IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.852 OF 2022

Heena Jayesh Tanna, Age 53 years,
Occ.Housewife, R/o.Bungalow No.4,
Shree Balasinor CHS Ltd;
S.V.Road, Kandivali (West),
Mumbai-400 067. Petitioner

versus

1. M/s.Sidhpur Commodities Pvt.Ltd.
Through authorized representative,
Natha Parab, having office at 112-C Wing,
Mittal Tower, Nariman Point,
Mumbai-400 021.

2. M/s.SSSC Escatics Pvt.Ltd.
(formerly known as M/s.Shree Sai Consultants),
1, Ramkrupa Building, Devji Bhimji Lane,
Mathuradas Road, Kandivali (W), Mumbai-67.

3. Jayesh Vinod Tanna,
Director/Guarantor,
M/s.SSSC Escatics Pvt.Ltd.
1, Ramkrupa Building, Devji Bhimji Lane,
Mathuradas Road, Kandivali (W), Mumbai-67.

4. Vivek Jayesh Tanna,
Director/Guarantor,
M/s.SSSC Escatics Pvt.Ltd.
1, Ramkrupa Building, Devji Bhimji Lane,
Mathuradas Road, Kandivali (W), Mumbai-67.

5. Deep Vinod Tanna,
Guarantor,
M/s.SSSC Escatics Pvt.Ltd.
1, Ramkrupa Building, Devji Bhimji Lane,
Mathuradas Road, Kandivali (W), Mumbai-67.

6. The State of Maharashtra Respondents

Mr.Akhilesh Upadhyay, Advocate for Petitioner.
Ms.Lakshmi Raman, Advocate for Respondent no.1.
Mr.A.R.Patil, APP, for Respondent-State.

CORAM : PRAKASH D. NAIK, J.

DATE : 18th August 2022

PC :

1. The Petitioner has challenged the order issuing process dated 31st March 2021 passed by learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai for offences punishable under Section 138 r/w 141 of Negotiable Instruments Act.

2. Petitioner is arraigned as accused no.4 in the criminal complaint filed by respondent no.1 bearing No.6515/SS/2021 and pending before the Court of learned Metropolitan Magistrate, 25th Court, Mazgaon, Mumbai.

3. The brief facts of the complaint are as follows :-

(a) The complainant is a private limited company registered under the provisions of Companies Act and engaged in the business of loans and advances. The complaint is directed against M/s.SSSC Escatics Pvt.Ltd and its Directors who are authorized, in-charge and are responsible for day to day affairs of the company, and it's Guarantors who are responsible for day to day affairs of the company and more specifically for the transaction that are the subject matter of complaint;

(b) The accused sought financial assistance from the complainant company by entering into a loan transaction and getting it extended from time to time by making various representations to the complainant company. Loan agreement and supplementary agreements were executed by accused with complainant company. Accused nos.2 to 5 were the signatories to loan agreement, supplementary agreements and other documents;

(c) In August-2013 accused nos.2 to 5 approached the Directors of complainant company Mr.Rajkumar Saraf for and on behalf of accused no.1, which was then a partnership firm under the name and style of M/s.Shree Sai Sagar Consultants. The accused represented that they are involved in real estate and completed several projects in Mumbai. In respect of several other projects, they are in need of finances and requested for providing financial assistance to the tune of Rs.2 crores. Accused represented that they are deeply involved and concerned with day to day affairs and management of business of accused no.1 and they will repay the loan amount along with interest as per schedule of payment. The accused also induced the complainant company by offering to pay interest @ 18% p.a and compensation @ 24% p.a for delay, if any, in making payment of principal and interest amount;

(d) The accused assured that they would not close the bank accounts against which cheques are issued towards repayment and they would maintain adequate balance in the bank account for clearance of cheques. The accused also assured that they would not dissolve the partnership firm or make changes in the constitution thereof without consent of complainant company. Accused nos.2 to 5 will be personally responsible for repayment of loan along with interest;

(e) Accused nos.2 to 5 expressed their willingness to create mortgage in respect of flat in their project namely "The Nest" and to execute all necessary documents;

(f) Relying upon the representations, the complainant company entered into the transaction with accused by providing financial assistance to the tune of Rs.2 crores vide Loan Agreement dated 26th August 2013, Mortgage Deed dated 26th August 2013, Bill of Exchange and Money Receipt;

(g) Accused then represented that due to unforeseen circumstances they are facing financial crunch and unable to repay the principal amount and requested for extension of time for repayment of principal amount;

