IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1337 OF 2022

Abhijeet s/o Jairaj Pathrikar Age 39 years, Occu: Business R/o Plot No.32, Sahakar Nagar, Aurangabad	...	**Petitioner (Original complainant)**

VERSUS

1. State of Maharashtra

2. Mama Stone Metal Works, Through its proprietor Ishwar s/o Govindrao Shirsat Age 55 years, Occu: Business, R/o Flat No.10, Sneha Apartment Near Maria Hospital, Bansilal Nagar, Aurangabad	...	**Respondents R/2 Original accused)**

Ms. Ranjita Barhate h/for Mr. Y. R. Barhate, Advocate for the Petitioner,
Mr. S. B. Narwade, APP for the Respondent No.1 State
Mr. S. S. Thombre, Advocate for Respondent No.2

CORAM : Y. G. KHOBRAGADE, J.
RESERVED ON : 21.11.2024
PRONOUNCED ON: 29.11.2024

JUDGMENT:-

1. Rule. Rule made returnable forthwith and with the consent of both the parties, heard finally.

2. By the present writ petition under Article 227 of the Constitution of India r/w Section 482 of the Criminal Procedure Code, the petitioner impugned the order dated 27.11.2021 passed by the learned Additional

Sessions Judge, Aurangabad, in Cr. Revision No.282 of 2019, thereby quashed and set aside the order of issuance of process passed on 24.07.2019 by the learned JMFC, Court No.20, Aurangabad, in SSC No.4961/2019.

3. The Petitioner/ori., complainant filed a complaint bearing SCC No. 4961 of 2019 u/s Sec. 138 of Negotiable Instruments Act and alleged that, he is legal heir of Shri Jairaj Annasaheb Pathrikar. He filed said complaint and alleged that, the Respondent No. 2/Oril Accused issued three cheques bearing Nos. (1) 817746 of Rs.3,00,000/- dated 09.01.2019, (2) 817747 of Rs.2,00,000/- dated 09.01.2019 and (3) 817748 of Rs.2,50,000/-, dated 30.01.2019, drawn on State Bank of India, Branch Maliwada Tq. & Dist. Aurangabad in favour if his father Shri Jairaj Annasaheb Pathrikar for discharging legal liabilities in pursuance of registered Agreement to sale dated 20.08.2018 at Sr. N.4928 and registered General Power of Attorney at Serial No.4930 dated 20.08.2018 in respect of sale of Land bearing Gat No.76 to the extent of 1 Hectare 22 Gunthas situated at village Jambhala Tq. Gangapur, district Aurangabad. Since his valuable rights are involved in said agricultural land, the complainant and his father have raised objection for registration of the sale deed. Thereafter, the accused, through its proprietor approached him and his father. After due negotiations, the accused agreed to pay an amount of Rs.7,50,000/- to the complainant and

his father. Accordingly, on 08.01.2019, the complainant and his father executed Consent Deed in favour of the accused in presence of two witnesses. The said consent deed duly registered with Notary at Serial No.20 of 2019.

4. The Petitioner/complainant further alleged that, at the time of execution of the consent deed, the respondent No.2/Accused agreed to pay an amount of Rs.7,50,000/- to him and his father by way of cheque. Accordingly, the accused, in the capacity of proprietor of the firm, issued above three cheques in favour of his father. Accordingly, his father Shri Jairaj Annasaheb Pathrikar presented said cheques for encashment with his Banker i.e. Bank of Baroda, Aurangabad Branch, however, all above cheques are returned unpaid with the endorsement of "Payment stopped by Drawer" vide Bankers Memo dated 13.02.2019. Therefore, his father Shri Jairaj Annasaheb Pathrikar issued a mandatory notice u/s 138 of N.I. Act, by RPAD on 22.02.2019 and called upon the respondent No.2/ accused to make payment under dishonoured cheques to the tune of Rs.7,50,000/- within a period of 15 days from the date of service of notice, which duly served upon the accused on 23.02.2019 but the respondent/accused failed to comply with the notice. However, in the meantime, Shri Jairaj Annasaheb Pathrikar, the complainant's father sustained electric shock and died on 18.03.2019.

5. Since the complainant being son and legal heir of deceased Jairaj Pathrikar and having knowledge regarding the transaction between him, his father and the present accused, he has filed a complaint SCC No.4969 of 2019 under Section 138 of the NI Act, due to dishonour of above cheques. On 24.07.2019, the learned JMFC, Court No.20, Aurangabad passed the order and issued process against the accused under section 204 of the Cr.P.C., for the offence punishable under Section 138 of the NI Act.

