

CASE NO. :
Appeal (crl.) 212-216 of 2000

PETITIONER:
KUSUM INGOTS AND ALLOYS LTD.

RESPONDENT:
PENNAR PETERSON SECURITIES LTD. AND ORS.

DATE OF JUDGMENT: 23/02/2000

BENCH:
K.T. THOMAS & D.P. MOHAPATRA

JUDGMENT:
JUDGMENT

2000 (1) SCR 1120

The Judgment of the Court was delivered by D.P. MOHAPATRA, J. Leave granted.

The common question that arises for consideration in these appeals is whether a company and its Directors can be proceeded against for having committed an offence under section 138 of the Negotiable Instruments Act, 1881 (for short 'the NI Act') after the company has been declared sick under the provisions of The Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'SICA') before the expiry of the period for payment of the cheque amount. The answer to the question depends on interpretation of section 138 of the NI Act and its interaction with the relevant provisions of SICA. Since the relevant facts involved in all the cases are similar and a common question of law arises in all the cases they were heard together and they are being disposed of by this judgment.

The factual positions about which there is no dispute may be stated thus : Post-dated cheques were issued on behalf of the company in favour of the complainant in course of business of the company. When the complainant presented the cheques in the bank they were returned without payment. Then the complainant issued notice to the company and/or its Directors stating the facts of dishonour of the cheques and demanding payment. Since no payment was made within the period of 15 days stipulated under the NI Act the payee filed complaint against the company and/or its Directors alleging inter-alia that they had committed an offence under section 138 of the NI Act. Before the cheques were presented in the bank or after the bank declined to honour the cheques the drawer company was declared sick under the provisions of the SICA by the Board of Industrial and Financial Reconstruction (for short 'BIFR'). On receipt of the summons from the Court in the criminal case registered on the basis of the complaint the accused company and/or its Directors filed petitions under section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution seeking quashing of the complaint/proceeding in the criminal case, mainly on the ground that in view of the provisions in section 22 of SICA the criminal case instituted against them for commission of the alleged offence under section 138 NI Act is misconceived and compelling the accused to face trial in the case will amount to abuse of the process of Court. The High Court having declined to interfere in the proceeding and dismissed the petitions filed by the accused, they have filed these appeals challenging the order passed by the High Court.

The main thrust of the arguments of the learned counsel appearing for the appellants is that on the company being declared sick by the BIFR no steps could be taken by the complainants for realisation of the amounts said to be due to them and therefore the criminal proceeding initiated against the drawer company and its Director on the allegation that the cheques drawn in

favour of the complainant were dishonoured by the bank is misconceived and should be quashed; alternatively it is their contention that the proceedings in the criminal case should be stayed or suspended till the accused company becomes a functional and viable unit. On behalf of the appellants reliance is placed on sections 22 and 22-A of the SICA.

The learned counsel appearing for the respondents on the other hand contend that on the undisputed fact situation of the case a *prima-facie* case under section 138 of the NI Act is made out against the accused and on being satisfied about this position the learned magistrate took cognizance of the offence and ordered issue of summons to the appellants. It is their submission that section 22 has no application to, criminal proceedings and that the said section does not bar payment of dues by the accused company or its Directors; an embargo is placed only on the creditors from realising their dues from the company by a proceeding for winding up or execution or distress. It is also the submission of learned counsel for the respondents that the criminal case cannot be said to be a proceeding for realisation of money due from the company.

Before dealing with the rival contentions raised on behalf of the parties it will be convenient to note relevant provisions of the NI Act and SICA.

Sections 138 to 141 of the NI Act which are relevant for the purpose of the case are quoted hereunder :

"138. Dishonour of cheque for insufficiency, etc. of funds in the account - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both :

Provided that nothing contained in this section shall apply unless:-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation : For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

139. Presumption in favour of holder - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

140. Defence which may not be allowed in any prosecution under Section 138. It shall not be a defence in a prosecution for an offence under Section 138 that the drawer has no reason to believe when he issued the

cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

141. Offences by companies (1) If the person committing an offence under Section 138 is a company, every person, who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1); where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purposes of this section -

(a) "Company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

It is relevant to note here that Chapter XVII of the NI Act in which the aforementioned sections are included was inserted in the Act w.e.f.

1.4.1989 by Act 66 of 1988. The object of bringing Section 138 on statute is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. (See : Electronics Trade & Technology Development Corpn. Ltd., Secunderabad v. Indian Technologists & Engineers (Electronics) P. Ltd. And Anr., [1996] 2 SCC 739.

