

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 512 of 2020

Nikunj Keyal

Vs

M/S Golden Goenka Credit Pvt. Ltd.

For the Petitioner

: Mr. Navanil De,
Mr. Diprav Deb.

For the Opposite Party

: Mr. Sanjay Banerjee,
Mrs. Ledia Dasgupta.

Heard on

: 18.04.2023

Judgment on

: 11.05.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding in Complaint Case No. CS/97816 of 2018 dated November 20, 2018 under Sections 138/141 of the Negotiable Instruments Act and an order dated January 03, 2020 passed by the Learned Metropolitan Magistrate 16th Court at Calcutta and now pending before the said Court.
2. The petitioner's case is that the petitioner was a former sleeping partner of M/S Investment and Commercial Enterprise, an unregistered partnership firm and he was not involved with the day to day affairs of the partnership firm.
3. The Opposite Party is a private limited company which carries on its business for providing finance/loans to individuals, companies and/or firms.
4. On November 20, 2018 the Opposite Party herein filed a complaint before the Court of the Learned Chief Metropolitan Magistrate at Calcutta under Sections 138/141 of the Negotiable Instruments Act against the petitioner.
5. On November 20, 2018 the Learned Chief Metropolitan Magistrate at Calcutta after receiving the complaint took cognizance of the same and transferred the case to the Court of the Learned Metropolitan Magistrate, 16th court at Calcutta for enquiry and disposal.

6. The Learned Metropolitan Magistrate, 16th Court at Calcutta on January 10, 2019 after perusing the Initial Deposition and after perusing the materials on record issued process under Section 204 of the Code of Criminal Procedure against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act.
7. It is submitted that the Late father of the present petitioner was the principal partner of the partnership firm named and styled as M/s Investment and Commercial Enterprise.
8. The petitioner was the sleeping partner of the said partnership firm with only the petitioner and his father as the partners.
9. That as a security, the father of the petitioner namely Late Sanjay Kumar Keyal, issued a blank cheque in favour of the complainant bearing cheque no. 993898 drawn on Indusind Bank, Kolkata Stock Exchange Branch, Indian Exchange Place, Kolkata sometime in the year of 2017.
10. On November 1, 2017, the father of the petitioner Sri Sanjay Kumar Keyal expired.
11. That after the death of Sanjay Kumar Keyal, the Partnership firm which was formed on October 1, 2016 stood dissolved on and from March 27, 2018 and a sum of Rs. 600/- was paid as fees and charge for closure of the enlistment in the records of the Kolkata Municipal Corporation (License Department).
12. That the premises wherein the partnership firm being M/s Investment and Commercial Enterprise carried out its business was rented by Late

Sanjay Kumar Keyal and by Ajay Keyal (Uncle of the petitioner) from one “The Rampuria Estates Pvt. Ltd.” for the last 30 years. That the petitioner is the director of a private limited company which carries on business under the name and style of M/s Kaypee Paper Industries Pvt. Ltd. from part of the same premises also rented from the Rampuria Estates Pvt. Ltd.

13. That the Opposite Party was intimated by the petitioner herein regarding the death of his father on November 01, 2017. Even on being informed about the death of the father of the petitioner, the complainant presented the cheque before the bank and got the instrument dishonoured with ulterior motive.
14. The Learned Trial Court has passed an order of attachment of the property of the unregistered firm. The local police station is trying to attach the present office premises of the petitioner which is in no way connected to the said partnership firm.
15. **Mr. Navanil De, learned counsel for the petitioner** has submitted that in a proceeding under N.I. Act, the principles of vicarious liability is not attracted and as such the proceeding against the petitioner being bad in law is liable to be quashed.
16. It is further submitted that since the partnership firm stood dissolved, the firm has got no existing liabilities in a criminal proceedings and if any liability remains, the remedy lies before a Civil Court.

17. That, the impugned proceeding is essentially civil in nature and as such the same is bad in law.
18. That the purported allegations made in the complaint are so absurd that a prudent person can never reach a conclusion that there is any prima facie case against the petitioner. The only intention of the complainant was to wreck the vengeance against the petitioner without any iota of materials.
19. That the purported allegations even if taken on its face value and accepted in its entirety does not make out any offence against the petitioner. The continuance of such frivolous and vexatious proceeding is nothing but an abuse of the process of Court and in the interest of justice and to prevent such abuse of Court, the entire proceeding is liable to be quashed.
20. **Mr. Sanjay Banerjee, learned counsel appearing for the Opposite Party**, (on VIRTUAL MODE) has submitted that the petitioner being a partner of the firm (accused no.1, partnership firm) is liable for all the debts and liabilities of the firm. As such the revision is liable to be dismissed.
21. **On hearing the learned counsels for both sides and considering the materials on record the following facts are before this court.**
 - i) The petitioner was the partner of the partnership firm M/s Investment & Commercial Enterprise along with his father, Sanjay Kumar Keyal (died on 01.11.2017).

