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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.4460 OF 2022

Morarjee Textiles Limited & Ors. … Petitioners
V/s.
The Federal Bank Ltd. & Anr. … Respondents

Mr. Shirish Gupte a/w Mr. Dhrupad Vaghani & Mr. Ajiz M.K for the petitioners.

Mr. A.R. Patil, APP for the respondent No.2/State.

Ms. Sneha Panchmukh a/w Deepa mani & Mr. Soham Acharekar i/by D.M. Legal Ventures for the respondent No.1.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 14, 2022

P.C.:

1. The petitioners are challenging order of issuance of process dated 7th March, 2022, and order dated 12th October, 2022 passed by the learned Sessions Judge confirming order of issuance of process.

2. The respondent No.1 bank filed a complaint under section 138 of the Negotiable Instruments Act, 1881 contending that credit facilities were sanctioned to the accused No.1. Details of the credit facilities are mentioned in the complaint. In furtherance of the credit facilities, accused Nos.1 and 2 created security interest in favour of the complainant by mortgaging immovable property. Additionally, loan documents were executed in favour of the complainant. There was default in payment of loan disbursed in favour of accused No.1.

3. On 16th April, 2021, the complainant issued notice under section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 calling upon accused Nos.1 and 2 to pay an amount of Rs.11,28,91,937/- (Rupees Eleven Crore Twenty Eight Lakh Ninety One Thousand Nine Hundred and Thirty Seven Only).

4. On 28th April, 2021, the complainant deposited the cheque in question, which according to the complainant was issued in discharge of legally recoverable debt. It is contended that the accused Nos.2 and 3 are signatories on behalf of the accused No.1. It is averred in paragraph 5(i) that accused Nos.2 to 6 are handling day-to-day management / administration / affairs and smooth functioning of the business of accused No.1 and are responsible for day-to-day affairs and operations of accused No.1/company.

5. The learned Magistrate by impugned order issued process against all the accused. The accused challenged the order of issuance of process before the revisional Court which has been dismissed by impugned order. The petitioners have, therefore, challenged orders passed by the learned Magistrate and the learned Sessions Court issuing process against the petitioner.

6. Mr. Shirish Gupte, learned senior advocate appearing for the petitioner submitted that the issuance of notice under section 13(2) of Securitization Act amounts to material change in circumstances as the accused Nos.1 and 2 were called upon to pay the amount within sixty (60) days and before expiry of period of sixty (60) days the cheque in question was deposited and, therefore, the offence under section 138 of the Negotiable Instruments Act, 1881 *prima facie* is not made out. To bolster his submission, he relied upon the judgment of the Apex Court in the case of **Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel and Another** reported in (2022) SCC OnLine SC 1376.

7. He next submitted that the averments in the complaint are not sufficient to attract liability of accused Nos.3 to 6 under section 141 of the Negotiable Instruments Act, 1881 as the said averment are mechanically made. He submitted that in the verification in support of the complaint, there are no averments made against accused Nos.3 to 6 nor the verification is sufficient to fulfill ingredients of section 138 of the Negotiable Instruments Act, 1881.

8. Having considered the submissions made on behalf of the petitioners, in my opinion, the Courts below were justified in the issuing process against the petitioners.

9. As per the averments in the complaint, the complainant has averred that various loan facilities were granted to the accused No.1. The details of the loan facilities are specified in paragraph 5(iii) and paragraph 5(iv). It is also averred in paragraph 6(xi) that the necessary loan documents and guarantee agreements were executed by the accused No.2 There is no unimpeachable documents produced on record that the accused had repaid entire amount of loan as called upon to repay by demand notice.

Therefore, for the purpose of issuance of process, the averments made in the complaint along with the documents produced before the learned Magistrate were sufficient to issue process against the accused.

10. In so far as the contentions raised on behalf of the petitioners that accused Nos.1 to 3 are not vicariously liable, it needs to be noted that the complainant in paragraph 5(ix) has stated that accused Nos.2 and 3 are signatory to the cheque which was issued on behalf of the accused No.1 for discharging a legally enforceable debt.

11. The petition is filed only by accused Nos.1 to 3.

12. The learned senior advocate submitted that the issuance of notice under section 13(2) of Securitization Act granting sixty (60) days period to the petitioner amounts to material change in circumstances before the cheque is presented. He relied on the observations made by the Apex Court in paragraph 19 of judgment in the case of **Dashrathbhai Trikambhai Patel** (supra). The Apex Court in paragraph 19 as held as under:

> "19. The judgments of this Court on post-dated cheques when read with the purpose of Section 138 indicate that an offence under the provision arises if the cheque represents a legally enforceable debt <u>on the date of maturity.</u> The offence under Section 138 is tipped by the dishonour of the cheque when it is sought to be encashed. Though a post-dated cheque might be drawn to represent a legally enforceable debt at the time of its drawing, for the offence to be attracted, the cheque must represent a legally enforceable debt at the time of encashment. If there has been a material change in the circumstance such that the sum in the cheque does not represent a legally enforceable debt at the time of

> maturity or encashment, then the offence under Section 138 is not made out.

13. Careful reading of paragraph 19 of the judgment of the Apex Court, it is clear that the Apex Court has observed that if there has been material change in the circumstances such that the sum in the cheque does not represent a legally recoverable debt at the time of maturity or encashment other than the offence under section 138 of the Negotiable Instruments Act,1881 is not made out. In the facts of the present case, notice under section 13(2) of Securitization Act is to recover debt of secured creditor without intervention of the Court.

14. Respondent No.1-Bank being secured creditor has both options to pursue remedies conferred under different statutes. Merely because a remedy under one statute is pursued by the secured creditor, it will not take away right of the secured creditor to pursue another remedy under different statute. In so far as right to file complaint under section 138 of the Negotiable Instruments Act, 1881 vests with the complainant on fulfillment of conditions enumerated in the provisions of Negotiable Instruments Act, 1881. Such right is independent of right conferred on secured creditor under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

15. From the material produced before the learned Magistrate on the date of issuance of process, it is demonstrated that the material on record is sufficient to attract essential ingredients of offence under section 138 of the Negotiable Instruments Act, 1881, therefore order of issuance of process cannot be faulted.

16. Except raising two submissions as recorded above no other submission is made. Therefore, in my opinion, the order of issuance of process passed by the learned Magistrate and confirmed by the learned Sessions Court cannot be termed as perverse. There is no miscarriage of justice. There is no merit in the petition.

17. The petition is, therefore, dismissed. No Costs.

(AMIT BORKAR, J.)