6. Being aggrieved by the said order, the Respondent/accused filed Criminal Revision No. 282 of 2019 under section 397 of the Cr.P.C. before the Sessions Court. On 27.11.2021, the learned Sessions Court passed the impugned judgment and order holding that, the cheques were issued in favour of Jairaj Pathrikar, the complainant's father. Therefore, the petitioner/complainant does not fall within the ambit of "payee" or "holder in due course" within the meaning of Sec. 9 of the NI Act. Further, the Petitioner/complainant is not armed either letter of administration or probate or succession certificate after demise of his father. Therefore, the learned Revision Court dismissed the complaint, considering the ratio laid down by this Court in the case of **Vishnupant s/o Chaburao Khaire Vs. KailasBalbhir Madan** (Writ Petition No. 842 of 2099 dated 25.01.2010), wherein it has been held that when the complainant is not payee or holder

in due course within the meaning of law, he has no authority to demand money under Section 138 and he will not be entitled to file complaint under section 142 of the NI Act.

7. In above backdrop of the case in hand, a question arises that, can a legal representative of the payee file a complaint under Section 138 of the NI Act, when the holder in due crouse died after issuance of mandatory notice under section 138 of the NI Act?

8. Ms. Ranjita Barhate, the learned counsel appearing for the Petitioner, placed reliance on judgment in the case of ***Chandra Babu Vs. Remani, 2003 (2) DCR 347 equivalent to 2003(2) KLT 750****,* wherein, similar question was under consideration before the Division Bench of Kerala High Court. In the said case, the Division Bench of Kerala High Court considered the case of ***Padam Prasad Vs. Lok Nath Ishwar Sarup (AIR 1964 Punjab 497)*** and held that, complaint at the behest of legal heir of payee of the cheque is perfectly maintainable and legal representative of the payee or holder in due course can file complaint under section 138 read with Section 142 of the NI Act, if other conditions in the above sections are satisfied.

9. The learned counsel appearing for the Petitioner further relied on unreported Judgment/order dated 10.02.2023 passed by the Coordinate

Bench of this Court in Criminal Application No. 17 of 2023, ***Tridhaatu Maruthi Developers LLP & Ors. Vs. Nirzari Rajiv Shroff & ors***., wherein, the Coordinate Bench of this Court considered cases i.e. (i) Jyotindra Motibhai Thakkar vs. State of Gujarat and Others reported in MANU/GJ/0927/2017;(ii) Ramashbhai Manibhai Patel and Others vs. State of Gujarat and Others reported in 2011 SCC OnLine Guj 7608; (iii) Vishnupant S/o. Chaburao Khaire vs. Kailash S/o. Balbhir Madan reported in 2010(3) Mh.L.J. 259,(iv) Shankar Lal vs. Sanyogita Devi (Dead) through LRs. reported in Criminal Appeal No. 485 of 2002 decided on 28/10/2009 and held that, the averment in the complaint indicates that Respondent/complainant in cited case filed a complaint as she came into possession of cheque in capacity of widow of the deceased Rajiv Chandrakant Shroff. It is further observed that applicants accused responded to the demand notice. The respondent/complainant being widow of the deceased, by law of succession/inheritance, became payee/ holder in due course of the cheque

10. The learned counsel for the petitioner further placed reliance on judgment of the Kerala High Court in case of ***Muhammedkutty, Vs. C.P. Sarasu w/o Lt. Sivanandan****,* dated 01.02.2007 in Cri. M.C. No. 250 of 2007, wherein it has been held that, when a complainant dies, any fit person can be permitted to prosecute the complaint who have been

brought on record being legal heirs and they have certificate to show the heirship.

11. Per contra, Mr. Thombre, the learned Advocate appearing for Respondent No.2/accused canvassed in vehemence that though the Petitioner/complainant is legal heir of deceased, holder of cheque in due course, but neither the cheques in question are issued in favour of the petitioner/complainant nor mandatory notice under section 138 of the NI Act issued by the complainant. Further, the Petitioner has not obtained succession certificate during pendency of complaint or Revision. The cheques in question amount to debts and securities specified under section 381 of the Indian Succession Act, therefore, to initiate proceedings for recovery of debt/security and to initiate proceedings under Section 138, 142 of the NI Act, succession certificate is necessary and in absence of said certificate, letters of administration or probate granted by the competent Court to the complainant, no proceeding is maintainable. Therefore, findings recorded by the learned Revisional Court are just and proper, hence, prayed for dismissal of the petition.

