

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1126 OF 2019

1. Prasad Baburao Tanpure,
Age : 77 years, Occu. Agri,
R/o. Tanpure Galli, Tanpure Wada,
Tq. Rahuri, Dist. Ahmednagar.
2. Dnyandeo Tukaram Pawar,
Age : 59 years, Occ. Agri.,
R/o. Kesapur, Tq. Rahuri,
District Ahmednagar.
3. Vijay Tanaji Patil,
Age : 64 years, Occ: Agri.,
R/o. Ward No.7, Behind Patel High School,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.

Petitioners...

Versus

Godawari Biorefinaries Ltd.,
Registered Company
Somaiya Bhawan, 45/47,
M.G. Road, Ford, Mumbai-1.

Respondent...

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Advocate for Petitioner : Senior Advocate Mr. R.N. Dhorde i/by
Mr. Vikram R. Dhorde

Advocate for Respondent : Senior Advocate Mr. V. D. Hon i/by
Mr. Ashwin V. Hon.

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CORAM : KISHORE C. SANT, J.
RESERVED ON : 22nd DECEMBER 2022.
PRONOUNCED ON : 23rd FEBRUARY 2023.

JUDGMENT :

1. Heard the learned Senior Advocates for the respective parties at length. Hence Rule. Rule made returnable forthwith with consent of the parties.

2. The petitioners are the original accused in 138 proceeding filed by the respondent. Some of the facts giving rise to the present petition are as below:

That the petitioners are the Directors of one Sugar Factory, namely Dr. Baburao Bapuji Tanpure SSK Ltd. The Sugar Factory and the respondent entered into an agreement, whereby the Factory was to supply its by-product i.e. specially denatured spirit ('SDS' for short) as a raw material for manufacture of certain chemical products during the period of November, 2013 to May, 2014. The agreement took place on 02.09.2013. The respondent was to purchase the said product 'SDS',

a total quantity of 50 lack liters as per the schedule. For the period in between 01.11.2013 to 13.04.2014 eight lac liters per month and two lac liter in the month of May, 2013 at a price of Rs.21.25 per liter. The advance payment was received by the factory. In the agreement, there was a stipulation that in case of failure by manufacturer to deliver a minimum monthly quantity or the total quantity of the product, the factory shall be liable to refund to the purchaser a balance un-adjusted amount of the advance payment of Rs.1 Crore. Further stipulation was that the respondent would be entitled to encash the post dated cheques in case of non-payment of the amount by the manufacturer etc.

3. After execution of the agreement, the manufacturer started delivery of SDS. It is alleged by the respondent that the factory failed to supply the agreed quantity of SDS. Out of supply of total eight Crore Rupees, the supply made was only of an amount of Rs.2,98,77,979/-. It is further alleged that the respondent became

entitled to receive Rs.5,50,00,000/- as Factory committed breach of agreement.

4. Since there was a breach of the agreement, the respondent presented all 11 cheques of Rs.50,00,000/- each, total amounting to Rs.5,50,00,000/-. The said cheques came to be dishonoured and therefore the respondent sent notices through registered post on 04.12.2014 on the address of the factory. However the said notices came to be returned back with an endorsement as factory is closed. The notices were re-issued to the present petitioners on their residential address on 11.12.2014 and 12.12.2014 and same were served upon them in between 12.12.2014 to 15.12.2014. Since no payment was made, the complaint bearing STC No.218/2015 came to be lodged by the respondent against the factory and the petitioners.

5. The learned Judicial Magistrate First Class, Rahuri issued process against the petitioners by order dated 15.04.2015. The process was issued on reading the complaint i.e. bearing S.T.C. No.208/2015

and on going through the affidavit of the complainant and copies of the documents. The learned JMFC further recorded that the alleged cheques were signed by the Chairman and Managing Director/Petitioner No.1. The Petitioner No.2 & 3 were shown as Director and Managing Director of the Factory. Since thereafter in view of the change in legal position as regards territorial jurisdiction, the complaint was returned by order dated 11.12.2015.

6. After transfer the said complaint came to be renumbered as S.T.C. No.2/2016. The learned JMFC, Kopergaon thereafter issued summons. Thereafter petitioner no.3 received summons of the case and he appeared before the Court. Petitioner no.1 & 2 suo moto appeared in the Court on 19.12.2016. It is thus, they appeared after getting the knowledge of the complaint.

7. The petitioners on getting the knowledge filed a Revision Application No.48/2017 in the Court of learned Sessions Judge, Kopergaon challenging an order of issuance of process on various

grounds, including that the learned JMFC has not applied mind properly, while issuing notice and other grounds. It was also a ground that no notice is issued to the Factory.

