

CRM-M No.28887 of 2023 (O&M)

2023:PHHC:164411

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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CRM-M No.28887 of 2023 (O&M)

Date of Decision: 20.12.2023

NEELAM SHARMA

.....Petitioner

Vs

SANDEEP

....Respondent

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Ivan Singh Khosa, Advocate and
Ms. Shairon Tyagi, Advocate
for the petitioner.

HARKESH MANUJA, J. (Oral)

[1]. By way of present petition filed under Section 482 Cr.P.C., prayer has been made for quashing of Complaint No.NACT/1247/2020 dated 30.09.2020 (Annexure P-1) titled as "*Sandeep Vs. Dev Dutt and another*" and order dated 01.11.2021 (Annexure P-2) passed by the Judicial Magistrate Ist Class, Ambala, arising out of proceedings under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter to be referred as 'the 1881 Act') along with all subsequent proceedings arising therefrom.

[2]. Learned counsel for the petitioner submits that the proceedings under Section 138 of the 1881 Act were initiated by the respondent against the petitioner and her husband Dev Dutt Sharma by alleging that a cheque bearing No.036721 dated 25.02.2020 drawn on Allahabad Bank, Kurukshetra amounting to Rs.1,00,000/-(Rupees One Lac only) was given by husband of the petitioner to respondent as a part of settlement for re-payment of earnest money received by the husband of petitioner in lieu of Agreement for sale of two plots and two shops

situated at village Dhanoura, Tehsil Mullana, Distt. Ambala. However, the said cheque was dishonoured on presentation by the respondent with his banker and came back with remarks "Insufficient Funds" on 29.02.2020. Thereafter, a statutory notice was sent by respondent to the petitioner on 20.03.2020, however, no payment was made to the respondent. Consequently, the respondent filed a complaint under Section 138 of the 1881 Act against the petitioner and her husband Dev Dutt Sharma. Thereafter, the trial Court took cognizance of the offence and summoned the petitioner and her husband.

[3]. Learned counsel further submits that the petitioner has been arrayed as an accused in the present case only on the ground that the petitioner and her husband are joint account holders in the bank account, from which, the said cheque was issued, whereas, the petitioner is not the signatory to the cheque in question. Learned counsel further submits that the petitioner could not have been summoned in the present case only on the ground that the cheque in question was issued from the joint account of the petitioner and her husband. Learned counsel relies upon the law laid down by the Hon'ble Supreme Court in the matters of *Aparna A Shah Vs. M/s Sheth Developers P. Ltd. And another, 2013 (8) SCC 71* and *Alka Khandu Avhad Vs. Amar Syamprasad Mishra & Anr. 2021 (4) SCC 675*, to contend that it is the drawer of the cheque, who can be prosecuted.

[4]. I have considered the submissions made by learned counsel for the petitioner and gone through the paper book.

[5] In the present case, petitioner was neither drawer of the said cheque nor a signatory to it and the cheque was signed by her husband.

[6]. Section 138 of the 1881 Act refers to the payee or holder in due course of the cheque. It indicates that after the dishonour of the cheque, the drawer of the same could be brought to the dock for the fault committed by him. Section 138 the said Act reads as under:-

“138, - Dishonour of cheque for insufficiency, etc., of funds in the account mere any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any part of other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with Imprisonment for [a term which may be extended to two years), or with fine which may extend to twice the amount of the cheque, or with both:

provided that nothing contained in this section shall apply unless - (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier; (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

Thus, on perusal of the above Section, it is clear that it is the drawer of the said cheque, who could be prosecuted under the provisions of Section 138 of the 1881 Act, if he/she fails to make the payment on receipt of the statutory notice.

The drawer of the cheque has been defined under Section 7 of the 1881 Act, which reads as under:-

“7 “Drawer”, “drawee”- The maker of a bill of exchange or cheque is called the “drawer”, the person thereby directed to pay is called the “drawee”.

[7]. In the facts of the present case also, even though, the cheque has been drawn on a joint bank account of the petitioner and her husband, but the cheque in question was signed by her husband only and the liability regarding the dishonour of the cheque can be fastened upon the drawer of the cheque. In other words, it can very well be explained that the cheque in question was issued by Dev Dutt Sharma, husband of the petitioner, in discharge of his liability and not by the petitioner. The petitioner was admittedly not the drawer. The mere fact that the petitioner happens to be the spouse of the co-accused is hardly sufficient to condemn her as co-accused with him. Even, from the scheme of the Act, it is apparent that there is no provision in the Act regarding taking cognizance against a person, other than the “drawer” of the cheque. However, there is one exception to this that in case the person, who committed the offence under Section 138 of the 1881 Act, is a Company, then the person incharge of the Company as well as the Company itself shall be deemed guilty of the offence as provided under Section 141 of the 1881 Act.

