

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 844 OF 2021

1. POSH Agro
A Partnership Firm having its registered office at
12/13, Moti Mahal, RTO Road,
Mahesh Nagar, Ahmednagar

2. Mrs. Sharda Gowardhan Bihani
Age: Major, Occu.: Partner Posh Agro

3. Mrs. Pooja Bhushan Bihani
Age: Major, Occu.: Partner Posh Agro

4. Mrs. Ankita Akshay Bihani
Age: Major, Occu.: Partner Posh Agro

All R/o 12/13, Moti Mahal, RTO Road,
Mahesh Nagar, Ahmednagar

..PETITIONERS

VERSUS

1. State of Maharashtra

2. Arth Niti Sallagar Pvt. Ltd.,
Through it's General Manager,
Mr. Shrikesh Savlaram Dixit,
Having its registered office,
Shop No.4, Promoter N Complex,
Plot No.5, Town Center, Aurangabad

..RESPONDENTS

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Mr. S.S. Khivansara, Advocate for petitioners

Mrs. G.L. Deshpande, A.P.P. for respondent no.1 – State

Mr. S.A. Deshmukh and Mr. R.B. Muley, Advocate for respondent no.2

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CORAM : R.G. AVACHAT, J.
RESERVED ON : 15th FEBRUARY, 2022
PRONOUNCED ON : 18th JULY, 2022.

JUDGMENT :

1. Heard finally with consent of learned counsel for the parties.
2. This petition has been filed for quashment of complaint/criminal proceeding of Summary Criminal Case No. 2566 of 2021, instituted for the offence punishable under Section 138 of Negotiable Instruments Act ('N.I. Act'). The petitioners herein are Accused Nos. 1 to 4 in the said case.
3. The facts, giving rise to the present proceeding are as follows :-

Respondent No.2 is a private limited company engaged in business of arranging or helping or assisting in fund raising. Petitioner No.1 is a partnership firm. Petitioner Nos. 2 to 4 are its partners. The petitioners wanted to set-up a unit for manufacturing jaggery in Maharashtra. They, therefore, approached Respondent No.2 – complainant for raising of funds for the proposed project. An agreement in writing came to be executed between the petitioners and Respondent No.2 on 14th September, 2020. Respondent No.2 – complainant claims to have provided all the assistance and ensured grant of loan by the Central Bank of India for the proposed project. The petitioners, however backed-out of the transaction. It is also the case of Respondent No.2 – complainant that since it had to spend a lot, it only raised a bill of Rs.4,50,000/- (50% of the fixed fees). Accused No.5 in the case, was looking after the business of Petitioner No.1 – partnership firm. He issued a

cheque of Rs.4,50,000/- towards payment of Respondent No.2's fees. The cheque was presented for encashment. It, however returned unpaid for the reason 'Funds Insufficient'. Respondent No.2 – complainant, therefore, issued statutory demand notice to the petitioners and Accused No.5. The notice was replied with false contentions. Prosecution, therefore, came to be initiated.

4. Learned counsel for the petitioners disputed almost all the averments in the complaint. He denied Accused No.5 to have been anyway related with Petitioner No.1 – partnership firm. According to the petitioners, merely a pre-sanction letter was issued by the bank. The services extended by Respondent No.2 – complainant were unsatisfactory. It was so communicated to it. The cheque issued by Accused No.5 was under his signature alone and drawn on his personal account. The petitioner firm and its partners no way liable for the offence punishable under Section 138 of the N.I. Act. Learned counsel has relied on the judgment of the Apex Court in the case of *Alka Khandu Avhad Vs. Amar Syamprasad Mishra and Another*, (2021) 4 SCC 675.

5. Learned counsel for Respondent No.2 – complainant placed on record an agreement entered into between the petitioner - firm and Respondent No.2 – company. It has also placed on record a communication made by Accused No.5 with Respondent No.2, for and on behalf of the petitioner – firm. Learned counsel has placed reliance on the judgment of the

Apex Court in the case of *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhall and Another*, AIR 2005 SC 3512. According to him, the complaint contains all the averments constituting ingredients of an offence of dishonour of cheque. Whatever contentions the petitioners have raised, are all in the nature of defence, to be proved during trial. Learned counsel, therefore, urged for dismissal of the petition.

6. Considered the submissions advanced. Perused the complaint and the documents relied on. It is not in dispute that agreement in writing was executed between Respondent No.2 - complainant on one hand and Petitioner No.1 - partnership firm on the other. Respondent No.2 - complainant was supplied with the details of promoters and the deed of Petitioner No.1 - firm, wherein Petitioner Nos. 2 to 4 are shown as partners of the firm. Accused No.5 was shown as Founder and Managing Director of Petitioner No.1 - firm. There is evidence to indicate that Petitioner No.1 - firm had proposed to set-up jaggery manufacturing unit. It, therefore, engaged Respondent No.2 - company for its services for raising funds. An agreement was entered into in that regard. Petitioner No.1 - firm is said to have backed-out.

7. A cheque dated 08th October, 2020 in the sum of Rs.4,50,000/- came to be issued on 23rd November, 2020 in the name of Respondent No.2 - company. The question is whether ingredients of Section 138 of the N.I. Act

are prima facie made out against the petitioner – firm and its partners. The Apex Court in the case of Alka Avhad (supra) has observed thus :-

“9. On a fair reading of Section 138 of the N.I. Act, before a person can be prosecuted, the following conditions are required to be satisfied :

9.1. That the cheque is drawn by a person and on an account maintained by him with a banker.

9.2. For the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability.

9.3. The said cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account.

10. Therefore, a person who is the signatory to the cheque and the cheque is drawn by that person on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. Section 138 of the N.I. Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 of the N.I. Act. A person might have been jointly liable to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque.”

8. Copy of the cheque issued by Accused No.5 is on record. The cheque was issued by him, who is the husband of Petitioner No.3, in his individual capacity i.e. not for and on behalf of Petitioner No.1 – firm. Moreover, the cheque has been issued on personal account of Accused No.5 - Bhushan Bihani. As such, it cannot be said that the cheque has been issued by Petitioner No.1 – firm on an account maintained by it and Petitioner Nos. 2 to 4 - partners, being liable in view of the principle of constructive criminal liability.

9. The facts of the case of S.M.S. Pharmaceuticals Ltd. (supra) are altogether different. Although, in the complaint it has been averred that Petitioner Nos. 2 to 4, being partners of Petitioner No.1 - firm, entered into an agreement with Respondent No.2 – company, as stated above, no ingredient of offence punishable under Section 138 of the N.I. Act are made out against any of the petitioners herein. Allowing the proceeding in S.C.C. No. 2566 of 2021 to continue against the petitioners herein would, therefore, be an abuse of process of Court. The petition, thus deserves to be allowed.

10. In view of above, writ petition succeeds. Same is allowed in terms of prayer clause (A). Rule is made absolute.

(R.G. AVACHAT, J.)

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