

VRJ

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

WRIT PETITION NO.1796 OF 2022

Devendra Arvindbhai Parmar ... Petitioner
V/s.
The State of Maharashtra & Anr. ... Respondents

Mr. Satyadev D. Joshi for the petitioner.

Mr. A.R. Patil, APP for the respondent No.1/State.

Mr. Gaurav V. Gokhale for respondent No.2

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 14, 2022

PC.:

- 1. Rule.** Rule is made returnable forthwith by consent of the parties.
- 2.** The order of issuance of process in a proceeding under section 138 of the Negotiable Instruments Act, 1881 is the subject matter of this writ petition. The grounds raised in the petition is that the notice mandatorily required under section 138 of the Negotiable Instruments Act, 1881 has not been issued to the drawer.
- 3.** The facts relevant for the adjudication of the present petition are as under. The complainant is a proprietary firm having name M/s. Essar Electro Control of which one Mr. Rahul M. Shah is the proprietor. The accused is the proprietary firm of which, according

to the complainant, one Mr. Devendra Aravindbhai Mistry is a proprietor. According to the accused, it is Mr. Devendra Aravindbhai Parmar who is the proprietor. The transaction between the parties was sale and supply of control panel accessories and hardware goods which were received by M/s. Neutron Engineering Corporation Limited under invoices. Towards the liability incurred out of the said transactions, five (5) cheques bearing Nos.511052 dated 17th April 2020 in the amount of Rs.25,705/-, 511051 dated 18th April 2020 in the amount of Rs.19,539/-, 680436 dated 10th May, 2020 in the amount of Rs.80,807/-, 312022 dated 25th May, 2020 in the amount of Rs.1,53,980/- and 312023 dated 10th June, 2020 in the amount of Rs.67,589/- were issued.

4. The complainant deposited the cheques with the banker, which were returned dishonoured with the remark 'payment stopped by the drawer' and 'funds insufficient'.

5. The complainant, therefore, issued a demand notice dated 21st July, 2020 by registered post acknowledgment due. The copy of the notice is produced on record at page 84. The relevant portion of the notice reads thus:

“To,
Mr. Sameer Shah,
M/S. Neutron Engineering Corporation,
E-1, Shree Ram Amin Industrial Estate,
Ram Mandir Road, Goregaon (W),
Mumbai-400 104.”

6. Since the amount as demanded under the said notice was not paid, a complaint was filed by the respondent. The learned

Magistrate by the impugned order issued process against the petitioner. The said order of issuance of process is the subject matter of challenge in the present petition.

7. The learned Advocate for the petitioner invited my attention to the title of the notice which mentions name of Mr. Sameer Shah as proprietor of M/s. Neutron Engineering Corporation. He also invited my attention to the name of the accused which has been amended to incorporate the name of Devendra Aravindbhai Mistry in place of Sameer Shah. Therefore, the cause-title of the complaint as today does show Devendra Aravindbhai Mistry as accused. It is, therefore, submitted that the notice as mandatorily required under section 138 of the Negotiable Instruments Act, 1881 has not been issued to the drawer.

8. *Per contra*, the learned advocate for the complainant submitted that the notice was sent on the correct address of proprietary firm. It is also submitted that the validity of notice is a triable issue which needs to be considered at the time of trial of the complaint. He submitted that the invoices have been signed by Mr. Sameer Shah.

9. Reliance upon unreported judgment of Apex Court in **Criminal Appeal No.1325 of 2019** (Kishore Sharma Vs. Sachin Dubey and the judgment of Himachal Pradesh) decided on 3rd September 2019 and **Criminal Miscellaneous Petition No. 176 of 2022** (Bhim Singh Vs. Natthu Singh) decided on 11th March, 2022.

10. It is well settled principle of law that following are the

components of the offence under section 138 of the Negotiable Instruments Act, 1881: 1) Drawing of the cheque; 2) Presentation of the cheque to the bank; 3) Returning the cheque un-paid by the drawing bank; 4) Giving notice in writing to the drawer of the cheque demanding amount of the cheque; and 5) Failure of drawer to make payment within 15 days of the receipt of notice.

11. A copy of cheque is on record which shows that the cheque has been signed by Mr. Devendra Aravindbhai Mistry as authorized signatory of M/s. Neutron Engineering Corporation Limited. Therefore, Mr. Devendra Aravindbhai Mistry is the drawer of the cheque. The notice on record shows that it was issued to Mr. Sameer Shah as the proprietor of M/s. Neutron Engineering Corporation. Therefore, in my opinion, the essential ingredients of the offence under section 138 of Negotiable Instruments Act, 1881 on the face of it has not been fulfilled. The submission that the invoices were signed by Mr. Sameer Shah is not relevant fact to adjudicate whether the notice was issued to a drawer of a cheque or not. The material on record may show that the real transactions might have occurred between Mr. Sameer Shah and the complainant. For the purpose of constituting offence under section 138 of the Negotiable Instruments Act, 1881 demand from the drawer of a cheque is necessary ingredient which fact has not been complied with by the complainant.

12. The judgments relied upon by the learned advocate for the complainant has no bearing on the issues involved as in the facts of those cases, the issue regarding service of notice on proper address or the validity of notice on different count was involved

which required evidence. In the facts of the case, the name of drawer is mentioned in the notice as also in the complaint. The name of signatory of a cheque has been mentioned on the basis of documents which was the material before the learned Magistrate at the time of issuance of process. It was clear that the notice was not issued to the drawer and, therefore, the learned Magistrate could not have issued process against the petitioner. Hence, the following order:

The impugned judgment and order passed by the learned Metropolitan Magistrate, 56th Court, Mazgaon in C.C. No.5602394/SS/2020 dated 19th July, 2021 issuing process against the petitioner is quashed and set aside.

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

(AMIT BORKAR, J.)