GRM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1767 OF 2019

M/s. D. J. Vision & Ors. … Applicants

V/s.

The State of Maharashtra & Anr. … Respondents

Mr. Premlal Krishnan a/w Mr. Preston Dias, Mr. Prashant Bothre i/b Pan India Legal Services LLP, Adv. for the Applicants.

Ms. Anamika Malhotra, APP for the State/Respondent.

Mr. M. S. Mohite, Sr. Adv. i/b Mr. Kamlesh Y. Mali, Adv. for Respondent No. 2.

CORAM : R. G. AVACHAT, J.

DATED : FEBRUARY 10, 2023

P.C. :

Heard.

2. The challenge in this application, under Section 482 of the Code of Criminal Procedure, 1973 (for short "**Cr.P.C.**"), is to the order of issuance of process under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (for short "**NI Act**") passed by learned Metropolitan Magisterial, 7th Court, Dadar, Mumbai in C.C. No. 943/SS/2019 dated 10/06/2019.

3. Applicant no. 1 herein is a partnership firm and applicant nos. 2 & 3 are its partners. Respondent no. 2 is a public limited company engaged in the business of manufacturing, marketing and sale of readymade apparels and accessories under the brand name "Pepe Jeans, London". The applicants are Kerala based. Applicant no. 1 firm is engaged in the business of distribution of footwear, apparels, etc. A Distribution Agreement was executed

between the applicants on one hand and respondent no. 2 company on the other.

4. It is a case of respondent no. 2 company that towards its outstanding dues, applicant no. 1 firm issued 30 cheques. Since the cheques bounced, a Statutory Demand Notice was issued. The notice was however replied with false contentions. Respondent no. 2 company therefore filed a complaint under Section 138 of NI Act for dishonour of all 30 cheques.

5. Learned Advocate for the applicants would submit that applicant no. 3 did not sign any of the documents, nor is she a signatory to any of the cheques. One of the 30 cheques was unsigned. A common complaint has been filed for dishonour of 30 cheques. The same is not maintainable. The applicants are Kerala based. Learned Magisterial therefore ought to have made enquiry under Section 202 of Cr.P.C. before issuance of process. Respondent no. 2 company has encashed the Bank Guarantee worth Rs. 25,00,000/-. The Distribution Agreement was terminated. Various meetings took place between the applicants on one hand and respondent no. 2 company on the other. Respondent no. 2 company had given discount to its customers. If the accounts are taken, respondent no. 2 company would be found to have owed some amount to applicant no. 1 firm. Arbitration Proceedings are in progress. Award may be passed shortly. No liability of the applicants, has thus been crystallized. The cheques were issued as a ‘security’. Those were not supposed to be put to encashment. On all the aforesaid grounds, learned Advocate for

the applicants urged for allowing the application.

a. Learned Advocate relied on the judgment of Hon'ble Apex Court in the case of **Birla Corporation Limited and Ors. vs. Adventz Investments and Holdings Limited and Ors.** reported in **MANU/SC/0714/2019**, wherein it has been observed that -

> "Reiterating the contention of other Respondents, Mr. K. V. Viswanathan, learned Senior Counsel appearing on behalf of Respondent No. 6 submitted that Respondent No. 6 is a well reputed lawyer and a trustee of the Birla Education Trust which is a shareholder of the Appellant Company. The learned Senior Counsel further submitted that in the absence of specific allegations against Respondent No. 6, he cannot be made vicariously liable merely because he is adorning the position of trustee in Birla Education Trust. It was submitted that the complaint filed by the Appellant is intended to arm twist the Respondents from ventilating the legitimate rights before the appropriate judicial forum and in the absence of materials, the proceedings initiated against Respondent No. 6 is liable to be quashed."

b. Learned Advocate has also relied on the judgment of Constitution Bench of the Hon'ble Apex Court in **Suo-Motu Writ Petition (Crl.) No. 2 of 2020** (in the case of **Makwana Mangaldas Tulsidas vs. The State Of Gujarat And Anr.** reported in **Special Leave Petition (Criminal) No. 5464 of 2016 decided on 05/03/2020**) **Re : Expeditious Trial of Cases under Section 138 of NI Act, 1881 decided on 16/04/2021**, to submit that it has directed the Central Government to amend the NI Act so that more than three offences, committed within a period of one year, could be charged and tried in one case.

