

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 762 OF 2019

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| <p>Sidharth Chauhan]</p> <p>Age- 45 years, Occ- Business]</p> <p>Plot No. 128, Sector- 44,]</p> <p>Gurgaon. 122003, Haryana.]</p> <p style="text-align: center;">VERSUS]</p> | <p>..... Petitioner</p> |
| | |
| <p>1. Aditya Birla Real Estate Fund]</p> <p>Through its investment Manger]</p> <p>and Lawful attorney, Aditya Birla]</p> <p>Sun Life AMC Limited (formerly]</p> <p>known as Birla Sun Life Asset]</p> <p>Management Company Limited)]</p> <p>having its registered office at one]</p> <p>India Bulls Centre, Tower 1, 17th]</p> <p>floor, 841 Jupiter Mill Compound,]</p> <p>Senapati Bapat Marg, Elphinstone]</p> <p>Road Mumbai- 400013.]</p> | |
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| <p>2. The State of Maharashtra]</p> | <p>..... Respondents</p> |

Mr. Rohan R. Sonawane for petitioner.

Mr. A.A. Ponda, Mr. N. Mundargi a/w. Mr. S. Poria & Mr. C. Keswani
i/b. Economic Law Practice for Respondent No. 1.

Mr. A.R. Patil, APP for Respondent/State.

CORAM : S. S. SHINDE J.
RESERVED ON: 27th June 2019.
PRONOUNCED ON: 19th July 2019.

JUDGMENT

1. Rule, with the consent of the learned counsel appearing for the parties made returnable forthwith and heard.

2. The present writ petition is filed with the following substantive prayer:-

b) that this Hon'ble Court be pleased to quash and set aside the impugned order dated 11.12.2018 passed in C.C. No. 8349/SS/2018 on exemption application dated 11.12.2018 filed on behalf of Petitioner by the Ld. 33rd Metropolitan Magistare, Ballardpier, Mumbai;

3. Brief facts leading for filing the present petition are as under:-

It is the case of the petitioner that, the petitioner is an individual accused in complaint C.C. No. 8349/SS/2018 filed by Respondent No. 1 before the learned 33rd Metropolitan Magistrate, Ballardpier, Mumbai under the Negotiable Instruments Act. The Respondent No. 1 is the original complainant in C.C. No. 8349/SS/2018 pending before the learned Metropolitan Magistrate, Mumbai wherein the petitioner stands arraigned as accused. The complaint proceedings alleged commission of offence under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as "the said Act"). It is the case of the petitioner that, it is alleged in the complaint that in the year 2013, the petitioner alongwith Sidhartha Buildhome Private Limited as promoters of one CSN Estates Private Limited approached the complainant and represented to the complainant that the accused alongwith CSN were engaged in the business of real estate development and vide share subscription cum shareholders agreement dated 09.05.2012 executed between CSN, Tata Housing Development and Lemon

Tree Land and Developer Private Limited (“SPV”), CSN and Tata Housing have entered into a joint Venture for development of a residential project on a parcel of land admeasuring approximately 24.695 acres, situated at Gurgaon.

4. It is also alleged in the complaint that, further to the aforesaid representations made, the accused alongwith Sidhartha Buildhome Private Limited and CSN executed Subscription Agreement and Shareholders Agreement dated 29.09.2013. In the terms of Subscription Agreement and Shareholders Agreement, the complainant had agreed to subscribe 1,00,00,000 optionally convertible debentures of face value of Rs. 100/- each. It is further the case of the complainant that in addition to other securities, the Accused had executed a Deed of Guarantee dated 29.09.2013 in favour of the complainant taking personal responsibility to repay the debts of CSN arising under the Subscription Agreement and Shareholders Agreement. It is stated in the complaint that CSN failed to pay interest and redeem the optionally convertible debentures upon expiry of the period of three years from its subscription despite being called upon by the complainant. It is further alleged in the complaint that to secure the complainant in respect of the principal amount of Rs. 100 crores invested by the complainant under the Subscription Agreement and Shareholders Agreement and to discharge liability of CSN, the Accused handed over 4 (four) cheques drawn towards the repayment of principal sum of Rs. 100 Crores in the name of the

complainant.

