

Voltas Limited and ors. Vs. Hiralal Agarwalla and ors.

Voltas Limited and ors. Vs. Hiralal Agarwalla and ors.

SooperKanoon Citation : sooperkanoon.com/858596

Court : Kolkata

Decided On : Nov-13-1990

Reported in : (1991)1CALLT459(HC),[1991]71CompCas273(Cal),1991CriLJ609

Judge : Siba Prosad Rajkhowa, J.

Acts : [Negotiable Instruments Act, 1881](#) - Section 138; ;Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988

Appeal No. : Criminal Revision No. 649 of 1990

Appellant : Voltas Limited and ors.

Respondent : Hiralal Agarwalla and ors.

Advocate for Def. : Balai Candra Roy, ;Y. Dastoor and ;Amitabha Ganguly, Advs.

Advocate for Pet/Ap. : Bhaskar Sen, ;M.M. Guha and ;Subir Banerjee, Advs.

Disposition : Petition dismissed

Judgement :

Siba Prosad Rajhowa, J.

1. By this revision application, the petitioners have challenged the order dated March 1, 1990, passed by the learned Metropolitan Magistrate, 9th Court, Calcutta, in Case No. C/1930 of 1989 under Section 138 of the Negotiable

Instruments Act, whereby the learned Magistrate rejected the petition filed by the petitioners praying for dropping the proceeding on the ground of maintainability.

2. The facts of the complaint case as disclosed from the copy of the complaint petition dated August 23, 1989, appended to this revision application may be summarised as follows :

The opposite party as complainant filed the said complaint case in his capacity as Secretary, Titagarh Steel Limited. The complaint petition goes on to say that accused-petitioner No. 1 is a public company with its registered office at 19, J. N. Heredia Marg., Volkart Building, Ballard Estate, Bombay-36 and its Calcutta office at Gillan-der House, N. S. Road, Calcutta-1. Accused-petitioners Nos. 2, 3 and 4 are chairman, vice-chairman and secretary of accused-petitioner No. 1. Accused-petitioners Nos. 5 and 7 are working for gain in the said company at its Calcutta office and accused-petitioner No. 6 is the divisional manager (industrial machinery division) of the said company and he sits in the registered office at Bombay. According to the complaint, all the accused petitioners were and are in charge of and responsible for the day-to-day conduct of the business of accused-petitioner No. 1. The complainant's company purchased two machines from the accused-petitioner No. 1 on full payment thereof to the tune of Rs. 15,46,780. The said machines were not working properly due to some inherent defects and so a settlement was arrived at by and between the complainant's company and the accused petitioners which was recorded in a minute signed by accused Nos. 5 and 6 on behalf of accused No. 1 on July 12, 1989, and, as per the said settlement, the accused petitioners agreed to return 90% of the total price of the said machines. In terms of the said settlement, the accused issued an account payee cheque, bearing No. 329985, dated July 27, 1989, in favour of the complainant's company for a sum of Rs. 14,12,996 drawn on the Bank of America, India Exchange Place, Calcutta. The said cheque was duly presented for encashment through the banker of the complainant's company, viz., The State Bank of Bikaner and Jaipur, Park Street Branch, Calcutta, within its validity period. But the said cheque was returned being dishonoured by non-payment with the remark 'referred to drawer' on August 1, 1989. This fact of the dishonoured cheque was brought to the notice of the accused by Sri R.L. Gagger, Solicitor and Advocate of the complainant's company,

by his letter dated August 9, 1989, wherein he requested the accused to make full payment of the said cheque failing which it was intimated that legal consequences would follow. The accused received the said notice but, in order to avoid their criminal liability under Section 138 of the Negotiable Instruments Act, started making wild, frivolous and contradictory statements in their letters and raised some false and flimsy grounds which were false and false within their knowledge as well. The accused failed and neglected to pay the aforesaid amount within the stipulated period as contemplated under Section 138 of the Negotiable Instruments Act, as amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988.

3. The learned Chief Metropolitan Magistrate, Calcutta, took cognizance of the offence and, thereafter, transferred the case to the court of the learned Metropolitan Magistrate, 9th Court, for disposal before whom the accused petitioners prayed for dropping the proceedings and the learned Magistrate, by his impugned order, rejected that prayer of the accused petitioners.

