IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

**WRIT PETITION NO.4176 OF 2021**

Altaf Atikur Rehman Mukhi ...Petitioner
vs.
The State of Maharashtra and Another ...Respondents

VISHAL SUBHASH PAREKAR

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Mr. Tariq Khan a/w. Mr. Uzair Kazi and Ms. Dhanashree Hublikar, for the Petitioner.
Mr. G.S. Bhat a/w. Mr. C.N. Kumar, for Respondent No. 1.
Ms. Ranjana Humane, APP for the Respondent No. 2-State.

**CORAM : N. J. JAMADAR, J.**
**RESERVED ON : MARCH 12, 2024**
**PRONOUNCED ON : MARCH 27, 2024**

**JUDGMENT :**

1. Rule. Rule made returnable forthwith. With the consent of the learned counsel for the parties, heard finally at the stage of admission.

2. This petition under Article 227 of the Constitution of India, calls in question the legality, propriety and correctness of an order passed by the learned Additional Sessions Judge , Greater Bombay in Criminal Revision Application No. 1356 of 2019, whereby the revision application preferred by the petitioner came to be rejected, affirming the order dated 3rd September, 2019 passed by the learned Magistrate in CC No.497/SS/2018 of issue of process against the petitioner, for an offence punishable under section 138 of the Negotiable Instruments Act, 1881 (the Act, 1881).

3. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed in CC No. 497/SS/2018.

4. Background facts can be summarized as under:-

A] The complainant/respondent No. 1 claimed to have advanced a friendly loan of Rs. 1 Crore to the accused/petitioner in the month of May, 2016 by cheque. The accused had assured to repay the amount after a period of three months. Despite repeated requests, the accused did not repay the loan as promised. In the first week of September, 2018 towards repayment of the loan amount, the accused had drawn four cheques for an amount of Rs. 25 lakhs each on Bank of India, Nagpada branch; all payable on 1st October, 2018.

B] Upon presentment, the cheques were returned un-encashed with the remarks "funds insufficient" on 8th October, 2018. On 1st November, 2018 a statutory demand notice was addressed to the accused calling upon the accused to pay the amount covered by the dishonoured cheques. Instead of complying with the demand, the accused addressed a reply on 14th November, 2018 raising false contentions. Hence, the complainant was constrained to give a rejoinder and thereafter lodge a complaint for the offence punishable under section 138 of the Act, 1881.

C] The learned Magistrate, ordered issue of process on 3rd September, 2019.

D] Being aggrieved, the accused preferred a Revision Application before the learned Sessions Judge. The accused, inter alia, contended that the real transaction between the accused and the complainant was suppressed. In fact, the complainant paid the sum of Rs. 1 Crore towards part payment of consideration for the purchase of Flat No. 808, 8th Floor, B wing, Raj Paradise, Military Road, Marol, Andheri(E), Mumbai. The complainant had agreed to purchase the said flat for a consideration of Rs. 1.45 Crore. The complainant did not pay the balance amount of Rs. 45 lakhs. Therefore, the accused was constrained to cancel the transaction.

E] It was further contended that the subject cheques were delivered by way of security in the year 2016 itself. Vide reply dated 14th November, 2018 the accused had called upon the complainant to accept the sum of Rs. 1 Crore by way of a pay order and return the original registered agreement in respect of the said premise between the vendor of the accused and the developer and also return the original share certificate. A copy of the pay order was also annexed to the said reply. Thus, there was no propriety in issuing process for the offence punishable under section 138 of the Act, 1881 as accused had already complied with the demand in the statutory notice.

F] By the impugned order, the learned Additional Sessions Judge was persuaded to reject the revision holding that there was inconsistency in the stand of the accused as regards the number of cheques which were allegedly delivered by way of security. Secondly, as the accused had acknowledged the receipt of Rupees One Crore from the complainant and admitted the issuance of the cheque, it was for the accused to dislodge the presumption of enforceability of the debtor liability, at the trial. Therefore, the learned Judge declined to interfere with the order passed by the learned Magistrate.

5. Mr. Tariq Khan, the learned counsel for the petitioner submitted that the learned Additional Session Judge was in error in declining to interfere with the order passed by the learned Magistrate. It was submitted that the cause of action to lodge the complaint cannot be said to have arisen as the accused had offered the amount covered by the cheques by annexing a copy of the pay order to the reply to the demand notice. Thus, it cannot be said that drawer of the cheque failed to make the payment of the amount covered by the dishonoured cheque. This aspect of the matter was not at all adverted to by the learned Additional Sessions Judge.