8. The learned Revisional Court after hearing the parties, by judgment and order dated 04.05.2019 rejected the said Revision. The learned Sessions Judge observed that the documents which were produced alongwith the complaint, were sufficient to make out a case against the petitioners and got himself satisfied about the existence of prima facie case. In the meantime, the respondent had also approached the Civil Court by filing a suit bearing Special Suit No.53/2015 for recovery against the Sugar Factory, State of Maharashtra and Registrar Co-operative Societies, Pune. The suit was allowed and the decree came to be passed for an amount of Rs.6,57,75,439/- and penalty charges at Rs.14% per annum. This fact is mentioned as there was also one of the grounds by the petitioners that in view of filing of the civil suit, the proceeding under Section 138

of the Negotiable Instruments Act (N.I. Act for short) was not maintainable. Thus, now the petitioners are before this Court.

9. Mr. Dhorde, learned Senior Advocate argued that there is no averment in the complaint about the liability upon the petitioners to pay the amount. His main argument is that :

(i) in the complaint there is no averment that the petitioners are in charge and they are responsible for the conduct of the business of the Factory.

(ii) It is admitted that the cheques were post dated cheques given only towards security in the event of non supply of the material.

(iii) It is clear that the first notice was returned unserved and therefore second time notices were issued only to the Directors/Petitioner without sending notice to the Factory. For this reason, there is no cause of action to file complaint against Factory and since there is no cause of action for filing complaint against Factory there is no question of filing complaint against the petitioner.

(iv) The suit is decreed against the Sugar Factory where these petitioners/Directors were not made a party.

(v) That procedure as per Section 202 of Cr.P.C. is not followed.

. It is his submission that it is clear that the Directors were not liable to pay the amount. He further submits that the trial Court failed to apply it's mind while issuing process. In his support he relied upon the following judgments.

- (a) Pawan Kumar Goel Vs. State of U.P. & Another passed by the Hon'ble Apex Court in Criminal Appeal No.1999/2022.
- (b) Ashoke Mal Bafna Vs. Upper India Steel Manufacturing and Engineering Company Limited, (2018) 14 SCC 202.
- (c) Himanshu Vs. B. Shivamurthy and Another, (2019) 3 SCC 797.
- (d) N. Harihara Krishnan Vs. J. Thomas, (2018) 13 SCC 663.
- (e) Rameshbhai Pandurao Hedau Vs. State of Gujarat
AIR (2010) SC 1877.

10. In reply, the learned Senior Advocate Mr. Hon for respondent argued that;

- (i) there was breach of conditions of the agreement and thus the

petitioners and the Sugar Factory became liable to make the payment.

(ii) the petitioners are the signatory to the agreement. In the agreement, the petitioner have accepted the liability.

(iii) the factory is shown as accused no.1 and the petitioners are shown as accused no.2, 3 and 4. Thus, there is a compliance of Section 141 of the N.I. Act. The order of issuance of process shows application of mind. Both the Courts below have applied the mind. The present stage is only stage of issuance of process. In support of his contentions, he relied upon the following judgments.

- (a) Lakshman V. State of Karnataka, (2019) 9 SCC 677.
- (b) Standard Chartered Bank Vs. State of Maharashtra, (2016) 6 SCC 62.
- (c) Rajesh Bhalchandra Chalke Vs. State of Maharashtra, (2011) 1 MhLJ 244.
- (d) Mukeshbhai Balabhai Patel Vs. State of Maharashtra, (2018) 6 MhLJ 513.

11. Before coming to the conclusion, it would be necessary to

discuss the judgments relied upon by the learned Advocate for the petitioners as well as Advocate for the respondent. The first judgment relied upon by the petitioners in the case of Pawan Kumar Goel (supra), it is held that it is necessary to make an averment in the complaint to the effect that when the offence was committed, the accused was in charge and was responsible to the Company for the conduct of its business. In that case, there were no such averments. It was therefore held that the High Court had rightly quashed the proceeding.

12. The next judgment in the case of Ashoke Mal Bafna (supra), the Hon'ble Apex Court had considered that to fasten vicarious liability under Section 141 of the N.I. Act, on a person, the Complainant has to specifically show as to how and in what manner the accused was responsible. It is held that simply because a person is a Director of defaulter Company does not make him liable to an action under the Act.

13. The judgment in the case of Himanshu Vs. B. Shivamurthy and Another (supra), again it was a case wherein the Hon'ble Apex Court has considered that such averment is necessary to fasten liability upon the accused. In the said case, the facts were that the complaint was filed under Section 138 of the N.I. Act, wherein the only averment was that the cheque was issued by one of the Directors on behalf of the said Company. The further averment in the complaint was that the accused had issued a cheque and the said cheque was bounced. In that view of the matter, it was held that there was no specific averment to satisfy the ingredient of Section 141 of the N.I. Act. In that case further it was considered that the Company was not added as an accused and a complaint against the Director was therefore not maintainable. The notice of demand was not served on the Company and it was also held that since there was no demand notice served on the Company, there was no compliance of the proviso of Section 138 of the N.I. Act. In that case, the High Court had held that the Company can be added as accused even at that stage. The Hon'ble Apex Court

had held that the High Court was in error in rejecting the petition.

