

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

**CRIMINAL WRIT PETITION NO. 2920 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 283 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 282 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 280 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 269 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 258 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 259 OF 2022**

M/s. Suraj Estate Developer And Anr ...Petitioners
Versus

Dilip Ashok Desai And Anr. ...Respondents

**WITH
CRIMINAL WRIT PETITION NO. 350 OF 2022**

Chetan Hasmukhbhai Vasa ...Petitioner
Versus

Dilip Ashok Desai And Anr. ...Respondents

**WITH
CRIMINAL WRIT PETITION NO. 348 OF 2022**

Rajiv Chinubhai Parikh ...Petitioner
Versus

Dilip Ashok Desai And Anr. ...Respondents

**WITH
CRIMINAL WRIT PETITION NO. 2992 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 2993 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 2921 OF 2022**

M/s Suraj Estate Developer And Anr ...Petitioners
Versus

Dilip Ashok Desai And Anr ...Respondents

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Mr. Surel S. Shah, Advocate for the Petitioner in all petitions.

Mr. Suryajeet Chavan i/by One Legal Bay Advocate for Respondent No.1 in all petitions.

Mr. S. R. Agarkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 29th SEPTEMBER, 2022

PC :

1. The petitioner in all these petitions have invoked inherent powers of this Court under Section 482 of Criminal Procedure Code and jurisdiction of this Court under Article 227 of the Constitution of India challenging the impugned complaints and order issuing process dated 08.02.2022 passed by the Court of learned 5th Judicial Magistrate First Class, Kolhapur in each complaints.

2. The complaints are filed by respondent No.1 alleging that the accused No.1 Suraj Estate Developers is the registered partnership firm and accused No.2 is the partner of the said firm. The accused is Builder, Land Developer, Estate broker and involved in Sale and Purchase of Immovable Property, Developing Property, Promoting Housing Scheme, Constructing Residential Building and Civil Construction etc. The accused No.2 is looking after day to

day affairs to accused No.1. The bank account of accused No.1 is operated by accused No.2. The complainant purchased property situated at Kasaba Bawda, RS No. 919 area. 1.36 R, potkharab area 0.03 Hect, total area 1.39 R NA 0.34 R from Randhir Gaikwad and Sangram Gaikwad by registered sale deed dated 21.04.2018. The complainant executed development agreement with the accused on 24.04.2018. Power of attorney was executed in favour of the accused, it was registered. The accused had agreed to pay consideration of Rs.3,30,00,000/- (three crore thirty lacs) to the complainant. As per agreement 10% of amount to be given to complainant up to 10.03.2023 bearing No.048987 for Rs.18 lakhs, cheque dated after deducting TDS by way of installments. It was also agreed that four flats would be provided to the complainant with parking, valued Rs.70,67,550/-. The accused No.1 issued cheques in favour of the complainant. The cheque dated 20.04.2018 and 10.06.2018 bearing No.48988 for an amount of Rs.18,00,000/-, cheque dated 10.09.2018 bearing No.48989 for an amount of Rs.18,00,000/-, cheque dated 10.11.2018 bearing No.48990 for an amount of Rs.9,00,000/- and cheque dated 10.02.2019 bearing No.48991 for an amount of Rs.13,68,000/- were honoured in favour of complainant.

Thus, the complainant had received an amount of Rs.85,20,000/-. Towards the balance payment of Rs.2,44,80,000/-, the accused issued cheques bearing No.54426 to 54473 in the sum of Rs. 4,59,000/- each for a period of 48 months from April 2019 to March 2023. Cheque bearing No.54426 dated 10.04.2019 cheque No. 54427 dated 10.05.2019, cheque bearing No.54428 dated 10.06.2019, cheque bearing No.54429 dated 10.07.2019 and cheque bearing No.54430 dated 10.08.2019 each for amount of Rs.54,59,000/- were honoured. Thus, the complainant received the amount of Rs.25,50,000/- towards the aforesaid cheques. Thus, the total amount were received by complainant is Rs.1,10,70,000/-. The complainant deposited cheque bearing No.54450 dated 10.04.2021, cheque bearing No.54451 dated 10.05.2021 and cheque bearing No.54452 dated 10.06.2021. Each cheques was issued for amount of Rs.4,59,000/-. All the cheques were returned with remark "Payment stopped by drawer". Demand notice was issued to the accused on 13.07.2021. Notice was served. Payment was not paid. The complainant filed summary criminal Case No. 427 of 2022. Process was issued for offence under Section 138 of Negotiable Instruments Act vide order dated 08.02.2022.

