

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 182 OF 2005

Shri. Harish S/o Prakash Changade,
Age. 30 years, Occ. Doctor,
R/o. Jyoti Saree Centre, Tilak Path,
Aurangabad.

...APPLICANT

Versus

1. Anand Trading Company,
Through its Proprietor,
Shri. Nanakran Hazarimal Paraswani,
Age. 58 years, Occ. Business,
R/o. Tilakpath, Aurangabad.

2. The State of Maharashtra. ...RESPONDENTS

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Advocate for Applicant : Mr C D Fernandes h/f Mr. A N
Kakade

Advocate for Respondent No. 1 : Mr R F Totala
Advocate for Respondent/State : Mr. S P Tiwari

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CORAM : V.K. JADHAV, J.
Dated: November 28, 2016
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ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the 3rd Additional Sessions Judge, Aurangabad dated 8.12.2004 in criminal revision no.255/2003 original accused has preferred this application.

2. Brief facts, giving rise to the present application are as follows :-

The applicants an accused in SCC No.5691/2002 filed by respondent no.1 under section 138 of the Negotiable instruments Act. After recording verification statement, the learned Magistrate has considered the facts of the case and issued process against the applicant-accused for the offence punishable u/s 138 of the Negotiable Instrument Act. In response to the said process, the applicant-accused appeared before the learned Magistrate and filed an application Exh.17 for recalling of the said process. Respondent-original complainant has strongly resisted the said application, however, the learned Magistrate by order dated 12.9.2003 below Exh.17 allowed the application and thereby recalled the process. Being aggrieved by the same, respondent-original complainant has approached the Sessions Court, at Aurangabad and the learned 3rd Additional Sessions Judge, Aurangabad by its impugned judgment and order dated 8.12.2004 allowed the revision petition and thereby quashed and set aside the

order passed by the Magistrate below Exh.17 dated 12.9.2003 in SCC No.5691/2002 and further directed the Magistrate to restore the file on its original number and proceed with the same in accordance with law. Being aggrieved by the same, the applicant-accused has filed present criminal application.

3. Learned counsel for the applicant submits that the applicant-accused has no concern with M/s Jyoti Saree Center and his parents and two brothers formed the partnership and the partnership firm run said business. Learned counsel submits that the applicant accused is Doctor by profession and he had no concern with the said partnership firm. Furthermore, the applicant accused has not issued the cheque in dispute nor signed the said cheque as alleged in the complaint. Learned counsel submits that the applicant-accused has produced before the trial court, original partnership deed and the deed placed on record unmistakably point out that the applicant accused is not the partner of the said firm. Furthermore, the learned Magistrate has compared the signature on the cheque and other two

signatures of the applicant-accused on record and further observed that signatures are different one. The learned Magistrate has therefore rightly allowed the application at Exh.17 and called back the process issued against the applicant-accused. However, the learned Additional Sessions Judge without applying mind erroneously quashed and set aside the order passed by the Magistrate and allowed the criminal revision in view of the judgment of Adalat Prasad Vs. Rooplal Jindal and Others reported in 2004 AIR SCW 5174 case. Learned counsel submits that therefore, the order passed by the Magistrate issuing process against accused under section 138 of the Negotiable Instrument Act is liable to be quashed and set aside.

4. Learned counsel for respondent-original complainant submits that probable defence of the applicant-accused cannot be considered at the time of issuance of process. Furthermore, the document of partnership deed which is produced on record is highly suspicious document and partnership deed as alleged by the applicant accused is not registered one. Learned

counsel submits that, applicant accused is not doing his medical practice nor he is medical practitioner by profession. on the contrary, he is sitting on the counter of the shop of Ms Jyoti Saree Center and he is looking after day to day business of said Saree Center. Learned counsel submits that the applicant accused has issued a cheque and the cheque bears his signature. Learned counsel submits that learned magistrate has rightly issued process against the accused for the offence punishable under section 138 of Negotiable Instrument Act. Though Magistrate has recalled the process passing an order below Exh.17, in view of the authoritative pronouncement of the Supreme Court in Adalat Prasad's case (supra) the learned Additional Sessions Judge has quashed and set aside the order passed by the Magistrate in the aforesaid criminal revision. In view of this, no interference is required. Criminal Application is thus liable to be quashed and set aside.

5. It is well settled that probable defence of the applicant-accused cannot be considered at the time of

issuance of process. In the instant case, the document in the form of partnership deed which is placed on record is a document of unregistered partnership deed and learned counsel for respondent-original complainant has vehemently submitted that said document is highly suspicious document and it is after thought creation. So far as other contentions raised such as signature on the disputed cheque etc. are concerned, that can be seen and examined at the time of full fledged trial of the case.

6. In view of the above, criminal application cannot be entertained. The learned Magistrate has rightly passed the order of issuance of process against the applicant accused under section 138 of the Negotiable Instrument Act by considering the allegations made in the complaint and on the basis of the verification statement of the complainant and relevant documents attached to the complaint. No interference is required. Hence, following order.

ORDER

- I. Criminal Application is hereby dismissed.
- II. Rule discharged.

(V.K. JADHAV, J.)

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aaa/-