HIGH COURT OF GUJARAT

A B GARWARE AND ORS
V/S
STATE OF GUJARAT AND ANR

Date of Decision: 26 October 2010

Citation: 2010 LawSuit(Guj) 1263

Hon'ble Judges: Akil Kureshi

Case Type: Criminal Misc Application

Case No: 11807 to 11848 of 2007

Subject: Banking, Civil, Criminal

Acts Referred:
Indian Penal Code, 1860 Sec 420, Sec 114
Negotiable Instruments Act, 1881 Sec 141, Sec 138

Final Decision: Petition dismissed

Advocates: K S Nanavati, Kartik Pandya, Prabhav Mehta, R J Goswami

Reference Cases:
Cases Referred in (+): **8**

Judgement Text:-

Akil Kureshi, J

[1] Counsel for the Petitioners stated that Petitioner No. 3 has expired. He stands

deleted from the cause title at the oral request of the counsel for the Petitioners.

[2] Petitioners are some of the accused in separate cheque bouncing complaints lodged by Respondent No. 2 who is common in all the complaints. Petitioners seek quashing of such complaints on various grounds. Since facts are similar on all material aspects in all the petitions, they may be recorded as emerging in Criminal Misc. Application No. 11807 of 2007. Petitioners in this petition are original accused Nos. 1 to 5 and 9 respectively in Criminal Complaint No. 2070/95 filed before the learned Chief Judicial Magistrate, Baroda by Respondent No. 2 on 13th June 1995. The complainant alleged commission of offence punishable under Section 138 of the Negotiable Instruments Act as well as 420 of the Indian Penal Code by all the accused including the Petitioner. With respect to the contents of this complaint, reference in detail will be made at a later stage.

[3] Petitioners previously approached the learned Magistrate and requested that the process issued be dropped on the grounds that the Petitioners as Directors of accused No. 14 Company are not responsible for its day to day functioning and that no part of cause of action had arisen within the territorial limits of the learned Magistrate and they are wrongly joined as accused. Having failed in their attempt before the learned Magistrate, they approached the High Court. Learned Single Judge by his judgment dated 17.1.2004 since reported in the case of R.C. Mehta v. G.S.F.C. Ltd., 2004 3 GLR 1952 dismissed the petitions holding that to decide the issue, fullfledged trial would be necessary.

[4] The Petitioners challenged the judgment of the learned Single Judge before the Apex Court. The Hon'ble Supreme Court by the judgment reported in the case of S.V. Mazumdar v. Gujarat State Fertilizer Co. Ltd., 2005 4 SCC 173, dismissed the SLP. While doing so, the Apex Court directed that the trial should be completed by the end of November 2005. For the reasons which are not on record, such trial could not be completed within the stipulated time.

[5] After the said judgment of the Hon'ble Supreme Court, the Petitioners once again approached before the learned Magistrate and sought their discharge which was rejected by the learned Magistrate by order dated 24.1.07. This order, it is stated that, was challenged by filing Criminal Misc. Application No. 7416 of 2007 and connected matters, which came to be disposed on 21.6.07 in following manner:

> At the outset, Mr. P.M. Thakkar, learned Senior Advocate with Mr. S.V. Raju,

learned Advocate with Mr. Atul Mehta, learned Advocate appearing on behalf of the respective parties, seek permission to withdraw the present applications without entering into merits of the case. Permission is accordingly granted. All the applications are dismissed as withdrawn.

[6] After the said order of the learned Single Judge, the present group of petitions have been filed with the following prayers:

(A) Your Lordships be pleased to call for record and proceeding of complaint being Criminal Case No. 2070 of 1995 from the Court of Ld. Chief Judicial Magistrate, Baroda and after perusing the same be pleased to quash the impugned complaint, in the interest of justice;

(B) Your Lordships be pleased to stay the further proceedings of impugned complaint being Criminal Case No. 2070 of 1995 pending in the Court of Ld. Chief Judicial Magistrate, Baroda pending the admission hearing and final disposal of this petition;

(C) Your Lordships be pleased to grant such other and further reliefs as deemed fit in the interest of justice.

[7] Counsel for the Petitioners submitted that the Petitioners as Directors of accused No. 14 Company could not have been held vicariously liable for the offence of dishonour of cheque. He further submitted that as clarified in the subsequent decisions of the Apex Court, the complaint could not have been filed before the learned Magistrate at Baroda. He submitted that such clarifications have been made by the Apex Court after the decision in the case of the Petitioners. In any case, the ratio laid down therein would apply.

