IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2281 OF 2008

Athena Financial Service Ltd and Ors .. Petitioners

Vs

State of Maharashtra and Ors .. Respondents

Shri. S.K. Jain with Shri. Madhav Jamdar, Mr. Shailesh Keote and Mr. Subhash Jadhav, Advocates i/b M/s. ALMT Legal for the petitioners

Shri. Abhay Nevgi, Advocate i/b M/s Paras Kuhad & Associates for respondent 2

Mr. A.S. Shitole, APP for the State.

CORAM : D.G. KARNIK, J.
DATE : 17th November, 2009

P.C.:

1. Rule. By consent, rule is made returnable forthwith.

2. Heard the learned counsel appearing for the parties.

3. Learned counsel for the petitioners states that respondent nos. 3 to 6 are the formal parties and no relief is claimed against them. Service to respondent nos. 3 to 6 is therefore, dispensed with.

4. By this petition, the petitioners challenge the order dated 11th October, 2006 passed by the learned Judicial Magistrate, First

Class, Pune issuing process under Sections 403, 406, 417, 420, 421, 422, 423, 424 read with Section 34 of the Indian Penal Code and the order dated 9th September, 2008 passed by the Additional Session Judge, Pune dismissing the revision application against that order.

5. Petitioner no. 1 is a company registered and incorporated under the Companies Act, 1956. At all relevant time, petitioner no. 2 was the chairman,petitioner no. 3 was the managing director and petitioner nos. 4 and 5 were the whole time directors / directors in employment of the petitioner no. 1.

6. Respondent no. 2 is a banking company and is a scheduled commercial bank. On the request of petitioner no. 1, respondent no. 2 granted to it working capital term loan of Rs. five crores on the terms and conditions contained in sanction letter dated 25th January, 2002. According to respondent no. 2, the petitioners diverted and used the money for a purpose other than the one for which the loan was sanctioned. Respondent No. 2 discovered not only several irregularities but also several fraudulent acts committed by the petitioners in or about December 2003, when petitioner no. 1 applied for Corporate Debt Restructuring (CDR) and in the special investigation audit. Respondent no. 2, therefore, filed a criminal complaint against the petitioners and other directors of the petitioner no. 1. By an order dated 11th October, 2006, the magistrate directed issuance of process. The order of issuance of process was challenged by the petitioners before the Sessions Court who by its order dated 9th September, 2008 dismissed the revision. Hence, the petitioners have approached this Court.

7. Learned counsel for the petitioners submitted that the complaint does not contain any averments about commission of offenses so far as accused numbers 6 to 11 (petitioner nos. 4,5,6,7 and respondent nos. 5 & 6 herein) were concerned. In response, the learned counsel for respondent no. 2 submitted that respondent no. 2 does not press any charges against original accused nos. 6 to 11 and the order of issuance of process so far as they are concerned, may be quashed. In view of this, the order of issuance of process so far as the original accused nos. 6 to 11 are concerned,is hereby quashed and set aside.

8. Learned counsel for the petitioners submitted that the complaint also does not disclose any offence by the accused nos. 1 to 3 i.e the company and its chairman, managing director and therefore order of issuance of process against petitioner no. 1 to 3 also needs to be quashed.

9. It is settled principle of law that the magistrate can refuse to issue process if averments made in the complaint taken at their face value do not disclose any offence. The magistrate is not required to ascertain and decide at the stage of issuance of process whether the averments made in the complaint are not true or not likely to be proved. At the stage of issuance of process, the magistrate is required only to consider that whether the averments made in the complaint, if proved, disclose an offenses and whether there is prima facie material against the accused.

10. The complaint runs into 38 typed pages and it is not necessary nor feasible to extract all averments made in the complaint. Suffice it to say that the averments made in the complaint, in my opinion, if proved, do make out an offence against the accused.

11. Mr. Jain, the learned counsel for the petitioners relied upon a decision of a Division Bench of this Court in Sayed Mohammed Masood Vs State of Maharashtra & Another, 2008(1) Bom.C.R. (Cri) 670 wherein it is held that for the purpose of making out an offence under Section 420 of Indian Penal Code, the accused must have a dishonest intention at the inception of the contract. In order to establish cheating as provided under Section 420 of Indian Penal Code, it must be established that the accused had an intention to induce, to deceive and to cheat the complainant right from the beginning. For establishing an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Mr. Jain, the learned counsel further submitted that the complaint does not disclose that at the inception i.e at the time, when the loan was granted, the petitioners had a dishonest intention. The intention to divert the funds was not at the inception but subsequent and therefore, the offense under Section 420 of Indian Penal Code was not made out. The issuance of process under Section 420 of Indian Penal Code, therefore, was uncalled for. In this respect, Mr. Jain invited my attention to the averments made in paragraph 35 wherein it is stated :

> "The complainant states that the cause of action in the present complaint arose for the first time or or about December, 2003 when the aforesaid acts of omission and commission by the accused, were disclosed in C.D.R. Proposal and thereafter, when the special investigation audit of the accused was conducted wherein it was revealed that the accused company had misappropriated the funds by diverting the loan amount....."

