IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 1853 OF 2005

Kailash s/o Dwarkadas Mantri
Age 42 years, Occ. Service,
R/o. M.M. Terraces, N-6, CIDCO,
Aurangabad ...Applicants

versus

1. Syed Ishaq s/o Syed Hussain,
Age 48 years, Occ. Business,
R/o. Ashti, Taluka Ashti,
District Beed

2. Mukesh Mehta
(deleted as per the order of this
Court dated 7.4.2006) ...Respondents

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Advocate for Applicant : Mr. Ram B. Deshpande

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CORAM : V. K. JADHAV, J.
DATED : 20th OCTOBER, 2016

ORAL JUDGMENT:-

1. The applicant seeks quashing of criminal proceedings/ prosecution initiated vide S.C.C. No. 478 of 2002 pending before J.M.F.C. Ashti.

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

a) Respondent No.1 original complainant, has filed a complaint bearing S.C.C. No. 478 of 2002 against the present applicant original accused No.1 and one more accused before J.M.F.C. Ashti for having committed an offence punishable under Sections 138 of Negotiable Instruments Act (for short “N.I. Act”) and Sections 420 and 114 of I.P.C. It has alleged in the complaint that the applicant and other accused are residents of Aurangabad and they carry on business in the name of 'Mehta Corporation Shil Products' at Aurangabad. Respondent No.1 complainant had agreed to sell goods of the said firm on commission basis to the general public. However, due to sub standard quality of goods, respondent No.1 complainant had stopped to sell the goods of the firm and cancelled the agreement entered with the said firm. However, certain amount was due and original accused No.2 Mukesh Mehta with a view to settle the account, issued cheque No. 0003789 dated 25.12.2001 for Rs.21,037/- in favour of respondent No.1 complainant. It has further alleged in the complaint that the said cheque was written by the present applicant. Respondent No.1 original complainant had presented the said cheque for encashment of amount on 22.3.2002 in his bank, which was returned with an endorsement “insufficient funds”. Thereafter, respondent No.1 complainant had issued legal notice through his advocate to the present applicant and accused No.2 Mukesh Mehta. The said notice was returned unserved as not accepted and therefore, respondent No.1 complainant constrained to file complaint before the Court. The learned J.M.F.C. Ashti, after recording statement of complainant on oath, by order dated 19.8.2002 issued process against the present applicant and accused No.2 for the offences punishable under Section 138 of N.I. Act and Section 114 of I.P.C.

b) On appearance, the applicant filed an application Exh.12 before the Magistrate praying therein for recalling of order of issuance of process. However, learned Magistrate by order dated 17.6.2005 rejected the said application. Hence, this criminal application.

3. Learned counsel for the applicant submits that even though the allegations made in the complaint are accepted as it is, no prima facie case is made out against the applicant for issuance of process under Section 138 of N.I. Act r.w. Section 114 of I.P.C. It has alleged in the complaint that the applicant has written the said cheque in the capacity as manager of the said firm, however, the said cheque was issued by the original accused Mukesh Mehta drawn on the account maintained by him. In view of this, the provisions of section 138 of N.I. Act cannot be attracted in the given set of allegations against the present applicant and there is no question of abetting the act,

punishable under Section 138 of N.I. Act. The question of abetting the offence under Section 138 of N.I. Act does not arise for the reason that Section 138 of N.I. Act makes the person liable to face the prosecution if he issues cheque drawn on the account maintained by him and the said cheque subsequently dishonoured.

Learned counsel in order to substantiate his submissions, placed reliance on the judgment of Madras High Court in the case of ***M. Inbarajan and another vs. Baladhandapani, reported in 1999 Cri.L.J. 75.***

4. Even though respondent No.1 duly served, none appears for him.

5. On careful perusal of complaint, it appears that in para 3 of the complaint, it has alleged that the present applicant original accused No.1 has written the said cheque in his own hand writing in the capacity of Manager of the firm of which original accused No.2 Mukesh Mehta is owner and as such, he has committed offence punishable under Section 138 of N.I. Act r.w. Sections 420 and 114 of I.P.C. Learned Magistrate by order dated 19.8.2002 issued process against the applicant and said accused No.2 for the offences punishable under Section 138 of N.I. Act and r.w. Section 114 of

I.P.C.

6. Section 138 of N.I. Act speaks that 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 be extended to two years or with fine which may extend to twice the amount of the cheque, or with both.

7. In the instant case, it is alleged in the complaint that the applicant original accused No.1 has written the cheque and original accused No.2 Mukesh Mehta has signed the said cheque, which was drawn on the account maintained by original accused No.2 Mukesh Mehta. Under these circumstances, there is no question of issuance process against the applicant original accused No.1 for the offences punishable under section 138 of N.I. Act r.w. Section 114 of I.P.C.

Furthermore, there is no question of any abetment when the liability as contemplated under Section 138 of N.I. Act is of the person, who has issued the cheque drawn on the account maintained by him.

8. In the case of ***M. Inbarajan and another (supra),*** in similar set of facts, the Madras High Court in para 7 of the said judgment, has made the following observations:-

> *"7. The allegation against the 3rd accused is that he is the person, who abetted the complainant to become time share holder. There is no scope for abetment of the offence under section 138 of Negotiable Instruments Act. The question of abetting does not arise. It is not an offence under the Indian Penal Code. But it is made an offence under the amendment made to the Negotiable Instruments Act. It does not make mention of any abetting nor proposes to make persons abetting liable for the offence. Therefore, as regards, accused 2 and 3, who are the petitioners herein, it has to be stated that there is absolutely no basis at all to proceed against them. Of course, the learned counsel for the petitioners has also produced extracts from the Registrar of Companies to the effect that as on 15.7.1994, the 2nd accused has resigned from service and that on 9.5.1994, the 3rd accused was relieved from service of the company."*

9. The view taken by Madras High Court squarely applies to the facts and circumstances of the present case. Thus, this criminal

application is required to be allowed in terms of its prayer clauses and accordingly I proceed to pass the following order:-

ORDER

I. Criminal application is hereby allowed in terms of prayer clause “C”.

II. Criminal application is accordingly disposed of. Rule is made absolute in the above terms.

(V. K. JADHAV, J.)

rlj/