(h) Supplementary Agreement dated 17th August 2015 was entered wherein accused promises to continue to pay interest and principal amount on or before 10th August 2016, however, accused once again failed to pay the principal amount and requested for extension of further period for repayment of amount till 10th August 2017. Supplementary Agreement dated 10th August 2016 was executed between complainant and accused wherein accused promises to pay interest and repay the principal amount;

(i) Accused nos.2 to 5 without consent ad knowledge of complainant company converted their partnership firm M/s.Shree Sai Sagar Consultants into private limited company under the name and style of M/s.SSSC Escatics Private Limited (accused no.1);

(j) Accused nos.2 to 5 promised to continue to be the guarantors of the loan transaction and represented that though only accused nos.2 and 3 are shown to be the Directors of accused no.1, the accused nos.4 and 5 being family members are deeply involved, concerned and responsible for day to day affairs and management of business of accused no.1. Thus, the accused are responsible to repay the said loan amount and other dues for and on behalf of accused no.1;

(k) The complainant executed fresh agreement dated 27th July 2017 with the accused. The loan obtained by accused nos.2 to 5 in the name of partnership firm Shree Sai Sagar Consultants was transferred in the name of accused no.1 by executing documents;

(l) In the covering letter of guarantee issued by accused nos.2 to 5 it was stated that change in Shree Sai Sagar Consultants to M/s.SSSC Escatics Pvt.Ltd shall not alter the personal guarantee dated 10th August 2016 and each and every term of and condition of continuing personal guarantee dated 10th August 2016 is valid, binding and enforceable;

(m) The agreement dated 10th September 2017 was executed between complainant and accused for extension of term of loan. It was again extended vide agreement dated 24th December 2018;

(n) The accused issued fresh cheques vide letter dated 30th March 2019. The complainant finally agreed to extend the loan for a period up to 31st December 2019 vide agreement dated 23rd October 2019. Even thereafter request was made by accused for extension of time.

(o) The complainant presented Cheque Nos.001778, 001779, 001762 and 001780 on 16th March 2020 and Cheque No.001759 on 19th March 2020 with their banker. However, vide intimation dated 17th March 2020 in respect of Cheque Nos.001778, 001779, 001762 and 001780, the complainant was informed that cheques were returned with remark "funds were insufficient". As far as Cheque No.001759 is concerned, no intimation was received by the complainant nor the amount was credited to their account. The complainant requested it's banker about status of the said cheque and consequently it was informed that cheque was returned dishonoured on account of insufficient funds.

(p) Statutory notice was issued to the accused. However, payment was not made. Complaint was filed before concerned Court for offence u/s.138 of Negotiable Instruments Act (`N.I.Act').

4. Learned Magistrate vide order dated 31st March 2021 issued process against accused nos.1 to 5 for offence u/s.138 r/w 141 of N.I.Act. The case was thereafter transferred to learned Metropolitan Magistrate, 25th Court, Mazgaon, Mumbai. Fresh summons was issued to the accused vide order dated 6th October 2021.

5. Learned advocate for Petitioner submitted that Petitioner is neither a Director of the accused nor signatory to the impugned cheques. Petitioner cannot be prosecuted by invoking Section 141 of N.I.Act. Petitioner has not played any role in the transactions. The order issuing process was issued without application of mind. Petitioner was not in-charge and responsible for day to day affairs of accused no.1 company. Although Petitioner and others were guarantors in previous communication, respondent no.1 did not take any step to recover the loan amount. Petitioner is not responsible for dishonour of cheques issued by accused no.1 either personally or being family member. Petitioner is wife of respondent no.3. She is not involved in the management of company. The guarantor has no role in the management of company and Petitioner cannot be joined as an accused in a complaint u/s.141 of N.I.Act. The guarantor, at the most, could be held liable in the civil proceedings. Only Directors of the company will be responsible for the affairs of company. The order of process was obtained by suppressing material facts. Learned Magistrate has issued the process mechanically without verifying the documents.

