2024:BHC-AUG:11766

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

AURANGABAD BENCH, AURANGABAD

CRIMINAL APPLICATION No.1492 OF 2019

1. Rajeev Raj Kumar (Company Secretary),
   Age 42 years;
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area
   RoskaMeo, P.O. Sohna
   Gurgaon, Haryana 1220033.

2. MadhuVij (Independent Director)
   Age 63 years;
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area
   RoskaMeo, P.O. Sohna
   Gurgaon, Haryana 1220033.

3. Arvind Dham (Non Executive Director)
   Age 68 years;
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area
   RoskaMeo, P.O. Sohna
   Gurgaon, Haryana 1220033.

4. Gautam Malhotra (Non Executive Director)
   Age 38 years; M/s. Amtek Auto Ltd.
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area
   RoskaMeo, P.O. Sohna
   Gurgaon, Haryana 1220033.

5. Vinod Kumar Uppal (CFO)
   Age 55 years;
   M/s. Amtek Auto Ltd.,

Having registered office at
Plot No.16, Industrial Area
RoskaMeo, P.O. Sohna
Gurgaon, Haryana 1220033.

6. Rajeev Kumar Thakur (Independent Director)
Age 68 years;
M/s. Amtek Auto Ltd.,
Having registered office at
Plot No.16, Industrial Area
RoskaMeo, P.O. Sohna
Gurgaon, Haryana 1220033.

7. Sanjay Chhabra (Independent Director)
Age 58 years;
M/s. Amtek Auto Ltd.,
Having registered office at
Plot No.16, Industrial Area
RoskaMeo, P.O. Sohna
Gurgaon, Haryana 1220033.

8. Mukesh Kumar Gupta (Non Executive Director)
Age 58 years;
M/s. Amtek Auto Ltd.,
Having registered office at
Plot No.16, Industrial Area
RoskaMeo, P.O. Sohna
Gurgaon, Haryana 1220033. : APPLICANTS

...**VERSUS**...

1. State of Maharashtra,
Notice to be served upon
The Public Prosecutor,
High Court of Judicature of Bombay,
Bench at Aurangabad.

2. Jailaxmi Casting and Alloys Pvt. Ltd.,
Through its Director and Authorised Person
Sriniwas s/o. Jayram Palsuledesai,
Age 48 years,

Occupation : Business,
Having Factory at : Gut No.75,
Village Farola, Paithan Road, Tq. Paithan,
District : Aurangabad 431107. : RESPONDENTS

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Mr. R.N. Dhorde, Senior Advocate i/b. Sharad V. Natu a/w. Ajinkya A. Joshi Advocate for Applicants.
Ms. Pratibha J. Bharad, Asstt. Government Pleader for respondent No.1.
Mr. R.S. Deshmukh, Senior Advocate i/b. Devang R. Deshmukh, Advocate for Respondent No.2.
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CORAM : SANJAY A. DESHMUKH, J.

RESERVED ON : 10.05.2024.
PRONOUNCED ON : 21.06.2024.

JUDGMENT :

1. Heard. Rule. Rule made returnable forthwith.

2. This application is filed under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Cr.P.C.') for quashing and setting aside the Summary Criminal Case No.001287/2018, pending before the learned Judicial Magistrate, First Class, Aurangabad. It is case for dishonour of cheques filed under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act').

3. Brief facts of the case are as under :

A respondent No.2 alleged in the complaint under Section 138 of the N.I. Act that the applicants i.e. accused Nos.2 to 9 are Executive of Amtek Auto Ltd. and they are liable for all the acts of it. The respondent No.2 further averred that as per the demand of the Amtek Auto Ltd. rerolling material on credit was supplied to it from time to time. The applicants have not paid its due amount of Rs.3,79,47,504/- to the respondent No.2. The details of the cheques are as under :

Sr.No.	Cheque Nos.	Date	Amount	Drawn
1	000665	09.08.2017	32,14,417	Andhra Bank
2	000666	10.08.2017	22,81,559	Andhra Bank
3	084635	10.08.2017	15,23,431	Andhra Bank
4	000667	12.08.2017	35,16,608	Andhra Bank
5	084632	13.08.2017	21,18,411	Andhra Bank
6	084636	16.08.2017	19,20,876	Andhra Bank
7	084637	22.08.2017	27,15,757	Andhra Bank
8	000851	10.09.2017	21,27,482	Andhra Bank
9	000852	16.09.2017	37,38,747	Andhra Bank
10	000853	21.09.2017	32,69,867	Andhra Bank
11	000854	23.09.2017	32,73,076	Andhra Bank
12	000855	27.09.2017	37,21,210	Andhra Bank

4. The above cheques of Andhra Bank were issued for an amount of Rs.3,34,21,441/- out of that outstanding amount. All the cheques were deposited in the Union Bank, Aurangabad Branch, Aurangabad for realization and it were dishonoured. Therefore, it were returned with cheque return memo dated 06.11.2017 with the endorsement ‘Funds Insufficient’. The respondent No.2 sent a statutory notices under Section 138 of the Negotiable Instruments Act,

1881 to the applicants. The notice to the Amtek Company was served on 04.12.2017. The complaint along with application for condonation of delay of 43 days was filed. The delay was condoned. The process was issued against all the petitioners.

