

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Reserved on : 28.02.2023
Pronounced on : 20.03.2023

(i) CRM-M-48780-2022 (O&M)
Sangeeta Kumar Petitioner

V/S

State of Punjab Respondent

(ii) CRM-M-50085-2022 (O&M)
Harjesh Bhagat Petitioner

V/S

State of Punjab Respondent

(iii) CRM-M-50399-2022 (O&M)
K.K. Jajoo Petitioner

V/S

State of Punjab Respondent

(iv) CRM-M-50913-2022 (O&M)
Chandresh Jajoo Petitioner

V/S

State of Punjab Respondent

CORAM : HON'BLE MR. JUSTICE ASHOK KUMAR VERMA

Present: Dr. Anmol Rattan Sidhu, Senior Advocate with
Ms. Puja Chopra, Advocate and
Mr. Sumeet Mehta, Advocate
for the petitioners in all the petitions.

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Mr. Jaspal Singh Guru, Asstt. A.G., Punjab
for the respondent-State.

Mr. Sandeep Suri, Advocate
for the complainant.

ASHOK KUMAR VERMA, J.

1. This order will dispose of the above mentioned petitions as the same have arisen out of the common FIR.
2. The petitioners have filed the present petitions under Section 438 of the Code of Criminal Procedure, 1973 for grant of anticipatory bail to them in case FIR No.25 dated 07.03.2022 registered under Sections 420 and 120-B of the Indian Penal Code, 1860 at Police Station Navi Baradari, District Police Commissionerate Jalandhar.
3. The above-said FIR was registered on the basis of written complaint moved before the Commissioner of Police, Jalandhar by complainant-Sahil Goyal alleging that he is partner of M/s K.J. International and their firm deals in iron/steel. About 02 years back Mr. K.K. Jajoo, Chariman, Mr. Chandresh Jajoo, Managing Director, Ms. Sangeeta Kumar, Director and Mr. Harjesh Bhagat, Director of M/s Hema Engineering Industries Ltd. (HEIL) (herein the petitioners) contacted the complainant's firm and stated that their firm is dealing in manufacturing of Auto Parts and for that purpose they need raw material and in order to manufacture their material, they want to get Iron and Steel on loan basis. After purchasing the raw material they will make the payment in a short period and on the continues assurances

given by them, the complainant's firm supplied raw material to their firm. Initially, for gaining confidence of the complainant, they make payment on time and thereafter they started purchasing raw material on loan basis and in order to keep confidence, they went on to make small payments and promised to pay the remaining amount afterwards. When the loan amount goes on higher side i.e. Rs.5,37,12,245/-, the complainant asked them to clear the dues and in order to discharge their liability, they issued various cheques of different dates and asked the complainant that these cheques are good for payment on their presentation in the bank but when the said cheques were presented to the bank the same were got dishonoured. Thereafter, the complainant asked them repeatedly to clear the dues on which the petitioners started giving threats to the complainant.

4. Learned counsel for the petitioners have argued that the petitioners have been falsely implicated in the present case. All the petitioners are an erstwhile Director/Managing Director/Employee of the firm M/s HEIL. Petitioners-Sangeeta Kumar and Chandresh Jajoo were already suspended due to pending insolvency/liquidation proceedings. Petitioner-Sangeeta Kumar was wrongly mentioned as Director in the FIR. Petitioner-K.K. Jajoo had resigned from the company in 2012, however, being father of Chandresh Jajoo, Managing Director, he was retained as signatory in Bank Account of Ms/ HEIL in case of emergent situation and was discharged in March, 2020.

Petitioner-Harjesh Bhagat was retired on attaining the age of

superannuation in 2017. After retirement, he was offering consultancy services to M/s HEIL and since the consultation fee was not paid to him, he himself lodged his claim before NCLT Delhi. The entire business, assets, record etc. are under the control of Official Liquidator. The petitioners have no role in operations and transactions of the company. The petitioners have not signed any of the cheques issued to the complainant's firm. Business of around Rs.9 Crores was transacted between the parties. The payments were made by M/s HEIL from time to time to the complainant's firm. However, due to Covid and some other factors, the business and manufacturing activities of M/s HEIL suffered. Mere collapse or failure of business cannot be equated to criminal mens-rea.

