



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 19.03.2024

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CRL.M.C. 153/2023 & CRL.M.A. 632/2023

SAURABH KASHYAP

..... Petitioner

Through: Mr. Milind Srivastava, Advocate.

Versus

SUNIL GOSWAMI

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. The present petition has been instituted under Section 482 Cr.P.C., whereby the petitioner seeks quashing of the Criminal Complaint No.688/2016 (new No. 954/2017) instituted under Section 138 and 142 of the Negotiable Instruments Act (hereinafter, '*NI Act*') pending in the Court of learned MM (Shahdara), Karkardooma Courts, Delhi as well as order dated 14.07.2017 vide which the petitioner has been summoned in the aforesaid criminal complaint.

2. Notice in the present petition came to be issued vide order dated 11.01.2023, whereafter on 12.04.2023, the respondent was represented through his counsel, who sought time to file reply. The petition has thereafter been listed twice i.e. on 02.08.2023 and 20.11.2023, but neither the respondent has been represented on these dates nor has any reply been filed on his behalf. Even today, the respondent remains unrepresented. Accordingly, the Court has proceeded to hear the petition and adjudicate upon the contentions raised by the learned counsel for the petitioner.



3. The facts, as discernible from the record, are that the respondent had preferred the aforesaid criminal complaint, thereby alleging that the petitioner, whom he had known for about two years, approached him with an investment plan, wherein the respondent would have to invest monies in certain construction works on the pretext of yielding great profit. It was further alleged that on 16.04.2016, the petitioner approached the respondent and informed that he was constructing the house of one *Vinod Pandit* at H-12, Mansarovar Park, Delhi and in case the respondent would invest a sum of Rs.12 lacs, then whatever profit would be received by the petitioner, would be divided based upon the invested amount. Resultantly, the respondent invested a sum of Rs.12 lacs, however, after about a month or so when the petitioner was unable to complete the construction of the said house, the respondent demanded his money back. The petitioner, in discharge of his liability, handed over a cheque bearing number 057097 dated 16.06.2016 for a sum of Rs.12 lacs drawn on ICICI Bank, Hargovind Enclave, Delhi. The said cheque, when presented for encashment, was dishonoured with the remark 'insufficient funds' vide return memo dated 11.07.2016. Upon the request of the petitioner, the cheque was again presented for encashment, however, it was again dishonoured with the remark 'insufficient funds' vide return memo dated 10.08.2016. Consequently, the respondent issued a demand notice dated 09.09.2016 asking the petitioner to pay the sum under the cheque. However, upon his failure to repay the said amount, the aforesaid criminal complaint came to be filed.

4. The present petition is premised on the ground that the subject cheque, a copy of which has been placed on record, was issued from the



account of *M/s Sauteek Infrastructure Co. Pvt. Ltd.* (hereinafter, '*the company*') and the same was signed by the petitioner in the capacity of an authorized signatory. However, the respondent has neither issued any demand notice to the company nor has he impleaded the company in the criminal complaint. Thus, it is contended that the criminal proceedings initiated against the petitioner are liable to be set aside. In support of his submissions, attention of the Court has been invited to the printout of the Company Master Data from Ministry of Corporate Affairs website, which shows the present petitioner along with one *Prateek Kumar Sawhney* as Directors/Signatory of the said company. Notably, the respondent himself had placed the aforementioned master data record alongwith his complaint.

5. I have heard learned counsel for the petitioner and have also gone through the entire material placed on record including the criminal complaint along with its annexures.

6. Indisputably, the subject cheque relates to the account maintained by the company with ICICI Bank and has been signed by the petitioner in the capacity of an authorized signatory. The mandate of Section 138 NI Act requires that a notice of dishonour be issued to the drawer of the cheque, which in the present case is the company. Along with the present petition, the legal demand notice dated 09.09.2016 (Ex.CW1/F) has also been placed on record. The same has been issued to the petitioner, in his individual capacity, and the criminal complaint has also been filed under Sections 138 and 142 NI Act against the petitioner only.

7. The question arising for consideration is whether the respondent was required to array the company as an accused considering that the company was the drawer of the cheque, and that the same had been signed by the



authorized signatories of the company.

8. In N. Harihara Krishnan v. J. Thomas¹, the Supreme Court observed as under:-

“xxx

26. The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are : (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

27. By the nature of the offence under Section 138 of the Act, the

¹ (2018) 13 SCC 663



first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of the Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide “cause of action for prosecution”. Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint.

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9. Positive reference may also be made to the Supreme Court decision in Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.², wherein while

² (2012) 5 SCC 661



dealing with the issue of vicarious liability w.r.t cheque issued by the company, it was observed:-

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58. *Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.*

59. *In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself...*

xxx”

Further, in Himanshu v. B. Shivamurthy & Ors.³, the Supreme Court observed as under:-

“xxx

13. *In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High*

³ (2019) 3 SCC 797,



Court was in error in holding that the company could now be arraigned as an accused.

xxx”

10. Indisputably, the legal position is clear that the company which is the drawer of the cheque, needs to be arrayed as an accused and its authorized signatory can only be made liable vicariously. Further, as per the law propounded by the Supreme Court in Aneeta Hada (Supra), in such situations, wherein the company is the drawer of the cheque, impleadment of the company as an accused is mandatory and failure to do so, leads to a fatal defect in the complaint under Section 138 NI Act itself.

11. In the present case, neither the legal notice was issued to the company nor was it impleaded as a party in the abovementioned complaint. Only the petitioner has been issued the notice and made a party in the complaint. Insofar as the offence under Section 138 NI Act is concerned, the company is indisputably the drawer of the cheque whereas the petitioner can only be made vicariously liable. Since the respondent has failed to implead the company as an accused, the complaint under Section 138 is defective and the same cannot be allowed to continue. Consequently, the petition is allowed and the complaint is quashed. As a necessary sequitur, the summoning order dated 14.07.2017 is also set aside. Pending application is disposed of as infructuous.

12. A copy of this order be also communicated to the learned Trial Court.

MANOJ KUMAR OHRI
(JUDGE)



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By: NIJAMUDDIN ANSARI
Signing Date: 03/04/2024
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