IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 543 OF 2022

Preeti Malik ...Applicant
Versus
Sanjay Tukaram Khanvilkar And Anr. ...Respondents

WITH
CRIMINAL APPLICATION NO. 547 OF 2022

Tanya Malik ...Applicant
Versus
Sanjay Tukaram Khanvilkar And Anr. ...Respondents

WITH
CRIMINAL APPLICATION NO. 548 OF 2022

Preeti Malik ...Applicant
Versus
Sanjay Tukaram Khanvilkar And Anr. ...Respondents

WITH
CRIMINAL APPLICATION NO. 546 OF 2022

Tanya Malik . ...Applicant
Versus
Sanjay Tukaram Khanvilkar And Anr. ...Respondents

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Mr. Navin Arora a/w Mr. Sanjeev Sagar, Advocate for the Applicants in all applications.

Mr. Rahul Gaikwad a/w Mr. Aman J. a/w Ms. Reshma Nair i/by Gravitas Legal Advocate for Respondent No.1/Complainant.

Mr. A. R. Patil, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 15th SEPTEMBER, 2022.

PER COURT:

1. The applicants in all these applications are prosecuted for the offence punishable under Section 138 of Negotiable Instruments Act, 1881. The order issuing process passed by the learned Magistrate for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 and the proceedings therein are challenged in these applications. The applicants in Criminal Application Nos.543 of 2022 and 546 of 2022 are arraigned as accused in C.C. No.638 of 2021 pending before the Court of learned Metropolitan Magistrate, 33rd Court at Ballard Pear, Mumbai, whereas the applicant in Criminal Application Nos. 547 of 2022 and 548 of 2022 are arraigned as accused in C.C. No.637 of 2021 pending before the Court of learned Metropolitan Magistrate, 33rd Court, at Ballard Pear, Mumbai.

2. The factual matrix of C.C. No.638 of 2021 which is under challenge in Criminal Application No.543 of 2022 and 546 of 2022 are as follows :-

(a) The complainant is partner of M/s. 4S Infrastructure LLP Ltd. which is limited liability partnership registered under the Companies Act. The complainant is also director of Man Management Service Private Ltd.

(b) Accused no.1 is the Managing Director and authorized signatory of accused No.2 M/s. Davin Info. Pvt. Ltd. The accused No.2 is a private Company. It is operating the business of conducting online exam delivery services. The accused No.4 Ms. Preeti Malik is the Chief Executive Officer of the said Company. The accused Nos. 1, 3 & 4 are involved in managing day to day affairs of the accused No.2 – Company.

(c) In January – 2018, the complainant was told that, accused No.4 is in business of conducting online exam delivery services and in search for an investor who can infuse capital for a period of approximately 15 months. The complainant had meeting with accused No.4. During the meeting, accused No.4 represented to complainant that they wanted an investor for a fixed period of approximately 18 months. The main role of complainant is to infuse an amount which was required and after 18 months the principal shall be returned. The complainant would be entitled for certain profits.

(d) The complainant was told by accused No.4 that he would have to invest sum of Rs.1 Crore initially. Accused No.4 represented that after a period of 15 months, the complainant shall be refunded his entire amount. The accused No.4 stated that the complainant shall be made a partner with 30% share holding and upon refund of his investment amount he will have to transfer the 30% shares back to the Company. As a security for the shares of accused No.1 which should not be transferred to others apart from accused No.1 or his family, the accused No.1 also incorporated Clause No.4.2 which limited the capacity of Complainant to transfer the shares to someone else other than accused No.1.

(e) In February – 2018, the complainant was initially offered to enter into a partnership firm by accused for helping their business which indulges in online exam services. The complainant accepted their offer. E-mail dated 13.03.2018 was forwarded by accused No.4 to Mr. Vinayak Bhise (Manager of M/s. 4S Infrastructure LLP Ltd.) of which CC was also sent to the complainant and accused No.1. The accused No.4 confirmed the partnership of complainant with accused No.2 – Company for the business of online exams.