5. Learned counsel for the petitioners have further submitted that insolvency proceedings were also initiated against M/s HEIL before NCLT, New Delhi before registration of the present FIR and vide order dated 05.04.2021 passed by NCLT, New Delhi, all the Directors of the company were suspended and the entire operations of the company were taken over by Mr. Vikas Gupta, who was appointed as Interim Resolution Professional. Moratorium as per Section 14 of the Insolvency and Bankruptcy Code, 2016 was allowed and public announcement was also made calling upon financial creditors of M/s HEIL to submit their claims. Vide order dated 17.05.2021, Liquidator was appointed and fresh moratorium under Section 33(5) of the Insolvency and Bankruptcy Code, 2016 commenced. Instead of filing

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claim, the complainant initiated CIRP proceedings against M/s HEIL before NCLT, Chandigarh which was withdrew by him vide order dated 25.04.2022. The complainant has also filed 02 cases bearing Nos.NACT/563/2021 and NACT/221/2021 under Section 138 of the Negotiable Instruments Act, 1881 before the present FIR which are pending before the Competent Court at Jalandhar and thus, the present FIR is an abuse of process of law and is an act of double jeopardy under criminal law for same offence. The petitioners are ready and willing to join the investigation and their custodial interrogation is not required in the case. In support of their submissions, learned counsel for the petitioners have placed reliance upon the judgments passed by Hon'ble Supreme Court in *G. Sagar Suri Vs. State of UP : Law Finder Doc ID # 32656*; *Veer Prakash Sharma Vs. Anil Kumar Agarwal and another : 2007 (3) RCR (Criminal) 960*; *Sripati Singh (since deceased) Through His Son Gaurav Singh Vs. The State of Jharkhand and another : 2021 (4) RCR (Criminal) 620*; *Samir Sahay @ Sameer Sahay Vs. State of U.P. and another : Law Finder Doc ID # 897338*; *Kapil Agarwal and others Vs. Sanjay Sharma and others : Law Finder Doc ID # 1814008* and *Kola Veera Raghav Rao Vs. Gorantla Venkateswara Rao and another : 2011 (1) RCR (Criminal) 803*.

6. Per contra, learned State counsel has opposed the present petitions in terms of reply filed by the State and submits that the petitioners have committed a fraud with the complainant for a huge amount of Rs.5,37,12,245/-. For thorough investigation of the case and

for recovery of amount, the custodial interrogation of the petitioners is necessary. Therefore, the present petitions may be dismissed.

7. Learned counsel for the complainant submits that the petitioners have committed cheating with the complainant's firm and also gave threats to the complainant. Petitioner-K.K. Jajoo is the signatory of the cheques first given. Now, he cannot claim that he is not in any manner associated with the company as he no longer the Director of the company. 04 other FIRs under the similar offence have already been registered against accused-K.K. Jajoo and Chandresh Jajoo and in 06 complaint cases, non-bailable warrants of arrest have been issued against them. During the pendency of the proceedings under Section 138 of the N.I. Act, proceedings under Sections 406 and 420 of the IPC can be launched. In support of his argument, learned counsel for the complainant has placed reliance upon the judgment of Hon'ble Supreme Court passed in ***Sangeetaben Mahendrabhai Patel Vs. State of Gujarat and another : AIR 2012 SC 2844.***

8. Learned counsel for the complainant further submits that the moratorium proceedings are in the year 2021 whereas the offence relates to the period December, 2019 to December, 2020. Therefore, the petitioners cannot claim any rights from the moratorium. In support of his argument, learned counsel for the complainant has placed reliance upon the judgment of Hon'ble Supreme Court passed in ***P. Mohanraj and others Vs. M/s Shah Brothers ISPAT Pvt. Ltd. : (2021) 6 SCC 258***, and ***State Bank of India Vs. Ramakrishnana : 2018 (17) SCC 39.***

9. I have heard learned counsel for the parties and gone through the relevant record.

10. As per the prosecution, initially, petitioners-K.K. Jajoo, Chairman, Chandresh Jajoo, Managing Director, Sangeeta Kumar, Director and Harjesh Bhagat, Director of M/s HEIL gain the confidence of the complainants' firm by paying the dues from time to time. When the loan amount goes on higher side i.e. Rs.5,37,12,245/-, the complainant asked them to clear the dues and in order to discharge their liability, the petitioners have issued various cheques of different dates and asked the complainant that these cheques are good for payment on their presentation in bank but when the said cheques were presented to the bank the same were got dishonoured. When the complainant's firm filed complaints under Section 138 of the N.I. Act against the petitioners, the petitioners firm assured the complainant that they should take the complaints back and they will make the payment. On 06.08.2022 they gave more cheques to the complainant which were also got dishonoured on their presentation in the bank. When the complainant asked the petitioners repeatedly to make the payment, the petitioners started giving threats to the complainant. Thereafter, the complainant made a complaint before the Commissioner of Police, Jalandhar which was enquired into by Assistant Commissioner of Police (Detective), Commissionerate Jalandhar and on the basis of enquiry report the opinion of D.A. (Legal) was taken and then the present FIR was registered against the petitioners. During the investigation, notice

