(2019) 08 BOM CK 0026

In the Bombay High Court

Case No : Criminal Writ Petition No. 600 Of 2004

Mahavir Babagonda Patil And Ors — APPELLANT

Vs

M/s. Tirupati Traders And Ors — RESPONDENT

Date of Decision : 08-08-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138
Indian Penal Code, 1860 — Section 420
Code Of Criminal Procedure, 1973 — Section 204

Citation : (2019) 08 BOM CK 0026

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : Prabhakar M. Jadhav, Vishwajit Sawant, M.R. Tidke

Final Decision : Dismissed

Judgement

1. Rule. Rule made returnable forthwith, with consent of parties heard finally.

2. This Petition taken an exception to the order dated 3rd April 2003 of issuance of process passed by the learned J.M.F.C. at Pune and also 23.12.2003 passed by the 4th Additional Sessions Judge, Pune in Criminal Revision Application No. 864 of 2003 filed by the Petitioners rejecting the application of the Petitioners for recall of process issued under Sections 138 of the Negotiable Instruments Act, 1881 (for Short the said Act)

3. Brief facts leading for filing the present Petition can be summarized as under:

The Respondent No. 1 is a partnership firm represented through its partner, has filed Criminal Complaint No. 3844 of 2003 in the Court of Judicial Magistrate First Class, at Pune against the Petitioners and Respondent Nos. 2 and 3 above named. It is contended by the Respondent No. 1 in the complaint that, it is a stockist and distributor of various types of refined and non refined oil and oil products. The Respondents no. 1 deals in distribution of said oil in bulk as well as retail, packed and non packed oil. In the said complaint it is stated that, the petitioners are the partners of Arihant Trading Company, and the Respondent No. 1 used to trade oil with the said firm. It is further stated that the partners of the said firm have assured payment for the bulk oil tankers by the Respondent No.1 to the said firm, and the said firm is deemed to be a party to the complaint. It is further stated that, from time to time Respondent No. 1 has supplied to the accused i.e. the Petitioners, and Respondent Nos. 2 and 3 oil tankers and, as on 30.09.2002 the account of the accused in the complaint shows debit balance of Rs. 35,26,997/- and that the accused had failed and neglected to pay the price of oil supplied to the accused along with interest at the rate of 2% per month towards compensation for loss of interest from the due date till actual realization. It is further stated that, towards the charge of legally enforceable debts and in discharge of the dues payable by the Petitioners, the accused expressly represented to the Respondent No. 1 that some amount is payable by accused no. 1 and 2 to the accused No. 3 to 6 i.e. is one Mahavir Trading Company and its sole Proprietor, to the Petitioners, and the same can be adjusted directly through said Mahavir Trading Company and its Proprietor making payment to the Respondent no. 1 - Complainant, and accordingly the accused accepted the said adjustment and have issued the enumerated cheques in favour of the complainant, in discharge of the debts of accused no. 3 to 6 alleged to be payable to the Respondent No. 1 - Complainant. It is further alleged that the Petitioner would provide discharge to Respondent No. 2 and 3 for the amount of Rs. 15 Lacks paid by the said cheques to the Respondent No. 1. It is further alleged that, the said cheques were presented as per the specific instructions of the accused for collection in the bank account with Pune People's Co-operative Bank Ltd, which were allegedly returned under the bankers memo dated 21.02.2003 with endorsement "Account is Closed". It is alleged that, the Respondent No. 1 received knowledge of dishonour through the invoice of the banker or about 26.02.2003. It is also alleged that, the said cheques were physically handed over by accused no. 4 i.e. the Petitioner No. 2, to the Respondent No. 1 and provided the particulars of the accused nos. 1 and 2 with the request to get the amount collected to banker. It is further alleged that, the complainant agreed to give credit of the said cheques amounts to the Petitioners, and amount from their alleged dues of Rs. 35,26,997/-. On these allegations, the Respondent No. 1 has contended that, the accused in the complaint had jointly and severally committed an offence punishable under Chapter XVII and Section 138 of the Negotiable Instruments Act. It is also stated that, accused have in this manner joined hands and cheated the complainant and committed on offence punishable under provisions of Section 420 of the Indian Penal Code.

