IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1413 OF 2021

Mr. Inder Rochaldas Lulla
age 67 years, Occu. Service,
R/o A-1204, Imperial Heights,
BEST Colony, Road, Goregaon (West),
Mumbai – 400 004 (Maharashtra) … PETITIONER

VERSUS

M/s Laxmi Agni Components &
Forgings Private Limited,
through Mr. Shaikh Mohd. Ayyaz Ahmed,
Age 45 years, Occu. Service,
B-37, Waluj M.I.D.C., Aurangabad … RESPONDENT

....

Shri Rahul Totla, Advocate for petitioner
Shri B.R. Kawre, Advocate for respondent

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WITH

CRIMINAL WRIT PETITION NO.1414 OF 2021

Mr. Inder Rochaldas Lulla
age 67 years, Occu. Service,
R/o A-1204, Imperial Heights,
BEST Colony, Road, Goregaon (West),
Mumbai – 400 004 (Maharashtra) … PETITIONER

VERSUS

M/s Laxmi Agni Components &
Forgings Private Limited,
through Mr. Shaikh Mohd. Ayyaz Ahmed,
Age 45 years, Occu. Service,
B-37, Waluj M.I.D.C., Aurangabad … RESPONDENT

....

Shri Rahul Totla, Advocate for petitioner
Shri B.R. Kawre, Advocate for respondent

…….

WITH

CRIMINAL WRIT PETITION NO.1415 OF 2021

Mr. Inder Rochaldas Lulla
age 67 years, Occu. Service,
R/o A-1204, Imperial Heights,
BEST Colony, Road, Goregaon (West),
Mumbai – 400 004 (Maharashtra) … PETITIONER

VERSUS

M/s Laxmi Agni Components &
Forgings Private Limited,
through Mr. Shaikh Mohd. Ayyaz Ahmed,
Age 45 years, Occu. Service,
B-37, Waluj M.I.D.C., Aurangabad … RESPONDENT

…….

Shri Rahul Totla, Advocate for petitioner
Shri B.R. Kawre, Advocate for respondent

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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 8th March, 2022
Date of pronouncing judgment : 3rd August, 2022

J U D G M E N T :

Rule. Rule made returnable forthwith and taken up for final hearing with the consent of learned counsel for the parties.

2. All these three Criminal Writ Petitions are taken up together since parties thereto are one and the same and questions involved therein are common.

3. The challenge in these petitions is to the orders dated 9/3/2021, 4/12/2020 and 9/2/2021 respectively of issuance of process for the offence punishable under Section 138 of the Negotiable Instruments Act (N.I. Act for short).

4. The petitioner herein is accused in all the three criminal cases, while the respondent herein is the complainant therein. The orders of issuance of process were taken exception to by preferring Criminal Revision Applications. The petitioner in all these Writ Petitions has, however, been unsuccessful therein. Hence these Criminal Writ Petitions.

5. Facts, in short, giving rise to the present Criminal Writ Petitions are as under :-

The respondent – complainant is a Private Limited Company. It is engaged in the business of manufacturing auto components and forging parts as well. M/s Mercury International is a proprietary concern. It is said to be trading in heavy machines, tools and equipments. The petitioner herein has been described as General Manager of M/s Mercury International in the complaints. The petitioner/ accused alleged to have approached the respondent Company for marketing purpose. He assured to supply the complainant with imported used Hot Forging Press TMP – Voronezh Model KB 8042 capacity of 1600 Ton. The vendor was Ukraine based. The respondent – complainant issued purchase order dated 18/1/2019. It paid amount of 52,000/- U.S.D. and 1,04,000/- U.S.D. (United States Dollars) on 24/1/2019 and 8/3/2019 respectively. The payment was said to have been made in the name of the petitioner/ accused. It is further alleged in the complaint that the petitioner/ accused failed to supply the ordered machines within a specified time. After getting the agreed payment, the petitioner/ accused did not turn to the complainant and avoided to give delivery of ordered machines or return purchase money. On frequent demands of money, the petitioner/ accused issued cheques against collected amount, showing that the cheques were issued in lieu of money paid to OM Progressive Inc Seychelles as his principal to supply used Hot Forging Press TMP – Voronezh Model KB 8042 capacity of 1600 ton. The details of the cheques issued are as under :-

Sr. No.	Cheque No.	Date	Amount (Rs.)	Name of the Bank
1	056678	10/01/2020	40,00,000/-	Karnataka Bank Ltd.
2	056679	10/01/2020	40,00,000/-	Karnataka Bank Ltd.
3	056677	10/01/2020	30,00,000/-	Karnataka Bank Ltd.
		Total:-	1,10,00,000/-	

6. It is also the case of the respondent – complainant that, the cheques were presented for encashment. The cheques could not be honoured for the reasons "Funds insufficient". The petitioner/ accused was, therefore, served with demand notice/s, asking him to pay the amount/s covered by the cheqeue/s. The notice/s were replied with false contentions. The prosecution for the offence punishable under Section 138 of the N.I. Act, therefore, came to be instituted.

7. The learned Judicial Magistrate, First Class issued process. The petitioner/accused took exception to the order/s of issuance of process by filing Criminal Revision Applications before the Sessions Court. The learned Additional Sessions Judge was pleased to dismiss the Revision Applications in terms of the following order :

> "The basic challenge as to the role of applicant not being proprietor of the firm to which he has represented disputing his existing legal liability within the scope of Section 138 of N.I. Act will certainly need recording of evidence of the parties to arrive on the decision on merits, for final determination of the dispute between the parties according to the law.
>
> Therefore, the grounds of revision and challenge to the impugned order cannot be attended at the

> stage of preliminary inquiry prior to recording of evidence. Hence, I do not found merits in the revision petition and consequently there exists no reason to interfere in the impugned order.”