[8] On the other hand, counsel for the original complainant opposed the petitions contending that all issues were previously examined by the High Court as well as by the Apex Court. Thereafter also, the Petitioners had approached the learned Single Judge of his Court but had withdrawn the petitions. It is the third round of litigation. The Petitioners are in some way or other stalling the trial.

[9] To examine the rival contentions, contents of the complaint and some of the

decisions including those rendered in the case of the Petitioners need to be noticed at some length.

[10] In the impugned complaint, the complainant has averred, inter alia, as under:

> 2. The accused No. 14 is a Limited Company registered under the Companies Act 1956, and producer of Nylons and other related products. The accused No. 1 is a Chairman and Managing Director, while the accused Nos. 2 to 11 are the directors of the accused No. 14 which is a Public Limited Company. The accused No. 12 is the Director (Finance) looking after financial affairs of the accused No. 14 and the accused No. 13 is the General Manager (Finance) subordinate to the Director (Finance).
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> 5. The accused gave instruction and various purchase orders during the period of 8/6/94 to 26/9/94. The Complainant started supply of Caprolactam from the month of June, 1994 as per the lifting schedule provided by the accused. It was specifically mentioned and made it clear in the purchase order that the credit against the goods (Caprolactam) supplied will be of 120 days out of which 90 days credit period will be interest free and the remaining 30 days with 17.5% interest per annum.
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> 6. That as per the above purchase orders and lifting schedules the accused signed and delivered around 80 cheques of total amount of Rs. 5,19,31,838/- against the supply of 756 M. tonnes of Caprolactam. The cheques were signed and delivered by the accused No. 12, 13 and some other authorized persons on behalf of the accused No. 14, the Company. They also gave an assurance that the above cheques will be honoured on presentation. On the said assurance the cheques were accepted which were drawn in favour of the complainant and drawn on Dena Bank, Ind. Finance Branch, Bombay.
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> 7. Following cheques were deposited by the complainant in their account

with ANZ Grindlays Bank, M.G. Road, Bombay for clearing on 3rd May, 1995 along with other cheques.

Cheque No.	Date	Amount
433435	15.11.94	12,01,824
433436	15.11.94	17,287
	Total	**12,19,111**

However, to the surprise of the complainant the above cheques were dishonoured and returned unpaid by the Dena Bank, Industrial Finance Branch, Bombay with Bank Memo clearly mentioning the reason "EFFECTS NOT CLEARED" AND "FUNDS INSUFFICIENT". Along with these some other cheques given by the accused were also dishonoured on the same day.

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[11] The said notice have been served to all the accused on or around 17th to 20th May, 1995 and of all the directors and the accused company, only accused Nos. 1 to 9 and 12 to 14 have replied the notice in vague manner and even after expiry of the specified period of 15 days the accused have not made the payments of Rs. 5,19,31,838/- towards the above mentioned dishonoured cheques till today. Further, the accused have not taken any action to pay the sum of cheques.

13. All the accused knew before the cheques were given to the complainant that there was insufficient fund to honour the cheques even though the supply of 18 tonnes of Caprolactam was received and cheques of Rs. 12,19,111/- were given. Thus all the accused have committed serious offence Under Section 138 of Negotiable Instrument At and Under Section 420 and 114 of I.P.C. So, the complainant company has filed this complaint before your Honour.

14. As per the information and record the accused Nos. 1 to 12 are the

directors of the company and they decide the policy regarding the business of their company and as per that policy all the directors and concerned officers are implementing the said policy. Being directors and officers all accused are responsible for their act done on behalf of the accused company No. 14. Thus they are liable for criminal action.

15. The purchase orders was received at Baroda and the goods were also delivered from Baroda. The factory and registered office of the Complainant company are situated at Baroda. Further, the final transaction also took at Baroda. So this Hon'ble Court is having jurisdiction to try this complaint.

11. In the first round of litigation before this Court, learned Single Judge in the reported judgment in the case of R.C. Mehta (supra) considered both the contentions, namely, with respect to the vicarious liability of the Directors and the territorial jurisdiction of the learned Magistrate at Baroda and came to the following conclusions:

9.1 It is true that, in case of the offence by a company, a person, for being charged with the offence, has to be shown to be in charge of and responsible to the company in the conduct of its business. Such person could as well be a director or officer of the company to be covered by Sub-section (1) of Section 141. It must be noted that such person in charge of and responsible to the company in the conduct of its business is not required, in order to be implicated in the offence of dishonour of cheque, to be shown also to have actually committed any act. However, under the proviso to Sub-section (1), he cannot be punished if he proves that the offence was committed without his knowledge or despite his due diligence to prevent the commission of the offence. Sub-section (2) of Section 141, opening with a non-obstante clause, covers a wider spectrum of persons, irrespective of their being in charge of or responsible to the company, if the offence were proved to have been committed with their consent, connivance or neglect. It is trite that, in order to prove implicating facts against a person, such person has to be impleaded as an accused person.