6. Inviting attention of the Court to the notices exchanged between the parties and a copy of the plaint in Suit No. 3789 of 2018, instituted by the accused against the developer and complainant, it was submitted that the learned Additional Sessions Judge should have appreciated that the complainant had approached the Court with a demonstrably false case that the complainant had advanced a friendly loan to the accused.

7. Laying emphasis on the copy of the pay order annexed to the reply, Mr. Tariq Khan submitted that the continuation of the prosecution amounts to a clear abuse of the process of law. Therefore, the impugned order as well as the order of issue of process deserve to be quashed and set aside.

8. Mr. Bhat, learned counsel for respondent No. 1 countered the submissions on behalf of the petitioner. Taking the Court through the reply to the notice, Mr. Bhat urged that the accused had made a farce of offering payment of the amount covered by the cheque. The said offer was accompanied with the condition of return of the original registered agreement and original share certificate of Flat No. 808, which were never delivered to the complainant. Thus, the said offer to pay the amount covered by the cheque cannot amount

to “payment” of the amount covered by the subject cheques.

9. Mr. Bhat urged with a degree of vehemence that the accused had resorted to the subterfuge of transaction of sale and purchase of the subject flat with a view to avoid the liability to repay the amount. Mr. Bhat, laid emphasis on the fact that in Suit No. 3789 of 2018, the accused had sought simpliciter injunction against the dispossession. Neither relief of specific performance of the contract, nor delivering up the alleged original documents and share certificates allegedly entrusted to the complainant was made. In these circumstances, according to Mr. Bhat, the learned Sessions Judge committed no error in declining to interfere with the order of issue of process.

10. Evidently, on the aspect of the issue and dishonour of the cheques and the compliance of the provisions contained in clause (a) and (b) of the proviso to section 138 of the Act, 1881there does not seem to be much controversy. The controversy revolves around the question as to whether the accused failed to make the payment, as envisaged by clause (c) of the said proviso.

11. Reference to the reply on behalf of the accused wherein the

stand of the accused was articulated becomes necessary for the resolution of the aforesaid controversy. In the said reply, the accused has essentially set up a different transaction than the one pleaded by the complainant in the complaint. The accused contended that the amount of Rs. 1 Crore was paid as and by way of part consideration towards purchase of Flat No. 808. There was a verbal agreement to purchase the subject flat for Rs. 1.45 Crores. The complainant failed to pay the balance amount of Rs. 1 Crore. By way of security, according to the accused, the registered agreement and the original share certificate were also delivered to the complainant. As the transaction failed on account of default on the part of the complainant, the accused was ready to return the amount of Rs. 1 Crore, as was conveyed vide letter dated 17th October, 2018. Thus, a pay order was prepared for a sum of Rs. 1 Crore. A copy of which was annexed to the reply. The accused called upon the complainant to return the original registered agreement and original share certificate of Flat No. 808.

12. It would be contextually relevant to note that on 17th October, 2018, the accused had addressed a letter to the complainant broadly incorporating the aforesaid case and sought the return of original registered agreement, against the repayment of Rs. 1

Crore. The learned Additional Session Judge was of the view that there was discrepancy in the stand of the accused as initially the accused claimed that one blank signed cheque was delivered by way of security and, in fact, there was four cheques which were eventually dishonored. At this stage, it would be hazardous to draw such an inference sans evidence.

13. The moot question that wrenches to the fore is whether, at this stage of the proceeding, the revisional Court or for that matter this Court, would delve deep into core controversy as to the real nature of the transaction between the parties. Admittedly, the accused had received a sum of Rs. 1 Crore from the complainant. The parting of the money by the complainant is simply incontrovertible. For the complainant the said amount was paid by way of a friendly loan. The accused contends, the said amount was towards part payment of the consideration for the sale of Flat No. 808. In this backdrop, the controversy is rooted in thickets of facts. The issue of the subject cheque by the accused is also incontestable. What is sought to be put in contest is the purpose for which those cheques were drawn.