5. It is stated in the complaint that the complainant was constrained to present and deposit all the 4 (four) cheques issued by Accused to discharge its principal amount liability of Rs. 100 Crores on 04.06.2018. However, the 4 (four) cheques were returned unpaid on account of insufficiency of funds on 06.06.2018. The complainant immediately vide its statutory legal notice dated 13.06.2018 called upon the accused to pay the cheque amounts to the complainant within a period of 15 days of receipt of the statutory legal notice under the said Act. The complainant thereafter approached the learned 33rd Metropolitan Magistrate, Ballardpier, Mumbai by way of a complaint. The learned Magistrate upon hearing the complainant and perusing the complaint and documents annexed to the complaint held that prima facie case was made out and was further pleased to issue process against accused by order dated 01.10.2018.

6. It is the case of the petitioner that, summons was issued to the accused returnable on 11.12.2018. The summons was served upon the accused on or about 01.11.2018. The petitioner, owing to unavailability of a confirmed travel ticket was unable to travel from Gurgaon to Mumbai and attend the Trial Court on 11.12.2018 but instructed an advocate to attend the proceedings and take

appropriate steps in the interest of the petitioner. The advocate of the petitioner appeared before the Trial Court on 11.12.2018 and presented an application for personal exemption of the petitioner. The learned Magistrate passed a conditional order thereby allowing the exemption application on a condition that the Advocate for the accused shall record plea on behalf of the accused and if the advocate is pleading not guilty then the accused shall secure his presence for bail and deposit 20% of the cheque amount as interim compensation within 60 days from the date of the order. It is further stated that, the impugned order dated 11.12.2018 is passed by the learned Magistrate in exercise of his powers under Section 143A of the said Act, inserted by the Negotiable Instruments (Amendment) Act, 2018. The section 143A of the said Act empowers the Magistrate to order the accused to deposit 20% of the cheque amount as interim compensation in a summons case when the accused pleads not guilty to the accusations made in the complaint. It is pertinent to note that the Section 143A of the said Act, does not contemplate recording plea of accused through his pleader. The provision of section 143A of the said Act, also does not allow the learned Magistrate to order deposit of interim compensation as a conditional order. More particularly, such order under Section 143A of the said Act, cannot be passed on an application preferred on behalf of the accused seeking exemption from personal appearance before the Court. Hence the present writ petition.

7. It is submitted by the learned counsel appearing for the petitioner that, the impugned order has been passed in an arbitrary manner without considering the provision of law and appreciating the documentary evidence available on record. The learned Magistrate erred in passing the impugned order when the petitioner was absent and an exemption application seeking personal exemption for the day was sought on his behalf. The learned Magistrate erred by assuming that the advocate for the accused had instructions to record plea on behalf of the accused. It is further submitted that, the learned Magistrate exceeded its powers by directing the advocate to sign on the plea on behalf of the petitioner.

8. It is further contended that, the learned Magistrate ought to have allowed or rejected the exemption application preferred on behalf of the petitioner and the Respondent No. 1 could have taken steps to secure presence of the petitioner on the next date. It is contention of the petitioner that such order to deposit interim compensation ought to have been passed on an application on behalf of the complainant/Respondent No. 1 and not on an application for personal exemption on behalf of the petitioner. Therefore, learned counsel appearing for petitioner submits that, petition may be allowed.

9. Learned counsel appearing for Respondent No. 1 relying upon notes

of written submissions placed on record made following submissions.

A. Summary nature of proceedings for the dishonour of cheques under the Negotiable Instruments Act, 1881.

a. According to the Statement of objects and Reasons of the Negotiable Instruments (Amendment) Act, 2018 Section 143 (A) has been introduced inter alia to address the issue of undue delay in the final resolution of cheque dishonour cases provide relief to payees of dishonoured cheques.

