

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

CRIMINAL WRIT PETITION NO.2623 OF 2022

Panduranga Dhondu Naik Petitioner
Versus
Shamrao Laxman Patil
and another Respondents

Mr. Rahul Shelke, Advocate a/w. Neha Sharma, Akshay
Bansode, for the Petitioner.

Mr. S.S. Redekar, Advocate for the Respondent No.1..

Mr. M.G. Patil, APP for the Respondent No.2-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 14th JULY, 2023

P.C. :

1. Heard Shri Rahul Shelke, learned counsel for the
Petitioner, Shri S.S. Redekar, learned counsel for the
Respondent No.1 and Shri M.G. Patil, learned APP for the
Respondent No.2-State.

2. Rule. Rule is made returnable forthwith with
consent of the parties.

3. The Petitioner has challenged the order dated

13.3.2020 passed by the Judicial Magistrate, First Class, Vengurla in S.C.C. No.38/2020 under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'N.I. Act').

4. The complaint is filed by the Respondent No.1 herein. The original complaint was filed against two accused. Accused No.2 is the present Petitioner. It is mentioned in the complaint that the complainant was knowing the accused No.1. The Petitioner had a landed property in village Shiroda, Taluka Vengurla, District-Sindhudurg. The Petitioner had given power of attorney to the accused No.1. It was registered. Based on that document, the accused No.1 had constructed a commercial building on that land. The complainant decided to purchase a shop and parking space for Rs.14 Lakhs. It is mentioned in the complaint that he had paid Rs.6 Lakhs to both the accused. The complaint further elaborates that the amount of Rs.6 Lakhs was transferred to the account of the original accused No.1. In repayment thereof, on past two occasions

some cheques were given by the accused but the same were dishonored. However, the subject matter of this complaint are the cheques dated 21.12.2019 bearing Nos.000161 & 000162 drawn on State Bank of India, Shiroda Branch, Taluka-Vengurla for Rs.3 Lakhs and Rs.2,50,000/- respectively. It is specifically mentioned in the complaint that those cheques were given by the accused No.1. Those cheques were dishonored and after following the required procedure, the complaint was filed.

5. Learned counsel for the Petitioner submitted that both the cheques were issued by the original accused No.1 from his own bank account. The Petitioner had not issued those cheques. He stated that the accused No.1 has passed away. Therefore, the complainant is harassing the Petitioner through this proceeding.

6. According to learned counsel, the offence, if at all, can only be attributed against the original accused No.1. The complaint itself shows that the Petitioner had given a

power of attorney to the original accused No.1 and the amount of Rs.6 Lakhs paid by the complainant had directly gone to the account of the accused No.1. Thus, not only that the Petitioner was not concerned with the transaction, but, even otherwise he cannot be brought under the purview of Section 138 of the N.I. Act.

7. Learned counsel for the original complainant – Respondent No.1 submitted that the complaint mentions the role played by the present Petitioner. He submitted that though the transaction between the complainant and the accused was cancelled through a cancellation deed, the amount of Rs.6 Lakhs was not returned to the complainant. The complaint establishes the role played by the present Petitioner.

8. I have considered these submissions. Section 138 of the N.I. Act reads thus :

“138. Dishonour of cheque for insufficiency, etc., of funds in the account. --- Where any cheque drawn by a person on an account maintained by

him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
- (c) the drawer of such cheque fails to make the

payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability."

Thus, the main ingredient of Section 138 of N.I. Act is that the person, who is drawer of the cheque from an account maintained by him, can only be an accused who can be prosecuted under that section.

9. In this case, there is no dispute that the Petitioner had not drawn the cheques. It is also admitted that those the two cheques were not drawn from his account. Therefore, the Petitioner cannot be prosecuted under the provisions of Section 138 of the N.I. Act. Since the basic requirement of said section could not be fulfilled against the present Petitioner, the consequent prosecution is thus unsustainable. Therefore, the Petition succeeds.

10. Hence, the following order:

:: O R D E R ::

- i. The order dated 13.3.2020 passed by the Judicial Magistrate, First Class, Vengurla, Sindhudurg in S.C.C. No.38/2020 issuing process against the Petitioner under Section 138 of the N.I. Act, is set aside.
- ii. Rule is made absolute in the aforesaid terms. The Petition is disposed of accordingly.

(SARANG V. KOTWAL, J.)

Deshmane (PS)