

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION (APL) NO. 839 OF 2019
WITH
CRIMINAL APPLICATION (APL) NO. 898 OF 2019

CRIMINAL APPLICATION (APL) NO. 839 OF 2019

APPLICANT : Mukund S/o. Manohar Wazalwar,
Aged about 61 years, Occu: Business,
R/o. Plot No.74, Pannase Layout
No.2, Besides Proposed London
Street, Nagpur.

//VERSUS//

RESPONDENTS : 1. Eknath S/o. Bajirao Hatwar (Dead)
through his L.Rs :

Amended as per
Court's Order Dt.
23.02.2021

- 1(1) Durwas Eknath Hatwar, Aged 41
years, Occu. Service, R/o. Chimur,
Tah. Chimur, District Chandrapur
(Son).
- 1(2) Sau. Vanita Vinod Kirpan, Aged 39
years, Occ. Household, R/o. Civil
Ward, Sakoli, Tq. Sakoli, District-
Bhandara (Daughter).
- 1(3) Sau. Sunita Sudhakar Katekhaye, Aged
37 years, Occu. Household, R/o. Post
Chikhali (Ayad), Tah. Pauni, District
Bhandara (Daughter).
- 1(4) Sau. Dimpal Lakesh Dharamsare, aged
35 years, Occ. Household, R/o. Ward
No.9, Lakhani, Dist. Bhandara

(Daughter).

1(5) Sau. Manjusha Shrikant Selokar, Aged 33 years, Occu. Household, R/o. Umrer, Tah. Umrer, District - Nagpur (Daughter).

1(6) Smt. Sharda Eknath Hatwar, Aged 60 years, Occu. Household, R/o. Lakhani, Dist. Bhandara (Wife).

2. The State of Maharashtra, Through Police Station Officer, Sakoli, Tahsil Sakoli, District Bhandara.

Mr. S.P. Kshirsagar, Advocate for the Applicant.

Mr. A.K. Bangadkar, Advocate for Non-applicant Nos.1(1) to 1(6).

Ms. Mayuri Deshmukh, APP for Non-applicant No.2/State.

WITH

CRIMINAL APPLICATION (APL) NO. 898 OF 2019

APPLICANT : Ravindra S/o. Vishnupant Bhalerao, Aged about 67 years, Occ. Retired, R/o. Deshbandhu Ward, Near Khamb Talav, Bhandara, Tah. and District – Bhandara.

//VERSUS//

RESPONDENTS : 1. Eknath S/o. Bajirao Hatwar (Dead) through his L.Rs :

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Court's Order Dt.
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1(1) Durvas Eknath Hatwar, Aged 41 years, Occu. Service, R/o. Chimur, Tah. Chimur, District Chandrapur (Son).

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- 1(3) Sau. Sunita Sudhakar Katekhaye, Aged 37 years, Occu. Household, R/o. Post Chikhali (Ayad), Tah. Pauni, District Bhandara (Daughter).
- 1(4) Sau. Dimpal Lakesh Dharamsare, aged 35 years, Occ. Household, R/o. Ward No.9, Lakhani, Dist. Bhandara (Daughter).
- 1(5) Sau. Manjusha Shrikant Selokar, Aged 33 years, Occu. Household, R/o. Umrer, Tah. Umrer, District- Nagpur (Daughter).
- 1(6) Smt. Sharda Eknath Hatwar, Aged 60 years, Occu. Household, R/o. Lakhani, Dist. Bhandara (Wife).

Mr. R.M. Patwardhan, Advocate for the Applicant.

Mr. A.K. Bangadkar, Advocate for Non-applicant Nos.1(1) to 1(6).

CORAM : G. A. SANAP, J.

DATED : 25th APRIL, 2023.

