

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 777 OF 2005

Shree Nagani Silk Mills Pvt. Ltd.

..Petitioner

Versus

I.D. Textile Industries Ltd. & Ors.

..Respondents

Mr. Anilkumar Patil a/w. Manish Khadakban a/w. Sachin Bhavar
for Petitioner in all W.Ps.

Mr. Rishi Bhuta a/w. Neha Patil, Manish Bohra, Gunjan Thakkar,
Mamta Singh, Saakshi Jha, Omer Farooq, Risha Rathod, Prateek
Dutta and Parth Govilkar for Respondent Nos. 1 to 5.

Mr. Arfan Sait, APP for State/Respondent No.6.

CORAM : SARANG V. KOTWAL, J.

DATE : 5 OCTOBER 2023

JUDGMENT:

1. The Petitioner has challenged the order dated 15.01.2005 passed by the learned Additional Sessions Judge, Greater Mumbai, in Criminal Revision Application No.152 of 2003. The petitioner is the original complainant in Criminal Case No.1168/S/2001 before the court of the Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai. The Respondent Nos.1 to 5 are

the original accused before the learned Magistrate in these proceedings. The complaint was filed U/s.138 r/w. 141 of the Negotiable Instruments Act (hereinafter referred to as 'N.I.Act').

2. The accused preferred an application for recalling of the process and discharging them from the case before the learned Magistrate. The learned Magistrate rejected that application. The accused thereafter preferred Criminal Revision application before the Additional Sessions Judge, Greater Mumbai which was allowed by the impugned order thereby discharging the accused from the said case. The complainant/petitioner being aggrieved by that order has preferred the present writ petition.

3. Heard Mr. Anilkumar Patil, learned counsel for the Petitioner, Mr. Rishi Bhuta, learned counsel for the Respondent Nos.1 to 5 and Mr. Arfan Sait, learned APP for the State/Respondent No.6.

4. The complaint was filed by the petitioner by mentioning that the accused Nos.2 to 5 were in-charge of day to day affairs of the accused No.1 company. The accused Nos.2 to 5 were residing

at Mumbai. It is mentioned in the complaint that, pursuant to the orders placed by the accused with the complainant company at Mumbai, the complainant sold and supplied the goods to the accused at the agreed rates. In part payment of the price of those goods, the accused issued one cheque of Rs.20 lakhs in favour of the complainant i.e. Cheque No.948362 dated 25.04.2001 drawn on the Karnataka Bank Ltd., Fort Branch, Mumbai. On presentation, that cheque was dishonoured. Thereafter, statutory notice was sent to the accused, but the payment was not made. Therefore, the complaint was filed.

5. The accused made an application before the trial Court for their discharge or for recalling of process issued against them. The learned Magistrate referred to the Judgment of the Hon'ble Supreme Court in the case of *M/s. Kusum Ingots & Alloys Ltd. V M/s. Pennar Peterson Securities Ltd. and others*¹. He also referred to the order passed by the B.I.F.R. i.e. The Board for Industrial and Financial Reconstruction; referred to under Section 3(1)(b) of the Sick Industrial Companies (Special Provisions) Act, 1985

1 2000 AIR SCW 609

(hereinafter referred to as the 'said Act'). The order was passed U/s.22A of the said Act. It was observed that, from the allegation in the complaint, the company was still running its business after passing of the order by the B.I.F.R. on 21.08.2000. The accused placed order for the goods and had issued cheque for the cost of the goods. The trial Court observed that, ultimately all these facts could be established only during trial and, therefore, declined to recall the order of issuance of process and to discharge the accused.

6. Learned Additional Sessions Judge, on the other hand, observed that the trial Court ought to have considered that the liability of the accused dated back to March 31, 1999 which was clear from the invoices of the complainant and by the letter dated 16.07.2001. He further observed that the trial Court had failed to appreciate that the liability of the accused was a past liability as on 31.03.1999 for which there was ban by the B.I.F.R. There was no current liability. On this basis the contention of the accused was upheld and their revision application was allowed and they were discharged from those proceedings.

7. Learned counsel for the petitioner submitted that the order passed U/s.22A of the said Act permitted running of the business. The order passed by the board mentioned that, in case the company was running, the current assets could be drawn to the extent required for day to day operations. He submitted that the date of the cheque was after the order was passed by B.I.F.R. on 21.08.2000. Therefore, the subsequent transaction in issuance of cheque would fall within the direction that the current assets could be drawn to the extent of day to day operations. He also relied on the same Judgment of *M/s. Kusum Ingots* (supra) to support his contention. He submitted that the revisional court went beyond its power in considering the dates of the transaction which was not even mentioned in the complaint.

8. Learned counsel for the Respondents/accused, on the other hand, relied heavily on the same Judgment of *M/s. Kusum Ingots* (supra) and submitted that the said Judgment clearly laid down the ratio which is applicable to the facts and circumstances of the present case and, therefore, proceedings could not have been initiated or continued against the accused U/s.138 r/w. 141

of the N.I.Act.

