

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 15.12.2023

Pronounced on: 28.12.2023

CRM(M) No. 1002/2022

- 1. Mariano Fernandes** Appellant(s)/Petitioner(s)
S/O Mr. Constanico Fernandes,
R/O 1st Floor, Raghunath Building
Opposite Auto, Vasko-da-Gama,
Mormungao, South Goa, Goa.

Through: Mr. Navyug Sethi, Advocate.

Vs

- 1. M/s Rama Builders,** Respondent(s)
Near J&K Bank, Paloura Top Jammu,
Th. Proprietor, Anil Gupta, S/O Ram Lal
Gupta, R/O Ward No. 59, Paloura Top,
Jammu

Through: Mr. Varun Raina, Advocate.

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. The petitioner has filed the present petition for quashing the criminal proceedings arising out of complaint titled "Rama Builders Vs. Mariano Fernandes" pending before the court of learned 2nd Additional Munsiff, Jammu (hereinafter to be referred as 'the trial court') and also for quashing the order dated 09.02.2021 whereby the process has been issued by the learned trial court against the petitioner for commission of offence under section 138 of Negotiable Instrument Act, 1881.
2. It is stated that Mr. Tarkeshwar Gupta who has been cited as witness in the complaint has already filed a suit against the petitioner which is pending before the court of learned Civil Judge, Senior Division at Mapusa, Goa and in order to create pressure upon the petitioner the complaint has been filed by the respondent in connivance with

Tarkeshwar Gupta and his father Sanjay Gupta, who also has been cited as one of the witnesses in the complaint. The respondent had forcibly snatched this cheque from the petitioner and filed a complaint against the petitioner, in respect of which the petitioner had already filed a complaint dated 29.05.2020 with the Deputy Superintendent of Police, Porovorum, Goa.

3. The petitioner has sought the quashing of the complaint as well as order dated 09.02.2021 on the following grounds:

- (i) That the cheque was issued by M/s “Ocean Pearl Fisheries” and not by the petitioner in his personal capacity, as such, the petitioner cannot be held liable in respect of the dishonour of cheque issued by the “M/s Ocean Pearl Fisheries”.
- (ii) That the respondent had forcibly taken the cheque from the petitioner in respect of which he had already filed a complaint with the Deputy Superintendent of Police, Porovorum, Goa.
- (iii) That the complaint has been filed by the respondent in connivance with Tarkeshwar Gupta, who has already filed a suit against the petitioner, which is sub judice before the court of learned Civil Judge, Senior Division at Mapusa, Goa. Tarkeshwar Gupta and well as his father Sanjay Gupta figure as witnesses in the list of witnesses submitted by the respondent.
- (iv) That the requirements of the Section 141 of Negotiable Instrument Act are not fulfilled, as the cheque was issued in the name of M/s Ocean Pearl Fisheries and M/s Ocean Pearl Fisheries has not been arrayed as accused.

- (v) That the cheque was rejected by the bank on 26.06.2020 and legal notice was received by the petitioner on 02.08.2020 although the same was allegedly sent by the complainant/respondent on 22.07.2020, therefore, the complaint is not maintainable as the petitioner has not adhered to the timeline as provided under Section 138 of Negotiable Instrument Act.
4. Mr. Navyug Sethi, learned counsel for the petitioner vehemently argued that the cheque was issued by M/s Ocean Pearl Fisheries and without arraying the M/s Ocean Pearl Fisheries, the complaint could not have been filed against the petitioner. He further argued that the complaint is required to be quashed as the petitioner had already approached the Deputy Superintendent of Police in respect of snatching of cheque by the respondent. He also argued that the order impugned has been passed by the learned trial court without following the mandate of section 202 Cr.P.C. Learned counsel for the petitioner has relied upon the judgment of High Court of Punjab and Haryana in case titled **“Sardar Bhupinder Singh Vs. M/s Green Feeds Through its Partner Vipin Kumar”** bearing CRM-M-54111-2021 decided on 26.08.2022.
5. *Per contra*, Mr. Varun Raina, learned counsel for the respondents vehemently argued that the provisions as contained in Section 141 Negotiable Instrument Act are not applicable where the cheque is issued by the owner of proprietary concern, as the proprietary concern has no independent existence other than the owner of the proprietary concern. He further submitted that the contentions raised by the learned counsel for the petitioner amounts to defence of the petitioner, which the petitioner can

