IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 300 OF 2015
WITH
CRIMINAL APPEAL NO. 301 OF 2015

Raosaheb Majhavir Chimanna .. Appellant

v/s.

Abhay Prabhakar Lele & Anr. ..Respondents

Mr. S.S.Patwardhan for the Appellant.
Mr. Ashutosh A. Kumbhakonii/b. A.M.Kulkarni and Mr. Abhay Shinde for the Respondent No.1.
Mr. Rajesh More, APP for the State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : OCTOBER 16, 2015.

JUDGMENT.

1. Rule. Rule made returnable forthwith. With consent of parties, appeals are taken for hearing.

2. These appeals are directed against the judgments dated 13.1.2009 in S.C.C.No.1973 of 2005 and 1974 of 2005, whereby the learned Judicial Magistrate, First Class, Sangli has acquitted the respondent no.1-accused of offence under Section 138 of Negotiable Instruments Act.

3. The case of the appellant-complainant in brief is that he is the owner of the property bearing CTS No.525/A having an area of 260.22 sq. meters situated at Sangli. The respondent accused is a builder and developer by profession. The appellant-complainant executed a development agreement dated 30.3.2005 and a power of attorney in favour of the respondent no.1-accused for development of the said property.

4. The case of the appellant-complainant was that the respondent had paid Rs.50,000/- in cash and issued two cheques bearing nos.541861 dated 30.4.2005 and 541862, dated 30.5.2005 for Rs.9 lakhs each, towards consideration for development of the said property. Both the cheques were dishonoured. The cheque number No.541862 for Rs. 9 lakhs is the subject matter of Criminal Appeal 300 of 2015 arising from S.C.C.No. 1974 of 2005.

5. The case of the complainant is that upon dishonor of the second cheque no.541861 for Rs. 9 lakhs, the accused had issued two

cheques bearing no. 002599 dated 30.4.2005 for Rs. 6 lakhs and cheque no.002600 dated 30.5.2005 for the amount of Rs. 3 lakhs. The cheque bearing no. 002599 for Rs. 6 lakhs was honoured, but the second cheque bearing no.002600 for Rs.3 lakhs was dishonoured for insufficient funds. The said cheque is the subject matter of criminal appeal 301 of 2015 arising from SCC. No. 1973 of 2005.

5. The appellant-complainant had issued demand notices calling upon the respondent-accused to pay the cheque amount. The respondent-accused having failed to pay the cheque amount of Rs. 9 lakhs and Rs. 3 lakhs, the appellant complainant filed the afore stated complaints under Section 138 of the N.I. Act.

6. Upon being served with summons, the respondent-accused put in his appearance, pleaded not guilty and claimed to be tried. The appellant-complainant examined himself and produced all the relevant documents. The statement of the respondent-accused was recorded under Section 313 of Cr.P.C. The respondent-accused did

not adduce any evidence but filed his written statement. The defence of the respondent-accused was that by notice dated 30.9.2005, the appellant-complainant had revoked the general power of attorney, as a consequence thereof he was unable to develop the property and sell the premises as per the terms of the agreement. The respondent-accused therefore claimed that there was no enforceable debt and hence he was not liable to pay the cheque amount.

7. The learned Magistrate, upon considering the evidence adduced by the appellant-complainant and considering the defence raised by the respondent-accused held that the respondent-accused had issued the cheque towards legally enforceable debt. The learned Magistrate further held that the complainant had proved the essential ingredients of section 138 of N.I. Act and hence convicted the accused in both the abovesaid cases. In SCC/1974/2005 the accused has been convicted to undergo R.I. for 12 months and to pay compensation of Rs. 9 lakhs i.d. to undergo R.I. for 6 months. In SCC/1973/2005 the accused has been sentenced to undergo R.I. for

six months and to pay compensation of Rs.3 lakhs and i.d. R.I. for two months. Aggrieved by the said orders of conviction, the respondent accused filed appeals being Cri. Appeal Nos.44 of 2009 and 45 of 2009 before the Sessions Court, Sangli.

8. The learned Sessions Judge held that the cheques were issued pursuant to the execution of the development agreement. The learned Sessions Judge further held that in view of the termination of the Power of Attorney, there was no legally enforceable debt as on the date of issuance of the statutory notice under Section 138 of the N.I.Act. The learned Sessions Judge, therefore, held that the cheque was not issued towards the existing liability and that the ingredient of the offence under Section 138 were not made out. The learned Sessions Judge therefore set aside the orders of conviction and sentence and acquitted the accused of the offence under Section 138 of the N.I.Act. Being aggrieved by the said orders of acquittal the appellant-complainant has filed these appeals.

