Andreza

# IN THE HIGH COURT OF BOMBAY AT GOA

## CRIMINAL APPLICATION (MAIN) NO.270 OF 2022 (F)

## WITH

## CRIMINAL MISC. APPLICATION NO. 52 OF 2022
## IN
## CRIMINAL APPLICATION (MAIN) NO.270 OF 2022 (F)

Raksha Sushant Dicholker ... Applicant

*Versus*

S. S. L. Developers. Rep. By its Partners Damodar @ Deepak Shankar Lotlikar & anr. ...Respondents

**Mr. Nigel Da Costa Frias, Advocate** *with Ms. Sonadevi Nishad, Advocate for the Applicant.*

**Mr. S. S. Kakodkar, Advocate** *for the Respondent No.1.*

**CORAM: B. P. COLABAWALLA, J**
**DATED: 16th JANUARY 2023**

**ORAL ORDER:**

**1.** Criminal Misc. Application No. 52 Of 2022 is filed seeking to convert the above Main Criminal Application [i.e. Criminal Application (Main) No.270 Of 2022 (F)] from one under Section 482 of the Code of Criminal Procedure, 1973 (for short the **"Cr.P.C."**), to one under Section 397 of the Cr.P.C. At the outset, the learned

Advocate appearing on behalf of the Applicant stated that he is not pressing the above Criminal Misc. Application and is only pressing the above Main Criminal Application [i.e. Criminal Application (Main) No.270 Of 2022 (F)] in terms of the alternate prayer therein which reads thus :

> **"In the alternative, this Hon'ble Court may be pleased to quash further proceedings against the Petitioner in Criminal Case No. 81/2020/H (in the matter of S.S.L. Developers versus Sushant Dicholker & anr.) pending before learned Judicial Magistrate First Class, at Margao."**

**2.** In these circumstances, I have heard the parties only on the issue of the alternative prayer reproduced above.

**3.** Mr. Nigel Da Costa Frias, the learned Advocate appearing on behalf of the Applicant, submitted that in the facts of the present case, it is the case of the original Complainant (Respondent No.1 herein) that the husband of the Applicant had a proprietorship concern called 'Sunrise Restaurant' who had a verbal agreement with Respondent No.1 (the original Complainant) under which the Applicant's husband would take one two BHK Flat (on the 4th Floor) and 8 Studio Apartments (on the 3rd Floor) belonging to Respondent No.1 (the original Complainant) and give them out to tourists. It is the further case of the original Complainant that there was also a verbal agreement that the husband of the Applicant would pay to Respondent

No.1 (the original Complainant), a sum of Rs.1,50,000/- per month (for the 2 BHK Flat) and Rs.4,25,000/- per month (for the 8 Studio Apartments) aggregating to Rs.5,75,000/- per month. In discharge of the alleged dues of the Applicant's husband to Respondent No.1 (the original Complainant), the Applicant's husband issued three cheques in the sums of (i) Rs.3,37,500/-; (ii) Rs.3,37,500/; and (iii) Rs.10,00,000/- (aggregating to Rs.16,75,000/-). These cheques, when presented for payment on 23.12.2019, were dishonoured. Accordingly, Respondent No.1 (the original Complainant) filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short the **'*NI Act*'**), not only against the husband of the Applicant (i.e. Accused No.1) but also against the Applicant (i.e. the wife – Accused No.2).

**4.** Mr. Frias submitted that in this complaint, a process was issued by the learned Trial Court on 16.03.2020. Being aggrieved by this action, the Applicant preferred an application under Section 258 of the Cr.P.C. for stopping the proceedings on the ground that the Applicant before the Court (i.e. the wife) was not a signatory to the said dishonoured cheques. This application was opposed by Respondent No.1 (the original Complainant) mainly on the ground that the Trial Court had no power to review or recall its own order which had issued the process against the Applicant.

**5.** It was the submission of Mr. Frias that the Trial Court, after hearing the parties, by its order dated 28.02.2022, dismissed the application filed by the Applicant (under Section 258 of the Cr.P.C.) on the ground that it had no power to recall and/or review its own order. Mr. Frias submitted that this order is challenged in the present Main Criminal Application along with the order issuing process dated 16.03.2020. He submitted notwithstanding this challenge, he is restricting himself only to the alternative prayer (reproduced earlier) for quashing the proceedings against the Applicant by invoking Section 482 of the Cr.P.C.

**6.** The relief of quashing the proceedings is sought on the basis of the Judgment of the Supreme Court in the case of **Alka Khandu Avhad vs. Amar Syamprasad Mishra & Anr. [(2021) 4 SCC 675].** Mr. Frias submitted that in the aforesaid decision, the Hon'ble Supreme Court has clearly held that 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 NI Act. In these circumstances, proceeding with the criminal complaint (under Section 138) against the Applicant, would be an abuse of process of law and, therefore, liable to be quashed and set aside, was the submission.

**7.** On the other hand, Mr. Kakodkar, the learned Advocate appearing on behalf of Respondent No.1 (the original Complainant), submitted that the Applicant and her husband were managing the affairs of the business called 'Sunrise Restaurant' in association with one another. Both of them were in charge of and were responsible for the conduct of the said business. Mr. Kakodkar submitted that the dishonoured cheques have been issued by the husband of the Applicant with the consent and connivance of the Applicant, and further, both of them are responsible, and liable in law, for the dishonour of the said cheques. He, therefore, submitted that in the light of these facts, there is no question of the proceedings being quashed against the Applicant and she would have to face trial.

