

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

CRIMINAL WRIT PETITION NO.739 OF 2023

1. Mahendra s/o Khanderao Deshmukh
 2. Manisha w/o Mahendra Deshmukh
- ... PETITIONERS

VERSUS

Sopan s/o Sheshrao Tonde

... RESPONDENT

Mr. S. S. Rathi, Advocate for the petitioners
Mr. S. J. Salunke, Advocate for the respondent

CORAM : R. M. JOSHI, J.
DATE : 25th OCTOBER, 2023

P.C. :-

1. This petitions takes exception to the order of issuance of process in SCC No. 989/2022 for the offence punishable under Section 138 of Negotiable Instruments (for short 'NI') Act and confirmation of the said order in Criminal Revision No. 11/2023 by Addl. Sessions Judge, Latur.
2. Learned counsel for the petitioners at the outset submitted that perusal of the complaint coupled with the documents on record and in particular the statutory notice issued to the accused person abundantly shows that there is material discrepancy in the claim of the complainant with regard to the amount remained to have been paid in respect of the cheque in question. Thus, it is his submission that the learned Magistrate ought to have considered this discrepancy before issuance of process and as the same has not been considered, order of issuance of process

deserves interference. He further submits that as far as accused No.2 is concerned, the accused No.2 is not a drawer of the cheque in order to make her responsible for the offence punishable under Section 138 of NI Act.

3. Learned counsel for the respondent/original complainant submitted that the part payment of the cheque amount involved in the cheque does not create a bar for filing complaint for the offence punishable under Section 138 of NI Act. It is his submission that the factual amount to be recovered is not a issue before the Criminal Court but the offence of dishonor of the cheque is for its consideration. As far as accused No.2 is concerned, he is sought to be argued that in the complaint there is specific pleading to the effect that both accused person obtained loan from the complainant and that the cheque in question was issued by both of the in discharge of the said liability. It is submitted that since the accused No.2 is holding account jointly with co-accused she is liable/responsible for the dishonor of the cheque. It is his further submission that since the order in question was upheld by the Revisional Court, it would not be open for this Court to cause interference therein while exercising the jurisdiction under the Article 227 of the Constitution of India. To support his submissions he placed reliance on the case of ***Fiona Shrikhande Vs. State of Maharashtra, 2023 AIR SCW 6639.***

4. As far as the order of issuance of process for the offence punishable under Section 138 of NI Act is concerned, the Magistrate apart from the contents of the complaint is required to consider the documents filed along with complaint more particularly the cheque in question, the memo of dishonored of the cheque and statutory notice issued to the accused person. There is no dispute about the fact that the cheque in question is signed by accused No.1. In order to commit the offence under Section 138 of NI Act, the cheque must be drawn by a person on an account maintained by him with the bank. Section 7 defines "drawer" who is the maker of cheque. As far as present case is concerned, even though the account from which the cheque is issued is jointly held by the accused persons, there is nothing on record to indicate that the said account is operated with their joint signatures to fasten joint liability on them. Had been such case the dishonored of the cheque would have been by Bank only on that count. It is thus clear that the account in question is operated with signature of either of them. In such circumstances it is difficult to accept the contention of the learned counsel for the respondent that though the accused No.2 has not signed the cheque she becomes drawer for the reason as she is a joint holder of the account. Since the accused No.2 is not a drawer of the cheque, no offence can be said to have been committed by her. Learned Magistrate as well as learned Revisional Court have failed to consider the said aspect and as such the order of issuance of process deserves

interference to that extent.

5. As far as the accused No.1 is concerned, this Court finds no reason to accept the contention of the learned counsel for the petitioners that there is discrepancy in the pleadings in the complaint as compared to the statutory notice issued to the accused by the complainant and therefore it is not case for issuance of process. It seems that the learned counsel for the petitioners wants to suggest that the amount recoverable by the complainant would determine the offence punishable under Section 138 of NI Act. The offence is not for the recovery of amount but for the dishonor of the cheque. At the most, the amount which has remained to be paid covering the said cheque would become relevant for determination of compensation if the accused is held guilty for the said offence. Hence, in consider view of this court, the said submission made on behalf of accused No.1 is devoid of merit. Hence, there is no impropriety issuance of process against accused No.1. Hence, petition is partly allowed. Order of process issued against petitioner No.2 stands quashed. Order against accused No.1 is maintained.

(R. M. JOSHI, J.)

ssp