This complaint and order of process has been challenged by preferring Criminal Writ Petition No.2920 of 2022. Similarly cheque No. 54455 dated 10.09.2021 and 54456 dated 10.10.2021 for amount of Rs.4,59,000/- each issued by accused were deposited on 11.10.2021. Both cheques were dishonoured with remarks 'Payment stopped by drawer' and 'Refer to drawer' on 12.10.2021 and 13.10.2021. Demand notice was issued on 22.10.2021. It was served upon accused. Payment not made. Complaint was filed. Complaint was registered as SCC No.431 of 2022. Process was issued. This proceedings are challenged in Criminal Writ Petition No. 2921 of 2022. Cheque No. 54447 dated 10.01.2021, cheque No.54448 dated 10.02.2021 and cheque No.54449 dated 10.03.2021 for Rs.4,59,000/- each were dishonoured on 18.03.2021 and 19.03.2021 with remarks 'payment stopped by drawer'. Complaint was filed and process was issued. Complaint is numbered as SCC No. 425 of 2022. It is challenged by preferring Criminal Writ Petition No. 2992 of 2022. Cheque No. 54453 dated 10.07.2021 and 54454 dated 10.08.2021 for Rs. 4,59,000/- each were dishonoured on 16.08.2021 on similar ground. Notice of demand was issued on 31.08.2021. Notice was served on accused on 02.09.2021. Complaint was filed. It

was numbered as SCC No. 429 of 2022. It is under challenge in Criminal Writ Petition No. 2993 of 2022. Cheque No. 54445 dated 10.11.2020 and 54446 dated 10.12.2020 were dishonoured on 23.11.2020 and 14.12.2020. Notice was issued. Complaint was filed and it was numbered as SCC No. 394 of 2021. It is under challenged in criminal Writ Petition No.258 of 2022. Cheque No. 54432 dated 10.10.2019 was dishonoured on 11.10.2019. Complaint was numbered as SCC No. 6330 of 2019. It is challenged by preferring Criminal Writ Petition No. 259 of 2022. Cheque No. 54431 dated 10.09.2019 was dishonoured on 13.09.2019. Complaint was filed. It is numbered as SCC No. 6318 of 2019. It is subject matter of challenge in Criminal Writ Petition No. 269 of 2022. Cheque No.54438 dated 10.04.2020 and cheque No. 54439 dated 10.05.2020 were dishonoured on 17.06.2020. Complaint was registered as SCC No.1064 of 2021. It is challenged by preferring Criminal Writ Petition No.280 of 2022. Cheque No.54434 dated 10.12.2019, Cheque No. 54435 dated 10.01.2020, Cheque No.54436 dated 10.02.2020 were dishonoured on 19.02.2020. The complaint was registered as SCC No.175 of 2021. The same is challenged by preferring Criminal Writ Petition No.282 of 2022. Cheque

No.54442 dated 10.08.2020, Cheque No.54443 dated 10.09.2020, cheque No.54444 dated 10.10.2020 were dishonoured on 14.10.2020. Complaint was registered as SCC No. 1061 of 2021. The proceedings are challenged by preferring Criminal Writ 283 of 2022. The facts which are subject matter of Criminal Writ Petition No.348 of 2022 and Writ Petition No.350 of 2022 are different. The complaint SCC No.6329 of 2019 has been challenged in Criminal Writ Petition No.348 of 2022. It is alleged that accused Rajiv Chinubhai Parekh, Chetan Hasmukhbhai Vasa and Anand Shankarrao Mane owed amount of Rs.1,75,00,000/- to complainant Dilip Desai. MOU was executed between complainant, Chetan Vasa, Rajiv Parikh and Shankarrao Mane on 25.04.2018. It was agreed to pay amount of Rs.1,75,00,000/- to complainant. Cheques were issued. Cheque number 000043 dated 18.09.2019 was issued to complainant for amount of Rs.50 lakh. The said cheque was dishonoured on 20.09.2019. Notice was sent and complaint was filed. In relation to same transaction cheque number 062772 dated 18.07.2020 for amount of Rs.50 lakhs was issued. It was dishonoured on 20.07.2020. Complaint was filed against Chetan Vasa. It was registered as SCC No. 1119 of 2021. It is under challenge in Criminal

Writ Petition No.350 of 2022.

