IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3612 OF 2021
WITH
CRIMINAL WRIT PETITION NO. 6446 OF 2021

Hari Nair ...Petitioner

Versus

The State of Maharashtra And Anr. ...Respondents

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Mr. Adithya R. Iyer a/w Mihir Tambe a/w Mr. Advit Helekar, Advocate for the Petitioner.
Mr. Ashok Mundargi, Sr. Advocate a/w Mr. Faisal Sayyed i/by Manilal Kher Ambalal & Co., Advocate for Respondent No.2.
Mr. Arfan Sait, APP for the Respondent - State.

CORAM : PRAKASH D. NAIK, J.
DATE : 4th AUGUST, 2022.

P.C.

1. The Petitioner has invoked supervisory jurisdiction of this Court under Article 227 of Constitution of India and Section 482 of Code of Criminal Procedure taking exception to the Order issuing process dated 5th March, 2021 passed in C.C. No. 2300002/SS/2021 and C.C. No.2300001/SS/2021pending before the Court of Metropolitan Magistrate 23rd Court, Esplanade Mumbai.

2. The Petitioner has arraigned as Accused No.5 in both the complaints. The facts of both the complaints are similar. The complainant has alleged that Accused No.1 is a private limited company. Accused No.1 is carrying on the business of trading and investment. Accused Nos. 2 to 4 are whole time Directors of Accused

No.1. Accused Nos. 5 and 6 are the signatories of Accused No.1. Accused Nos. 2 to 6 were the principal officers for and in overtime control and in-charge of day-to-day affairs of Accused No.1 with full and absolute authority of taking decisions and giving instructions for issuing cheques. They are liable for acts of omission and commission of Accused No.1. In order to raise debts, accused No.1 issued and allotted freely transferable, secured, rated, redeemable non-convertible debentures of face value of Rs.10,00,000/- (Ten Lakhs) and aggregating to 1,50,00,00,000/- (One Hundred fifty Crores). Debenture Trustee Agreement dated 6th October, 2017 and Debenture Trust Deed were executed on 6th October, 2017 and the complainant was appointed as Debenture Trustee. The accused also executed other documents. The Accused No.1 vide its letter dated 6th October, 2017 under the signature of Accused No.6 delivered, in the name of the complainant post dated cheques signed by Accused Nos. 5 and 6. The complainant called upon the Accused to pay the entire outstanding amount. The complainant acting as per the instructions of debenture holders enforced the pledged security and sold the shares to recover the outstanding amount. After appropriating the proceeds a balance of Rs.28,70,59,575/-and Rs.29,66,29,322/- remained outstanding towards the principal amount. The cheque issued by Accused No.1 bearing No.188762 dated 4th November, 2022 for a sum of Rs.28,70,59,575/-(Twenty Eight Crores Seventy Lakhs Fifty Nine Thousand Five Hundred Seventy Five) signed by Accused Nos.5 and 6 was presented for encashment on 4th November, 2020 with the banker of complainant. However, the cheque was returned with the remark “Drawers signature to operate account not received” vide Bank Memo dated 5th November, 2020. Statutory notice was sent to the Accused on 17th November, 2020 demanding amount. The notice was served upon the Accused. Complaint was filed before the learned Metropolitan Magistrate for an offence under Section 138 of Negotiable Instrument Act (for short ‘N.I. Act’). The complaint was numbered as C.C. No.230002/SS/2021. Process was issued for a offence under Section 138 of N.I. Act against Accused Nos. 1 to 6 vide Order dated 5th March, 2021. The accused issued another cheque bearing No.188758 dated 4th November, 2020 for a sum of Rs.29,66,29,322/-(Twenty Nine Crores Sixty Six Lakhs Twenty Nine Thousand Three Hundred Twenty Two) signed by Accused No.5 and 6. The cheque was deposited for encashment by the complainant. The cheque was returned unpaid with remark “Drawers signature to operate account not received” in the Bank Memo dated 5th November, 2022. Statutory notice dated 17th November, 2020 was sent to the Accused demanding the amount. Since the amount was not paid, complaint was filed for an offence under Section 138 of N.I. Act. Process was issued vide order dated 5th March, 2021 for an offence under Section 138 of N.I. Act. The complaint was registered as C.C. No.2300001/SS/2021.

