

a
ABC 2019 (III) 203 BOM
ACQUITTAL & BAIL CASES
HIGH COURT OF BOMBAY

(Rohit B. Deo, J.)

Criminal Writ Petition No 740 of 2018

Decided on 9 July 2019

b
 Nagpur Bench

M/S. NRC LIMITED A COMPANY & ORS - Petitioner(s).

Versus

c
M/S. FUEL CORPORATION OF INDIA & ORS - Respondent(s).

Law Covered:- (A) *Negotiable Instruments Act, 1881 – Section 138 – Sick Industrial Companies (Special Provisions) Act, 1985– Section 22 – Sick Industrial Companies (Special Provisions) Repeal Act, 2003 – Section 4(b) – Issuance of process – Ban order passed by the BIFR – Restraint order under SICA in force – Held, the directors of the company were prevented by reasons beyond their control from honouring the cheques – The repeal of SICA, cannot breathe life in the complaint – the offence u/s 138 was not complete – the order of issuance of process is unsustainable. (Para 29)*

e
 (B) *Sick Industrial Companies (Special Provisions) Act, 1985– Section 22 – Scope – Section 22 only deals with the proceedings for recovery of money or for enforcement of any security or guarantee in respect of any loans or advance granted to the company & a proceedings for winding up of the company – there is no reference to any criminal proceedings. (Para 24)*

f
 (C) *Negotiable Instruments Act, 1881 – Section 138 – Vis-à-vis – Sick Industrial Companies (Special Provisions) Act, 1985– Section 22 – Pendency of proceedings under Section 22(1) of the SICA alone is not sufficient to get absolved from the liability u/s 138, NI Act. (Para 24)*

g
 (D) *Negotiable Instruments Act, 1881 – Section 138 – Sick Industrial Companies (Special Provisions) Act, 1985– Section 22A – Declaring a Company sick & passing of restraint order – Dishonour of Cheque – Held, if before the date on which the cheque was drawn or expiry of the statutory period of 15 days after notice, a restraint order of BIFR under Section 22A was passed against the company – then it cannot be said that the offence u/s 138 completed – Failure to make the payment would be for reasons beyond the control of the*

accused – amount claimed is not recoverable from the assets of the company in view of the ban order passed by the BIFR. (Para 25)

Facts:- The present petition was filed against the issuance of processes for the offence u/s 138, NI Act. It was contended that the accused company entered into coal supply agreement with another company to cater to the coal requirements of the manufacturing unit. Complainant 1 acted as an agent of accused company for lifting the coal and transporting the same to the manufacturing unit of the accused company. It is contended that complainant-1 was also providing trade credit to the accused company for the cost of coal and/or transportation costs, against the security provided by the accused company in the form of letter of credit/bank guarantee/post dated cheques.

The question which fell for consideration before the honourable High Court was whether a company and its directors can be proceeded against for having committed an offence punishable u/s 138 of the Act after the company has been declared sick under the provisions of the SICA before the expiry of the period for payment of the cheque amount. It was held that because the directors of the company were prevented by reasons beyond their control from honouring the cheques, the offence was not complete as on the date of the issuance of process by the learned Magistrate. Petition was allowed and order of issuance of process was quashed and set aside.

Law of relief:- When the directors of the company were prevented by reasons beyond their control from honouring the cheques the offence u/s 138 is incomplete.

Held:- Since both the accused and the complainant rely on the decision of the Apex Court in M/s. Kusum Ingots, it would be necessary to consider the said decision in some detail. The question which fell for consideration was whether a company and its directors can be proceeded against for having committed an offence punishable under Section 138 of the Act after the company has been declared sick under the provisions of the SICA before the expiry of the period for payment of the cheque amount. The Apex Court has held that Section 22 only deals with the proceedings for recovery of money or for enforcement of any security or guarantee in respect of any loans or advance granted to the company and a proceedings for winding up of the company and there is no reference to any criminal proceedings. The Apex Court then referred to its earlier decision in M/s. BSI Ltd. v. Gift Holdings Pvt. Ltd. 2000 AIR SCW 521 which holds that pendency

a of proceedings under Section 22(1) of the SICA alone is not sufficient to get absolved from the liability under Section 138 of the Act (emphasis supplied). (Para-24)

