IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.667 OF 2022

Sunil Pandurang Mantri, Age 61 years,
R/o.69, Walkeshwar Road,
Mumbai-400 006. Applicant
versus
1. The State of Maharashtra
2. Krishna Textiles Respondents

AND
CRIMINAL APPLICATION NO.668 OF 2022

Sunil Pandurang Mantri, Age 61 years,
R/o.69, Walkeshwar Road,
Mumbai-400 006. Applicant
versus
1. The State of Maharashtra
2. Shree Gnesh Textiles Respondents

Mr.Sachin Mahajan, Advocate for applicant in both matters.
Mr.Manohar H. Ramsinghani with Mr.Kantilal Behwal, Mr.Kaustubh Gaonkar and Mr.Keshav Thakur, Advocate for respondent no.2.
Mr.S.R.Agarkar, APP, for State in APL No.667 of 2022.
Mr.Arfan Sait, APP, for State in APL No.668 of 2022.

CORAM : PRAKASH D. NAIK, J.

DATE : 18th August 2022

PC :

1. Criminal Application No.667 of 2022 relates to the proceedings in criminal complaint No.1997/SS/2016 pending before the Court of learned Metropolitan Magistrate, 64th Court, Esplanade, Mumbai. The applicant therein has challenged the order dated 3rd May 2019 passed by Metropolitan Magistrate and order dated 13th

April 2022 passed by Session Court in Criminal Revision Application No.893 of 2019.

2. The brief facts of C.C No.1997/SS/2016 which is subject matter of challenge in Criminal Application No.667 of 2022, are as follows :-

(a) The complainant Krishna Textiles is carrying business. Accused no.1 is company in which accused no.2 is authorized signatory/Director and person in-charge of day to day affairs of accused no.1 at all relevant ties. Accused no.3 is the whole time director and accused nos.4 and 5 are directors and authorized signatories of accused no.1. Accused nos.2 to 5 are and were at at all relevant times in-charge and responsible for conduct of business of respondent no.1;

(b) The accused approached the complainant in September-2010 for advancement of loan. Accordingly complainant advanced and paid Sunil Mantri Realty Limited (presently known as Mantri Realty Limited) a sum of Rs.5 lakh vide account payee cheque No.802526 dated 27th September 2010. The accused initially paid interest and then renewed the loan with interest by using various bills of exchange and post dated cheques;

(c) The accused accepted liability of Rs.9.20 lakh. The accused executed fresh bill of exchange dated 30th October 2015 of Rs.9.20 lakh payable on 27th April 2016 and issued fresh cheque for Rs.9.20 lakh dated 27th April 2016 bearing No.79775;

(d) The cheque was dishonoured for want of sufficient funds on 29th April 2016;

(e) Notice was forwarded to the accused. Since payment was not made, complaint was filed u/s.138 of Negotiable Instruments Act (`N.I.Act');

(f) Learned Metropolitan Magistrate, 64th Court, Esplanade Court, Mumbai issued process u/s.138 of N.I.Act against accused vide order dated 3rd September 2019;

(g) The said order was challenged by preferring Criminal Revision Application before Session Court, which has been rejected vide order dated 13th April 2022.

3. The factual aspects of C.C No.1198/SS/2016 which is under challenge in Criminal Application No.568 of 2022, are as follows :

(a) Complaint was filed by Shree Ganesh Textiles. Accused no.1 is company. Accused no.2 is the authorized signatory and director. Accused no.3 is the whole time director. Accused nos.4 and 5 are directors and authorized signatories of accused no.1. They were in-charge and responsible for the conduct of the business of accused no.1;

(b) Accused approached the complainant in July-2010 for loan. The complainant advanced a sum of Rs.15 lakh to accused no.1 vide cheques dated 19th July 2010, 31st August 2010 and 15th January 2011. Rs.5 lakh were repaid by accused no.1 vide cheque dated 5th April 2011;

(c) The accused renewed the loan with interest by issuing bills of exchange and post dated cheques;

(d) The accused confirmed the liability to Rs.18.60 lakh. Fresh bill of exchange dated 21st October 2015 for Rs.18.60 lakh was payable on 18th April 2016 and fresh cheque bearing No.79774 for Rs.18.60 lakh dated 18th April 2016 was issued. It was dishonoured;

(e) Demand notice was forwarded and thereafter complaint was filed;

(f) Learned Metropolitan Magistrate, 64th Court, Esplanade Court, Mumbai, issued process against accused for offence punishable u/s.138 of N.I.Act.