ORAL JUDGMENT

Both the applications arise out of the common judgment and order passed by the learned Sessions Judge, Bhandara dated

18th July, 2019 and therefore, the same are being disposed of by common judgment. The applicant in Criminal Application No.839/2019 is accused No.2 in the complaint and the applicant in Criminal Application No.898/2019 is the accused No.3 in the complaint. The non-applicants No.1(1) to 1(6) in both the applications are the legal heirs of the deceased-complainant in the complaint filed by him under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as “the N.I. Act” for short). The learned Sessions Judge, Bhandara, by the impugned judgment and order, dismissed the revision applications filed by the applicants and confirmed the order passed by the learned Judicial Magistrate First Class, Sakoli, rejecting the applications made by the applicants/accused for their discharge from the complaint.

02] The facts relevant for deciding these applications are as follows:

In this judgment the parties would be referred by their nomenclature in the complaint. The deceased-complainant filed complaint under Section 138 of the N.I. Act initially against 10 accused. Accused No.1 is the Trust. The remaining accused from accused Nos.2 to 10 are either the Trustees, Directors or Office-

bearers of the Trust. According to the complainant, accused No.2 is the President of the Trust. Accused No.3 is the Secretary of the Trust. It is stated that accused No.3 was well acquainted with the complainant. The Trust required money for construction of the school building. The accused No.3, therefore, made a demand of Rs.10,00,000/-. The deceased-complainant considering his relations, paid a sum of Rs.10,00,000/- as a hand loan to accused No.3. The complainant made a demand of money. The accused No.3 instead of repaying the amount assured the complainant that as and when there is a vacancy in school, his daughter Sangeeta would be given an appointment as a teacher. It is stated that amount of Rs.10,00,000/- was not returned. According to the deceased-complainant, the transaction was with the consent of accused Nos.2, 4 to 10. It is stated that instead of repaying Rs.10,00,000/-, the accused No.3 issued a cheque bearing No.006903 dated 6th December, 2014 for Rs.5,00,000/-, drawn on his account maintained with Cosmos Co-operative Bank Limited, Main Branch, Amravati. The accused persons assured him that the cheque would be honoured. On presentation of the cheque, the deceased-complainant was informed that the cheque was dishonoured on the ground that there was no sufficient amount in the account to honour the cheque. The deceased-complainant,

therefore, issued a notice to the accused Nos.2 to 10. Despite receipt of the notice, they did not pay the amount. He, therefore, filed complaint against the Trust as an accused No.1 and the other Office-bearers as the accused Nos.2 to 10. The learned Magistrate, on conducting the necessary enquiry, was pleased to take cognizance and issued process against the accused Nos.1 to 10 for commission of the offence under Section 138 read with Section 141 of the N.I. Act.

03] The accused Nos.2 and 3 appeared before the learned Magistrate. The complaint was filed in the year 2016. On 6th December, 2017, the complainant made an application and sought permission to delete the names of the accused Nos.1, 4 to 10 with a consequential amendment. The learned Judicial Magistrate First Class, Sakoli, by order dated 6th December, 2017, allowed the application. The learned Magistrate further noted that the complaint would, therefore, proceed against the accused Nos.2 and 3 (present applicants).

04] The accused Nos.2 and 3 thereafter made an application for their discharge by pleading number of grounds. The complainant opposed the said application. In the reply, it was categorically stated that the accused No.3 had issued the cheque on

behalf of the Trust. Therefore, the accused Nos.2 and 3 are equally liable. The transaction was with the consent and approval of the accused No.2, who is the President of the Trust. The learned Magistrate rejected the said application made by the accused Nos.2 and 3. The revisions preferred against the said order came to be dismissed. The applicants/accused Nos.2 and 3 are, therefore, before this Court.

05] I have heard learned advocate for the complainants and learned advocates for the accused Nos.2 and 3. Perused the record and proceedings.