9. Heard Mr Patwardhan, learned counsel for the appellant. He

has submitted that the findings of the learned Appellate Court that there was no legally enforceable debt as on the date of issuance of the demand notice dated 14.10.2005 is erroneous. He has submitted that the revocation of power of attorney did not lead to termination of the development agreement dt.30.3.2005. The revocation of power of attorney had no bearing on the development agreement and that the rights and obligations under the said agreement continued to subsist even on the date of the filing of the complaint. The learned counsel for the appellant has further submitted that the finding of the learned Session Judge are factually incorrect and being illegal and perverse, cannot be sustained. He has relied upon the decision of the Apex Court in ***Kusum Ingots and Alloys Ltd. Vs. Pennar Peterson Securities Ltd., & Ors. (2000) 2 SCC 745***.

10. Shri Kumbhakoni, the learned Sr. Counsel for the respondent accused has submitted that to constitute offence under Section 138 of the N.I.Act, the chain of cause of action , that is the act of issuance of cheque till filing of the complaint must continue to exist and even if a single link in the chain of events is found missing, the accused cannot

be prosecuted under Section 138 of the N.I.Act. Highlighting the chronology of events, the learned Counsel for the respondent has submitted that the power of attorney was terminated on 30.9.2005 and as such as on the date of cause of action ie. on 30.10.2005, the respondent had no right to sell the constructed premises and consequently there was no legally enforceable debt as on the said date. The learned counsel for the respondent has submitted that the respondent-accused has not obtained any monetary benefit and has not received any consideration out of the development agreement and as such he was not liable to pay the cheque amount to the appellant complainant.

11. I have perused the records and considered the submissions made by the learned counsels for the respective parties. At the outset it may be mentioned that in ***Kusum Ingots and Alloys Ltd. Vs. Pennar Peterson Securities Ltd., & Ors. 2002 SCC 745*** the Apex Court while considering the scope and object of Section 132 of the N.I.Act has held as under:_

10. On a reading of the provisions of Section 138 *NI Act it is* *clear that the ingredients which are to be satisfied for making out a case under the provision are :*

(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 for the discharge of any debt or other liability;

(ii) 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;

(iii) 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;

(iv) 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;

(v) 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;

> *11. If the aforementioned ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. In the explanation to the section clarification is made that the phrase "debt or other liability" means a legally enforceable debt or other liability."*

6. Reverting to the facts of the present case, it is not in dispute that the appellant complainant is the owner of the property bearing CTS No. 525/A. The complainant had executed a development agreement and a power of attorney dated 30.3.2005 in favour of the respondent-accused for development of the said property. In terms of the said development agreement the respondent-accused was to develop the said property. By executing the power of attorney in favour of the respondent-accused the appellant-complainant, amongst other powers, had authorized the respondent-accused to sell the constructed premises to the prospective buyers. As per the terms and condition of the development agreement, the respondent accused was required to construct and hand over to the appellant-complainant 500 sq.ft. godown at basement and in addition an

amount of Rs.18,50,000/-, out of which Rs.50,000/- was to be paid on or before 30.3.2005 and sum of Rs. 9 lakhs each on or before 30.4.2005 and 30.5.2005. The subject cheques were issued in advance towards the consideration that the respondent-accused would derive from the sale of the premises. Dishonour of the said cheques had led to filing of the said two criminal cases.

7. It is pertinent to note that the appellant-complainant had revoked the power of Attorney by notice dated 30.09.2005 which was published in four local dailies on 3.10.2005. It is thus evident that the power of attorney was revoked even before the dishonor of the subject cheques, issuance of statutory notices and accrual of cause of action. As a consequence thereof, the authority conferred on the respondent-accused to sell the constructed property to the proposed buyers had ceased to exist even before accrual of the cause of action.

8. It is pertinent to note that the power of attorney was cancelled even before the property was developed and the premises were constructed. The respondent accused was therefore precluded from

selling the premises proposed to be constructed in the said property as per the development agreement. The revocation of power of attorney therefore led to cessation of the development agreement and further handing over of the possession of the land to the appellant-complainant. The respondent-accused had neither developed the property nor sold any premises to the proposed buyers. The respondent accused had not derived any benefit from the said agreement. Resultantly, the respondent-accused was not liable to pay any consideration under the agreement. In the case of ***Indus Airways Pvt. Ltd. vs. Magnum Aviation Pvt. Ltd. 2014 LawSuit (SC) 252,*** the Apex Court has held as under:

> *"13. The explanation appended to Section 138 explains the meaning of the expression 'debt or liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leave no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, the drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for*

which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability.”

9. In the instant case, the cheques were issued in advance towards the consideration that the respondent accused would derive from the development of the property and the sale of the premises. The appellant having terminated the power of attorney, the respondent accused was unable to sell the premises. As stated earlier, it is also not in dispute that the possession of the said property has already been handed over to the appellant-complainant. The agreement between the parties had not reached its logical conclusion and hence there was no existing legally enforceable debt as on the date of the accrual of the alleged cause of action.

10. Under the circumstances, and in view of the discussion supra there is no merit in the appeals. Both the appeals are dismissed.

(ANUJA PRABHUDESSAI, J.)