b The illustrations given by the Apex Court are illuminating. The Apex Court articulates that if before the date on which the cheque was drawn or expiry of the statutory period of 15 days after notice, a restraint order of BIFR under Section 22A was passed against the company, then it cannot be said that the offence under Section 138 of the Act was completed. The reasoning of the Apex Court is that the failure to make the payment would be for reasons beyond the control of the accused and it may also be contended that the amount claimed is not recoverable from the assets of the company in view of the ban order passed by the BIFR. (Para-25)

c The submission of the learned counsel for the complainants that in view of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 coming into force w.e.f. 01.12.2016, the statutory disability to prosecute the accused is removed, cannot be countenanced. Nor it is necessary to consider the provisions of the saving clause in juxtaposition with Section 6 of the General Clauses Act, 1897. The statutory immunity available under Section 22 of the SICA may not be available w.e.f. 01.12.2016. However, in view of the observations in paragraph 19 of Kusum Ingots, it must be held that the offence under Section 138 of the Act was not complete and the order of issuance of process is unsustainable. The offence not complete, not because there was a statutory bar, but as explained by the Apex Court, because the directors of the company were prevented by reasons beyond their control from honouring the cheques. The repeal of SICA, cannot breathe life in the complaint which was still born since the offence was not complete as on the date of the issuance of process by the learned Magistrate. (Para-29)

Counsel:- For Petitioner(s): Mr. Anil Mandikar, Mr. S.L. Kotwal, Advs.
For Respondent(s): Smt. Shilpa Tapdiya, Adv.

Cases Referred:-

- h 1. M/s. Kusum Ingots & Alloys Ltd., vs. M/s. Pennar Peterson Securities Ltd and others, AIR 2000 SC 954, (Para-19)
2. Harshad Jayprasad Bakshi v. State of Maharashtra and another, 2014(2) Mh.L.J. 95, (Para-23)
3. M/s. BSI Ltd. v. Gift Holdings Pvt. Ltd, 2000 AIR SCW 521, (Para-23)

JUDGMENT

ROHIT B. DEO, J.: - 1. Heard Shri Anil Mardikar, the learned Senior Counsel with Shri S.L. Kotwal, for the petitioners and Smt. Shilpa Tapdiya, the learned Counsel for the respondents. With consent the petition is finally heard at the admission stage. **a**

2. The petitioners are assailing the order dated 20.04.2018 rendered by the 25th Joint Civil Judge (Junior Division) and Judicial Magistrate First Class, Nagpur in Criminal Complaint Case 3866 of 2011 of issuing process for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ('Act'). Prior to the issuance of process, vide order dated 07.12.2017 the complainants were permitted to amend the complaint, which order is also assailed herein. **b**
c

3. The petitioners shall be referred to as the accused and the respondents as complainants for the sake of convenience.

4. Accused 1 is a Company Registered under the Companies Act. Accused 2 is the Managing Director and accused 3 is the Chief Financial Officer of accused 1 company. **d**

5. The accused contend that the company was registered with the Board for Industrial and Financial Reconstruction (BIFR) w.e.f. 03.12.2008 and was declared a sick unit on 16.07.2009 and a direction under Section 22A of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) restraining the company from disposing of the assets was issued. **e**

6. The accused contend that the company was in the business of manufacturing and selling rayon, yarn, nylon, tyre, cord and chemicals and has a manufacturing unit at Mohone, Kalyan, District Thane. The company entered into coal supply agreement with Western Coal Fields Limited, Nagpur to cater to the coal requirements of the manufacturing unit. Complainant 1 M/s Fuel Corporation of India acted as an agent of accused 1 company for lifting the coal and transporting the same to the manufacturing unit of the accused company. It is contended that complainant 1 was also providing trade credit to the accused company for the cost of coal and/or transportation costs, against the security provided by the accused company in the form of letter of credit/bank guarantee/post dated cheques. **f**
g
h

7. The accused company contends that cheques were issued in favour of the complainant 1 company towards security and for advance

a payment against the future supply. The accused company asserts, that the cheques were issued with the specific stipulation that the cheques should not be deposited in the Bank without written confirmation from the accused company. The further assertion is that the accused company did not receive any material against the cheques handed over to the complainant company as security. Covering letter dated b 12.06.2010, 24.06.2010 and 24.06.2010 are annexed to the petitions as Annexures B, B1 and B2 to substantiate the said assertions.