**8.** In this factual backdrop, I have heard Mr. Frias, the learned Counsel appearing on behalf of the Applicant, as well as Mr. Kakodkar, the learned Advocate appearing on behalf of Respondent No.1 (the original Complainant). The facts, as placed before me, clearly reveal that the husband of the Applicant was running a proprietorship concern called 'Sunrise Restaurant'. It is the husband of the Applicant who issued the three cheques (aggregating to Rs.16,75,000/-), and which were dishonoured. It is not in dispute that the wife (the Applicant) is not the proprietor of 'Sunrise Restaurant' and neither is the business (carried on in the name and style of 'Sunrise Restaurant') a partnership firm or a company, of which the Applicant is a partner/director. It is also not in dispute that the dishonoured cheques have been issued by the husband of the Applicant and she has not signed the said cheques. It is also stated in the above Main Criminal Application that the Applicant is not even a joint holder of the Bank Account from which the said cheques were issued. This position is disputed by the Complainant. Be that as it may, the Applicant is not a signatory to the cheques which were dishonoured and considering that 'Sunrise Restaurant' is admittedly a proprietary concern of the husband of the Applicant, she is in no way legally concerned with the said 'Sunrise Restaurant' (the proprietary concern). In these facts, in my opinion, the ratio laid down by the Hon'ble Supreme Court in the case of **Alka Khandu Avhad vs. Amar Syamprasad Mishra & anr. [(2021) 4 SCC 675]** would be squarely attracted. The Hon'ble Supreme Court has clearly laid down (in Paragraph 10 of its decision) that a person who is a 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 under Section 138 of the Negotiable Instruments Act, 1881. The Supreme Court has clearly opined that Section 138 does not speak about joint liability. Even in cases of joint liability, where it concerns 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 Negotiable Instruments Act, 1881. The Supreme Court has clearly held that a person might have been jointly liable to pay the debt, but 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. The Supreme Court has also clearly opined that Section 141 of the Negotiable Instruments Act, 1881 relates to an offence by companies and it cannot be made applicable to individuals. The relevant portion of the Supreme Court decision reads thus:

> **"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 NI Act does not speak about the joint liability. <u>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 NI 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</u>.
>
> **11.** Now, so far as the case on behalf of the original complainant that the appellant herein-original Accused 2 can be convicted with the aid of Section 141 of the NI Act is concerned, the aforesaid has no substance.
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> **12.** Section 141 of the NI Act is relating to the offence by companies and it cannot be made applicable to the

individuals. The learned counsel appearing on behalf of the original complainant has submitted that "company" means any body corporate and includes, a firm or *other association of individuals* and therefore in case of a joint liability of two or more persons it will fall within "other association of individuals" and therefore with the aid of Section 141 of the NI Act, the appellant who is jointly liable to pay the debt, can be prosecuted. The aforesaid cannot be accepted. Two private individuals cannot be said to be "other association of individuals". Therefore, there is no question of invoking Section 141 of the NI Act against the appellant, as the liability is the individual liability (may be a joint liabilities), but cannot be said to be the offence committed by a company or by it corporate or firm or other associations of individuals. <u>The appellant herein is neither a Director nor a partner in any firm who has issued the cheque</u>. Therefore, even the appellant cannot be convicted with the aid of Section 141 of the NI Act. Therefore, the High Court has committed a grave error in not quashing the complaint against the appellant for the offence punishable under Section 138 read with Section 141 of the NI Act. <u>The criminal complaint filed against the appellant for the offence punishable under Section 138 read with Section 141 of the NI Act, therefore, can be said to be abuse of process of law and therefore the same is required to be quashed and set aside</u>.**"**

(Emphasis supplied)

**9.** In view of this authoritative pronouncement of the Hon'ble Supreme Court, I am clearly of the view that in the facts of the present case, the criminal complaint filed against the Applicant (the wife of Accused No.1) for the offence punishable under Section 138 of the NI Act can never be taken to its logical conclusion to ultimately convict / hold the Applicant guilty of the said offence. In other words, to allow the criminal complaint filed against the Applicant to proceed would be an abuse of the process of law and the same is required to be quashed and set aside.

**10.** In these circumstances, the above Main Criminal Application is allowed in terms of the alternative prayer which reads thus :

> *"In the alternative, this Hon'ble Court may be pleased to quash further proceedings against the Petitioner in Criminal Case No. 81/2020/H (in the matter of S.S.L. Developers versus Sushant Dicholker & anr.) pending before learned Judicial Magistrate First Class, at Margao."*

**11.** It is made clear that the trial against the husband of the Applicant (Accused No.1), shall continue and the proceedings qua him have not been quashed by this order.

**12.** At this stage, Mr. Kakodkar, the learned Counsel appearing on behalf of Respondent No.1 (the original Complainant), submitted that Section 143-A of the NI Act, contemplates that the drawer of the cheque can be asked to pay interim compensation to the Complainant to the extent of 20% of the cheque amount. He submitted that in the complaint filed before the Trial Court, he has in fact made a specific prayer directing the Accused to make payment of interim compensation of Rs.3,35,000/- to the Complainant. He submitted that this prayer is pending for consideration before the Trial Court and hence, it be directed to consider the payment of interim compensation on the next date of hearing.

**13.** Having heard Mr. Kakodkar on this aspect, and considering that such a prayer has in fact been made in the complaint filed by the Complainant, the Trial Court is requested to consider the prayer for payment of interim compensation (under Section 143-A of the NI Act) on merits, on the next date of hearing. It is however made clear that the payment of interim compensation, if awarded by the Trial Court, shall be only against the husband of the Applicant (Accused No.1) and not against the Applicant herein.

**14.** The above Criminal Application (Main) No. 270 of 2022(F) as well as Criminal Misc. Application No. 52 of 2022 are disposed of in the aforesaid terms.

**15.** This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

**B. P. COLABAWALLA, J**

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA Date: 2023.01.17 18:42:31 +05'30'