(f) The complainant was offered 15% equity stake, however, subsequently it was revised to 30% equity stake. On 25.03.2018 Memorandum of Understanding was entered between the complainant and accused and representatives of accused No.2, discussing the business plans. Clause 2.2 stated that, it has been agreed by the parties that the payment of consideration and issuance of shares shall be completed not later than 30.04.2018. Clause 2.3 stated that out of Rs.1 Crores equity subscription Rs.25,00,000/- will be paid by investors to the issuing Company or Sunil Malik on signing of the Memorandum, shares will be issued on signing SHA. The MOU was entered into to acquire 30% equity stake by the complainant in his personal capacity. The accused No.1 in his personal capacity had issued a cheque in favour of complainant being cheque No.285497 for Rs.1,00,00,000/- dated 23.09.2019 drawn on Yes Bank, Hiranandani Gardens, Powai from his personal bank account. The complainant deposited the cheque amount to Rs.1,00,00,000/- on 23.09.2019. The cheque was returned unpaid with reason 'Funds Insufficient'. The bank Memo was received by the complainant on 25.09.2019. The complainant thereafter, redeposited the cheque on 27.11.2019. It was dishonoured. Bank Memo was received by the complainant on 28.11.2019.

(g) The complainant through Advocate sent statutory notice dated 18.10.2019 and subsequently on 10.12.2019 under Section 138 r/w Section 141 of the Negotiable

Instruments Act, 1881. The accused No.1 to 4 were called upon to pay the said amount covered by cheque. The notices were returned with remarks "unclaimed".

(h) Complaint was filed before the Court on 18.01.2020. process was issued for the offence punishable under Section 138 of Negotiable Instruments Act, 1881.

3. The applicant in Criminal Application No.543 of 2022 was impleaded as accused No.4, whereas the applicant in Criminal Application No.546 of 2022 was impleaded as accused No.3 in the aforesaid complaint.

4. Criminal Application No.547 of 2022 and 548 of 2022 are preferred by same applicants challenging the order issuing process and proceedings in CC No. 637/2021. The case of the complainant is as follows:-

(i) The complainant is partner of M/s. 4S Infrastructure LLP Ltd. which is limited liability partnership registered under the Companies Act. The complainant is also director of Man Management Service Private Ltd Company.

(ii) Accused no.1 is the Private Company. It is operating in the business of conducting online exam delivery services. Accused No.2 is the Managing Director and authorised signatory of Accused No.1 and Managing day to day and routine affairs of the said Company. Accused No.3 is the Director of Company. The accused No.4 is the Chief Executive Officer of the said Company. The accused Nos. 2 to 4 are involved in managing day to day affairs of the accused No.1 – Company.

(iii) Somewhere in January – 2018, the complainant was told that, accused No.4, who is in business of conducting online exam delivery services is in search for an investor who can infuse capital for a period of approximately 15 months. The complainant had meeting with accused No.4. During the meeting, accused No.4 represented to the complainant that they wanted an investor for a fixed period of approximately 18 months. It was clarified that the main role of complainant is to infuse of an amount which was required and after 18 months the principal shall be returned. The complainant would be entitled for certain profits.

(iv) The complainant was told by accused No.4 that he would have to invest sum of Rs.1 Crore initially. Accused No.4 represented that after a period of 15 months, the complainant shall be refunded his entire amount. The accused No.4 stated that the complainant shall be made a partner with 30% share holding and upon refund of his investment amount he will have to transfer the 30% shares back to the Company.

(v) In February – 2018, the complainant was initially offered to enter into in a partnership firm by accused for helping their business which indulges in online exam services. The complainant accepted their offer. E-mail dated 13.03.2018 was forwarded by accused No.4 to Mr. Vinayak Bhise (Manager of M/s. 4S Infrastructure LLP Ltd.). The accused No.4 confirmed the partnership of complainant with accused – Company for the business of online exams.

(vi) The complainant was offered 15% equity stake; however, subsequently it was revised to 30% equity stake. On 25.03.2018 Memorandum of Understanding was entered between the complainant and accused No.1. MOU was entered into to acquire 30% equity stake by complainant in his personal capacity. During month of August 2018, the accused No.1 was under financial crises. The accused No.2 in capacity as Director and working partner of accused No.1 had approached complainant for payment of Rs.2,50,00,000/- by way of hand loan, to clear salary of employees. Accused No.2 had assured that it is a temporary arrangement and hand loan would be paid in this months. Accused No.2 did not pay the loan. Accused issued cheque in favour of complainant.

(vii) The accused No.2 – Sunil Malik in his capacity as director of the accused No.1 – Company had issued cheque No.797420 for Rs.2,50,00,000/- dated 20.09.2019 drawn on Axis Bank, Andheri (E) Mumbai from the account of his Private Ltd. Company M/s. Davin Info Pvt. The cheque was deposited on 20.09.2019. The cheque was returned unpaid with reason 'Funds Insufficient'.

