

AGK

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

WRIT PETITION NO.33 OF 2020

Krishnamilan Shukla

...Petitioner

V/s.

Dattaram Walunj & Anr.

...Respondents

Mr. Sujit B. Shelar for the petitioner.

None for respondent no.1.

Mr. A. R. Patil, APP for the State.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 7, 2022

P.C.:

1. By this petition under Article 227 of the Constitution of India, the petitioner (accused no.1) is challenging order dated July 5, 2018 passed by the learned Magistrate in CC No. 1754/SS/2018 issuing process against the petitioner.

2. Respondent no.1 has filed a complaint under section 138 of the Negotiable Instruments Act, 1881 ("NI Act", for short) against the petitioner and three (3) others. The respondent no.1 alleged that he had booked flat no.402 with accused no.2. It is also alleged that accused no.1 represented to the complainant that the development rights of the property in dispute are assigned to the petitioner and will be developed by accused no.4 and, therefore, the complainant agreed to purchase the said flat in the project of

accused nos. 1 to 4. According to the complainant, he paid an amount of Rs.14 lakh to the accused no.2 towards amount of consideration of the flat. Accused no.2 issued receipt to that effect. Since accused no.3 delayed handing over of possession, the complainant registered a complaint against accused nos.1 to 4 under sections 420, 406 and 34 of the Indian Penal Code. It is alleged that during the investigation accused nos.1 to 4 agreed to repay amount of Rs. 23,50,000/- (Rupees Twenty Three Lakh Fifty Thousand Only) by cheque to the complainant towards the price of the flat. Accused no.4 issued the cheque in question in favour of the complainant. It is alleged that the said cheque was issued for and on behalf of accused nos.1 to 3. The said cheque was dishonoured and, therefore, the complaint was filed under section 138 of the NI Act.

3. The learned Magistrate issued process against the accused persons. The petitioner (accused no.1) challenged the order of issuance of process by filing revision, which came to be dismissed. The petitioner has, therefore, filed present petition challenging order dated November 29, 2019.

4. This Court on February 24, 2020 issued notice to the respondent no.1. The respondent no.1 appeared before this Court through advocate. On 28th July 2022, learned advocate for respondent no.1 was absent and, therefore, the matter was adjourned to 25th August 2022. On 25th August 2022 also learned advocate for the respondent no.1 failed to remain present and, therefore, the matter was kept today high on board in order to give opportunity to the respondent no.1 to appear in the matter. Today

also, learned advocate for the respondent no.1 is absent and, therefore, the petition is being decided on merits.

5. Perusal of the averments in the complaint demonstrates that the cheque in question has been issued by accused no.3 for and on behalf of accused no.4. The role attributed to the accused no.1 in the complaint is that the accused no.1 stated and represented that the development rights and title of the property in dispute are assigned to the accused no.3 and the same will be developed by accused no.4 within period of two (2) years. In paragraph 7, the complainant averred that the cheque in question was issued by accused no.4 on behalf of accused nos.1 to 3 against its legal dues and discharge of its legal liabilities. The status of accused no.4 has not been brought on record as to whether it is a firm, company or proprietary concern. In the absence of status of the respondent no.4 being mentioned in the complaint, and in the absence of necessary averments as required under section 141 of the NI Act, the learned Magistrate was not justified in issuing process against the accused no.1. Nowhere in the complaint it has been averred that accused no.4 is a company/firm or accused no.1 is in-charge or responsible for day-to-day business of the company/firm. In the absence of averment to link accused no.1 with accused no.4, in my opinion, the order of issuance of process against accused no.1 cannot be sustained.

6. Hence, the following order :

(a) The impugned judgment and order dated 29th November 2019 passed by the learned Sessions Court in

Criminal Revision Application No.651 of 2019 is quashed and set aside;

(b) The order of issuance of process dated 5th July 2018 passed by the learned Metropolitan Magistrate, 6th Court, Mazgaon (Sewree), Mumbai in C.C. No.1754/SS/2018 is set aside as against the petitioner (accused no.1).

7. Rule is made absolute in above terms. No costs.

(AMIT BORKAR, J.)