[8]. The Hon'ble Supreme Court in the case of *Alka Khandu Avhad's case* (supra) has held as under:-

“9. On a fair reading of Section 138 of the NI Act, before a person can be prosecuted, the following conditions are required to be satisfied:

9.1. *That the cheque is drawn by a person and on an account maintained by him with a banker.*

9.2 *For the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability.*

9.3 *The said cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that accused.*

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. 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.”*

[9]. The Hon’ble Apex Court further in case of **Aparna A Shah’s case** (supra) has held as under:-

“21. *The above discussion with reference to Section 138 and the materials culled out from the statutory notice, reply, copy of the complaint, order, issuance of process, etc. clearly show only the drawer of the cheque being responsible for the same.*

22. *In addition to our conclusion, it is useful to refer to some of the decisions rendered by various High Courts on this issue.*

23. *The learned Single Judge of the Madras High Court in Devendra Pundir v. Rajendra Prasad Maurya¹⁰, following decisions of this Court, has concluded thus:*

“7. This Court is of the considered view that the above proposition of law laid down by the Hon'ble Apex Court in the decision of Fine Tubes⁹ is squarely applicable to the facts of the instant case. Even in this case, as already pointed out, the first accused is admittedly the sole proprietrix of the concern, namely, ‘Kamakshi Enterprises’ and as such, the question of the second accused to be vicariously held liable for the offence said to have been committed by the first accused under Section 138 of the Negotiable Instruments Act not at all arise.”

After saying so, the learned Single Judge, quashed the proceedings initiated against the petitioner therein and permitted the Judicial Magistrate to proceed and expedite the trial in respect of others.

24. *In Gita Berry v. Genesis Educational Foundation¹¹, the petitioner therein was wife and she filed a petition under Section 482 of the Code seeking quashing of the complaint filed under Section 138 of the NI Act. The case of the petitioner therein was that the offence under Section 138 of the Act cannot be said to have been made out against her only on the ground that she was a joint account-holder along with her husband. It was pointed out that she has neither drawn nor issued the cheque in question and, therefore, according to her, the complaint against her was not maintainable. The learned Single Judge of the High Court of Delhi, after noting that the complaint was only under Section 138 of the Act and not under Section 420 IPC and pointing out that nothing was elicited from the complainant to the effect that the petitioner was responsible for the cheque in question, quashed the proceedings insofar as the petitioner therein.*

25. *In Bandeeep Kaur v. Avneet Singh¹² , in a similar situation, the learned Single Judge of the Punjab and Haryana High Court held that in case the drawer of a cheque fails to make the payment on receipt of a notice, then the provisions of Section 138 of the Act could be attracted against him only. The learned Single Judge further held that though the cheque was drawn to a joint bank account which is to be operated by anyone i.e. the petitioner or by her husband, but the controversial*

document is the cheque, the liability regarding dishonouring of which can be fastened on the drawer of it. After saying so, learned Single Judge accepted the plea of the petitioner and quashed the proceedings insofar as it relates to her and permitted the complainant to proceed further insofar as against others.

26. *In the light of the principles as discussed in the earlier paragraphs, we fully endorse the view expressed by the learned Judges of the Madras¹⁰ Delhi¹¹ and Punjab and Haryana High Courts¹².*

27. *In the light of the above discussion, we hold that under Section 138 of the Act, it is only the drawer of the cheque who can be prosecuted. In the case on hand, admittedly, the appellant is not a drawer of the cheque and she has not signed the same. A copy of the cheque was brought to our notice, though it contains the name of the appellant and her husband, the fact remains that her husband alone had put his signature. In addition to the same, a bare reading of the complaint as also the affidavit of examination-in-chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque.*

28. *We also hold that under Section 138 of the NI Act, in case of issuance of cheque from joint accounts, a joint account-holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account-holder. The said principle is an exception to Section 141 of the NI Act which would have no application in the case on hand. The proceedings filed under Section 138 cannot be used as arm-twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under Section 138. The culpability attached to the dishonour of a cheque can, in no case “except in case of Section 141 of the NI Act” be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the Act. Even the High Court has specifically recorded the stand of the appellant that she was not the signatory of the cheque but rejected the contention that the amount was not due and payable by her solely on the ground that the trial is in progress. It is to be noted that only after issuance of process, a person can approach the High Court seeking quashing of the same on various grounds available*

to him. Accordingly, the High Court was clearly wrong in holding that the prayer of the appellant cannot even be considered. Further, the High Court itself has directed the Magistrate to carry out the process of admission/denial of documents. In such circumstances, it cannot be concluded that the trial is in advanced stage”.

[10]. In view of the above discussion and ratio of law as held in the aforecited cases, it would be safe to observe that the petitioner is not liable for the cheque drawn by her husband from the joint account relating to both of them.

[11]. Resultantly, the present petition is allowed and Complaint No.NACT/1247/2020 dated 30.09.2020; summoning order dated 01.11.2021 passed by the Judicial Magistrate Ist Class, Ambala, along with all subsequent proceedings arising therefrom are hereby quashed *qua* the petitioner only.

December 20, 2023	(HARKESH MANUJA)
<i>Atik</i>	JUDGE
Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No