(Ref- paraas 7 and 9 of judgment of the Supreme Court of India In Surinder Singh Deswal & Ors V. Virender Gandhi (2019 SCC Online SC 739).

b. Recognising the need for speedy resolution of trials for dishonour of cheques, the legislature introduced Section 143 (3) on 06 February 2003, which provided as under:

“143-Power of court to try cases summarily”

(1)

(2)....

(3) Every trial under this Section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.”

B. Recording of plea by the advocate for the accused.

a. At paragraph 9 of the captioned Writ Petition the Petitioner has made

the following statement on oath, "...The petitioner, owing to unavailability of confirmed travel ticket was unable to travel from Gurgaon to Mumbai and attend the Ld. Trial Court on 11.12.2018 but instructed an advocate to attend the proceedings and take appropriate steps in the interest of the Petitioner... " (Emphasis Supplied).

b. In a Summons case, all that can be done upon receipt of summons is to either plead guilty or not guilty. Thus, by pleading not guilty the advocate for the Petitioner/Accused has taken appropriate steps in the interest of the Petitioner/Accused.

c. Further, if the advocate of the Petitioner/Accused desires to protect his client's interest and prevent issuance of a warrant, he could have submitted to the trial court that he does not have the authority to enter a plea on behalf of his client. However, the advocate for the Petitioner/Accused has not said any such thing. Also, the Vakalatnama presumes that the Petitioner/Accused has given such an authority to his advocate.

d. It must also be noted that the plea was recorded on 11 December 2018. The Petitioner/Accused however does not take any step to promptly challenge the order dated 11 December 2018 but files the captioned Writ Petition on 09 February 2019 i.e. only 2 days prior to the expiry of the date on which the 20% deposit was required to be made by the Petitioner/Accused before the trial court.

e. The recording of the plea by the advocate of the Petitioner/Accused is legal. (*Ref- Bhaskar Industries Ltd V Bhiwani Denim & Apparels Ltd & Ors 2001 7 SCC 401 paragraph 3 read with paragraph 17*).

f. Further, the decision in ***Bhaskar Industries*** (supra) speaks of two stages i.e. Section 205 and 317 of the Code of Criminal Procedure 1973 (“CrPc”). Under Section 205 C CrPc, on the first day, the advocate for the accused can record the plea whereas Section 317 of the CrPc speaking of a later stage of the trial-recording of evidence. Section 317 of the CrPc has no application with the facts of the present case.

g. The ruling of the Supreme Court in ***Tgn Kumar Vs State of Kerala & Ors (AIR 2011 SC 708)*** supports the decision of the Apex Court rendered in ***Bhaskar Industries Ltd (supra)***.

C. Section 143A- Power to direct interim compensation.

a. On a plain reading, this section does not require an application in writing to be made by the complainant for its operation and can be made directly by the Ld. Magistrate.

Therefore, learned counsel appearing for Respondent No. 1 submits that petition may be rejected.

10. Heard the learned counsel appearing for the parties at length, with their able assistance perused grounds taken in the petition, annexures thereto and impugned order under challenge in this petition. It is the contention of the petitioner that, the petitioner owing to unavailability of a confirmed travel ticket was unable to travel from Gurgaon to Mumbai and attend the Trial Court on 11.12.2018 but instructed an advocate to attend the proceedings and take appropriate steps in the interest of the petitioner. It is the contention of the

petitioner that only application for exemption was filed, however, the Trial Court allowed the said application subject to Advocate of the accused to sign on plea. According to the petitioner, the Court of Metropolitan Magistrate ought to have allowed the said application or rejected the same, however, there was no occasion for allowing the said application subject to Advocate appearing for accused to sign on plea. In this respect it is necessary to make reference to pleadings in Para No. 9 of the petition wherein it is stated by the petitioner as under:-

“9. The petitioner states that summons was issued to the Accused returnable on 11.12.2018. The summons was served upon the Accused on or about 01.11.2018. The Petitioner, owing to unavailability of a confirmed travel ticket was unable to travel from Gurgaon to Mumbai and attend the Ld. Trial Court on 11.12.2018 but instructed an advocate to attend the proceedings and take appropriate steps in the interest of the Petitioner. The advocate for the Petitioner appeared before the Ld. Trial Court on 11.12.2018 and presented an application for personal exemption of the Petitioner.”

