2024:BHC-AUG:28670

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

1 CRIMINAL WRIT PETITION NO. 1196 OF 2024

Ambaji Trading Company Through Its Partner Chitrasen Yashwantrao Patil And Others
VERSUS
Jalgaon District Central Co Op Bank Ltd Jalgaon Through General Managar Pralahad Bhaulal Sapkale

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Mr. Jay Chavan, Advocate h/f Mr. D.B. Thoke, Advocate for Petitioners.
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[CORAM : Y. G. KHOBRAGADE, J.]

DATE : 02nd DECEMBER, 2024

ORDER :

1. Heard at length the learned counsel appearing for petitioners.

2. By the present petition, under Article 226 and 227 of the Constitution of India, read with section 482 of the Code of Criminal Procedure, the petitioners/original accused takes exception to order dated 04.10.2019, whereby the learned Judicial Magistrate, First Class, Court No.2, Jalgaon issued process against the petitioners/original accused 1 to 15 for the offence punishable under section 138 of the Negotiable Instruments Act.

3. On face of the record, prima facie it appears that, the Respondent/complainant filed a complaint S.C.C. No. 1658 of 2019 and alleged that, the present petitioner no.1 is a Registered partnership firm/Financial Institution. The petitioners No.2 to 14/original accused are partners of the petitioner no.1/Firm as well as they are responsible for all transactions of the accused no. 1/ Firm.

4. The Petitioner firm participated in the E-Auction conducted by the Respondent/Ori. Complainant, who was secured creditor of Belganga Sahakari Sakhar Karkhana Limited, Chalisgaon. However, said Sahakari Sakhar Karkhana fail to repay the loan. Therefore, the Respondent/ori. Complainant was initiated the proceeding under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. After the Order passed by the competent authority, the mortgage property was put for E-Auction for recovery of outstanding loan.

5. It is a matter of record that, the accused No.1 participated in E-Auction and purchased the mortgaged property of Belganaga Sahakari Sakhar Karkhana in higest bid of Rs.

39,22,00,001/- (Thirty Nine Crore Twenty Two Lakhs and One). However, after payment of entire amount of auction bid, the Respondent/Complainant intimated to petitioner firm about pendency of W.P. No. 2969/2016 before this Court wherein auction initiated by the Provident Fund Authority for issuance of recovery certificate by the Provident Fund Department.

6. Needless to say that, when the secured creditor bank initiated the recovery proceedings under the SARESI Act, the Provident Fund Authorities filed the Civil Application No. 268 of 2017 in W. P. 2969/2016 and was opposed the E-Auction of the mortgage property. It is not in dispute that, this Court passed an order in C.A. No. 268 of 2017 in W. P. 2969/2016 and directed the petitioner no. 1 Firm to deposit amount of Rs. 11,00,00,000/- (Rs. Eleven Crore) out of sale proceed with the P.F. Department. However, said order was never disclosed the petitioner no. 1 firm. But after getting the knowledge, the Respondent/Complainant Bank and the Petitioner No. 1 to 15 arrived at the settlement on 06.01.2018 in said writ petition.

7. As per the terms and conditions of the said settlement, the present petitioners 1 to 15 have accepted liability for payment

of Rs. 11 Crores. Not only this but the Petitioners 1 to 15 have also furnished undertaking before the Central Government Industrial Tribunal, Nagpur, (C. G. I. T., Nagpur) to deposit the said amount within 4 weeks from the date of judgment.

8. It further appears that, in pursuance of clause ii, iv and v of the terms of compromise, the petitioners/accused persons issued a cheque No.130961 of Rs.11 Crores, drawn on Jalgaon Janta Sahakari Bank Ltd. Jalgaon, Branch Chalisgaon in favour of the Respondent/Complainant toward payment of dues of Provident fund in pursuance of order passed in appeal No.244/2017 by the Industrial Tribunal, Nagpur. However, said cheque returned unpaid on account of insufficient balance and referred to drawer. The said cheque was returned to the respondent/complainant on 22.01.2019. The petitioners/accused persons are duly served with mandatory notice but they fail to comply with it. Therefore, the respondent/complainant has instituted the complaint bearing SCC No.1658/2019 and prayed for award of appropriate sentence under Sec. 138 of N. I Act.

9. After the necessary compliance, on 04.10.2019, the learned Trial Court passed an order and issued the process against

the present petitioners/accused persons for the offence punishable under section 138 of the Negotiable Instruments Act.

