

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

CRIMINAL WRIT PETITION NO. 690 OF 2022

Sunil Bhai Sheth

Petitioner

Versus

1. M/s. Agricore Commodities Pvt. Ltd

2. Anil Mines and Minerals Pvt. Ltd.

3. State of Maharashtra

Respondents

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Mr. Arun Mehta i/by Akshar Laws, Advocate for petitioner.

Mr. Hrishikesh Chavan, Advocate for Respondent No.1.

Mr. A.R. Patil, APP, for State/Respondent.

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CORAM : PRAKASH D. NAIK, J.

DATE : 19th SEPTEMBER, 2022

PC :

1. The petitioner challenges the order dated 23.10.2017 passed by learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai and order dated 06.12.2021 passed by Sessions Court in Criminal Revision Application No.1332 of 2019.

2. The Petitioner is facing proceedings under Section 138 of the Negotiable Instruments Act initiated by respondent No.1 filed in CC No.2305627/SS/2016 before the Court of learned Metropolitan Magistrate, 23rd Court at Esplanade, Mumbai. The petitioner was

arraigned as accused No.2. The complainant has alleged that accused No.1 is Private Limited Company. The accused Nos.2 to 5 and 8 are Directors of accused No.1. They looked after day to day business of accused No.1. The accused Nos. 6 and 7 are signatories to the cheques which are dishonoured. Accused Nos.6 and 7 are responsible for the day to day activities and business affairs of the accused No.1. The complainant executed sales contracts with Anil Limited for supply of Maize. Various invoices were raised from time to time towards supply of maize. The complainant delivered goods in terms of contracts from time to time and the same were received without any protest. As per terms and conditions of the contracts, there was a credit period of 90 days and the post dated cheques (PDC) were to be offered as security for payments under the invoices raised. The accused No.1 handed over post dated cheques. Sum of Rs.7,94,70,512/- was due and payable to the complainant. Some of the cheques when presented for payment were not honoured for reasons of "Insufficient Funds". Notice dated 25.07.2016 was issued by the complainant to the accused under Section 138 of Negotiable Instruments Act. Assurances were given by accused No. 2 to 7 and also by Directors and Promoters of accused No.1. The accused as well as Directors and promoters of accused No.1 has requested to settle the dispute by entering into a Memorandum of Understanding

(MOU) and accordingly MOU dated 28.07.2016 was executed between accused No.1 and complainant. In the MOU, accused No.1 accepted the liability to pay outstanding of Rs.7,81,99,695/- to complainant towards contracts. In terms of MOU, the accused No.1 issued post dated cheques. The cheques were forwarded by accused No.1 vide letter dated 02.08.2016. The said letter acknowledges the MOU and liabilities. The accused Nos. 1 to 5 vide their advocate's letter dated 19.08.2016 replied to the notice dated 25.07.2016 requesting that the notice be withdrawn in view of MOU. The said letter does not deny any payment obligations and admits liability. Accused No.1 issued various cheques as per MOU amounting to Rs.1,81,99,690/-. The cheque bearing No.242884 for an amount of Rs.50,00,000/- was issued on 17.10.2016. It was deposited by complainant on 20.10.2016. It was dishonoured with return memo dated 20.10.2016. Cheque No.242885 for an amount of Rs. 50,00,000/- was issued on 17.10.2016. It was deposited by complainant on 20.10.2016 and it was dishonoured by return memo dated 20.10.2016. Cheque No.242886 for an amount of Rs.50,58,590/- was issued on 25.10.2016. It was deposited by complainant on 26.10.2016 and it was dishonoured by return memo dated 26.10.2016. Cheque No.242887 for an amount of Rs.31,41,100/- was issued on 25.10.2016. It was deposited by

complainant on 26.10.2016 and it was dishonoured by return memo dated 26.10.2016. The accused have specifically admitted and accepted the liabilities arising out of the contracts and the MOU. All the accused were instrumental in holding meetings and calls with the complainant pursuant to which the MOU was executed. Thus, each of the accused are Directors / Officers /Incharge of and responsible to accused No.1 for day to day affairs of Company and its business. Notice dated 17.11.2016 was issued to accused under Section 138 of the Negotiable Instruments Act, to make payment of Rs. 1,81,99,690/-. The notice was received by accused. Some of the accused had replied. Accused No.5 replied the notice. The accused No.2 has also replied the notice. They gave lame excuses having resigned as Director of accused No.1 with a view to shirk their liability to pay the amount demanded under the notice. The accused are liable for payment as demanded in the notice and they were in all negotiations/meetings concerning the MOU. The complaint was filed for offence punishable under Section 138 of the Negotiable Instrument Act.