06] Learned advocate for the complainants submitted that the cheque was issued by the accused No.3 to the complainant from his personal account. Learned advocate submitted that it was not possible to serve the Trust and the remaining accused and therefore, the application was made to delete their names. Learned advocate submitted that the learned Magistrate granted the permission to delete their names and carry out the amendments. Learned advocate submitted that accordingly, the amendment has been carried out. Learned advocate submitted that the accused Nos.2 and 3, being the President and Secretary respectively, are jointly and severally liable to make the payment. Learned advocate

submitted that the amount was used and utilised for the construction of the school building. Learned advocate further submitted that the defence of the accused put-forth in the discharge application cannot be appreciated and considered at this stage. Learned advocate submitted that for the said purpose the parties would be required to lead the evidence and put-forth their respective contentions before the Court.

07] Learned advocates for the accused Nos.2 and 3 submitted that in view of the undisputed facts that sum of Rs.10,00,000/- was taken from the complainant for the purpose of construction of the school building and the same having been utilised for the construction of the school building, it was the joint and several liability of the Trust and other Office-bearers of the Trust to return the same to the complainant. Learned advocates submitted that as per the explanation appended to Section 141 of the N.I. Act, the “company” means anybody corporate and includes a firm or other association of individuals. Learned advocates submitted the Trust would be squarely covered under the expression, “other association of individuals”. Learned advocates, therefore, submitted that the Trust in the facts and circumstances would be the principal offender and the Directors

and Office-bearers of the Trust would be vicariously liable by deeming fiction provided under Section 141 of the N.I. Act. Learned advocates submitted that the process was issued against all the accused including the Trust. Learned advocates pointed out that on the application of the complainant, the Trust and the remaining accused were deleted from the array of the parties and therefore, the complaint in the present form cannot be prosecuted against the accused Nos.2 and 3. Learned advocates submitted that in the audit report of the Trust placed on record, there was a specific mention that amount of Rs.3,30,000/- was borrowed from the complainant for the construction purpose. It is pointed out that the complainant has made a grievance that instead of Rs.10,00,000/-, which was actually borrowed from him, the amount of Rs.3,30,000/- was mentioned in the audit report. Learned advocates, therefore, submitted that the accused Nos.2 to 10 were not liable in their individual capacity, but they were liable being the Trustees of the Trust-accused No.1. Learned advocates, therefore, submitted that the complaint in this form cannot be prosecuted against the accused Nos.2 and 3 and therefore, it is liable to be quashed and set aside. In order to seek support to their contention, learned advocates have relied upon a decision in the case of *Shri Banwarilal L. Saini and Anr. Vs. The State of*

Maharashtra & Anr. [2012 ALL MR (Cri) 2564].

08] At the cost of repetition, it would be necessary to set out the undisputed facts at one place. Initial complaint was filed against the Trust and the remaining 9 accused. The process was issued against the Trust as well as the remaining 9 accused. The accused Nos.2 and 3, after service of the process, appeared before the learned Magistrate. The Trust-accused No.1 and the remaining accused could not be served. Therefore, the deceased-complainant made the application on 6th December, 2017 to delete the Trust-accused No.1 and the remaining accused Nos.4 to 10. This application was allowed by the learned Magistrate on 6th December, 2017. It is undisputed that the money was borrowed from the complainant for the purpose of construction of the school building. The accused No.3 is the Secretary of the Trust. He issued a cheque to the complainant from his individual account. However, the fact indubitably remains that the accused No.3 had not borrowed the money for himself. The money was borrowed for the construction of the school building. The auditor's report relied upon by the complainant, of the school run by the Trust, clearly indicates that Rs.3,30,000/- was borrowed from the deceased-complainant for the purpose of construction of the school building.

It is to be noted at this stage that in the reply to the application filed for discharge by the accused Nos.2 and 3, the complainant has stated that they are personally liable because the accused No.3 had issued the cheque on behalf of the Trust. It is stated that all the facts would be required to be taken into consideration at the stage of evidence.

