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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION No. 3478 OF 2010

Nikhil Merchant & Ors.

...Applicants

Vs.

State of Maharashtra & Ors.

...Respondents

Mr. A. P. Mundargi, Sr. counsel i/b Ashish S. Chavan, for the Applicant.

Mrs. M. R. Tidake, APP for Respondent No.1.

Mr. Yashpal Thakur i/b Paras Kuhad Associates, for Respondent No.2.

CORAM: V. M. KANADE J.

DATE : AUGUST 30, 2010

P.C.

1. Heard the learned senior counsel for the applicant and the counsel for respondent No.2. The applicants are challenging the order of issuance of process dated 30th June, 2009, passed by the learned Magistrate, under Section 138 of the Negotiable Instruments Act.

2. Firstly, it is submitted on behalf of the applicants that the petitioners have already resigned prior to issuance of the cheques and intimation thereof was given to the Registrar of Companies. It is

submitted that the learned Magistrate has recorded the statement given by the complainant in a fixed format and therefore, the verification has not been properly recorded.

3. Reliance is placed on the decision of the learned Single Judge of this Court in the case of - Amarnath Baijnath Gupta & Anr. v. Mohini Organics Pvt. Ltd. & Anr. [2009 ALL MR (cri) 184]. It is submitted that in the verification the complainant has to state the role played by the accused, particularly when a complaint is filed under S. 138 of the N.I. Act. It is submitted that the verification does not mention the role of the present applicant. It is submitted that the Apex Court also held that the verification is part of the complaint. The recording of verification has to be done in a proper manner. Since the mandatory procedure has not been followed, the order of issuance of process on a defective verification is liable to be quashed. On the other hand, the learned counsel appearing on behalf of respondent No.2 submitted that plea of the accused has been recorded. The affidavit in lieu of evidence has been filed and the stage of the trial is 'cross-examination of the complainant'. It is therefore, submitted that at this stage no interference is called for by this Court.

4. Secondly, it is submitted that so far as resignation of the

applicants/Directors is concerned, it being a question of fact, cannot be decided at this stage. The learned senior counsel appearing on behalf of the applicants submitted that plea was recorded on the first date and therefore, merely because plea is recorded, that does not preclude this Court in exercising the jurisdiction under S. 482 Cr.P.C. to look into the submissions made by the applicants/accused.

5. In my view, since in this case the plea of the accused is already recorded and the affidavit-in-lieu of evidence has also been filed, it will not be proper to interfere with the order of issuance of process at this stage. The applicants, however, are exempted from appearing in the trial Court and their statement under S. 313 Cr.P.C. may be recorded through the advocate, subject to an undertaking to be furnished by them that they will not dispute the answers given by their advocate. Under these circumstances, the criminal application is dismissed with the above direction.

6. So far as the issue of verification in the case of *Amarnath Gupta (supra)* is concerned, in my view, it will be appropriate if the said issue is referred to the Division Bench or Full Bench, since as a result of this judgment in all cases where verification is recorded in a fixed format, practically most of the matters are required to be stayed. Office

is directed to place the said issue in the light of decision in the case of *Amarnath Gupta (supra)* before the Hon'ble Chief Justice, so that the decision can be taken to refer this issue to either the Division Bench or the Full Bench of this Court.

7. So far as issue of faulty verification is concerned, the same is kept open and the learned Magistrate shall decide the criminal complaint in accordance with the law.

[V. M. KANADE J.]