

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPLICATION NO. 1044 OF 2014

WITH
CRIMINAL APPLICATION NO. 811 OF 2014

Birla Cotsyn (India) Pvt. Ltd. .. Applicant

Versus

M/s. Wazir Financial Services Pvt. Ltd. & Anr... Respondents

Mr. Satyavrat Joshi a/w Ms. Sonal More i/b Vidhii Partners,
Advocate for the applicant

Mr. Siddhartha Murarka, Advocate for the respondent No. 1.

Mr. Ajay Patil, APP for the respondent-State.

CORAM:-M.L. TAHALIYANI,J.

DATED : -02/02/2015

P.C.

Admit. Respondents waive service of notice. By
consent of the parties taken up for final hearing.

Heard Mr. Satyavrat Joshi, the learned counsel for
the applicant and Mr. Murarka, learned counsel for respondent
No. 1. Heard Mr. Patil, learned APP for the respondent No.2-
State.

3 The applicant is facing trial for the offence

punishable under section 138 of the Negotiable Instruments Act along with other accused in criminal case No. 3413/SS/2012. After recording statement of the respondent No. 1, on oath the learned Magistrate has issued orders directing issuance of process against the applicant and others for the offences punishable under section 138 r/w 141 of the Negotiable Instruments Act.

4 The said order is challenged in the present criminal application. In the first place, it may be mentioned here that the applicant in fact should have gone to the sessions Court by way of revision application. However, that issue is out of consideration because this Court has heard both sides at length. On merits, it is submitted by the learned counsel Mr. Joshi that post dated cheques were issued by the applicant and other accused and, therefore, in view of the judgment of Hon'ble Supreme Court in **Criminal Appeal No. 830 of 2014 (M/s. Indus Airways Pvt. Ltd. & Ors. v. M/s. Magnum**

Aviation Pvt. Ltd. & Anr.), the complaint was not maintainable. Before going to the judgment cited by Mr. Joshi, it is necessary to state few facts of the case which led to issuance of summons against the applicants and others. It was alleged by the respondent No. 1 that an Inter Corporate loan to the extent of Rs.2 Crores was provided to the applicant and others and that the cheque in question and other cheques were issued for discharging the said liability. This is clearly stated in the complaint at para 3. After dishonour of the cheques in question, the statutory notice was also issued to the applicant and others by the respondent No. 1. It is an admitted position that the said notice was not replied by the applicant.

5 In the circumstances, the question that arises for consideration is as to whether the law laid down by the Hon'ble Supreme Court will be applicable to the present set of facts. In the case before Supreme Court, there was an agreement for purchase. The cheques were issued towards advance payment

at the time of signing the contract. The Hon'ble Supreme Court observed that, if at the time of entering into a contract, it is one of the conditions of the contract that purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability u/s. 138 of the Negotiable Instruments Act. It is further observed by the Hon'ble Supreme Court that for a criminal liability to be made out u/s. 138 of the Negotiable Instruments Act, there should be legally enforceable debt or other liability subsisting on the date of drawal of cheque.

6 It can be seen that the facts of the case before the Supreme Court were altogether different from the issue involved in the complaint filed by the respondent No. 1 against the applicant and others. In my opinion, the judgment of the Supreme Court is of no help to the learned counsel for the applicant.

7 The defence taken by the applicant will have to be
established during the course of trial, particularly when even
the statutory notice was not replied by the applicant.

8 I do not find any substance in the applications. The
application are, therefore, dismissed.

9 Ad-interim order if any stand vacated.

(JUDGE)

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