- ii) The Complaint Company is a non banking finance company, which on 11.04.2017 provided financial support to the accused firm to the tune **of Rs. Fifty Lakhs through RTGS.**
 - iii) The accused firm then in discharge of its liability on 08.08.2017 issued a post dated cheque bearing number 993898 dated 30.07.2018 in favour of the complainant company.
 - iv) Sanjay Kumar Keyal, (father of the petitioner), the other partner died on 1st November, 2017.
 - v) The Cheque was then deposited for encashment on 25.09.2018 but was dishonoured on 29.09.2018 with the remarks “referred to drawer”.
22. The petitioner’s case is that he was a sleeping partner of the firm, and he did not issue the cheque in question. The cheque was deposited after the death of the partner who signed it and as such the proceedings in the complaint case is only an abuse of the process of law, and is thus liable to be dismissed.
23. **It is further submitted that as the cheque has been returned with the remark “referred to drawer” it is not “dishonour” under Section 138 of the N.I. Act.**
24. It is further stated that the partnership firm was dissolved on the death of partner Sanjay Kumar Keyal and stood dissolved/closed on and from 27th March, 2018. The cheque was deposited on 25.09.2018.
25. The relevant provisions of the Partnership Act, 1932 are reproduced herein:-

Section 2(a):-

“2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(a) an “act of a firm” means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm;”

The cheque in this case was issued by a partner on behalf of the firm.

Section 25:-

“25. Liability of a partner for acts of the firm.—Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.”

Section 42(c):-

“42. Dissolution on the happening of certain contingencies.—Subject to contract between the partners a firm is dissolved,—

(a).....

(b).....

(c) by the death of a partner;” (in this case).

26. In the present case the firm was dissolved on death of partner Sanjay Kumar Keyal.

27. **Section 48 of the Partnership Act, 1932, lays down:-**

“48. Mode of settlement of accounts between partners.—In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed:—

(a) losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) the assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:—

(i) in paying the debts of the firm to third parties;

(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;

(iii) in paying to each partner rateably what is due to him on account of capital; and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.”

28. Section 49 of the Partnership Act, 1932, lays down:-

“49. Payment of firm debts and of separate debts.—

Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.”

29. From the copy of the deed of partnership dated 1st October, 2016 filed, though not on affidavit, it is seen that the petitioner had 50% share in the business.

30. Copy of an **Amended deed of partnership dated 1st March, 2017** has also been filed (also not on affidavit), amending the terms of the partnership as follow:-

- 1) That, with effect from 01st March, 2017 the Net Profit or Loss of the Partnership business after the payment of all expenses or

other out goings including capital profit or loss, shall be divided amongst the Partnership the following manner:-

(a) Sanjay Kumar Keyal.....99%(Ninety-nine percent)

(b) Nikunj Keyal.....01% (One percent)

- 2) That, henceforth all day to day business activities, management and decisions shall be taken solely by Sri Sanjay Kumar Keyal as the Managing Partner. And Sri Nikunj Keyal shall not interfere with any decision of the Firm and shall be the Sleeping Partner.
 - 3) That, Sri Nikunj Keyal being the Sleeping Partner shall not be responsible and/or liable in any manner for any financial, civil or criminal liabilities of the Partnership Firm. And Sri Sanjay Kumar Keyal being the Managing Partner shall be wholly and solely responsible and liable for the same.
31. This was done prior to issuance of the cheque dated 30.07.2018 in this case. This itself also makes out a prima facie case against the petitioner.
32. The following judgments have been relied upon by the petitioner:-

(a) Babulal Nainmal Jain vs Khimji Ratanjshi Dedhia and Ors., 1997 SCC OnLine Bom 767, Crl. Writ Petition No. 1122 of 1990, on August 14, 1997.

“7. It is not every return of cheque which is made punishable by the provisions of Section 138 of Negotiable Instruments Act. After a said cheque is returned, for the reason that it is referred to drawer

for some other reason e.g. the signature does not tally or it is not MICR cheque then the drawer of the cheque cannot be said to have committed an offence under Section 138 of the Negotiable Instruments Act and this being the legal position the learned Magistrate was not justified in issuing process for an offence punishable under Section 138 of the Negotiable Instruments Act.”

