

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.362 OF 2023

Kushan Nandy & Kiran Shroff
Pictures Pvt. Ltd. & Ors.

.... Petitioners

versus

The State of Maharashtra & Anr.

.... Respondents

.....

- Mr. Ashok M. Saraogi, Advocate for Petitioners.
- Mr. Arfan Sait, APP for the State/Respondent No.1.
- Mr. Lalan Gupta a/w Anuj Loya i/b. Shardul Amarchand Mangaldas Co., Advocate for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
DATE : 01st AUGUST, 2023

P.C. :

1. Heard Mr. Ashok M. Saraogi, learned counsel for the Petitioners, Mr. Lalan Gupta, learned counsel for the Respondent No.2 and Mr. Arfan Sait, learned APP for the State.

2. In this Petition, the Petitioner has challenged the two orders dated 28/02/2020 and 02/11/2022 passed in C.C. No.4029/SS//2019 by the Metropolitan Magistrate, 63rd Court,

at Andheri, Mumbai. Incidentally, both these orders are passed by different Magistrates because after the first order was passed, the learned Magistrate was transferred in due course and he was replaced by the Magistrate who had passed the order dated 02/11/2022.

3. Learned counsel for the Petitioner submitted that he came to know from his business circle about the pendency of some warrant issued against him and therefore he started making enquiries and eventually came to know that a complaint was filed by the present Respondent No.2 (hereinafter referred to as the 'complainant') in the Court of Metropolitan Magistrate, 63rd Court at Andheri, Mumbai. By making further enquiries he came to know that an order was passed on 28/02/2020 issuing bailable warrant against the Petitioners. Learned counsel for the Petitioners submitted that the entire record of the case did not show any order of issuance of process having been passed before 28/02/2020. The order of issuance of bailable warrant was passed purely on the basis of the prayer made by the

complainant for such relief. Learned counsel for the Petitioners submitted that the complainant misled the Court to pass the said order and the Court also did not check the record before passing the said order.

4. Learned counsel for the Petitioners submitted that the Petitioners approached the Court of Sessions by way of Revision Application. But there was no order which could be impugned in respect of issuance of process and therefore the Revision Application was withdrawn. In the meantime, on 02/11/2022, a fresh order was passed and this time the process was specifically issued against the Petitioners. Therefore in this situation, the Petitioners have approached this Court.

5. Learned counsel appearing for the Respondent No.2 i.e. the original complainant submitted that on merits, the complainant has a good case and the order of issuance of process does not suffer from any infirmity. However, he could not controvert that when the bailable warrant was issued, at

that time, the order of issuance of process was not available before the Court.

6. I have considered these submissions and the uncontroverted facts which are referred to hereinabove.

7. The order dated 28/02/2020 reads thus :

“Complainant representative present. Advocate for complainant present. Accused absent when called. An application for bailable warrant against accused. o/p Issue bailable warrant of Rs.5000. for report. matter not traced today.”

And the next date for hearing was given as 10/07/2020.

From this order it is quite clear that the papers of the matter were not before the learned Magistrate and he passed the order only on the basis of the application preferred by the complainant and he relied on the statement made in that

application on the assumption that the process was already issued against the Petitioners, and that they were not appearing before the Court. After this, the Petitioners appeared before the Court through their advocate. By that time, the Presiding Officer had changed. On 02/11/2022 he recorded a noting below Ex.1 in C.C.No.4029/SS/2019. In the first paragraph of the noting, the learned Magistrate recorded that the complainant filed an application and submitted that on 26/09/2019 the complaint was filed and after verification, the order of issuance of process was passed. On the same day, summons were collected and posted on the address of the accused. They did not appear and hence on 28/02/2020 the complainant filed an application for issuance of bailable warrant. The application was allowed. The accused appeared for the first time in the Court on 17/03/2022 and pointed out that the order of issuance of process was missing. On 01/04/2022 the accused again appeared before the Court and informed the Court that he had filed a Revision Application challenging the issuance of summons and warrant.

8. It was further noted that, the complainant filed an application requesting for issuance of process order against the accused. The learned Judge then called for say of the concerned Judicial Clerk and the Interpreter. They submitted that the complaint was filed on 26/06/2019 and on the same date the complainant received the summons. But the copy of the order of issuance of process was not found on record. The learned Judge further observed that considering the arguments advanced by both the sides and the say filed by the Judicial Clerk and the Interpreter of the Court, it was clear that the previous order of issuance of process, if any, was not traceable. The learned Judge went on to observe that considering the interest of both the parties it was a fit case to pass the order of issuance of process on merits.

9. On the same date i.e. on 02/11/2022, the learned Judge passed the following order ;

“1. Heard. Perused complaint and

documents filed on record. Upon dishonour of cheque, notice is issued within limitation.

2. Accused No.1 is a private limited company and accused Nos.2 to 4 are its directors of it. Prima-facie case under Section 138 of N. I. Act appears against accused Nos.1 to 4. Hence, it is a fit case to issue process against accused. With this following order is passed :

ORDER

Issue summons against accused Nos.1 to 4 for commission of offence under Section 138 of Negotiable Instruments Act.”

10. Considering this situation and history it is quite clear that the learned Magistrate, while recording his noting below Ex.1, had made up his mind that it was in the interest of both the parties, it was a fit case to pass the issue process order on merits. Then he proceeded to pass the order of issuance of process against the Petitioners u/s 138 of the Negotiable Instruments Act on the same day i.e. 02/11/2022. The said order is also under challenge in the present Petition.

11. Thus it is quite clear that the learned Magistrate was influenced by the earlier orders and has in fact noted that it would be in the interest of both the parties that the order of issuance of process was passed on merits. Therefore there is scope to believe that his decision of issuance of process was influenced by the history recorded hereinabove as he had recorded that it would be in the interest of both the parties to pass the order of issuance of process. Therefore, at this stage it cannot be said that the Magistrate had applied his mind purely to the merits of the case while passing the order of issuance of process and therefore at this stage I am inclined to set aside that particular order and remand the matter back for fresh consideration for application of mind without being influenced by the earlier orders. The learned Magistrate is expected to apply his judicial mind in accordance with law in taking further steps of either issuance of process or dismissing the complaint. This course is left open to the Magistrate from this stage onwards. The verification of the complaint is already recorded.

Therefore from that point onwards the Magistrate can proceed to deal with the matter.

12. Hence, the following order :

ORDER

- (i) The order dated 28/02/2020 and the order dated 02/11/2022 passed in CC No.4029/SS/2019 by Metropolitan Magistrate, 63rd Court at Andheri, Mumbai, are set aside. Consequently, the pending process and pending bailable warrant against the Petitioners are also set aside.
- (ii) The learned Magistrate shall apply his mind to the merits of the complaint and decide the question of issuance of process or of dismissing of the complaint afresh. It is made clear that verification statement of the complainant is already recorded u/s 200 of Cr.P.C. The learned Magistrate shall proceed further from that point onwards. He shall not be influenced by the earlier orders or what had transpired previously

in this particular case. He shall pass his order in accordance with law.

- (iii) All the questions raised by both the parties in this Petition on merits are specifically left open.
- (iv) With these observations, the Writ Petition is disposed of.
- (v) The learned Magistrate shall take further steps expeditiously.

(SARANG V. KOTWAL, J.)