9. I have considered these submissions. Section 18 and 22A of the said Act are important, which read thus:-

18. Preparation and sanction of schemes.—(1) Where an order is made under sub-section (3) of section 17 in relation to any sick industrial company, the operating agency specified in the order shall prepare, as expeditiously as possible and ordinarily within a period of ninety days from the date of such order, a scheme with respect to such company providing for any one or more of the following measures, namely:—

(a) the financial reconstruction of the sick industrial company;

(b) the proper management of the sick industrial company by change in, or take over of, management of the sick industrial company;

(c) the amalgamation of—

(i) the sick industrial company with any other company, or

(ii) any other company with the sick industrial company;

(hereafter in this section, in the case of sub- clause (i), the other company, and in the case of sub-clause (ii), the sick industrial company, referred to as “transferee company”;

(d) the sale or lease of a part or whole of any industrial undertaking of the sick industrial company;

(da) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;

(e) such other preventive, ameliorative and remedial measures as may be appropriate;

(f) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (a) to (e).

(2) The scheme referred to in sub-section (1) may provide for any one or more of the following, namely:

—
(a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, duties and obligations of the sick industrial company or, as the case may be, of the transferee company;

(b) the transfer to the transferee company of the business, properties, assets and liabilities of the sick industrial company on such terms and conditions as may be specified in the scheme;

(c) any change in the Board of Directors, or the appointment of a new Board of Directors, of the sick industrial company and the authority by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made and in the case of appointment of a new Board of Directors or of any director, the period for which such appointment shall be made;

(d) the alteration of the memorandum or articles of association of the sick industrial company or, as the case may be, of the transferee company for the purpose of altering the capital structure thereof or for such other purposes as may be necessary to give effect to the reconstruction or amalgamation;

(e) the continuation by, or against, the sick industrial company or, as the case may be, the transferee company of any action or other legal

proceeding pending against the sick industrial company immediately before the date of the order made under sub-section (3) of section 17;

(f) the reduction of the interest or rights which the shareholders have in the sick industrial company to such extent as the Board considers necessary in the interests of the reconstruction, revival or rehabilitation of the sick industrial company or for the maintenance of the business of the sick industrial company;

(g) the allotment to the shareholders of the sick industrial company of shares in the sick industrial company or, as the case may be, in the transferee company and where any shareholder claims payment in cash and not allotment of shares, or where it is not possible to allot shares to any shareholder the payment of cash to those shareholders in full satisfaction of their claims—

(i) in respect of their interest in shares in the sick industrial company before its reconstruction or amalgamation; or

(ii) where such interest has been reduced under clause (f) in respect of their interest in shares as so reduced;

(h) any other terms and conditions for the reconstruction or amalgamation of the sick industrial company;

(i) sale of the industrial undertaking of the sick industrial company free from all encumbrances and all liabilities of the company or other such encumbrances and liabilities as may be specified, to any person, including a co-operative society formed by the employees of such undertaking and fixing of reserve price for such sale;

(j) lease of the industrial undertaking of the sick industrial company to any person, including a co-operative society formed by the employees of such

undertaking;

(k) method of sale of the assets of the industrial undertaking of the sick industrial company such as by public auction or by inviting tenders or in any other manner as may be specified and for the manner of publicity therefor;

(l) transfer or issue of the shares in the sick industrial company at the face value or at the intrinsic value which may be at discount value or such other value as may be specified to any industrial company or any person including the executives and employees of the sick industrial company;

(m) such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation or other measures mentioned in the scheme are fully and effectively carried out.

(3) (a) The scheme prepared by the operating agency shall be examined by the Board and a copy of the scheme with modification, if any, made by the Board shall be sent, in draft, to the sick industrial company and the operating agency and in the case of amalgamation, also to any other company concerned, and the Board shall publish or cause to be published the draft scheme in brief in such daily newspapers as the Board may consider necessary, for suggestions and objections, if any, within such period as the Board may specify;

(b) The Board may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the sick industrial company and the operating agency and also from the transferee industrial company and any other company concerned in the amalgamation and from any shareholder or any creditors or employees of such companies.

Provided that where the scheme relates to amalgamation the said scheme shall be laid before the company other than the sick industrial company in the general meeting for the approval of the scheme by its shareholders and no such scheme shall be proceeded with unless it has been approved, with or without modification, by a special resolution passed by the shareholders of the company other than the sick industrial company.

(4) The scheme shall thereafter be sanctioned, as soon as may be, by the Board (hereinafter referred to as the “sanctioned scheme” and shall come into force on such date as the Board may specify in this behalf:

Provided that different dates may be specified for different provisions of the scheme.