c 8. The accused company contends that due to financial problem a reference under Section 15 of the SICA was made to BIFR which was received by the BIFR on 03.12.2008 and registered as Case 55 of 2008 and the BIFR passed an order dated 16.07.2009 (Annexure C) which *inter alia* declared the accused company as sick unit.

d 9. The accused contends that the complainant company intervened in the proceedings vide Miscellaneous Application under reference 125 of 2012 *inter alia* seeking impleadment and a direction to the accused company to release payment of Rs.605.50 lakhs and in the alternative to permit the complainant company to take recourse to recovery proceedings. The accused company asserts that the said application was disposed of by the BIFR vide order dated 22.01.2014 e which reads thus:

f "*Having considered the submissions of the parties during the hearing and material on record the Bench allowed the MA No. 125 of 2012 to the extent of implement and directed the parties to reconcile the account and Coal quantity and submit a report to OA. The MA was accordingly disposed off.*"

g 10. The petitioner contends that without obtaining the consent of the board, the complainants filed complaint under Section 138 of the Act which was registered as Case 3866 of 2011. The learned Magistrate directed issuance of process vide order dated 04.03.2011. The said order was challenged in Writ Petition 186 of 2012 *inter alia* on the ground that there is no specific allegation against the accused as would warrant a trial and that the order of issuance of process dated h 04.03.2011 was not signed by the learned Magistrate. This Court vide order dated 31.08.2017 directed the learned Magistrate to reconsider the issuance of process.

11. The accused contends that on 25.09.2017 the complainants filed an application for amendment of the complaint. The accused contends that although the submission was that the amendment is

formal in nature and seeks to bring on record the change of registered office address of the accused company, in the pleadings incorporated in proposed paragraph 2, material changes to the original pleadings were affected. The learned Magistrate vide order dated 07.12.2017 allowed the application for permission to amend the complaint reasoning that no prejudice will be caused to the accused. a

12. It is contended that the complainants filed an application to issue process against the accused on 26.02.2018 and sought permission to issue summons by registered post acknowledgment due. Even before the issuance of process, the learned Magistrate directed the issuance of summons which were made returnable on 07.04.2018. b c

13. The accused aver that the learned Magistrate directed issuance of process for offence punishable under Section 138 of the Act vide order dated 20.04.2018.

14. The accused have reproduced the material averments in the complaint in order to substantiate the grounds raised in this petition for assailing the order of issuance of process. d

15. The first ground is that since the cheques are deposited at Mumbai, the learned Judicial Magistrate, Nagpur did not have the territorial jurisdiction to entertain the complaint. e

16. The second ground is that joint complaint qua the 12 cheques which allegedly were dishonoured, was not maintainable.

17. The third ground is that the process was issued against the persons not residing within the territorial jurisdiction of the Court without conducting the preliminary inquiry under Section 202(1) of the Criminal Procedure Code, 1973 ('Code'). f

18. The fourth ground is that in view of the provisions of Section 46 of the Act, and the written stipulations as evidenced in the three communications referred to *supra*, the cheques could not have been presented for encashment. g

19. The fifth ground, and which is the thrust of the submissions of the learned Senior Counsel Shri Anil Mardikar, is that in view of the decision of the Apex Court in *M/s. Kusum Ingots & Alloys Ltd., vs. M/s. Pennar Peterson Securities Ltd and others* reported in *AIR 2000 SC 954*, the ingredients of offence punishable under Section 138 of the Act are not established. This submission is on the premise that in view of the proceedings under the SICA and the h

a orders passed by the BIFR therein, the accused were precluded from honouring the cheques, even if it is assumed that the cheques were issued towards satisfaction of existing and legally enforceable debt.

b 20. The sixth ground is that in view of the specific bar under Section 22 of the SICA no prosecution could have been initiated without prior permission of the BIFR.

c 21. The Complainants have not filed affidavit in response to the petition. However, the learned counsel for the accused has filed on record written submissions dated 24.06.2019. The submission is that the provisions of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 came into force w.e.f. 25.11.2016 and the proceedings pending before the BIFR stood abated in view of the provisions of Section 4(b) of the Repeal Act. The submission is that in view of the repeal, the proceedings initiated under Section 138 of the Act are not barred and no exception can be taken to the order of d issuance of process dated 20.04.2018.