14. In such a situation, where the issue of the cheque is not in

dispute, the presumption contained in section 118 and 139 of the Act, 1881 come into play with a full force. The onus would lay on the accused to dislodge the presumption in the manner known to law. In exercise of writ jurisdiction, it would be impermissible for this Court to enter into arena of controversy on facts.

15. Keeping in view of the aforesaid remit of the exercise of writ jurisdiction, the submission that the accused had paid the amount covered by the dishonoured cheques and therefore there was no cause of action to lodge the complaint deserves appraisal. First and foremost, it is necessary to note that the offer to pay the amount was expressly conditional. Both in the letter dated 17th October, 2018 and the reply to the demand notice dated 14th November, 2018 the offer to pay the amount covered by the cheque was conditional upon the return of the original registered instrument and the share certificate of Flat No. 808, which the complainant categorically denied to have been delivered to him.

16. Under clause (c) of the proviso to section 138 of the Act, 1881 it is the failure to make payment of the amount covered by the cheque within the stipulated period that constitutes an ingredient of offence under section 138 of the Act, 1881. An offer to make

payment can not be equated to 'payment' envisaged by clause (c) of the proviso. When the offer was conditional, the complainant was not enjoined to accept the same. That brings in the element of the real nature of the transaction between the parties. If eventually the accused succeeds in demonstrating that the real nature of the transaction was one of sale of subject flat and the subject cheques were delivered as and by way of security for the due performance of the contract for sale of the subject flat, the question as to whether the offer to make the payment of the amount covered by the dishonoured cheque against the delivery of the original documents was sufficient to dislodge the presumption of enforceability of the debt can be legitimately considered. At this stage, the fact remains that the accused did not pay the amount covered by the subject cheques within the stipulated period of the service of the demand notice. The complaint, therefore, must go to trial.

17. The support sought to be drawn by the learned Additional Session Judge from the pronouncement of the Supreme Court in the case of **Rajeshbhai Muljibhai Patel v. State of Gujrat and Another**[1] appears to be well founded. In the said case, the Supreme Court observed, inter alia, as under:-

> 22] The High Court, in our view, erred in quashing the criminal

1 (2020) 3 Supreme Court Cases 794.

> case in C.C.No.367/2016 filed by appellant No.3-Hasmukhbhai under Section 138 of N.I. Act. As pointed out earlier, Yogeshbhai has admitted the issuance of cheques. When once the issuance of cheque is admitted/established, the presumption would arise under Section 139 of the N.I. Act in favour of the holder of cheque that is the complainant Appellant No.3. The nature of presumptions under Section139 of the N.I. Act and Section 118(a) of the Evidence Act are rebuttable. Yogeshbhai has of course, raised the defence that there is no legally enforceable debt and he issued the cheques to help appellant No.3-Hasmukhbhai for purchase of lands. The burden lies upon the accused to rebut the presumption by adducing evidence. The High Court did not keep in view that until the accused discharges his burden, the presumption under Section 139 of N.I. Act will continue to remain. It is for Yogeshbhai to adduce evidence to rebut the statutory presumption. When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the N.I. Act ought not to have been quashed by the High Court by taking recourse to Section 482 Cr.P.C. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the N.I. Act on the legal issues like limitation, etc. criminal complaint filed under Section 138 of the N.I. Act against Yogeshbhai ought not have been quashed merely on the ground that there are inter se disputes between appellant No.3 and respondent No.2. Without keeping in view the statutory presumption raised under Section 139 of the N.I. Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in C.C.No.367/2016 filed under Sec.138 of N.I. Act.

18. The upshot of the aforesaid consideration is that having admitted the receipt of a sum of Rs. 1 Crore and issuance of the subject cheques, it is for the accused to dislodge the premumption of enforceability of the debt, at the trial. Therefore, the trial and revisional Courts below cannot be said to have committed any error which warrants interference in exercise of extra-ordinary writ jurisdiction. The petition, therefore, deserves to be dismissed.

Hence, the following order.

**ORDER**

1] The petition stands dismissed.

2] Ad-interim order stands vacated.

3] Rule discharged.

4] There shall be no order as to costs.

**(N. J. JAMADAR, J.)**

19. At this stage, learned counsel for the petitioner seeks continuation of ad-interim order.

20. In the backdrop of the reasons recorded by this Court, prayer for continuation of ad-interim order does not seem justifiable. Hence oral application is rejected.

**(N. J. JAMADAR, J.)**