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915 cri wp 1413.24

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

915 CRIMINAL WRIT PETITION NO. 1413 OF 2024

**ASAD KHAN ALI KHAN PATEL
VERSUS
SUBODH MOHANLAL MATHUR**

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Advocate for the Petitioner : Mr. Muthiyan Namit Sunil

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**CORAM : Y.G. KHOBRAGADE, J.
DATE : 09.10.2024**

PC.:-

1. Heard the learned counsel for the Petitioner. None appeared for the Respondent.

2. The Petitioner has invoked the jurisdiction of this Court under Article 226 and 227 read with Section 482 of the Cr.P.C., and impugned the judgment and order dated 05.07.2024 passed by the learned Additional Sessions Judge, Aurangabad in Criminal Revision No.335/2023 arising out of order dated 12.08.2023 in SCC No.7427/2023, whereby the process under Section 138 of the Negotiable Instruments Act (for short the N.I. Act) was issued against the Petitioner-Accused.

3. The present Petitioner is the Original Accused in Complaint SCC No.7427/2023 instituted by the Respondent for the offence punishable under Section 138 of the N.I. Act. On 12.08.2023, the learned Magistrate passed an

order and issued process as against the Petitioner-Accused for the offence punishable under Section 138 of the N.I. Act. Being aggrieved by the said order the Petitioner-Accused filed a Criminal Revision No.335/2023 before the Sessions Court, Aurangabad. After hearing both the sides, on 05.07.2024, the learned Additional Sessions Judge, Aurangabad dismissed the revision of the Petitioner. Being aggrieved by the said order, the present Petitioner instituted the present Petition.

4. The learned counsel appearing for the Petitioner canvassed that the Respondent/Complainant instituted a complaint mainly on the ground that in the month of July-2020 the Petitioner-Accused approached him with a request for providing hand loan for extension of Medical Shop. The Petitioner/Accused agreed to pay interest @ 2.5% per month on the loan amount. Later, frequently within a period of two years the Petitioner/Accused asked the loan for Car Seva Shop and furniture etc. Accordingly, the Respondent-Complainant provided hand loan on different dates as described in para no.4 of the complaint w.e.f. 05.05.2021 till 07.10.2021 i.e. total amount of Rs.1,50,20,000/-. Therefore, the learned counsel for the Petitioner canvassed that as per the pleadings of the Respondent-Complainant, it itself constitute money lending transactions between the complainant and the Petitioner-Accused. Therefore, there is no legal liability as against the

Petitioner-Accused. Therefore, the learned trial Court ought to have refused to issue the process but the learned Revisional Court failed to appreciate the fact of money lending transaction. Therefore, both the Courts below failed to consider the facts and law. Therefore, the impugned judgment and order as well as order the passed by the learned Magistrate is illegal, bad in law and hence, prayed for quashing and setting aside the same.

5. In support of these submissions the learned counsel appearing for the Petitioner placed reliance on the order dated 02.08.2022 passed by a Co-ordinate Bench of this Court in the case of ***Mrs. Monica Sunit UjjainV/s. Sanchu M. Menon and Ors.*** (Coram : Prakash D. Naik, J.), wherein this Court held that in cases of money lending business without license the provisions of Section 138 of the N.I. Act are not attracted.

6. In the case in hand, it *prima facie* appears that the present Petitioner-Accused issued two cheques one bearing no.4971 dated 01.06.2023 for an amount of Rs.1,50,00,000/- and another cheque bearing no.4972 dated 01.07.2023 for an amount of Rs.50,00,000/- drawn on AU Small Finance Bank, Jalna Road, Aurangabad Branch in favour of the Respondent. There is no dispute that both these cheques were dishonored and returned unpaid on the ground that the account was blocked. Therefore, the Respondent issued a mandatory notice on 12.06.2023 which has been served upon the Petitioner-

Accused on 13.06.2023. However, the Petitioner-Accused failed to reply the said notice and also not complied with the notice. Needless to say after service of summons, the Petitioner appeared in the matter and challenged the order of issuance of process dated 12.08.2023 by invoking the jurisdiction under Section 397 of the Cr.P.C. before the Revisional Court only on the ground that the documents which have been produced by the Respondent-Complainant are contrary to the provisions of the Money Lending Act. So also, the proceeding under Section 138 of the N.I. Act is not maintainable on the basis of illegal money lending transaction. Therefore, the issuance of process on the basis of illegal money transaction is illegal and bad in law.

7. On face of record, it appears that on 05.07.2024 the learned Revisional Court passed the impugned order and recorded the findings that though the Petitioner contended that as per the averments of the complaint there were money lending transactions and the cheque for an amount of Rs.50,00,000/- was issued towards the amount of interest, therefore, there is no enforceable liability against the Petitioner-Accused. However, the learned Revisional Court considered the documentary material available on record holding that the order of issuance of process dated 12.08.2023 was passed by the learned J.M.F.C. after considering the legal provisions and *prima facie* case. Since the Petitioner-Accused was served with the mandatory notice

under Section 138 of the N.I. Act and had called upon him to repay the amount. Therefore, the Petitioner-Accused had an opportunity to deny the said transaction or to set out defence at the first motion, however, the Petitioner-Accused kept silent and did not reply to said notice. *Prima facie*, for constitution of the offence and to issue the process for the offence punishable under Section 138 of the N.I. Act, it is the primary duty of the learned Magistrate to see whether the instrument had been issued by the accused and whether it is for the legal liability, it has been presented by the complainant in whose favour the cheque has been issued and the cheque/instrument has been dishonored on any other ground which has been specified. Nonetheless, even if it is presumed that the Respondent/complainant provided hand loan to the Petitioner/Accused on interest for some duration, it itself does not constitute that the Respondent was running money lending business. Therefore, I do not find any force in the submissions canvassed on behalf of the Petitioner.

8. In the case in hand on 12.08.2023, the learned J.M.F.C. passed an order below Exh.1 in SCC No.7427/2023 observing as under:

“2. The cheque (Exh.3/1) shows that it is prima facie signed by accused. It is settled that only signatory to the cheque can be prosecuted for the offence punishable under section 138 of the Negotiable Instruments Act, 1881. All essential ingredients of the offence punishable under section 138 of the Negotiable Instruments Act, 1881 are prima-facie made out against accused. Hence, as per the directions given by Hon'ble Apex Court in Indian Bank Association & others Vs. Union of Indian & Others, AIR 2014 SC

2528, cognizance of offence punishable under section 138 of the Negotiable Instrument Act, 1881 is taken. Thus, I pass following order:

ORDER

Issue process against accused for an offence punishable under section 138 of the Negotiable Instrument Act, 1881.”

9. On perusal of the impugned judgment and order dated 05.07.2024, it *prima facie* appears that the learned Revisional Court considered all necessary ingredients, which constitutes offence punishable under Section 138 of the N.I. Act. The learned Revisional Court further held that due to friendly relations the Respondent/Complainant provided hand loan to the Petitioner-Accused and in order to refund the same hand loan, the cheques which are the subject matter of the complaint were issued but said cheques were dishonored. Therefore, the controversy in the matter cannot be adjudicated at a ascent stage and the revision was dismissed, which does not appear illegal or perverse. Needless to say that the defence of the Petitioner/Accused cannot be considered while taking the cognizance of the offence, which *prima facie* was made out against accused but the said defence may be considered after conclusion of the trial. Therefore, I do not find any reason to interfere with the findings recorded by the learned Revisional Court. Accordingly, the petition is dismissed.

[Y.G. KHOBRADE, J.]