

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

CRIMINAL WRIT PETITION NO. 2180 OF 2023

M/s. Protech Telelinks

..Petitioner

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. Viqar Rajguru a/w. Himanshu P. Singh i/b. S. A. Legal for
Petitioner.

Ms. Sangita D. Shinde, APP for State/Respondent No.1.

Mr. Bhomesh Bellam a/w. Xetres Bharucha i/b. Purnanand and Co.
for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 7 DECEMBER 2023

PC :

1. The petitioner has challenged the order dated 05.08.2022 passed by the Metropolitan Magistrate, 48th Court, Andheri, Mumbai, issuing process U/s.138 r/w. 141 of the Negotiable Instruments Act, in S.C.C.No.97/SC/2021.

2. Heard Mr. Viqar Rajguru, learned counsel for the Petitioner, Ms. Sangita Shinde, learned APP for the State/Respondent No.1 and Mr. Bhomesh Bellam, learned counsel for the Respondent No.2.

3. At the outset, it must be mentioned that the accused in the said complaint is described as :

“M/s. Protech Telelinks
A partnership firm, Constituted under
the Indian Partnership Act, 1932
Through its Partner,
Mr. Aniket Dhingra,
Vill Ogli Suketi Road,
Kala AMB, Simaur,
Himachal Pradesh 173030.”

There is only one accused mentioned in that complaint.

4. The complaint is filed by the respondent No.2 herein. It is his case that, in respect of the material sold, supplied and delivered to the accused, the complainant raised an Invoice dated 15.02.2021 for an amount of Rs.80,30,018/-. In repayment of that liability and the dues, a cheque dated 07.06.2021 for an amount of Rs.80,64,048/-, drawn on Yes Bank, Model Town, Yamuna Nagar branch was issued by the accused. It was dishonoured and thereafter this complaint was filed on 15.11.2021.

5. The present petition is filed by the same accused M/s. Protech Telelinks. Therefore, it appears that the partnership firm is

made an accused through its partner. The partners of the partnership firm are not separately made accused in the complaint.

In this background, learned Magistrate passed the following order:

“Read complaint, perused affidavit of verification of the complainant and also gone through the documents produced on record. So also complainant has filed affidavit of evidence u/s. 145 of N.I. Act along with original documents. Heard the learned advocate on behalf of the complainant. It appears that this complaint is filed within the period of limitation. Accused is the partner of Partnership firm as mentioned in the complaint. Accused is looking after the day to day affairs of partnership firm. Further, the documents produced on record and from the affidavit of the verification of the complainant, it appears that there is sufficient ground to proceed against the accused for the offence punishable under section 138 of the Negotiable Instruments Act. Hence, I pass following order:-

ORDER

Issue process against accused for the offence punishable under Section 138 r/w. 141 of Negotiable Instruments Act, R/o. 27/09/2022.”

6. Learned counsel for the petitioners submitted that the impugned order shows that the learned Magistrate has not applied his mind and, therefore, the cognizance is not proper. The learned Magistrate has observed that the accused was the partner of the

partnership firm as mentioned in the complaint. The learned Magistrate has gone on to observe that the accused was looking after the day to day affairs of the partnership firm. He submitted that, there is no such averment in the complaint. He submitted that the learned Magistrate had treated an individual partner and not the partnership firm as the accused. There is only one accused in the complaint. Therefore, the impugned order is liable to be set aside as there is no proper application of mind. He submitted that, after setting aside the impugned order, the matter be remanded back for fresh consideration on the basis of the title of the complaint with reference to the particular accused which is the partnership firm.

7. Learned counsel for the Respondent No.2 agreed that there is no averment in the complaint that the accused was looking after the day to day affairs of the partnership firm. He also concedes that, an individual partner is not made a separate accused in this case, but the partnership firm is the only accused. He, therefore, could not defend the impugned order which was based on the observation regarding the role of an individual

partner.

8. I have considered these submissions. I find substance in the submissions of learned counsel for the petitioner. The complaint is filed only against one accused i.e. the partnership firm, though, it is mentioned that the accused is M/s.Protech Telelinks, a partnership firm, through its partner Mr. Aniket Dhingra. There is only one accused in the complaint. Learned counsel for the complainant submits that the partnership firm is the accused in the case. In any case, the complaint would not be maintainable unless the partnership firm is made as an accused as the cheque is issued by the partnership firm. In this view of the matter, the observation of the learned Magistrate that, accused was looking after the day to day affairs of the partnership firm is not factually correct as there is no such averment in the complaint. Secondly, the learned Magistrate has treated the individual partner as the accused which is not even the case of the complainant and in particular, the title of the complaint shows that the partnership firm is the only accused.

9. The present petition is filed by the partnership firm. Learned counsel for the petitioner has pointed out this infirmity in the impugned order. In this view of the matter, as submitted by the learned counsel for the petitioner, the impugned order is liable to be set aside with further directions of remanding back the case for fresh consideration by the learned Magistrate.

10. Hence, the following order:

ORDER

- i) The impugned order dated 05.08.2022 passed by the Metropolitan Magistrate, 48th Court, Andheri, Mumbai, in S.C.C.No.97/SC/2021, is quashed and set aside.
- ii) The learned Magistrate shall consider the question of issuance of process afresh based on the title and the averments made in the complaint.
- iii) With this direction, the petition is disposed of.

(SARANG V. KOTWAL, J.)