10. Learned Counsel for the petitioner canvas in vehemence that the cheque was to be deposited after the decision of appeal before the Central Government Industrial Tribunal, Nagpur, and if, the appeal is not decided within the period of one year, then also, the cheque was to be deposited. However, this eventuality has occurred because the appeal came to be rejected twicely on the point of locus but said appeal had not been decided on merit. The cheque was issued as per the compromise terms in favour of respondent/Bank with anticipation that the said appeal would adjudicate and claim of provident fund amount would be finally decided. Therefore, offence u/s 138 of NI Act does not constitute as against the petitioners/accused.

11. Needless to say that to constitute the offence under section 138 of the Negotiable Instruments Act, it is only require to see that the instrument/cheque was issued for discharging of legal liability but said instrument (Cheque) has been dishonoured on the reasons that provided u/s 138 of the N.I. Act, including insufficient balance, stoppage of payment or any other reasons. So also,the

mandatory notice under section 138 of the Negotiable Instrument Act has been issued but even after service of said notice, the notice fail to comply with the mandatory notice.

12. Needles to say that the petitioners have not denied about service of mandatory notice u/s 138 of the Act. In the case in hand, the petitioners have not denied fact about issuance of cheque in question, which has been dishonored. According to the respondent/complainant, petitioner no.1 issued a cheque on it's account. The petitioners No.2 to 14 are the partners of the said firm, who are responsible for day to day transaction of the Petitioner/Accused No. 1 Firm. It is an admitted fact that, said cheque was presented for encashment on 21.09.2019, but it was returned unpaid with an endorsement "due to insufficient balance" on 22.01.2019. The respondent/complainant issued a mandatory notice on 08.02.2019, however, the said notice not been complied. Therefore, the learned Trial Court, on satisfaction and application of mind, passed the impugned order and issued process against the petitioners/accused persons. Therefore, impugned order does not appear to be illegal, bad in law.

13. It would be worthwhile to mention that, at the time of issuing process under Sec. 204 of Cr. P. C., the learned Magistrate requires to satisfy about existence of necessary ingredients to constitute an offence u/s 138 of the N I Act. The defence of the petitioners/accused are not required to consider.

14. As per the case details generated from the website of this Court it appears that, the present petitioners have filed the present petition on 04.07.2024 for challenging the order dated 04.10.2019 but after lapse of 4 years 11 months 25 days, the petitioners have got listed the matter first time, and it does not appear that the petitioners are vigilant about their right.

15. Irrespective of above facts, the petitioners have availed the remedy under Articles 226, 227 of the Constitution of India r/w Sec. 482 of Cr. P. C., after lapse of 4 years 11 months 25 days and prayed for quashing of order of issuance of process passed by the learned Magistrate on 04the October, 2019 in SCC No. 1658.

16. It is trite settled principle of law that, order of issuance of process is not interlocutory order, therefore, remedy under section 397 of the Code of Criminal Procedure is available. However, the petitioners have approached this Court under Articles

226, 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, seeking to quash the order of issuance of process after lapse of 4 years 11 months 25 days.

17. In ***Mrinmoy Maity Vs. Chhanda Koley, AIR 2024 SC 2717***, the Hon'ble Supreme Court in paragraph Nos. 9 to 11 held thus:

> *"9. Having heard rival contentions raised and on perusal of the facts obtained in the present case, we are of the considered view that writ Petitioner ought to have been non-suited or in other words writ petition ought to have been dismissed on the ground of delay and latches itself. An applicant who approaches the court belatedly or in other words sleeps over his rights for a considerable period of time, wakes up from his deep slumber ought not to be granted the extraordinary relief by the writ courts. This Court time and again has held that delay defeats equity. Delay or latches is one of the factors which should be born in mind by the High Court while exercising discretionary powers Under Article 226 of the Constitution of India. In a given case, the High Court may refuse to invoke its extraordinary powers if laxity on the part of the applicant to assert his right has allowed the cause of action to drift away and attempts are made subsequently to rekindle the lapsed cause of action.*
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> *10. The discretion to be exercised would be with care and caution. If the delay which has occasioned in approaching the writ court is explained which would appeal to the conscience of the court, in such circumstances it cannot be gainsaid by the contesting party that for all times to come the delay is not*

to be condoned. There may be myriad circumstances which gives rise to the invoking of the extraordinary jurisdiction and it all depends on facts and circumstances of each case, same cannot be described in a straight jacket formula with mathematical precision. The ultimate discretion to be exercised by the writ court depends upon the facts that it has to travel or the terrain in which the facts have travelled.

