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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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Date of decision:27.03.2023

Swati Dua

..... Petitioner

V/s

M/s Chhabra Yarns

...Respondent

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Suresh Kumar Jindal, Advocate,
for the petitioner.

Mr. Divyam Singh, Advocate,
for Mr. Vikram Singh, Advocate,
for the respondent.

JASJIT SINGH BEDI, J. (Oral)

The prayer in the present petition under Section 482 Cr.P.C. is for quashing of the criminal complaint bearing case CIS No.NACT-2896 of 2018 dated 13.09.2018 titled as M/s Chhabra Yarns versus M/s Ashish Handloom Industries and others (Annexure P-1), summoning order dated 13.09.2018 (Annexure P-2), the order dated 20.08.2022 (Annexure P-4) passed by the Judicial Magistrate Ist Class, Panipat and all the subsequent proceedings arising therefrom.

2. The brief facts of the case are that the respondent filed a criminal complaint under Section 138 of the Negotiable Instruments Act against M/s Ashish Handloom Industries, its proprietor Ashish Dua and the present petitioner-Swati Dua who was stated to be the Chief Executive Officer of the said concern. As per the allegations three cheques i.e. Cheque

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Cheque No.354457 dated 25.07.2018 for an amount of Rs.2,00,000/- each had been issued which had been dishonoured. Based on the evidence led, a summoning order (Annexure P-2) came to be passed on 13.09.2018. A copy of the complaint dated 10.09.2018 and the summoning order dated 14.09.2018 are attached to the present petition as Annexures P-1 and P-2.

3. Pursuant to the said order of summoning, an application was moved for discharge on behalf of the petitioner. The said application also came to be dismissed vide order dated 20.08.2022 (Annexure P-4).

4. The complaint dated 13.09.2018 (Annexure P-1), the summoning order dated 13.09.2018 (Annexure P-2) and the order dated 20.08.2022 (Annexure P-4) are under challenge in the instant petition.

5. The learned counsel for the petitioner contends that the petitioner was neither a signatory nor a proprietor in the accused concern i.e. Ashish Handloom Industries. The proprietor of the same was Ashish Dua, husband of the petitioner. In fact, the petitioner had been falsely implicated merely because she was the wife of the said proprietor and had wrongly been called a Chief Executive Officer. He contends that in terms of the judgments of the Hon'ble Supreme Court in the cases of '**Raghu Lakshminarayanan versus M/s Fine Tubes, 2007(2) RCR (Criminal) 571, Alka Khandu Avhad versus Amar Syamprasad Mishra & Anr. 2021(2) RCR (Criminal) 286' and a judgment passed by the Delhi High Court in the case of 'M.M. Lal versus State of NCT of Delhi and another, (2013) ACD 766'**, the proceedings qua the petitioner were liable to be quashed. He also contends that in one other case against the petitioner under Section 138 of the Negotiable Instruments Act, she stands discharged vide order 09.02.2021

passed by the JMIC, Panipat (Annexure P-5).

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6. The learned counsel for the complainant, on the other hand, contends that a perusal of the complaint would reveal specific allegations against the petitioner as also her husband-Ashish Dua, who is undoubtedly the proprietor. The petitioner was the Chief Executive Officer and therefore, cannot escape her liability. He, therefore, contends that the present petition being devoid of merits ought to be dismissed.

7. I have heard the learned counsel for the parties.

8. Before proceeding further, it would be apposite to refer to the provisions of Section 138 of the Negotiable Instruments Act. The same are reproduced hereinbelow:-

“138 Dishonour of cheque for insufficiency, etc., of funds in the account.—Where 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 debt or 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 for¹⁹ [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

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the cheque,²⁰ [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.”

9. The Hon’ble Supreme Court in the case of ‘**Raghu Lakshminarayanan versus M/s Fine Tubes, 2007(2) RCR (Criminal) 571**’, held as under:-

“12. If accused No. 1 was not a Company within the meaning of Section 141 of the Negotiable Instruments Act, the question of an employee being preceded against in terms thereof would not arise. Respondent was aware of the difference between a 'partnership firm' and a 'business concern' as would be evident from the fact that it described itself as a partnership firm and the accused No. 1, as a business concern. Significantly, Respondent deliberately or otherwise did not state as to in which capacity the appellant had been serving the said business concern. It, as noticed hereinbefore, described him as in charge, Manager and Director of the accused No. 1. A person ordinarily cannot serve both in the capacity of a Manager and a Director of a Company.

13. The distinction between partnership firm and a proprietary concern is well known. It is evident from Order 30 Rule 1 and Order 30 Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in M/s. Ashok Transport Agency v. Awadhesh Kumar and another, 1999(1) RCR (Civil) 197: [(1998) 5 SCC 567] wherein this Court stated the law in the following terms :-

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the

provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order 30, Rule 1, Civil Procedure Code enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 Order 30, which make applicable the provisions of Order 30 to a proprietary concern enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 Order 30 have no application to such a suit as by virtue of Order 30, Rule 10 the other provisions of Order 30 are applicable to a suit against the proprietor of proprietary business "in so far as the nature of such case permits." This means that only those provisions of Order 30 can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

14. We, keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a 'Company' or a 'Partnership Firm' as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Indian Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a Company incorporated under

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the Indian Companies Act or a firm within the meaning of the provisions of the Section 4 of the Indian Partnership Act.

