IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1731 OF 2007

Farokh S. Timberwala ….Petitioner.
Vs.
Devidas Parshuram Gavai & Anr. ….Respondents.

Mr. Rajesh Datar for the Petitioner.
Mr. S.S. Hulke APP, for the Respondent-State.

CORAM : A. S. GADKARI, J.
DATE : 5th OCTOBER, 2018.

P.C.:-

By the present Petition, under Article 227 of the Constitution of India, the Petitioner, Original Complainant has impugned the Judgment and Order dated 19th July 2007, passed by the learned Sessions Judge, Thane in Criminal Revision Application No.67 of 2007 thereby setting aside the Order of issuance of process dated 19th October, 2006 passed by the learned Judicial Magistrate, First Class, Vashi, District Thane.

2 Heard Mr. Datar, the learned counsel for the Petitioner and the learned APP. Perused the record.

As per the record, the Respondent No.1 is duly served. Despite service, none appears for the Respondent No.1.

3 The Petitioner is the original Complainant. The Petitioner had filed a complaint under Section 138 of the Negotiable Instruments Act, against the Respondent No.1 in the Court of Judicial Magistrate First Class, Vashi bearing Private Complaint No. 1666 of 2006. The learned Magistrate, after reading, the complaint and verification of statement of the Complainant, was pleased to issue process against the Respondent No.1 under the Negotiable Instruments Act, by its Order dated 19th October, 2006.

The Respondent No.1, feeling aggrieved by the said Order preferred Criminal Revision Application No.67 of 2007 before the Sessions Judge, at Thane which has been allowed by the impugned Judgment and Order dated 19th July 2007.

4 The case of the Petitioner in nutshell is that, he had advanced an amount of Rs.20,00,000/- in cash to the Respondent as a loan for his business purpose. Towards the said lawful liability and/or debt, the Respondent No.1 issued a cheque dated 27th February, 2006 to the Petitioner, which came to be dishonoured on presentation. After completing the necessary legal formalities, the present complaint was filed before the Court of competent jurisdiction i.e. before the Judicial Magistrate, First Class, Vashi on 14th August, 2006.

The Revisional Court, in para No.2 of the impugned Order has held that, the cheque so presented by the Petitioner was within the period of limitation. The perusal of impugned Judgment and Order clearly indicates that, the learned Revisional Court has in detail scrutinized the defence of the Respondent No.1 and accepted it thereby allowing the said Revision and setting aside the Order of issuance of process.

5 It is to be noted here that, the impugned Judgment and Order is *ex-facie* silent on the aspect of *prima facie* case made out by the Petitioner as contemplated under Section 138 of the Negotiable Instruments Act and the Revisional Court has proceeded to dissect the evidence and/or defence put forth by the Respondent No.1 minutely without granting an opportunity to the Petitioner to lead evidence in support of his case and/or to examine the Respondent No.1 in that behalf.

6 It is by now the well settled position of law that, at the time of issuance of process, the concerned Court has to see a *prima facie* case if at all made out and has to further see whether the proceedings instituted by the Complainant is not an abuse of process of law and/or instituted only to harass or subject the accused to

harassment.

7 A plain reading of the complaint would *prima facie* disclose that an offence, as contemplated under Section 138 of the Negotiable Instruments Act is made out, and in view thereof, the learned Revisional Court ought not have entered into an arena of scrutinizing and/or dissecting the alleged evidence put forth by the Respondent No.1, in his defence.

8 In view of the above, the impugned Judgment and Order dated 19th July, 2007 passed by the learned Sessions Judge, Thane deserves to be quashed and set aside and is accordingly set aside.

The Complaint No. 1666 of 2006 is restored to the file of learned Judicial Magistrate, First Class, Vashi.

9 Petition is accordingly allowed.

Rule is made absolute in the aforesaid terms.

10 As the Original complaint was filed on 14th August, 2006, the learned Judicial Magistrate First Class, Vashi seized of Criminal Complaint No. 1666 of 2006 is hereby directed to expedite the hearing of the same and to make an endeavour to dispose off the same within a period of one year from the date of receipt of the present Order.

(A.S. GADKARI, J.)