

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.317 OF 2004

Ramesh Pahulraj Makhija	]	
Residing at 61, Ashoka Apartments,	]	
6 th Floor, Nepeansea Road, Mumbai – 6	]	 Applicant.

Versus

1]	The State Of Maharashtra	]	
		]	
2]	M/s. Weikfield Mhenmonix Infonetworks	]	
	Pvt. Ltd. having its office at	]	
	116, Koregaon Park, Pune – 411 001	]	 Respondents.

Mr. Subodh Desai i/by M/s. Ramesh Makhija & Co. for the Applicant.
Mr. A R Patil, APP for the Respondent/State.

CORAM : S. S. SHINDE J.
Reserved on : 19th August 2019
Pronounced on : 23rd August 2019

JUDGMENT

1 By this Criminal Application the Applicant challenges the order dated 3rd January, 2004 passed by the learned Magistrate, 1st Class (A.C.) Court, Pune at Pune in Criminal Complaint No.538 of 2003 by which order the application filed by the Applicant, who is original accused No.6, for discharge/recalling the process came to be rejected.

2 The facts for filing the present Application in brief can be stated thus :-

The Applicant herein is the original accused No.6 in the complaint

No.538 of 2003 filed by Respondent No.2/original complainant under Section 138 of the Negotiable Instruments Act. The Applicant is a solicitor enrolled with the Bar Association of Maharashtra and Goa, and has been in legal practice. Respondent No.2 is a private limited company engaged in inter-alia the business of Development of Wireless Technologies and Development of Software in relation thereto. It is the case of the Applicant, that he came to be associated with a Company being M/s. Echovox (India) Pvt. Ltd. for the purpose of rendering his specialized advise in legal matters. It is the case of the Applicant that whenever he was invited on the board of directors of any of the companies, the same was accepted on a clear understanding that the applicant would be associated only for his expert legal advice and would not be concerned with the day-to-day business affairs and functioning of the company or the conduct of the business of the company. On 01/04/2003, the Applicant tendered his resignation from the board of directors of the said Company M/s. Echovox (India) Pvt. Ltd. Pursuant to the resignation of the Applicant, on 16/04/2003 the said Company filed Form No.32 with the Registrar of Companies. Thereafter on or about 3rd and 4th May 2003 the said Company issued two cheques of Rs.28164/- and 36972/- respectively to Respondent No.2 for certain transactions entered into by the said Company with Respondent No.2. When the said cheques were represented by Respondent No.2 in the bank, the same were returned dishonoured with remarks "insufficient funds". Respondent No.2, therefore, issued an advocate's notice

dated 02/06/2003 under the provisions of Negotiable Instruments Act. The Applicant had replied the said notice informing Respondent No.2 that, the applicant had ceased to be a director of the said company and the necessary form had already been filed by the said company with the Registrar of Companies, Maharashtra.

3 As the accused did not make payment to Respondent No.2, Respondent No.2 filed a complaint before the learned Judicial Magistrate, Ist Class (A.C.) Pune being Criminal Case No.538 of 2003 against 7 accused including the Applicant for offences under Section 138 r/w 141 and 142 for the Negotiable Instruments Act. It is the case of Respondent No.2/Complainant that accused No.1 is a company with whom the complainant had entered into a lease contract. Accused No.2 is a authorized signatory and accused Nos.3 to 6 are the directors of the said company and accused No.7 is also understood to be in-charge of the affairs of the said company. It is the case of Respondent No.2 that the said company issued two cheques in favour of Respondent No.2 towards payment of quarterly lease amount of the computers and related equipment. Respondent No.2 deposited the said cheques with their bank, however, the said cheques were returned dishonoured with memo "insufficient funds". Respondent No.2 therefore sent a notice through advocate to the accused. However, the accused did not make payment. Therefore, Respondent No.2, as stated herein above filed the complaint against the accused. The

learned Magistrate, after perusing the material on record, by his order dated 21/07/2003 directed to issue process against interalia the Applicant.

4 Thereafter the Applicant filed an application for discharge before the learned Magistrate. It is stated in the said discharge application that the applicant had tendered his resignation much before issuance of the cheques in question and the same is duly documented before the statutory authorities i.e. Registrar of Companies. It is also stated that the resignation came to be effected from 01/04/2003. It is also stated that Form No.32 was filed by the said company with the Registrar of Companies. It is also stated that except averment in the complaint that the applicant was a director at the relevant time, there was no other allegations against the Applicant in the said complaint. It is stated that the applicant was not involved in the transaction between the accused company with the complainant and the cheques in question were not signed by the applicant. The complainant has not produced any document showing that the applicant was aware of any transaction or dealings of the accused company with the complainant. The applicant therefore prayed that the process issued against him may be recalled, and he may be discharged from the present case.