9.2 It is seen earlier that all the ingredients essential to implicate a person

need not be clearly spelt out in detail in the complaint. At the stage of investigation or initiation of trial, a strict and hypertechnical approach of sieving the complaint through a cullendar of the finest gauzes for testing the ingredients is clearly disapproved by the Supreme Court in Rajesh Bajaj (supra). Therefore, at this stage, it has to be broadly seen whether factual foundation for the offence has been laid in the complaint and the question of quashing the complaint or declaring that no criminal offence was made out arises only in extremely rare cases of the complaint being bereft of even the basic facts absolutely necessary for making out the offence.

9.3 Having regard to the above basic legal premises, the defences and contentions of the Petitioners to the effect that some of the Petitioners were non-wholetime non-executive directors not concerned with the day-to-day affairs of the company and not having signed or delivered the cheques cannot be considered at this stage. Equally irrelevant at this stage are the contentions that the complainant and the accused companies had long-standing business relationship and that the cheques were issued only by way of security which failed without any mala fides or mens rea on the part of the Petitioners.

10. There are clear allegations in the complaint suggesting knowledge and consent of the Petitioners as the directors of the accused company in purchasing huge stocks of raw materials from the complainant and issuing number of cheques towards payment or for securing payment without actual payment or realization of the cheques being arranged for. Prima facie, it would be difficult to assume that cheques in the sum exceeding Rs. 5 crores could have been issued by the persons in charge of the company without the knowledge or connivance of the board of directors. The course of events culled out from the record, prima facie, lends credence to the allegations of the complainant that it was induced and deceived into delivering goods on credit against the security of cheques which bounced when presented for realization. Thus, the allegations against the Petitioners indicate larger offences of cheating or abetment thereof within which the monetary transaction of issuance of cheques and dishonour thereof will have to be examined on the basis of evidence that may be led at the trial. When it is alleged that the offences were committed by the company as well as the

directors collectively, it would not be necessary to separately allege that each director had consented to or connived at the commission of the alleged offences. It is not just a case of bald allegation of the Petitioners being responsible as directors of the company whose cheques were dishonoured but, instead, specific statements on oath are made by the complainant to allege that the accused had issued cheques with the intention of cheating.

10.1 As for the territorial jurisdiction of the Court at Vadodara, by the judgments of the Supreme Court in K. Bhaskaran v. Sankaran Vidhyan Balan, 1999 7 JT 558 as followed by this Court in Chemox v. GNFC,2003 44 GLR 424, it is settled that complainant can choose any one of those Courts within whose jurisdiction any one of the five acts constituting the offence had taken place; which acts include failure to pay within 15 days of the receipt of notice under Section 138 of the NI Act. In the facts of this case, the goods having been supplied by the complainant at Vadodara and the amount of the cheques having been payable, after notice, at Vadodara, the Court thereat had the jurisdiction to take cognizance of the offences.

10.2 In the above circumstances, the impugned order of the trial Court rejecting the application (Exh.25) for dropping the cases is legal, justified and does not require any interference. In fact, after the judgment of the Supreme Court in John Thomas (supra), the original application (Exh.25) would not have lied.

[12] The above decision was upheld by the Apex Court in the case of S.V. Mazumdar (supra) wherein the Apex Court observed as under:

8. 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 the 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.

9. Under Scheme of the Act, if the person committing an offence under Section 138 of the Act is a company; by application of Section 141 it is deemed that every person who is in charge of and responsible to the company for conduct of the business of the company as well as the company are guilty of the offence. A person who proves that the offence was committed without his knowledge or that he had exercised all due diligence is exempted from becoming liable by operation of the proviso to Sub-section (1). The burden in this regard has to be discharged by the accused.

10. The three categories of persons covered by Section 141 are as follows:

(1) The company who committed the offence.

(2) Everyone who was in charge of and was responsible for the business of the company.

(3) Any other person who is a director or a manager or a secretary or officer of the company with whose connivance or due to whose neglect the company has committed the offence.

11. 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.

[13] In view of the above decision, it clearly emerges that both the questions which the Petitioners are seeking to urge before me in the present group of petitions were raised, argued, considered and decided by not only the learned Single Judge of this Court, but also by the Apex Court in a confirming judgment. The question is, would it be

permissible for this Court to reopen the issues at this stage all over again in view of some of the decisions of the Apex Court throwing lights on these aspects of the matter.

