IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2643 OF 2022

Faisal Nisar Ahmed ...Petitioner

Versus

1. The State of Maharashtra
2. Satwant Singh Bhatti ...Respondents

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Mr. Prashant Pandey a/w Mr.Ashok Dhanuka, Mr. Dinesh Jabhwani, Mr. Irfan Unawala, Mr. Ashish Jain, Dipsy Sequeria i/by W3 Legal LLP, Advocate for the Petitioner.

Mr. Niranjan Mundargi a/w Ms.Keral Mehta i/by Mr.Abulfazal Rezwani, Advocate for Respondent No.2.

Mr. Arfan Sait, APP for Respondent-State.

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ETHAPE DNYANESHWAR ASHOK Digitally signed by ETHAPE DNYANESHWAR ASHOK Date: 2024.02.17 12:29:10 +0530

CORAM : PRAKASH D.NAIK, J.

DATE : 25th JANUARY 2024

<u>P.C.</u>:-

1. The Petitioner is tried for offence punishable under Section 138 of the Negotiable Instruments Act vide C.C. No.4148/SS/2019 pending on the file of learned Metropolitan Magistrate, 7th Court, Dadar, Mumbai. Vide order dated 21st January 2020, the learned Magistrate had issued process against petitioner/accused for offence under Section 138 of the Negotiable Instrument Act. The Respondent No.2 is the complainant.

2. The brief facts of the complaint are as under:-

(i) The accused is the partner of the AM-Automotive, 3M Car Care and Car City Showroom.

(ii) On the basis of skills, experience and knowledge of the complainant in the field of automotive, the accused offered the complainant the post of Advisor in his concern.

(iii) On insistence of the accused, the complainant agreed to join his concern to assist the accused in his business and accordingly joined the accused in the year 2015. Confirmation letters dated 5th November 2015 and 2nd November 2016 were issued by accused in favour of the complainant.

(iv) The accused promised to reward the complainant of his labour and hard work. The complainant believing on the inducement and assurances given by the accused continued to provide his skill and expertise in the field of automotive for expansion and growth of the business of accused.

(v) The accused failed to fulfill the promises made by letters dated 5th November 2015 and 2nd November 2016 respectively i.e. pay monthly compensation amount to the complainant. In addition to the monthly compensation amount, the complainant incurred day to day expenses to the tune of Rs.22,70,000/- out of his own pocket to run and administer the business of accused, on his request, which the accused assured to repayback.

(vi) After several telephonic reminders and meetings, the accused handed over paltry amounts. The complainant was not paid as per the terms and conditions and decided to leave the services of the firm.

(vii) After much persuasion and informing the accused about taking legal recourse against him, the accused handed over three cheques towards part payment of legal dues to the complainant.

(viii) Cheque bearing No.875102 dated 18th September 2019 was issued for an amount of Rs.33,00,000/-, cheque bearing No.000077 dated 18th September 2019 was issued for an amount of Rs.15,00,000/- and cheque bearing No.874809 dated 18th September 2019 was issued for an amount of Rs.5,00,000/-. The total amount of Rs.53,00,000/-.

(ix) The cheques were duly filled and signed by the accused in presence of the complainant. The accused assured encashment of the cheques on presentation. The complainant accordingly deposited the cheques with his banker Canara Bank, Sewree Branch, Mumbai.

(x) The cheqeus were dishonoured with remarks “funds insufficient” vide Bank return memos dated 21st September 2019.

(xi) The complainant issued legal demand notice dated 7th October 2019 to make the payment of the dishonoured cheques. The demand notice dated 7th October 2019 was posted. Postal endorsement returned back with remarks “closed and unclaimed”. The accused failed to discharge legal liability. Complaint was filed.

