

(2012) 12 BOM CK 0081

In the Bombay High Court

Case No : Criminal Application No's. 164, 165, 166, 167, 168, 169, 170, 171 and 172 of 2012

Mrs. Jayanthi Senthil Nathan

APPELLANT

Vs

Kotak Mahindra Bank Ltd. and Another

RESPONDENT

Date of Decision : 13-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 252, 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13

Citation : (2012) 12 BOM CK 0081

Hon'ble Judges : K.U. Chandiwal, J

Bench : Single Bench

Advocate : N.K. Thakore and Mr. Prakash Naik, for the Appellant; Jatin P. Shah and Mr. A.R. Patil, APP for State, for the Respondent

Final Decision : Dismissed

Judgement

K.U. Chandiwal, J.—Heard extensively. These nine petitions deal with common question of law and facts. Hence, by consent, taken together. Heard finally. This is second round of litigation in this Court initiated by the petitioners questioning legality, propriety of orders of issuance of process. In the first round the canvass projected was, in respect of want of service of statutory notice u/s 138 of the Negotiable Instruments Act and jurisdictional inquiry u/s 202 (amended provisions) of Cr. P.C. The petitioners by order dated 24.9.2010 failed in the respective criminal applications, same was questioned before the Hon''ble Supreme Court and the petitions before the Hon''ble Supreme Court were also dismissed.

2. Mr. Thakore, the learned Counsel for petitioners contended, there could not be multiple proceedings permitted to the bank as a creditor to initiate against the petitioners-the borrower. He states that loan of Rs. 12 crores was availed by the petitioners, Rs. 6 crores each, and for that purpose indeed there was a

memorandum of understanding/ agreement entered into between the bank and the petitioners dated 10.9.2007 which is annexed at pages 37 to 39 of the petition. The learned Counsel submits, in the light of the memorandum of understanding, and further the bank having initiated proceedings before the Debt Recovery Tribunal, exhausted the same, acted in terms of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short "SARFAESI Act) 2002, the bank could not take recourse of filing proceedings u/s 138 of the Negotiable Instruments Act. The learned Counsel has, by placing reliance on the judgment of the Supreme Court in the matter Transcore Vs. Union of India (UOI) and Another, , has repeated his point. The learned Counsel submits that since the loan was released by the bank, if without any security, it is in violation of RBI guidelines, consequently could not be treated as legally enforceable debt in terms of Section 138 of the Negotiable Instruments Act.

3. The submissions more leans to ask this Court to refer to MOU dated 10.9.2007, basically cannot be looked into as the defence in terms of Section 482 of Cr. P.C., as the document is wanting proof. It is a matter of record, genuineness of the document is yet to be translated in the evidence which opportunity the petitioner has not yet taken, as the bank is not confronted to meet it. At this stage in the above situation, the Memorandum of Understanding would not insight any belief to be acted upon, it ignite suspicions about its truthfulness. However, to repeat it is left to adjudicate upon before the competent authority.

4. The limb of submission of suppression of facts by the bank as the complainant, is again contrary to the record. In the complaint in paragraphs 5, 6 and 7 in unequivocal terms the nature of transactions of 600 lakhs term loans dated 5.1.2008 and sanctioning the same under valid documents executed, signed by the accused in favour of the bank/complainant, is demonstrated. It is not that merely based on issuance of cheques subject of the prosecution, the bank has come forward against the petitioners. I do not see, it is imperative for the bank to have referred in the proceedings u/s 138 of the Negotiable Instruments Act, to the so called M.O.U. since the bank was banking on the theory of advancing term loans supported with the documents referred in paragraphs 5 & 6 of the complaint.

5. The principles of election placed reliance by the learned Counsel by referring to the Apex Court judgment, is not applicable with the force. Paragraphs 44 and 46 of the said judgment of the Apex Court, indeed demonstrate the dual obligation in respect of same transaction and in the process of election, there should be existence of two or more remedies, inconsistencies between such remedies and choice of one of them. The view taken by the High Court in the said proceedings of applicability of doctrine of election was quashed and set aside by the Hon''ble Supreme Court. Incidentally, the said matter was arising out of banking transaction and taking recourse to the process of securitisation and

proceedings under DRT. Apex Court did not find fault with action of bank.

6. The learned Counsel for Bank/complainant has pointed, the plea is already recorded in the matter which is not disputed by the petitioners. The legal position is indicated by the Hon''ble Supreme Court in the matter of Subramaniam Sethuraman Vs. State of Maharashtra and Another, , referring to paragraph 16 thereof. Mr. Thakore, the learned Counsel for petitioners has, to controvert the contention, invited my attention to paragraph 19 of the said judgment.

Keeping both paragraphs in juxtaposition, there cannot be a contest to the view expressed by the Hon''ble Supreme Court that once the plea is recorded u/s 252 of Cr. P.C., the procedure contemplated under Chapter XX has to be followed which is to take the trial to its logical conclusion. On this count also the petitions fail.

7. It was rightly pointed by the learned Counsel for respondents that M.O.U. Dated 10.9.2007 repeatedly recoiled, is not reflected in any of the pleadings in earlier round of litigation in Criminal application no. 1332 of 2010 and the group matters. I quite see, there was no injunction against the petitioners, not to refer the same.

8. The submissions in respect of legality of action of the bank in the light of M.O.U. or the loan documents or action having taken place in DRT or the petitioners questioned the action in the appellate forum at Chennai, are the matter of defence to be taken to its logical end at the time of trial, confronting the bank witnesses to face the same. However, at this stage of the matter this aspect cannot be considered. The applications lack merits, dismissed. The observations are prima facie in nature, not to be treated as conclusion in respect of either agreement dated 10.9.2007 or the stand of the term loan of Rs. 600 lacs canvassed by the respondent-bank.