under Section 41 of the Cr.P.C. was issued to the petitioners to join enquiry but the petitioners did not join the enquiry. Earlier, Petitioners- Sangeeta Kumar and Harjesh Bhagat have filed petitions bearing No.CRM-M-42131-2022 and CRM-M-42136-2022, respectively, for quashing of the FIR which were dismissed by this Court. The accused firm after receiving raw material worth Rs.5,37,12,245.-/- did not make the payment with intention to cheat and defraud the complainant's firm.

11. So far as the argument made by learned counsel for the petitioners regarding the present FIR is an abuse of process of law and is an act of double jeopardy under criminal law for same offence is concerned, Hon'ble Supreme Court in ***Sangeetaben Mahendrabhai Patel's case (supra)***, while dealing with the question whether prosecution for offence under Section 138 of the NI Act and offences under Section 406, 420 of IPC can be continued simultaneously against an accused on same set of facts, observed as under:-

“27. Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 N.I. Act and the case is sub judice before the High Court. In the instant case, he is involved under Sections 406/420 read with Section 114 IPC. In the prosecution under Section 138 N.I. Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420 IPC is a serious one as the sentence of 7 years can be imposed. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in

the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary.

28. There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions.”

12. From the aforesaid analysis of law on the subject, it is clear that offences under Section 138 of the NI Act and Section 420 of IPC are distinct from each other because ingredients of the two offences are different. While in a prosecution under Section 138 of NI Act, fraudulent or dishonest intention at the time of issuance of cheque need not be proved but in a prosecution under Section 420 of IPC, such intention is an important ingredient to be established. For proving offence under Section 138 of NI Act, it has to be established that the cheque has been issued by the accused to discharge a legally enforceable debt or liability and the same has been dishonoured for insufficiency of funds etc. and despite receipt of statutory notice of demand, the accused has failed to pay the amount of cheque within the stipulated time. It is only when accused fails to make the payment within the stipulated time upon receipt of notice of demand that the offence under Section 138 of NI Act is made out against an accused. In the case of prosecution for the charge under Section 420 of IPC, these ingredients need not be proved by the prosecution. However, it has to be proved by prosecution that at the very inception i.e. at the time of

issuance of the cheque by the accused, he had a dishonest intention. Thus, offence under Section 420 of IPC is made out at the time of issuance of the cheque itself which is not the case with offence under Section 138 of NI Act. Therefore, the two offences are distinct from each other and the principle of double jeopardy or rule of estoppel does not come into play.

13. So far as the argument made by learned counsel for the petitioners regarding insolvency proceedings already initiated against the company which extinguish the civil and criminal liability of the petitioners is concerned, Hon'ble Supreme Court in ***P. Mohanraj's case (supra)*** while dealing with the same question observed as under:-

“41. Section 32-A cannot possibly be said to throw any light on the true interpretation of Section 14(1)(a) as the reason for introducing Section 32-A had nothing whatsoever to do with any moratorium provision. At the heart of the section is the extinguishment of criminal liability of the corporate debtor, from the date the resolution plan has been approved by the adjudicating authority, so that the new management may make a clean break with the past and start on a clean slate. A moratorium provision, on the other hand, does not extinguish any liability, civil or criminal, but only casts a shadow on proceedings already initiated and on proceedings to be initiated, which shadow is lifted when the moratorium period comes to an end. Also, Section 32-A(1) operates only after the moratorium comes to an end. At the heart of Section 32-A is the IBC's goal of value maximisation and the need to obviate lower recoveries to creditors as a result of the corporate debtor continuing to be exposed to criminal liability.