4. Learned advocate for applicant submitted as under :

(i) The unsecured creditors of accused no.1 company filed company petitions u/s433(e), 434 and 439 of Companies Act for winding up of the company. By order dated 4th February 2015 passed on Company Petition No947 of 2014 and Company Petition No.948 of 2014, the Court appointed Official Liquidator as provisional liquidator of the company;

(ii) Vide further order dated 8th January 2016 the Court directed Official Liquidator to take physical possession of all the assets, properties and bank accounts of the company;

(iii) The cheque was dishonoured on 30th April 2016. At the tie of dishonour of cheque, the company was with the official liquidator and the applicant was not in control of accused no.1 company;

(iv) The Session Court has erroneously rejected revision application challenging order issuing process;

(v) The cheque which subject matter of other complaint was also dishonoured when the official liquidator was appointed;

(vi) Proceedings u/s.138 of N.I.Act are not maintainable;

(vii) Learned advocate for applicant has relied upon decision of Delhi High Court in the case of **M.L.Gupta and another Vs. Ceat Financial Services Ltd**[1].

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1 2006-SCC OnLine-Del-1448

5. Learned advocate for respondent no.2-complainant submitted as under :-

(a) The applicant is the promoter of the company. The company is in existence. The company is not ordered to be wound up;

(b) The transaction is of October-2010. The amount was parted. It was renewed from time to time. The applicant issued cheques under his signatures;

(c) Bill of exchange was issued, post dated cheques were issued;

(d) The company is not before Court. The director is trying to take advantage. Even if official liquidator is appointed, nothing prevented the accused from making payment;

(e) Reliance is placed on decisions of Supreme Court in cases of **Pankaj Mehra and another Vs. State of Maharashtra** and another[2] and **Indorama Synthetics (I) Ltd. Vs. State of Maharashtra and others**[3].

6. Learned counsel for applicant do not urge point of resignation of the applicant, although it is pleaded in the application.

7. The applicant has challenged the order issuing process before Session Court by preferring revision applications which were rejected. The facts appearing in the complaints makes it clear that complainant had advanced loan to M/s.Sunil Mantri Realty Limited (presently known as Mantri Realty Limited). The loan was renewed. Bill of exchange was issued. Post dated cheques were issued. After drawing accounts the liability was acknowledged. Fresh bill of

2 (2000)2-SCC-756
3 2016(4)-Mh.L.J.-249

exchange was issued and fresh cheque was issued. The cheques were dishonoured. Learned Magistrate issued process. The Session Court dismissed revision applications. The contention of applicant is that provisional liquidator was appointed and accused no.1 company was under control of liquidator.

8. In the decision of M.L.Gupta and another (supra) relied upon by advocate by applicant, the question was whether complaint u/s.138 of N.I.Act can be filed against a company and/or its Managing Director/Director after winding up of the company. Whether the complaint is maintainable against its directors. The Delhi High Court had observed that complaint u/s.138 of N.I.Act cannot be filed as on the date of presentation of cheque company was in liquidation and cannot be stated to have committed any offence. It is pertinent to note that in the present case the company was not wound up.

The Supreme Court in the case of Pankaj Mehra and another (supra) has observed that merely because petition for winding up of company is presented, company cannot escape penal liability for dishonour of cheque u/s.138 on the ground that payment of cheque pursuant to issuance of notice would amount of disposition of property of company and void u/s.536(2) of Companies Act. Presentation of winding up petition would not disentitle the creditor-payee from legally enforceable debt u/s.138 of N.I.Act. Presumption u/s.139 of N.I.Act that cheque was received for discharge of legally enforceable debt or liability cannot stand rebutted merely because of commencement of winding up of the company by virtue of presentation of the petition. The Companies

Act does not prohibit enforcement of debt due from the company. Failure to pay the cheque amount for whatever reason renders the drawer of the cheque liable for the penal offence under Section 138. During interregnum between presentation of petition for and issuance of order of winding up, the company is not prohibited from making payment of cheque drawn by it on issuance of notice by payee under proviso (b) to Section 138 of N.I.Act.

The Division Bench of this Court in the case of Indorama Synthetics (I) Limited (supra) has observed that expression suit or other proceedings mentioned in Section 446(1) of Companies Act does not include criminal complaint filed u/s.138 of N.I.Act.

9. In the light of legal position and applying it to the facts of present case, I do not find any reason to interfere in the order issuing process and the order passed by Session Court dismissing the revision applications.

ORDER

(i) Criminal Application Nos.667 of 2022 and 668 of 2022 stand rejected and disposed off.

(PRAKASH D. NAIK, J.)

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