

Rajiv Gupta Vs. State and Another

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Court : Delhi

Decided On : Jul-04-2000

Reported in : 2000VAD(Delhi)802; [2001]104CompCas26(Delhi);
86(2000)DLT798

Judge : M.S.A. Siddiqui, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 482; Negotiable Instrument Act, 1881 - Sections 138, 141 and 142; [Companies Act, 1956](#) - Sections 433, 441(2) and 536(2)

Appeal No. : Crl. M. (M) Nos. 3444/99, 3445/99, 3446/99, 3447/99

Appellant : Rajiv Gupta

Respondent : State and Another

Advocate for Def. : Mr. M.S. Butalia, Adv.

Advocate for Pet/Ap. : Mr. R.K. Bharti Adv

Judgement :

ORDER

M.S.A. Siddiqui, J.

1. The common question that arises in these petitions filed under Section 482 Cr. P.C., is whether a company and its Director can be proceeded against for having committed an offence under Section 138 of the Negotiable Instruments Act (for short 'the Act') after the expiry of the period of payment of the cheque amount before passing of the order of winding up under Section 433(e) and (f) of the Companies Act. Since the relevant facts involved in all the cases are similar and a common question of law arises in all the cases, they were heard together and they are being disposed of by this order.

2. It is sufficient to set out the facts from one of these petitions in this batch. Facts in Crl. M. (M) No. 3444/99 are the following: M/s. Sakura Seimitsu (India) Ltd. is a Limited Company incorporated under the Indian Companies Act. The petitioner was the Managing Director of the said company. Mr. M.L.Gupta, Chairman of the said company issued the following postdated cheques in favor of the respondent No. 2.

CHEQUE	DATE	AMOUNT (Rs.)
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No.		
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446072	19.4.1997	98,592.00
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446073	19.5.1997	98,592.00
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446074	19.6.1997	98,592.00
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446075	19.7.1997	98,592.00
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446077	19.9.1997	98,592.00
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3. These cheques when presented for encashment were dishonoured by the drawee bank on the ground of insufficiency of amount in the account concerned and, the respondent No. 2 issued a notice on 18.10.1997, demanding payment of the amount covered by the aforesaid cheques. As the company failed to make the payment within 15 days of the receipt of the notice, a complaint under Sections 138/141/142 of the Act read with Section 420 of the Indian Penal Code was filed against the Company, its Chairman and the Managing Director. On such complaint

being filed, the learned Magistrate issued process vide orders dated 17.11.1998. Aggrieved thereby, the petitioner has filed the petition under Section 482 Cr.P.C. seeking quashing of the complaint. A petition for winding up of the company was filed on 18.3.1997 and the winding up order was passed on 23.11.1998 by the Company Court. The above is the background in which learned counsel for the petitioner contended that on the company being wound up by the order of the Company Court, no steps could be taken by the complainant for realisation of the amounts said to be due to it and, therefore, the criminal proceedings initiated against the drawer company and its Director is misconceived and should be quashed. He submitted that the expression 'in the case of a winding up by the Court' employed in Section 536(2) of the Companies Act does not mean that the said Section is to come into force only after a winding up order is passed. According to him, the said expression must be read in the light of Section 441(2) and, therefore, once a petition for winding up is filed, Section 536(2) comes into operation and there can be no transfer or disposition of properties. He submitted that even if any transfer takes place, such transfer would be void. He further submitted that in such a situation the Company and its Director would be entitled not to make payment because if such payment is made it would be void. He submitted that the Court cannot force a company or its director to make a void payment or do something, which is not sanctioned or permitted by law. He also submitted that on 23rd November, 1998, an order of winding up was passed by the Company Court and an official liquidator was appointed, which bars the company and its Director from making any payment. According to him, the said bar would operate retrospectively by virtue of Section 441 but the bar would come into existence only on the order of winding up being passed or a provisional liquidator being appointed. He further submitted that the said legal disability prevented the company and its Director from making payment. He submitted that the offence under Section 138 of the Act is deemed to have been committed only if the drawer of the cheque fails to make the payment of the money to the holder in due course within 15 days of the receipt of the notice as stipulated in Section 138 of the Act. If before the period of 15 days is over, any circumstance intervenes which makes it impossible to make payment, then there can be no failure to make payment within the meaning of Section 138 of the Act.

4. On the other hand, learned counsel appearing for the complainant submitted that under Section 138 of the Act the offence is deemed to be committed on dishonour and non-payment of the amount covered by the cheque within 15 days of receipt of notice of demand and a subsequent order of winding up, even though it relates back, would have no effect on the offence which is already deemed to be committed.

5. It needs to be highlighted that the offending cheques were issued between 19th April, 1997 and 19th September, 1997. The petition for winding of the company was filed on 18.3.1997 and the winding up order was passed on 23.11.1998 by the Company Court. The demand notice was issued on 18th October, 1997. Thus, till the end of the period of 15 days there has been no order of winding up. That being so, the question for consideration is whether merely by reason of a winding up petition being presented there was a bar or legal disability in making payment by the company and its Director. The Supreme Court had an occasion to consider similar question in *Pankaj Mehra & Anr. Vs . State of Maharashtra & Ors.*, : 2000 CriLJ1781 . After analysing the scope and ambit of Sections 441(2) and 536(2) of the Companies Act and Sections 138/141 of the Act, their Lordships of the Supreme Court have held that a company and its directors cannot escape from penal liability under Section 138 of the Act on the premise that a petition for winding up of the company has been presented and was pending during the relevant time. Thus, in my opinion, the present case is squarely covered by the said authoritative pronouncement of the Supreme Court.

6. For the foregoing reasons, I am not inclined to interfere in the matter in exercise of the inherent power under Section 482 Cr.P.C. Accordingly, the petitions are dismissed.