the conduct or the business of the company. He, therefore, urged that the Magistrate erred in issuing process against the applicants for offence punishable u/s 138 of the Act. Placing reliance upon the judgment of the three-Judge Bench of the Apex Court in [S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another](#), Mr. Naik submitted that it was absolutely essential for respondent No. 1 to make averment in the complaints that the applicants were in-charge of, and responsible for the conduct of business of the company and in the absence of such averments in the complaints as well in the statements of Mr. Suresh Dabekar, the duly constituted attorney of the company, the Magistrate committed gross illegality in issuing process against the applicants. Placing reliance upon the said judgment, Mr. Naik submitted that the order issuing process passed by the Magistrate against the applicants in all the complaint cases filed by respondent No. 1 as well as the impugned judgment and order passed by the Revisional Court disposing of the revision applications deserve to be quashed and set aside.

5. Per contra, Mr. Darnle, learned Counsel for respondent No. 1 original complainant submitted that whether the applicants were in-charge of, or were responsible to the company for the conduct of business as required in terms of Section 141 of the Act is the matter of evidence and at the stage of issuance of process, the Court is only concerned with prima facie material placed on record by the complainant. Learned Counsel further submitted that the parties have not yet led evidence and, therefore, the issue regarding liability of the applicants cannot be entertained at this stage. He further submitted that it is not necessary for the complainant to aver that the applicants were in charge of, and responsible for conduct of business of the

company but it is sufficient for the complainant to produce the documents which, prima facie, show the commission of offence punishable u/s 138 of the Act by the applicants. According to learned Counsel, the complainant has produced such documents before the Magistrate. In support of his submissions, learned Counsel placed reliance upon the following judgments.

(1) [S.V. Muzumdar and Others Vs. Gujarat State Fertilizer Co. Ltd. and Another](#), .

(2) *Raj Lakshmi Mills v. Shakti Bhakoo*, (2002) 8 SCC 236 .

6. Mr. Patel, learned A.P.P. for respondent No. 2 submitted that even at the stage of issuance of process, the Magistrate has to consider whether the complainant has made averment in the complaint that the applicants sought to be prosecuted were in charge of and responsible for conduct of the business of the company at the relevant time.

7. I have considered the submissions made by learned Counsel appearing for the parties and learned A.P.P. I have perused the records and the authorities cited by the respective parties.

8. The applicants are accused Nos. 3 and 4 in all the complaints filed by respondent No. 3. The only averment made by the complainant in paragraph 2 of the complaint in each case as against present applicants is as under:

That the directors (2) to (4) of the accused No. (1) are well acquainted with the complainant and have good business relations with him from last several months.

9. Perusal of the statement of Mr. Suresh Dhabekar who was examined at the time of issuance of process does not make any specific reference to the applicants. On the contrary the statement of the said witness discloses that before instituting the complaint notices dated 16-12-2002 were sent to accused No. 1-M/s, Kulkarni Engineering Associates Ltd. and not to the applicants. It is also pertinent to note that at the time of examination of Mr Suresh Dhabekar, no document has been tendered and marked as exhibit in the evidence What emerges. therefore. is that the complainant has not averred in the complaint that the applicants were in-charge of and responsible for conduct of business of the company at the time of issuance of cheques in question and secondly, there is no statement made by Mr. Suresh Dhabekar as to in what manner offence u/s 138 of the Act was committed by the applicants.

10. In the case of *S.M.S. Pharmaceuticals Ltd.* AIR 2005 SC 3512 (supra) the Apex Court was dealing with a reference made by the two-Judge Bench for determination of the following questions by a larger Bench.

(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that

the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in-charge of and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in-charge of the company and responsible to the company for conduct of its business could be proceeded against.

11. The Apex Court after considering the entire law on the subject and considering the relevant provisions of the Act has answered the questions posed. In para 19 of the Apex Court has held thus:

19 "(a) It is necessary to specifically aver in a complaint u/s 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable u/s 141 of the Act. A director in a company cannot be deemed to be in-charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in-charge of and responsible for the conduct of business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in-charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable u/s 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director; these persons are in-charge of and responsible for the conduct of business of the company. Therefore, they get covered u/s 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Sub-section (2) of Section 141.

12. From the perusal of the above judgment, it is clear that the Apex Court has held that it is necessary to aver in the complaint u/s 141 of the Act that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 of the Act and without this averment in the complaint, the requirements of Section 141 cannot be said to be satisfied. The Apex Court has held

that being a director of company is not sufficient to make the person liable u/s 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of the business. The ratio laid down by the Apex Court in the case of [S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another](#), is squarely applicable in the present cases. Undisputably neither in the complaint nor in the statement of the witness examined by the complainant there is any averment that the applicants as directors, were in charge and were responsible for the conduct of the business of the company - M/s. Kulkarni Engineering Associates Ltd. at the relevant time. In this view of the matter, the issue involved in all these cases stands concluded by the above judgment of the Apex Court.

13. In view of the judgment of the Apex Court in the case of [S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another](#), . I am unable to place reliance upon the judgments relied upon by Mr. Damle, learned Counsel for the respondent No. 1 in support of his submission. I am also unable to accept the submission of Mr. Damle that since the respondent No. 1 has produced documents which establish that the accused applicants were in charge and were responsible for the conduct of the business of the company at the relevant time, no inference is called for by this Court in exercise of jurisdiction u/s 482 of the Code of Criminal Procedure. Therefore, all the applications deserve to be allowed.

14. For the reasons aforesaid, all the applications are allowed. Consequently the orders issuing process against the applicants by Judicial Magistrate First Class, Nagpur in Complaint Case Nos. 150/03, 151/03, 152/03, 153/03, 154/03 and 155/03 and judgment and order dated 23-5-2006 passed by 3rd Additional Sessions Judge, Nagpur dismissing Criminal Revision Application Nos. 471/05, 472/05, 473/05, 474/05, 475/05 and 476/05 are quashed and set aside and criminal proceedings in the above complaint cases initiated against the applicants are quashed. Needless to mention that interim orders passed by this Court in all the applications are vacated. Learned Magistrate shall proceed with criminal complaints filed against other accused and dispose of the same in accordance with law.