(2019) 08 BOM CK 0034

In the Bombay High Court

Case No : Criminal Writ Petition No. 3362, 3363, 3364, 3365, 3366 Of 2019

Prakash Nanji Thakkar — APPELLANT

Vs

State Of Maharashtra And Anr — RESPONDENT

Date of Decision : 07-08-2019

Acts Referred:

Hindu Marriage Act, 1955 — Section 9, 24
Negotiable Instruments Act, 1881 — Section 118, 138, 138(b), 139
Code Of Criminal Procedure, 1973 — Section 202, 239, 252, 482

Citation : (2019) 08 BOM CK 0034

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

Bench : Single Bench

Advocate : Kamlesh Jain, M.R. Tidke, Yashpal Thakkar, Pravina A Thakkar

Final Decision : Dismissed

Judgement

1. The above group of five Petitions has been filed by the Petitioner, original accused, challenging the order dated 06/06/2019 passed by the learned Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai. By the said order the Trial Court directed the Petitioner to pay interim compensation to the complainant which is 20% of the cheque amount within 60 days from the date of the said order.

2. It appears that the 5 cheques, alleged to have been issued by the Petitioner in favour of the contesting Respondent, have got dishonoured on being presented in Bank of Respondent No.2, therefore, 5 complainants have been filed by Respondent No.2 against the Petitioner in the Trial Court and, the Trial Court has passed five separate orders dated 06/06/2019. Hence these five Petitions.

3. By consent of the learned counsel for the parties, Writ Petition No.3362 of 2019 is treated as a lead matter.

4. Rule, with the consent of the learned counsel for the parties made returnable and heard forthwith.

5. The facts giving rise to filing of the above Petition in a nutshell can be stated thus:

The Petitioner herein is the husband of Respondent No.2 herein who is original complainant. The Petitioner got married to Respondent No.2 on 27/04/2012. The Petitioner was earlier married to one Mrs. Heena Prakash Thakkar who expired on 16/01/2012 and after the death of his first wife, he got married to Respondent No.2. It is the case of the complainant that after 6 months of the marriage, Respondent No.2 came to know about her husband i.e. the Petitioner herein receiving untimely calls, text and whatsapp message from his office employee Deepali to which Respondent No.2 objected. When Respondent No.2 objected, the Petitioner started quarreling with her and declared that he is having intimate relations with the said Deepali. It is the case of Respondent No.2 that whenever she demanded money from the Petitioner for grocery and household expenses, he refused to give. It is the case of Respondent No.2 - complainant that the Petitioner pressurized for signing certain papers by stating that those papers were the applications for dissolving marriage. It is her case that the Petitioner was ill treating her and giving harassment. It is the case of Respondent No.2 that ultimately Petitioner insisted her that if she signs a Petition for divorce by mutual consent, then the Petitioner would arrange a residential accommodation of 2BHK for complainant at Mulund and pay her a lump-sum alimony of Rs.1,30,00,000/-for dissolving their marriage. The Petitioner then gave a sum of Rs.80,00,000/- as a part alimony and promised to arrange a flat in her name and to pay further balance amount by post dated cheques in her name. Accordingly the Petitioner issued 25 cheques of Rs.2,00,000/- each. Out of the said cheques, Respondent No.2, on instructions of Petitioner, deposited five cheques in her Axis Bank ltd. Mazgaon Branch, Mumbai. It is the case of Respondent No.2 complainant that the said five cheques got dishonoured with remark "account closed". The complainant sent a demand notice dated 13/02/2019 to the Petitioner, which has been replied by the Petitioner. Since the amount of cheques was not released, Respondent No.2-complainant filed the present complaints against the Petitioner.

6. After filing the complaint, the learned Metropolitan Magistrate recorded the verification statement of the original complaint and issued process/summons against the Petitioner/accused by order dated 08/04/2019.