3. Learned Advocate for petitioner submitted that the petitioner No.1 is the registered partnership firm. The petitioner and respondent No.1 entered into a registered development agreement dated 24.04.2018 to develop land belonging to respondent No.1 bearing R.S. No.919 situated at Kasba Bawda, Kolhapur. The agreement stipulated that the petitioners to pay respondent No.1 a sum of Rs. 3,30,00,000/- and would also give possession of four 1 BHK flats and three parking slots in the proposed apartment. Sum of Rs.85,20,000/- was paid by the petitioners to respondent No.1 from 20.04.2018 to 10.02.2018 towards the consideration for development. As a part of the agreement, the balance of Rs.2,44,80,000/- was to be paid to respondent No.1 from April 2019 to March 2023 by way of post dated cheques. The petitioners have paid a sum of Rs. 1,10,70,000/- till 10.08.2019. Apart from the above cheques, the partners of the petitioner No.1 issued cheques of Rs.50,00,000/- each towards security for performance of the development agreement. At the time, when the development agreement was executed the property belonging to respondent No.1 was lying in yellow zone

(residential zone). In the year 2019, there was heavy rain in Kolhapur and the area which was to be developed under the development agreement was flooded with water. Due to the flood situation, pursuant to directions of National Green Tribunal and Irrigation Department, the Government had included the suit property in the blue line i.e. flood line and as a result, the development over the suit property was prohibited. The petitioners addressed notices to respondent No.1 on 23.08.2019, 04.09.2019 and 16.09.2019 informing him not to deposit the cheques on account of the property being included in the flood line. The Assistant Director of Town Planning imposed restrictions on development in the said area. Reliance is placed on the notification issued by Kolhapur Municipal Corporation issued on 22.12.2019. However, the respondent No.1 deposited cheques which were dishonoured. The petitioners had given instructions to the bank to stop the payment on account of impossibility of performance of agreement. The petitioners had replied the notice and stated about impossibility of performance of the agreement and frustration of the same. Although the complainant had knowledge that it is impossible to perform the agreement, the cheques were deposited and complaint was filed. The

reply to notice was suppressed. The process was issued mechanically. Initiation of the criminal proceedings is abused of process of law.

4. Learned advocate for the petitioner is replied upon the following decisions:-

- (a) Rathish Babu Unnikrishnan Vs. State (Govt. of NCT of Delhi) and Another¹.
- (b) Sunil Todi and Others Vs. State of Gujarat and Another².
- (c) Indus Airways Private Limited and Others Vs. Magnum Aviation Private Limited and Another³.
- (d) Meghmala and Others Vs. G. Narasimha Reddy and Others⁴.

5. Learned Advocate for respondent No.1 submitted that the cheques were issued toward legally enforceable liability. Cheques were dishonoured. Demand notice was sent to the accused. False excuses were given by accused for development. The payment in respect to the cheque was stopped by accused. The accused was not performing the development agreement in respect to the area where there is no prohibition to carry out construction. The grounds

1 2022 SCC OnLine SC 513

2 2021 SCC OnLine SC 1174

3 (2014) 12 SCC 539

4 (2010) 8 SCC 383

urged by petitioners are required to be considered during trial. The decisions relied upon by learned advocate for petitioner are not applicable in the present cases.

6. The prosecution relates to the offence under Section 138 of the Negotiable Instruments Act. The cheques were issued in favour of the complainant. The clearance of the cheques were stopped by drawer. According to the accused on account of circumstances beyond control of the accused the performance of the agreement is frustrated. It is impossible to develop the property. Whereas, the complainant has contended that accused is giving false excuses assuming that constructions is not possible over the same part of property which is subject matter of development agreement to the accused is not carrying out construction on the remaining part of property where there is no restrictions of whatsoever nature. Accused is required to rebut presumption under Section 139 of Negotiable Instruments Act. Learned Magistrate recorded verification statement of the complainant. Inquiry was conducted under Section 202 of Cr.P.C. The Court considered the document on record and formed the opinion that prima facie offence

punishable under Section 138 of the Negotiable Instruments Act is made out. The accused can urge the defence raised in the petition during trial. The decisions relied upon by learned advocate for the petitioner were delivered in factual matrix of the respective cases. The proceedings cannot be quashed. The grounds urged by petitioner are based on disputed questions of fact. Hence, I pass the following order:-

ORDER

- (i) All Criminal Writ Petitions are rejected.
- (ii) At this stage, learned counsel for the petitioners seek extension of interim relief granted by this Court, to enable the petitioner to challenge the order before the Higher Court.
- (iii) Interim relief is extended by six weeks.
- (iv) Petitions stand disposed of.

(PRAKASH D. NAIK, J.)