This judgment relates to cheque being marked ‘referred to drawer’ for reasons other than insufficiency of fund.

(b) *Aparna A. Shah vs Sheth Developers Private Limited and Anr., (2013) 8 SCC 71, Criminal Appeal No. 813 of 2013, on July 1, 2013.*

This judgment relates to joint holder of an account.

In the present case it is an account of the partnership firm.

(c) *Greaves Cotton Limited and Ors. vs State of West Bengal and Anr., 2023 SCC OnLine Cal 454, CRR 1979 of 2021, on February 28, 2023.*

This relates to compliance of Section 202 Cr.P.C.

In the present case, the address of the firm is within the jurisdiction of the Court of the Learned Magistrate.

33. **REFER TO DRAWER" means** that the cheque you have presented to your banker has not been honored and you need to refer the issue to drawer of the cheque. This happens when the drawer's bank account is short of funds and the cheque bounces due to insufficient funds.

- (i) The Supreme Court in ***Electronics Trade and Technology vs Indian Technologists, Appeal (Crl.) no. 124 of 1996, on 22 January, 1996***, held:-

“The appellant laid the complaints under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act') for dishonour of cheque for insufficiency of the funds in the accounts of the accused. The complain of the appellant read thus:

*"The above cheque was presented by the complainant 01 28.11.1990, through their Bankers M/s. Hyderabad Bank, Sarojini Devi Road, Secundcrabad for realisation, with the promise by the accused, that the same will be honoured when presented. However, the said cheque was dishonoured with the Banker's endorsement dated 29.11.1990, "1. **referred to drawer**. 2. instructions for stopping payment and stamped. 3. exceeds arrangements". It is evident from the Banker's memo dated 29.11.1990 that the said cheque was dishonoured by the Bank for wants of funds only.*

*It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case, "I **refer** to the **drawer**" (2) "instructions for stoppage of payment" and (3) "stamp exceeds arrangement", it amounts to dishonour within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonour, to the **drawer** demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied.”*

- (ii) In *M/s. Laxmi Dychem vs State of Gujarat & Ors., Criminal Appeal Nos. 1870-1909 of 2012 (arising out of SLP (Crl.) Nos. 1740-1779 of 2011 with Criminal Appeal Nos. 1910-1949 of 2012 (arising out of SLP (Crl.) Nos. 1780-1819 of 2011)*, on 27 November, 2012, the Supreme Court held:-

“14. A three-Judge Bench of this Court in *Rangappa v. Sri Mohan* (2010) 11 SCC 441 has approved the above decision and held that failure of the **drawer** of the cheque to put up a probable defence for rebutting the presumption that arises under Section 139 would justify conviction even when the appellant **drawer** may have alleged that the cheque in question had been lost and was being misused by the complainant.

15. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in *NEPC Micon Ltd.* (supra) that the expression “amount of money is insufficient” appearing in Section 138 of the Act is a genus and dishonour for reasons such “as account closed”, “payment stopped”, “**referred to the drawer**” are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency **referred** to in Section 138, so also dishonour on the ground that the “signatures do not match” or that the “image is not found”, which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act. This Court has in the decisions **referred** to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the **drawers** of the cheques which would inevitably result in the dishonour of the cheque issued by them. For

instance this Court has held that if after issue of the cheque the **drawer** closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the **drawer** changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories. There is in our view no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised 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 would become an offence under Section 138 subject to other conditions prescribed being satisfied. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the **drawer** and the specimen available with the bank may result in dishonour of the cheque even when the **drawer** never intended to invite such a dishonour. We are also conscious of the fact that an authorised 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 course of ordinary business of a company, partnership 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 is only when the **drawer** despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated

under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial Court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.”

- (iii) The Supreme Court in ***Lafarge Aggregates & Concrete vs Sukarsh Azad & Anr., Criminal Appeal No. 1941 of 2013, on 10 September, 2013***, held:-

“8. However, we do not feel persuaded to accept this submission as the appellant has to apprise himself that the primary object and reason of the Negotiable Instruments Act, 1881, is not merely penal in nature but is to maintain the efficiency and value of a negotiable instrument by making the accused honour the negotiable instrument and paying the amount for which the instrument had been executed.