09] In this context, it would be necessary to take a bird's eye view of the relevant facts stated in the complaint. It is stated in paragraph 2 of the complaint that the accused No.3 to 10 are the Office-bearers of the Trust and therefore, they are the in-charge and responsible for day-to-day running of the school. It is also stated that for the financial transaction in this case, the accused Nos.1 to 10 are jointly and severally liable. The complainant has categorically stated that the amount was borrowed by the accused No.1-Trust for the construction of the school building. He has stated that the construction work was completed in the year 2013. The complaint, therefore, made a demand of money, however, on one pretext or the other, his money was not returned. It is stated that when he insisted for return of his money, the cheque was issued. The sum and substance of the complaint, therefore, clearly indicate that the amount was borrowed by the Trust for the

purpose of construction of school building. It further reveals that the said amount was utilised for the construction of the school building. It would, therefore, indicate that the amount was not utilised in any manner by the accused No.2 or accused No.3. The accused No.3, at the relevant time, was the Secretary of the Trust. The accused No.2 was the President. According to the complainant, in their capacity as President and Secretary, they are jointly liable to pay the amount.

10] The controversy in this case is required to be addressed in the backdrop of the above stated facts. At this state, it would be necessary to consider the legal position. There are number of reported decisions, wherein it has been held that the phrase, “association of individuals” has to be read along with the word “company and firm” occurring in the explanation appended to Section 141 of the N.I. Act. It is also settled legal position that the expression, “association of individuals” is intended to cover the cases of societies, trusts etc, who have a legal and juristic personality. Reference can be made to the decision in the cases of *Shri Banwarilal L. Saini & Anr. (supra)*, *Bijaya Manjari Satpathy Vs. State of Orissa and Ors. [2022 LiveLaw (Ori) 158]*, and *M/s. Abraham Memorial Educational Trust and Ors. Vs. C. Suresh*

Babu [Crl. OP Nos.12630 & 12661 of 2012, decided on 07.08.2012].

11] The primary question arisen in these cases was whether the Trust either public or private is a company covered in terms of Section 141 of the N.I. Act and as such a juristic person, liable for punishment for the offence punishable under Section 138 of the N.I. Act. It is to be noted that the specific question as above fell for consideration of the Madras High Court in the case of *M/s. Abraham Memorial Educational Trust and Ors.* (supra). The learned Single Judge of the Madras High Court, after considering the length and breadth of the subject in this erudite decision, has held that the Trust either public or private/ charitable or otherwise is a juristic person and is liable for punishment for offence punishable under Section 138 of the N.I. Act. It is further held that a Trust either private or public/ charitable or otherwise having either a single trustee or two or more trustees, is a company in terms of Section 141 of the N.I. Act. It is further held that for the offence under Section 138 of the N.I. Act, committed by the Trust, every trustee, who were the in-charge of the day-to-day affairs of the Trust shall also be liable for punishment besides the Trust.

12] On going through the record and proceedings and also the dicta laid down in the above decisions, I am of the opinion that the Trustee is a juristic person. The Trust, being an association of persons, would be a company in terms of Section 141 of the N.I. Act. In this case, the cheque was issued by or on behalf of the Trust. The Trust is, therefore, the principal offender in this case. It is further pertinent to mention that by a legal fiction created under Section 141 of the N.I. Act, all the persons who are the Office-bearers of the Trust being in-charge of the day-to-day affairs of the Trust, shall also be liable for punishment besides the Trust.

13] In this background, it would be necessary to consider the settled position on the important point as to the effects and consequences of not arraigning the Trust as a principal accused or the effects and consequences of deletion of the name of Trust from the complaint during the pendency of the complaint. In my view, this situation would be required to be addressed in the backdrop of the law laid down in the cases of *Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd.* [(2012) 5 SCC 661], *Himanshu Vs. B. Shivamurthy and Anr.* [(2019) 3 SCC 797] and *Pawan Kumar Goel Vs. State of U.P. & Another* [2022 SCC OnLine SC 1598]. The exposition of the law in these decisions clearly states that if a

cheque is issued by the company or on behalf of the company, then the Company is the principal offender. It is further held that apart from the company being a principal offender, every person who at the time when the offence was committed was in-charge or was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of offence and shall be liable to be proceeded against and punished. It is held that in the absence of company being the principal accused in the complaint, the prosecution against the remaining persons, being vicariously liable by deeming fiction, gets vitiated.

