

*

HIGH COURT OF DELHI : NEW DELHI

+

Crl.M.C.No.3633 of 2007

%

Judgment reserved on: 29th November, 2007

Judgment delivered on: 12th March, 2008

1. M/s. Hindustan Cables Ltd.
9, Lala Lajpat Rai Sarani,
Elgin Road,
Kolkata-700020
2. Mr. N.C.Ghosh,
General Manager
(Unit Head) Rupnarainpur Unit,
Hindustan Cables Ltd.,
P.O. Hindustan Cables,
Rupnarainpur
Distt. Burdwan, Asansol,
West Bengal-713335
3. Mr. Sukamal Sinha,
Deputy General Manager (Finance)
Hindustan Cables Ltd.
P.O. Hindustan Cables,
Rupnarainpur
Distt. Burdwan, Asansol,
West Bengal-713335
4. Mr. P.K. De,
Manager (Finance)
Hindustan Cables Ltd.,

P.O. Hindustan Cables,
Rupnarainpur
Distt. Burdwan, Asansol,
West Bengal-713335

5. Mr. Sapan Kumar Bhowmick,
Deputy Manager (Finance)
Hindustan Cables Ltd.,
P.O. Hindustan Cables,
Rupnarainpur
Distt. Burdwan, Asansol,
West Bengal-713335
6. Mr. S. Patra,
Manager (Commercial)
Hindustan Cables Ltd.,
P.O. Hindustan Cables,
Rupnarainpur
Distt. Burdwan, Asansol,
West Bengal-713335
7. Mr. A.K.Guha,
General Manager (Commercial)
Hindustan Cables Ltd.,
P.O. Hindustan Cables,
Rupnarainpur
Distt. Burdwn, Asansol,
West Bengal-713335
8. Mr. P.K. Roy,
Deputy General Manager
Hindustan Cables Ltd.,
P.O. Hindustan Cables,

Rupnarainpur
Distt. Burdwan, Asansol,
West Bengal-713335.

Through: Mr. Jayant K. Sud with
Mr. Suraj Prakash, Mr.
Anil Sahi and Mr.
Kalyan Dutt, Advs.

Versus

1. The State,
Govt. of NCT of Delhi
Through the Secretary (Home),
Delhi.

2. Manish Industries
304, Surya Kiran Building,
Kasturba Gandhi Marg,
New Delhi

Respondents

Through: Mr. M.P.Singh, Adv. for the State.

Mr. Sidharth Luthra, Sr. Adv.
with Mr. P.K.Dubedy & Mr. Shiv
Singh, Adv. for respondent No.2.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

- | | |
|---|-----|
| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |

3. Whether the judgment should be reported
in the Digest?

Yes

V.B. GUPTA, J.

The present petition has been filed under Section 482 Cr.P.C. vide which the petitioners have challenged the summoning order dated 14th August, 2003 passed by the learned Matropolitan Magistrate, in complaint case No.315/1/03 (Manish Industries vs. Hindustan Cables Limited and Others) under Section 138/141 of the Negotiable Instruments Act (for short as 'Act') and also for setting aside the order dated 24th August, 2004 passed by the learned Magistrate rejecting the prayer and application of the petitioners for dropping the proceedings and also for setting aside of the order dated 19th January, 2005 passed by the learned Additional Sessions Judge, dismissing the Criminal Revision Petition filed by the petitioners.

2. Brief facts of this case are that Petitioner Company, M/S. Hindustan Cables Ltd., Calcutta (for short as HCL) is a Govt.

company. Petitioner Company issued a cheque in favour of the Respondent No.2 towards the supply of goods on 20.4.02. At the request of Respondent No.2, the aforesaid cheque was revalidated on 19.10.02 for six months. At the request and insistence of the Respondent No.2, the aforesaid cheque was once again revalidated on 18.4.03, subject to the condition that the same will be presented after confirmation from Petitioner Company. When the aforesaid cheque was presented for payment, the same was dishonoured by the banker of the petitioner on the ground of "exceeds arrangement" in the account of the petitioner and the same was communicated to the Respondent No.2 by their banker on 29.5.03. Then Respondent No.2 sent statutory legal notice under Section 138 read with Section 141 of the Act to the petitioner company informing about the dishonour of the cheque in question and demanding payment of the amount covered by the cheque within fifteen days from the date of receipt of the said notice.

3. In response to the aforesaid statutory legal notice, petitioner company replied that the respondent no.2 suppressed the material fact that the cheque was issued subject to the condition that same would be presented after getting confirmation from HCL and BIFR had declared petitioner company as sick unit vide order dated 21.3.2003 and hence if the Respondent No.2 would proceed further, he would do so at his own cost risk.

4. Respondent no. 2, thereafter filed the complaint u/ss. 138/141 of the Act read with Ss.420/120B I.P.C. against the HCL and 13 others in the Court of the Metropolitan Magistrate, Delhi. The Magistrate took cognizance of the offence and issued summons against the accused persons.