e 22. The complainants then contend that Section 22 of the SICA as then, stood did not contemplate stay or suspension of criminal proceedings. The next submission is that the restraint order stood revoked due to abatement of the proceedings w.e.f. 01.12.2016. The complainants also rely on the decision in M/s. Kusum Ingots & Alloys Ltd. to contend that criminal proceedings were not contemplated even by the then existing Section 22 of the SICA.

f 23. The complainants contend that the restraint order which is the basis of the challenge to the issuance of process is not placed on record. Reference is made to internal page 80 of the paperbook and to the following observations in the summary proceedings dated 22.01.2014 of BIFR.

g *"However, if the unit is working the current assets could be utilized for running daytoday operations, subject to keeping proper records thereof and routing all transactions through the account with the company's financing bank(s) only."*

h The complainants then rely on the decision in *Harshad Jayprasad Bakshi v. State of Maharashtra and another* reported in 2014(2) Mh.L.J. 95 and the Apex Court decision in *M/s. BSI Ltd. v. Gift Holdings Pvt. Ltd.* reported in 2000 AIR SCW 521.

24. Since both the accused and the complainant rely on the decision of the Apex Court in *M/s. Kusum Ingots*, it would be

necessary to consider the said decision in some detail. The question which fell for consideration was whether a company and its directors can be proceeded against for having committed an offence punishable under Section 138 of the Act after the company has been declared sick under the provisions of the SICA before the expiry of the period for payment of the cheque amount. The Apex Court has held that Section 22 only deals with the proceedings for recovery of money or for enforcement of any security or guarantee in respect of any loans or advance granted to the company and a proceedings for winding up of the company and there is no reference to any criminal proceedings. The Apex Court then referred to its earlier decision in *M/s. BSI Ltd. v. Gift Holdings Pvt. Ltd.* 2000 AIR SCW 521 which holds that pendency of proceedings under Section 22(1) of the SICA alone is not sufficient to get absolved from the liability under Section 138 of the Act (emphasis supplied).

In paragraph 18 the Apex Court enunciates thus:

18. In our considered view S 22 SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of an offence under S 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.

In the context of the issue which falls for consideration in this petition, paragraph 19 of the decision in *Kusum Ingots* is important and is reproduced below:

19. The question that remains to be considered is whether S 22 A 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 subsection (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

a 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
 b 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
 c 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
 d 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 22A was passed against the company then it cannot
 be said that the offence under S 138 NI Act was completed. In
 e 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
 f 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. (emphasis supplied)

g 25. The illustrations given by the Apex Court are illuminating.
 The Apex Court articulates that if before the date on which the cheque
 was drawn or expiry of the statutory period of 15 days after notice, a
 restraint order of BIFR under Section 22A was passed against the
 company, then it cannot be said that the offence under Section 138 of
 the Act was completed. The reasoning of the Apex Court is that the
 failure to make the payment would be for reasons beyond the control
 of the accused and it may also be contended that the amount claimed
 h is not recoverable from the assets of the company in view of the ban
 order passed by the BIFR.

26. The facts of the present case may now be considered on the
 anvil of the decision in Kusum Ingots. 13 cheques were dishonoured.
 One cheque is dated 12.06.2010 and the other 12 cheques are dated
 24.06.2010. The averment in the complaint is that the cheque dated

12.06.2010 was initially issued on 19.06.2008 and then renewed and revalidated and the 12 cheques dated 24.06.2010 were initially issued on 24.06.2009 and then renewed and revalidated. The undisputed position is that the cheques were presented on 06.12.2010, the return memo was received on 07.12.2010, the statutory notice was issued on 04.01.2011 and the period of 15 days to make the payment expired on 20.01.2011. Even if the averment in the complaint that the cheques were renewed and revalidated is taken at face value, the relevant dates are 12.06.2010 and 24.06.2010 which would be the dates of issuance of the cheques and 20.01.2011 which is the date on which the 15 days statutory period expired. In view of the enunciation of law in paragraph 19 in Kusum Ingots, the seminal issue is whether the accused company was declared sick and a restraint order under Section 22A of the SICA was issued prior to the issuance of the cheques or the expiry of the 15 days statutory period.