3. Learned Advocate for the Petitioner submitted as follows:

i. The complainant was never a Director of the Accused No.1 company. He was not in-charge of the affairs of and functioning of the company.

ii. The Petitioner was an authorized signatory of the company. He was employee of Accused No.1 company. The Accused No.1 company had replaced the Petitioner as its authorized signatory of ICICI Bank vide resolution dated 26th December, 2019. The copy of Board resolution was served upon the ICICI Bank with directions to update the record and honour all chques, bills of exchange, promissory notes or other orders for payment drawn as per new resolution passed. The said resolution makes it clear that from 26th December, 2019, the Petitioner was no longer an authorized signatory of the company.

iii. The cheques were dishonoured with remark “Drawers signature of operate not received”. The provisions of Section 138 of N.I. Act cannot be invoked against the Petitioner. The said reason is not covered within conspectus of Section 138 of N.I. Act.

iv. The remark on the dishonoured memo corroborates the version of the Petitioner as he was replaced as an authorized signatory before the cheque was presented for encashment.

v. Letter dated 6th February, 2020 acknowledged by ICICI Bank establishes the fact that the company had replaced the Petitioner with respect to all banking transactions and even referred to new list of authorized signatories for all transactions including honour of cheques. The undated cheque which were purportedly handed over in October, 2017, were presented for encashment in November, 2020 i.e. after a passage of more than three years. The bank returned the cheques on the ground that the drawer's signature to operate the account had not been received. At the relevant time i.e. presentation of cheque as well as the time of dishonour, the Petitioner was not responsible for affairs of the Accused company.

vi. The Petitioner had left the employment of Accused No.1 company in March, 2020 before the cheques were presented to the bank by Respondent No.2.

vii. When the cheque was presented the company had replaced the Petitioner as its authorized signatory vide Bank

Resolution dated 27th December, 2019.

viii. The Petitioner had resigned from Accused No. 1 company vide letter dated 1st April, 2020.

4. Learned Advocate for the Petitioner had relied upon the following decisions :

i. *DCM Financial Services Ltd. V/s. J.N. Sareen and Another, delivered by Hon'ble Supreme Court in Criminal Appeal No.875 of 2008.*

ii. *Raj Kumar Khurana V/s. State of (NCT of Delhi) and Anr., delivered by Hon'ble Supreme Court in Criminal Appeal No.913 of 2009.*

iii. *Ramesh Pahulraj Makhija V/s. State of Maharashtra and Another, 2019 SCC Online Bom 1656.*

iv. *Praveen Kumar V/s. State of Maharashtra and Another, 2020 SCC Online Bom 6314.*

v. *Order passed by Karnataka High Court dated 8th January, 2019 in Criminal Petition No.100323 of 2014.*

5. Learned Senior Advocate Mr. Mundargi for the Respondent No.2 in both the petitions submitted that the grounds urged by the Petitioner at this stage. There are sufficient averments in the complaint to show that the Applicant had participated in day to day affairs of Accused No.1 company. The Petitioner had signed

documents. The Petitioner was authorized signatory of Accused No.1 company of signing cheques. The cheques in question were signed by the Petitioner. The grounds urged by the Petitioner are based on disputed question of facts. While exercising power under Article 227 of Constitution of India and inherent power under Section 482 of Cr.P.C. this Court may not consider the disputed question of facts for quashing the proceedings. There are sufficient averments in the complaint to invoke Section 141 of N.I. Act against the Petitioner. The resignation of the Petitioner is not recorded. The Petitioner being authorized signatory is entrusted with wide powers on behalf of the Accused No.1 and responsible for the day-to-day affairs of Accused No.1 company. The reason for dishonour of cheque being "Drawers signature to operate account not received" squarely fall within the scope and ambit of the provisions of the Act. Reliance is placed on the decision in the case of *Laxmi Dyechem V/s. State of Gujrat, (2013) 13 SCC 375.* The reason for launching prosecution of the under Section 138 of the Act cannot be limited only to funds insufficient and it would be matter of trial to examine such issue. The learned Magistrate had issued process on the basis of averments in the complaint and documents on record. There is no illegality in the Order issuing process. The cheques were issued in discharge of liability. Specific role has been attributed to the Petitioner in the complaint.

6. Undisputedly, the Petitioner is not the Director of Accused No.1 company. The Accused Nos. 2 to 4 are whole time Director of Accused No.1 company. The Petitioner was appointed as signatory of Accused No.1 company. The Accused No.1 vide its letter dated 6th October, 2017 issued under signature of Accused No.6 delivered post dated/undated cheques signed by Accused Nos. 5 and 6. The Petitioner is impleaded as Accused No.5. The impugned complaints are relating to Cheque No.188762 dated Cheque No.188758 dated 4th November, 2020. Both the cheques were presented for encashment on 4th November, 2020 with the complainant's banker. Vide Bank Memo dated 5th November, 2020, the cheques were returned unpaid with remark "Drawers signature to operate account not received". The question which arises for consideration is whether the Petitioner can be prosecuted for an offence under Section 138 of N.I. Act.