5. The Ld. Metropolitan Magistrate vide order dated 24.8.2004 held that the accused is a company incorporated under the Companies Act and the accused no.2 to 5 were public servants within the meaning of Sec.21 of the Indian Penal Code, their

prosecution was not maintainable without the written sanction as required u/s.197, Cr.P.C. Thus, the Ld. Metropolitan Magistrate dropped the proceedings against accused no.2 to 5 for want of sanction. However, he rejected the application in respect of the remaining accused persons (Petitioners) and directed them to appear in person on the next date of hearing on 27.10.04.

6. Aggrieved thereby the Petitioners filed a Revision Petition before the Sessions Judge. The Ld. Additional Sessions Judge observed that in view of the judgment passed by the Supreme Court in *Adalat Prasad v. Rooplal Jindal & Others*, 113 (2004) DLT 356 (SC) and *Subramaniam Sethuraman v. State of Maharashtra & Another*, 2004 (4) Crimes 78 (SC), the only course of action available to the accused/petitioners by way of filing a Petition u/s.482, Cr.P.C before this Court against the order of the Ld. Metropolitan Magistrate relating to the summoning order. Accused persons have got no right to ask recalling of the summoning order either directly/indirectly by way of filing the Revision Petition; hence,

dismissed the said Revision Petition being not maintainable in the eyes of law, without entering into the merits of the case.

7. On 21.4.05, the Petitioners filed the petition u/s.482 before this Court and the Court vide order dated 25.4.05 directed stay of the further proceedings in the Trial Court. The aforesaid petition was disposed off by this Court with liberty granted to the Petitioners to file fresh petition to challenge the summoning order to face trial for the offence u/ss.138/141 of the Act within 3 weeks challenging the summoning order dated 14.8.03 and granted stay of further proceedings.

8. Hence, the petitioners have filed the present petition u/s.482,Cr.P.C before this Court.

9. The Petitioner Company seek quashing of the complaint filed u/s.138 of the Act on the ground that since the offending company has been declared sick by the BIFR, no steps could be taken by the respondent no.2 (complainant) for realization of the amounts said to

be due to them and therefore the criminal proceedings initiated against the petitioner company and its directors on the allegation that the cheque drawn in favour of the respondent no.2 was dishonoured by the bank is misconceived and should be quashed. Reliance has been placed on Sections 22 and 22A of SICA.

10. The main thrust of the arguments of the Ld. Counsel for the Petitioner Company is that the Petitioner Company is a govt. company. Directors and Person-in-Charge are responsible only for day-to-day affairs. There is no material gain to connect the petitioners with the alleged offence.

11. Further, on 21.3.03, the BIFR had declared the petitioner company as a "Sick Industrial Company" in terms of Section 3 (1)(o) of the SICA and the company/ promoters were restrained u/s. 22A of SICA not to dispose of any fixed or current assets without the consent of the secured creditors and the BIFR. Because of the said

restraint order passed by the BIFR, Petitioner Company had no authority to entertain the claim made by respondent no.2. Moreover, when the cheque was drawn, the restraint order was in force. Hence the instant criminal proceeding against the petitioners is not maintainable. Reference is made regarding the judgment of Supreme Court in *Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd.* (2000) 2 SCC 745.

12. It is also contended that in view of the written undertaking, the Respondent No.2 had no authority to present the said cheque in the bank for encashment and the said written undertaking by the respondent no.2 amounts to an agreement and failure or refusal to abide by the stipulations contained in the said written undertaking amounts to a breach/violation which has rendered the said cheque an invalid instrument in the eyes of law.

13. In view of decision in *Kusum Ingots & Alloys Ltd. case (supra)*, if before the date on which the cheque was drawn on or

before expiry of the statutory period of 15 days after notice, restraint order passed by the BIFR u/s.22A then it cannot be said that the offence was completed. In such case, dishonouring of the cheque by the bank and failure to make payment by the company/management is for reason beyond the control of the petitioners as the cheque amount due to respondent no.2 is not recoverable from the assets in view of the ban orders. Therefore, it would be unfair and unjust and against the intent and purpose of the statute to hold that the directors should be compelled to face trial in a criminal case.

14. Thus, by presenting the said cheque in the bank for encashment without obtaining the consent of the petitioner company, the respondent no.2 acted illegally in utter violation of the condition of the agreement entered between him and the petitioner company. Hence it did not give rise to any cause of action to institute a prosecution against the petitioner company and its director or executive Director in accordance with law.

15. The Ld. Counsel for the Respondent No. 2 on the other hand contends that on 21.3.03 the order was passed by the BIFR which finds mention of the reference made earlier by petitioners based on balance sheet as on 31.3.01 and the same was rejected as time barred on 26.7.02 and despite that they placed an order with the respondent no.2 for supply of goods by concealing these facts from the respondent no.2.

16. It is further stated that the cheque were issued on 20.4.02 which was revalidated on 19.10.02 and lastly on 18.4.03. Again these facts were concealed by the petitioner company from the respondent no.2.