3. Learned Advocate for the petitioner submitted that, the impugned proceedings are not maintainable in law. The learned Magistrate has mechanically issued the process. The partnership firm was not impleaded as accused without impleading partnership firm, the petitioner cannot be prosecuted for offence under Section 138 of the Negotiable Instrument Act. From the tenor of the complaint, notice and the documents relied upon by complainant it is apparent that, the liability is of the partnership firm and the impugned cheques were issued towards said liability. Therefore, the partnership firm ought to have been impleaded as accused. The learned Magistrate ought not to have taken cognizance of the complaint in the absence of the partnership firm. Undisputedly, the petitioner was the partner of AM-Automotive, 3M Car Care and Car City Showroom as contended by complainant. The cheques are signed by petitioner. The complainant had claimed that, he had worked at the request of the partner of the firm in their concern i.e. partnership and for the work performed by the complainant, the cheques were issued. It is not individual liability, it was the liability of the firm. In the light of Sections 138 and 141 of the Negotiable Instrument Act, without firm being impleaded as accused, the complaint is not maintainable. Notice was not sent to the firm. It was only sent to the partner of the firm. Section 141 of the Negotiable Instrument Act relates to offences by the company. Explanation to the said provision indicate that, the 'company' means any body corporate and includes a firm

or other association of individuals; and 'director', in relation to a firm, means a partner in the firm. The case of the complainant is that, he was appointed as Advisor in the partnership firm and towards his employment, the cheques were issued. The demand notice mentions that liability is of Firm. The notice does not mention that petitioner had shouldered the liability of firm. Demand notice is defective. The order issuing process is bad in law.

4. Learned Advocate for Petitioner has relied upon the following decisions:-

(a) Himanshu Vs. B. Shivamurthy and Ors.[1]
(b) Aneeta Hada and Ors. Vs. Godfather Travels and Tours Pvt. Ltd. and Ors.[2]
(c) Dilip Hariramani Vs. Bank of Baroda[3]
(d) Ramesh Nagarkoti Vs. Kedar Datt Purohit[4]
(e) Suman Sethi Vs. Ajay K. Churiwal and Ors.[5]
(f) Sharad Kumar Sanghi Vs. Sangita Rane[6]
(g) Upasana Mishra Vs. Trek Technology India Pvt. Ltd. delivered by Supreme Court in Special Leave Petition (Cri.) No. 9062 of 2023 decided on 12th December 2023.
(h) Rangabashyam and Ors. Vs. Ramesh[7]
(i) Anil Gupta Vs. Star India Pvt. Ltd.[8]
(j) K.P.G. Nair Vs. Jindal Menthol India Ltd.[9]
(k) Shri Hari Shamsheer Kaushik Vs. Shri Jasbir Singh,

1 MANU/SC/0072/2019
2 MANU/SC/0335/2012
3 2022 SCC OnLine SC 579
4 MANU/UC/0074/2021
5 MANU/SC/0062/2000
6 MANU/SC/0205/2015
7 2019(3)MLJ(Cri)649
8 AIR 2014 SC3078
9 MANU/SC/2327/2000

Managing Director, M/s. Accura Care Pharmaceuticals Pvt. Ltd. delivered by Delhi High Court in Criminal M.C. No.1382 of 2022 decided on 9th May 2022.

(l) Sunil Todi and Ors. Vs. State of Gujarat and Ors.[10]

(m) P. J. Agro Tech Limited and Ors. Vs. Water Base Limited.[11]

5. Mr.Mundargi, learned Advocate for Respondent No.2/complainant submitted that, the contentions of the petitioner are devoid of merits. The cheqeus were issued by petitioner from his account. The partnership firm is not the drawer of the company. The cheqeus were not issued from the account of the partnership firm. Assuming that, there was liability of the firm, the petitioner has taken over the liability and issued cheques and therefore he is liable for dishonour of the said cheques. It is not necessary to implead partnership firm as accused in this case. The decisions relied upon by the learned Advocate for petitioner are not applicable in the present case. The proceedings cannot be quashed on the threshold by considering grounds urged by the petitioner.

6. Learned Advocate for Respondent No.2/complainant has relied upon the following decisions:-

(i) Mainduddin Abdul Sattar Shaikh Vs. Vijay D. Salvi delivered by Supreme Court in Criminal Appeal No. 1472 of 2009 decided on 6th July 2015.

(ii) Anees Nisar Ahmed Vs. The State of Maharashtran and

10 AIR 2022SC147
11 MANU/SC/0526/2010

Anr. delivered by this Court in Criminal Application No. 781 of 2022 and other connected matters decided on 30th November 2022.

(iii) Ramanee Narayanan Vs. C. K. Mukundan delivered by Kerala High Court in CRL. A. No. 1201 of 2009 (A) decided on 4th August 2016.

7. Section 141 of the Negotiable Instruments Act, 1881 reads as under:-

> "141. Offences by companies.- (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was incharge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
>
> [provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> *Explanation*.- For the purposes of this section,-
> (a) "company" means any body corporate and includes a firm or other association of individuals; and
> (b) "director", in relation to a firm, means a partner in the firm."