3. The learned Magistrate perused the complaint, verification statement and documents on record. Vide order dated 23.10.2017, process was issued against the accused No.1 to 10 for offence

punishable under Section 138 of the Negotiable Instrument Act. The learned Magistrate considered the facts that the accused No.2 to 10 are responsible for day to day affairs of business of accused No.1 and the complainant has made out prima facie case to issue process against the accused.

4. The petitioner challenged the order of process by preferring Criminal Revision Application No. 1332 of 2019 before the Court of Sessions for Greater Bombay. The Revision Application was dismissed vide order dated 06.12.2021.

5. Learned advocate for the petitioner submitted that the order issuing process dated 23.10.2017 was challenged by the petitioner before the Sessions Court by preferring Criminal Revision Application No. 1332 of 2019 and there was delay in preferring the said application. The petitioner has filed application for condonation of delay. The learned Sessions Judge had refused to condone the delay in filing the revision application. The said order was challenged before this Court by preferring Criminal Writ Petition No. 865 of 2019. This Court vide order dated 08.07.2019 rejected Criminal Writ Petition No. 865 of 2019. The order passed by this Court was challenged before the Apex Court vide Criminal Appeal No. 1634 of

2019 (SLP (Cri.) No. 8594 of 2019) and the Hon'ble Apex Court vide order dated 04.11.2019 was pleased to condone the delay in filing the Revision Application and directed Sessions Court to dispose off the Criminal Revision Application on merits. The order dated 04.11.2019 passed by Apex Court records the submission of the petitioner that he had already resigned from the post of Directorship of the Company and that he was not responsible for the affairs of the company and that he could not be prosecuted for the offence under Section 138 of Negotiable Instruments Act. The Court also observed that dishonour of another cheque by the same company to the same complainant had resulted in prosecution of the company and that the present petitioner was granted benefit by the Revisional Court vide order dated 12.12.2018, in Criminal Revision Application No.719/2018 and the order issuing process was set aside. Hence, the matter is required to be considered on merits and delay should have been condoned by the Revisional Court. It is submitted that the order dated 12.12.2018 passed by the Sessions Court was not challenged by the complainant before the higher Court. The complainant has suppressed vital facts from the Court. The learned Sessions Court has erroneously rejected the revision application without appreciating the undisputed documents on record. In reply to notice, the petitioner had brought to the notice of the complainant

that he has resigned from the accused No.1 Company on 15.06.2016. In spite of this fact being known to the complainant, the petitioner was impleaded as accused. The Learned Sessions Judge erred in coming to the conclusion that since the original complainant has disputed the resignation of petitioner, in such circumstances, the petitioner has to prove the truth of the contents of Form DIR-12. The findings of the Sessions Court are contrary to law. The Court failed to appreciate form No. 32 produced by complainant and form DIR-12 produced by petitioner. The complainant had not produced any receipt issued by Ministry of Corporation Affairs on the day on which the print out of form No. 32 was taken out by complainant. The petitioner had not only produced form DIR-12 but also the date of payment and print out taken from the website of Ministry of Corporate Affairs in respect of form DIR-12 which shows that the petitioner is no more Director of accused No.1 w.e.f 15.06.2016. The petitioner has ceased to be the Director of accused No.1 Company. He has resigned from the said company on 15.06.2016. The petitioner has relied upon form DIR-12 which supports the submission of the petitioner that he has ceased to be Director of accused No.1 from 15.06.2016. There was no reason to doubt genuineness of the documents produced by petitioner. Cheque dated 17.10.2016, 25.10.2016 and 28.10.2016 were dishonoured on the

date mentioned in the complaint. Thus, the cause of action for initiating the proceedings under Section 138 of the Negotiable Instruments Act had occurred after the resignation of the petitioner. The MOU was executed on 28.07.2016, which is post resignation of the petitioner. The petitioner was not signatory to the memorandum of understanding. There is no sufficient material to invoke Section 141 of the Negotiable Instrument Act against the petitioner. The allegations are general in nature. No role was assigned to petitioner to invoke Section 141 of Negotiable Instruments Act.