6. Learned Advocate for respondent no. 2 company would on the other hand submit that plea has been recorded and trial has commenced. There are specific averments in the complaint indicating both the partners of applicant no. 1 firm were in-charge of day-to-day affairs of the firm. According to learned Advocate, whatever has been urged on behalf of the applicants, is a matter of fact and that could only be answered during trial of the case. He therefore urged for rejection of the application.

7. Considered the submissions advanced. Perused the complaint and the authorities relied on by both the parties.

8. Applicant no. 1 is a partnership firm and applicant nos. 2 & 3 are its partners. It has been specifically averred in paragraph 5 of the complaint that both the partners of applicant no. 1 firm had approached respondent no. 2 company and introduced themselves as the partners of applicant no. 1 firm. A Distribution Agreement was executed on 23/07/2013 between respondent no. 2 company and applicant no. 2. Applicant no. 2 admittedly issued 30 cheques in favour of respondent no. 2 company.

9. It has specifically been averred in the complaint that both applicant nos. 2 & 3 had requested respondent no. 2 company to do not deposit the cheques for realization. It has also been specifically averred in paragraph 16 of the complaint that both the partners were responsible for day-to-day affairs of applicant no. 1 firm. Learned Advocate for the applicants therefore could not be heard to say that applicant no. 3 had no role in the business

transaction, nor was she responsible to the day-to-day affairs of the partnership firm.

10. It is true that the Distribution Agreement came to be terminated and meetings between the two took place over settlement of account. Arbitration Proceedings are underway. The fact remains that applicant no. 1 firm issued 30 cheques under the signature of applicant no. 2 in favour of respondent no. 2 company.

11. Section 139 of NI Act speaks of the statutory presumption, which reads thus :-

> "It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability."

12. Even the Bank Guarantee furnished by applicant no. 1 firm, has been encashed by respondent no. 2 company post issuance of process. Pendency of Arbitration Proceedings shall not be a ground for non-continuance of criminal proceedings (**Sri Krishna Agencies vs. State of Andhra Pradesh and Another** reported in **(2009)1 Supreme Court Cases 69**).

13. It is reiterated that the plea has been recorded. The trial has thus commenced. It is informed that one of the witnesses has even been examined. In the application, the order of issuance of process has not been taken exception to on the ground that the applicants being Kerala based and therefore, the learned

Magistrate ought to have made enquiry under Section 202 of Cr.P.C.

14. Admittedly all the cheques have been issued towards what was allegedly due to respondent no. 2 company. This Court in the case of **Rajasthani Trading Co. & Anr. vs. Chemos International Limited & Anr.** reported in **2000 SCC OnLine Bom 989** has observed that when number of cheques were issued in respect of the same transaction, accused can be charged and tried in one trial. Even Section 220(1) of Cr.P.C. permits for such a single trial.

15. In the case of **Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Limited** reported in **(2016)10 Supreme Court Cases 458**, it has been observed by the Hon'ble Apex Court that -

> "**A. Debt, Financial and Monetary Laws - Negotiable Instruments Act, 1881 — S. 138 — Post-dated cheque described as 'security' towards repayment of installment of already disbursed loan amount — Dishonour of – Proceedings under Section 138, held, maintainable in case of dishonour of such cheque.**
>
> - Held, crucial point is whether cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being any subsisting liability — Once loan amount was disbursed and as per agreement, installments had fallen due on date of issuance of cheque, dishonour of such cheque would fall under Section 138 — Such issuance of cheque undoubtedly represents outstanding liability — Contract Act, 1872, Section 128 (Paras 10 to 19).

16. In short, there are specific averments in the complaint suggesting applicant no. 3 to have been in the control and management of day-to-day affairs of applicant no. 1 firm. It was she along with applicant no. 2 (signatory of the cheques), had approached respondent no. 2 company. The Distribution Agreement thus came to be executed. 30 cheques were issued under the signature of applicant no. 2, partner of applicant no. 1 firm.

17. The case of applicants that the complainant company had given discount to the customers and the same has not be accounted for and therefore, the complainant company in fact owes the applicants, is a disputed question of fact. The question that the applicants were Kerala based and therefore, the learned Magistrate ought to have made enquiry under Section 202 of Cr.P.C. has not been raised in this application. Ongoing Arbitration Proceedings shall not be a bar to the simultaneous continuance of the proceedings under Section 138 of NI Act.

18. In this view of the matter, the application is sans merit. The same is, therefore, dismissed and disposed of accordingly.

19. In view of the above order, Criminal Interim Application No. 301/2023 stands disposed of.

(R. G. AVACHAT, J.)