

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 152 OF 2016

Neeta Hemant Desai ...Petitioner
Versus
The State Of Maharashtra And Ors ...Respondents

**WITH
CRIMINAL WRIT PETITION NO. 153 OF 2016**

Manthan Hemant Desai ...Petitioner
Versus
The State Of Maharashtra And Ors ...Respondents

Mr. Sanchita Thakur a/w Ms. Nilima C. Sarvagod i/by Mr.Suresh
Dubey Advocate for Petitioner.

Mr. Irfan A. Shaikh i/by Manish R. Bohra Advocate for Respondent
No.2.

Mr. Arfan Sait, APP for Respondent-State.

CORAM : PRAKASH D. NAIK, J.

DATE : 22nd JANUARY, 2024

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1. The Petitioners are facing the prosecution for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 vide C.C. No.2032/SS/2014 pending before the Learned Magistrate, 72nd Court Vikhroli, Mumbai.

2. The complaint reads as follows:-

(i) Accused No.1 is the partnership firm. The accused No.2 is the power of attorney holder of accused Nos.3 and 4. The accused Nos.3 and 4 are

partners of accused No.1.

(ii) Accused No.1 runs the business of construction of building. Accused No.1, 3 and 4 are Developers. Accused No.2 is power of attorney holder of accused No.1, 3 and 4.

(iii) On 6th December 2010, the accused entered into development agreement for construction of building with Mrs. Latifa Begum Maqbool Kureshi, owner of the property having land situated at house No.165 admeasuring 770 sq.ft., house No.168 admeasuring 1120 sq. ft., house No. 329 admeasuring 900 sq.ft. The total area consisted of 2790 sq.ft. at Panvel, District Raigad.

(iv) The development agreement was registered at Sub-Registrar Office at Panvel on 6th December 2010. The ratio of development of building between accused and owner of the house was 55:45.

(v) The complainant is in the business of construction. He is carrying out business of contractor for construction of building.

(vi) The accused and complainant were knowing each other. The accused No.2 approached the complainant and offered him to carry out construction of building on the plot. Accused No.2 being Power of Attorney Holder, accused Nos.1, 3 and 4 granted subject contract of the construction of the building on the land mentioned herein above.

(vii) The complainant was into business of construction of building and has knowledge of construction of building. He agreed to construct the

building of the accused.

(viii) The accused offered the complainant to construct proposed building with material and complainant started working on the said project and commenced the construction of the building.

(ix) It was agreed between both of them that the accused would make payments in respect of construction work and the material, upon completion of work slab wise in the proposed building.

(x) The complainant commenced the work of construction and inquired expenses. After completing first slab, the complainant demanded the construction charges and expenses from accused. The accused were unable to make payment payment towards material required and also did not pay labour charges for construction work.

(xi) The complainant completed 90% of work of the proposed building. He was entitled to received 40,00,000/- from the accused.

(xii) The accused issued cheque No. 974467 dated 11th December 2013 for an amount of Rs.40,00,000/-.

(xiii) The complainant deposited the cheque in his bank on 7th March 2014. The cheque was returned with remarks "Refer to drawer".

(xiv) The complainant issued demand notice dated 26th March 2014 through his Advocate. The accused received notice. Reply was sent with false and frivolous contentions and denying the liabilities. Complaint was filed.

3. Verification statement of the complainant was recorded. Process was issued for offence under Section 138 of the Negotiable Instruments Act. The petitioners preferred Criminal Revision Application No. 412 of 2015 and Criminal Revision Application No.396 of 2015. The Criminal Revision Applications were rejected vide order dated 26th October 2015.

4. Learned Advocate for Petitioners submitted that, the petitioners ought not to have been arraigned as accused in the complaint. The petitioners were impleaded as partner of accused No.1. The accused No.2 is the power of attorney holder of Accused No.3 and 4. The complaint does not specify role of the petitioners to invoke Section 141 of Negotiable Instruments Act. The complaint does not mention that, the petitioners are responsible for day to day affairs of accused No.1. Merely on the ground that, the petitioners are partners of accused No.1, vicarious liability cannot invoked against them. Specific role is not attributed to the petitioners. The petitioners are not signatories to the cheque. The order issuing process reflects non-application of mind. The payment towards the construction has been made to the complainant. The said fact is reflected in the bank statement. There was no liability towards cheque. There was no written agreement regarding contract between the parties.

5. Learned Advocate for the petitioners has relied upon the following decisions:-

(i) National Small Industries Corporation Limited Vs.

Harmeet Singh Paintal and Another¹

(ii) The decision of this Court in the case of Urvashi Kavita Palicha Vs. The State of Maharashtra and Anr. delivered in Criminal Application No. 1370 of 2021 decided on 22nd August 2022.

6. Leaned Advocate for Respondent No.2 submitted that, the petition is not maintainable. Plea is already recorded. There are sufficient averment against the petitioner in the complaint. The petitioners are vicariously liable for the acts of accused No.1. There is sufficient material to invoke Section 141 of Negotiable Instruments Act. Sub-section 2 of Section 141 of N. I. Act refers to other persons other than director or partners, who are responsible for day to day affairs of company of partnership firm. The petitioners have given power of attorney to accused No.2. Several acts relating to the transactions with complainant were executed by power of attorney of accused No.2. The grounds urged by petitioners are to be adjudicated during trial. Cheques were issued towards the legal enforceable debt and liabilities. The contention of the petitioners that the petitioner is being made and there was no liabilities, is disputed.

7. Learned Advocate for Respondent has relied upon the decision of the Supreme Court in the case of **S. P. Mani and Mohan Dairy Vs. Dr. Snehalatha Elangovan** delivered in Criminal Appeal No. 1586 of 2022 decided on 16th September 2022.

¹ (2010) 3 SCC 330

8. On perusal of the complaint it can be seen that, the accused No.1 is the partnership firm. Accused Nos.3 and 4 are partners of accused No.1. The accused No.2 is the power of attorney of accused No.3 and 4 (Petitioners). The complaint provides role of partners. The accused No.2 was acting on behalf of other accused. Sub-section 2 of Section 141 stipulates that notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. The complaint provides, the role of all accused persons. The submissions advanced by learned Advocate for petitioners cannot be considered at this stage. The power of attorney holder was acting on behalf of petitioners. All the accused entered into agreement with complainant. Accused No.2 is signatory to cheque. Petitioners executed power of attorney in his favour. Acts done by accused No.2 are binding on petitioners. The partnership is run by petitioners. There are no other partners. Accused No.2 is Power of Attorney Holder. He was performing at the behest of petitioners. The decisions relied upon by petitioners are delivered in facts of those cases. Prima facie, case is made out against the petitioners. No case is made out to

set aside the order issuing process.

9. At this stage, learned Advocate for the petitioners submitted that the petitioner in Criminal Writ Petition No. 152 of 2016 is the lady. She may be exempted from appearing before the trial Court.

ORDER

(i) Criminal Writ Petition Nos. 152 of 2016 and 153 of 2016 are rejected and disposed off.

(ii) The petitioner in Criminal Writ Petition No. 152 of 2016 is exempted from appearing before trial Court. As and when trial Court directs her to appear, she shall appear before the trial Court.

(PRAKASH D. NAIK, J.)