6. The learned Advocate for the petitioner had relied upon the followings decisions:

- i. Ashoke Mal Bafna Vs. M/s. Upper India Steel Mfg. & Engg. Co. Ltd. AIR 2017 S.C. 2854.
- ii. Harshendra Kumar D. Vs. Rebatilata Koley and Others (2011) 3 SCC 351.
- iii. Anita Malhotra Vs. Apparel Export Promotion Council and Others MANU/SC/1323/2011.

7. The Respondent No.1 has filed affidavit-in-reply opposing the relief sought in this petition.

8. Learned advocate for Respondent No.1 submitted that there are sufficient averments attributing role to the petitioner. Prima facie case is made out for issuing process. The grounds urged by

petitioners are based on the disputed question of facts. The application viz Criminal Application No.14850 of 2008 preferred by accused No.5 Anita Lalwani has been dismissed by this Court vide order dated 04.02.2020 in identical complaint, where this Court considered averments as well as correspondence. The same correspondence which is at page no.75 of the present petition, which exemplifies that the petitioner like other accused director, continued for and on behalf of company. The respondent No.1 has expressly made averments with respect to the role of the petitioner in the said transaction. The respondent No.1 dealt with the purported resignation of petitioner in the complaint. The alleged resignation of petitioner is not of any relevance because he continued to act for and on behalf of the company. This is evident from the correspondence dated 19.08.2016. The said correspondence is apparently post the purported resignation of the petitioner. The conduct of petitioner post his purported resignation dated 15.06.2016 shows his involvement in day to day affairs of the company. The correspondence dated 19.08.2016 which is at page No. 75 of this petition shows that the petitioner continued to work for the company. The petitioner had deliberately not made reference to his resignation in the said correspondence. Assuming that the petitioner had resigned before the dishonour of cheques and if he continued to

act for and on behalf of the company, he would be liable being in charge and responsible for the affairs of the accused company. Section 141 of the said Act does not restrict the liability to a Director but to every person who is in charge and responsible for the affairs of the company. There was no reason for the complainant to believe that he is no more associated with the company. Learned Sessions Judge has rejected the revision application preferred by the petitioner. The petitioner is misusing the order dated 04.11.2019 passed by the Hon'ble Supreme Court. The order clearly indicate that the matter was not considered on merits. The Court restored the revision application of the petitioner to the file of Sessions Court of Greater Mumbai to be disposed off on merits. In the said petition before the Apex Court, the petitioner had also prayed for setting aside the order of learned Magistrate. The Apex Court did not consider the said prayer. The Apex Court did not decide the question of law on merits. The Apex Court condoned the delay and directed Sessions Court to dispose off the said case on merits. At the time of appointment Form 32 was followed Form DIR-12 was not in existence. The petition is devoid of merits.

9. Learned Advocate for respondent No.1 has relied upon following decisions:

- (i) Suhas Bhand & Anr. Vs. State of Maharashtra and Anr. (2010) (1) AIR Bom R 564),
- (ii) A.R. Radha Krishna Vs. Dasari Deepthi & Ors (AIR 2019 SC 2518),
- (iii) Anita Lalwani Vs. State of Maharashtra 2020(1)-ABR (Cri.)-942.