4. On 03.04.2003 learned Judicial Magistrate First Class (A.C) by an impugned order issued process against the petitioners under Section 138 of the said Act.

5. The petitioners filed an application under Section 204 of the Cr.P.C for recall of process issued against the Petitioners.

6. On 01.11.2003 the application filed by the Petitioners was not entertained on

the ground that, application require an adjudication of said evidence in order to prove the complaint, and as case is fixed for evidence an application will be considered after recording entire evidence on record.

7. Being aggrieved by the said order petitioners preferred Criminal Revision Application No. 846 of 2006 before the Sessions Court at Pune.

8. Learned Addl. Sessions Judge, Pune by an order dated 23.12.2003 rejected the Revision filed by the Petitioners. Hence this Writ Petition.

9. Learned counsel appearing for the Petitioners submit that, the complaint did not disclose any cause of action for the purpose of issuing process against the Petitioners since the cheques alleged to have been issued by the Petitioners did not bear signatures of any of the Petitioners. Both the courts below have not considered that the cheques were not issued from the bank account maintaining the name of the Petitioners. Petitioners are not concern in any manner for issuance of such cheques. There is no privity of contract between the Petitioners and the Respondent Nos. 1 to 3. It is submitted that, an alleged cheques mentioned in the complaint were not issued to discharge any legal dues and liability of the Petitioners. It is submitted that, no any tripartite agreement between the complainant, the Petitioners and person issuing the cheques was entered into. Learned counsel also invites attention of this Court to the grounds taken in the Petition and submits that, the Petitioners have not signed the cheques and therefore, order issuing process deserves to be set aside. It is submitted that the Supreme Court in the case of Jugesh Sehgal Vs. Shamsher Singh Gogi reported in (2009) 14 SCC 683 has taken a view that, to constitute an offence under Section 138 of the Negotiable Instruments Act, 1881 following ingredients are required to be fulfilled:

(i) a person must have drawn a cheque or an account maintained b him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) the cheque should have been issued for the discharge, the whole or in part, of any debt or other liability;

(iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account b an arrangement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money of the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

10. Learned counsel submits that, since the petitioners have not singed the cheques, neither they are under obligation to pay the amount mentioned in the cheques, the Petition may be allowed thereby set aside the impugned orders.

11. Though contesting Respondent is served none appears for the contesting Respondent Nos 1 to 3. Learned APP relying upon the reasons assigned by the Courts below submits that the petition may be rejected.

12. Heard learned counsel appearing for the Petitioners and learned APP appearing for the State at length, with their able assistance perused the pleadings and grounds taken in the Petition and annexures thereto. It appears that, the present Petitioners filed application under Section 204 of Cr.P.C. The Supreme Court in the case of Adalat Prasad versus Rooplal Jindal and others (2004) 7 SCC 338 held that, the Court, who has issued process, has no power of review its order of issuance of process, and hence order of issuing process cannot be recalled. In the present case, petitioner preferred an application for recalling the order of issuance of process passed by the learned Magistrate, which was not tenable in view of law laid down in the case of Adalat Prasad (supra). Hence, the application preferred by the petitioner was not maintainable.

13. Therefore, the issue of maintainability of the application filed by the petitioner under Section 204 of the Cr.P.C. goes to the root of the matter, in as much as, the application filed by the petitioners itself was not maintainable in law and therefore, adjudication of such application by the Courts below was not called for being not maintainable. So far other grounds taken by the Petitioner in the Petition, the Petitioners will get opportunity before the Trial Court to contest the Proceedings. However, in view of the settled position in law in Adalat Prasad (supra), the application filed by the petitioners under Section 204 Cr.P.C. itself was not maintainable and therefore, the Petition deserves no consideration. Hence, Writ Petition stands dismissed. Rule stands discharge.

