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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1280 OF 2010

M/s. Indorama Synthetics (I) Ltd.	..Petitioner.
V/s.	
State of Maharashtra & Ors.	..Respondents.

Mr.Mangesh Patel for the petitioner.

Mr.S.S. Pednekar, APP for the respondent-State.

CORAM: NITIN W.SAMBRE, J.

DATE : MARCH 14, 2018

PC.:-

Heard the learned counsel for the petitioner and learned APP for respondent No.1-State. None appears for respondent Nos.2 and 3.

2. The petitioner initiated the proceedings bearing C.C. No.899/SS/2005 pending on the file of Metropolitan Magistrate, 21st Court, Bandra, Mumbai against the respondent-company and its director for an offence punishable under section 138 and 141 of the Negotiable Instruments Act, 1881 ('the N.I. Act' for short).

3. Pursuant to summons served on the accused persons, an application came to be moved by accused No.2 under section 446(1) of the Companies Act, 1956 stating that prosecution initiated is not maintainable for want of leave of the High Court of Gujarat in Company Petition Nos.115 of 2001, 157 of 1997 and 245 of 1997 and in these petitions, the respondent-accused company is ordered to be wound-up. It is also alleged that an Official Liquidator was appointed and as such in absence of leave of the High Court of Gujarat, the prosecution against the respondents was not maintainable.

4. By the impugned order passed by the learned Metropolitan Magistrate on December 2, 2008, the petitioner-complainant was directed to secure the leave from the Hon'ble High Court, Gujarat before which the winding-up proceedings are pending. Till such leave was granted, the proceeding before the Magistrate was deferred.

5. Another application came to be moved on December 19, 2008 seeking permission to prosecute the director who has been stated to be in-charge and responsible for the affairs of the

accused-company and to issue appropriate intimation to the Official Liquidator as warranted under the Companies (Court) Act and the Rules framed thereunder. It is claimed by the petitioner that the leave of the High Court in winding-up proceedings is not required in view of the law laid down by the Apex Court. This claim was opposed by the respondents-accused. The learned Magistrate rejected the said application vide order dated July 23, 2009 on the ground that the Magistrate has no powers to review its earlier order. Hence, this writ petition.

6. During the pendency of the present petition, it was brought to the notice of this Court that the issue is already governed by the judgment delivered in the matter of *Firth (India) Steel Co. Ltd. (In Liqn.) V/s. Respondent*¹ wherein no such leave or permission of the Court taking up winding-up proceedings is required pursuant to the provisions of sections 442 and 446(1) of the Companies Act, 1956. A contrary view was also brought to the notice of this Court as reflected in the judgment of this Court delivered in Criminal Revision Application No.245 of 1997 on February 13, 2007.

¹ 1995(5) Bom.C.R. 907

7. The Division Bench judgment of this Court considered the said issue and pronounced a judgment on May 6, 2016 in Criminal Writ Petition No.1280 of 2010 by observing thus :-

“ 33. Accordingly, it was held that the proceedings under Section 138 of N.I. Act cannot be stayed for want of leave of the Company Court under Section 446(1) of the Companies Act.”

8. In the backdrop of the aforesaid legal provisions particularly the Division Bench judgment of this Court answering the reference delivered in the present petition on May 6, 2010, it is urged that the existing suit or proceedings referred to in section 446(1) under Chapter II part VII of the Companies Act, 1956 does not impede a complaint under section 138 of the N.I. Act. According to him, the order impugned as such is not sustainable and it is necessary to issue directions to the learned Metropolitan Magistrate to proceed with the complaint and disposed of the same expeditiously as the same is pending for more than eight years.

9. The learned APP relied upon the provisions of law.

10. The Division Bench of this Court while pronouncing the judgment on the issue referred to it as to whether the proceedings under the N.I. Act are maintainable in pending winding-up proceedings wherein the appointment of the Liquidator is already ordered are maintainable or not, has answered the issue in favour of the present petitioner-original complainant. Even if a winding-up proceedings are pending in the three company petitions before the High Court of Gujarat, wherein the Official Liquidator is appointed, this Court has concurred with the view expressed by the Division Bench in *Firth (India) Steel Co. Ltd. (supra)* and declared that the embargo created on the right of a party who initiated criminal proceedings particularly for an offence punishable under sections 138 and 141 of the N.I. Act will not operate, as said proceedings are not within the meaning of expression 'suit or other proceedings'.

11. Once this Court has already taken a view that during the pendency of the winding-up proceedings wherein the Official Liquidator is appointed, the proceedings under the N.I. Act are maintainable, the impugned orders passed by the Magistrate on

December 2, 2008 and July 23, 2009, in my opinion, are not sustainable as the reasons cited therein are both contrary to the Division Bench judgment cited supra.

12. In the aforesaid backdrop, both these impugned orders are hereby quashed and set aside. The writ petition is allowed in terms of prayer clause (b). The learned Metropolitan Magistrate is directed to deal with the complaint and decide the same without insisting upon the leave of the High Court Gujarat in the three winding-up proceedings against respondent Nos.2 and 3 wherein Official Liquidator is appointed. The Magistrate shall decide the proceedings expeditiously.

13. The petition is disposed of in the above terms.

(NITIN W.SAMBRE, J.)