IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 877 OF 2016
WITH
CRIMINAL APPLICATION NO. 878 OF 2016
CRIMINAL APPLICATION NO. 879 OF 2016
CRIMINAL APPLICATION NO. 880 OF 2016
CRIMINAL APPLICATION NO. 881 OF 2016
CRIMINAL APPLICATION NO. 882 OF 2016
CRIMINAL APPLICATION NO. 883 OF 2016
CRIMINAL APPLICATION NO. 884 OF 2016

Tushar Nutritive Foods Pvt. Ltd. & ors. ... Applicants.

Versus

M/s. Jindal Drugs Ltd. & anr. ... Respondents.

Mr. Dinesh Tiwari a/w. Mr. Mikhail Dey i/b. Dinesh Tiwari and Associates, advocate for Applicants.

Mr. Girish R. Agrawal, advocate for respondent No. 1.

Mr. S.R. Agarkar, APP for State.

CORAM : SMT.SADHANA S. JADHAV,J
DATE : APRIL 5, 2017

P.C.:

1 Heard the learned Counsel for the applicants and the learned Counsel for the respondent.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 Being aggrieved by the order dated 2/11/2015 passed by the Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai, thereby issuing process against the Petitioner for offence punishable under section 138 of the Negotiable Instruments Act. It is stated that the said order was not challenged under section 397 of the Code of Criminal Procedure, 1973.

4 It is the case of the applicants that the respondent herein had filed private complaints before Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai against the applicants, who happen to be the

directors of Tushar Nutritive Foods Pvt. Ltd. It is alleged in the complaints that the company of the respondent was supplying nutritive foods to the applicants. They had supplied and delivered to the applicants the goods worth Rs. 3,69,55,973/- till September, 2013. Against the said total liability of Rs. 1,50,65,112/-, the applicants had issued cheques of Rs. 5 Lakhs and Rs. 6 lakhs respectively, to be drawn on Dena Bank in favour of the complainant in discharge of the debt and other liability for the part payment of the goods. The said cheque were presented for encashment on 5/5/2014, 5/5/2014, 2/4/2014, 4/3/2014, 13/3/2014,13/3/2014, 22/2/2014 and 2/4/2014 respectively with Standard Chartered Bank. The said cheques were dishonoured. The complainant had issued statutory notices, as contemplated under section 138 of Negotiable Instruments Act. The said notices were sent to all the accused i.e. to all directors of the said company i.e. Tushar Nutritive Foods Pvt. Ltd. The notices were duly received by the accused. There was no reply to the statutory notices under section 138 of the Negotiable Instruments Act.

The amount was not paid within the stipulated period and hence, the complaints were filed under section 138 of the Negotiable Instruments Act.

5 The learned Counsel for the applicants has made vehement submission. The first contention of the applicants is that it is stated in the complaints that the accused herein are directors of the said company, which is accused No. 1. That the accused Nos. 2 to 5 are in-charge of and responsible for the conduct and day to day business and affairs of the accused No. 1 at all relevant time and the offence was committed within their knowledge and with their consent. According to the learned Counsel for the applicants, there are no specific averment as far as the applicants are concerned. The complainant has only mentioned their status and that they were in-charge of and responsible for the conduct of the business and affairs of the company. According to the learned Counsel for the applicants, there are vague allegations. There are no specific averments in

respect of the role assigned to them and therefore, prima facie, complainant deserves to be quashed.

6 The learned Counsel for the respondent placed reliance on the Judgment in the case of **Standard Chartered Bank v/s. State of Maharashtra reported in AIR 2016 SC 1750.** The Hon'ble Apex Court has held as follows :

> "An accused cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director."
>
> "31. We have referred to these decisions as they explicitly state the development of law and also lay down the duty of the High Court while exercising the power of quashing regard being had to the averments made in the complaint petition to attract the

> vicarious liability of the persons responsible under Section 141 of the Act."

No case is made out to hold that the allegations are vague. Basic averments are made in the complaint which are sufficient to proceed against the applicants.

7 The next contention raised by the learned Counsel for the applicants is that initially the complainant had approached the Magistrate at Delhi. The complaints are filed at Jammu and complaints are also filed at Mumbai. Reliance is placed on the Judgment of the Hon'ble Apex Court in the case of **Damodar S. Prabhu v/s. Sayed Babalal H.** reported in **(2010) 5 SCC 663.** The Hon'ble Apex Court had issued certain guidelines. The Hon'ble Apex Court has directed as follows :

> "It should be mandatory for the complainant to disclose that no other complaint has been filed in any other court in respect of the same transaction. Such a disclosure should be made on a sworn affidavit which should accompany the complaint filed under Section 200 of the CrPC. If it is found that such multiple

complaints have been filed, orders for transfer of the complaint to the first court should be given, generally speaking, by the High Court after imposing heavy costs on the complainant for resorting to such a practice. These directions should be given effect prospectively."

