

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 3504 of 2022**

=====

NYARA ENERGY LIMITED
Versus
STATE OF GUJARAT

=====

Appearance:

KEDAR B BINIWALE(3030) for the Applicant(s) No. 1
MS CM SHAH, APP for the Respondent(s) No. 1
RULE SERVED for the Respondent(s) No. 2,3

=====

CORAM:HONOURABLE MR. JUSTICE ILESH J. VORA
Date : 01/02/2024
ORAL ORDER

1. By way of this petition, the petitioner being a company Nyara Energy Limited, incorporated under the Companies Act, 1956, invokes the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 and thereby, seeks quashing of criminal complaint being numbered as 75938 of 2021 for the dishonour of cheque, which is pending before the Chief Judicial Magistrate Court at Surat.
2. Brief facts giving rise to file present petition are that the petitioner company is engaged in the business of sale of petrol and diesel by establishing retail outlets. The respondent no.3 Bhakti Petroleum through its proprietor P.G. Patel was allotted a franchise to run said retail outlet, on the land bearing Survey No.34/2, Block No.145 of Village Khadsad, Kamrej, which originally belongs to Sejalben Kantibhai and others. In order to get the said

outlet, Bhakti Petroleum through its proprietor and land owners have separately executed MOU and the same was produced along with the proposal made by Bhakti Petroleum and accordingly, the separate registered lease agreement dated 26.11.2019 came to be executed and since then, Bhakti Petroleum is running the said outlet on the lease-hold land. The applicant company was not the party to the lease agreement entered into between land owner and respondent no.3 Bhakti Petroleum. It is the Bhakti Petroleum to honour its liability towards the rent, etc. to the land owner. The Bhakti Petroleum has issued the cheque towards the rent, in favour of the land owner Sejalben Patel from the account maintained by them. The said cheque was presented for clearing and the same returned back due to funds insufficient. The land owner respondent no.2 served a statutory notice to the parties. Within stipulated time, the Bhakti Petroleum who is holding the franchise did not repay the cheque amount. The respondent no.2 Sejalben within a limitation filed a criminal complaint bearing No.75933 of 2021 under Section 138 of the N.I. Act against the Bhakti Petroleum and the present company Nyara Energy Limited. The learned Trial Court after taking cognizance issued summons to the parties. The applicant company has appeared before the Court through its lawyer.

3. In the aforesaid facts, the applicant company is before this Court praying inter alia that the institution of the criminal proceedings against the company, is sheer abuse of process of law and Court as the company has not

committed any offence and ingredients of Section 138 of the N.I. Act are not satisfied. The second issue is that while issuing the process, the learned Magistrate, without verifying, the legal liability of the company in a mechanical manner, issued the summons.

4. Mr.K.B. Binivale, learned counsel for the applicant company, has submitted that the proceedings implicating the company for alleged dishonour of cheque is nothing, but a sheer abuse of process of law as ingredients required to constitute offence under Section 138 of the N.I. Act are not satisfied. The cheque in question is not issued by the applicant company. The company is not party to the lease agreement allegedly executed between the respondent nos.2 and 3. In such circumstances, the company has been wrongly implicated with malafide and ulterior motive. The Trial Court while issuing the summons failed to appreciate the said aspect in a mechanical manner has issued the summons and the same is not sustainable in law as *prima facie* no offence is made out.
5. The private respondents, though served, have did not contest the petition nor filed affidavit in reply.
6. Having regard to the facts and circumstances of present case, and on perusal of the contents of the criminal complaint, this Court is of the considered view that the applicant company has been wrongly roped in the alleged offence. To constitute an offence under Section 138 of the Negotiable Instruments Act, 1881, the following ingredients are required to be fulfilled:

- “(i) A person must have drawn a cheque on an account maintained by 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, in 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 by an agreement 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 to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.”

7. In light of the statutory provisions and applying to the facts of present case, the cheque in question has not been drawn by the applicant company. Thus, the primary conditions as referred, has not been satisfied. It needs to be noted that the land in question was taken on lease by the respondent no.3 Bhakti Petroleum for which the

company was not party to the lease agreement nor in any way assurance given by the company to the land owner about regular payment of rent. In such circumstances, the Court concerned while taking cognizance of the offence failed to consider that it is only drawer of the cheque who can be made liable for the penal action under Section 138 of the N.I. Act and it is settled that strict interpretation is required to be given to penal statute. In the case of Pepsi Food Limited (1998 (5) SCC 749) and thereafter, in canteen of decision, the Apex Court observed that summoning of an accused in a criminal case is a serious matter. Criminal law cannot set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegation made in the complaint and evidence in support thereof and then, examined if any offence is *prima facie* committed by the accused or not.

8. In the facts of present case, as discussed above, the ingredients of Section 138 of the N.I. Act qua the applicant company are not satisfied. The learned Trial Court, without examining the factual aspect of the case as well as the applicable law, has mechanically issued summons as *prima facie* no offence is made out against the applicant company.
9. For the reasons aforementioned, this Court is convinced that the further continuation of the proceedings qua the applicant company is nothing, but is amount to misuse of process of law and Court. Thus, the case is made out for

exercising the inherent powers of this Court.

10. Resultently, present petition stands **allowed**. The proceedings of criminal complaint being numbered as 75938 of 2021 pending before the Chief Judicial Magistrate Court at Surat is quashed qua the applicant herein.
11. The view expressed above are tentative in nature and confined to decide the present petition.
Direct Service is permitted.

(ILESH J. VORA,J)

Rakesh