

Ladda

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION No. 3187 of 2014

Swajay Finance Pvt Ltd and Anr ..Petitioners.
(Original Accused persons)

Vs

M/s Mode Export Pvt ltd and Anr ..Respondents.

Mr Yashpal Thakur, Advocate for the Petitioners.

Mrs. G.P. Mulekar, APP for the State.

Mr Santosh D.Thakur for Respondent No.1.

CORAM : A.R.JOSHI,J

DATE : 8th April, 2015

P.C. :

1) Rule. Rule is made returnable forthwith. By consent of parties, matter is taken up for final hearing at the admission stage itself as the issue involved is very small, inasmuch as not allowing the present petitioners – original accused Nos. 1 and 3 to cross examine the original complainant.

2) The present petitioners are original accused nos. 1 and 3 in CC No.1675/SS/13. Said case was filed by the present respondent original complainant under Section 138 read with section 141 of Negotiable Instruments Act, 1881 (“the N.I.Act” for short) on

account of bouncing of a cheque purportedly given by the accused persons including the present petitioners.

3) Without going much into details as to the lodging of the complaint and on the aspect as to how the cheque was dishonoured, suffice it to say that the matter was before the Trial Court on 12th May, 2014 for filing affidavit in lieu of examination-in-chief of the complainant. Accordingly, said affidavit was filed and the matter was adjourned to 27th June, 2014. On this date, further examination-in-chief of the complainant/present respondent No.1 was recorded and various documents, then filed along with the list, were taken on record and were in fact exhibited from Exhibits 41 to 69. That time, it so happened that the present petitioners and other co-accused were absent but their respective Counsel were present. After filing of the said documents on behalf of the respondent No.1 / original complainant, as there was no say filed on behalf of the then accused, whether to admit or deny the said documents as per the provision of Section 294 of Cr.P.C., the Trial Court thought it fit to exhibit the said documents.

4) At this juncture, it must be noted that though the said documents were filed along with list by the complainant there was no application filed by the complainant under Section 294 of

Cr.P.C. for seeking directions of the Court to get the say from the other side i.e. the present petitioners and the co-accused, whether they admit or deny the documents. Under this premise, the fact remained that there was no say or there was nothing on record before the Trial Court that any of the documents were admitted by the accused. In spite of this, the said documents were marked as “Exhibits” as mentioned above at “Exhibits 41 to 69”. That time, the application was preferred by the learned Counsel appearing on behalf of the accused asking for time to cross-examine the complainant. However, applications preferred on behalf of the accused were rejected. Those are the applications Exhibits 70 and 71. Even the Trial Court passed order as to “No cross” so far as accused Nos. 1, 3 and 4 are concerned and so far as accused no.2 is concerned. As such, by the end of 27th June, 2014 the Trial Court rejected the applications on behalf of the accused persons for allowing them to cross-examine the complainant and also marked all the documents produced by the complainant as Exhibits. Even on the same day a pursis was filed on behalf of the complainant closing its evidence and posting the matter for further steps in accordance with law and as such apparently the matter was fixed for recording statements of the accused under Section 313 of

Cr.P.C.

5) After the above, being aggrieved by the said order of “No cross” an application was preferred on behalf of accused Nos. 1, 3 and 4 at Exhibit 75 asking for de-exhibiting the earlier “exhibited documents” and allowing the accused persons to cross-examine the complainant. This application was heard and disposed of vide order dated 16th July, 2014 by the Metropolitan Magistrate, 7th Court, Dadar Mumbai. By the said order, the application of accused Nos. 1, 3 and 4 was rejected. This order is challenged in the present writ petition by original accused Nos. 1 and 3.

6) The reasoning given by the Trial Court specifically in paragraph 3 of the impugned order is seen and it must be mentioned that there is in fact erroneous observation by the Trial Court that on 27th June, 2014 the matter was fixed for cross-examination. Secondly, it must be mentioned that the Trial Court has carried the impression that as there is no say filed by the accused persons either to admit or deny the documents filed by the complainant, all the documents must be exhibited. In fact, this is not the mandate of the law. On the contrary, the party which file documents, if it chooses, has to file an application under section 294 of Cr.P.C. Then, in that event the other side i.e. the accused

persons in the present case can give their say, whether to admit or deny the documents. In any event, when there is no any such application by the complainant and in fact when there is no such consent, specifically given by the accused persons admitting the documents, it was required by the trial Court to see that the documents are proved as per the provisions of the Evidence Act and then only the trial Court should have proceeded further.

7) In any event, considering the reasoning given by the Trial Court and considering that the matter has already been posted for recording the statements of the accused persons under Section 313 of Cr.P.C. without there being any opportunity for the cross-examination of the complainant, it must be said that there is a need to interfere with the impugned order and the same is required to be quashed and set aside. Moreover, it must be borne in mind that it was not the factual position of asking a number of adjournments on behalf of the accused persons allowing them for the cross-examination but all the events happened only on 27th June, 2014 from recording of the examination-in-chief, filing of the documents, exhibiting the same, passing the orders for no cross and ultimately putting the matter for recording of the statements of the accused under Section 313 of Cr.P.C. Though there is mandate of

law that the proceedings under Section 138 of the N.I.Act are required to be disposed off within a period of six months and more specifically considering that these are the cases to be tried in summary manner, a balance must be struck while denying the right of the accused persons to cross-examine the complainant and in the opinion of this Court this is an appropriate matter in which that has not been done by the Trial Court and there is a need to cure the said defect under the writ jurisdiction and hence the present writ petition is allowed. The impugned order is quashed and set aside.

8) The Trial Court is directed to give an opportunity to the accused persons to cross-examine the complainant and allow to file their say whether the documents filed by the complainant are admitted by them or not. Needless to mention that the Trial Court shall deal with any such say which will be filed by the accused persons for admitting the documents or otherwise and then proceed further with the matter in accordance with law.

9) Rule is made absolute accordingly.

(A.R.JOSHI, J.)