5 The said application was opposed to by Respondent No.2 by filing a reply. It is stated in the said reply that the accused had committed an offence

under Section 138 of the Negotiable Instruments Act, and all the procedure laid down in the Negotiable Instruments Act is followed by the complainant. The complainant submits that as per the information received by the complainant the accused No.6 is the first subscriber to the memorandum of association of accused No.1 company and is also the first director of accused No.1 company. It is submitted that the applicant was the director of the company at the relevant time and, it was the responsibility and bounden duty of the applicant to see that the cheques issued by the accused company were duly honoured. It is denied by Respondent No.2 that the applicant was director by virtue of his profession and had nothing to do with the day to day affairs of the company, and he has tendered his resignation much before issuance of cheques. Respondent No.2 submits that they have made out a prima facie case against the accused and the complainant is ready to start the evidence and hearing of the matter, and therefore, the application filed by the applicant for discharge is premature and deserves to be dismissed.

6 As indicated herein above, the learned Magistrate by the impugned order dated 03/01/2004 rejected the said discharge application filed by the Applicant. The learned Magistrate observed that, the fact that the company is closed down or the accused no.6 has resigned from the post of director needs to be proved at the time of trial. It is also observed that the accused no.6 being practicing lawyer and was doing only the work of giving

legal advice to the company needs to be proved at the time of trial. It is also observed that the contention of the accused No.6 that he was not responsible or in-charge of the company and he has nothing to do with day to day affairs of the company is to be proved through evidence only. The learned Magistrate, after hearing the parties and considering the material placed on record, came to a conclusion that prima facie case under section 138 of the Negotiable Instruments Act is made out against the accused No.6 and, as indicated above, rejected the application of the applicant for discharge.

7 The learned counsel for the applicant submits that the complainant has failed to make out a prima facie case against the applicant, and therefore the learned Magistrate has erred in issuing the process qua the applicant under Section 138 of the Negotiable Instruments Act. He submits that the applicant had tendered his resignation from the board of directors by his letter dated 01/04/2003 which was accepted by the resolution of the company and accordingly Form No.32 was submitted to the Registrar of companies on 16/04/2003. He further submits that the cheques in question were admittedly issued on 03rd and 04th May 2003 much after the resignation of the applicant from the board of directors of the accused company. It is submitted that the applicant was not aware of the transaction between the accused company and the complaint. He also submitted that the applicant is not concerned with the day to day affairs and dealings of the company. He

therefore submits that there is no involvement of the applicant in the alleged offences, and impleading the applicant in the complaint as an accused is nothing but an harassment, and great hardship would be caused to the applicant, if he is not discharged from the present case. He therefore prays that this Criminal Application may be allowed and the process issued qua the present applicant may be recalled and he may be discharged from the present case.

8 In spite of service and recently steps taken by the applicant to serve the 2nd Respondent, none appears for the 2nd Respondent in the matter.

9 Heard the learned counsel for the applicant and the learned APP appearing for the 1st Respondent/State at length. With their able assistance I have perused the pleadings and grounds taken in the application as also the annexures thereto. I have also perused the material placed before me and the reasons assigned by the learned Magistrate in the impugned order whilst rejecting the application of the applicant for discharge.

10 At this stage it needs to be noted that the Supreme Court in the case of *Adalat Prasad v/s Rooplal Jindal & ors*¹ held that, the Court, who has issued process, has no power of review its order of issuance of process,

1 (2004) 7 SCC 338

and hence order of issuing process cannot be recalled. However, in the present case the applicant filed application on 06/09/2003 for discharge/recall of order of issuance of process before the learned Magistrate. On the relevant date of filing the application, the exposition of law in the matter of K M Mathew v/s. State of Kerala & Anr.² was in force, wherein it was held that :-

“after issuance of summons under section 204 of the Code, it was open to the Magistrate on being satisfied at the instance of the summoned accused to reconsider its decision of issuing summons under section 204. This Court in that case also held that the Magistrate issuing the summons can do so only on there being material to issue summons hence summons erroneously issued can be recalled by the Magistrate for which no specific provision is required.

The judgment in ***Adalat Prasad's*** case (supra) was pronounced on 25/08/2004. therefore on the relevant date i.e. 06/09/2003 when the application was filed by the applicant, the exposition of law in Mathew's case was in force. Therefore, in the facts of the present case, the application filed by the applicant for discharge/recalling of process before the learned Magistrate was maintainable.

11 It is an admitted fact that the cheques issued by Accused No.1 company in favour of Respondent No.2 towards lease contract came to be dishonoured with remarks “insufficient funds”. It is also an undisputed fact that the notice issued by Respondent No.2 is duly served upon the Applicant.

² (1992) 1 SCC 217

The Applicant replied the said notice by letter dated 10th June 2003. By the said letter, the applicant has informed the complainant that the applicant had ceased to be a director of the said company, and necessary Form No.32 in that regard had already been filed with the Registrar of Companies. The Applicant has specifically stated in the said letter that he had resigned from Echovox (India) Pvt. Ltd much before the transactions in question, and therefore, the complainant rightly did not implead him as an accused in the earlier notice dated 03/04/2003. It is also stated by the applicant that the complainant has deliberately impleaded him as an accused. It is also informed to the complainant that the complainant is free to take inspection of the documents in respect of the resignation of the applicant.