*9. The object of bringing Sections 138 to 142 of the Negotiable Instruments Act on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business of negotiable instruments. Despite several remedy, Section 138 of the Act is intended to prevent dishonesty on the part of the **drawer** of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induces the payee or holder in due course to act upon it. Therefore, once a cheque is drawn by a person of an account maintained by him for payment of any amount or discharge of liability or debt or is returned by a bank with endorsement like (I) **refer to drawer** (ii) exceeds arrangements and (iii) instruction for stop payment and like other usual endorsement, it amounts to*

dishonour within the meaning of Section 138 of the Act. Therefore, even after issuance of notice if the payee or holder does not make the payment within the stipulated period, the statutory presumption would be of dishonest intention exposing to criminal liability.”

Under the banking rules “Refer to Drawer” **includes the cheque being dishonoured for insufficient funds.** In this case the partnership had dissolved when the cheque had been presented.

All these facts and circumstances have to be proved during trial by way of adducing evidence.

34. **The following Judgment has been relied upon by the Opposite Party:-**

(i) S.N. Virmani vs Som Distilleries Ltd., Misc. Cri. Case Nos. 4688 to 4690 of 2005, on 17.05.2010.

“Criminal – Quashing – Dishonour of Cheque- Liability of Partner – Section 482 of Criminal Procedure Code, 1973 (Cr.P.C.) and Section 138 of Negotiable Instruments Act, 1881- Present petitions filed under Section 482 of Cr.P.C. for quashing corresponding criminal proceedings under Section 138 of Act – Held, considering well settled position of law on point as applicable to factual scenario, Petitioner was prima facie liable for dishonour of cheques as partner of firm on whose behalf negotiable instruments were issued – It is trite law that at stage of taking cognizance, evidence sufficient for initiating action and not for recording a conviction must be available on record – Besides this, in exercising jurisdiction under Section 482 of Cr.P.C., this Court should not embark upon an enquiry whether allegations in complaint are likely to be established by evidence or not – It was not possible to conclude that the allegations made in any one of complaints even if taken at their face value and accepted in its entirety, would not

constitute offence under Section 138 of Act – Defence raised by Petitioner would require inquiry into facts and could not be considered at preliminary stage for purpose of quashing complaint and proceedings initiated on its basis – In this view of matter, no case for interference under inherent powers was made out – As an obvious consequence, interim order staying criminal proceedings stood vacated – In result, petitions dismissed.”

35. The Supreme Court in ***Mohd. Laiquiddin and Anr. Vs Kamala Devi Misra (Dead) by L.Rs & Ors., Civil Appeal Nos. 6933-6934 of 2002 with Smt. Kamala Devi Misra (Dead) by L.Rs & Ors. vs. Mohd. Laiquiddin Khan and Anr., Civil Appeal Nos. 4411-4412 of 2002, on January 05, 2010***, held:-

“38. *In the case of Narayanappa v. Krishtappa, [(1966) 3 SCR 400], the issue was whether on relinquishment of rights by partners of an erstwhile partnership, there was a transfer of immovable property, which required to be registered to constitute a valid transfer. This Court observed:*
“No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own...His right is to obtain such profits, if any, as fall to his share from time to time and upon dissolution of the firm to share in the assets of the firm which remain after satisfying the liabilities set out in S.48. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property...The person who brought it in would, therefore, not be able to claim any exclusive right over any property which he has brought in, much less over any other partnership property.”

39. *This principle was reiterated in the case of **Malabar Fisheries Co. Calicut v. CIT**, [(1979) 4 SCC 766].*

40. *In the case of **S.V. Chandra Pandian v. S.V. Sivalinga Nadar** [(1993) 1 SCC 589], this Court held that:*

“In the entire asset of the firm all the partners have an interest albeit in proportion to their share and the residue, if any, after the settlement of accounts on dissolution would have to be divided among the partners in the same proportion in which they were entitled to a share in the profit... The mode of settlement of accounts set out in Section 48 clearly indicates that the partnership asset in its entirety must be converted into money from the pool disbursement has to be made...”

36. Thus in the present case, the petitioner is prima facie liable for the debt of the firm which includes the cheque amount of Rs. 50 lakhs in this case, which was issued on behalf of the partnership firm.

37. All these facts including the extent of liability etc has to be decided in trial and this is not a case where the inherent powers of this court should be exercised.

38. CRR 512 of 2020 is dismissed.

39. No order as to costs.

40. All connected Applications stand disposed of.

41. Interim order if any stands vacated.

42. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

43. Urgent Photostat Certified copy of this judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)