5. Learned Senior Counsel Mr. R.N. Dhorde, for the applicants submitted and pointed out the grounds of objections of this application that the complaint is illegal and process is illegally issued by the trial Court against the applicants without considering fact about their liability to pay that amount. It is abuse of the process of the Court. He further submitted that the Amtek Auto Limited is a Company registered under the Companies Act. It filed insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC') for appointment of "Interim Resolution Professional" before the National Company Law Tribunal at Chandigarh (for short, 'NCLT'). He further pointed out that the Hon'ble NCLT, Chandigarh Bench vide its order dated 24.7.2017 pleased to admit that application No.CP(IB) No.42/Chd/Hry/2017 under Section 7 of the IBC. Another application No.CP(IB) No.42/Chd/Hry/2017 was filed by the Corporation Bank for Corporate Insolvency Resolution Process (CIRP) of M/s. Amtek Auto Ltd. under the provisions of the IBC and for declaration of moratorium

under Section 14 of the IBC. The NCLT appointed "Interim Resolution Professional" with directions that no any proceeding shall be continued in any court of law, tribunal, arbitrator, penal or other authority regarding transferring, encumbering, alienating or disposing any legal right or beneficial interest out of assets of Amtek Auto Limited. As per that order the Interim Resolution Professional made public announcement and invited claim from the creditors. The respondent No.2 filed its claim before the IRP on 10.8.2017. This fact is concealed by the respondent No.2 and not pleaded in the complaint. The respondent No.2 has not issued notice to the signatory of cheque and he is not made party to the complaint. The statutory notice was not served to any of the applicants. The notice is also not issued to the Insovency Resolution Professional by the respondent No.2. The cheques in question were received on 4.12.2017 by the respondent No.2 which clearly shows that those were issued during the pendency of Insolvency Resolution Professional proceeding. By the said proceeding the Amtek Company was precluded from making payments and it is beyond its control and therefore the applicants Director (Ex-Director) etc. cannot be held liable for it. The order of issue process is illegally passed against the applicants. The general allegations are made against the applicants about their liability without pointing out their actual role and knowledge of issuing the cheque for the alleged liability to pay the amount of dishonoured cheques. The complaint is filed only with malafide intention. The applicants are not involved with day to day affairs of the Amtek Company. No any legal liability is in existence to pay that amount of the dishonoured cheques. Merely because they are shown as Director, it is not legal ground to proceed against them. The applicants non-executive status is evidenced from Annexure-G i.e. Corporate Governance Report for the year 2016-2017.

6. Learned Senior Counsel Shri R.N. Dhorde for the applicants is relying upon following the authorities :

i) **Rajeev Kumar and others Vs. State of Maharashtra, 2019(2) Mh.L.J. 628** in which it is held that when accused persons are not signatory to the disputed cheque, an order of issuance of process cannot be sustained.

ii) **N.K. Wahi Vs. Shekhar Singh & Ors., 2007 DGLS (SC) 293,** in which it is held that to lodge a prosecution against a Director there must be a specific allegation in the complaint as to the part played by them in the transaction.

iii) Aparna A. Shah Vs. Sheth Developers Pvt. Ltd., 2013 DGLS (SC) 456, it is only drawer of the cheque who can be made an accused.

7. Learned Senior Counsel Shri R.N. Dhorde for the applicants lastly prayed that complaint is not maintainable as per Section 141 of the N.I. Act against this applicant and it would be abuse of the process of Court. He prayed to quash the complaint.

8. Learned Senior Counsel Mr. R.S. Deshmukh for the respondent No.2 submitted that liability of all the applicants are pleaded and prima facie established from complaint as per Section 141 of the Negotiable Instruments Act. He pointed out that all the applicants are responsible for the conduct of business of Amtek Company. They shall be deemed to be guilty and punished under Section 138 of the N.I. Act and as per Section 141 of the N.I. Act. He is relying upon the following authorities :

i) **P. Mohanraj & Others Vs. M/s. Shah Brothers Ispat Pvt. Ltd.,** Civil Appeal No.10355/2018, decided on 1st March, 2021. Para 77 and 79 read as under :

