

Pradeep Kumar Malhotra and anr. Vs. State of West Bengal and anr.

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Court : Kolkata

Decided On : Jun-22-2011

Judge : Kalidas Mukherjee, J.

Acts : Code of Criminal Procedure (CrPC) (Cr.P.C) - Sections 438, 482; The Negotiable Instruments Act 1881 - Sections 138, 141, 93

Appeal No. : CRR NO. 756 OF 2011

Appellant : Pradeep Kumar Malhotra and anr.

Respondent : State of West Bengal and anr.

Advocate for Def. : Mr. Ayon Bhattacharyya; Ms. Archana Chowdhury; Mr. Biplab Majumdar, Adv.

Advocate for Pet/Ap. : Mr. Krishnendu Bhattacherya; Mr. Prodip Paul; Mr. Partha Sarathi Mondal, Adv.

Judgement :

1. These are the two applications under Section 482 of the Code of Criminal Procedure praying for quashing of the Complaint Case No. C - 1950 of 2010 pending before learned 10th Judicial Magistrate, Alipore under Section 138 read with Section 141 of the Negotiable Instruments Act 1881. These two applications are taken up together and heard as those arise out of the same case. The petitioners have been arraigned as accused persons in the complaint filed under

Section 138 read with Section 141 of the Negotiable Instruments Act.

2. The case of the complainant is that the petitioner M/s Orient Investments is an investment partnership firm and since 19.08.05, has been engaged in business of providing financial assistance. In course of business three cheques were issued by the accused persons duly signed with the company seal in the legal and lawful discharge of the liability. In course of business a sum of Rs. 4,50,000/- was due and the accused company and the directors issued account payee cheque in the name of the complainant company drawn on State Bank of India, Kalighat Branch being Cheque No. 221975 dated 22.06.2010.

The complainant deposited all the account payee cheques bearing No. 221998 dated 30.04.2010 amounting to Rs. 7,91,101/- Cheque No. 221975 dated 22.06.2010 amounting to Rs. 4,50,000/- with the Bank. Both the cheques were drawn on State Bank of India, Kalighat Branch and another account payee cheque drawn on Axis Bank Limited being Cheque No. 138236 dated 20.03.2010 amounting to Rs. 20,568/-. The said cheques were deposited with the complainant's banker Bank of Baroda, P.A.S. Branch on 30.06.2010 and the same were returned with a remark "funds insufficient" and the matter was intimated by the banker on 01.07.2010.

3. Thereafter, the complainant sent a notice under Section 138 of N.I. Act, through the learned Advocate for payment of the said amount within 15 days from the receipt of the said cheque issued by the accused persons. The said notice returned with a remark 'not claimed'. Thereafter the accused persons on several occasions contacted the complainant's agent over telephone and assured payment within a few days, but in vain.

4. It has been stated in the complaint that the accused persons issued the cheques in the discharge of their existing liability.

5. The learned counsel appearing on behalf of the petitioner submits that the demand notice issued by the Opposite Party is not in accordance with law, in as much as, it has been issued on behalf of M/s. Orient Investments and M/s. N. K. Choudhury HUF. The learned counsel submits that under Section 138 of the N.I.

Act, the holder of the cheque can issue notice and under Section 93 of the Act, the notice cannot be issued by more than one person. It is contended that the holder of the cheque as mentioned in Section 138 of the Act cannot be more than one person and in the instant case there are two distinct legal entities on whose behalf the notice was issued.

6. It is contended on behalf of the petitioner that in the notice no role was assigned in respect of each of the accused persons.

7. It is contended that Mrs. Rekha Malhotra and Mrs. Urvashi Korpai resigned prior to the issuance of the cheque which is evident from Form No.32 and, as such, the proceeding against them is not maintainable. It is contended that the demand notice is not in consonance with the averments made in the complaint.

8. The learned counsel appearing for the petitioner has referred to and cited the decisions reported in (2011) Cri. L.J. 692 [M.A.A. Annamalai v. State of Karnataka] ; (2011) 1 SCC (Cri) 1139 Paragraph 8-17 and 25-27 [Harshendra Kumar D. vs. Rebatilata Koley and Ors.];(2010)2 SCC (Cri) 1113 [National Small Industries Corporation Limited vs. Harmeet Singh Paintal And Another].

9. The learned counsel appearing on behalf of the opposite party submits that merely by filing Form No. 32 it would not, ipso facto, prove that Mrs. Rekha Malhotra and Mrs. Urvashi Korpai resigned prior to the issuance of cheque.