27. It is not in dispute that the accused company was declared sick vide BIFR order dated 16.07.2009. However, the complainants contend that the restraint order was not absolute and the observations in paragraph 19 of Kusum Ingots would not come to the rescue of the accused. Paragraph 2.10.1 of the order dated 16.07.2009 reads thus:

2.10.1 Having considered the submissions made and the material on record, the Bench observed that there being no valid objections to the company's sickness from the parties present today and considering that the company fulfilled the various criteria for sickness under SICA, the Bench was satisfied that the company had become a sick industrial company in terms of section 3(1)(o) of SICA. The company vide their letter dated 15.07.2009 has requested the Board to appoint Punjab National Bank as Operating Agency (OA). In view of this the Bench noted that the provisions of Section 18 of the Act would have to be explored in public interest in relation to the company. Accordingly, in terms of powers available u/s 17(3) of the Act the Bench appointed Punjab National Bank as the Operating Agency (OA) with directions to prepare a revival scheme for the company, if feasible within an overall period of four months. The OA was directed to keep in view the provisions of Section 18 of the Act and the enclosed guidelines and Checklist while carrying out this exercise. Meanwhile, it is necessary in public interest to protect the interest of the company, its creditors, employees, Government departments to whom dues are to be paid share holders etc. and ensure that the assets of the company are used under the direction of

a BIFR. Accordingly, the company was directed not to dispose of, lease, sell or alienate except with the consent of the Board, any of its assets as per Section 22A of the SICA. However, if the unit is working, the current assets could be utilized for running daytoday operations, subject to keeping proper records thereof and routing all transactions through the account with the company's financing bank

b (s) only. It is specifically directed that investments of the company shall also not be disposed of, sold or alienated without the prior permission of BIFR although the company may have classified investments under current assets. The cutoffdate (COD) for the scheme shall be taken as 30.07.2007 as indicated in the CDR scheme.

c 28. The order dated 16.07.2009 is unambiguous. It is clear that the accused company was declared sick and restrained from disposing of except with the consent of the board any of its assets. The order impugned invokes power under Section 22A of SICA. The

d observation that if the unit is working, the current assets could be utilized for running daytoday operations, subject to keeping proper records thereof and routing all transactions through the financing bank of the company, which are emphasized in the written submissions of the complainant company do not authorize the

e accused company to utilize the current assets, if any, to pay the alleged outstanding for the coal purchased or transportation cost incurred during the period 2006-2007 to 31.03.2009. Paragraphs 6, 7, 8 and 9 of the complaint would reveal that the balance of Rs.6,05,50,000/which is allegedly outstanding against the accused

f company is arrived at after adjusting the payments made by the accused company from 2006-2007 onwards against the coal and transportation cost incurred by the complainant company from 2006-2007 till 2008-2009. The averment in the complaint is that there is no transaction between the complainant and the accused after 29.07.2009.

g In such a situation, and taking the complaint averment at face value, it cannot be said that the permission to utilize the current assets for running daytoday operations could have permitted the accused, even if it is assumed that there were current assets available to pay the

h complainant company, to comply with the statutory notice.

29. The submission of the learned counsel for the complainants that in view of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 coming into force w.e.f. 01.12.2016, the statutory disability to prosecute the accused is removed, cannot be countenanced. Nor it is necessary to consider the provisions of the

saving clause in juxtaposition with Section 6 of the General Clauses Act, 1897. The statutory immunity available under Section 22 of the SICA may not be available w.e.f. 01.12.2016. However, in view of the observations in paragraph 19 of Kusum Ingots, it must be held that the offence under Section 138 of the Act was not complete and the order of issuance of process is unsustainable. The offence not complete, not because there was a statutory bar, but as explained by the Apex Court, because the directors of the company were prevented by reasons beyond their control from honouring the cheques. The repeal of SICA, cannot breathe life in the complaint which was still born since the offence was not complete as on the date of the issuance of process by the learned Magistrate.

30. This Court is satisfied, that exercise of inherent power is necessary *ex debito justitiae*.

31. I may record that although several other grounds are raised in the petition, the ground which was the main plank of the submissions is the effect of the restraint order under the SICA which was in force prior to the issuance of the cheque, and in any event prior to the expiry of the statutory period and having found merit in the submission that the offence under Section 138 of the Negotiable Instruments Act was not complete, it is not found necessary to deal with the other grounds raised in the petition.

32. The order of issuance of process dated 20.04.2018 in Criminal Complaint Case 3866 of 2011 is quashed and set aside.

33. The petition is allowed in the aforestated terms.

Result:- Petition allowed.