6. Learned advocate for respondent no.1 submitted that Petitioner was involved in day to day affairs of accused no.1 company. The role of Petitioner has been explained in the complaint. The order of process has been issued by the Court on the basis of material on record. The Court was satisfied that Petitioner is responsible for conducting day to day activities of the company. The averments made in complaint are sufficient to issue process against the Petitioner. In the complaint the Petitioner has been described as guarantor and not Director. Hence question of suppressing vital facts from the Trial Court does not arise. All the accused had represented that they are responsible for the day to day affairs of the business of accused no.1. They had agreed to repay the loan amount obtained by accused no.1. The Petitioner had participated in the loan transaction. All the accused had agreed that they will be personally responsible for repayment of the loan along with interest. The accused had expressed their willing and readiness to mortgage a flat. The Petitioner and other accused had expressed willingness and readiness to execute other necessary documents. The loan was advanced to accused no.1. The Petitioner was provided mortgage deed dated 26th March 2013 in respect of flat and she has signed on the same. The Petitioner had agreed to abide by all the terms and conditions while obtaining loan. The Petitioner was personally present while making request for extension of repayment of loan. She has signed the supplementary agreement dated 10th August 2016. Petitioner had signed on the Memorandum of Association dated 30th November 2016 as a Director. Petitioner was actively involved at the time of loan being transferred. Petitioner and other accused had issued fresh cheques vide letter dated 30th March 2019.

The said letter was signed by Petitioner. The letter mentions that accused nos.2 to 5 on behalf of accused no.1 requested for deferment of payment of interest and issued fresh cheques towards interest. The letter refers physical presence of Petitioner in the meeting while handing over the interest cheques on behalf of accused no.1 towards loan obtained from complainant. Despite issuing letter, Petitioner and other accused failed and neglected to pay the dues of complainant and again made a request for extension of time to repay the loan. Extension was granted from time to time and subsequently cheques were deposited. Clause-6 of the loan agreement dated 23rd October 2019 defines the role of Petitioner and other accused and their responsibility towards affairs of accused no.1.

7. Perused the complaint, order issuing process, documents annexed to the petition, affidavit in reply filed by complainant and documents annexed to the reply. Although the Petitioner was not the Director of accused no.1 company, there is sufficient evidence on record to indicate her participation in the day to day affairs in the day to day business of accused no.1. There are sufficient averments in the complaint describing role of Petitioner which is sufficient to invoke Section 141 of N.I.Act. Petitioner was guarantor to the loan. She is guarantor to the loan agreement. It is not necessary that every person should be a Director of accused company for being prosecuted u/s.138 of N.I.Act. The Petitioner is apparently responsible and in-charge for day to day affairs of the accused no.1 company. Apart from loan agreement, letter dated 30th March 2019, there are various other documents which show involvement of Petitioner in the transactions of accused no.1. Petitioner is party to the loan advanced to accused no.1. The liability towards cheques

issued by accused no.1 was in respect of loan advanced to accused no.1. The extract of minutes of meeting of partners of partnership firm Shree Sai Sagar Consultants held on 16th August 2013 mentions that all the partners jointly and unanimously authorize and give consent to partners Mr.Jayesh Vinod Tanna and Mrs.Heena Jayesh Tanna (Petitioner) jointly or severally for mortgaging Flat No.103, situated in the building `The Nest', 2, Sidhpur Commodities Pvt.Ltd. (complainant) and availing loan of Rs.2 crores and for said purpose to do all such acts of executing the mortgage agreement in the office of Sub Registrar of Assurance, Loan Agreement, Bill of Exchange, money receipt, post dated cheques, all documents required to secure loan along with interest etc be executed on behalf of partnership firm M/s.Shree Sai Sagar Consultants and for such acts, all partners will be fully responsible. The Petitioner was present at the said meeting and she is the guarantor to the minutes of said meeting. The Memorandum of Association of accused no.1 dated 30th November 2016 was signed by Petitioner along with Mr.Jayesh Vinod Tanna. The letter dated 30th March 2019 was also signed by Petitioner along with others. The said letter was addressed to the complainant company stating that they undertake to clear entire outstanding of interest, penal interest and principal before 10th August 2019 and enclose cheques towards part payment against interest. The Petitioner is also signatory to the letter dated 9th November 2019 forwarded to the complainant company with an undertaking that they would honour all the cheques issued towards repayment of dues.

8. Considering the documents on record and averments in the complaint, the contention of Petitioner that she is not responsible for

the day to day affairs of accused company and that she cannot be prosecuted for the offence u/s.138 of Negotiable Instruments Act vide impugned complaint, cannot be accepted. The petition is devoid of merits and deserved to be rejected.

9. Hence, I pass following order :

ORDER

(i) Criminal Writ Petition No.852 of 2022 is rejected and stands disposed off.

(PRAKASH D. NAIK, J.)

MST