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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2260 OF 2013

Arvind S.Chheda,
Karta of Arvind S.Chheda H.U.F.,
through his constituted attorney
Mukesh Lalji Bhatia ..Petitioner.

V/s.

1. Bhuvnesh D.Sampat,

2. Mrs.Hiral B.Sampat,

3. State of Maharashtra ..Respondents.

Mr.Sandesh Shukla with Rajmani Verma i/b. Navdeep Vara & Associate for the petitioner.

Mr.S.A.Jabber i/b. Bilas Jadhav for respondent No.1.

Mr.Naresh Pradhan for respondent No.2.

Mr. H.J. Dedhia, APP for the respondent-State.

CORAM: NITIN W.SAMBRE, J.

DATE : MARCH 8, 2018

ORAL ORDER

This petition is by original complainant questioning the order dated October 22, 2012 passed by the learned Additional Sessions Judge, Greater Mumbai in Criminal Revision Application No.6/2012 quashing the complaint for an offence punishable under section 138 of the Negotiable Instruments Act, 1881 ('the N.I. Act' for short) against respondent No.2.

2. The facts necessary for deciding the petition are as under :-

In a complaint case No.5004001-SS-11 initiated by the petitioner for an offence punishable under section 138 and 141 of the N.I.Act against the respondents before the learned Metropolitan Magistrate, 50th Court Vikhroli, Mumbai order of isuance of process on September 23, 2011 came to be passed.

3. This order dated September 23, 2011 of issuing process against the respondents-accused was subject matter of challenge in Criminal Revision Application No.6/2012, which came to be partly allowed on October 22, 2012 vide order passed by the Additional Sessions Judge, Greater Mumbai, whereby the order came to be set aside against respondent No.2 Hiral Bhunesh Sampat and the complaint came to be dismissed against her. It is this order which

is impugned in the present petition at the behest of the petitioner-complainant.

4. It is the case of the petitioner-complainant that the complainant firm had given loan of Rs.55 lakhs to M/s. New Tech Auto Industries, a proprietory concern of respondent No.1, whereas respondent No.2 was assisting respondent No.1 in managing the business of the said firm by associating herself in the day to day management of business and responsibility. It is then claimed that a cheque dated February 6, 1995 for an amount of Rs.55 lakhs was encashed by respondent No.1.

5. The liability was acknowledged vide letter dated August 27, 1997 to the extent of balance amount of Rs.44 lakhs. It is further claimed that cheque issued towards repayment since were dishonoured, process came to be issued against accused persons. The order of issuance of process which was set aside to the extent of respondent No.2 by the learned Additional Sessions Judge is based on following reasons:-

(i) Accused No.1 is the proprietor of the concerned;

(ii) The accused No.2 is not a signatory to the cheque and as such, there is no vicarious liability, (iii) even if accused No.2 is a signatory to the memorandum of understanding, she cannot be proceeded against in view of the firm being a proprietory concern.

6. The order of dismissal of complaint against accused No.2 is questioned by the petitioner based on the following submissions:-

a) That both the accused have joint and several liability towards repayment of cheque amount, as documents speaks of participation of even accused No.2 in the transaction in question. Attention of this Court is invited to the acknowledgement of outstanding loan executed by accused persons on August 27, 1997, bill of exchange and deed of guarantee of same date, which were executed by accused No.2 and also consent terms executed between the complainant and accused in the case in 2005 before the Metropolitan Magistrate, 50th Court, Vikhorli, Mumbai, etc.;

b) The learned Additional Sessions Judge ought not to have interfered in the order;

c) He would also try to rely on the provisions of section 141 of the N.I. Act particularly Explanation (a), which reads thus :-

> *" Explanation – For the purposes of this section,-*
> *(a) 'company' means any body coroporate and includes a firm or other association of individuals; "*

d) According to him, body of individual in the present case consists of respondent Nos.1 and 2 – accused persons and that being so, the ingredients of section 141 of N.I. Act are satisfied. He submits that the order impugned to the extent of dismissal of the complaint against accused No.2 is liable be quashed and set aside.