12 The learned counsel for the applicant laid emphasis on the fact that the applicant has already been resigned from the board of directors of the accused No.1 company prior to issuance of the cheques in question by the accused company in favour of Respondent No.2 complainant towards the lease contract between the accused company of Respondent No.2. Significantly it is required to be noted that the applicant by letter dated 01/04/2003 submitted his resignation as the director of the accused No.1 company, and the cheques in question were issued by the accused No.1 company to Respondent No.2 admittedly on 3rd and 4th May 2003. To buttress his submissions that the applicant has resigned prior to issuance of cheques, the learned counsel for

the applicant invites the attention of this Court to the letter dated 01/04/2003 which is on page 16 at Exhibit B of the Criminal Application and, Form No.32 filed by the accused company with the Registrar of Companies whereby the applicant was deemed to have resigned as on 01/04/2003. The said Form No.32 is annexed at Exhibit C on page 17 of the Criminal Application. It can be seen from the reading of the said letter dated 01/04/2003, that the Applicant has informed Mr. Claude Schaerer, Echovox (India) Pvt. Ltd. that he is submitting his resignation as the Director of Echovox (India) Pvt. Ltd with immediate effect. So also from the perusal of Form No.32 it can be said that the said Form No.32 has been presented by David Marcus and Claude Schaerer on behalf of Echovox (India) Private Limited, and the said Form has been duly received by the office of the Registrar of Companies on 16/04/2003. The name of the applicant is appearing in the said Form, and date of appointment or change mentioned therein is "01/04/2003", and the reason mentioned in the column of brief particulars of change is, "Resigned as Director". It is crystal clear from the perusal of the aforesaid two documents that the applicant has resigned as director of the accused company Echovox (India) Pvt. Ltd with effect from 01/04/2003 which is prior to issuance of the cheques in question on 3rd and 4th May 2003. It is pertinent to mention at this stage that the said cheques were issued by the accused No.1 company towards lease contract between it and Respondent No.2, and the applicant is not the signatory of the said cheques.

13 During the course of arguments, certified true copy of Form No.32 has been produced before me. I have verified the same with the copy of the said Form No.32 which is on record. The photo copy of certified true copy of Form No.32 is taken on record and marked as X for identification. After verification, the original certified copy of Form No.32 is returned to the learned counsel for the applicant. The contents of certified true copy of Form No.32 are the same to the contents appearing in the copy of Form No.32 which is on record. The stamps and signature of Registrar Companies are also appearing on the Certified True copy of Form No.32. The Date “16/04/2003” is mentioned as passed for registration. On reverse side of the said document, signatures of Director Mr. David Marcus and Director Mr. Claude Schaerer are appearing. Perusal of the contents of the said document would lead to an inevitable conclusion that the document produced on record by the applicant is unimpeachable and incontrovertible in nature.

14 Respondent No.2 Complainant has not produced on record any document showing that the Applicant was the director of the accused No.1 Company at the time of issuance of cheque. On overall reading of the complaint shows that except mere stating that Applicant was director and concerned with the day to day affairs of the accused No.1 company, Respondent No.2/Complaint did not bring on record unimpeachable and

incontrovertible evidence which would clearly indicate that the Applicant is involved in the present case. The complaint does not contain the basic averment which is sufficient to make out a prima facie case against the present applicant. Because of the absence of more particulars about the role of the applicant as the director, it could not be held that the applicant as director is concerned with the issuance of the cheques in question. Considering the unimpeachable and incontrovertible document i.e. Form No.32 produced by the applicant, this Court is of the view that the Criminal Application deserves to be allowed.

15 As already observed herein above, the Applicant was not the director of the accused No.1 company at the time of issuance of cheques and therefore is not held to be responsible for the business of the said company as averred in the complaint. Respondent No.2/Complainant has not brought on record any unimpeachable and incontrovertible evidence to show that the applicant is concerned with the issuance of cheques.

16 For the discussion made herein above, the order dated 3rd January, 2004 passed by the learned Magistrate, 1st Class (A.C.) Court, Pune at Pune in Criminal Complaint No.538 of 2003 rejecting the application of the applicant for discharge/recalling the process is required to be quashed and set aside, and is accordingly quashed and set aside. The applicant herein is discharged from

Complaint No.538 of 2003 pending before the learned Magistrate, 1st Class (A.C.) Court, Pune at Pune. The observations made herein above are prima facie in nature and confined to the adjudication of the present Criminal Application. The learned Magistrate would proceed against the remaining accused and decide the said complaint on its own merits and in accordance with law, if not already decided. The Criminal Application is accordingly allowed. Rule is made absolute to the aforesaid extent.

[S.S. SHINDE, J.]