IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 245 OF 2019

Digant D. Mehta ...Applicant

Versus

The State of Maharashtra and Anr. ...Respondents

Mr. R. Sathyanarayanan a/w Mr. Pratik Surti, Advocate appointed for Applicant.

Mr. A.D. Kamkhedkar, APP for the Respondent–State.

Mr. Amir Arsiwala a/w Mr. Abdullah Qureshi, Obaid Thakur and Akshata Parekar, Advocate for Respondent No.2.

CORAM : PRAKASH D. NAIK, J.

DATE : 23rd JUNE, 2022.

PER COURT :

1. Applicant has invoked inherent powers of this Court under Section 482 of Code of Criminal Procedure challenging the Order issuing process dated 2nd August, 2018 passed by learned Metropolitan Magistrate 23rd Court at Esplanade Mumbai in Criminal Case No.870/SS/2018 and the proceedings therein.

2. The brief facts of the impugned complaint lodged by Respondent No.2 alleging commission of offence under Section 138 of Negotiable Instruments Act, 1881 (for short 'N.I. Act') are as follows :-

i. The complainant M/s. Insta Capital Pvt. Ltd. company incorporated under the provisions of Companies Act, 1956 is registered non banking financial company under the provisions of Reserve Bank of India.

ii. The Accused No.1 M/s. Mediaman Infotech Pvt. Ltd. is a company incorporated and registered under the Companies Act, 1956. The Accused No.2 is the Managing Director, Accused No.3 and 4 are the Directors of Accused No.1. As such being the Managing Director and Directors of Accused No.1 are incharge of and responsible for day-to-day work affairs of Accused No.1 company and were also dealing with the complainant company at the relevant time.

iii. The Accused Nos. 2 to 4 on behalf of Accused No.1 company had approached the complainant company for the purpose of availing credit facility for business expansion of Accused No.1 company. The Accused Nos. 2 to 4 assured the complainant company with respect to the financial capabilities of Accused No.1 company and the complainant company was induced by the said representations and agreed to provide credit facility to Accused No.1 company on certain terms and conditions.

iv. Upon receiving an amount of Rs.30,00,000/- (Thirty Lakhs) from the complainant vide RTGS, the Accused No.2 to 4 on behalf of Accused No.1 company executed demand bill of exchange dated 11th September, 2017 in favour of complainant company assuring due repayment of the said loan amount on demand which was duly signed by Accused No.4 on behalf of Accused No.1 company. The Accused No.4 had also signed the said demand bill of exchange in his personal capacity as an acceptor.

v. Pursuant to the aforesaid understanding, the complainant company presented the said demand bill of exchange, to the Accused on 13th November, 2017 towards repayment of the balance loan amount of Rs.18,00,000/-(Eighteen Lakhs). The Accused No. 2 to 4 on behalf of Accused No.1 issued four cheques in favour of complainant company towards repayment of said balance loan amount of Rs.18,00,000/-(Eighteen Lakhs).

vi. The cheque dated 14th November, 2017 bearing no. 000808 was issued for an amount of Rs.1,50,000/-(One lakh fifty thousand). Cheque dated 21st November, 2017 bearing no.000809 was issued for amount of Rs.1,50,000/- (One lakh fifty thousand). Cheque dated 28th November, 2017 bearing no.000810 was issued for Rs.1,50,000/-(One lakh fifty thousand) and cheque dated 4th December, 2017 bearing no.000798 was issued for an amount of Rs.13,50,000/-

(Thirteen lakhs fifty thousand).

vii. The aforesaid cheques were signed by Accused No.2 on behalf of Accused No.1 company. The cheques were returned dishonoured by the bankers of Accused. The complainant company immediately informed the Accused about the dishonour of aforesaid cheques. Accused No.4 in his individual capacity transferred an amount of Rs. 1,50,000/-(One lakh fifty thousand) by NEFT into the bank account of the complainant company from his personal bank account as part payment towards repayment of the aforesaid balance loan amount.