15. A Constitution Bench of this Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, 2005(4) RCR (Criminal) 141 : 2005(3) Apex Criminal 229 : [AIR 2005 Supreme Court 3512] furthermore categorically stated that the complaint petition must contain the requisite averments to bring about a case within the purview of Section 141 of the Act so as to make some persons other than company vicariously liable therefor. [See also *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, 2007(2) RCR (Criminal) 126 : 2007(1) R.A.J. 871 : [2007(3) SCALE 245].

16. For the reasons aforementioned, we are unable to agree with the High Court that no case had been made out for exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure.

The impugned judgment is set aside. Appeal is allowed. The complaint case against the appellant is quashed
Appeal allowed”.

10. In the case of ‘**Mrs. Aparna A. Shah versus M/s Sheth Developers Pvt. Ltd. and another**, 2013(4) SCC (Cri) 241’, the Hon’ble Supreme Court held as under:-

“22. 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 name of the appellant and her husband, the fact remains that her husband alone 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.

23) We also hold that under [Section 138](#) of the N.I. 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 N.I. Act which would have no application in the case on hand. The proceedings filed under [Section 138](#) cannot be used as an 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 dishonour of a cheque can, in no case “except in case of [Section 141](#) of the N.I. 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.

24) Under these circumstances, the appeal deserves to be allowed and process in Criminal Case No. 1171/SS/2009 pending before the Court of learned Metropolitan Magistrate 13th Court, Dadar, Mumbai deserves to be quashed,

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accordingly, quashed against the appellant herein. The appeal is allowed.”

11. The Hon’ble Supreme Court in the case of **‘Alka Khandu Avhad versus Amar Syamprasad Mishra & Anr. 2021(2) RCR (Criminal) 286’**, held as under:-

“7. 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:

i) that the cheque is drawn by a person and on an account maintained by him with a banker;

ii) 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; and

iii) 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 account.

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.

8. Now, so far as the case on behalf of the original complainant that the appellant herein – original accused No. 2 can be

convicted with the aid of [Section 141](#) of the NI Act is concerned, the aforesaid has no substance.

8.1 [Section 141](#) of the NI Act is relating to the offence by companies and it cannot be made applicable to the individuals. 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. The appellant herein is neither a Director nor a partner in any firm who has issued the cheque. 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](#) r/w [Section 141](#) of the NI Act. The criminal complaint filed against the appellant for the offence punishable under [Section 138](#) r/w [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.

9. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order dated 21.08.2019 passed by the High Court in Criminal Writ Petition No. 2595 of 2019 refusing to quash the criminal complaint against the appellant for the offence punishable

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under Section 138 read with Section 141 of the NI Act is hereby quashed and set aside. The complaint case pending in the Court of the learned Metropolitan Magistrate filed by respondent No. 1 – original complainant being C.C. No. 2802/SS/2016 is hereby quashed and set aside. The appeal is allowed accordingly.”

12. This Court in the case of **‘Rachna versus Joginder Singh and anr. (CRM-M-4174-2022 decided on 20.03.2023)’**, held as under:-

“10. Coming back to the facts of the present case, a perusal of the complaint would reveal that there are no specific allegations against the petitioner so far as the issuance of the cheque in question is concerned. On the contrary, the cheque (Annexure P-11) has been signed by Rachpal Singh, Proprietor of Rachna Trading Company. The petitioner is neither a signatory to the cheque nor an office holder in the proprietorship concern as is clearly discernible from Annexure P-6, the Registration Certificate for GST. Since the petitioner is neither a signatory to the cheque in question nor a partner in the sole proprietorship concern of her husband-Rachpal Singh, the question of her liability of the petitioner does not arise.

11. In view of the above, the present petition is allowed and the complaint bearing No.NIACT/944/2019 titled as ‘Joginder Singh versus Rachpal Singh and others’ under Section 138 of the Negotiable Instruments Act (Annexure P-3), the summoning order dated 13.03.2020 (Annexure P-2) under Section 138 of the Negotiable Instruments Act, the order dated 29.11.2021 (Annexure P-1) passed in revision petition and all subsequent proceedings arising therefrom are quashed”.

13. Coming back to the facts of the present case, it is apparent that

M/s Ashish Handloom Industries is a proprietorship concern and its sole

proprietor is Ashish Dua. The petitioner is neither a proprietor, the drawer of

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the cheque or an authorized signatory on behalf of M/s Ashish Handloom Industries, the proprietorship concern. Therefore, the question of the liability of the petitioner does not arise. In fact, in another complaint filed against the petitioner, she has been exonerated vide order dated 09.02.2021 (Annexure P-5).

14. In view of the aforementioned discussion, I find merit in the present petition. Therefore, the criminal complaint bearing case CIS No.NACT-2896 of 2018 dated 13.09.2018 titled as M/s Chhabra Yarns versus M/s Ashish Handloom Industries and others (Annexure P-1), summoning order dated 13.09.2018 (Annexure P-2), the order dated 20.08.2022 (Annexure P-4) passed by the Judicial Magistrate Ist Class, Panipat and all the subsequent proceedings arising therefrom are hereby quashed qua the petitioner-Swati Dua alone. The proceedings, however, shall continue against the proprietorship concern as also the proprietor-Ashish Dua.

(JASJIT SINGH BEDI)
JUDGE

March 27, 2023
sukhpreet

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No