

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

CRIMINAL WRIT PETITION NO. 1132 OF 2023

Mr. Khrishnamilan Shukla

..Petitioner

Versus

Mr. Mohammed Ishaq M. Dawookorekar & Anr.

..Respondents

Mr. Sujit B. Shelar a/w. Pranav P. More for Petitioner.

Mr. Vikrant Shinde a/w. Firoz Maner for Respondent No.1.

Ms. Pallavi N. Dabholkar, APP for State/Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 13 DECEMBER 2023

PC :

1. Rule. With consent of the parties, rule is made returnable forthwith.

2. Heard Mr. Sujit Shelar, learned counsel for the petitioner, Mr. Vikrant Shinde, learned counsel for the Respondent No.1 and Ms. Pallavi Dabholkar, learned APP for the State-Respondent No.2.

3. The petitioner has challenged the order dated 17.03.2021 passed by the Metropolitan Magistrate, 70th Court, Mazgaon, Mumbai, in C.C.No.2108/SS/2020 issuing process against the petitioner and other co-accused U/s.138 of the

Negotiable Instruments Act.

4. The complaint is filed by the Respondent No.1 herein. It is his case that the accused No.1 M/s. Quality Developers was a partnership firm and the accused Nos.2 and 3 were the partners of the accused No.1 firm. The present petitioner is named as the accused No.2. It is further stated in the complaint that the accused Nos.2 and 3 are equally responsible for the day to day activities of the partnership firm i.e. the accused No.1. The complainant came to know that the accused No.1 was having its project at New Panvel, Plot No.7, by the name 'Avenue Apartment'. At the time of preliminary enquiry, the accused Nos.2 and 3 informed the complainant that the project would get ready by April 2014. On their representation, the complainant paid advance amount of Rs.2,21,000/- for flat No.A-402 on the 4th floor of that building. The consideration was fixed at Rs.11,09,000/-. The complainant paid the entire consideration amount of Rs.11,09,000/-. After the initial payment of Rs.2,21,000/- was made, an agreement for sale was entered into on 20.04.2010 through the accused No.3. It was registered, as well. However, subsequently, the project was not

getting completed and, therefore, the complainant requested the accused to cancel the agreement for sale. Accordingly, cancellation deed was executed. The accused paid Rs.4,00,000/- and balance was Rs.7 lakhs. In repayment of the balance amount of Rs.7 lakhs, the cheque No.002536 dated 25.11.2019 for Rs.7 lakhs drawn on the firm's account i.e. M/s. Quality Developers, maintained with Indusind Bank, Bandra branch was given to the complainant. That cheque, on presentation, was dishonoured. Thereafter the statutory notice was issued and then the complaint was filed.

5. Learned counsel for the petitioner submitted that the description of the accused in the complaint is not correct. The agreement for sale which is referred to in the complaint and which was executed on 20.04.2010 itself describes the vendor as M/s. Quality Developer through its proprietor Mr. Shaikh Shaukat Husen. Therefore, there was no question that, it could be a partnership firm of which the petitioner was a partner. That description in the complaint is wrong. The agreement for sale was strictly between the complainant and the accused No.3 as the proprietor of the accused No.1.

6. Learned counsel further submitted that the notice issued by the complainant was not served on the petitioner. However, the notice which is annexed to the complaint shows that it was addressed to M/s. Quality Developers through its 'Director' Mr. Baba Shukla (petitioner) and Shaukat Shaikh (accused No.3). Even the notice does not describe the parties correctly. The complaint was filed against the three accused as mentioned earlier. Apart from that, there was no averment in the complaint that the petitioner was in-charge of the accused No.1 firm. A copy of the cheque which is annexed to this petition shows that the cheque was issued from the account of Quality Developers. This fact is also mentioned in the complaint. Therefore, by no stretch of imagination, it can be held or suggested that the present petitioner was in any way concerned with this prosecution. The order issuing process against the petitioner was not correct.

7. Learned counsel for the Respondent No.2 could not defend these arguments made by the learned counsel for the petitioner. He could not explain as to why the agreement which is annexed to the complaint describes M/s. Quality Developers as the

proprietorship firm. He submitted that, there are other averments in the complaint. He submitted that, there is another proceeding pending between the parties and a separate F.I.R. is lodged against the present petitioner and his co-accused Shaukat Shaikh. Therefore, there is nexus between the two accused.

8. I have considered these submissions. As far as the other F.I.R. is concerned; it is a separate subject matter which can go on independently. In the present petition, I am only considering the correctness and legality of the impugned order of issuance of process against the petitioner U/s.138 of the N.I.Act. For that purpose, I have considered the averments in the complaint. The complaint described the accused No.1 as the partnership firm and it further describes the other two accused as the partners of the said firm. That means, it is the complainant's case that the cheque was issued by the partnership firm of which the present petitioner was a partner. This averment is incorrect on the face of the documents annexed to the complaint itself. The agreement for sale dated 20.04.2010 clearly mentions that, it was executed by M/s. Quality Developer through its proprietor Mr. Shaikh Shaukat

Husen. Therefore, it cannot be a partnership firm. The petitioner can not be a partner of the accused No.1. Hence, he cannot be arraigned as one of the accused by taking recourse to Section 141 of the N.I. Act. The complaint itself mentions that the cheque was issued from the account maintained by M/s. Quality Developer; it was not issued by the present petitioner at all. The petitioner was not the Proprietor of the drawer firm, therefore, the petitioner cannot be prosecuted for commission of offence U/s.138 of the N.I. Act.

9. In this view of the matter, the impugned order is not sustainable and is liable to be set aside.

10. Hence, the following order:

ORDER

- i) Rule is made absolute in terms of prayer clause (c); as far as the present petitioner only is concerned.

The prayer clause (c) reads thus:

“That this Hon’ble Court may be pleased to quash and set aside the order of issuing process dated

17/03/2021, passed by the Ld. Metropolitan Magistrate, 70th Court, Mazgaon (Sewree), Mumbai in C.C.No.2108/SS/2020.”

- ii) It is clarified that this petition is allowed only in respect of the present petitioner.
- iii) The petition is disposed of.

(SARANG V. KOTWAL, J.)