Coming to the provisions of SICA sections 22 and 22-A which are relevant for appreciating the questions raised in the case, are quoted hereunder :

"22. Suspension of legal proceedings, contracts etc - (1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof (and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company) shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2) Where the management of the sick industrial company is taken over or changed (in pursuance of any scheme sanctioned under section 18), notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law -

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) (Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period) or consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adoption and in such manner as may be specified by the Board :

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 91 of 1956, or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer of other authority or of any submission, settlement or standing order and accordingly -

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect -

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

"22-A - 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."

On a reading of the provisions of Section 138 NI Act it is clear that the ingredients which are to be satisfied for making out a case under the provision are :

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iii) that cheque is returned by the bank unpaid. either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;

If the aforementioned ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. In the explanation to the section clarification is made that the phrase "debt or other liability" means a legally enforceable debt or other liability.

Section 141 NI Act is a provision specifically dealing with the offences by companies. Therein it is laid down, inter alia, that if the person committing an offence under section 138 NI Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Under the proviso to sub-section (1) it is laid down that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Sub-section (2) of the Section makes any director/manager/secretary or other officer of the company in connivance or any neglect on the part of whom, an offence under the Act has been committed by the Company, such director/manager/secretary or other officer is deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

From the facts of the case alleged by the complainant gist of which has been noted earlier the position is clear that no exception can be taken against the order of the Magistrate taking cognizance of the offence under section 138 NI Act against the appellants. Undisputedly the cheques were drawn by the appellants for payment of certain amount of money due to the complainant, from the account in the bank and the said cheques were dishonoured by the bank and the amount remained unpaid even after lapse of 15 days from the date of the notice issued by the complainant after the cheques were dishonoured. Therefore, the ingredients of section 138 being prima facie established from the complaint and the documents filed with it, the Magistrate rightly took cognizance of the offence and issued summons to the appellants.

The next question for consideration is whether under the provisions of the SICA there was any legal impediment for payment of the amount for which the cheques were drawn and for that reason the appellants cannot be taken to have committed an offence under section 138 NI Act. A bare reading of the section 22 of the SICA makes the position clear that during pendency of an inquiry under section 16 or during the preparation of a scheme referred to under section 17 or during implementation of a sanctioned scheme or pendency of an appeal under section 25, no proceedings for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company, shall lie or be proceeded with further, except with the consent of the Board or, the Appellate Authority, as the case may be. The section only deals with proceedings for recovery of money or for enforcement of any security or a guarantee in respect of any loans or advance granted to the company and a proceedings for winding up of the company. The section does not refer to any criminal proceeding. In M/s. B.S.I. Ltd. & Anr. v. Gift Holdings Pvt. Ltd., Criminal Appeal No. 847 of (1999) we held that pendency of proceeding under Section 22(1) of SICA alone is not sufficient to get absolved from the liability under Section 138 of the NI Act.

A contention was raised on behalf of the appellants that if the criminal case is proceeded with and the appellants are convicted and sentenced to fine then it will be necessary to realise the amount of fine from the assets of the company which would be impermissible in view of the provisions of section 22 of the SICA. We have no hesitation in rejecting this contention. In fact the same contention was considered by us at length in M/s. BSI Ltd. v. Gift Holdings, (Criminal Appeal No. 847 of 1999) and it was repelled. In our considered view the contention is premature and far-fetched as the occasion to realise fine from the accused company or its directors will arise only in case they are convicted and sentence of fine is imposed against them. That is not a ground to hold that the criminal proceeding should be foreclosed at the threshold.

Another contention which was raised on behalf of the appellant in this connection is that if the Directors of the company on being convicted are arrested and kept in jail the efforts of the BIFR for reconstruction/revival of the company will not be possible and in that event the very purpose of inquiry by the BIFR will be rendered futile. The contention is too remote and the apprehension far-fetched. We reject the said contention.

In our considered view section 22 SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of an offence under section 138 of the NI Act against a company or its Directors. The section as we read it only creates an embargo against disposal of assets of the company for recovery of its debts. The purpose of such an embargo is to preserve the assets of the company from being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its directors to other persons for satisfaction of their legally enforceable dues.

The question that remains to be considered is whether section 22 A of SICA affects a criminal case for an offence under section 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 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. This exercise of the power by the Board is condi-

tioned 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 section 22-A 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 section 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 Section 22-A was passed against the company then it cannot be said that the offence under section 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.

Except in the circumstances noted above we do not find any good reason for accepting the contentions raised by the learned counsel for the appellants in favour of the prayer for quashing the criminal proceedings or for keeping the proceedings in abeyance. It will be open to the appellants to place relevant materials in this regard before the learned Magistrate before whom the cases are pending and the learned Magistrate will examine the matter keeping in mind the discussions made in this judgment. We make it clear that we have not considered the question whether in the facts and circumstances of a particular case Section 138 NI Act is attracted or not, for that is a question to be considered by the Court at the appropriate stage of the case in the light of evidence on record. The appeals are disposed of on the terms aforesaid.