42. Unfortunately, Section 32-A is inelegantly drafted. The second proviso to Section 32-A(1) speaks of persons who are in any manner in charge of, or responsible to the

corporate debtor for the conduct of its business or associated with the corporate debtor and who are, directly or indirectly, involved in the commission of “such offence” i.e. the offence referred to in sub-section (1), “as per the report submitted or complaint filed by the investigating authority ...”. The report submitted here refers to a police report under Section 173 CrPC, and complaints filed by investigating authorities under special Acts, as opposed to private complaints. If the language of the second proviso is taken to interpret the language of Section 32-A(1) in that the “offence committed” under Section 32-A(1) would not include offences based upon complaints under Section 2(d) CrPC, the width of the language would be cut down and the object of Section 32-A(1) would not be achieved as all prosecutions emanating from private complaints would be excluded. Obviously, Section 32-A(1) cannot be read in this fashion and clearly includes the liability of the corporate debtor for all offences committed prior to the commencement of the corporate insolvency resolution process. Doubtless, a Section 138 proceeding would be included, and would, after the moratorium period comes to an end with a resolution plan by a new management being approved by the adjudicating authority, cease to be an offence qua the corporate debtor.

43the expression “prosecution” in the first proviso of Section 32-A(1) refers to criminal proceedings properly so-called either through the medium of a first information report or complaint filed by an investigating authority or complaint and not to quasi-criminal proceedings that are instituted under Sections 138/141 of the Negotiable Instruments Act against the corporate debtor, the object of Section 14(1) IBC gets subserved, as does the object of Section 32-A, which does away with criminal prosecutions in all cases against the corporate debtor, thus absolving the corporate debtor from the same after a new management comes in.

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45. Section 138 contains within it the ingredients of the offence made out. The deeming provision is important in that the legislature is cognizant of the fact that what is

otherwise a civil liability is now also deemed to be an offence, since this liability is made punishable by law. It is important to note that the transaction spoken of is a commercial transaction between two parties which involves payment of money for a debt or liability. The Explanation to Section 138 makes it clear that such debt or other liability means a legally enforceable debt or other liability. Thus, a debt or other liability barred by the law of limitation would be outside the scope of Section 138. This, coupled with fine that may extend to twice the amount of the cheque that is payable as compensation to the aggrieved party to cover both the amount of the cheque and the interest and costs thereupon, would show that it is really a hybrid provision to enforce payment under a bounced cheque if it is otherwise enforceable in civil law. Further, though the ingredients of the offence are contained in the first part of Section 138 when the cheque is returned by the bank unpaid for the reasons given in the section, the proviso gives an opportunity to the drawer of the cheque, stating that the drawer must fail to make payment of the amount within 15 days of the receipt of a notice, again making it clear that the real object of the provision is not to penalise the wrongdoer for an offence that is already made out, but to compensate the victim.”

14. In view of above, it is clear that no provision of the Insolvency and Bankruptcy Code bars the continuation of the civil/criminal proceedings initiated against the corporate debtor or its Directors and officials. By the moratorium only the corporate debtor (i.e. the company) is protected and no protection against civil and criminal liability is available to the guarantors or any other person who has committed a criminal act. The signatories/directors cannot escape from their penal liability under Section 138 of the NI Act by citing dissolution of the company. What is dissolved, is only the company, not the personal penal liability of the accused covered under Section 141 of

the NI Act.

15. Furthermore, investigation is still going on in the present case. For thorough investigation of the case and for recovery of huge amount, custodial interrogation of the petitioners is necessary. It is settled proposition of law that power exercisable under Section 438 of the Cr.P.C. is somewhat extraordinary in character and it is to be exercised in exceptional cases. The Hon'ble Supreme Court in ***State Vs.***

Anil Sharma : (1997) 7 SCC 187 held as under:-

“6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favorable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.”

16. The facts and circumstances of the judgments relied upon by learned counsel for the petitioners are quite distinguishable from the facts of the present case because every case has its own peculiar facts and circumstances. Therefore, no benefit of the same, whatsoever, can

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be given to the petitioners.

17. Having regards to the totality of facts and circumstances of the case aforementioned, serious nature of averments qua cheating, fraud made against the petitioners, coupled with the fact that huge amount of money is involved in this case but without commenting upon the merits of the case, I do not find it a fit case for grant of anticipatory bail to the petitioners.

18. Accordingly, all the petitions are hereby dismissed.

19. Misc. Application(s) pending in all petitions, if any, shall stand disposed of accordingly.

20.03.2023
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(ASHOK KUMAR VERMA)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether Reportable:	Yes/No