7. It is the case of the Petitioner that way back in March 2018, the Petitioner sent a notice under Section 9 of the Hindu Marriage Act to Respondent No.2 Complainant thereby requesting her to return to her matrimonial home and further seeking restitution of conjugal rights. It is stated in the said notice that the complainant has left the Petitioner in the month of December 2016 after inducing the Petitioner to pay a sum of Rs.80,00,000/- in the month of November 2016 in her account for a joint investment purpose. By the said notice the Petitioner called upon the complainant to bring back Rs.80,00,000/- which she took away from the Petitioner under the pretext of joint investment. The said

notice was replied to by the original complainant through her advocate's reply dated 30/03/2018. Since Respondent No.2 - original complainant did not return to her matrimonial home, the Petitioner filed Petition under Section 9 of the Hindu Marriage Act in the Family Court, Thane. Respondent No.2 replied to the said Petition filed by the Petitioner. Thereafter Respondent No.2 original complainant moved an application under Section 24 of the Hindu Marriage Act before the Family Court which was replied to by the Petitioner. Thereafter the Petitioner has received a demand notice dated 13/02/2019 from the original complainant in respect of dishonour of 5 cheques of Rs.2,00,000/- each. The Petitioner has replied the said demand notice by his reply dated 28/02/2019. Respondent No.2 - original complainant sent a rejoinder dated 08/03/2019. The said rejoinder was also replied by the Petitioner vide his letter dated 20/03/2019.

8. Thereafter Respondent No.2 original Complainant has filed complaint against the Petitioner under Section 138 of the Negotiable Instruments Act before the learned Metropolitan Magistrate, 20th Court, Mazgaon at Sewree, Mumbai. As stated herein above, the learned Metropolitan Magistrate issued process/ summons against the Petitioner under Section 138 of the Negotiable Instruments by order dated 08/04/2019. Thereafter the learned Magistrate recorded a plea of the Petitioner and, by order dated 06/06/2019 directed him to deposit 20% of the cheque amount as interim compensation. It is the said order dated 06/06/2019 passed by the learned Magistrate which is taken exception to by way of the above Writ Petition.

9. Heard the learned counsel for the parties.

10. The learned counsel appearing for the Petitioner/Accused invites this Court's attention to the allegations made in the complaint and submits that even if the said allegations are read in its entirety, the alleged offence is not disclosed. There are no supporting documents placed on record by the complainant to prove the averments made in the complaint. It is submitted that what is alleged in the complaint is that, there was understanding between the Petitioner/Accused and, Respondent No.2/Complainant that the Petitioner insisted Respondent No.2 for signing the papers for taking divorce by mutual consent. It is submitted that there was no such request made by the Petitioner, and whatever stated in the complaint is only imaginary. It is also submitted that, even if the allegations are read in its entirety, no offence as alleged is made out. It is further submitted that there is no legally enforceable debt or liability, and therefore, at the threshold if the Petitioner has demonstrated that there is no legally enforceable debt or liability, in that case the complaint filed by Respondent No.2 deserves to be quashed and set aside. The learned counsel for the Petitioner also invites this Court's attention to the unreported judgment of the Delhi High Court in the case of Harish Kapoor v/s. Akansha Gupta in Cri. M C. 3869/2007 decided on 04/12/2008.

In response to the preliminary objection raised by the learned counsel for the contesting Respondent/Complainant that since the plea of the Petitioner has been recorded by the Trial Court, and therefore, this Court may not entertain the present Petitions by invoking the writ jurisdiction and jurisdiction under Section 482 of the Criminal Procedure Code, the learned counsel for the Petitioner submits that the jurisdiction under Section 482 of the Criminal Procedure Code can be invoked at any stage of proceedings. In support of the said contention, the learned counsel for the Petitioner sought to place reliance on the judgment of this Court (Coram : Prakash D Naik, J) in the case of Pradeep Khetshi Shah v/s. State of Maharashtra and ors in Criminal Writ Petition No.1727 of 2017 decided on 07/01/2019 reported in Laws(Bom)-2019-1-44. The learned counsel for the Petitioner also sought to place reliance on the judgment of the Apex Court reported in Laws (SC)-2018-11-14 in the case of Anand Kumar Mohatta and anr v/s. State (Govt. of NCT of Delhi) Department of Home and Anr. in support of the aforesaid contention.