7. *Per contra*, the learned counsel for the respondents would support the order. According to him, the order is based on the principle that respondent No.2 has not signed the cheque and there is no vicarious liability for offence punishable under sections 138 and 141 of the N.I. Act. He sought dismissal of the petition.

8. The learned APP submits that appropriate order may be passed in the petition in the facts and circumstances of the case.

9. Considered rival submissions.

10. The admitted facts as can be derived from the contents of the complaint and other materials on record are as under :-

(i) The petitioner through an authorised constituted attorney has filed complaint against respondent No.1 who is a proprietor of the firm, who is alleged to have taken loan from the petitioner and the cheque issued towards repayment was dishonoured.

11. In the aforesaid backdrop, if we consider the submissions made by the learned counsel for the petitioner, it is to be noted that it is not the case of the petitioner that respondent No.2-accused is signatory to the said cheque. Rather, it is the case of the petitioner that respondent No.2 stood as guarantor for the respondent No.1 and was helping in managing the day to day business. Even if she has signed as a guarantor on certain documents, respondent No.2 can be held vicariously responsible

for the alleged offence under the N.I. Act being neither a signatory to the cheque nor was responsible in law for such dishonour of cheque. In support of above findings, appropriate support can be drawn from the judgment of the Apex Court in the matter of *Mrs.Aparna A.Shah V/s. M/s. Sheth Developers Pvt. Ltd. & Anr.*[1] wherein in paragraphs 22 and 23, it is observed thus :-

> *" 22. In the light of the above discussion, we hold that under Section 138 of the Act, it is only the drawer of the cheque who can be prosecuted. In the case on hand, admittedly, the appellant is not a drawer of the cheque and she has not signed the same. A copy of the cheque was brought to our notice, though it contains name of the appellant and her husband, the fact remains that her husband alone put his signature. In addition to the same, a bare reading of the complaint as also the affidavit of examination-in- chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque.*
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> *23. We also hold that under Section 138 of the N.I. Act, in case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception to Section 141 of the N.I. Act which would have no application in the case on hand. The*

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proceedings filed under Section 138 cannot be used as an arm twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under Section 138. The culpability attached to dishonour of a cheque can, in no case "except in case of Section 141 of the N.I. Act" be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the Act. Even the High Court has specifically recorded the stand of the appellant that she was not the signatory of the cheque but rejected the contention that the amount was not due and payable by her solely on the ground that the trial is in progress. It is to be noted that only after issuance of process, a person can approach the High Court seeking quashing of the same on various grounds available to him. Accordingly, the High Court was clearly wrong in holding that the prayer of the appellant cannot even be considered. Further, the High Court itself has directed the Magistrate to carry out the process of admission / denial of documents. In such circumstances, it cannot be concluded that the trial is in advanced stage."

12. That being so, it can't be inferred that respondent No.2 is required to be held responsible for the alleged offence of dishonour of cheque. She in no case can be held to be vicariously

liable being neither a proprietor nor signatory to the cheque.

13. Though learned counsel for the petitioner is right in pointing out that the allegations in the complaint *prima facie* satisfies the requirement of N.I. Act and as such constitute an offence, the order of the Magistrate cannot be faulted with. However, in revision, the claim of the respondents-accused cannot be shunted out because of aforesaid principle, as order of issuance of process being adverse to the interest of accused. The respondent-accused has every legal right to question the same before the competent forum.

14. It is not the case of the petitioner that respondent Nos.1 and 2 are body of individual running a proprietory concern. Rather, the petitioner himself has admitted that respondent No.1 is the proprietor whereas respondent No.2, his wife acts in aid of respondent No.1 in managing day to day business. That being so, if the interpretation as sought to be made by the petitioner, of constituting a body of individuals, respondent Nos.1 and 2 if accepted, the same will lead to an anamalous situation as it cannot

be inferred from the record that respondent Nos.1 and 2 at any time before have acted as body of individuals.

15. In the aforesaid background, I hardly notice any reason to cause interference. The petition lacks merits and hence dismissed.

(NITIN W.SAMBRE, J.)