10. The petitioner is accused No.2 in the complaint. In para No. 2 of the complaint it is stated that accused No.1 is Pvt. Ltd. Company. The accused No.2 to 5 and 8 to 10 are Directors of accused No.1. They looked after day to day business of accused No.1. Accused No.6 and 7 are the signatories to the cheques. Accused Nos.6 and 7 are responsible for the day to day activities and business affairs of accused No.1. In paragraphs No.8 of the complaint it is alleged that negotiations were held with the accused No.1 and complainant. These negotiations were in the form of meeting and conference calls participated by directors and promoters of Anil Limited and accused Nos.1 to 7 representing accused No.1. Various assurances were given by accused Nos. 2 to 7 as also by Directors and Promoters of accused No.1 in those meetings /conference calls. All the accused as well as Directors and Promoters of accused No.1 requested to settle the dispute by entering into a memorandum of understanding (MOU). The MOU dated 28.07.2016 came to be entered into between accused No.1 and complainant. In paragraph No.9 of the complaint,

it is averred that in the MOU the accused No.1 accepted the liability to pay outstanding of Rs.7,81,99,695/- to complainant towards the contracts and consequent invoices raised alongwith interest. In terms of MOU, the accused No.1 issued post dated cheques and agreed to pay the same. Thus, cheques were forwarded by accused No.1 in letter dated 02.08.2016. The said letter acknowledges the MOU and liabilities. The MOU sets out the payment mode and the dates on which the payment were to be made. In paragraph No.10, it is stated that after execution of MOU, accused Nos. 1 to 5 vide their advocate letter dated 19.08.2016 replied to the notice dated 25.07.2016 issued under Section 138 of the Negotiable Instruments Act by complainant through its advocate requesting that the notice be withdrawn in view of MOU. The letter does not deny any payment obligations and more importantly acknowledges the legal liability for paying the debts arising under the contracts in as much as it specifically relies upon the MOU. In paragraph No. 11 it is averred that pursuance of MOU the accused No.1 issued various cheques amounting to Rs.1,81,99,690/- towards discharge of legal liability in terms of MOU. The cheques were dishonoured. In paragraph No.13, it is alleged that the accused No.1 to 10 have accepted the liabilities arising under the MOU and more so subsequently in letter dated 19.08.2016 and the accused have

specifically admitted and accepted the liability arising out of the contracts and the MOU. All the accused have been instrumental in holding meeting and calls with the complainant pursuant to which the MOU came to be executed. This show that each of the accused, who are in-charge and responsible to accused No.1 for day to day affairs and its business. Paragraph No.18 of the said complaint states that the accused No.5 has replied the notice by an e-mail dated 21st November 2016 addressed to Advocate for complainant. The accused no.2 (petitioner) has replied to the notice by letter dated 28th November 2016. The complainant has noted the stand of the petitioner that he had resigned from accused No.1/company and it is specifically stated that the accused No.1 as well as accused No.5 have given lame excuse of having resigned as a director of accused No.1 with an intent to shirk their liability to pay the amount demanded under the notice. The complainant therefore, reiterated that the accused No.2(petitioner) and accused No.5 who claimed to have resigned from accused No.1 are liable for payment as demanded in the notice as they were involved in all negotiations/meetings concerning the MOU.

11. Thus, the complaint is not vague. It dealt with the overt act of the accused. It also deals with the defence of the petitioner that he

had resigned. The complaint also referred to the MOU dated 08.07.2016 and the advocates letter dated 19.08.2016 written to the advocate for the complainant. The said letter mentioned that he advocates are concerned for M/s. Anil Mines & Minerals Ltd. (Accused No.1), Mr. Gaurav Gunottam Shah (Accused No.3), Mr. Nalinkumar S. Thakur (Accused No.4), Ms. Anita Lalwani (accused No.5) and Mr. Sunilbhai Sheth (accused No.2/Petitioner). Thus the said letter was also written representing the petitioner. Letter mentions that the aforesaid persons are in receipt of notice dated 25.07.2016 calling upon them to make payment. Pursuant to notice dated 25.07.2016 the complainant and Anil Limited have entered into MOU dated 28.07.2016, wherein the parties have arrived at mutual understanding with respect to payment terms for the amount outstanding as per the sales contracts mentioned in the notice. The letter dated 19.08.2016 was forwarded after the purported date of resignation of petitioner. The petitioner is denying that the letter is written on his instructions as he had resigned from accused No.1 company with effect from 15.06.2016. Thus, the petitioner's case involves disputed question of facts and on the basis of document relied upon by petitioner, the impugned proceedings cannot be quashed against the petitioner.