It is also submitted by the learned counsel for the Petitioner that if the complainant has failed to demonstrate that the Petitioner/Accused has to discharge his legally enforceable debt/liability, in that case, the entire complaint is liable to be vitiated. He further submitted that merely a plea is recorded by the Trial Court is not a ground to decline exercising the jurisdiction under Section 482 of the Criminal Procedure Code.

11. On the other hand, the learned counsel appearing for Respondent No.2 - original complainant submits that, since the Trial Court has recorded the plea of the Petitioner and is in process of recording the evidence, and now the matter is posted for recording of evidence of PW-2, this Court may not cause any interference in the impugned order passed by the Trial Court. In support of the aforesaid contention, the learned counsel for Respondent No.2/complainant invites this Court's attention to the judgment of this Court (Coram : V M Kanade,J) in the case of Subhiksha Trading Services Ltd and ors v/s. Kotak Mahindra Bank Limited, a Banking Company and ors in Criminal Writ Petition No.523 of 2010 decided on 12/08/2010, and in particular paragraphs 9 and 10 thereof. The learned counsel for Respondent No.2/complainant also sought to place reliance on the judgment of the Apex Court reported in Manu/SC/0296/2015 in the matter of HMT Watches Ltd. v/s. M A Abida and ors. and in particular paragraph 10 thereof, and judgment of the Apex Court in Subramanium Sethuraman v/s. State of Maharashtra and ors, reported in Manu/SC/0770/2004.

It is further submitted by the learned counsel for Respondent No.2/complainant that if this Court undertakes adjudication of the issues/points raised by the Petitioner, it may amount to adjudication of the disputed questions of facts, which is not desirable while exercising the jurisdiction under Section 482 of the Criminal Procedure Code. It is submitted that the facts in the case of Pradeep Khetshi Shah (supra) are clearly distinguishable vis-a-vis the facts in the present case. In the said case, the Petitioner therein placed on record the documents of impeachable character and uncontroverted which would indicate that the

Petitioner therein resigned prior to issuance of the cheque and therefore in the facts of that case this Court held that the jurisdiction under Section 482 can be invoked in the appropriate cases even if the plea is recorded by the Trial Court.

12. Upon appreciation of the rival contentions and perusal of the pleadings and grounds taken in the Petition, annexures thereto and the averments made in the complaint, this Court is of the opinion that if the contention of the Petitioner that he did not ask Respondent No.2/Complainant to sign the papers so as to apply for mutual divorce, and further as a matter of fact no such Petition is filed, if considered, the same would lead to undertake an exercise of adjudication of disputed question of facts.. The contesting Respondent/complainant has made assertion in the complaint that the Petitioner had asked her to sign the papers so as to apply for mutual divorce with consent, and also he agreed to pay amount to the contesting Respondent/ complainant.. The contesting Respondent/ complainant in paragraph 9 of the complaint has also alleged as under :-

"9 I say that in the month of December 2016, the Accused paid me part alimony of Rs.80,00,000/- and promised to arrange a 2 BHK flat in my name at Mulund and further promised to pay the balance amount of lumpsum alimony by issuing post-dated cheques in my name from the bank account of the Accused, maintained by him with State of Bank of Hyderabad, Khandeshwar Branch, Navi Mumbai. At that time, the Accused signed and issued in my favo7ur, 25 post dated cheques of Rs.2,00,000/- each, all drawn on his Bank Account maintained with State Bank of Hyderabad, Khandeshwar Branch, Navi Mumbai and promised me that he had sufficient funds in his above referred bank account and that the said post dated cheques would be duly honoured when presented to the bank. I say that in this manner, the Accused through me out of the said premises by assuring that he would pay me lump sum alimony of rupees 1,30,00,000/- and arrange a 2 BHK flat in my name at Mulund, Mumbai.