7. The cheques were presented for encashment after a period of three years. The Petitioner's contention is that he had joined Accused No.1 company on 2nd September, 1996 and last date of his employment as salaried employee was on 31st March, 2020. The Petitioner has relied upon the letter dated 1st April, 2020 issued by Accused No.1 company stating that his last date of employment as a

salaried employee is 31st March, 2020. He had resigned from the said company w.e.f. 31st March, 2020. Since, the Petitioner was not a Director of the company, there was no requirement of filing form 32 or DIR-12 with the concerned authority. It is pertinent to note that vide Resolution dated 26th December, 2019, it was resolved by Accused No.1 company that in supersession of the earlier resolution passed by the Board of Directors in its meeting on 30th January, 2017, for banking operations in respect of current Account No.000405024104 and 039305002111 held with ICICI Bank Ltd., the bank be and is hereby authorized to honour all cheques, bills of exchange, promissory notes or other orders payment drawn, accepted or made or signed by the authorized signatories mentioned therein for and on behalf of the company and to act upon any instructions so given relating to the account whether the same be overdrawn or not or relating to any transactions of the company. The copy of the Resolution dated 26th December, 2019 has been annexed to this petition which indicate that the names of authorized signatories were category I, Shri. Vikas Singhla, Sunil Kakani, category II, Yogesh Bhadra, Pramod Satam and Navin Dixit. Vide letter dated 6th February, 2020 the ICICI Bank Ltd. was informed by the Accused No.1 Churchgate that the Board of Director of the company has passed a resolution where they have superseded the earlier resolution passed on 30th January, 2017 in respect of current Account No.000405024104 and 039305002111 held with ICICI Bank Ltd. and the revised list of authorized signataries was given by the Board and names of aforesaid persons were provided as authrized signatories. The Petitioner ceased to hold position of authorized signatory. The resignation of Petitioner was accepted w.e.f 31st March, 2020. This is evident from confirmation letter dated 1st April, 2020. The bank memo with regards to the unpaid cheque mentions that the cheque is dishonored by the bank with reason "Drawers signature to operate account not received". This Court is not examining whether the prosecution under Section 138 of N.I. Act is not maintainable on account of dishonor of cheque on account of aforesaid endorsement. However, the question is whether the Petitioner who was employee of Accused No.1 company authorized signatory of company can be prosecuted for the offence under Section 138 of N.I. Act after he ceased to be employee and authorized signatory of accused company and dishonour of cheque on the count that Drawers Signature to operate account is not received. It is pertinent to note that, before the cheque was presentd for encashment resolution dated 26th December, 2019 was passed for changing authorized signatories and communication was issued to ICICI Bank that there is change in authorized signatories for operating bank account on 8th February, 2020. The cheques were presented for encashment on 4th November, 2020 and the cheques were dishonoured vide memo dated 5th November, 2020. In the light of aforesaid factual aspects the Petitioner cannot be prosecuted for offence under Section 138 of N.I. Act. At the time of dishonour of cheques and occurrence of cause of action for offence under said provision, the Petitioner was not employee or authorized signatory of accused company in respect to bank on which the cheques were drawn. The cheques were undisputadly signed and handed over to complainant in 2017 and presented for encashment in 2020. Section 141 of N.I. Act cannot be invoked in absence of evidence against the Petitioner.

8. It is also pertinent to note that Petitioner's contention is that he has not in employment of Accused No.1 company w.e.f. 31st March, 2020. There is no material to record to indicate that the Petitioner was involved in the affairs of the Accused No.1 company and was responsible for the business for Accused No.1 company after 31st March, 2020. The letter dated 1st April, 2020 issued by the employer company indicate that the Petitioner was in employment as salaried employee and he ceased to be in employment from 31st March, 2020.