raise during the course of trial before the Magistrate. He placed reliance upon the judgment of the Hon'ble Supreme Court of India in case titled **“Raghu Lakshmi Naraan Vs. Fine Tubes”, 2007 AIR (SC) 1634** and **Sunil Todi vs. State of Gujarat, AIR 2022 SC 147.**

6. Heard and perused the record.
7. A perusal of the record reveals that the respondent had filed a complaint against the petitioner being the proprietor of the M/s Ocean Pearl Fisheries in respect of dishonour of cheque amounting to Rs. 23 Lacs due to difference in signatures of the drawer of the cheque, as is evident from the memo dated 26.06.2020 issued in favour of the respondent by the bank. The contention of the petitioner is that the proprietary concern was required to be arrayed as an accused in terms of Section 141 of Negotiable Instrument Act. Section 141 of Negotiable Instrument Act is reproduced as under:

“141. Offences by companies.—

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence: 6[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) 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. Explanation.—For the purposes of this section,

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.”

8. A mere perusal of the Section 141 of Negotiable Instrument Act would reveal that the same is applicable to the Companies and further the explanation appended to the Section defines Company as a body corporate and includes a firm or other association of individuals.
9. This Court is of the considered view that a proprietary concern has no independent existence other than the proprietor thereof. The Hon’ble Supreme Court in case titled “**Raghu Lakshminarayanan Vs. Fine Tubes**” reported as **2007 (5) SCC 103** has observed that there is distinction between the proprietary concern and partnership firm and the proprietary concern would not fall within the category of company or a firm. The relevant portion of the judgment is extracted as under:

“12. We keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a ‘Company’ or a ‘Partnership Firm’ as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Indian Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a Company incorporated under the Indian Companies Act or a firm within the meaning of the provisions of the Section 4 of the Indian Partnership Act.
10. In view of the above judgment, the judgment relied upon by the learned counsel for the petitioner in “**Sardar Bhupinder Singh Vs. M/s Green Feeds Through its Partner Vipin Kumar**” is not applicable.
11. The other contention raised by the learned counsel for the petitioner was that the petitioner had lodged a complaint in respect of snatching of cheque by the respondent before the Deputy Superintendent of Police

concerned and also that the complaint has been filed by the respondent in connivance with Tarkeshwar Gupta and his father Sanjay Gupta to pressurize him as the said Tarkeshwar Gupta has filed the suit against the petitioner in Goa.

12. Without commenting upon the merits of the contentions raised by the petitioner, this Court is of the considered view that these are the facts which amount to defence of the accused, which the petitioner may raise during the course of trial and it is for the learned trial court to accept the defence or reject the defence of the petitioner. This Court while exercising jurisdiction under Section 482 Cr.P.C. cannot examine the disputed questions of fact, more particularly the defence of the accused while examining the validity of the order of issuance of process against the accused and the maintainability of the complaint. The complaint under Section 138 NI Act, no doubt can be quashed when it suffers from legal lacunae but not on the factual issues those are to be adjudicated upon only during the course of trial. Reliance is placed upon the decision of Apex Court in case titled **Rajeshbhai Muljibhai Patel v. State of Gujarat, reported in (2020) 3 SCC 794**, the relevant para is reproduced as under:

22. The High Court, in our view, erred in quashing the criminal case in CC No. 367 of 2016 filed by Appellant 3 Hasmukhbhai under Section 138 of the NI 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 NI Act in favour of the holder of cheque that is the complainant Appellant 3. The nature of presumptions under Section 139 of the NI 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 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 the NI 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 NI Act ought not to have been quashed by the High Court by taking recourse to Section 482 CrPC. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the NI Act on the legal issues like limitation, etc. criminal complaint filed under Section 138 of the NI Act against Yogeshbhai ought not to have been quashed merely on the ground that there are inter se disputes between Appellant 3 and Respondent 2. Without keeping in view the statutory presumption raised under Section 139 of the NI Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in CC No. 367 of 2016 filed under Section 138 of the NI Act.