viii. Thereafter, the complainant company persistently followed up for recovery of the outstanding amount of Rs.16,50,000/-(Sixteen lakhs fifty thousand). The Accused Nos. 2 to 4 on behalf of Accused No.1 company issued two fresh cheques for an amount of Rs. 1,50,000/-(One lakh fifty thousand) each in favour of complainant company and instructed the complainant company to redeposit the aforesaid cheque for amount of Rs.13,50,000/- (Thirteen lakh fifty thousand). The fresh cheques were dated 23rd January, 2018 bearing no.000818 for an amount of Rs.1,50,000/- and cheque dated 30th January, 2018 bearing no.000819 for an amount of Rs.1,50,000/-. The previous cheque dated 4th December, 2017 bearing no.000798 was for amount of Rs.13,50,000/-(Thirteen lakh fifty thousand).

ix. The cheques were presented by complainant company with their banker and inspite of assurances by the Accused, all the three cheques were dishonoured with remarks 'payment stopped by drawer'. The Accused deliberately instructed their banker to stop payment after issuing the aforesaid cheques with dishonest intentions to deceive and avoid lawful claims of complainant company.

x. The complainant company issued Demand Notice dated 14th March, 2018 through their Advocate which was dispatched on 16th March, 2018 calling upon the Accused to pay the cheque amount to the complainant. The notice was duly served upon the Accused on 17th March, 2018. The Accused Nos. 2 and 4 replied to the Demand Notice vide Advocate's Letter dated 24th March, 2018 and 31st March, 2018 respectively.

xi. Complaint was filed for an offence under Section 138 of N.I. Act on 19th April, 2018.

3. Vide order dated 2nd August, 2018, the learned Magistrate issued process against Accused Nos. 1 to 4 for the offence punishable under Section 138 of N.I. Act. In the said order it is mentioned that, Accused No.1 is a company and Accused Nos. 2 and 3 are the Directors of Accused No.1 as per the company master data tendered by complainant. The accused No.2 is the signatory to the disputed cheque. The Accused No.4 was the Director and he participated in the transactions as per the documents filed by the complainant. The complainant has made out *prima facie* case against Accused Nos. 1 to 4 to take cognizance of offence under Section 138 of N.I. Act.

4. Learned Advocate Mr. Sathyanarayanan appearing for the Applicant submitted that, the order issuing process was passed mechanically. There is no evidence to invoke Section 141 of N.I. Act against the Applicant. There are no sufficient averments in the complaint to fasten vicarious liability by invoking Section 141 of N.I. Act, against the Applicant. The Applicant has not participated in day-to-day affairs of business of Accused No.1 company. On receipt of the Demand Notice issued at the instance of complainant, the Applicant had responded to it by Advocate's reply dated 31st March, 2018, wherein it was clearly stated that, the Applicant had already informed the complainant vide letter dated 6th February,

2018 that he is no way concerned with Accused No.1 company. He had resigned as employee of Accused No.1 company w.e.f. 25th November, 2017. Change report is intimated to the Registrar of companies. It is submitted that the Applicant had filed Form No.DIR-11 with the Registrar of companies stating that he has resigned from the company w.e.f. 27th December, 2017. The Applicant had submitted resignation letter dated 26th December, 2017 to the Board of Directors of Accused no.1 company. The Applicant's resignation letter was accepted by the Board of Directors vide resolution dated 27th December, 2017. The Applicant is relying upon the letter of resignation dated 26th December, 2017, resolution dated 27th December, 2017 and Form No. DIR-11, and DIR-12. The Accused no.2 had published notice in the newspapers stating that he has severed all ties and relations with his son Digant Mehta (Applicant) since last several months. Applicant is not connected with Accused No.1 company in any capacity whatsoever. He is not entitled to represent Accused No.1 or any of his Directors including Accused Nos.2 and 3, as a Director, employee, agent and representative or in any other capacity whatsoever. In respect to previous notice dated 18th December, 2017, reply was forwarded at the instance of the Applicant stating that, the Applicant had no shareholding of Accused No.1 company. He was salaried employee in the role of an assumed Director of company. He was acting under instructions of Accused No.2 Dushyant D. Mehta, Managing Director of Accused company and reporting to him. He resigned as an employee Director w.e.f. 25th November, 2017 which is duly accepted and confirmed by Managing Director of the Company. He is in no way concerned with the Accused No.1 company or its liability. On the date of dishonour of cheques the Applicant was not the director of Accused No.1 company. Reliance is placed on the Advocate's letter dated 6th March, 2018 forwarded on instructions of the Applicant and Advocates letter dated 12th March, 2018. Reliance is placed on the decisions in the case of *DCM Financial Services Limited V/s. J.N. Sareen And Another, (2008) 8 SCC 1* and *Harshendra Kumar D. V/s. Rebatilata Koley and Others, (2011) 3 SCC 351.*