8. The complaint relates to three cheques dated 18th September 2019 for an amount of Rs.33,00,000/-, 15,00,000/- and 5,00,000/- respectively. The first cheque bearing No.875102 was signed by petitioner. It was from joint

account of petitioner and Anees Ahmed. The second cheque bearing No.000077 was signed by the petitioner. It was joint account of petitioner and Radha Chandulal Patel. The third cheque bearing No.874809 was also signed by the petitioner. It was joint account of Petitioner and Anees Ahmed.

9. Section 141 of the Negotiable Instruments Act relates to offences by companies. Company includes a firm or other association of individuals. Cheques were issued by petitioner from his account. Since the cheques are not issued from the account of partnership firm, it would not be necessary to implead the partnership firm as accused in the complaint. Even if it is accepted that there was liability of partnership firm, the petitioner has accepted the liability and issued cheque. The partnership firm is not the drawer of cheque.

10. In the case of **Aneeta Hada and Ors. Vs. Godfather Travels and Tours Pvt. Ltd. and Ors**. (supra), the question for consideration before the Supreme Court was whether an authorised signatory of a company would be liable for prosecution under Section 138 of N.I. Act without the company being arraigned as an accused. The cheque was issued by appellant-Aneeta Hada being authorised signatory of company registered under the Companies Act, 1956, in favour of complainant which was dishonoured as a consequence of which the complaint was filed under Section 138 of the N.I. Act. The company was not arrayed as accused. The Apex Court held that,

on reading section 141 of N.I. Act, it is plain as day that if a person who commits offence under Section 138 of the Act is a company, the company as well as every person incharge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. Section 141 uses the term 'Person' and refers it to a company. The company is a juristic person. The concept of corporate criminal liability is attracted to corporation and company and it is evident from the language employed under Section 141 of the Act. The company was not arrayed as accused. The proceedings are not maintainable against the director.

11. It is pertinent to note that, in the aforesaid case the cheque was issued by the authorised signatory on behalf of the company. It was the liability of the company. In the light of Section 141 of the N.I. Act, it was held that, without impleading the company, the director or the authorised signatory cannot be prosecuted for offence under Section 138 of the N. I. Act.

12. In the case of **Himanshu Vs. B. Shivamurthy and Ors.** (supra) the question before the Court was that, the cheque was issued by one of the director of the company on behalf of company. It was a public limited company. It was contended that, the cheque was not issued by the signatory in his personal capacity. The complaint ought to have been instituted against the company and its director and not against the

appellant. The cheque was drawn by the appellant for company as its director. Notice of demand was served on the appellant. Complaint was lodged only against the appellant without arraigning the company as an accused. In this circumstances, it was held that in the absence of the company being arraigned as an accused, complaint against appellant is not maintainable. The appellant had signed the cheque as a director of the company and for and on its behalf. The cheque was not issued in personal capacity. Therefore, it was imperative to add the company as an accused.

13. In the case of **Dilip Hariramani Vs. Bank of Baroda** (Supra), the appellant was convicted for offence under Section 138 of the Negotiable Instruments Act. The accused No.1 and 2 were partners of indebted firm. Term Loan Facility was provided to the partnership firm. The firm through its authorised signatory had issued three cheques which was dishonoured on presentation. Complaint was filed under Section 138 of the N.I. Act against partners of firm. It was held that, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) or (2) would not be liable and convicted as vicariously liable. The provisions of Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence as a principal accused, the persons mentioned in subsection (1) or (2) would not be liable and convicted as vicariously liable.

14. In the case of **Ramesh Nagarkoti Vs. Kedar Datt Purohit** (supra) it was held that, if the cheque is issued by the firm which is subsequently dishonoured, a partner of the firm would not be liable for prosecution without the firm being arraigned as an accused.

15. In the case of **Upasana Mishra Vs. Trek Technology India Pvt. Ltd.** (supra), the apex Court had observed that, in the notice of demand made under N.I. Act demand shall not be omnibus. There must be clear demand. In the case of **Suman Sethi Vs. Ajay K. Churiwal and Ors**. (supra) held that notice has to be read as a whole. Demand has to be made for cheque amount.

