IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL WRIT PETITION NO.186 OF 2024

PETITIONER : Mrs. Monica W/o Nirav Shah,
Aged 46 years, Occ. Housewife,
Presently R/o 4, Pushpa Barkha, 97 S V Road, Thar West, Mumbai.
(ORI ACCUSED NO. 2)

..**VERSUS**..

RESPONDENT : The Dharampeth Mahila Multi State Co-Operative Society Ltd, Nagpur (Earlier Known as The Dharampeth Mahila Urban Credit Co Operative Society Ltd.) having its head office at Swamy Arcade, Laxmi Bhawan Chowk, West High Court Road, Dharampeth, Nagpur- 10 through its court agent Shri Rajesh Nilkantrao Sathwane aged about 55 Yrs, Occ service, R/o Nagpur.
(ORI COMPLAINANT)

Mr S. S. Sitani, Advocate for Petitioner.
Mr A. Tripathi, Advocate for Respondent.

CORAM : M. W. CHANDWANI, J.
DATE : 6th MAY, 2024.

ORAL JUDGMENT

. Heard.

2. **Rule**. Rule made returnable forthwith. Heard finally by consent of the learned counsels appearing for the parties.

3. The petition seeks quashing and setting aside of the order dated 13.04.2017 passed below Exhibit-1 by the learned Judicial Magistrate First Class, Nagpur, in S.C.C. No.16088 of 2016, thereby issuing process against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

4. Shorning of unnecessary details, the case is as follows :

The respondent – State Co-operative Society Limited, Nagpur, filed a criminal complaint bearing S.C.C. No.16088 of 2016 against the petitioner as well as her husband for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, “the N.I. Act”). The Co-operative Society had advanced a loan to the tune of Rs.2,75,00,000/- to the husband of the petitioner. The petitioner as well as one Mr Vishal Tilakraj Malik stood guarantors to the said loan transaction. It is further submitted that the husband of the petitioner issued a cheque bearing No.003542 dated 10.08.2016 amounting to Rs.10,00,000/- drawn on Kotak Mahindra Bank, Santacruz (W), Mumbai, signed by him being joint account holder alongwith the petitioner, which came to be dishonoured. In-spite of issuance of statutory notice, the petitioner, her husband and Vishal did not pay the amount, therefore, the aforesaid complaint came to be filed against them. The learned Trial Court issued the process against the petitioner and her husband and drafted the proceedings against Vishal. Feeling aggrieved with the order of issuance of process, the present petition came to be filed.

5. Mr S. S. Sitani, learned counsel appearing for the petitioner, would submit that the petitioner is the wife of Mr Nirav Pravin Shah, who allegedly took a loan to the tune of Rs.2,75,00,000/- from the respondent – Co-operative Society. The petitioner and her husband are the joint account holder in Kotak Mahindra Bank. The cheque in question is signed by the husband of the petitioner. The petitioner is not a signatory to the said cheque in question. Just because the petitioner is the joint account holder alongwith her husband in Kotak Mahindra Bank, she cannot be held liable for the cheque issued and signed by her husband. She is not the drawer of the said cheque, therefore, the learned Trial Court should not have issued the process against the

petitioner. To buttress his submission, he seeks to rely on the decision of the Hon'ble Supreme Court in the case of ***Aparna A. Shah vs. Sheth Developers Private Limited and Anr***, ***(2013) 8 SCC 71***.

6. Per contra, Mr A. Tripathi, learned counsel appearing for the respondent, submits that a presumption cannot be made that the signatory is liable for the punishment under Section 138 of the N.I. Act. According to him, it is not the signatory who is made liable, but it is the person who issued the cheque is liable for punishment under Section 138 of the N.I. Act. The person, who draws a cheque on the bank for payment of legal dischargeable liability shall be held liable under Section 138 of the N.I. Act.

7. Mr Tripathi, learned counsel for respondent, took me to the definition of person enumerated under Section 3(42) of the General Clauses Act, 1987 submitting that "person" includes body of individuals and therefore, the petitioner, who holds the joint account and also the co-borrower, is liable for punishment under Section 138 of the N.I. Act. He supported the impugned order and sought rejection of the petition.

8. This takes me to Section 138 of the N.I. Act. In order to constitute an offence under Section 138 of the N.I. Act, a person must have drawn a cheque on an account maintained by him with a banker for payment of any amount of money to another person out of that account. Thus, a person, who draws the cheque, is liable for punishment under Section 138 of the N.I. Act. The person mentioned in Section 138 of the N.I. Act, is qualified as a person who has drawn the cheque, thus it is not any person but the drawer of the cheque who is liable for punishment under Section 138 of the N.I. Act. Therefore, I do not find force in the argument of Mr Tripathi, learned counsel for respondent.

9. The word "drawer" is defined under Section 7 of the Negotiable Instruments Act, which reads as under :

> *"**7. Drawer.**- The maker of a bill of exchange or cheque is called the drawer. …"*

10. Evidently, the petitioner is not the maker of the cheque, therefore, she is not the drawer of the said cheque. The identical issue came up for consideration before the Hon'ble Supreme Court in the case of ***Aparna A. Shah*** (supra), which is relied upon by the learned counsel for the petitioner, wherein the Hon'ble

Supreme Court in Paras 27 and 28 has held as under :

> ***"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 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 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 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."

11. Thus, what is deduced from the aforesaid Authority is that a joint account holder cannot be prosecuted for the offence punishable under Section 138 of the N.I. Act, unless the cheque has been signed by each and every person, who is joint account holder. No doubt that there is an exception to the rule, which is prescribed under Section 141 of the N.I. Act, which also covers the case argued by the learned counsel for the respondent, but no where it is the case of respondent – Co-operative Society in the criminal complaint that the petitioner and her husband took a loan and issued a cheque as a body of individuals, therefore, the argument of the learned counsel for respondent does not hold water.

12. In light of the above discussion and in my considered opinion, the case in hand is squarely covered by the decision of the Hon'ble Supreme Court in the case of ***Aparna A. Shah*** (supra). The continuation of process against the petitioner will be nothing but an abuse of the process of law. Therefore, the impugned order dated 13.04.2017 passed by the learned JMFC, Nagpur, in S.C.C.

No.16088 of 2016, issuing the process against the petitioner, does not stand and the same is hereby quashed and set aside.

13. The rule is made absolute in above terms.

(M. W. CHANDWANI, J.)

TAMBE