IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1417 OF 2016
WITH
CRIMINAL APPLICATION NO. 1418 OF 2016

M/s Gorgeous Skin Pvt. Ltd. & Anr. … Applicants
Vs.
S.H.A.M.K. Mercantile Pvt. Ltd. & Anr. … Respondents
...
Mr. Vinay J. Bhanushali for the applicant.
Mr. D.T. Tiwari I/by Mr. Ram Mani Upadhyay for the Respondent No.1.
Mr. P.H. Gaikwad, APP for the Respondent-State.
...

CORAM : PRAKASH D. NAIK, J.
DATE : 27th JUNE, 2018.

P.C.

1. The applicants in both these applications are prosecuted for the offence punishable under Section 138 of Negotiable Instruments Act. The process was issued against the accused for the said offence. The applicants preferred Revision Application challenging the order of process which was rejected, hence, the applicants have preferred these applications under Section 482 of Code of Criminal Procedure.

2. Criminal Application No. 1417 of 2016 relates to Criminal Case No. 3531/SS/13. It is alleged that the accused had taken

premises from complainant on leave and license. The accused issued cheque for an amount of Rs.3,79,215/- on 13th September, 2013. The cheque was dishonoured. The complainant forwarded a notice dated 17th October, 2013. Since the payment was not done, the complaint was filed. The Criminal Application No.1418 of 2016 relates Criminal Case No. 1897/SS/2013. In respect to leave and license agreement stated above the accused had issued cheque dated 8th April, 2013 for an amount of Rs.13,74,214/- and cheque dated 8th April, 2013 for an amount of Rs.5,00,000/-. Both cheques were dishonoured with remarks payment stopped by drawer. Notice dated 9th April, 2013 was sent. Payment was not done. Hence, complaint was filed. Process was issued in both complaints.

3. The counsel for the applicant submitted that there was no liability in respect to the dishonoured cheque and therefore proceedings were not maintainable. It is further submitted while issuing process, learned Magistrate has not invoked Section 141 of Negotiable Instruments Act. To substantiate his point, Shri Bhanushali learned counsel for the applicants relied upon the leave and license agreement dated 14th January,2013 which has been annexed to the application. It is submitted that the said

agreement was for a period of 24 months starting from 1st January, 2013 to 31st December, 2014. The licence fee to be provided towards occupying the premises was Rs.50,000/- per month payable on or before 7th of each month. It is submitted that the applicants have made the payment to the complainant which was more than the existing liability qua the said agreement. Therefore as of date of issuance of cheque the liability under agreement will be Rs.4,00,000/- and Rs.1,50,000/- in respect to both complaints. It is submitted that the applicants had paid the amount of Rs.11,54,215 vide cheque No.392656 and further payment vide cheque Nos.802798, 101106, 101132 and 11004 totaling amounting to Rs.15,16,860/-, even before cheques were deposited. It is submitted calculating the compensation as stipulated in the agreement it can be seen with the payment which is parted to the complainant was more than the amount agreed in the leave and license agreement. It is therefore stressed upon that at the time the cheques were deposited by the complainant there was no existing liability and therefore the complaint under Section 138 of Negotiable Instruments Act qua the said cheques which are subject matter of complaint was not maintainable in law. The complaint nowhere in its averment speaks that, any cheque was issued by drawer against any enforceable debt or liability. The complainant has to mention in complaint that there is existing legal liability to pay the amount under dishonoured cheques. It is submitted that bank record indicate that more amount is paid than the amount of dishonoured cheques. It is submitted that there is no other transaction and the cheques were issued only in connection with the leave and license agreement.

4. Per contra, learned counsel representing the respondent-complainant submitted that the applicant had suppressed the vital facts. The contention raised by the complainant are based on the disputed question of fact and this Court may not entertain such contentions at this stage. It is submitted that the accused had defaulted in making payment towards the leave and license agreement as well as other agreements and they are occupying the premises. The respondent has filed affidavit in reply opposing reliefs. The complainant has relied upon several documents including the other agreements in relation to the said property and has claimed that the accused were liable to make the payment and there is default on their part. It is submitted that the accused has not replied to the notices of demand. The applicants are occupying premises illegally, without making any payment. The

respondent No.1 has filed eviction proceedings against applicants before Civil Court. It is submitted that accused entered into three agreements i.e leave and licence, agreement of furniture and fixtures and agreement of security deposit. Licence fee and other terms were agreed through these agreements. It is submitted that monthly payable amount comes to Rs.3,75,000/- apart from service tax. It is further submitted that the Sessions Court after considering all the submissions advance at the instance of the applicant have dismissed the revision application preferred by them. The order of process was issued by the trial Court on the basis of verification statement, averments made in the complaint and the documents placed alongwith complaint.

5. On going through the documents on record, it is apparent that the cheques issued by the accused were dishonoured. Learned Magistrate had issued process on the basis of the documents on record. The applicant had relied upon the leave and license agreement and it is pleaded that only payment was due to be paid to the complainant was in the sum of Rs.50,000/- per month as per leave and license Agreement for occupation premises. It is noted that the notice which was forwarded to the accused was not accepted by them and the same was refused. The

complainant has placed on record several documents in support of their claim and has contended that there was a liability which was to be claimed by the accused for which the cheques were issued. The details are reflected in the reply filed by the respondent-complainant. The complainant has to be given opportunity to prove their case during trial. The submission of the applicants are disputed question of fact. It is observed by revisional Court that the record indicates amount is payable in favour of the complainant and under such circumstances whether the amount of cheque was purporting to legally enforceable debt or not can be assessed only after recording of the evidence. At this juncture, it will be premature to arrive at conclusion regarding legally enforceable debt. I do not find any reason to take a different view of the matter. It will be permissible to applicants to raise these contentions by way of defence. This is not the stage to appreciate the evidence or to consider the defence. The learned Magistrate had issued process on the basis of averments mentioned in the complaint verification statement and documents. Merely because there is no reference to Section 141 of Negotiable Instruments Act in the order issuance process, would not vitiate the said order

6. Taking into consideration all these aspects, I do not find any

reason to entertain these applications and the same are required to be rejected. Hence, I pass the following order.

ORDER

(i) Both Criminal Applications stand rejected.

(ii) It is clarified that the observations made in this order are only for adjudicating these applications and the trial Court shall not be influenced by the same at the time of trial.

(PRAKASH D. NAIK, J.)