16. In the case of **Sharad Kumar Sanghi Vs. Sangita Rane** (supra), it is observed that when a company has not been arrayed as a party, no proceedings can be initiated against it even where vicarious liability is fastened on certain statutes. In the case of **Rangabashyam and Ors. Vs. Ramesh** (supra) the cheque was issued in the name of partnership firm and after it was dishonoured no notice was issued to firm and the partnership firm was not made as an accused in the complaint only partners were made accused. Such complaint is not maintainable. In the case of **Anil Gupta Vs. Star India Pvt. Ltd.** (supra) the Apex Court reiterated the law laid down in the case of **Aneeta Hada and Ors.** (supra).

17. The aforesaid decisions relied upon by petitioner are decided in facts of respective cases and are of no assistance to accept the submissions of learned Advocate for Petitioner in the present case. The decisions in the case of K.P.G. Nair Vs. Jindal Menthol India Ltd. (supra); Shri Hari Shamsheer Kaushik Vs. Shri Jasbir Singh; Sunil Todi and Ors. Vs. State of Gujarat and Ors. (supra); P. J. Agro Tech Limited and Ors. Vs. Water Base Limited. (supra) and Krishna Kumar Dokania Vs. State of Jharkhand and Ors.[12] cannot be applied to the facts of this case.

18. In the case of **Mainuddin Abdul Sattar Shaikh Vs. Vijay d. Salvi** (supra) factual matrix indicated that, the complainant had book a flat which was to be developed through accused. In acknowledgment of the amount, the accused issued receipts to the complainant. The cheque was drawn by him in his individual capacity and not in the capacity as a director of developer or as proprietor of the developers. The cheque was dishonoured. The accused was acquitted by the trial Court on the ground that, the company was not made as an accused and the accused was impleaded in his personal capacity. The cheque could not be said to have been issued for the discharge of whole or part of the liability. The contention of the complainant before the Apex Court was that, it is the drawer of the cheque who is made punishable for offence under Section

12 MANU/JH/0374/2022

138 of the NI Act. The cheque in question was drawn by the accused and not by the Company of which he is the Managing Director. The cheque was drawn by him in his personal capacity on an account maintained by him with his Banker. The Courts have wrongly concluded that notices under Section 138(b) of the N.I. Act were sent to all the Directors of the Company. The issue involved in the case before the Apex Court was whether the accused can be made liable in his personal capacity when the Company has not been made a party to the complaint. The Apex Court observed that, bare reading of Section 138 of the N.I. Act, the following essentials have to be met for attracting a liability under the Section. The first and foremost being that the person who is to be made liable should be the drawer of the cheque and should have drawn the cheque 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 discharge in whole or part, of any debt or other liability. The accused in that case is drawer of cheque on bank account maintained by him. Where the cheque drawn by the employee of the appellant-company on his personal account, even if it be for discharging dues of the appellant-company and its Directors, the appellant-company and its Directors cannot be made liable under Section 138 of the NI Act. The aforesaid decision is clearly applicable in the present case. The petitioner has issued a cheque in his individual capacity. The cheque was not issued from the account of the partnership firm. It was not necessary to

implead the firm as party by invoking Section 141 of N.I. Act.

19. Learned Advocate for Petitioner further submitted that, in the aforesaid decision the accused had shouldered responsibility. It is further submitted that while deciding the aforesaid decision, the Court had not referred to the decision in the case of **Aneeta Hada and Ors.** (supra) which was delivered by larger Bench. The decision is *per incuriam*.

20. The submissions cannot be accepted. The decision clearly deals with the facts of the case and interpretation of section 141 of the Negotiable Instruments Act.

21. Thus, I am of the considered opinion that non-joinder of partnership firm would not vitiate the proceedings on the ground of infraction of Section 141 of Negotiable Instruments Act. Hence, the petition is required to be dismissed.

ORDER

(i) Criminal Writ Petition No. 2643 of 2022 stands dismissed and disposed off.

(ii) At this stage, the learned Advocate for petitioner submitted that, the petitioner is intending to challenge the order before the higher Court and therefore, interim order granted by this Court may be extended by four weeks.

(iii) Learned Advocate appearing for Respondent

No.2/complainant opposed the prayer for extention of interim relief.

(iv) Considering the fact that, the petitioner intends to challenge this order in the higher Court, interim order is extended by four weeks from the date of uploading this order.

(PRAKASH D. NAIK, J.)