(viii) Bank Memo was received by the complainant on 25.09.2019. The cheque was redeposited on 27.11.2019 which was returned unpaid on 28.11.2019. Statuary notice at 18.10.2019 and 10.12.2019 was forwarded and complaint was filed for the offence punishable under Section 138 of Negotiable Instruments Act, 1881.

5. Learned advocate for applicants submitted as under:-

(i) Cheque No.285497 for Rs. 1 crore was issued by Sunil Malik in his personal capacity. Hence, applicants Preeti Malik and Tanya Malik cannot be summoned and arrayed as parties in C.C. No. 638/SS/2021.

(ii) The summoning order is non speaking and lacks application of mind. At the time of filing of complaint ROC record nor details of directors was on record.

(iii) Preeti Malik was CEO between period 10.09.2017 to 22.06.2018. She resigned on 22.06.2018 and her resignation by way of Form DIR 12 was uploaded before ROC on 16.07.2018. Hence, from that day she ceased to be officer of the company. She was not the authorised officer and signatory of the company nor directed issuance of cheque by the company. She has not signed the cheque.

(iv) The complaint is silent as to how an officer of the company who has not signed the cheque can be made accused. Even in the evidence filed by complainant, no averments are made regarding the cheque in question and responsibility of Preeti Malik. As on officer of the company she was not discharging the duties of the management nor was responsible for day to day affairs of the company. Post resignation she has not discharged any responsibility for the company nor has dealt with respondent in respect of transaction in question.

(v) Tanya Malik was Director of Info Pvt. Ltd. from 21.07.2017 to 20.11.2019. She resigned on 20.11.2019. ROC was notified on 27.11.2019.

(vi) In the complaint, respondent has not explained what was her role. No averment exists against her in the complaint and the evidence filed by complainant. She has not signed the cheque. The complaint does not satisfy requirement of section 141 of the Negotiable Instruments Act.

(vii) Tanya Malik has resigned on 20.11.2019. DIR 12 Form was accepted on 27.11.2019. She was not Director on the date of dishonour of cheque.

(viii) Sunil Malik is the Managing Director of Company. Only he can be held responsible. Preeti Malik is wife and Tanya Malik is daughter of Sunil Malik.

(ix) Documents relied by advocate for complainant were not part of complaint.

(x) The applicant's counsel relied on following decisions:

(a) Sunita Palita and Others Vs. Panchami Stone Quarry[1].

(b) Pooja Ravinder Devidasani Vs. State of Maharashtra and Another[2].

(c) Harshendra Kumar D. Vs. Rebatilata Koley and Others[3].

(d) K. Srikanth Singh Vs. North East Securities Ltd and Another[4].

1 2022 SCC OnLine SC 945
2 (2014) 16 SCC 1
3 (2011) 3 SCC 351
4 (2007) 12 SCC 788

(e) Dharna Goyal Vs. Aryan Infratech Pvt. Ltd.[5].

6. Learned Advocate for the complainant/respondent No.1 submitted as follows :-

i. No ground is made out for quashing the proceedings.

ii. The grounds urged by the applicant for dropping the proceedings cannot be considered at this stage. It is in the form of defence, which will have to be established during trial.

iii. The applicant Preeti Malik has played a vital role in the transactions. Her role has been explained in the complaint.

iv. The documents relating to the resignation are under clouds of suspicion. The accused No.2 is the family Company. The accused No.1 and accused No.3 were directors of accused No.2 and accused No.4 were instrumental in conducting transaction. Assuming that Preeti Malik was not director of a company, and she was officer of company. She can be termed as a person in-charge and responsible for day to day affairs of the company. The resolution accepting resignation is purportedly signed by accused No.2, who is the husband and father of the applicants herein. It is very easy to create such documents. The date of presentation of DIR - Form is not

5 2020 SCC OnLine Del 2075

established.

v. The applicant Preeti Malik has participated in the transaction, even after the purported resignation from accused No.1 – Company.

vi. Learned Advocate for the complainant has relied upon the communication in the form of E-mail exchanged between the accused and the complainant. The communication exchanged by Preeti Malik after her resignation shows she is actively involved. She was instrumental in executing the Memorandum of Understanding.

vii. There are sufficient averments against applicant Tanya Malik in the complaint to invoke section 141 of Negotiable Instruments Act.