(Emphasis Supplied).

11. It is clear from the reading of the aforesaid contention of the petitioner that, the Advocate appearing for him before the Metropolitan Magistrate was instructed to attend the proceedings and take appropriate steps in the interest of the petitioner. The Metropolitan Magistrate has allowed the prayer of the Advocate for the petitioner and dispensed with the presence of the petitioner on 11.12.2018, however, subject to Advocate appearing for the petitioner to sign on plea. It is observed that if the Advocate is pleading not

guilty then to secure presence of the accused for bail and to deposit 20% of cheque amount as interim compensation within 60 days from 11.12.2018. It was further observed that on failure advocate for the complainant to take steps. Therefore, the impugned order makes it abundantly clear that in case the Advocate is willing to sign on plea in that case only such application/prayer for exemption was granted. If the contention of the petitioner is accepted that the Advocate was not instructed to sign on plea, in that case it was open for the Advocate not to sign on plea. Since the Advocate for the petitioner has signed the plea and pleaded not guilty, it is not open for the petitioner to say that Advocate was not instructed accordingly. The Supreme Court in the case of ***Bhaskar Industries*** (supra) has taken a view that magistrate can allow an accused to make even the first appearance through a counsel. The magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with.

The contention of the learned counsel appearing for the petitioner is that no written instructions were given to the Advocate, thereby authorizing him to record plea of the accused. The Supreme Court in the case of ***Bhaskar Industries*** (supra) held that-

“The last limb of Section 317(1) confers a discretion on the Magistrate to direct the personal attendance of the accused at any subsequent stage of the

proceedings. He can even resort to other steps for enforcing such attendance. Thus it is within the powers of Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carrier on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the Magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course. When an accused makes an application to a Magistrate through his duly authorized counsel praying for affording the benefit of his personal presence being dispensed with the Magistrate can consider all aspects and pass appropriate orders thereon before proceeding further.”

12. An aforesaid observations would make it clear that, Section 317 of the Cr.P.C. comes into picture at the later stage of the trial recording of evidence. However, under Section 205 of Cr.P.C. on the first day, the Advocate for the accused can record the plea, for which written application by the accused is not contemplated.

13. In the present case first respondent filed the complaint C.C. No. 8349/SS/2018 before the Ld. Metropolitan Magistrate, Ballardpier, 33rd Court,

Mumbai. In the said complaint the learned Magistrate issued process against the petitioner which was made returnable on 11.12.2018. On 11.12.2018 the said Court was pleased to pass the impugned order. The petitioner near about two months from the date of passing the impugned order filed the present writ petition. The proceedings under Section 138 of Negotiable Instruments Act are required to be disposed of within six months keeping in view the mandate of Section 143 of the said Act and within three months from the date of assignment of the case as held by the Hon'ble Supreme Court in the case of **Indian Bank Association and Others Vs. Union of India & Others reported in (2014) 5 Supreme Court Cases 590.** It would be apt to reproduce herein below Section 143 of the Negotiable Instruments Act, 1881, which reads as follows:

1]143. Power of Court to try cases summarily.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees:

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one

year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

(Underlines added)

14. The Hon'ble Supreme Court in the case of **Indian Bank Association & others** (supra) while issuing directions, for appropriately dealing with the cases under Section 138 of the NI Act, in Para 21(5) directed as under:

(5) The Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within the three months of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses in the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court.

15. Therefore, keeping in view the mandate of Section 143 of the said Act and also judgment of Hon'ble Supreme Court in the case of **Indian Bank Association & others** (supra), the learned Metropolitan Magistrate was right in passing the impugned order. Prima facie it appears that the petitioner is trying

to delay the proceedings pending before the learned Metropolitan Magistrate. In that view of the matter no case is made out to cause interference in the impugned order. Hence, petition stands rejected. Rule is accordingly discharged.

[S.S. SHINDE, J.]