9. In the case of *DCM Financial Services Ltd. V/s. J.N. Sareen and Another* (Supra) the Apex Court at that an issue with regards to resignation from Directorship of the company and dishonour of cheque after resignation of the said Director. The question which was considered by the Apex Court is whether an authorized signatory in the situation in the said case would be liable for prosecution. The accused was Director of company. It was observed that the cheque in question was post dated. It was signed on 3rd April, 1995. It was presented in June, 1998. In the meantime the Accused / Director had resigned from the Directorship of the company. Complaint was filed on 20th August, 1998. Complainant was informed about resignation it was not disclosed before Magistrate that Accused was signatory to cheque. A person who had resigned with knowledge of complainant could not be person in-charge of the company when the cheque is dishonoured. In the case of *Raj Kumar Khurana V/s. State of (NCT of Delhi) and Anr.* (Supra), it was observed that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of Section 138 of N.I. Act. In the case of *Laxmi Dyechem V/s. State of Gujarat* (Supra), the orders passed by High Court quashing complaints under Section 138 of N.I. Act were under challenge the High Court had taken a view that dishonour of a

cheque on the ground that the signature of the drawer of a cheque do not match the specimen signature available with the bank, would not attract the penal provisions of Section 138 of N.I. Act. Section 138 are attracted only in cases where a cheque is dishonoured either because the amount of money standing to the credit of the account maintained by the drawer is insufficient to pay the cheque amount or the cheque amount exceeds the amount arranged to be paid from account maintained by the drawer by an agreement made with the bank. The dishonour of a cheque on the ground that the signatures of the drawer do not match the specimen signatures available with the bank does not, according to the High Court fall in either of two contingencies. The question before Apex Court was whether a dishonour of a cheque would constitute an offence only in one of the two contingencies envisaged under Section 138 of the Act. The Accused company and one of the signatory were parties in the said proceedings before High Court and Supreme Court. The complainant had informed the Accused about dishonour by notice and called upon them to pay the amount covered by the cheques. According to Accused the complainant was informed about change of mandate and requested the complainant to return the cheques in exchange of fresh cheques. However, fresh cheques signed by authorized signatories as per new mandate were never issued to complainant because the offer to issue such cheques was subject to settlement of accounts, which according to Accused had been bungled by outgoing authorized signatories. On behalf of signatory it was argued before High Court that dishonour of cheque on account of signatures not being complete would not constitute offence under Section 138 of N.I. Act. The Supreme Court observed that expression of money insufficient appearing in Section 138 of the Act is a genus and dishonour for reasons such as, account closed, payment stopped, referred to drawer are only species of that genus. So also dishonour on the ground that signature do not match or that image is not found would constitute dishonour within meaning of Section 138 of the Act. Similar result can be brought about by drawer changing his signature given to the bank or in the case of company by changing mandate of those authorized to sign the cheques on its behalf. Such chaques or alteration in the mandatte may be dishonest or fraudulent and that would inevitably result in dishonour of cheques signed by the previously authorized signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour could become an offence under Section 138 of the Act. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer never intended to invite such a dishonour. An authorized signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the couse of ordinary business of a company, partenership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It was contended on behalf of signatories dishonour had taken place after they had resigned. The failure of company to honour commitment cannot be construed as dishonestly by signatories. It was observed that, just because the signatories have taken a different line of defence than one taken by the company does not justify quashing of proceedings against them. In the present case cheques were handed over by covering letter dated 6th October, 2010. The Accused No.1 passed resolution regarding change of authorized signatories on 28th December, 2019. Intimation about it was given to bank on 6th February, 2020. The Petitioner has resigned on 31st March, 2020. In the facts of this case, the Petitioner cannot be prosecuted for offence under Section 138 of N.I. Act. The Accused No.1 company is not before the Court. The Petitioner was not in employment at the time of dishonour of cheque. He was not signatory to cheque at the time of cause of action to intimate proceedings under Section 138 of the Act. In reply to notice the Petitioner had intimated to complainant that, in the event the cheque is presented the undated cheque signed by Petitioner in October-2017 after a passage of more than three years, it is possible that the cheque was returned as a result of the change in bank mandate for authorized signatories by company. The complainant should pursue the matter with company.

10. In the light of the aforesaid observations, the prosecution against the Petitioner for an offence under Section 138 of N.I. Act in both the complaints deserves to be quashed and set aside.

ORDER

i. Criminal Writ Petition No. 3612 of 2021 and Criminal Writ Petition No.6446 of 2021 stand allowed.

ii. Order issuing process dated 5th March, 2021 alongwith proceedings in C.C. No.2300002/SS/2021 pending before Court of Metropolitan Magistrate 23rd Court, Esplanade, Mumbai are quashed and set aside qua the Petitioner.

iii. Order issuing process dated 5th March, 2021 alongwith proceedings in C.C. No.2300001/SS/2021 pending before the Court of Metropolitan Magistrate 23rd Court at Esplanade, Mumbai are quashed and set aside qua the Petitioner.

[PRAKASH D. NAIK, J.]