11. For filing of a writ petition, there is no doubt that no fixed period of limitation is prescribed. However, when the extraordinary jurisdiction of the writ court is invoked, it has to be seen as to whether within a reasonable time same has been invoked and even submitting of memorials would not revive the dead cause of action or resurrect the cause of action which has had a natural death. In such circumstances on the ground of delay and latches alone, the appeal ought to be dismissed or the applicant ought to be non-suited. If it is found that the writ Petitioner is guilty of delay and latches, the High Court ought to dismiss the petition on that sole ground itself, in as much as the writ courts are not to indulge in permitting such indolent litigant to take advantage of his own wrong. It is true that there cannot be any waiver of fundamental right but while exercising discretionary jurisdiction Under Article 226, the High Court will have to necessarily take into consideration the delay and latches on the part of the applicant in approaching a writ court. This Court in the case of Tridip Kumar Dingal and Ors. v. State of W.B and Ors., (2009) 1 SCC 768 has held to the following effect:

> *56. We are unable to uphold the contention. It is no doubt true that there can be no waiver of fundamental right. But while exercising discretionary jurisdiction Under Articles 32, 226, 227 or 136 of the Constitution, this Court takes into account certain*

factors and one of such considerations is delay and laches on the part of the applicant in approaching a writ court. It is well settled that power to issue a writ is discretionary. One of the grounds for refusing reliefs Under Article 32 or 226 of the Constitution is that the Petitioner is guilty of delay and laches.

57 . If the Petitioner wants to invoke jurisdiction of a writ court, he should come to the Court at the earliest reasonably possible opportunity. Inordinate delay in making the motion for a writ will indeed be a good ground for refusing to exercise such discretionary jurisdiction. The underlying object of this principle is not to encourage agitation of stale claims and exhume matters which have already been disposed of or settled or where the rights of third parties have accrued in the meantime (vide State of M.P. v. Bhailal Bhai [AIR 1964 SC 1006: (1964) 6 SCR 261], Moon Mills Ltd. v. Industrial Court [AIR 1967 SC 1450] and Bhoop Singh v. Union of India [SCC 136: (1992)]. This principle applies even in case of an infringement of fundamental right (vide Tilokchand Motichand v. H.B. Munshi [(1969) 1 SCC 110], Durga Prashad v. Chief Controller of Imports & Exports [(1969) 1 SCC 185] and Rabindranath Bose v. Union of India [(1970) 1 SCC 84]).

58. There is no upper limit and there is no lower limit as to when a person can approach a court. The question is one of discretion and has to be decided on the basis of facts before the court depending on and varying from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose.

18. No doubt in cases of ***Prabhu Chawala Vs. State of Rajasthan, (2016) 16 SCC 30, Vijay and another Vs. State of Maharashtra, (2017) 13 SCC 317, Mohit Vs. State of U.P. (2013) 7 SCC 789*** and ***Dhariwal Tobacco Products Ltd. Vs. State of***

Maharashtra (2009) 2 SCC 370, the Hon'ble Apex Court held that, section 397 of the Code of Criminal Procedure is attracted against all orders than interlocutory, a contrary view would limit the availability of inherent powers under section 482 of the Code of Criminal Procedure only to petty interlocutory orders. A situation which is wholly unwarranted and undesirable. The three Judges Bench has confirmed the law that laid down by this Court in ***Dhariwal Tobacco Products Ltd.*** (cited supra). Therefore, mere availability of alternative remedy cannot be a ground to disentitle the relief under section 482 of the Code of Criminal Procedure.

19. In case on hand, it appears that, the petitioners have not brought any exceptional circumstances on record, which has been observed by the Hon'ble Supreme Court in ***Dhariwal Tobacco Products Ltd.*** (cited supra). It is a well settled principle of law that, the order of issuance of process does not come within the ambit of interlocutory order and revision against the order of issuance of process is maintainable as per the ratio laid down in case of ***Rajendra Kumar Sitaram Pande & Ors vs Uttam & Another, AIR 1999 SC 1028.***

20. In view of the above discussion, I do not find that the impugned orders is perverse, illegal or bad in law and no grounds are set out to interfere with the order of issuance of process passed by the learned Trial Court. Accordingly, the Criminal Writ Petition is dismissed.

[Y. G. KHOBRAGADE]
JUDGE

S. P. Rane