[14] Counsel for the Petitioner took me through the decision of the Apex Court in the case of S.M.S. Pharmaceuticals v. Neeta Bhalla, 2005 8 SCC 89 wherein the question of vicarious liability of the Directors of a Company came to be considered by a larger Bench. The Apex Court observed as under:

> 11. A reference to Sub-section (2) of Section 141 fortifies the above reasoning because Sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these officers in a company. In such a case, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases in their proved involvement.
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> 12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.
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> 18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself....
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> 19. In view of the above discussion, our answers to the questions posed in

the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 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 question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for 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 the 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 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] Counsel for the Petitioners also placed heavy reliance in the case of K.K. Ahuja v. V.K. Vora, 2009 10 SCC 48 wherein the Apex Court summed up the ratio in following manner:

27. The position under Section 141 of the Act can be summarised thus:

(i) If the accused is the Managing Director or Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under Sub-section (2) of Section 141.

(iii) In the case of a Director, secretary or manager (as defined in Section 2(24) of the Companies Act) or a person preferred to in Clause (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other officers of a company cannot be made liable under Sub-section (1) of Section 141. Other officers of a company can be made liable only under Sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

[16] Reliance is also placed in the case of National Small Industries Corporation Ltd. v.

Harmeet Singh Paintal, 2010 3 SCC 330, wherein the Apex Court reiterated this position in para 39 in following manner:

> 39. From the above discussion, the following principles emerge:
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> (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
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> (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
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> (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.
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> (iv) Vicarious liability on the part of a person must be pleased and proved and not inferred.
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> (v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.
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> (vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the Company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the 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.

[17] To my mind, however, it is not possible to reopen the issue in the present group of petitions and undertake a threadbare exercise whether by virtue subsequent decisions and the ratio laid down therein, there is a case for quashing made out. To repeat, both the contentions of the Petitioners were considered, dealt with and turned down previously by the learned Single Judge of this Court which judgment was upheld by the Apex Court by a detailed judgment. Thereafter, the Petitioners once again approached the learned Magistrate and sought discharged. When refused, they approached this Court challenging such order, but withdrew the petitions, wherein no prayer was made to permit them to file quashing petitions. In the third round at this stage, it would not be possible for this Court to examine minutely the contentions of the Petitioners regarding vicarious liability of the Directors and the question of jurisdiction. The learned Single Judge has in the judgment in the case of R.C. Mehta (supra) gone into at considerable length and found that no case for quashing the proceedings against the Petitioners is made out. In the case of S.M.S. Pharmaceuticals (supra) also, the Apex Court, as already noted, observed that Section 141 of the Negotiable Instrument Act operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. It is further observed that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. I have already reproduced the relevant portion of the contents of the complaint. The learned Single Judge in the case of R.C. Mehta (supra) was of the opinion that such allegations are sufficient to permit fullfledged trial and would not make a case for dropping the proceedings with a trial. With the limited scope of the present proceedings, since it is the third round of litigation before the High Court, I am of the opinion that no case for reopening the entire gamut and resultant quashing of the complaint is made out.

[18] For the same reason, I am of the opinion that the question of territorial jurisdiction also cannot be permitted to be reopened. Such question was concluded by the learned Single Judge in the previous round of litigation. The complainant has made averments about jurisdiction of the Court in para 15 of the complaint. The learned Single Judge

was of the opinion that the proceedings must be permitted to be tried.

[19] Reliance was, however, placed in the case of Harman Electronics Private Ltd. v. National Panasonic India Private Ltd., 2009 1 SCC 720 wherein the Apex Court finding that mere issuance of notice by the complainant from its office would not cloth the Magistrate of the region to entertain cheque bouncing complaint. In the present case, the averments are more elaborate and have already been examined by the learned Single Judge of this Court previously and the view adopted has been approved by the Apex Court. In the third round of litigation, it is not possible to reopen the issue all over again.

[20] It is clarified that the observations made in this order pertain only to the prayer of the Petitioners for quashing the proceedings which are made in peculiar background of the present case wherein these issues have already been at the ad-hoc stage where the trial is yet to be completed. While confirming the judgment of the learned Single Judge, the Apex Court has observed that whether or not the evidence to be led would establish the accusations is a matter of trial.

[21] In the result, all these petitions are dismissed clarifying, however, that these observations will not come in way of the Petitioners in raising all the questions before the Trial Court.