5. The Respondent No.2 has filed affidavit-in-reply opposing the relief sought in this application. Learned Advocate for Respondent No.2 urged that, the application is devoid of merits. The contentions of the Applicant are based on disputed questions of fact. The documents relied upon by the Applicant are disputed. The defence of the Applicant is required to be tested during trial. The Applicant was incharge and responsible for day-to-day affairs of the Accused No.1 company. The Applicant being the Director of

Accused No.1 company approached Respondent No.2 for availing credit facilities and believing his assurances, the Respondent No.2 agreed to provide credit facility to Accused No.1 company. The loan application form for the purpose for availing the credit facilities was signed by Applicant on behalf of Accused No.1 company. Demand bill of exchange of Rs.30,00,000/- dated 11th September, 2017 was executed in favour of Respondent No.2 and the said bill of exchange was signed by Applicant on behalf of Accused No.1 company and also in his personal capacity as an acceptor upon presentation of bill of exchange for repayment of the loan, cheques in favour of Respondent No.2 company were issued. The cheques were dishonoured on presentation. The Applicant vide E-mail dated 10th January, 2018 assured Respondent No.2 regarding repayment of loan. Thereafter, the Applicant transferred an amount of Rs.1,50,000/- vide NEFT directly to the bank account of Respondent No.2 as part payment towards outstanding loan of the Accused No.1 company and informed about it to Respondent No.2 vide E-mail dated 11th January, 2018. Accused No.1 company is closely held company of family members wherein the Directors are members of same family. The Applicant is son of Applicant No.2. The cheques were dishonoured with remarks payment stopped by drawer. The Accused No.2 in reply to the Demand

Notice has shifted the blame on the Applicant. In the reply to notice the Applicant had stated that, he had resigned from Accused No.1 company w.e.f. 25th November, 2017. In the Form Nos.DIR-11 and 12, it is suggested that the resignation was effective from 27th December, 2017. The date of alleged resignation is not specified in this application. The defence of resignation is disputed question of fact. The Form No.DIR-12 annexed to this application does not specify the date of filing the same with the Registrar of company. There is no infirmity in the order issuing process. Applicant's correspondence vide E-mail dated 10th January, 2018 and 11th January, 2018 containing assurances and transferring an amount of Rs.1,50,000/-(One lakh fifty thousand) as an part payment towards outstanding loan amount of Rs.1,50,000/-(One lakh fifty thousand) was made after the date of alleged resignation. The Form Nos.DIR-11 and 12 suggest that, the resignation was w.e.f. 27th December, 2017 which is after issuance of cheque dated 4th December, 2017. The Accused No.3 had preferred Criminal Writ Petition No.4929 of 2019 before this Court challenging the said proceedings on the ground that cheques were signed by Accused No.2 and not by Accused No.3. The person in control of day-to-day affairs of the company can be made an Accused in such prosecution. On the basis of averments in the complaint the petition was dismissed by this

Court vide order dated 28th January, 2020.

6. Learned Advocate for Respondent No.2 has relied upon the following decisions :

i. *Suhas Bhand V/s. State of Maharashtra and Anr. 2008 SCC online Bom 1610.*

ii. *Malwa Cotton And Spinning Mills limited V/s. Virsa Singh Sidhu And Others, (2008) 17 SCC 147.*

7. In *DCM Financial Services Ltd. V/s. J.N. Sareen and Another (supra),* it is held that Sections 138 and 141 are penal provisions which have to be construed strictly. Pleadings must be sufficient to specify role of individual person impleaded as Accused. Despite intimation of resignation the Respondent was impleaded as Accused. In the case of *Harshendra Kumar V/s. Rebatilata Koley and others (supra),* it was held that criminal prosecution is a serious matter it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. The High Court fell into error in not taking into consideration the uncontroverted documents relating to the Appellants resignation from the post of Director of the company, had these documents been considered by the High Court, it would have been apparent that the Appellant has resigned before the cheques were issued by the company. While exercising inherent

jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the code in a case where complaint is sought to be quashed, it is not proper for the High Court to considered the defense of the Accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents which are beyond suspicion or doubt placed by the Accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and asked to prove his defence before the trial Court. In *Malwa Cotton And Spinning Mills limited V/s. Virsa Singh Sidhu And Others (supra)*, it was held that quashing of criminal proceedings under Section 482 of Cr.P.C. is not justified where disputed questions of fact are involved. In the case of *Suhas Bhand V/s. State of Maharashtra and Anr. (supra)* decided by this Court it is observed that if there is no dispute of factum of resignation of Accused in case under Section 138 of N.I. Act, he can be discharged. If resignation is not accepted or admitted by the complainant upon production of certified copy of Form 32 the Accused would have to prove the truth of contents of said certified copy i.e. factum of his resignation. Such Accused cannot be discharged simplicitor on production of certified copy of Form-32.

8. The Applicant is impleaded as Accused No.4 in the complaint. The complainant has alleged that the Accused No.3 and Applicant are Directors of Accused No.1 company. Accused No.2 is the Managing Director of Accused No.1 company. Accused Nos. 2 to 4 had approached the complainant for the purpose of availing credit facility. Credit facility was advanced to Accused No.1. The Accused executed Demand bill of exchange dated 11th September, 2017 in favour of complainant company assuring due repayment of the loan amount. The Accused No.4 (Applicant) had signed the demand bill of exchange in his personal capacity as an acceptor. The Accused No.1 company issued four cheque. Three cheques were for amount of Rs.1,50,000/- (One lakh fifty thousand) each and one cheque dated 4th December, 2017 bearing no.000798 was for an amount of Rs.13,50,000/-(Thirteen lakhs fifty thousand). The cheques were dishonoured. The Accused No.4 (Applicant) in his individual capacity transferred an amount of Rs.1,50,000/-(One lakh fifty thousand) vide NEFT directly into the bank account complainant company from his personal bank account as part payment towards repayment of the balance loan amount. The balance outstanding was Rs.16,50,000/- (Sixteen lakhs fifty thousand). The Accused No.1 company issued two fresh cheques dated 23rd January, 2018 and 30th January, 2018 for Rs.1,50,000/-