4. Learned counsel for the petitioners has contended that the case is not at all maintainable against the petitioners as they are not at all responsible for the day-to-day conduct of the business of the company which is cited as accused No. 1. According to learned counsel, the petitioners are at the top of the hierarchy of the officers of the company who are responsible for framing the policies of the company but not directly responsible for the day-to-day conduct of its business and, therefore, the case is not maintainable against them. Learned counsel wants to draw support from certain reported decisions to prove his point that the case is not maintainable. I am presently going to discuss them one by one. In *K.N. Genda v. State*, [1982] Lab IC 1777 (Cal), the complainant's case was that the petitioners were the principal employer of Calco Engineering Works, a factory which was covered under the Employees' State Insurance Act. It was alleged that the petitioners, as principal employer of the said factory, deducted a sum of Rs. 2,206.75 as the employees' share of contribution from the wages of the employees for the period from June, 1980, to March, 1981, but failed to deposit the said amount in the Employees' State Insurance Funds within the specified time. In such circumstances, it was alleged that the accused persons had committed criminal

breach of trust in respect of the aforesaid documents and had committed an offence punishable under Section 406 of the Indian Penal Code. The Chief Metropolitan Magistrate, Calcutta, took cognizance of the offence and issued process against the accused petitioners. Being aggrieved, the accused petitioners came up before this court and this court quashed the proceeding on the ground that the only averment in the complaint that the accused was the principal employer was not sufficient to connect the accused with the alleged offence. In the case of *Mahalderam Tea Estate Pvt. Ltd. v. D.N. Prodhan*, [1978] Cal HN 336, this court was addressed on the point as to whether the directors of the company were liable for the offence under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. It was held that a director of a company may be concerned only with the policy to be followed and might not have any hand in the management of its day-to-day affairs and such persons must necessarily be immune from such prosecution. In this case, there was no material before the learned Magistrate to satisfy himself that the accused petitioners took some part in the running of the business of the company and there was no such averment in the petition of complainant and, therefore, cognizance taken on such complaint was held bad in law. A similar question arose in the case of *G. Atherton and Co. v. Corporation of Calcutta* [1979] Cri. LJ 86 (Cal). It was a case under the Prevention of Food Adulteration Act and this court was urged to decide whether, by virtue of the provisions under Section 17 of the Act, the officers of the company were vicariously liable for the offences committed. It was held that, 'under Section 17, a company has been made primarily liable, but to make other persons vicariously liable, it has to be shown that such persons were in charge of or were responsible to the company for the conduct of its day-to-day business. In the absence of any mention in the petition of complainant as to how the accused persons were concerned in the carrying on of the day-to-day business of the company, process could not have been issued against them.' The case of *Municipal Corporation of Delhi v. Ram Kishan*, : 1983 CriLJ159 , is also a case under the Prevention of Food Adulteration Act. The case was instituted against the company, its directors and manager. There were no clear allegations against the manager and the directors that they were responsible for the conduct of business of the disputed sample of the adulterated food. It was held that the proceedings could be quashed

against the directors but not against the manager.

5. However, Sri Roy, learned counsel for the opposite party, has referred to a decision of the Supreme Court in *Municipal Corporation of Delhi v. Purshotam Dass Jhunjunwala*, : 1983 CriLJ172 , as his trump card. It was also a case under the Prevention of Food Adulteration Act in which the directors of a sugar mill were sought to be prosecuted for manufacturing adulterated milk toffee. The averments in the complaint gave complete details of the role played by the directors and the extent of their liability and so it was held by the Supreme Court that the directors could be proceeded against. The Supreme Court quoted, in its judgment, paragraph 5 of the complaint petition, which is as follows (at page 159) :

'5. That the accused, Ram Kishan Bajaj, is the chairman, accused, R. P. Neyatia, is the managing director and accused Nos. 7 to 12 are the directors of the Hindustan Sugar Mills Ltd. and were in charge of and responsible to it for the conduct of its business at the time of commission of offence.'

6. The Supreme Court observed that for the purpose of quashing the proceedings, only the allegations set forth in the complaint have to be seen and nothing further and, from a perusal of the various clauses of the complaint, including para 5, the Supreme Court found it quite clear that a prima facie case for summoning the accused had been made out.

