IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.4018 OF 2021

Zulfikar Kasim Kazi & Anr. ..Petitioners
Versus
The State of Maharashtra & Anr. ..Respondents

Mr. Ganesh Bhujbal, for the Petitioners.
Mr. J. P. Yagnik, APP for the Respondent/State.

CORAM : NITIN W. SAMBRE &
SHARMILA U. DESHMUKH, JJ.

DATE : 13^{th} JUNE, 2023

P.C.

1. Heard Mr. Ganesh Bhujbal counsel appearing for the petitioners/accused against whom offence being Crime No.32 of 2017 punishable under Sections 420 r/w 34 of the IPC and Section 13(1)(2)(3) of the MOFA Act came to be registered with Dongri Police Station.

2. The respondent/complainant in the aforesaid complaint alleged that a registered agreement of permanent alternate accommodate was executed between the complainant and M/s. Shah Developers of which the Petitioners are partners. It is claimed that clause (6) of the said agreement, so also, clause (8) which reads thus :-

> *"6. The Owners/Developers shall allot to the Tenant Shop premises/Flat (admeasuring 6.73.2 Sq.Ft. Carpet Area) being Shop/Flat No.1201 on the 12th Floor of the new Building/s to be constructed on the said property in lieu of the said tenanted premises on ownership basis and free of the cost a plan of the said Shop premises/Flat as sanctioned by the MCGM is Annexed hereto, the said Shop premises/Flat are more particularly described in the Second Schedule hereunder written. The provisions of Maharashtra Ownership Flat Act, 1963 shall be applicable to the said Shop Premises/Flat allotted as aforesaid to the Tenant by way of permanent Alternate Accommodation.*
>
> *7. …………*
>
> *8. The Owners/Developers shall issue and deliver to the Tenant an account payee cheque of current date, drawn in favour of the Tenant of an amount of Rs.2,16,000/- (Rupees Two Lakhs Sixteen Thousand only) being and towards the 12 months advance license fees at the rate of Rs.18,000/- per month and another post date cheque for license fee for further 12 months in advance for the temporary alternate accommodation to be arranged by the Tenant pending construction and delivery of permanent alternate accommodation to be allotted and provided by the Owners/Developers."*

provides not only for the alternate accommodation to be provided by the firm and its partners by paying an amount of Rs.2,16,000/- towards the rent of one year, the permanent developed premises to the extent of 673.2 sq.ft carpet area being flat No.1201 on the 12th floor was to be allotted to the complainant. According to the complainant, the petitioners were in the capacity of the partners of the said firm M/s. Shah Developers have neither honoured clause

(6) nor clause (8) by either handing over developed flat No.1201 having 673.2 sq.ft. carpet area or the rent towards the permanent alternate accommodation. According to complainant, as the accused and the partnership firm have taken over their property with a promise for handing over the developed property and such promise being not honoured, an offence came to be registered.

3. While questioning the aforesaid FIR, Mr. Ganesh Bhujbal learned counsel appearing for the petitioners would invite attention of this Court to the fact that the partnership firm M/s. Shah Developers is not impleaded as the accused in the offence in question. According to him, the provisions of Sections 138 and 141 of the Negotiable Instruments Act, 1881 ("NI Act" for short) are *pari-materia* with that of provisions of Section 13 of the MOFA Act. He would urge that in case if the firm is not impleaded as accused, the prosecution against the partner of the firm is not maintainable. He would try to draw support from the very language of Section 14 of the MOFA Act and law laid down by the Supreme Court in the matter of ***Aneeta Hada Vs. Godfather Travels and Tours Private Limited with connected matters*** reported in ***(2012) 5 SCC 661***. His further contentions are, the liability of the petitioners can be restricted to that of the civil responsibility and not the criminal responsibility. According to him, the *mens rea* on the part of the petitioners cannot be inferred, particularly, when because of the financial difficulty the project in question has run into rough weather. As such, he would urge that it is always open for the

complainant to take recourse to the civil remedy either by filing suit for specific performance or such other remedy as is available to her. As such, drawing support from the judgment in the matter of ***State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.*** reported in ***AIR 1992 SC 604***, he would urge that prosecution is liable to be quashed and set aside.

4. Learned APP would support the act of the Investigating Officer of registering the offence. He would draw support from the very conduct of the petitioner as in narrated in the FIR, so also the recitals in the agreement dated 13th December, 2011. According to him, even if the provisions of Section 14 of the MOFA is sought to be read in *pari-materia* with that of provisions of Sections 138 and 141 of the NI Act, according to him, it is not mandatory while registering an offence under the MOFA Act to have statutory notice as required under Section 138 of the NI Act. As such, he would urge that there is *prima-facie* satisfaction of ingredients of offence punishable under Section 420 r/w 34 of the IPC and Section 13(1)(2)(3) of the MOFA Act.

5. We have appreciated the aforesaid submissions.

6. The admitted fact on record is about the execution of the agreement dated 13th December, 2011 between the firm M/s. Shah Developers of which the petitioners are admittedly partners. The moment the aforesaid agreement is executed and registered and in

part performance thereof the petitioners have failed to advance rent for one year i.e. at the rate of Rs.18,000/- per month, the fact remains that the petitioners owe their responsibility to discharge their burden as contemplated and provided under the terms of the said agreement. Based on the terms of the aforesaid agreement, it cannot be disputed that provisions of MOFA Act can be held to be applicable to the case in hand. The conduct of the petitioners as reflected in the FIR depicts that neither they have honoured the terms of clause (6) nor clause (8) of the recitals thereby handing over developed property as assured or any alternate rent.

7. As such, *prima-facie* there appears to be satisfaction of ingredients of offence as is alleged by the complainant.

8. Apart from above, the claim put forth that the dispute has nature of civil proceedings cannot be accepted, particularly, when the statute i.e. MOFA Act itself provides for a consequence of offence being committed under Section 13 as prescribed in the FIR for non discharge of the obligation as provided in the agreement admittedly entered into. In this background and having regard to the fact that in absence of the statutory provisions at par with Section 138 of the NI Act under the provisions of the MOFA Act, it cannot be said that for want of the partnership firm being impleaded as accused, prosecution against the petitioners is not maintainable. In our considered view, the prosecution against the petitioners can be held to be as maintainable and impleadment of

the partnership firm as an accused can be said to be a curable defect. That being so, no case for quashing is made out.

9. The petition as such stands dismissed.

[SHARMILA U. DESHMUKH, J.] **[NITIN W. SAMBRE, J.]**