IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2340 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 2341 OF 2022
WITH
CRIMINAL WRIT PETITION NO. 2342 OF 2022

Skywards Ashtika Lifestyle and Ors. ...Petitioners
Versus
Nareshkumar Mohansingh Mary And Anr. ...Respondents

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Mr. Chaitanya B. Nikte a/w Mr. Prajit S. Sahane, Ritvij Atul Kale, Mr. Hitanshu Jain i/b Mr. Prasad Sarvankar, Advocate for the Petitioners.

Mr. M. V. Swar, Advocate for Respondent No.1.

Mr. Arfan Sait, APP for Respondent No.2-State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 22nd JANUARY, 2024.

P.C.:

1. The Petitioners in these Petitions are aggrieved by the order dated 3rd March, 2022 passed by the Sessions Court rejecting Revision Applications challenging order issuing process dated 8th January, 2020 passed by the learned Metropolitan Magistrate for offence under Section 138 read with Section 141 of Negotiable Instruments Act, 1881 (for short "NI Act").

2. The Petitioners were arraigned as Accused in C.C. No.4819/SS/2019, C.C.No.4818/SS/2019 and C.C.No.4820/SS/2019 pending in the Court of learned Metropolitan Magistrate, 33rd Court, Ballard Pier at Mumbai.

3. The brief facts in respect of the three complaints which are the subject matter of challenge in these Petitions are as under :-

(i) The Accused No.1 is a Partnership Firm. The Accused Nos.2 to 4 are partners of Accused No.1. They are looking after day to day affairs of Accused No.1. They are responsible for financial affairs of Accused No.1.

(ii) Commercial Arbitration Petition bearing No.333 of 2017 was filed jointly by the Respondent No.1/Complainant in all these Petitions before this Court. Consent Terms were jointly prepared by the parties to the Petitions along with one Rahul Vilas Nahata and Mr. Rohan Vijay Nahata and the dispute was settled.

(iii) Consent Terms were executed on 5th October, 2017 and filed in the proceedings. The Accused admitted the execution thereof before this Court. The Arbitration

Petition was disposed off in terms of Consent Terms.

(iv) As per the terms of the Consent Terms, in the event of Accused failing to comply with any obligations mentioned in the Consent Terms within the stipulated date or failing to execute or register the agreement as set out in the Consent Terms, the amount of Rs.5,01,00,000/- shall become immediately due and payable along with 18% interest from the date of Consent Terms till the final realization of payment by the Accused along with Mr.Rahul Vilas Nahata and Mr.Rohan Vijay Nahata to all the complainants in equal proportions i.e. Rs.1,67,00,000/- each.

(v) In order to secure the amount of Rs.1,67,00,000/- which may become due and payable to the complainant in the event of default by the Accused in fulfilling of any obligations under the Consent Terms, the Accused handed over the cheques drawn on Axis Bank.

(vi) Cheque bearing No.051814 dated 1st July, 2019 for an amount of Rs.1,67,00,000/- was handed over to the complainant in CC No.4819/SS/2019.

(vii) Cheque dated 1st July, 2019 bearing No.51816 for an amount of Rs.1,67,00,000/- was handed over to the complainant in CC No.4818/SS/2019.

(viii) Cheque No.51815 dated 1st July, 2019 for an amount of Rs.1,67,00,000/- was issued in favour of the complainant in CC No.4818/SS/2019.

(ix) The Cheques were deposited by the complainant. All the cheques for dishonored with remarks "Funds Insufficient". Statutory notes under the N.I. Act was issued to the Accused. Payment was not received complaint was filed.

4. Process was issued vide order dated 8th January, 2020 for an offence under Section 138 read with 141 of N.I. Act.

5. The Petitioners preferred Criminal Revision Applications before the Sessions Court challenging the order issuing the process vide Criminal Revision Application No.651 of 2021, Criminal Revision Application No.652 of 2024 and Criminal Revision Application No.650 of 2021. All the Revision Applications were rejected by the learned Additional Sessions Judge vide separate orders dated 3rd March, 2022.

6. Learned Advocate for the Petitioner submitted that the offence under Section 138 of the N.I. Act is not made out. The complainant and the Accused No.1 were partners in Accused No. 1 Partnership Firm. All the complainants and other partners filed Commercial Arbitration Petition bearing No.333 of 2017 before this Court under Section 9 of the Arbitration and Conciliation Act, 1996 seeking various reliefs. The parties agreed to settle the dispute amicably and entered into Consent Terms. The Arbitration Petition was disposed off in terms of the Consent Terms. As per Consent Terms certain shops / offices in the project were allotted to complainant against liabilities. As per clause 3 of the Consent Terms dated 05/10/2017 certain obligations were cast upon the Respondents. Clause 6 of the Consent Terms provided that upon intimation by the complainant, the Applicant agree and undertake to enter into necessary agreement with the purchasers of the shops and offices as specified under RERA. As per clause 7 of the Consent Terms it was provided that only in the event the Accused failed to comply with the obligations mentioned in Clause 3 or failed to execute or register the

agreements as stated in Clause 6, the complainant would be entitled for the amount of Rs.5,01,00,000/- proportionately with interest at the rate of 18% per annum and to secure the said amount cheques were given to the complainant. As per the Consent Terms the Accused took immediate steps to comply their obligations. As agreed in Clause 6 of the Consent Terms, there was no intimation by the complainant calling upon the Accused to enter into any agreements with the purchasers of shops and offices directly as specified under RERA and its regulations. It is not the case of complainant that the complainant have identified any purchasers / buyers and inspite of any requests to execute an agreement, the Accused have failed to do so. It was the obligation of the complainant to pay Stamp Duty and Registration charges in respect of such agreements, no such payments were made by the complainant for effective execution of the agreement. The complainant was entitled to deposit the postdated cheque only in the event of default of obligations under the Consent Terms. However, the complainant wrongly deposited the cheques in spite of the fact that there was no default in fulfilling any obligations by the

