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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.3507 OF 2019

Zoom Developers, through
Asoo Nihalani & Ors. …Petitioners
V/s.
Vijaykumar Gupta & Anr. …Respondents

Mr. Amit P. Ghag for the petitioners.

Mr. V. C. Gupte with Mr. Chetan Akerkar for respondent no.1.

Ms. G. P. Mulekar, 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 is challenging the order dated 19th March 2019 passed by the learned Additional Sessions Judge in Criminal Revision Application No.260 of 2016 confirming the order of issuance of process dated 8th October 2013 passed by the learned Magistrate, 22nd Court, Andheri, Mumbai in C.C. No. 2525/SS/2013.

2. The petition arises out of a complaint under section 13 of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA Act", for short) read with section 4 of the MOFA Act. The respondent no.1/complainant filed a complaint with the learned Magistrate contending that on 4th October 2006, petitioner no.1 was assigned development rights by accused no.1. The petitioner no.1 agreed to convey four (4) flats in favour of accused no.1. It is also averred that accused no.1 assigned development rights of the plot owned by Sher-E-Punjab Cooperative Housing Society in relation to which an agreement dated 24th November 1993 was executed in favour of accused no.1 and was put in possession of the said flat.

3. Since there was a failure to execute a deed of conveyance in relation to the plot of respondent no.1, respondent no.1 filed a complaint before the learned Magistrate under section 13 of the MOFA Act. The learned Magistrate, by order dated 8th October 2013, issued a process against the petitioners and other accused. The petitioners challenged the said order through Criminal Revision Application No.260 of 2016, which came to be dismissed. Aggrieved, thereby, the present petition is filed.

4. Learned advocate for the petitioner made the following submissions in support of his case:

i) There was no privity of contract between the complainant and the petitioners as the initial agreement was executed in favour of accused no.1, and it is accused no.1 who, in turn, assigned the development rights in favour of petitioner no.1;

ii) The averments in the complaint are not sufficient to attract vicarious liability in relation to petitioner nos.2 and 3;

iii) The petitioners have not received any amount from the complainant; and

iv) petitioner no.1 has not transferred any right, title and interest in the property in dispute in favour of accused no.1.

5. *Per contra*, the learned advocate for respondent no.1 invites my attention to the definition of "promoter" under section 2(c), section 4 and section 13 of the MOFA Act to urge that the liability caste on the petitioner is statutory. From the documents on record, it is clear that the status of petitioner no.1 is that of the assignee. He submitted that in addition to his status as assignee, the expression "promoter" in section 2(c) of the MOFA Act includes those persons who built and the person who sells it to different persons. It is, therefore, submitted that, being a promoter, the petitioners are liable for the action under the provisions of the MOFA Act. Finally, he invited my attention to paragraph 3 of the complaint wherein it is averred that the petitioners agreed to convey four (4) flats in favour of accused no.1, which is sufficient to show that the petitioners are in charge and carrying out the day-to-day activity and, therefore, he prayed for dismissal of the writ petition.

6. Having considered the submissions on behalf of the parties, it is relevant to note the definition of the expression "promoter" under section 2(c), which reads as under:

> “2(c) "promoter" means a person and includes a partnership firm or a body or association of persons, whether registered or not, who constructs or causes to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and

includes his assignees and where the person who builds and the person who sells are different persons, the term includes both;."

7. Section 4(1) of the MOFA Act reads as under:-

> "**4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered.**- (1) Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Registration Act, 1908 (XVI of 1908); and such agreement shall be in the prescribed form;."

8. Section 13(1) of the MOFA Act reads as under:

> "**13. Offences by Promoters and consequences on convictions**.- (1) Any promoter who, without reasonable excuse, fails to comply with or contravenes, the provisions of sections 3, 4 5 (save as provided in sub-section (2) of this section), 10 or 11 shall, on conviction be, punished with imprisonment for a term which may extend to three years or with fine, or with both."

9. On a conjoint reading of the aforesaid provisions, the scheme appears to be that if a promoter without any reasonable excuse fails to comply with section 4 of the MOFA Act, which casts liability on the promoter to convey title, the conveyance under section 13 of the MOFA Act can be registered. *Prima facie*, the averments in the complaint and the terms of the agreement executed between accused no.1 and petitioner no.1 show that accused no.1 assigned development rights in favour of petitioner no.1/firm. Therefore, at this stage, it can be safely inferred that the status of petitioner no.1 would be that of the assignee as contemplated under the definition of the expression "promoter". Apart from petitioner no.1/company assignee, from the agreement placed on record, it appears that the development rights are transferred in favour of petitioner no.1 and, therefore, petitioner no.1 would be the person who would be covered under the last part of the definition "promoter". Once from the averments in the complaint, it is clear that the averments are sufficient to attract ingredients of section 13 read with section 4 of the MOFA Act, in my opinion, the order of issuance of process on that count is legal and proper.

