

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL WRIT PETITION NO. 4394 OF 2016

Maximum Entertainment Pvt Ltd. and othersPetitioners

Vs.

Yashraj Films Pvt. Ltd and another ... Respondents

Mr. Harshal S. Suryawanshi Advocate for Petitioners

Mr. Subodh Desai for Respondent no. 1.

Mr. V. V. Gangurde APP for the State.

CORAM: SMT.SADHANA S.JADHAV, J.
DATED : 20th APRIL, 2017.

P.C.

1) Heard.

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

3) Petitioners herein are accused in criminal complaint no. 6324/SS/2015 pending before Metropolitan Magistrate, 48th Court at Andheri. The learned Metropolitan Magistrate upon perusal of the complaint and the verification statement of the accused was pleased to issue process against the present petitioners. The learned Metropolitan Magistrate by an order dated

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04/04/2016 has been pleased to issue process against the accused for offence punishable under section 138 r/w section 141 of the Negotiable Instruments Act. Being aggrieved by the said order, petitioners have filed present petition seeking relief of quashing of issuance of process against them.

4) Respondent herein had filed complaint alleging therein that petitioners herein had issued cheques towards legally enforceable debt. Cheque bearing no. 581219 was dated 10/07/2015. It was presented for encashment on 11/07/2015 and the same was dishonoured and returned unpaid. The complainant had issued statutory notice to the petitioners. Petitioners have not replied the said notice dated 10/08/2015. It is specifically averred that in order to give a fair opportunity to the accused, complainant had once again presented the cheques on 21/09/2015. The cheque was dishonoured for the reason "Funds insufficient". The complainant had once again issued a statutory notice on 20/10/2015. Notice was received by accused, however, accused had not replied the said notice and the notice which was sent by Registered Post A.D. was returned back with the remark "Left". Complainant was therefore constrained to file a complaint against the petitioners. The

learned Magistrate had, after subjective satisfaction, issued process against the accused for offence punishable under section 138 r/w 141 of the Negotiable Instruments Act.

5) The learned counsel for the petitioners submits that some of the directors had resigned from the company even prior to issuance of disputed cheque and hence, they cannot be held liable for the dishonour of cheque.

6) The learned counsel for the respondent rightly submits that this would be a subject matter of fact finding and the same needs to be proved at the time of trial. The learned counsel for the respondent submits that as on today, plea of all the accused is recorded and therefore, the said issue raised by the present petitioners cannot be considered. It is also submitted that under section 139 of Negotiable Instruments Act, a presumption has to be drawn that accused is liable to pay the legally enforceable debt for which the cheque has been issued and that it is a rebuttable presumption. Accused can rebut the said presumption at the time of trial.

7) The learned counsel for the petitioner submits that in the facts of the case, complaint itself would not be maintainable as the complainant had not initiated prosecution under section 138 r/w 141 of Negotiable Instruments Act after the cheque was dishonoured at the first instance and that the complainant had subsequently presented the cheque for encashment for which the accused are being prosecuted.

8) In the case of **MSR Leathers V/s. S. Palaniappan and another [Criminal Appeal No. 261-264 of 2002]** the Hon'ble Apex Court had considered the issue as to whether payee could create cause of action on the subsequent dishonour of cheque i.e. on the basis of second presentation. The Hon'ble Apex Court has held in para 21 as follows:

“There is, in our view, nothing either in [Section 138](#) or [Section 142](#) to curtail the said right of the payee, leave alone a forfeiture of the said right for no better reason than the failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do so had first arisen. Simply because the prosecution for an offence under [Section 138](#) must on the language of [Section 142](#) be instituted within one month from the date of the failure of the drawer to make the

payment does not in our view militate against the accrual of multiple causes of action to the holder of the cheque upon failure of the drawer to make the payment of the cheque amount. In the absence of any juristic principle on which such failure to prosecute on the basis of the first default in payment should result in forfeiture, we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of [Section 138](#).

9) The Hon'ble Apex Court has further considered as to whether there is anything in section 142 (b) to suggest that prosecution based on subsequent or successive dishonour is impermissible. The Hon'ble Apex Court has held as follows:

“So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holder’s right to prosecute the drawer for the default committed by him remains valid and exercisable”.

10) In para 31 of the Judgment, the Hon'ble Apex Court has finally held as follows:

“We have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched”.

The view taken in the case of **Sadanandan Bhadran V. Madhavan Sunil Kumar** was over ruled.

The Hon'ble Apex Court has further observed:

“In the result, we overrule the decision in Sadanandan Bhadran’s case (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to [Section 138](#) of the Negotiable Instruments Act. The reference is answered accordingly. The appeals shall now be listed before the regular Bench for hearing and disposal in light of the observations made above ”.

11) The learned counsel for the respondent submits that affidavit of evidence is also filed.

12) In view of the Judgment of the Hon'ble Apex Court in the case of **MSR Leathers** (*Cited Supra*), it would not be proper to quash and set aside the order of issuance of process. In any case, plea is recorded and the matter is ready for proceeding.

13) Writ petition, being sans merits, stands rejected.

14) Rule is discharged.

(SMT. SADHANA S. JADHAV, J.)