Petitioners. The complainant also filed Execution Application bearing (L) No. 1176 of 2019 along with Interim Application (L) No. 2628 of 2021 before this Court alleging that the amount in clause 7 of the Consent Terms has become due. The Petitioners had contended that Clause 7 has not triggered. This Court had rejected the Interim Application filed by the complainant by prima facie accepting the stand of the Petitioners that money has not become due and payable. The complainant filed Commercial Appeal (L) No.8064 of 2021 with Interim Application (L) No.8068 of 2021 before this Court. The Division Bench of this Court rejected the application by order dated 24th February, 2021. Money was due on payable under Clause 7 only upon default in Clauses 3 or 6. Clause 3 provides various obligations. It was incumbent upon complainant to plead and give material particulars about any default committed by Petitioners. The complainant ought to have made averments that the intimation is given and still the Petitioners did not act upon the same. The complainant had deposited the cheque prematurely without there being any default on the part of the Petitioners. The Petitioners have complied the Consent Terms. There was no default. The Petitioners have never defaulted in complying the Consent Terms as the amount never became due. The High Court has prima facie accepting the case of the Petitioners. There was no default in complying the terms of Consent Terms by the Petitioners. The occasion to deposit the cheque never arose. There was no legally enforceable debt or liability towards complainants. The order issuing processes passed by the learned Magistrate as well as order passed by the Sessions Court rejecting the Revision Application are bad in law. The Petitioners cannot be prosecuted for the offences under Section 138 of N.I. Act.

7. Learned Advocate for the Respondent No.1 submitted that there is no infirmity in the order issuing process as well as the order passed by the Sessions Court. The complainant had complied all the procedural safeguards for initiating the proceedings under Section 138 of N. I. Act. The order passed by this Court in Civil proceedings does not deal with the liability accrued in relation to the cheques. The complainant provides sufficient details at the stage of issuance of process.

The Trial Court is required to see prima facie case. The learned Magistrate has issued the process on the basis of material before the Court. The defence of the Accused cannot be considered at this stage.

8. Clause 3 of the Consent Terms stipulates that the Respondents therein agree and undertake to take steps to renew and/or extend the joint development agreement entered into by the Petitioner No.1 with the owners of the plot within 30 days from the date hereof. The Respondents therein agree and undertake to obtain IOD for the project within 90 days from the filing of these Consent Terms. They have agreed and undertaken to obtain commencement certificate from the project within stipulated time. They also agreed to obtain occupation certificate for the project.

9. In view of the conduct of the Petitioners, the cheques were due for being deposited. Cheques were dishonored with remarks “funds insufficient”. The issue that there was no existence of legally enforceable liability at the time of depositing the cheque will have to be proved during the trial. At this stage, the proceedings cannot be scuttled.

10. The complaint provides the details of the proceedings initiated by the complainant vide Commercial Arbitration Petition. Complaint make reference to the Consent Terms executed between the parties. The Consent Terms were executed on 5th October, 2017. The complainant has alleged that as per the terms of the Consent Terms, in the event the Accused failed to comply with any obligations in the Consent Terms within stipulated dates or failing to execute or register the agreement as set out in the Consent Terms, the amount as agreed shall become immediately due and payable along with 18% interest from the date of Consent Terms till the final realization of the payment by the Accused along with Mr. Rahul Vilas Nahata and Mr. Rohan Vijay Nahata to the complainant in all the complaints in equal proportion of Rs.1, 67,00,000/-.

11. The complainant had contended that the Accused failed to fulfill their obligation under the Consent Terms and therefore the cheques were due for encashment. The issue urged by the Petitioners will have to be adjudicated during trial. In the light of averments in the complaint and the factual

aspects of this case, prima facie case is made out against the accused and the proceedings cannot be quashed.

12. The learned Sessions Judge has rejected the Revision Application preferred by the accused on the ground that the burden of proving that there was subsisting debt or liability or the complaint is premature or whether the cheque which is dishonoured or that it was issued as the security or towards some enforceable liability is a burden to be discharged during trial. At this stage, merely on the basis of averments made in the Revision Application it cannot be concluded that there is no subsisting liability. The learned Magistrate has properly evaluated the material on record and applied correct test for determination of issuance of the process.

13. I have perused the Clauses 3, 4 & 7 and other clauses of Consent Terms. The Consent Terms stipulates certain obligations upon the accused which would warrant deposit of the cheques by the complainant.

14. The Accused had undertaken to obtain commencement certificate within 100 days of the Consent Terms and occupation certificate within 21 months. As per clause 7 of the

terms, the complainant was entitled to deposit the cheque without recourse of the Accused on occurrence of any default as stipulated in clause 3 and 6 whether there was any enforceable legal liability nor is a matter of trial as the liability had become due on the specific date as per clause 7, no infirmity can be found in the impugned order and the proceedings.

15. In the light of the factual matrix of this case, I do not find any reason the interfere in the impugned orders passed by the Court below.

ORDER

(i) Criminal Writ Petition No.2340 of 2022, Criminal Writ Petition No.2341 of 2022 and Criminal Writ Petition No.2342 of 2022 are rejected and disposed off accordingly.

(ii) The observations made in this order are for adjudicating these Petitions. Trial Court shall not be influenced by the same during trial.

(PRAKASH D. NAIK, J.)