17. It is further contended that the BIFR passed directions to the petitioner company to make the payments for the running of the day-to-day business of the petitioner company. Therefore, a complete restraint was not placed upon the petitioner company for making the payment. The petitioner company is a running company

and the raw material was supplied by the respondent no.2 for the running of the day-to-day business of the company. The cheque in question was issued by the petitioners for liability which is legally enforceable liability and was not issued for any loan and therefore, Sec.22A of the SICA is not applicable in the facts and circumstances of the case.

18. The petitioners have deliberately concealed the material facts that the operation of the bank accounts of the petitioner company has not been restrained by any order of BIFR. Other payments were made by petitioner company to Respondent no.2 and M/s. Shakun Polymers Ltd., shows that there was no restraint order by BIFR for payment of their liability to the customers/suppliers for day-to-day business.

19. Section 22A of SICA, does not bar the criminal prosecution and payment of legally enforceable dues.

20. Even if the said order of BIFR was passed on 21.3.03, it was not in accordance with law as it apparent from the said order that there was no scheme u/s.18 during the period of preparation of consideration or during the period beginning with the recording of opinion by the board or for winding up that the board under Section 20(1) and up to the commencement of the proceedings relating to the winding up before the High Court concerned, in the absence of both the conditions, the order under section 22A of SICA is not in accordance with law.

21. The judgment in *Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd.* (2000) 2 SCC 745, is not applicable in the facts and circumstances of the case as much as the Supreme Court has laid down that if the company is sick and a restraint order has been passed by the BIFR, it would be open to the aggrieved party to place relevant material in this regard before Ld. Magistrate before whom the case is pending and the said Magistrate will examine the matter.

22. The offence under section 138 of the Negotiable Instruments Act stood completed when there was a default and non-payment subsequent to the receipt of the statutory legal notice under section 138. It is the admitted case of both the parties that the amount is payable but the contention raised by petitioner company in its defence is that company is not in a position to pay.

23. As regards the argument that the petitioner company has been declared sick by the BIFR and the company/ promoters were restrained u/s. 22A of SICA not to dispose of any fixed or current assets without the consent of the secured creditors and the BIFR, the facts of the present case show that despite that restraint order, the BIFR passed directions to the petitioner company to make the payments for the running of the day-to-day business of the petitioner company. The payment made by the petitioner company to the Respondent No.2 and M/s Shakun Polymers Ltd. also establish that there was no restraint order passed against the petitioner company by BIFR barring the payment of its liability to its

customers/suppliers for the running of day-today business. In the explanation to the section clarification is made that the phrase “debt or other liability” means a legally enforceable debt or other liability.

24. Further, the petitioner company had taken a written undertaking from the respondent no.2 that the cheque in question would not be presented for encashment in the bank without the consent of the petitioner company yet the revalidation letter has concealed about the restraint order made by the BIFR. Furthermore, there is no dispute that the present cheque was with respect to supply of the goods on 13.2.02, i.e. subsequent to the reference made by the petitioner company to the BIFR. These transactions were not restrained by BIFR.

25. In these facts and circumstances, the purported undertaking was voidable under section 19 of Indian Contract Act since there was concealment of facts on the part of the petitioner company. Keeping in mind the above discussions, the matter in dispute is a

triable issue and can only be decided after placing the evidence before the Trial Court and the complaint cannot be quashed under section 482, Cr.P.C.

26. As observed by the Supreme Court in *Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd.* (2000) 2 SCC 745, if the company is sick and a restraint order has been passed by the BIFR, it would be open to the aggrieved party to place relevant material in this regard before Ld. Magistrate before whom the case is pending and the said Magistrate will examine the matter. Analyzing the scope and ambit of the provisions of Sections 22 and 22A of the SICA, their Lordships have held that Section 22 of the SICA does not create any legal impediment for instituting and proceeding with the criminal case on the allegations of an offence u/s. 138 of the Negotiable Instruments Act against a company or its director. However, Apex Court observed that it will depend on the facts and circumstances of the case whether in such circumstances the proceedings could be initiated or not.

27. Therefore, no exception can be taken against the order of the Magistrate taking cognizance of the offence u/s. 138, against the Petitioners. Undisputedly the cheques were drawn by the petitioners for payment of certain amount of money due to respondent no.2, from the account in the Bank and the said cheque was dishonored by the Bank and the amount remained unpaid even after lapse of 15 days from the date of notice issued by respondent no.2 after the cheque was dishonored. Therefore, the ingredients of Sec.138 of the Act being prima facie, established from the complaint and the documents filed it with, the Magistrate rightly took cognizance of the offence and issued summons to the petitioners.

28. A question as to whether a magistrate after issuing process could recall it. It is now settled in *Adalat Prasad v. Rooplal Jindal (supra)*, that he cannot recall the process. The Supreme Court in *Subramaniam Sethuraman v. State of Maharashtra (supra)*, held that the only course available to an aggrieved person to challenge

the issuance of process under S.204 is by way of a petition under S.482 Cr.P.C.

29. So, in view of the above discussion it is held that present petition is not maintainable and the same is accordingly dismissed.

12th March, 2008
rs

V.B.GUPTA, J.