(5) The Board may on the recommendations of the operating agency or otherwise, review any sanctioned scheme and make such modifications as it may deem fit or may by order in writing direct any operating agency specified in the order, having regard to such guidelines as may be specified in the order, to prepare a fresh scheme providing for such measures as the operating agency may consider necessary.

(6) When a fresh scheme is prepared under sub-section (5), the provisions of sub-sections (3) and (4) shall apply in relation thereto as they apply to in relation to a scheme prepared under sub-section (1).

(6A) Where a sanctioned scheme provides for the transfer of any property or liability of the sick industrial company in favour of any other company or person or where such scheme provides for the transfer of any property or liability of any other company or person in favour of the sick industrial company, then, by virtue of, and to the extent provided in, the scheme, on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the property shall be

transferred to, and vest in, and the liability shall become the liability of, such other company or person or, as the case may be, the sick industrial company.

(7) The sanction accorded by the Board under subsection (4) shall be conclusive evidence that all the requirements of this scheme relating to the reconstruction or amalgamation, or any other measure specified therein have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the Board to be a true copy thereof, shall, in all legal proceedings (whether in appeal or otherwise) be admitted as evidence.

(8) On and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company and the transferee company or, as the case may be, the other company and also on the shareholders, creditors and guarantors and employees of the said companies.

(9) If any difficulty arises in giving effect to the provisions of the sanctioned scheme, the Board may, on the recommendation of the operating agency or otherwise, by order to anything, not inconsistent with such provisions, which appears to it to be necessary or expedient for the purpose of removing the difficulty.

(10) The Board may, if it deems necessary or expedient so to do, by order in writing, direct any operating agency specified in the order to implement a sanctioned scheme with such terms and conditions and in relation to such sick industrial company as may be specified in the order.

(11) Where the whole of the undertaking of the sick industrial company is sold under a sanctioned scheme, the Board may distribute the sale proceeds to the parties entitled thereto in accordance with the provisions of section 529A and other provisions of the Companies Act, 1956 (1 of 1956).

(12) The Board may monitor periodically the implementation of the sanctioned scheme.

22A. Direction not to dispose of assets. - The Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets -

(a) during the period of preparation or consideration of the scheme under section 18; and

(b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court.

10. The operative part of the order dated 21.08.2000 reads thus:

“The company/promoters were directed u/s 22-A of the Act not to dispose of any fixed or current assets of the company without the consent of the BIFR. In case the company was running, the current assets could be drawn to the extent required for day to day operations, proper account of which should be maintained.”

11. In paragraph-6 of the said order, it was observed that the accused No.1 company fulfilled the criteria of a sick industrial company. Accordingly it was declared to be a sick industrial company under the said Act. It was also observed that the

company could not have revived on its own and that it was necessary in public interest to take measures U/s.18 of the said Act. Accordingly, ICICI were appointed as Operating Agency (OA) U/s.17(3) of the said Act to examine the viability of the company and formulate a rehabilitation scheme for its revival if it was found viable. In this backdrop, it is necessary to refer to the ratio of the Hon'ble Supreme Court in the case of *M/s. Kusum Ingots (supra)*. In that context, paragraph-19 is important, which reads thus:-

“The question that remains to be considered is whether section 22A of SICA affects a criminal case for an offence under S. 138 NI Act. In the said section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets - (a) during the period of preparation or consideration of the scheme under S.18; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-sec. (1) of S. 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which the BIFR has submitted its report declaring a company as 'sick' and has also issued a direction under S.22A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence under S.138 NI Act cannot be instituted

during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR under S. 22-A was passed against the company then it cannot be said that the offence under S.138 NI Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case.

12. The said observations clearly laid down that, if the restraint order U/s.22A under the said Act was passed by the BIFR before the date on which the cheque was drawn, then it cannot be said that the offence U/s.138 of the N.I. Act was completed. In such a case, it can be said that the dishonouring of the cheque or failure to make payment of the amount of the cheque by the company or its Directors is for reasons beyond the control of the accused. In such circumstances, it would be unjust and unfair and against the intent and purpose of the statute to hold that the

Directors should be compelled to face trial in a criminal case. In the present case, the Board had passed an order on 21.08.2000 in the nature of restraint order U/s.22A of the said Act. The date of the cheque was after this date and, therefore, the ratio of this Judgment is squarely applicable to the facts of this case. Therefore, the accused cannot be made to face the criminal trial as held by the Hon'ble Supreme Court.

13. Though, the revisional court has transgressed its limitation in referring to various dates and other material beyond the complaint, the end result was in consonance with the ratio of the Judgment in the case of *M/s. Kusum Ingots (supra)*. Thus, the accused cannot be compelled to face the trial. Therefore, the operative part of the impugned order of discharging the accused from the case will have to be upheld.

14. Consequently, no relief can be granted in this petition and the petition is dismissed.

15. Rule is discharged.

(SARANG V. KOTWAL, J.)