14. The judgment in the case of N. Harihara Krishnan (Supra), the Hon'ble Apex Court had held that it is imperative to arraign the Company as an accused, based on the case by relying upon the observation in the case of Aneeta Hada (supra). It was further held that service of notice is must and failure to comply with one of the steps contemplated under Section 138 would not provide "cause of action for prosecution" and the proceedings were quashed.

15. The last judgment relied upon by the petitioners in the case of Rameshbhai Pandurao Hedau (supra), on the point of enquiry under Section 202 of the Cr.P.C., when the accused person is residing out of territorial jurisdiction, the learned Magistrate issued process against them. Here a reference also be made to a judgment by the Hon'ble Apex Court in Re: Expeditious Trial of Cases under Section 138 of N.I. Act, AIR 2021 SC 1957.

16. The judgments submitted by the learned Senior Advocate for the respondent, are discussed below. The first judgment in the case of Lakshman (supra) is to the effect that filing of the civil suit is no ground to quash the proceeding under Section 138 of the N.I. Act.

17. The next judgment in the case of Standard Chartered Bank (Supra), the Hon'ble Apex Court held that the sufficient averment was there in the complaint. In the complaint, there was an averment that accused persons were Chairman, Managing Director and whole-time Directors, Executive Director were the responsible persons and were in charge of day-to-day business of Company, when the offence was committed. The accused were signatory to the cheques which were dishonoured. In that view, the Hon'ble Apex Court had held that the complaint was very much maintainable and the learned Magistrate was directed to proceed with the complaint cases in accordance with law. The Court had quoted the specific averments from the complaint in the paragraph no.31 of the said judgment.

18. In the case of Rajesh Bhalchandra Chalke (Supra), the Full Bench of this Court in a reference recorded conclusions below:

(i) For the purpose of issuing process under Section 200, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I. Act. The Magistrate is not bound to call upon the complainant to remain present before the Court and to examine the complainant or his witnesses, while taking decision whether or not to issue process on the complaint under Section 138 of NI Act.

(ii) that there is nothing wrong in the complainant under Section 138 of the N.I. Act filing the affidavit in support of the complaint in a format indicating all the essential facts, is sufficient to enable the Magistrate to decide whether or not to issue process on the complaint and the reference was accordingly answered.

19. The last judgment relied upon by the learned Senior Advocate for the respondent in the case of Mukeshbhai Balabhai Patel (Supra),

which is delivered by the Single Judge of this Court, wherein it is held that the inquiry as contemplated under Section 202 is not mandatory in respect of proceeding for dishonour of cheques and the petition for quashing of the proceeding on that count was dismissed.

20. The judgment in the case of Pawan Kumar Goel (Supra) is clearly applicable in the facts of this case. So far as the judgment in the case of Lakshman, there cannot be any second opinion that in order to filing of the suit for recovery is no ground to quash the proceeding under Section 138. So far as judgment in Standard Chartered Bank (Supra) is concerned, the Hon'ble Apex Court has clearly held that there were sufficient averments in respect of responsibility of the Directions and as regards they were in charge of day to day business of the Company and in that view, it was held that Magistrate was right in issuing process. In the judgment of the Full Bench of this Court in a reference with respect, is not applicable in view of the Supreme Court judgments, which are discussed. Wherein

it is clearly held that Section 202 procedure is mandatory in the complaint under Section 138. The judgment in the case of Mukeshbhai Balabhai Patel (Supra) also cannot be accepted in view of judgment, which are already discussed.

21. Now coming to the aspects of service of notice and the averments in the complaint in the present case, it is clearly seen that no notice could be served upon the factory for the reason it was closed. However second notice was issued only on the petitioners and not on the Factory. Certainly it cannot be said to be compliance of Section 138 of the N.I. Act. Secondly there is no specific averment that the petitioners are responsible and are in charge of day to day business of the Factory. In view of the judgment of the Hon'ble Apex Court merely showing that the petitioners are Directors/Chairman is not sufficient.

22. The submission that notice was not served on the Factory,

needs to be accepted as second notice is not sent to the factory and was sent only to Directors/petitioners. So far as the submission that civil suit is decreed cannot be said to be a ground to quash the proceeding. This Court finds that all these grounds except the submission that the suit is also decreed, other submissions have a substance. So far as the submission of respondent, this Court finds that there is no substance. Sufficient ground is made out to allow the petition, therefore the petition is allowed. Rule is made absolute in terms of prayer clause 'B'.

23. The Writ Petition is disposed off in the aforesaid terms.

[KISHORE C. SANT, J.]