7. Paragraph 3 of the complaint petition in the instant proceeding before me has been intelligently drafted and appears to me to be almost identical to paragraph 5 of the complaint petition of the case before the Supreme Court under reference, i.e., *Municipal Corporation of Delhi v. Purshotam Dass*, : 1983 CriLJ172 . It is drafted thus:

'3. That all the accused were and are in charge of and were and are responsible for the day-to-day conduct of the business of accused No. 1, the company having its Calcutta office at Gillander House, N. S. Road (P.S. Hare Street), Calcutta-1, within the jurisdiction of the learned court.'

8. The next argument of learned counsel for the petitioners is that prima facie there are no materials to show that the accused petitioners have committed an offence punishable under Section 138 of the [Negotiable Instruments Act, 1881](#), as amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, hereinafter referred as the Act of 1988.

9. As regards the criminal liability of the accused-petitioners under Section 138 of the Act of 1988, the complainant alleged in the complaint petition (already adverted to) that, in discharge of the accused/ petitioners' liabilities, they issued an account payee cheque bearing No. 329985, dated July 27, 1989, in favour of the complainant company for a sum of Rs. 14,12,996 drawn on Bank of America, India Exchange Place, Calcutta. But, when the cheque was presented for encashment through the complainant's bankers, State Bank of Bikaner and Jaipur, Park Street Branch, Calcutta, the said cheque was returned being dishonoured by non-payment with the remark 'refer to drawer' on August 1, 1989. So, a letter was addressed to the accused petitioners on August 9, 1989, requesting them to make full payment of the said cheque. Despite this letter, the accused petitioners neglected to pay the said amount within the stipulated period. These averments in the complaint petition will show that the complainant had observed the formality as required by provisos (a), (b) and (c) of Section 138 of the Act of 1988 before initiating the criminal proceeding against the petitioners. Learned counsel for the petitioners has submitted that the Clause 'refer to drawer' does not necessarily mean that the cheque was dishonoured. He had tried to draw support from a judgment of the House of Lords in *London Joint Stock Bank Ltd. v. Macmillan and Arthur* [1918] AC 777. The relevant passage reads as follows (at page 824) :

'The case, then, must be taken as the simplest one, namely, of a cheque duly signed, forwarded on behalf of the customer to the banker, and honoured. My Lords, there are in these circumstances reciprocal obligations. If the cheque do not contain on its face any reasonable occasion for suspicion as to the wording and figuring of its contents, the banker, under the contract of mandate which exists between him and his customer, is bound to pay. He dare not, without liability at law, fail in this obligation, and the consequences to both parties of the dishonour of a duly signed and ex facie valid cheque are serious and obvious. In the second

place, if there be on the face of the cheque any reasonable ground for suspecting that it has been tampered with, then that in the usual case is met by the marking 'refer to drawer' and by a delay in payment until that reference clears away the doubt. Always granted that the doubt was reasonable, the refusal to pay is warranted. These obligations on the banker do not, of course, exist until after the cheque has been presented.'

As against the above submission, learned counsel for the opposite party has produced xerox copies of 3 letters, one from the Central Manager, Allahabad Bank, one from the Assistant Secretary, Bharat Chamber of Commerce and one from the Branch Manager, State Bank of Bikaner and Jaipur. By these letters, they have intimated that the remark 'refer to drawer' necessarily means as per banking custom that the cheque has been returned for want of funds in the account of the drawer of the cheque. In view of this clarification, it is prima facie seen that the cheque in question bounced because of inadequacy of funds in the drawer's account. As the cheque in question bounced, the complainant requested the accused petitioners to make full payment of the said cheque but the response of the accused-petitioners was not at all helpful. Under the facts and circumstances, it would be premature to hold that the accused persons have not committed an offence under Section 138 of the Act of 1988. That can be brought out only in a regular trial of the case. In my opinion, the learned Magistrate has not committed any illegality in proceeding with the trial of the case and in directing examination of the accused under Section 251 of the Code of Criminal Procedure.

10. In the result, the application fails and the same is rejected. The impugned order is upheld.