12. To buttress this submission, the learned counsel for respondent No.2/accused placed reliance on case of ***Vishnupant s/o Chaburao Khaire Vs. Kailas Balbhir Madan (supra),*** wherein, the Coordinate Bench of this Court held that the complainant is not a person

named in the instrument nor he is a person to whom or to whose order money by the instrument is directed to be paid. As a legal representative of deceased father/payee, the Respondent /complainant is entitled to possess valuable security/ movable property left by his deceased father and also to receive or recover the amount thereunder. Therefore, only a person who is authorized by succession certificate, letters of administration or probate granted by the court, is entitled to call upon the drawer to pay the amount of dishonoured cheque, by issuing notice under proviso(b) to Section 138 of the N.I.Act and he would be then entitled to file complaint under Section 142 of the Act as he would be then really entering into the shoes of the deceased payee.

13. Reverting back to the facts of the present case, it is not in dispute that the respondent No.2 accused issued three Cheques Nos. (1) 817746 of Rs.3,00,000/- dated 09.01.2019, (2) 817747 of Rs.2,00,000/- dated 09.01.2019 and (3) 817748 of Rs.2,50,000/-, dated 30.01.2019, drawn on State Bank of India, Branch Maliwada Tq. & Dist. Aurangabad in favour of Shir Jairaj Annasaheb Pathrikar, who presented said cheques with his Banker i.e. Bank of Baroda, Aurangabad Branch, however, all the above cheques are returned unpaid with the endorsement that, "Payment stopped by drawer" under Banker's Memo dated 13.02.2019. The Respondent no.2/accused has not denied about service of mandatory

notice dated 22.02.2019 issued by the father of the complainant. It is also not in dispute that, on 18.03.2019 before expiry of statutory period contemplated u/s 138 of N.I. Act, Shri Jairaj Pathrikar, the Petitioner’s father died due to electric shock. Thereafter, the complainant being legal heir of deceased payee/holder filed a complaint SCC No. 4961 of 2019 for the offence punishable under section 138 of the NI Act.

14. It is matter of record that, after due compliance u/s 204 of Cri. P. C., the learned JMFC passed an order dated 24.07.2019 and issued process against the respondent No.2/ accused for the offence punishable under section 138 of the NI Act. On 27.11.2021, the learned Revisional Court passed the impugned order holding that though the complainant is son of deceased Jairaj Annasaheb Pathrikar but the petitioner/complaint has filed said complaint after demise of his father without obtaining succession certificate, letters of administration or probate. Therefore, the Petitioner/complainant has no authority to lodge the complaint.

15. Needless to say that the Petitioner/complainant obtained legal heirs Certificate granted by the Civil Court in MARJI NO 366/2022 under the provisions of Bombay Regulation Act, 1827 and produced the same during pendency of revision. The learned Civil Court endorsed that, the Petitioner and his mother Smt. Chhaya wd/o Jairaj Pathrikar are legal heirs of deceased Jairaj Pathrikar, who is holder of cheques in question.

16. In case of ***Shankar Lal Vs. Sanyogita Devi****, cited supra,* the Hon'ble Supreme Court of India held as under:

> "*There is no provision under the Act which precludes the legal heir of the holder in due course of the cheque to file complaint under Section 138 of the Act. In our opinion that a heir of the deceased holder in due course of the cheque can bring action on the basis of the cheque to recover the amount due thereon to the deceased holder by reason of the fact that he succeeds to the estate of the deceased holder by inheritance i.e.; operational of law and if that be so there is no reason as to why the legal heirs cannot file complaint under Section 138 of the Act. There is, therefore, no reason on principle to hold that a complaint filed by a legal heir of the original holder in due course of the cheque cannot be taken cognizance by the court. In our considered view, neither the cause of action nor the right conferred upon the holder in due course of the cheque to proceed and file complaint under Section 142 of the Act or the offence under Section 138 of the said Act comes to an end after the death of the holder in due course of the cheque. The cause of action certainly survives as the legal heirs step into the shoes of the holder of the cheque in due course by operation of law and are entitled to prosecute and initiate the proceedings under Section 142 of the Act.*"

17. In **Bhagava vs. Sri Kadasiddeshwara Trading Co. 2004 (1) Crimes, 701,** Hon'ble High Court of Karnataka held as under:-

> *"12. Having regard to the factual aspects and the settled principles of law in this regard, in the opinion of this Court, on the death of the payee, his legal heirs steps into the shoes of the payee for all practical purposes and such a person can also file and prosecute the complaint after completing the legal formalities. It is also necessary to mention that it would be*

