$~20

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

\+ **<u>CRL.M.C. 3541/2019& CRL.M.A. 31733/2019</u>**

ASHOK KUMAR .....Petitioner

Through: Mr. Vaibhav Sethi and Ms. Roma Bedi, Advs.

versus

STATE & ANR .....Respondents

Through: Mr. Ajay Vikram Singh, APP for the State with Ms. Dhruvi Kinger and Ms. Pooja, Advs.
Mr. Mayank Mikhail Mukherjee and Mr. Ujjwal Singh, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

O R D E R

% 08.05.2024

1. The present petition is filed under Section 482 of the Code of Criminal Procedure, 1973 (‘**CrPC**’) challenging the order dated 09.04.2019 passed by the learned Sessions Judge, Saket Court, New Delhi whereby the learned Sessions Judge has dismissed the revision petition bearing no. 66/2019 titled as *‘Ashok Kumar vs Anuradha Agarwal’*. The learned Sessions Judge has upheld the order dated 07.04.2018 and 05.09.2018 passed by the learned Trial Court in CC No. 616296/2016 titled as *‘Anuradha Agarwal vs Kassa Finvest & Ors.’*

2. It is alleged that the complainant is business-women and the Accused No. 1 company through one Shri. Nitin Aggarwal,

the alleged vice president of the Accused No. 1 company approached the complainant in the month of April 2014, complainant opened a trading account with the Accused No. 1 company and was also assigned client code bearing No.CX0895 by NSE, which was confirmed by the accused no. l company *vide* a letter dated 23.05.2014.

3. It was alleged in the complaint that the amount deposited in the margin account was to be returned after an expiry of one year with interest of 18% p.a. as loyalty bonus on the unused margin. It is alleged that she deposited a sum of Rs.8 lakhs *vide* cheque no. 831755 to the accused as margin.

4. It is alleged that in the month of March 2015, the accused company started defaulting in its commitments. The complainant in the months of April 2015 allegedly made various visits in the Accused No. 1 company's office and the Petitioner herein issued a cheque bearing No. 215667 dated 22.05.2015, for a sum of Rs.8 lakhs to the complainant.

5. It is alleged that the said cheque was presented by the complainant and was returned back dishonoured *vide* memo dated 03.08.2015, with remarks '**Account Blocked**'.

6. After the said cheque was dishonoured, a legal demand notice dated 25.05.2015, was dispatched on 31.08.2015, which was allegedly served upon the accused persons including the Petitioner herein.

7. After receiving no response from the petitioner, the complainant filed a criminal complaint dated 15.10.2015, bearing no. 616296 of 2016 titled "*Anuradha Agarwal v. Kassa Finvest Pvt. Ltd. & Ors*." before the Ld. MM by the Complainant/Respondent No. 2 herein.

8. Subsequently, cognizance 138 Negotiable Instruments Act,

1881, (hereafter '**NI Act**') was taken and summons were issued to the Petitioner herein/Accused No. 2 in the Complaint on 15.03.2016, and further *vide* Order dated 22.10.2016, the Petitioner herein/Accused No. 2 therein was granted bail after furnishing bail personal bonds.

9. The learned Counsel for the petitioner submits that the account in question was blocked / frozen by the order dated 19.03.2015 by the order of SEBI and subsequently by Economic Offences Wing by order dated 24.04.2015

10. He submits that a written argument was filed before the learned Trial Court seeking discharge / dropping of the proceedings *qua* the petitioner. He submits that the cheque in question was a post-dated cheque.

11. He submits that the learned Trial Court *vide* Order dated 07.04.2018, has erroneously and without application of mind, rejected the arguments raised by the petitioner herein seeking discharge/dropping of proceedings against the petitioner, observing that there is no provision in Cr.P.C which permits dropping of proceedings under Section 251 of the Cr.P.C in a summons case and thereafter by order dated 05.09.2018 framed formal notice under Section 251 of Cr.P.C against the Petitioner for offence punishable under Section 138 NI Act.

12. He submits that subsequently the Petitioner preferred a Revision Petition bearing no. 66/2019, titled *Ashok Kumar v. Anuradha Aggarwal*. The learned Revisional Court by order dated 09.04.2019, dismissed the said revision petition which lead to filing of the present petition.

13. He submits that the learned Trial Court has erroneously relied upon the judgement of ***Subramanium Sethuraman v. State of Maharashtra*****: (2004) 13 SCC 324&*****Adalat Prasad v.***

Rooplal Jindal & Ors: **(2004) [illegible] SCC 338** to observe that it does not have the power to discharge /drop the proceedings in a summons case and gave a reasoning that the there is no provision in Cr.P.C for the same and further stated that once a process under Section 204 Cr.P.C has been issued, it cannot be recalled / reviewed or reconsidered.

14. He submits that the learned Trial Court had committed an error and failed to consider that the judgement in the case of***Adalat Prasad v. Rooplal Jindal & Ors*** (*supra*) is distinguishable and this Court in the Case of ***S.K. Bhalla v. State & Ors***: **180 (2011) DLT 219**, held that in cases where subsequent to summoning of the accused, if an accused makes an application of discharge at the stage of framing of notice under Section 251 of the CrPC, he may be discharged even in summons cases if the complaint doesn't disclose the commission of an offence.