(One lakh fifty thousand) each in favour of complainant company and instructed to redeposit cheque dated 4th December, 2017 bearing No.000798 for Rs.13,50,000/- (Thirteen lakhs fifty thousand). All the cheques were dishonoured with remarks 'payment stopped by the drawer' on 21st February, 2018. Statutory demand notice dated 14th March, 2018 was forwarded to the Accused at the instance of the complainant. The Accused No.2 (Father of Applicant) submitted reply dated 24th March, 2018 and contended that, the Accused No.4 has carried out certain acts, matters and things being misdemeanours and acts of cheating by entangling Accused No.1 company, as well as Accused No.2, into issues giving rise to the notice under reference. After having known about the misdemeanours and various acts of cheating committed by said Accused public notice dated 20th February, 2018 was communicated to the public at large with regard to Accused No.2 having no interest of any nature whatsoever with Accused No.4. Correspondingly the alleged liabilities created by Accused No.4 finds its genesis under an alleged Bill of Exchange which was never executed by Accused No.2 nor was there any authority to Accused No.4 to execute such Bills of Exchange and therefore question of liability upon Accused No.2 does not and cannot arise. As a corollary, to the alleged Bills of Exchange it is apparent that cheques handed over to complainant were an act of forgery committed by Accused No.4 or misuse of cheques which were executed by Accused No.2 and kept with Accused No.4 on the basis of certain assurances, hence question of any liability on Accused No.2 does not and cannot arise. Accused No.2 has lodged Police complaint with Dharavi Police Station on 17th March, 2018. Accused No.2 was unaware with regard to any liability being created by Accused No.4. The Applicant through his Advocate forwarded reply dated 31st March, 2018 to the demand notice and contended that, Accused No.4 has already informed by letter dated 6th February, 2018 that, he is in no way concerned with Accused No.1 company. The Accused No.1 company is under control and management of Accused Nos. 2 and 3. The Accused No.1 company through Accused No.2 had published notice in newspaper dated 20th February, 2018 stating that Accused No.4 is not entitled to represent the said company in any capacity. He is not associated with the Accused No.1 company. He had resigned as employee Director of Accused No.1 company w.e.f. 25th November, 2017. Necessary change report is intimated to Registrar of companies. Payment of Rs.1,50,000/- (One lakh fifty thousand) was on account of company and not in discharge of any personal liability. The complainant filed the complaint on 19th April, 2018. Process was issued on 2nd August, 2018. the main contention of Applicant is that, he is not responsible to the day-to-day affairs of Accused No.1 company. He is not signatory cheque. He has resigned from Accused No.1 company before the cause of action had arisen to constitute offence under Section 138 of N.I. Act. The applicant is relying upon his previous reply dated 6th February, 2018, 12th March, 2018 and reply dated 31st March, 2018. The Applicant also rely upon Form Nos.DIR-11 and DIR 12 to contend that, he has resigned from Accused No.1 company. Reliance is also placed on letter dated 26th December, 2017 forwarded to Board of Directors of Accused No.1 stating that, he has resigned from Directorship of company w.e.f. 27th December, 2017 and alleged resolution accepting resignation of Applicant w.e.f. 27th December, 2017. It is relevant to note that in letter dated 6th February, 2018 and reply dated 31st March, 2018 the Applicant has contended that he had resigned from Accused No.1 company on 25th December, 2017, Resolution dated 27th December, 2017, Form No.DIR.12 mentions that he had resigned w.e.f. 27th December, 2017. Thus there is variation in date of resignation. The Respondent No.2 has brought on record several facts which disputes the claim of the Applicant. From the averments in the complaint, it is apparent that the Applicant has played vital role relating to the credit facility advanced to Accused No.1 company and it cannot be said that there is no evidence to invoke Section 141 of the N.I. Act. The claim of resignation is debatable and based on disputed question of facts which is required to be established during the trial. The loan application was signed by the Applicant. The demand bill of exchange of Rs.30,00,000/-(Thirty lakhs) dated 11th September, 2017 was executed in favour of complainant and it was signed by the Applicant on behalf of Accused No.1 company. Although the Applicant is not signatory to the dishonoured cheques, he has played active role in the transactions. Accused No.2 and Applicant have blamed each other in their reply to demand notice. The Respondent No.2 through its affidavit-in-reply has placed on record that the Applicant vide E-mail dated 10th January, 2018 assured Respondent No.2 regarding repayment of the said loan. Thereafter, he transferred an amount of Rs.1,50,000 (One lakh fifty thousand) vide NEFT into the account of Respondent No.2 as a part payment towards the outstanding loans of Accused No.1 company and informed about it to Respondent No.2 vide E-mail dated 11th January, 2018. The Applicant has claimed that, he has resigned on 25th November, 2017 / 25th December, 2017. But the E-mails as stated above were forwarded 10th November, 2018 and 11th November, 2018. The amount of Rs.1,50,000/- (One lakh fifty thousand) was transferred after the alleged resignation of Applicant. It is apparent that, the Accused No.2 and Accused No.4 (Applicant) are shifting their liability against each other. The ground relating to role and invocation of Section 141 of N.I. Act urged by Accused No.3 is rejected by this Court vide order dated 28th January, 2020 passed in Criminal Writ Petition No.4929 of 2019. The Accused No.3 had contended that, cheques were signed by Accused No.2. Any person in control of day-to-day affairs of the company can only be made Accused in such prosecution. It is pertinent to note that Accused No.1 is family based company. The alleged resolution annexed to this application is purportedly signed by Accused No.2 (father of Applicant). The reply of Accused No.2 does not support the claim of Applicant that his resignation is accepted by company. On the contrary the Accused No.2 has alleged that Applicant has committed several acts including forgery. In the peculiar facts of this case the ground urged by the Applicant which are based on disputed question of fact cannot be considered for quashing the order of process and the criminal prosecution initiated against the Applicant. The learned Magistrate has issued the process by considering the documents on record and the averments in the complaint. There is no infirmity in the impugned order.

9. Considering facts of this case, I am of the opinion that, this is not the fit case to exercise the inherent powers to quash and set aside the impuged order and the proceedings.

ORDER

i. Criminal Application No.245 of 2019, is rejected and stands disposed off.

ii. The trial Court shall not be influenced by the observations made in this order and trial may be dealt with in accordance with law.

[PRAKASH D. NAIK, J.]