8 The learned Counsel for the respondent has stated on affidavit that in view of the amendment to the provisions of Negotiable Instruments Act by ordinance dated 15/6/2015 re-promulgated on 22/9/2015, the respondent No. 1 has also initiated proceedings for transferring the complaints pending in Jammu to Mumbai in consonance with section 142(a)(2) & (3) of the Amendment Act. It is also orally submitted that in view of various judgments, the complainant had to rush from pillar to post to recover the said amount. The learned Counsel for the respondent has also placed on record the order dated 16/9/2016 passed by the Judicial Magistrate First Class, Munsiff Samba (Jammu), by which the office was directed to issue bailable warrants. It is also observed that at that stage, the

Counsel for the complainant has filed an application for transfer of the case to Mumbai. It is also a matter of record that the said cases are transferred to Jammu from Delhi. Hence, it would be futile to give further directions to the complainant to transfer the cases.

9 The third contention of the learned Counsel for the applicants is that the said cheques were not issued against the legally payable debts but given towards security and that they were undated cheques. In the case of **Sampelly Satyanarayana Rao v/s. Engergy Development Ltd., AIR 2016 SC 4363,** the Hon'ble Apex Court has held as follows :

> "Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out."

Hence, the said contention raised by the learned Counsel for the applicants is unfounded and unwarranted and cannot be taken into consideration in view of the Judgment of the Hon'ble Apex Court (cited supra).

10 The fourth and last contention of the learned Counsel for the applicants is that the applicants herein have relied upon the email sent by the applicants to the complainant dated 23/9/2013.

> "Balance as per our book of accounts in all account heads … old chocolate, new chocolate, cocoa powder : Rs. 1,2800,000.00 (Rupees One Crore twenty eight lakh only)
>
> Claims and invoices submitted (subject to approval): Rs. 32,00,000(rupees thirty two lakh only)
>
> In this regard we have handed over 15 security cheques of Rs. 5,00,000.00 each to Mr. Vijay Jindal last week and the remaining security cheques of 46 lakhs are being sent to you tomorrow and a RTGS of 7,00,000 is transferred today. Please return the cheques as you receive RTGS payments against them, schedule already discussed with Mr. Vijay Jindal.

We look forward to a fantastic business association with you."

11 As against this, the learned Counsel for the respondent has drawn attention of this Court to the email sent by the applicants to the complainant, which reads as follows :

> "As discussed with Vijay Bhai,
>
> 1. We will be paying 50 lakh by 15th November out of which we have already sent 10 lakhs last week. Details of the same if being forwarded to you. Rest 40 lakhs we will clear on weekly basis by Nov. 15, 2013. Remaining amount of Rs. 60 lakhs by 31 dec. 2013."

The covering letter dated 24/9/2013 sent by the Director, Tushar Nutritive Foods (P) Ltd. to the Director, Jindal Drugs Ltd. is as follows :

> "Further to your letter dated 23rd Sep 2013, please confirm the following:
>
> 1. As of Sep 23rd 2013 Rs. 1,21,00,000/- (one crore twenty one lakh only) is due and payable, as per our accounts.

However, as per your account, about Rs. 1,53,00,000/- (one crore fifty three lacks only) is the outstanding.

2. The difference of Rs. 32,00,000/-(thirty two lacks) which is outstanding in your books towards supplies to us but being considered by us as expenses, is to be examined in detail by us, before any being approved.

3. 15 Cheques of Rs. 5 lacks each were given to you towards your due and payable amounts. We make direct payments to your accounts and no more outstanding amount remains, are then same will be returned to you.

4. Cheque for Rs. 46,00,000/- (forty six lacks) is being sent to you towards the balance amount due by today and when all payments are cleared we will return the same as above.

5. Cheques will be sent to you for every despatch, now onwards to be treated as above, and which amounts are to be realised by 60 days from the date of invoice."

12 The learned Counsel for the respondent has placed implicit reliance upon the Judgment of this Court in the case of **Prakash Sevantilal Vora v/s. State of Maharashtra & anr., 2011 (4) Civil Court Cases 489(Bombay),** wherein it was held that

> "If it is a defence of the accused that blank cheque was given as a security, whether any authority was given to the complainant to fill in the contents will have to be decided after evidence is led by both parties and, for that purpose, it is not necessary to send it to the Handwriting Expert."

Hence, it is clear that there would be a disputed question of fact, which can be decided only at the time of trial.

13 It appears from the record that the applicants had admitted the liability to the respondent/ complainant company. These are all disputed questions of facts and as held by the Hon'ble Apex Court, can be considered at the time of trial and hence, the submission hold no good ground for quashing the process issued against the applicants for offence punishable under section 138 of the Negotiable Instruments Act. In view of the several mandatory guidelines given by the Hon'ble Apex Court in the Judgments (cited supra), no case is

made out for quashing of the order of issuance of process. Hence, the applications being sans merits stand rejected.

14 Rule is discharged. The applications are disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)