10. The next submission made on behalf of the petitioner is to the effect that the averments in the complaint are not sufficient to constitute an offence against petitioner nos.2 and 3 as there are no sufficient averments that petitioner nos.2 and 3 are in-charge and responsible for day-to-day affairs of petitioner no.1/firm. The issue in relation to the averments to be made in the complaint has been interpreted by the Apex Court in a recent judgment in **S.P. Mani and Mohan Dairy v. Dr. Snehalatha Elngovan** reported in 2022 SCC OnLine SC 1238. In paragraph 55 of the said judgment, the Apex Court after considering earlier precedents, held as under:-

> "33. Thus, the legal principles discernible from the aforesaid decision of this Court may be summarised as under:—
>
> > (a) Vicarious liability can be fastened on those who are in charge of and responsible to the company or firm for the conduct of its business. For the purpose of

Section 141 , the firm comes within the ambit of a company;

(b) It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole;

(c) If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed in regards to the law.

(d) In construing a complaint a hyper-technical approach should not be adopted so as to quash the same.

(e) The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in the enactment of Sections 138 and 141, respectively should be kept in mind by the Court concerned.

(f) These provisions create a statutory presumption of dishonesty exposing a person to criminal liability if payment is not made within the statutory period even after the issue of notice.

(g) The power of quashing should be exercised very sparingly, and where, read as a whole, the factual foundation for the offence has been laid in the complaint, it should not be quashed.

(h) The Court concerned would owe a duty to discharge the accused if taking everything stated in the complaint is correct and construing the allegations made therein liberally in favour of the Complainant, the ingredients of the offence are altogether lacking.

11. It is, therefore, clear that the Court, while passing the order of issuance of the process, need not consider the averments in the language mentioned in the statute but the complaint as a whole need to be considered. It is also held that while considering averments in the complaint, the Court should not adopt hyper-technical approach as the complainant is not aware of the internal understanding of the legal person. Once sufficient averment concerning vicarious liability by the partners is made, that would be deemed sufficient compliance of pleadings to attract section 141 of the Negotiable Instruments Act, 1881. In the facts of the present case, the provisions of section 14 of the MOFA Act are similar to the provisions of section 141 of the Negotiable Instruments Act, 1881.

12. The complainant in paragraph 3 has specifically stated that while entering into an agreement with the accused on no.1 on 4th October 2006, the petitioners agreed to convey the title of four (4) flats ready for occupation on the 5th floor of the building. The relevant averment in the complaint reads as under:-

> "3. … The acsused no.1 assigned the rights of developing the said plot of land by construction a building thereon and as a consideration the accuse no.2, 3 & 4 agreed to convey the four flats completely ready for occupation on the 5th floor of the building known as "Kamlesh" in Sher-E-Punjab CHS Ltd., Village Mogra, Andheri (E), Mumbai bearing CTS No.368//4A. ..."

13. In my opinion, the said averment is sufficient to demonstrate at the stage of issuance of the process that accused nos.2 to 4 are responsible for the day-to-day affairs of the partnership firm.

14. The next submission on behalf of the petitioner is that the petitioners have not received any amount from the complainant, nor have they passed title in favour of accused no.1. As discussed earlier, the offence under section 13 read with section 4 of the MOFA Act is primarily made out by statutory fiction and is not based on an ordinary contract between the parties. The essential ingredients of the offence under section 13 are mainly dependent on the fact as to whether the present accused is a promoter under section 2(c) of the MOFA Act or not. Once it is established that the e person is a promoter under section 2(c) of the MOFA Act, section 4(1) of the MOFA Act casts liability on the promoter to convey title/conveyance in favour of the buyer. The ingredients of an offence under section 13 are met with failure to convey the title.

15. On perusal of the averments in the complaint, in my opinion, the ingredients of the complaint are sufficient to fulfil the ingredients of section 13 of the MOFA Act.

16. In that view of the matter, I do not find any illegality in the order passed by the learned Magistrate issuing process against the petitioner.

17. The writ petition is, therefore, dismissed. No costs.

ATUL GANESH KULKARNI Digitally signed by ATUL GANESH KULKARNI Date: 2022.10.10 16:25:40 +0530

(AMIT BORKAR, J.)