

Ghuge

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

WRIT PETITION NO.3260 OF 2022

Pramod Yashwant Desai ... Petitioner
V/s.
State of Maharashtra and Anr ... Respondents

Mr. Aashish Satpute for the petitioner.

Mr. Bhushan Deshmukh, Mr. Vedant Bende i/b
Satyajeeet Shirke for the respondent No.2.

Mr. M.G. Patil, APP for the State/respondent No.1.

CORAM : AMIT BORKAR, J.

DATED : APRIL 26, 2023

P.C.:

1. The petitioner has challenged the order dated 19th November, 2021 passed by 5th Judicial Magistrate First Class, Kolhapur in Summary Criminal Case No.4375 of 2021. The respondent No.1 filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 based on dishonour of cheque issued towards transaction of purchase of goods between the complainant and the accused. As per the averments in the complaint, as on 15th July 2021, the accused was liable to pay to the complainant an amount of Rs.1,27,14,892.60/- along with interest 24% from 9th October, 2020 till its realization. It is averred that towards repayment of said liability the accused issued disputed cheques for Rs.50,00,000/- and Rs.77,14,892/-. It is also

stated in the complaint that towards part payment of liability the accused paid an amount of Rs.20,00,000/- on 15th 2021.

2. The cheque is dated 30th June, 2021. On 27th September, 2021 the cheque is dishonoured. On 12th October, 2021 the complainant issued statutory demand which was received by the accused on 21st October, 2021. On 27th October, 2021 the accused replies statutory notice. Despite receipt of statutory notice the accused failed to pay the amount within 15 days. Hence, complaint was filed.

3. The learned Magistrate by impugned order issued process against the accused. Aggrieved thereby the accused has filed present petition.

4. Learned advocate for the petitioner, relying on the judgment of Apex Court in the case of **Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel**, in Criminal Appeal No.1497 of 2022 dated 11th October, 2022 submitted that whenever part payment is made towards the repayment of cheque amount, must be endorsed on the cheque under Section 56 of the Negotiable Instruments Act, 1881. If the unendorsed cheque is dishonoured on its presentation, offence under Section 138 of the Negotiable Instruments Act, 1881 is not attracted as the cheque does not represent legally enforceable liability.

5. In the facts of the case, paragraph 6 indicates that the legally recoverable liability is to the tune of Rs.1,27,14,892.60/- along with interest 24% from 9th October, 2020. Two cheques were issued. Both cheques were dishonoured. Two complaints were

filed. Order of issuance of process was passed in both the complaints. This Court by order dated 20th March, 2023 remitted the proceedings in companion case on the ground of non application of mind while issuing process.

6. According to the petitioner, in view of payment of Rs.20,00,000/- before the presentation of cheque, in absence of endorsement under Section 56 of the Negotiable Instruments Act, 1881 the complaint is not maintainable. I have carefully considered the judgment of the Apex Court. In the facts of the case before the Apex Court the amount of cheque represented total liability. Therefore, part payment out of total liability of the cheque amount would have made reduced legally recoverable liability. In the facts of the case, as per the averments in paragraph 7 of the complaints, total liability was Rs.1,27,14,892.60/- along with interest 24% from 9th October, 2020. Hence, payment of Rs.20,00,000/- reflected in paragraph 9 of the complaint could not have been said to be amount paid towards part payment of cheque amount. As referred earlier, the cheques is Rs.50,00,000/- and Rs.77,14,892/- and the total recoverable amounts exceeds to Rs. 1,27,14,892.60/-. Therefore, judgment of Apex Court is not applicable in the facts of the case. Ultimately, it is for the trial Court to consider the defense raised by the petitioner that the part payment of total recoverable dues need to be considered towards part payment of cheque amount in issue or not. At this stage, the scope of petition is to decide based on the averment in the complaint and material on record that there are sufficient grounds to proceed against the accused. Considering the amount of total

liability and the cheque, in my opinion, amount of Rs.20,00,000/- is of no consequence at this stage. However, accused at liberty to raise such plea, if permissible, in the trial. Hence, there is no merit in the petition. Therefore, the Writ Petition stands dismissed No costs.

(AMIT BORKAR, J.)