15. He further submits that the application made by the petitioner for dropping of the proceedings against him mentioned that the cheque in question was dishonoured for the reason "Account Blocked" and the said Account was blocked under the directions of SEBI and later by the Economic Offences Wing. The cheque was dishonoured for the ostensible reason which is different from the one's provided under the act and was beyond the control of the petitioner.

16. He also submits that no legal notice was ever served upon the petitioner or on M/s Kassa Finvest Pvt. Ltd.

17. The learned Revisional Court also while placing reliance on the judgements in the case of ***Amit Sibal v. Arvind Kejriwal & Ors:*****(2018) 12 SCC 165**;***John Thomas v. Dr. K. Jagadeesan*****: Appeal (Crl.) 688 of 2001 decided on 12.07.2001**;and***Subramanium Sethuraman v. State of***

Maharashtra (*supra*) and held "*it can be said that in summons trial case, at the stage of framing of notice under Section 251 of the Code, learned trial court cannot discharge the accused. Further, proceedings cannot be stopped under Section 258 of the Code in complaint case. If learned trial court cannot discharge the accused at the stage of framing charge under Section 251 of the Code and it cannot stop the proceedings under Section 258 of the Code, then revisional court cannot say that order of learned trial court suffers from illegality and impropriety etc. as mentioned in Section 397 of the code. Hence, revision is dismissed*."

18. The NI Act is a special law which was enacted for the purpose of speedy adjudication of the cases in relations to dishonour of the cheque. The purpose of the same was to instil the confidence of the public in the banking system. The provisions are attracted when a person draws a cheque from an account maintained by him in a bank for payment of certain amount for the discharge of any debt or liability.

19. The necessary ingredients of the offence under Section 138 of the NI Act have been noticed by the Supreme Court in *Kusum Ingots & Alloys Ltd.* v. *Pennar Peterson Securities Ltd.*, (2000) 2 SCC 745 and the same read as follows:—

> "*(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;*
> *(ii) that 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;*
> *(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;*
> *(iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;
(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."

20. Thus, a person commits an offence under Section 138 of the NI Act when he draws a cheque from an account maintained by him in a bank for discharge of any debt or any liability and the cheque is returned unpaid for the reason of the insufficient credit in the account. It is an admitted case as stated in the complaint filed by the complainant before the learned Trial Court that the cheque was dishonoured for the reason that the account was blocked by the order of SEBI and subsequently by Economic Offences Wing.

21. The attachment of the bank account of the petitioner had the effect of disabling the petitioner from operating or maintaining the said account. The petitioner could not exercise his right either to make a deposit or withdraw any money from the said account.

22. The attachment of the bank account of the petitioner cannot be said to be a voluntarily act and it also cannot be said that the petitioner got the bank account purposely attached only for the purpose of warding of the penal consequences under Section 138 of the NI Act.

23. As stated above, a person commits an offence under Section 138 of the NI Act when he draws a cheque on an account maintained by him for discharge of any debt or liability and the said cheque is returned unpaid for the reason of insufficient funds. In the present case, the account of the petitioner was blocked / frozen even prior to the issuance of the cheque in

question. Thus, the said account at the time of issuance of cheque cannot be held to be maintained by him in the bank. Drawing a cheque for discharge of any debt or liability from an account which is not maintained by a person for the reason of it being frozen may amount to an offence under other statutes but cannot be termed as an offence under Section 138 of the NI Act.

Re: A coordinate bench of this Court in the case of ***Vijay Chaudhary v. Gyan Chand Jain***:**2008 SCC OnLine Del 554** held as under:

> *"….It also cannot be said that after the attachment of the bank account, the same was being maintained bythe petitioner. For an account to be maintained by an account holder, it is essential that he is in a position to operate the said account by either depositing monies therein or by withdrawing money therefrom. He should be in a position to give effective instructions to his banker with whom the account is maintained. However, in the present case, once the account has been attached by an order of the Court, the said account could not be operated by the petitioner. He could not have issue any binding instructions to his banker, and the banker was not obliged to honour any of his instructions in relation to the said account, so long as the attachment under the court orders continued."*

24. Thus, for an account to be called as maintained by the drawer, it is essential that the he is in a position to operate the said bank account by either depositing the money or withdrawing the money thereform. The account holder should be in a position to give effective instructions to his banker with whom the account is being maintained.

25. In the present case, once the bank account has been attached by an order of SEBI and subsequently by Economic Offence Wing, the same could not have been operated by the petitioner or be called to have been maintained by him.

26. For the aforementioned reasons, even if, the contents of the complaint are accepted, no offence under Section 138 of the NI Act can be said to have been committed by the petitioner.

27. Since with consent of the parties, the arguments are heard on merits, this Court does not consider it apposite to delve on the issue of maintainability of the revision petition filed by the petitioner before the learned ASJ.

28. In view of the above, the present petition is allowed and the complaint filed by the respondent before the learned Metropolitan Magistrate for offence under Section 138 of the NI Act is quashed.

AMIT MAHAJAN, J

MAY 8, 2024