12. Accused No.5 Ms. Anita Lalwani, in the present case was also prosecuted in Criminal Case No. 10979/SS/2016 filed by respondent No.1/Ms. Agricore Commodities Ltd. Pvt. Ltd. The complaint was filed for offence punishable under Section 138 of the Negotiable Instruments Act. She had challenged the said proceedings before this Court by preferring Criminal Application No.1485 of 2018. Identical submission was made that she had resigned from accused company. This Court vide order dated 04.02.2020 rejected the application by considering the letter dated 19.08.2016 issued by advocate which is also under reference in the present proceedings.

13. Apparently, the petitioner has challenged the order refusing condonation of delay passed by Sessions Court in Criminal Revision Application challenging order of process before this Court as well as Apex Court. It was contended on behalf of the petitioner that he had resigned from the post of Directorship and not responsible for the affairs of the company. The Apex Court noted that in another complaint the proceeding against the petitioner were quashed by giving a benefit. The Apex Court directed that the revision is required to be heard on merits by condoning delay. It is pertinent to note that Special Leave Petition preferred by petitioner before the

Apex Court was not decided on merits and the delay in preferring Revision Application before the Sessions Court was condoned.

14. In the light of the fact of the present case, the averments in the complaint the proceedings against the petitioner cannot be quashed on the ground that he had resigned from accused No.1 Company. The grounds urged by petitioner are based on disputed questions of fact. The complainant must be allowed to prove their case.

15. In the case of Ashoke Bafna (Supra), the Apex Court had dealt with the issue of vicarious liability and it was held that the Courts must ensure strict compliance of the statutory requirements as well as settled principles of law before holding the accused vicariously liable. In the fact of case, the Court had observed that the accused had resigned from the company which fact was substantiated by Form No. 32 submitted to Registrar of Company and that he was not involved in day to day affairs of the company. There was no specific averments in the complaint about his role and activities. In the case of Harshendra Kumar D. (Supra), it was held that the Ex- Director cannot be made accountable and fastened with liability for anything done by company after acceptance of his resignation by company. On the day of offence, the said person had nothing to do with the

accused company. The Court can quash proceedings if material relied upon by the accused is beyond suspicion or doubt or which is in the nature of public documents and are uncontroverted. In the case of Anita Malhotra (supra), the Apex Court had held that the complaint should specifically spell out how and in what manner the director was in charge of or was responsible to the accused company for conduct of its business and mere bald statement that he or she was incharge of and was responsible to the company for conduct of its business is not sufficient. In the case of Suhas Bhand (supra), this Court had observed that if the resignation is not accepted or admitted by complainant, accused has to prove factum of his resignation. If the complainant produces any evidence showing continuance of accused as Director of company after date of his resignation claimed by him as per the certified copy, such accused cannot be discharged simplicitor upon production of Form No. 32. He will have to lead evidence to prove the factum of his resignation. The complainant would be entitled to prove the factum of the accused continuing as Director. In the case of A. R. Radha Krishna (supra), it was held that the complaint containing specific averments that, accused were running company together by actively participating in day to day affairs, being from same family and the complaint stating that all the accused in active connivance issued

cheques in favour of the complainant. It would be sufficient to continue the proceedings against the accused.

16. Thus, taking into consideration the averments in the complaint, document on record, the factual aspects of this matter, legal precedents, I do not find that this is fit case to exercise powers under Section 482 of Cr.P.C. or under Article 227 of the Constitution of India to quash the impugned proceedings. Hence, I pass the following order.

ORDER

- (i) Writ Petition is dismissed and disposed off;
- (ii) At this stage learned counsel for petitioner states that petitioner proposes to challenge this order before higher Court. Hence interim relief granted by this Court may be extended by eight weeks. Prayer is opposed by respondent. Considering submissions of both sides and since interim relief was granted on 30th March 2022, same is continued for a period of six weeks.

(PRAKASH D. NAIK, J.)