8. Heard. The learned counsel for the petitioner would submit that, the petitioner is resident of Mumbai. The learned Magistrate, therefore, ought to have made enquiry under Section 202 of the Code of Criminal Procedure before passing the order of issuance of process. He would further submit that, undisputedly, M/s Mercury International is a proprietary concern. The petitioner herein is not a proprietor thereof. He cannot be prosecuted for vicarious liability. The proprietress of Mercury International is not an accused in the case. The cheques were issued on an account maintained by the proprietary concern. The proprietary concern is represented by its proprietress for dealing with the Bank Account. According to learned counsel, ingredients of offence punishable under Section 138 of the Negotiable Instruments Act do not get squarely covered. According to him, the learned Magistrate ought not to have issued process. He, therefore, urged for allowing the Criminal Writ Petitions.

9. Learned counsel for the respondent – complainant would, on the other hand, submit that, the averments in the complaint and documents filed along therewith indicate that it

was a dealing between the petitioner and the respondent Company. The cheques were issued by the petitioner himself. The material on record would indicate that the petitioner was incharge and responsible to the day-to-day affairs of the proprietary concern. The learned counsel has relied on the judgment of the Apex Court in case of **K.K. Ahuja Vs. V.K. Vora & ors. [Criminal Appeal no.1130-31 of 2003**]. He would further submit that, whatever contentions the petitioner has raised are all issues of facts and those could only be decided during trial of the case. He, therefore, urged for dismisal of the petitions.

10. Sections 138 and 141 of the Negotiable Instruments Act read thus :-

> "138. **Dishonour of cheque for insufficiency, etc., of funds in the account**.— Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that 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 that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended

to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the 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;

(b) the payee or the holder in due course of the cheque, as the case may be, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation:— For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability.

141. Offences by companies.—

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to

> punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
>
> Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> Explanation: For the purposes of this section,—
>
> (a) "company" means any body corporate and includes a firm or other association of individuals; and
>
> (b) "director", in relation to a firm, means a partner in the firm."

11. Undisputedly, M/s Mercury International is a proprietary concern. It being neither a Company nor a partnership firm or a group of persons, its officials would in no way be attributed with the offence punishable under Section

138, with the aid of Section 141 of the N.I. Act. It is not the case of the respondent – complainant that in discharge of debt or legal liability of M/s Mercury International the petitioner has issued cheques on his own account.

12. Undisputedly, the Bank Account on which the cheques have been issued stands in the name of the proprietary concern. Preeti Inder Lulla, wife of the petitioner, is proprietress of M/s Mercury International. She represents the proprietary concern for the Bank Account. The Account is with Karnataka Bank. The Bank has issued a communication in this regard.

13. In case of **Alka Khandu Avhad Vs. Amar Syamprasad Mishra & anr. [(20210 4 SCC 675]**, the Hon'ble Apex Court in the case of Alka Avhad (supra) has observed thus :-

> "9. On a fair reading of Section 138 of the N.I. Act, before a person can be prosecuted, the following conditions are required to be satisfied :
>
> 9.1. That the cheque is drawn by a person and on an account maintained by him with a banker.
>
> 9.2. For the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability.

> 9.3. The said cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account.
>
> 10. Therefore, a person who is the signatory to the cheque and the cheque is drawn by that person on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. Section 138 of the N.I. Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 of the N.I. Act. A person might have been jointly liable to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque."

14. Admittedly, the cheques have been issued by the petitioner herein on the account maintained by the proprietary concern. The petitioner is not a proprietor thereof. As such, it is not the case of the cheque/s having been issued by the petitioner on an Account maintained by him. It is reiterated that, the proprietress of the proprietary concern is not an accused in the case. The petitioner herein is described as

General Manager of M/s Mercury International in the complaint. In case of **Raghu Lakshminarayanan Vs. Fine Tubes [(2007) 5 SCC 103]**, the Apex Court observed in paragraphs 8, 9 and 13 as under :-

> "8. The concept of vicarious liability was introduced in penal statutes like the Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the company or otherwise responsible for its affairs; the company itself being a juristic person.
>
> 9. . . . . A juristic person can be a company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, <u>but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a company. Company in terms of the Explanation appended to Section 141 of the Negotiable Instruments Act, means any body corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Partnership Act</u>.
>
> 13. The distinction between partnership firm and

a proprietary concern is well known. It is evident from Order 30 Rule 1 and Order 30 Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in *Ashok Transport Agency v. Awadhesh Kumar [(1998) 5 SCC 567]* wherein this Court stated the law in the following terms : (SCC pp. 569-70, para 6).

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Partnership act, 1932. Though a partnership is not a juristic person but Order 30 Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order 30 which makes applicable the provisions of Order 30 to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order 30 have no application to such a suit as by virtue of Order 30 Rule 10 the other provisions of Order 30 are applicable to a suit against the proprietor of proprietary business 'insofar as the nature of such case permits'. This means that only those provisions of Order 30 can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

15. It is reiterated that, the cheque has been issued

on an account maintained by the proprietary concern. The proprietress of the proprietary concern is not an accused in the complaints. The petitioner has issued the cheques for and on behalf of the proprietary concern. In the complaints, he is described as General Manager of the proprietary concern. The petitioner has not issued the cheques on an account maintained by him. As such, ingredients of Section 138 of the Negotiable Instruments Act do not squarely get attracted against him. The learned Magistrate erred in issuing process against the petitioner. The learned Additional Sessions Judge has upheld the orders of issuance of process. Interference with the orders impugned herein is warranted for the reasons given hereinabove.

16. In the result, the Criminal Writ Petitions succeed. The petitions are allowed in terms of prayer clause (B) of the petitions. Rule made absolute.

(R. G. AVACHAT)
JUDGE

fmp/-