10. It is contended that this point is a pure question of fact which is required to be proved at the time of trial. The learned counsel appearing for the opposite party submits that the mentioning of M/S. N.K. Choudhury in the notice sent by the complainant would not by itself, invalidate the notice. It is contended that in para 1 of the instant application it has been admitted that Mr. P.K. Malhotra is the Director who is to manage the affairs of the company. It is contended that no averment is required regarding him. The learned counsel for the O.P. No. 2 has referred to and cited the decisions reported in 2008(2) E Cr. N. (Cal) 516 [Rajendra Mohan Sodhi @ R. M. Sodhi vs. State of W.B & Anr.] (para 6,10,11); 2010(1) E Cr. N. (Cal) 38 (para 19,20,23); [Manoj Jalan vs. State of W.B. & Anr.]; 2007(2) E. Cr. N. (SC) 568 (PARA 6,7,11) [N. Rangchari vs. BSNL]; 2008 (3) JCC 353 (para 6,7,11)[Malwa

Cotton & Spinning Mills Ltd., vs. Virsa Singh Sidhu];(2009) 16 SCC 757 [Venkateshwaran & Anr.vs. Singaravel Yarn Traders];2011 STPL (Web) 380 SC (para 14,15,16)[Rallis India Ltd. vs. Podru Vidya Bhusan & Ors.,];AIR 2011 SC 20 (para 45)[Iridium India Telecom Ltd., vs. Motorola Incorporated & Ors.];AIR 1996 SC 204 [Anil Srarn vs. State of Bihar];2005 Cr.L.J. 4141 (para 1©/20/©)[SMS Pharmaceuticals Ltd. vs. Neeta Bhalla]; 2000 Cri L J. 4438 [Hammanna S Nayak vs. Vijay Kumar Kalyani]; 2004(1) ALD (CrI) 31 (SC)(para 11) [K R Indra vs Dr. G. Adinarayana]; 2009(3) E. Cr. N. (Cal) 1132 (para 14); 2009 (3) E. Cr. N. (Cal) 1132 (para 14) [Barendra Kumar Bera vs. Santanu @ Chottan Mukherjee].

11. It is the contention of the learned counsel appearing for the petitioner that the notice is bad in law, in as much as, notice under section 138 of N.I. Act cannot be issued on behalf of two persons. It is further contended by the learned counsel appearing for petitioner that two cheques were issued in the name of M/S. Orient Investments and another cheque was issued in favour of M/s. N. K. Choudhury.

12. On this point the learned counsel appearing for the O.P. submits that the addition of M/S. N.K. Choudhury as mentioned in the notice was a mere suplusage and it would not in any way vitiate the proceedings. In this connection the learned counsel appearing for the O.P. has referred to the case of Barendra Kumar Bera vs. Santanu @ Chottan Mukherjee (supra).

In the aforesaid decision it has been held by the Hon'ble Single Judge in paragraph 14 as follows ;-

“The ordinary dictionary meaning of the word ‘notice’ is intimation or instruction to someone to do something. It is making someone aware of some fact. According to the common parlance a notice need not be in writing. If statue does not explicitly provide that the notice must be in writing then in such a situation verbal notice is sufficient, for example, notice under section 93 of the N.I. Act may be oral. Now section 138(b) of the N.I. Act provides clearly that the payee or the holder in due course of the cheque has to make a demand for the payment of

the amount of money by giving a notice in writing to the drawer of the cheque. Therefore, there is no scope to argue otherwise. The question is as to the manner of giving notice. There are no rules to the Act providing for manner of giving of notice. Had there been any statutory rule framed under the Act concerning manner of giving notice then such a rule would have been mandatory to be followed. The statute does not demand anything more except saying that the notice has to be in writing asking the drawer to make payment. In such circumstances, the question therefore is what would be the legal consequence of a notice otherwise valid and since received by the drawer but not signed by the agent of the party. The law is very clear that the notice under section 138(b) need not necessarily be signed by the payee or the holder in due course. An authorised representative or agent of the payee or the holder in due course may issue the notice and here the Advocate acting as agent of the payee issued the notice in his letterhead but without signature. As already observed, there is no statutory rule providing for mode of issuance of notice or of any form.....”

13. Since the cheques were issued in favour of M/S. Orient Investments and M/S. N. K. Choudhury, it appears that the question as to the mention of the name of M/S. N. K. Choudhury along with M/S. Orient Investments in the notice should be considered at the time of final hearing of the case after evidence is led by the parties.

14. As regards the resignation of Mrs. Rekha Malhotra and Mrs. Urvashi Korpai reference has been made to the case of S.M.S. Pharmaceuticals Ltd., vs. Neeta Bhalla and Anr. (supra). In the aforesaid case it has been held in paragraph 20 (c) as follows;-

“The answer to question (c) has to be in 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 conduct of its business. When that is so, holders of such positions in a company become liable under Section 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 under Section 141. So far as 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.”