13. Now coming to the contention of the learned counsel for the Respondent/ Complaint that since the plea of the Petitioner has been recorded by the trial Court, this Court may not entertain the present Petition. It is required to be noted that admittedly the plea of Petitioner has been recorded and the matter is in process of recording of evidence, and posted for recording of evidence of PW-2.. The Apex Court in Subramanium Sethuram's case (supra) has observed that once the plea of the accused is recorded under Section 252 of the Code, the procedure contemplated under Chapter XX has to be followed which is to take the trial to its logical conclusion. Paragraph 16 of the said judgment is material and is reproduce herein under for the sake of ready reference :-

"16 The next challenge of the learned counsel for the appellant made to the finding of the High Court that once a plea is recorded in a summons case it is not open to the accused person to seek a discharge cannot also be accepted. The case involving a summons case is covered by Chapter XX of the Code of which does not contemplates a stage of discharge like Section 239 which provides for a discharge in a warrant case. Therefore, in our opinion the High Court was correct in coming to the conclusion once the plea of the accused is recorded under Section 252 of the Code the procedure contemplated under Chapter XX has to be followed which is to take the trial to its logical conclusion."

The learned Single Judge in the case of Subhiksha Trading Services Ltd. (supra) has observed that if the plea has been, it will not be possible to interfere with the order of issuance of process. Paragraphs 9 and 10 of the said judgment are material and are reproduced herein under for the sake of ready reference:-

9. After having heard both the Counsel at length, in my view, no case is made out for interfering with the order of issuance of process. Firstly, in the present case, plea has already been recorded on 18.9.2009, affidavit by way of Examination-in-Chief of the Respondent No.1 Company's representative has been filed on 22.12.2009. The Apex Court, in the case of Subramanium Sethuraman v. State of Maharashtra, (para16, Nikumbh Dairy Products ltd. v. State of Maharashtra (para 9) and in respect of prosecution under other sections in the case of Ratilal Bhanji Mithani vs. State of Maharashtra, reported in AIR 1979 Supreme Court 94 and in the case of Nandkishor Rampal Lohiya and others v. State of Maharashtra, reported in 2001 Cri. L.J. 2742 has held that the High Court should not ordinarily interfere in its inherent jurisdiction after the plea is recorded and the recording of evidence has commenced. On this ground alone, in my view, it will not be possible to interfere with the order of issuance of process. However, since both the parties argued the matters on these points at length, it is necessary to briefly consider the submissions made by the learned Senior Counsel for the Petitioners.

10. So far as question of existence of debt or liability is concerned, it is quite well settled that this issue has to be decided only during the trial and cannot be decided earlier in view of the presumption under sections 118 and 139. of the Negotiable Instruments Act. Though reliance is placed on one of the documents to show that the credit facility was extended till 31st January, 2009. This fact has been disputed by the Complainant and,therefore, it cannot be gone into by this Court under section 482 of the Criminal Procedure Code. On the question of territorial jurisdiction also, the cheque which was issued was "At Par" cheque and, as such,could be deposited at any of the branches of the drawee bank and, therefore, the Complainant was informed to deposit the same in Mumbai Branch because it being a "At Par" cheque. Secondly, the registered office of the Complainant is at Mumbai, the notice was issued from Mumbai and further the credit facilities were also sanctioned from Mumbai and, therefore, in view of the judgment of the Apex Court in the case of K.Bhaskaran v. Sankaran Vaidhyan Balan & Anr. Reportedin 1999 (4) ALL MR 452 and also the judgment of the Division Bench of this Court in the case of Preetha Babu v. Voltas Ltd. and Ors., the judgment of the Bombay High Court dated 3rd February, 2010 in Criminal Application No. 3158 of 2010 and judgment of the Apex Court in Samshad Begum v. B. Mohammed, reported in AIR2009 SC 1355, the Bombay Court, therefore, will have jurisdiction to try and decide the case. Lastly, it was argued