> "*77. As far as the Directors/persons in management or control of the corporate debtor are concerned, a Section 138/141 proceeding against them cannot be initiated or continued without the corporate debtor – see Aneeta Hada (supra). This is because Section 141 of the Negotiable Instruments Act speaks of persons in charge of, and responsible to the company for the conduct of the business of the company, as well as the company. The Court, therefore, in Aneeta Hada (supra) held as under:*

*"**51.** We have already opined that the decision in Sheoratan Agarwal [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] runs counter to the ratio laid down in C.V. Parekh [(1970) 3 SCC 491 : 1971 SCC (Cri) 97] which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in Anil Hada [(2000) 1 SCC 1 : 2001 SCC (Cri) 174] has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of lex non cogit ad impossibilia gets attracted."*

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*"**56.** We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons, whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term "as well as" in the Section is of immense significance and, in its*

tentacle, it brings in the company as well as the Director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the Directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as" have to be understood in the context."

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"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the *same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh [(1970) 3 SCC 491 : 1971 SCC (Cri) 97] which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000) 1 SCC 1 :2001 SCC (Cri) 174] is overruled with the qualifier as stated in para 51. The decision in Modi Distillery [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] has to be treated to be restricted to its own facts as has been explained by us hereinabove."*

Since the corporate debtor would be covered by the moratorium provision contained in Section 14 of the IBC, by which continuation of Section 138/141 proceedings against the corporate debtor and initiation of Section 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paragraphs 51 and 59 in **Aneeta Hada** *(supra) would then become applicable. The legal impediment contained in Section 14 of the IBC would make it impossible for such proceeding to continue or be instituted against the corporate debtor. Thus, for the period of moratorium, since no Section 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in Section 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 of the IBC would apply only to the corporate debtor, the natural* *persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act.*

CONCLUSION

79. Resultantly, the civil appeal is allowed and the judgment under appeal is set aside. However, the Section 138/141 proceedings in this case will continue both against the company as well as the appellants for the reason given by us in paragraph 77 above as well as the fact that the insolvency resolution process does not involve a new management taking over. We may also note that the moratorium period has come to an end in this case."

ii) **Firth (India) Steel Co. Ltd. (in liquidation) Vs. NR, 1999 (4) Bom.C.R. 748** in which it is held that the proceeding contemplated under Sections 442 and 446 (1) of the Companies Act cannot cover criminal proceeding under Section 138 of the N.I. Act.

9. Learned Counsel for the respondent No.2 lastly prayed to reject this application as there is no any legal or factual justifiable ground to quash said complaint.

10. Nobody will dispute ratio laid down in above authorities cited on behalf of both sides. However each case must be decided on its own merits and for that material facts of the case i.e. complaint are decisive.

11. The first ground of objection of this application is that under Section 14 of the IBC Act there is order of the NCLT Chandigarh and therefore no criminal liability of the applicants arise.

But in view of the law laid down in *P. Mohanraj and others Vs. M/s. Shah Brohters Ispat Pvt. Ltd.* (supra) Section 14 of the IBC applies to the corporate debtor and it is not applicable to the natural person. From the proceeding under Section 138 of the N.I. Act they are not exonerated from criminal liability. Thus, these applicants, who are natural persons cannot be benefited by the said order of NCLT. and Section 14 of the IBC. The argument of learned Senior Counsel Shri R.N. Dhorde for applicants is not acceptable in this regard. Thus, on this ground the application for quashing of the said complaint cannot be allowed.

12. The second ground for quashing complaint is absence of knowledge of issuing of cheque. Perused the complaint which is decisive for decision of this case. It is admitted fact that applicants have not signed any of cheques in question. The statutory notices were not send to them after dishonour of cheques. In para No.2 of the complaint it is mentioned that the applicant/accused are liable for all the acts and deeds of accused Amtek Auto Ltd. But their specific role i.e. as to who is incharge of and responsible for the day to day affairs of the Company and their knowledge as to issue of disputed cheques is not averred in the complaint. It is necessary to plead the knowledge of all these applicants which is require as per first proviso of Section

141 of the N.I. Act. Their specific status and role is not specified in the complaint. Their liability to pay that amount under dishonoured cheque is not establishing from the averments in the complaint. It is not established from any document or conduct that disputed cheques were signed with their knowledge. Therefore, all the applicants cannot be held liable and deemed to be guilty as per Section 141 of the N.I. Act.

13. This is a fit case to exercise inherent power under Section 482 of the Criminal Procedure Code to stop the abuse of the process of the Court and to secure ends of justice. Therefore, the argument of Senior Counsel for the respondent Shri R.S. Deshmukh is not acceptable in this regard. It would be abuse of process of Court if the applicants are continued to face the trial for dishonour of these cheques.

14. The application for quashing of the said complaint deserves to be allowed. It is allowed accordingly in terms of prayer clause “B”. No costs.

(SANJAY A. DESHMUKH, J.)

वाडोदे