15. In the case of Malwa Cotton & Spinning Mills Ltd. vs. Virsa Singh Sidhu & Ors. (supra) it has been held in paragraph 8 as follows ;-

“We find that the prayers before the courts below essentially were to drop the proceedings on the ground that the allegations would not constitute a foundation for action in terms of Section 141 of the Act. These questions have to be adjudicated at the trial. Whether a person is in charge of or is responsible to the company for conduct of business is to be adjudicated on the basis of materials to be placed by the parties. Sub - section (2) of Section 141 is a deeming provision which as noted supra operates in certain specified circumstances. Whether the requirements for the application of the deeming provision exist or not is again a matter for adjudication during trial. Similarly, whether the allegations contained are sufficient to attract culpability is a matter for adjudication at the trial.”

In the aforesaid case it has further been held in paragraph 11 as follows :-

“Whether or not the evidence to be led would establish the accusations is a matter for trial. It needs no reiteration that proviso to sub-section (1) of Section 141 enables the accused to prove his innocence by discharging the burden which lies on

him.”

16. In the case of N. Rangachari vs. Bharat Sanchar Nigam Limited it has been held by the Hon'ble Apex Court in paragraph 19 as follows ;-

“We think that, in the circumstances, the High Court has rightly come to the conclusion that it is not a fit case for exercise of jurisdiction under Section 482 of the Code of Criminal Procedure for quashing the complaint. In fact, an advertence to sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence under section 138 being satisfied, the burden is on the Board of Directors or the officers in-charge of the affairs of the company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to show that at the relevant time they were not in-charge of the affairs of the company. Reading the complaint as a whole, we are satisfied that it is a case where the contentions sought to be raised by the appellant can only be dealt with after the conclusion of the trial.”

17. It is the contention of the learned counsel appearing for the petitioner that the resignation was tendered on 02.03.2010 and the cheques were issued on 30.04.2010 and 20.03.2010. and 22.06.2010. It is the contention of the learned counsel appearing for the petitioner that in Form No. 32 it was mentioned that the resignation was tendered w.e.f. 02.03.2010.

18. In case of Rajender Mohan Sodhi@ R.M. Sodhi vs. State of West Bengal & Anr. this point of tendering resignation was not accepted. The Special Leave Petition against that judgement and order was dismissed as it appears from paragraph 20 of the decision in the case of Manoj Jalan vs. State of West Bengal & Anr. (supra). The alleged resignation of Mrs. Rekha Malhotra and Mrs. Urvashi Korpai, therefore, cannot form the basis of an order for quashing of the

proceedings under Section 482 of the Code of Criminal Procedure.

19. It is contended by the learned counsel appearing for the petitioner that no role was assigned in respect of the petitioners. In this connection the learned counsel appearing for the OP No. 2 has drawn my attention to paragraph 1 of the application bearing No. 756 of 2011 wherein it has been stated that the petitioner No. 1 Pradip Kr. Malhotra is a Director and he has been managing the business of the company with intense sincerity and integrity. It has also stated in the petition of complaint that the accused persons in discharge of their existing debts and liabilities in respect of the bills of exchange and towards such part payment issued three Account payee cheques.

20. In case of Iridium India Telecom Ltd. v. Motorola Incorporated & Ors. it has been held by the Hon'ble Apex Court in paragraph 45 as follows :-

“In such circumstances, in our opinion, the High Court ought to have refrained from indulging in detailed analysis of very complicated commercial documents and reaching any definite conclusions. In our opinion, the High Court clearly exceeded its jurisdiction in quashing the criminal proceeding in the peculiar facts and circumstances of this case. The High Court noticed that while exercising jurisdiction under Section 482 Cr. P.C. “the complaint in its entirety will have to be examined on the basis of the allegations made therein. But the High Court has no authority or jurisdiction to go into the matter or examine its correctness. The allegations in the complaint will have to be accepted on the face of it and the truth or falsity cannot be entered into by the Court at this Stage.” Having said so, the High Court proceeded to do exactly the opposite.”

21. The learned counsel appearing for the petitioner has referred to the case of M.A.A. Annamalai v. State of Karnataka & Anr. in support of his contention that accused petitioners Mrs. Rekha Malhotra and Mrs. Urvashi Korpai are not responsible, because of their resignation tendered prior to the issuance of cheque.

I find that the factual aspect of the aforesaid case is different and, as such, the said decision is not coming in the aid of the contention of the learned counsel appearing for the petitioner.

22. Since it is a disputed question of fact, it cannot be taken into consideration in an application under Section 482 Cr. P.C.

23. In view of the facts of the instant case it cannot be said that the facts complained of do not constitute any offence. The points urged by learned counsel appearing for the petitioner cannot form the basis of an order for quashing of the proceedings under Section 482 of the Code of Criminal Procedure. The points urged by the learned counsel for the petitioner are the matters to be considered at the time of trial.

24. Under such circumstances, I find that it is not a fit case for quashing of the proceedings.

25. Both the applications CRR No. 955/11 & CRR 756/11 are, therefore, dismissed.

26. Let a copy of this order be sent to the learned court immediately.

27. Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

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