IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1015 OF 2023

Ali Asgar Tayebali Arisiwala ..Petitioner
Versus
M/s. Fatima Developers & Ors. ..Respondents

Mr. Sameer P. Nangare for Petitioner.
Mr. S. H. Yadav, APP for State/Respondent No.4.

CORAM : SARANG V. KOTWAL, J.
DATE : 12 SEPTEMBER 2023

PC :

1. The Petitioner has challenged the order dated 15.12.2022 passed by the learned Additional Sessions Judge, Greater Mumbai, passed in the Criminal Revision Application No.158 of 2021. The Petitioner was the original complainant in C.C.No.2097/SS/2020 on the file of Metropolitan Magistrate, 56th Court, Sewree, Mumbai. At the first instance, the leaned Magistrate had issued process against the Respondent Nos.1 to 3 and one more accused for commission of offence punishable U/s.138 r/w. 141 of the Negotiable Instruments Act (hereinafter referred to as 'N.I.Act'). The learned Metropolitan Magistrate, 56th

Court, Mazgaon, had passed this order on 21.12.2020. Besides the Respondent Nos.1 to 3, there was original accused No.4 who is son of the Respondent No.2. The process was issued against all the four accused. This order was challenged in the Criminal Revision Application No.158 of 2021 by the accused Nos.1 to 3. The criminal revision application was allowed and hence, this petition is filed by the original complainant.

2. Learned counsel for the Petitioner submitted that the process was rightly issued by the learned Magistrate. The petitioner was to get an amount of Rs.1,80,00,000/- for retiring from the partnership firm i.e. accused No.1 and certain cheques were given for payment of that amount. The subject matter of this proceedings is the cheque bearing No.021783 dated 29.12.2019 drawn on the State Bank of India, Kalina branch, for Rs.20 lakhs. The complaint mentions that, it was issued by the accused. This cheque was dishonoured and hence, the proceedings were filed.

3. Learned counsel for the petitioner submitted that, all the accused together are responsible for dishonour of the cheque and,

therefore, process was rightly issued. The learned Additional Sessions Judge erred in allowing the criminal revision application. Learned counsel relied on the Memorandum of Understanding (M.O.U.) between the petitioner on one hand and the original accused Nos.2 and 3 i.e. the Respondent Nos.2 and 3 herein on the other hand. The said M.O.U. refers to the amount of Rs.1,80,00,000/-. It contains receipt of the said amount based on the post dated cheques. The said M.O.U. was signed by the original accused No.4 as witness. The receipt specifically included Cheque No.021783 which is the subject matter of the present complaint. He, therefore, submitted that, the Respondent Nos.1 to 3 are also equally liable to be prosecuted and convicted.

4. I have considered these submissions and I have also perused the impugned order passed by the learned Additional Sessions Judge, Greater Mumbai. The concerned cheque is signed by the original accused No.4. A copy of the cheque is annexed to the M.O.U. relied on by the learned counsel for the petitioner. The cheque is signed by the original accused No.4 Anwar Abdulla Qureshi. The cheque describes him as the signatory of the cheque

on behalf of M/s. Anwar Construction which was a proprietory firm. Hence, the accused No.4 only has issued the cheque on the account maintained by him. The cheque is drawn by him alone. Significantly, the cheque is not drawn by the accused No.1 partnership firm. The accused Nos.2 and 3 were the partners of the said firm and therefore, the liability U/s.138 of the N.I. Act is that of the original accused No.4. Section 138 of the N.I. Act reads thus:-

> **"Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the accounts ---**
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> 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 provisions 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:
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> Provided that nothing contained in this section shall apply unless--
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> (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
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> (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."

5. The learned Additional Sessions Judge in paragraph-12 has observed that the cheque in question was not issued from the account of the revision applicant No.1 partnership firm, but from the account of the proprietory concern of M/s. Anwar Construction. The present petitioner/complainant has nowhere stated that M/s. Anwar Construction was the sister concern of the accused No.1 partnership firm and, therefore, the accused Nos.1 to 3 cannot be saddled with any vicarious liability. I do not see any illegality or infirmity in the order passed by the learned Additional Sessions Judge. The cheque was not drawn by either of the respondent Nos.1 to 3 and, therefore, the prosecution U/s.138 of the N.I. Act will not lie against them. The process issued against

them was rightly set aside by the learned Additional Sessions Judge.

6. Hence, the petition is rejected.

(SARANG V. KOTWAL, J.)