

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 167 OF 1999

Shriram Shivram Mhatre

Age 38 years, Occ. Contractor,

R/o Mulchand, Tal. Uran,

Dist. Raigad

.. Appellant

v/s.

1. Vinayak Sadashiv Patil

Age 40 years, Occ. Contractor

R/o. Khopte, Tal. Uran,

Dist. Raigad.

2. The State of Maharashtra

.. Respondents

None for the appellant

Mr. Rajesh B. Parab i/b D.S. Sawant for the respondent no.1

Mrs. R.V. Newton, APP for the respondent State

CORAM : SMT. ANUJA PRABHUDESSAI, J.

RESERVED ON : 13th OCTOBER, 2015

PRONOUNCED ON : 30th NOVEMBER, 2015.

JUDGMENT :-

1. This is an appeal against the judgment and order dated 19.09.1998 in S.C.C. No. 252 of 1998, whereby the learned J.M.F.C. Uran has acquitted the accused - respondent no.1 for the offence under Section 138 of the N.I. Act.

2. The case of the appellant-complainant in brief is that the respondent accused had received work order issued by the Executive Engineer Maharashtra Industrial Development Corporation for removing old pipelines and putting up new pipelines. The complainant had stated that the respondent-accused had engaged him as a sub-contractor and accordingly he had carried out the work to the tune of Rs.63,000/-. All the bills were also passed in the name of the accused since the tender was in the name of the accused.

3. The complainant claimed that the respondent accused had issued a cheque dated 15.08.1991 for Rs.30,000/- towards the cost of work done. The said cheque was deposited in the bank but was dishonoured with remark "exceeds arrangement". The complainant deposited the cheque again on 12.08.1991, 07.09.1991, 06.09.1991 and 10.10.1991. The cheque was again dishonoured with remark "refer to drawer". The complainant by notice dated 19.10.1991 called upon the respondent accused to repay the loan amount. Despite receipt of the statutory notice, the respondent accused failed to pay the cheque amount. Hence, the applicant-complainant filed

the complaint under Section 138 of the N.I. Act.

4. Upon being served with summons, the respondent accused put in his appearance, pleaded not guilty and claimed to be tried. The learned Magistrate upon considering the evidence held that the subject cheque was issued by the firm whereas the accused was prosecuted in his individual capacity without impleading the firm. The learned Magistrate, therefore, held that the complaint was not maintainable and accordingly acquitted the accused of the offence under Section 138 of the N.I. Act. Being aggrieved by the said order of acquittal, the appellant complainant preferred this appeal.

5. At the outset, it may be mentioned that the complainant has admitted in his cross-examination that the tender was granted in favour of M/s. V.S. Patil, a partnership firm. The complainant has further admitted that the cheque was issued by the said partnership firm. The evidence of PW3 Shekhar Walke, the Branch Manager of the State Bank of India, Uran Branch, also reveals that the cheque was issued on the account of M/s. V. S. Patil, a partnership firm,

having three partners. Thus, the records reveal that M/s. V.S. Patil, a partnership firm was the drawer of the subject cheque. A plain perusal of the complaint reveals that the complaint was not filed under Section 141 of the Negotiable Instruments Act, but was filed against the respondent-accused in his individual capacity. Needless to state that the respondent- accused was not a drawer of the cheque, hence could not have been prosecuted in his individual capacity.

6. Be that as it may, though the cheque was issued by M/s. V.S.Patil, the complainant had not arrayed M/s. V.S.Patil as and accused. The complainant had not issued any demand notice to the said partnership firm. In *Anita Hada vs. M/s. Godfather Travels & Tours 2012 AIR (SC) 2795*, the Apex Court has held that for maintaining the prosecution under [Section 141](#) of the Act, arraigning of a company as an accused is imperative.

7. In the light of the principles laid down by the Apex Court in the aforesaid case, the respondent accused could not have been

prosecuted even as a partner of the said partnership firm.

8. Under the circumstances, the complaint was not maintainable as against the respondent-accused and in his capacity individual capacity.

9. The appeal, therefore, has no merits and the same is dismissed.

(ANUJA PRABHUDESSAI, J.)