12. Mr. Jain, submitted that the loan was advanced / sanctioned on 25th January, 2002 and from the averments in the complaint, the cause of action arose in December, 2003. This shows that the accused had no dishonest intention since beginning. In my view the submission, attractive as it is, cannot be accepted. The complaint has to read as a whole and paragraph no. 35 cannot be read in isolation. Obviously, if respondent no. 2 knew the dishonest intention of the petitioners in the beginning, it would not have ever advanced the loan. It is only after the loan was advanced and the money advanced was mis-utilized and diverted, that the respondent no. 2 came to know of the dishonest intention. The complaint read as a whole clearly shows that the complainant has alleged that the accused made false representations and fraudulently concealed the material facts from the complainant right from the beginning and induced the complainant into parting with huge amount loan to them with dishonest, fraudulent and malafide intention of cheating it. In paragraph no. 14 to 24 of the complaint, the complainant has disclosed various acts which, taken at the face value disclose fraudulent and dishonest acts and the dishonest intention of the accused from the beginning. When the financial position of the accused no. 1 company started deteriorating the State Bank of India, the lead Bank under the consortium, ordered special investigation team to inspect and carry out special audit. The special audit inter alia revealed that the accused no. 1 had a current account with the Centurion Bank since the year 2000 which was concealed by it. Payments received by the accused no. 1, instead of being deposited with the complainant or other consortium banks, were deposited in the Centurion Bank. More than Rupees Three Crores were so deposited between October 2003 and December 2003 in the account of the accused no. 1 with the Centurion Bank so as to defraud the complainant and other banks. The special audit investigation also revealed that the accused no. 1 had made a payment of Rs. 25.76 crores to Kinetic Engineering Ltd., a group company under control and management of accused nos. 2 and 3, since April, 2003. Money was thus, diverted from the businesses by accused nos. 1 to 3. After narrating several other violations, in paragraph 25 of the complaint the complainant has averred.

> "25. It is apparent from what is stated hereinabove that all the Accused have misrepresented and fraudulently concealed the material facts from the Complainant <u>right from the beginning</u> and had induced the Complainant into parting with huge amounts as loan from them with dishonest, fraudulent, malafide intentions and with clear intentions of cheating them." (underlining supplied)

The complainant not only gave the specific details of dishonest intention of the accused and cheating but has also averred that the accused had dishonest, fraudulent and malafide intention of cheating since beginning. Thus, there are clear avermetns in the complaint that the dishonest intention to cheat was in existence since beginning. What is stated in paragraph no. 35 is only that the complainant came to know of this dishonest intention in December 2003. There was prima facie material before the learned Magistrate that the accused nos. 1 to 3 had committed an offence punishable u/s. 420 of the Indian Penal Code. The decision of the Division Bench of this Court in Sayed Mohammed Masood Vs State of Maharashtra & Anr is not applicable to the facts of the present case.

13. The complainant has specifically alleged that accused nos. 2 and 3, who were the chairman and managing directors of petitioner no. 1 company, were responsible for the management of the company. They had taken active part in the negotiations relating to the loan, and had entered into correspondence and attended meetings with the officers of respondent no.2 bank. The accused no. 1 company who is a legal person does not have mind of its own and has only to act through its directors or officers. It were accused nos. 2 and 3 who were acting for the company and their mind was the mind of accused no. 1 company. They had made representations on behalf of accused no.1 company. Similar allegations have also been made against accused nos 4 and 5 who have not challenged the order of issuance of process. Thus, in my view, on plain averments made in the complaint, the learned magistrate was required to issue process against accused nos. 1 to 5. For these reasons, there is no merit in the writ petition. Hence, I proceed to pass the following order.

O R D E R

1. The order of issuance of process against accused nos. 6 to 11 is quashed and set aside on the concession made by the learned counsel for respondent no. 2 - complainant.

2. The order of issuance of process against accused nos. 1 to 3 is maintained. As the accused nos. 4 and 5 have not challenged the order of issuance of process and have not claimed any relief, no order qua them.

(3) After this order is pronounced in open court, the learned counsel for the petitioners submitted that the interim order passed by this court on 24th October, 2008 be continued for sometimes as the petitioners want to approach the Supreme Court. The interim order passed by this court on 24th October, 2008 to the effect "Trial shall not proceed till then" continued for a period of six weeks. After said

period is over, it stands vacated automatically.

(D.G. KARNIK, J.)