that the provisions of section 202 of the Cr.P.C. have not been applied to the present case. This Court in the case of Bansilal S.Kabra vs. Global Trade Finance Ltd. &. Anr., decided on 9th July, 2010and 29th July, 2010 passed in Criminal Application No.1344 of 2010, has held that the said provision is directory and not mandatory. In another judgment of the Learned Single Judge of this Court wherein it has been held that the said provision is mandatory. However, the Learned Single Judge in the said case was pleased to decide the said case, however, proceeded to consider the cases wherein the accused had come to the Court at a belated stage and was pleased to reject such applications which were filed in the High Court on the said ground. Therefore, merely because the issue has been referred to the Full Bench, it does not mean that all such cases wherein such issue is raised should be stayed."

The Apex Court in paragraph 10 of HMT Watches Ltd's case (supra) observed that whether the cheques were given as security or not, or whether there was outstanding liability or not, is a question of fact which could have been determined only by the trial Court after recording evidence of the parties.. The said paragraph 10 is reproduced herein under for the sake of ready reference :-

"10. Having heard learned counsel for the parties, we are of the view that the accused (respondent no.1) challenged the proceedings of criminal complaint cases before the High Court, taking factual defences. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties. The High Court further erred in observing that Section 138(b) of N.I. Act stood uncomplied, even though the respondent no.1 (accused) had admitted that he replied the notice issued by the complainant. Also, the fact, as to whether the signatory of demand notice was authorized by the complainant company or not, could not have been examined by the High Court in its jurisdiction under Section 482 of the Code of Criminal Procedure when such plea was controverted by the complainant before it."

In the light of aforesaid discussion, this Court is of the opinion that, whether there was any agreement between the Petitioner/Accused and Respondent No.2/ complaint would be a matter for appreciation of the contentions. of the parties. by the. trial Court.. It would depend upon appreciation of evidence, and the documents filed in the Trial Court.. In a given case there may be oral agreement or written agreement as the case may be.. In the facts of the case, the complaint has been filed by Respondent No.2/complainant against her husband i.e. the Petitioner herein, and therefore, what transpired between them would be difficult to visualized unless the averments made in the complaint and the documents placed on record are tested before the Trial Court.

14. The jurisdiction under Section 482 of the Criminal Procedure Code, can be exercised at any stage of the proceedings, however, it will depend upon the facts and circumstances of each case. If the documents of impeachable character or uncontroverted are placed on record, in a given case, this Court may endeavour to invoke the jurisdiction under Section 482 of the Criminal Procedure Code, irrespective of the stage of proceedings before the trial Court. However, in the facts of the present case, the plea has already been recorded by the Trial Court, the PW-1 has already been examined and, PW-2 would be examined on next date. In that view of the matter, no case for interference is made out.

15. All the Petitions stand rejected. All contentions raised on merits are kept open for being agitated before the Trial Court. Needless to state that the observations made herein above are prima facie in nature and confined to the adjudication of the present Writ Petitions.

16. In the peculiar facts of the present case, since the complaint is filed by Respondent No.2 - wife against the Petitioner - husband under Section 138 of the Negotiable Instruments Act, it is desirable that the concerned Court shall expedite the hearing of the proceedings and take it to the logical ends as expeditiously as possible, however, on or before 30th September 2019, keeping in view the relevant provisions of the Negotiable Instruments Act as also the judgment of the Apex Court in the case of Indian Bank Association and others v/s. Union of India and others, reported in (2014) 5 SCC 590.