14] In the above background, the question involved in both the applications is required to be addressed. Admittedly, the Trust was initially made a party as accused No.1. The notice was not issued to the Trust. The Trust has been deleted. Similarly, the names of the Directors and other Office-bearers of the Trust namely the accused Nos.4 to 10 have been deleted. The complaint is being prosecuted against the accused No.2-President of the Trust and the accused No.3-Secretary of the Trust and who had issued the cheque on his own account to discharge the liability of the Trust. The complainant has taken the risk by deleting the name of the Trust and the remaining Office-bearers. It is seen on perusal of

the complaint that it was stated that the accused Nos.1 to 10 are jointly and severally liable to face the prosecution for dishonour of the cheque. It has also been admitted in the complaint that the cheque was issued by the accused No.3 towards repayment of the loan provided to the Trust for the construction of the school building.

15] In the facts and circumstances, I am of the view that the entire complaint has been vitiated. It cannot be continued in this form. The complainant has invited the trouble. The complainant has to face the consequences for the same. The complainant now cannot contend that Court should adjudicate the issue at the stage of final hearing of the matter, because the accused Nos.2 and 3 were mainly concerned with the day-to-day affairs of the Society.

16] The accused applied for discharge by invoking the provisions of Section 239 of the Code of Criminal Procedure, 1973 (for short "Cr.PC"). It is to be noted that the case in question was tried as a summary trial. The procedure prescribed for summons case is applicable for the summary trial. Section 239 is a part of Chapter XIX, which mainly provides the procedure for the trial of warrant cases by Magistrates. Part (A) commencing from Section 238 to Section 243 provides the procedure in respect of the cases

instituted on a police report. Part (B) commencing from Section 244 to Section 247 provides the procedure in respect of the cases instituted otherwise than on police report. The above procedure is not applicable to the summary trials or trial of summons cases by Magistrates. In case of summary trial or trial of summons cases, there is no provision for discharge of the accused like Section 239 and Section 245 of the Cr.PC. It is seen that neither the learned Magistrate nor the learned Sessions Judge has dealt with such a vital and important point. Both the Courts proceeded on the assumption that the application for discharge by the accused in a summary trial was maintainable under Section 239 of the Cr.PC.

17] It needs to be stated that by considering the above position on merits, the application would have to be dismissed. It needs to be stated that the accused during the pendency of this application incorporated the prayer by way of an amendment and prayed for quashing the complaint by invoking the provisions of Section 482 of the Cr.PC. This Court in the absence of this prayer for quashing the proceeding would not have granted relief to the accused. The scope of the provisions of Section 482 of the Cr.PC is very wide. By exercising the inherent jurisdiction, the High Court can pass an appropriate order to prevent the abuse of the process of

any Court or otherwise to secure the ends of justice. In this case, the continuation of the complaint with the above noted manifest legal defect, in my view, would be the abuse of the process of the Court. Therefore, the case in question is fit to invoke the jurisdiction under Section 482 of the Cr.PC to avoid the abuse of the process of the Court and to secure the ends of justice.

18] In my view, in the absence of the Trust as an accused, being a principal offender, the prosecution against them would be hit by the provisions of law. As such, there is substance in both the applications. The applications are **allowed**.

19] The Criminal Complaints bearing Nos.21/2016 and 211/2016, pending on the file of learned Judicial Magistrate First Class, Sakoli are, therefore, quashed and set aside.

20] Rule is made absolute in above terms. Applications stand disposed of.

(G. A. SANAP, J.)

Vijay