(Emphasis added)

13. The contention though not argued but raised in the petition that the respondent has not adhered to the timeline prescribed by the Section 138 of Negotiable Instrument Act is misconceived because as per the own admission of the petitioner, notice was issued by the respondent on 22.07.2020 where as the cheque was dishonoured on 26.06.2020, as the notice of demand of amount in lieu of dishonoured cheque has to be issued within the period of 30 days from the date of receipt of information in respect of dishonour of the cheque from the Bank. In view of what has been said and discussed above, this Court finds that there is no merit in the contentions raised by the petitioner, as such, the same are rejected.
14. However, a perusal of the record file reveals that on 09.02.2021 learned counsel for the complainant had filed original documents as well as the preliminary statement of the complainant and after perusing the statement of the complainant and material placed on record, the learned trial court issued the process against the petitioner. From the record, it is evident that the petitioner is resident of Goa i.e. beyond the territorial jurisdiction of the learned trial court. Under such circumstances, it was incumbent on the part of the learned trial court to have resorted to the provisions contained in Section 202 Cr.P.C. *by holding an enquiry himself or directing an*

investigation to be made by a Police Officer or by such other person which he thinks fit for the purpose of deciding whether or not there exists sufficient ground for proceeding. The learned trial court has not complied with the provisions contained in Section 202 Cr.P.C. In Re: Expeditious Trial of Cases under Section 138 of N.I. ACT 1881, the Hon'ble Supreme Court has issued certain guidelines for expeditious disposal of cases under Negotiable Instruments Act and the relevant guidelines are extracted as under:

- 1) x x x x x
- 2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.
- 3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.
4. x x x x x x
5. x x x x x x
6. x x x x x x
7. x x x x x x
8. x x x x x x"

15. Further in an identical situation, the Hon'ble Supreme Court of India in **Vishwakalyan Multistate Credit Co Op Society Ltd. vs. Oneup Entertainment Private Limited, 2023 Legal Eagle 839**, has directed the Magistrate to proceed with inquiry under Section 202 Cr.P.C, when the Magistrate had issued the process against the accused for commission of offence under section 138 NI Act without proceeding in terms of section 202 Cr.P.C, who was not residing within the territorial jurisdiction of the Court. Relevant portion is extracted as under:

“We may note here that as far as complaints under Section 138 of the NI Act are concerned, this Court in Suo Motu Writ Petition (Criminal)No.2 of 2020 in the case of "In Re : Expeditious Trial of Cases Under Section 138 of N.I.Act, 1881" has laid down the

guidelines. In clause (3) of paragraph 24 of the said decision, the Constitution Bench has directed as under:

"3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses."

We, therefore, modify the impugned judgment and **direct the Trial Court to proceed from the stage of Section 202 of the CRPC. While doing so, the learned Magistrate will be guided by the direction issued by the Constitution Bench which is reproduced above."**

16. In view of the above, this Court is of the considered view that the order dated 09.02.2021 is not sustainable in the eyes of law and accordingly, the same is quashed. The learned trial court shall proceed in terms of Section 202 Cr.P.C. as per the mandate of the directions issued by the Hon'ble Apex Court as mentioned above. The Magistrate shall pass appropriate order within the period of 30 days from the date copy of this order is made available to the learned trial court. Registry to send the copy of the order to the learned trial court forthwith.

17. **Disposed of.**

(RAJNESH OSWAL)
JUDGE

Jammu
28.12.2023
Sahil Padha

Whether the order is speaking: Yes/No.
Whether the order is reportable: Yes/No.