



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 5267 OF 2022

SHISHIR AGARWAL

.. PETITIONER

VS.

BRESCON PARTNERS LLP AND ANR

..RESPONDENTS

Mr. Subodh Desai i/b Mr. Kartik Garg, for the Petitioner.

Mr. Aditya Mehta, for Respondent No.1.

Ms. S. D. Shinde, APP for the State- Respondent No.2.

CORAM : M. S. KARNIK, J.

DATE : FEBRUARY 06, 2024

JUDGMENT :

1. Heard learned counsel for the petitioner, learned counsel for the respondent no.1 and learned APP for the State.

2. The challenge in this petition is to an order dated 09/03/2020 passed by the Metropolitan Magistrate, 58th Court, Bandra, Mumbai issuing process against the petitioner. The order issuing process was challenged by the petitioner by way of Criminal Revision Application No. 143 of 2021. The Criminal Revision Application was dismissed by the Sessions Court on 23/10/2021. The order dated 23/10/2021 passed by the Sessions Court dismissing the Criminal Revision Application is also under challenge.

3. Learned counsel for the respondent no.1 raised a preliminary objection that the present petition suffers from delay and laches. It is submitted that process was issued by the trial Court in March 2020. The Revision was filed in October 2021. The Revision was dismissed on 23/10/2021. The present Writ Petition was filed on 20/11/2022 almost after 13 months. The delay is explained in paragraph 11 of the writ petition. Responding to this explanation, learned counsel for the respondent no.1 submits that when the petitioner is stated to be indisposed and claimed to be in Kolkata, the petitioner was in fact attending the proceedings in some other criminal cases in Mumbai. It is therefore contended that the explanation is not at all satisfactory. I am not inclined to uphold the objection of learned counsel for the respondent no.1 as I find that the writ petition does not suffer from delay and laches. No prejudice is caused to the respondent no.1 if the revisional Court's order is challenged at this juncture. It is the petitioner who is facing a criminal prosecution and hence I proceeded to examine the petition on merits.

4. So far as the merits are concerned, suffice it to

observe that 4 cheques in question which are subject matter of the offence amounting to Rs. 17,67,50,000/- have been issued from a joint account maintained by the petitioner and his father- Ashok Agarwal. The cheques are admittedly signed only by the petitioner's father i.e. Ashok Kumar Agarwal. The account in question was a joint account in the name of the petitioner and his father.

5. In ¹**Aparna A. Shah Vs. Sheth Developers Private Limited and anr.**, the Hon'ble Supreme Court has in the context of the person who can be prosecuted under section 138, in paragraphs 27 & 28 has observed thus :

"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

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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."

6. Relevant to the controversy in the present case is also a decision of the Hon'ble Supreme Court in ²**Alka Khandu Avhad Vs. Amar Syamprasad Mishra and anr.** In paragraph 9, Their Lordships explained the conditions which are required to be satisfied before the person is prosecuted for the offence punishable under section 138 of the Negotiable Instruments Act, 1881 ("NI Act", for short). In paragraph 10, it is observed that if a person who might have

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been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and he was a signatory to the cheque. Paragraphs 9, 10, 11 and 12 makes a profitable reading and hence reproduced :

“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 account.

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.

11. Now, so far as the case on behalf of the original complainant that the appellant herein-original Accused 2 can be convicted with the aid of Section 141 of the NI Act is concerned, the aforesaid has no substance.

12. Section 141 of the NI Act is relating to the offence by companies and it cannot be made applicable to the individuals. The 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 read with Section 141 of the NI Act. The criminal complaint filed against the appellant for the offence punishable under Section 138 read with 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."

7. Learned counsel for the respondent no.1 made a strenuous effort to contend that the aforesaid decisions are distinguishable on facts as they do not deal with a situation where cheques are issued as a consequence of a Memorandum of Understanding ("MoU", for short) executed between the parties acknowledging the debt. My attention

is invited to the MoU dated 31/01/2019 between the present respondent no.1 on one hand and the petitioner as well the signatory of the cheque-Shri Ashok Agarwal on the other. Learned counsel submitted that the recitals clearly indicate that the petitioner as well as his father signed the agreement in their capacity as Directors, authorised representatives and partners. It is submitted that the cheques are issued pursuant to the obligation which is created on the partners by virtue of the said MoU. Inviting my attention to clause (h) of the said MoU, it is submitted that the parties agreed that towards payment of the unpaid sum, the party of the first part also issued cheques for payment for the unpaid sum, on assurance to the party of the second part that the cheques will be honoured as set out in Annexure 'A' to the MoU. Learned counsel therefore submitted that the execution of the MoU is a factor which distinguishes the decisions relied upon in support of the petitioner's case.

8. In my opinion, the submission of learned counsel for the respondent no.1 cannot be accepted. The consequence of the joint account holder not being a signatory to the

cheques has been dealt with and clearly explained in **Aparna A. Shah** (*supra*) as well as in **Alka Khandu Avhad** (*supra*). The answer to the submissions of learned counsel for the respondent no.1 is in paragraph 12 of **Alka Khandu Avhad** (*supra*).

9. It is not disputed that the petitioner is not the signatory to the cheques and account in question was a joint account of the petitioner and his father who signed the cheques. As per MoU, the petitioner may be jointly liable to pay the debt. The consequences of the MoU will follow upon its enforcement in appropriate proceedings. The petitioner however cannot be prosecuted under section 138 of NI Act as the bank account though jointly maintained, the petitioner was not a signatory to the cheques.

10. In the light of what is observed hereinabove, the petition succeeds. Accordingly, the writ petition is allowed in terms of prayer clause (a) so far as the petitioner is concerned.

(M. S. KARNIK, J.)