

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1932 OF 2019

Sarbamangalam Finetex Pvt.Ltd.	Petitioner
versus	
Abdeali Saiffee Mamaji and another	Respondents

Mr.Yashpal M. Thakur, Advocate for petitioner.
Mr.A.R.Patil, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 29th June 2022

PC :

1. Respondent no.1 is absent though served. Office note indicate that respondent no.1 is duly served. The advocate for petitioner has filed affidavit of service dated 14th March 2022 stating that he served notice to respondent no.1 by hand delivery along with acknowledgement. The petition was listed on 17th June 2022. Respondent no.1 was not present nor any advocate on his behalf was present. This Court adjourned the petition till today by way of indulgence to enable the respondent no.1 to appear before the Court.

2. The petitioner is the original complainant in Criminal Case No.2161/SS/2015. The said complaint was filed u/s.138 of Negotiable Instruments Act ('N.I.Act'). Vide order dated 1st April 2015 learned Magistrate issued process against respondent no.1 for the offence u/s.138 of N.I.Act. The order of process was challenged by respondent no.1 before Sessions Court by preferring Revision Application No.1038 of 2017. The revision application was allowed by order dated 23rd January 2019. Order of process was set aside and complaint was dismissed.

3. In the complaint it is stated that accused is the Chairman and Managing Director of Y.A.Mamaji Furnishings Pvt.Ltd and carrying on business of designer furniture, furnishings etc. Accused was in need of finance for business purpose. He approached the complainant to provide short term financial assistance for his company Y.A.Mamaji Furnishings Pvt.Ltd for a period of three months. Accused promised to execute all documents to avail financial assistance. Finance of Rs.4,60,00,000/- was provided to accused vide letter dated 30th April 2013. Accused confirmed and accepted liability of Rs.4.60 crores payable to complainant. Accused promised complainant to personally repay the liability. HE gave cheque dated 1st June 2013 for Rs.4.60 crores drawn on his personal account. Cheques issued by company were dishonoured. Since company defaulted in making payment, accused as promised by him was personally responsible and was bound and liable to pay the dues. As instructed by accused, complainant deposited the cheque issued by accused. It was dishonoured for insufficient funds. Demand notice was sent to him. It was served upon him. Accused did not reply. He did not pay the amount. Hence complainant was filed. Process issued.

4. Learned advocate for petitioner submit that order passed by learned Sessions Judge depicts complete non application of mind. The order travels beyond scope of revisional powers. The revisional Court has appreciated the defence of the accused. The reasons assigned in the impugned order for setting aside the order of process are contrary to law. The complaint clearly stipulates that cheques were issued in respect of liability. The cheque was signed by

respondent no.1. Amount of cheques was Rs.4,60,00,000/-. Vide letter dated 30th April 2013 the accused had confirmed the liability and personally accepted the said liability of Rs.4,60,00,000/- payable to the complainant. Notice was issued to the accused, however, accused failed to repay the liability.. The Metropolitan Magistrate, 48th Court, Andheri, Mumbai issued process. In the light of averments made in the complaint, the Sessions Court ought not to have set aside the order of issuing process. On the basis of averments made in the complaint and documents annexed thereto, process was issued. Prima facie, case was made out for issuance of process. The issue as regards the co-extensive liability of the guarantor and the principle debtor is totally out of the purview of Section 138 of the Act.

5. On perusal of the complaint filed by the petitioner it is apparent that all the requisite ingredients to constitute offence u/s.138 of N.I.Act are spelt out in the complaint. It is not disputed that cheque was signed and issued by respondent no.1. It was dishonoured. The demand notice was issued to respondent no.1. He did not reply. According to complainant, the accused is the Chairman and Managing Director of Y.A.Mamaji Furnishing Pvt.Ltd. Vide letter dated 30th April 2013 the accused confirmed and personally accepted liability of Rs.4.60 crores. He issued cheque dated 1st June 2013. Learned Sessions Judge while setting aside order of process, the respondent no.1 is accused no.2 in C.C.No.2438/SS/2013. Both complaints are filed by same complainant for offence under Section 138 of Negotiable Instruments Act. Y.A.Mamaji Furnishings Pvt.Ltd. Is accused no.1 in C.C.No.2438/SS/2013. The respondent no.1 is its Managing

Director. It obtained financial assistance. It was not repaid. The respondent no.1 issued cheque for Rs.4.60 crores. The respondent no.1 and Saifee Mamaji are authorized signatory of said company. They jointly signed and issued ten cheques for Rs.4.60 crores. Cheques were dishonoured. C.C.No.2438/SS/2013 was filed. The respondent no.1 gave personal guarantee for repayment of Rs.4.60 crores and issued cheque. It was dishonoured and complaint was filed bearing No.2161/SS/2015. The Sessions Court relied on decision in the case of Pooja Devidasani Vs. State of Maharashtra and another (AIR-2015-SC-675) wherein it is observed that cheque issued on the basis of letter of guarantee gives way for civil liability and not prosecution under Section 138 of Negotiable Instruments Act. The accused could not be prosecuted in two cases in the capacity as Director and surety. The ground which is considered by the Sessions Court should be urged as defence in trial. The operative part of order dated 23rd January 2019 mentions that process order is set aside and the complaint is dismissed u/s.203 r/w 386, 401 and 400 of Cr.PC. Respondent no.2 was also directed to pay cost of Rs.10,000/- to respondent no.1 herein.

6. The other case referred by learned Sessions Judge is not before this Court. The Hon'ble Supreme Court in the case of **I.C.D.S. Limited Vs. Beena Shabeer and others (2002)6-SCC-426** has held that issue regards co-extensive liability of guarantor and principle debtor is out of purview of Section 138 of Negotiable Instruments Act.

7. In view of aforesaid observations, the impugned order dated 23rd January 2019 deserves to be set aside.

ORDER

- (i) Criminal Writ Petition No.1932 of 2019 is allowed and disposed of;
- (ii) Impugned order dated 23rd January 2019 passed by Additional Sessions Judge, Greater Bombay in Criminal Revision Application No.1038 of 2017 is set aside;
- (iii) The process order dated 1st April 2014 in CC No.2161/SS/2015 (old No.3035/SS/2013) issued by Metropolitan Magistrate, 48th Court, Andheri, Mumbai, stands restored;
- (iv) Both the parties are directed to appear before Trial Court on 18th July 2022 at 11.00 am;
- (v) This order may be brought to the notice of Trial Court.

(PRAKASH D. NAIK, J.)

MST