

Pavan Kumar Vs. Microsoft Corporation (India) Pvt. Ltd.

Pavan Kumar Vs. Microsoft Corporation (India) Pvt. Ltd.

SooperKanoon Citation : sooperkanoon.com/1177717

Court : Karnataka

Decided On : Jul-21-2015

Judge : A.N. Venugopala Gowda

Appeal No. : Criminal Petition No. 1666 of 2013

Appellant : Pavan Kumar

Respondent : Microsoft Corporation (India) Pvt. Ltd.

Judgement :

(Prayer: This CrI.P. is filed under S.482 Cr.P.C, praying to set aside the order dated 01.08.2011 passed by the xiv A.C.M.M., Bangalore in PCR No.5679/2010 (now registered in C.C.No.27012/2011) direct to register a criminal case against the petitioner, who is Accused No.3, for the offence p/u/s.138 of M.I. act and quash the entire proceedings in C.C.No.27012/2011 (PCR No.5679/2010) presently pending on the file of XXV Addl. Cmm., Bangalore for the offence punishable under S.138 of N.I. Act as against the petitioner.)

1. Respondent is the complainant and the petitioner is the accused No.3, in C.C.No.27012/2011, pending on the file of XXV Addl. CMM., Bengaluru City. The said criminal case was filed by the respondent, against the petitioner and two others, alleging commission of an offence punishable under S.138 of the Negotiable Instruments Act, 1881 ('the Act' for short). In the complaint, the allegations made, which are relevant for deciding of this petition, read as follows:

"3. Accused No.1 is also a company incorporated under the companies Act, 1956, engaged in the business of developing and marketing software products and services, more particularly for educational institutions, under the name and style of "Lyceum" and "My-Lyceum.net". Accused Nos. 2 and 3 are the Directors of Accused No.1 in charge of and responsible for the conduct of the business of Accused No. 1.

*** **

11. The Complainant submits that, as stated above, Accused No.1 is a company. Accused Nos.2 and 3 are the Directors of Accused No.1 and are in charge of and responsible to Accused No.1 for the conduct of the business of Accused No.1. Furthermore, Accused No.2 personally signed the six dishonoured Cheques which are the subject matter of the present complaint. Thus, by virtue of the provisions of Section 141 of the Negotiable Instruments Act, Accused Nos.2 and 3 are also deemed to be guilty of the offence of cheque dishonour committed by Accused No.1 and are also liable to be prosecuted and punished for the said offence along with Accused No.1."

2. Taking into account the allegations in the complaint, Magistrate took cognizance of the offence, issued process to the accused to face trial for the commission of the offence under S.138 of the Act. Seeking quashing of the said case, as against the accused No.3, this petition was filed. f

3. Mr. Amar Correa, learned advocate, contended that the petitioner being a non executive director, has no role in the conduct of the business of accused No.1 - Pac Soft Solutions Pvt. Ltd., a Company incorporated under the Companies Act, 1956, particularly, in the matter of issuance of cheques in question. He submitted that the accused No.2 being the authorized signatory of accused No.1, issued the cheques in favour of the complainant and the petitioner being not a signatory of the cheques, the Magistrate has committed illegality in taking cognizance of the offence and issue of summons to the petitioner. Learned counsel contended that to fasten vicarious liability, it is necessary, under S.141 of the Act, that the complainant must aver and prove how and in what manner, the accused was responsible for the conduct of the business of the company. Learned counsel

submitted that the complaint should state in the light of the provisions of S.141(1) of the Act, in what capacity, the accused was in-charge of the day-to-day affairs of the default company, at the relevant time, particularly when the cheques were issued. He submitted that the complainant having not fulfilled the pre-requisites contemplated by the Act, is unjustified in arraigning the petitioner as accused No.3. In support of the contentions, reliance was placed on the decisions of the Apex Court in: (1) S.M.S. PHARMACEUTICALS LTD... Vs. NEETA BHALLA AND ANOTHER, (2005) 8 SCC 89. (2) STATE OF NCT OF DELHI Vs. RAJIV KHURANA, (2010) 11 SCC 469 and (3) POOJA RAVINDER DEVIDASANI Vs. STATE OF MAHARASHTRA AND ANOTHER, 2014 SCC On Line SC 1020.

4. There is no appearance for the respondent.

5. Perused the record and considered the submissions made by Mr. Amar Correa. The point for consideration is, whether the petitioner has produced any credible material or shown any acceptable circumstance to substantiate his contention that he is not really concerned with the issuances of the cheques to the complainant?

6. Accused No.1, in C.C.No.27012/2011, pending before the Magistrate, is a Company, incorporated under the Companies Act, 1956. Accused No.2 and the accused No.3 are the directors of accused No.1, on whose behalf, accused No.2 has issued 6 cheques, the details of which have been furnished in para 7 of the complaint. The said cheques, on presentation for encashment, having been returned for the common reason "payment stopped by the drawer", having demanded the payment by issue of legal notice within 15 days period stipulated for such payment and the payment having not been made, complaint was filed alleging commission of offence punishable under S.138 of the Act.

7. In GUNMALA SALES PRIVATE LIMITED Vs. ANU MEHTA AND OTHERS, (2015) 1 SCC 103, after referring to the previous decisions, Apex Court, while observing that when a petition is filed for quashing process and in a given case, on an overall reading of the complaint, High Court may find that basic averment is sufficient, that it makes out a case against the director, has held as follows:

"31. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants

the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be an abuse of the process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director."

The conclusion has been summarized in para 34 as follows:

"34.1. Once in a complaint filed under Section 138 read with Section 141. of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director.

34.2. If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

34.3 In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about the role of the Director in the complaint. It may do so having come across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances

which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstance, complaint cannot be quashed.

34.4. No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director."

(emphasis supplied) *f*

8. In the present case, the complaint contains the basic averment, extracted supra, which is sufficient for the Magistrate to make out a case for issuance of process. The petitioner being the director of accused No.1, on whose behalf cheques have been issued, wants the process to be quashed. In order to succeed, the petitioner has not produced any material. Since basic averment appearing in the complaint, as held in the case of GUNMALA SALES PRIVATE LIMITED (supra), is sufficient, the Magistrate has directed him to face trial.

9. In the case of POOJA RAVINDER DEVIDASANI (supra), in view of the factual position of the case noticed in paras 24 to 27, it has been held as follows:

"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 Cheques were issued by the Company which stood dishonored. 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."

(emphasis supplied)

10. The said decision has no application to the instant case. On account of the unimpeachable and incontrovertible evidence produced that much before the transaction and issuance of the dishonoured cheque, the person had resigned from the Board of Directors of the Company, there being abuse of process of law, the criminal proceeding was interdicted at the threshold. In the present case the factual scenario is not identical. Hence, I do not find justification to quash the pending proceeding before the Court below. However, the Magistrate should consider the case of the petitioner in the light of the evidence, which may be brought on record by both sides.

In the result, petition is rejected. Magistrate is directed to decide the case independently and without being influenced by the dismissal of this petition. Complaint having been filed on 25.02.2010, Magistrate shall decide the matter as expeditiously as possible and within a period of six months from the next hearing date.