7. The applicants filed affidavits in respect of emails filed by respondent. Applicant Preeti Malik in her affidavit has stated that she is neither Director nor employee of Davin Info Pvt. Ltd. She was CEO of Davin Info Pvt. Ltd. from 10.09.2017 to 22.06.2018. She resigned on 22.06.2018 and ROC was notified on 16.07.2018. Respondent was also Director of Davin Info Pvt. Ltd. from 10.08.2018 to 25.01.2019. She is not signatory to cheque. She did not direct company or accused No.2 to issue cheques in question.

Cheque No.285497 for Rs.1 Crore was not issued by Davin Infor Pvt. Ltd., but by accused Sunil Malik. Post resignation is 2018, she did not hold any post nor was the authorised signatory of company. E-mails dated 04.09.2018, 03.10.2018, 17.04.2019 and 16.07.2019 were not sent in the capacity of CEO of company. None of E-mails are in relation to cheques. The e-mail ID is closed. Complaint does not refer to e-mails. Sunil Malik and employees of company has full control of e-mail Id's. E-mails were not filed before Court before issuance of process. Applicant Tanya Malik in her affidavit stated that she had resigned on 20.11.2019. ROC was notified on 27.11.2019. She is not signatory to cheque. Cheque of Rs. 1 crore was not issued by Company. Complaint does not describe her role. Cheque was presented on 25.11.2019 and dishonoured on 28.11.2019. She resigned on 20.11.2019. Learned Advocate for applicants has filed on record copy of complaint, affidavit of evidence of complainant, order issuing process, judgments and written submissions.

8. The accused Sunil Malik is husband of Preeti Malik and father of Tanya Malik. According to applicant Preeti Malik she had resigned on 22.06.2018. It was accepted on 22.06.2018. Reliance is placed on resignation letter dated 22.06.2018. The resignation letter of Preeti Malik does not bear any acknowledgment of receipt

of resignation by Company. The accused No.1 Company was conducted by the accused. It is a family concern. The applicant also rely on alleged resolution passed in the meeting of the Board of Directors of Davin Info Pvt. Ltd. held on 22.06.2018. Thus, it was allegedly submitted and accepted on same day. Although the title of said document refers to Resolution by Board of Directors, it is signed by accused No.2 Sunil Malik who is Managing Director of accused No.1 Company. The applicant Tanya Malik also rely on resignation letter dated 20.11.2019. Letter does not bear acknowledgment of receipt of letter. Similar Resolution is also relied upon by this applicant, which is signed by Sunil Malik. Learned Advocate for complainant has urged that acceptance of Resignation by one person vide Resolution of Company is defective as Resolution is not by sufficient quorum , genuineness of such documents is debatable and cannot be accepted at this stage. The documents placed on record by the learned Advocate for the respondent/complainant indicate that Preeti Malik was acting on behalf of Company its affairs even after her purported resignation. Preet Malik has played vital role in the transaction which is apparent from the contents of the complaint. She has represented company right from inception. She is the person who was in-charge and responsible for affairs of company. She need not be director of company. She has actively participated in subject transaction. The cheque of Rs. 1 crore is issued by Sunil Malik and hence it is urged that applicants are not responsible for dishonour of cheque. The submission cannot be accepted at this stage. The cheque was issued for liability of accused No.1 company. It is also urged that E-mails were not before trial Court. The complainant has produced it since applicant Preeti Malik has claimed that she has resigned and thereafter, did not participate in affairs of accused No.1. The ground urged by applicants regarding resignation cannot be accepted. Order issuing process need not be elaborate.

9. However, as far as applicant Tanya is concerned relating to role attributed to her, it is seen that she is impleaded in the complaint as director of accused – Company. She is not the signatory to the cheque. The complaint is silent about role played by her. There is no sufficient material to invoke Section 141 of the Negotiable Instruments Act against Tanya Malik.

10. Considering the aforesaid circumstances, I pass the following order :-

ORDER

i) Criminal Application No. 543 of 2022 and Criminal Revision Application No. 548 of 2022 are dismissed.

ii) Criminal Application No. 547 of 2022 is allowed.

iii) The order issuing process and the impugned criminal proceeding in C.C. No.637 of 2021 as against Tanya Malik, pending before the Court of learned Metropolitan Magistrate, Ballard Pier, Mumbai are quashed and set aside.

iv) Criminal Application No. 546 of 2022 is allowed.

v) The order issuing process and the impugned criminal proceeding in C.C. No.638 of 2021 as against Tanya Malik, pending before the Court of learned Metropolitan Magistrate, Bellard Pier, Mumbai are quashed and set aside.

vi) All Criminal Applications are disposed off accordingly.

(PRAKASH D. NAIK, J.)