IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CRIMINAL JURISDICTION
CRIMINAL APPEAL NO. 59 OF 1999

Jayant J. Apte)
Karta of Jayant J. Apte)
H.U.F. of M/s Ashutosh)
Enterprise having their office)
at 4134, Manesh Niwas, 3rd L.T)
Nagar, Goregaon (W))
Mumbai – 62) ..Appellant

Vs.

1 M/s Nemox Drugs &)
Pharmaceuticals Ltd. having)
its office at B-105, Avon)
Arcade, Dashratilal Joshi)
Road, Opp Bank of Baroda,)
Ville Parle (E) Mumbai-56)

2 Nimesh Anilkumar Thakkar)
Chairman of No.1 r/o. B/1)
Vishwakarma Housing Society)
Ltd. V. P.Road, Andheri (W))
Mumbai – 58)

3 Sandeep Bakul Sheth)
Managing Director of No.1)
R/o 7/24, Pearl of Juhu,)
Samarth Ramdas Road,)
J.V.P.D. Scheme, Mumbai-49) ..Respondents

Mr. S. V. Marwadi a/w Mr. Mr. N. M. Nadar and Ms Neha Rane for Appellant
Ms Bindal Kishor Bhatia i/b Mr. Kishor M. Bhatia for Respondent Nos.1 and 2
Ms Anamika Malhotra APP for State

CORAM : K.R.SHRIRAM, J.
DATE : 18th NOVEMBER 2019

ORAL JUDGMENT.:

1 This is an appeal filed under Section 378(4) of Criminal Procedure Code impugning the judgment and order dated 3-7-1998 passed by the Addl Chief Metropolitan Magistrate, 40th, Court Girgaum, Mumbai by which the accused were acquitted of a charge under Section 138 of the Negotiable Instruments Act.

2 The prosecution arises out of a private complaint filed by appellant against respondent no.1, which is a company limited by shares and respondent nos.2 and 3 were its Directors. According to the complainant/appellant, he was carrying on business as sole proprietor in the name and style of M/s Ashutosh Enterprises. Appellant says that on 28-10-1996 he gave a sum of Rs.5,00,000/- for subscription of 50,000 equity shares of Rs.10 each of respondent no.1. Respondent nos.2 and 3, who were the Directors of respondent no.1 have jointly undertaken to buy back the said shares after 6 months, i.e., 30-4-1997 at Rs.14/- per share and accordingly agreed to pay Rs.7 lacs to complainant. The buy back agreement dated 28-10-1996, is at Exhibit-1. Respondent nos.2 and 3 issued three post dated cheques, each for Rs.7,00,000/-. One cheuqe is issued by respondent no.2 in his personal name, second cheque is issued by respondent no.3 in his personal name and the third cheque is signed by respondent no.2 as Director on behalf of accused no.1. It is stated that respondent nos.2 and 3 also signed personal guarantees and issued irrevocable power of attorney to enable complainant to dispose of the

shares. It is stated that respondent nos.2 and 3 did not buy back the shares and, therefore, complainant brought this to the notice of respondents that complainant was going to deposit those cheques and in response respondents gave stop payment instructions and due to that, when complainant deposited all three cheques, all cheques were dishonoured.

3 It is settled law that one of the necessary ingredient of Section 138 is that the cheque drawn must be for discharge in whole or in part of a legally enforceable debt or other liability.

4 The agreement at Exhibit -1, based on which, the complainant has approached this court, is an agreement between accused nos.2 and 3 in their individual capacity. Accused no.1 is the company and is not a party to the said agreement. Therefore, the complaint as against the accused no.1 in any event, cannot survive.

5 Moreover, it is the contention of the complainant that the cheques issued were towards security. Clause 7 of the agreement says " on or before 23-4-1997 M/s Ashutosh Entreprise shall deposit all the 1,50,000/- shares of the company with Mr. Mahesh Poojara along with post dated cheques and Mr. Nimish Thakkar and/or Mr. Sandip Sheth shall give a pay order of Rs.7,00,000/- to M/s Ashutosh Enterprises". This Court in the matter of ***Joseph Vilangadan V/s. Phenomenal Health Care Services Private Limited and Anr.***[1] and in the matter of ***Adarsh Gramin Sahakari Pat Sanstha***

1. 2011 CRI. L. J. 531

Maryadit, Wadi, Nagpur V/s. Dattu Ramdasji Paithankar[2] has held that if the cheque is issued only as security for performance or any other purpose and not towards the discharge of any debt or other liability, then it cannot be said that the cheque was issued for discharge of liability and Section 138 cannot be invoked.

6 In the circumstances, I find nothing wrong in the impugned judgment. Appeal is dismissed.

(K.R. SHRIRAM, J.)

2. 2010 CRI. L. J. 1971