> *incumbent upon the Complainant to prove that the Complainant is the legal representative of the deceased payee, in the event of accused disputing the same.*
>
> *In the case on hand, the payee had died and the wife of the payee, as the legal heir, had presented the cheque in question and on the cheque being dishonoured, legal notice had also been issued and thereafter, the proceedings had been initiated under Section 138 of the NI Act."*

18. In ***M/s. Sri Sai Mourya Estates & Projects Pvt. Ltd. & Others vs. The State of A.P.,*** 2018 SCC OnLine Hyd 43, it is held as under:

> *"31. From the above provision, it is clear that the 2 and respondent holds the cheque after the death of his father being the payee and as a legal heir he is entitled to possess the same in his own name and in view of Section 53 he is the holder in due course and can get a full discharge. Thus, under Section 53 of the Act, a legal representative / heir of the payee or holder in due course can maintain a complaint under Section 138 of the Act."*

19. Though the the learned counsel appearing for Respondent No. 2 accused relied on the case of ***Vishnupant s/o Chaburao Khaire,*** *cited supra*, however, in cited case ratio laid down by the Hon'ble Court in case of **Shankar Lal Vs. Sanyogita Devi** not cited.

20. Section 9 of the NI Act provides definition of "holder in course", means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before the amount

mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

21 Section 138 of the NI Act provides Dishonour of cheque for insufficiency, etc., of funds in the account, which reads as under:

> *"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 provision 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*
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> *(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. Explanation.-- For the purposes of this section, debt of other liability means a legally enforceable debt or other liability".*

22. In case of ***Chandra Babu***, cited supra, it is held that a holder

of negotiable instrument who derives title from holder in due course has a right thereon of that holder in due course. Therefore, a holder deriving title from the holder in due course has all the rights of a holder in due course. Therefore, legal representative of a holder in due course has all the rights of the holder in due course. If the original payee is holder in due course, his representative has all his right. Therefore, the rights under sections 138 and 142 of the NI Act are applicable to the legal representatives also, if he derives title from the holder in due course.

23. In the case of ***Smt. Bhagava,*** cited supra, the payee was died before presenting the cheque for encashment and the cheque was therefore presented by his wife and on bouncing of the cheque, after completing formalities, widow of holder of cheque filed the complaint. In the above facts and circumstances of the case, it has been held that on death of payee, his legal heirs stepped into shoe of payee for all practical purposes and such legal heir could also file and prosecute complaint.

24. Similarly, in case in hand, the holder in due course already issued mandatory notice under section 138 of the NI Act but he died prior to institution of the complaint and the petitioner/complainant being a legal heir of holder of cheque/payee has instituted a complaint under Section 142 of the NI Act. The provisions under the NI Act does not create a bar

or disqualify, the legal heir of the holder in due course of instrument to prosecute the complaint, if the holder in due course dies prior to institution of the complaint. Further, Sec. 138 or Sec. 142 of N.I. Act does not provide that, the legal heir of the holder in due course shall first obtain the legal heir certificate or succession certificate and then institute a complaint, in case payee dies after issuance of mandatory notice u/s 130 of NI Act. Therefore, ratio laid down in case of ***Vishnupant s/o Chaburao Khaire Vs. Kailas Balbhir Madan (supra),*** does not apply to the facts and circumstances of present case. However, considering the ratio laid down in the case of ***Shankar Lal Vs. Sanyogita Devi,*** and ***Smt. Bhagava,*** cited supra, legal heirs stepped into shoes of the holder of cheque in due course by operation of law and is entitled to prosecute, initiate the proceedings under the provisions of Section 142 of the NI Act. However, in case in hand, the learned Revisional Court quashed and set aside the order of issuance of process passed by the learned Magistrate only on ground that on the date of filing of the complaint, the Petitioner/ complainant was not authorized by succession certificate, letters of administration or probate granted by the Court. Therefore, to my considered view, findings recorded by the learned Revisional Court are not sustainable and liable to be quashed and set aside. Accordingly, present Petition needs to be allowed. Hence, I proceed to pass the following order:

::ORDER::

(1) Criminal Writ Petition No. 1337 of 2022 is allowed.

(2) The impugned order dated 27.11.2021 passed by the learned Additional Sessions Judge, Aurangabad in Cr. Revision No.282 of 2019, is hereby quashed and set aside.

(3) The order dated 24.07.2019 passed by the learned JMFC, Court No.20, Aurangabad below Exh.1 in SSC No.4961/2019 for issuance of process under section 204 of Cr.P.C. for the offence punishable under section 138 of the Negotiable Instruments Act, 1881 is hereby restored.

(Y. G. KHOBRAGADE, J.)

JPChavan