

HIGH COURT OF DELHI**Bench: HON'BLE MR. JUSTICE SAURABH BANERJEE****Date of Decision: December 6, 2023**

CRL.M.C. 2842/2021 & CRL.M.A. 17916/2021

ARUSHI GUPTA**..... Petitioner****Versus****AJAY CHANANA****..... Respondent****Sections, Acts, Rules, and Articles mentioned in the judgment:**

Section 482 of the Code of Criminal Procedure, 1973

Section 138, 141 of the Negotiable Instruments Act, 1881

Section 3(42) of the General Clauses Act, 1897

Subject: Quashing of Complaint Case No. 4061/2020 under Section 138 of the Negotiable Instruments Act, 1881. The main issue was whether the petitioner could be impleaded as an accused under Section 138 of the Act for a dishonored cheque not drawn by her.

Headnotes:

Negotiable Instruments Act – Quashing of Complaint – Accused petitioner seeks quashing of Complaint Case No. 4061/2020 under Section 138 of the Negotiable Instruments Act, 1881 – Alleged dishonored cheque issued by petitioner's brother – Petitioner's contention that she is not the drawer of the cheque – Legal notice served, but payment not made – Whether petitioner can be impleaded as an accused under Section 138 of the Act – Examination of Section 138 and relevant case law – Court's opinion that the petitioner, not being the drawer of the cheque, cannot be held criminally liable – Prosecution can only continue against the drawer of the cheque – Quashing of complaint case as it pertains to the petitioner. [Para 1-14]

Referred Cases with Citations:

Aparna A. Shah vs. Sheth Developers Private Limited (2013) 8 SCC 71

Jugesh Sehgal vs. Shamsheer Singh Gogi, (2009) 14 SCC 683

Urmila Kumari vs. Rukmani Devi 2013 SCC OnLine Del 114

Alka Khandu Avhad vs. Amar Syamprasad Mishra 2021 (4) SCC 675

Representing Advocates:

Petitioner: Mr. Raghav Sharma and Mr. Ankit Kumar, Advocates

Respondent: Mr. Vikas Khatri, Advocate

J U D G M E N T

1. The petitioner, vide the present petition under Section 482 of the Code of Criminal Procedure, 1973 [**CrPC**], seeks quashing of Complaint Case No.4061/2020, CC NI ACT 118/2021 dated 11.12.2020 titled “**Ajay Chanana v. Ayush Gupta & Anr.**” under Section 138 of the Negotiable Instruments Act, 1881 [**Act**] qua the petitioner, pending before the learned MM (NI Act), Rohini Courts, Delhi [**MM**].
2. A perusal of the complaint reveals that the present Complaint Case emanates from a cheque, allegedly issued by the petitioner and her brother, bearing No.005532 dated 25.09.2020 for payment of a sum of Rs.37,50,000/- drawn on Axis Bank, Civil Lines, New Delhi-110054, in favour of the respondent/ complainant, in discharge of some liability. However, the aforesaid cheque, on presentation with the bank of respondent/ complainant, was dishonored due to '*Payment Stopped by Drawer*' and returned vide memo dated 09.10.2020.
3. Thereafter, the respondent duly served a legal notice dated 27.10.2020 upon the petitioner and her brother. However, the petitioner and her brother yet again failed to make the payment within the stipulated period. Hence, the petitioner proceeded with filing of the present complaint.
4. Learned counsel for the petitioner submits that the petitioner has been frivolously arrayed as an accused in the complaint and that the cheque from which the complaint case emanates, was neither drawn by the petitioner nor was issued from her bank account nor was it bearing her signatures. Reliance in this regard is placed upon **Aparna A. Shah vs. Sheth Developers Private Limited** (2013) 8 SCC 71; **Jugesh Sehgal vs. Shamsheer Singh Gogi**, (2009) 14 SCC 683, wherein it was held that under Section 138 of the Act, it is only the drawer of the cheque who can be prosecuted. Learned counsel for the petitioner, placing reliance upon **Urmila Kumari vs. Rukmani Devi** 2013 SCC OnLine Del 114, also submits that as the petitioner is not a joint-account holder, she cannot be made liable for the offence under Section 138 of the NIA.
5. Learned counsel appearing for the respondent on the other hand submits that the petitioner alongwith her brother was well aware of the present transaction and actively participated therein. He submits that the petitioner and her brother are Directors and shareholders of A.R. Restaurant Indian Pvt. Ltd., and also its authorized representatives. He further submits that prior to the impugned cheque, the petitioner has at multiple instances received payment from the respondent in garb of investment in the business they operated from the premises of the respondent, which the latter had taken on

rent. He also submits that the in light of arrears of rent mounting up, the respondent advanced to the petitioner and her brother a friendly-loan of Rs.37,50,000/-.

6. Learned counsel for the respondent also submits that the complainant in July, 2020 demanded the amount of Rs.37,50,000/-, which remain unpaid for long. It was only on receipt of the legal notice dated 27.10.2020, that the petitioner and her brother approached the complainant and tried to amicably settle the dispute. In pursuance of settlement, the impugned cheque was issued by the brother of the petitioner. In light of the factual matrix, the learned counsel for the respondent submits that the petitioner plays an inextricable role in the present complaint and the extent of her involvement can only be ascertained after trial. Therefore, quashing the impugned complaint would impair the trial qua the brother of the petitioner i.e., accused no.1.

7. This Court has heard the learned counsel(s) for the petitioner and the respondent and perused the documents on record as also the relevant judgments relied upon.

8. In the opinion of this Court, the primary issue for consideration is whether the petitioner herein would come within the ambit of Section 138 of the Act and be impleaded as an accused in the complaint before the learned MM. For a better appreciation of Section 138 of the Act, it is reproduced as under:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the account. *Where any cheque drawn by a person 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 the discharge, in whole or in part, of any debt or other liability, 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 by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless— (a) the 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;*

(b) the payee or the holder in due course of the cheque, as the case may be, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.- For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”

9. As per Section 138 of the Act, if the *drawer* of the cheque fails to make the payment on receipt of the legal notice, he is liable to be prosecuted under Section 138 of the Act. The „*drawer*“ of a cheque has been defined under Section 7 of the Act, which reads as under:-

“7. “Drawer”, “drawee”. The maker of a bill of exchange or cheque is called the “drawer”, the person thereby directed to pay is called the “drawee”.

10. In the present proceedings, *admittedly*, the impugned cheque has not been issued/ drawn by the petitioner and it has been issued by her brother from his bank account wherein the petitioner is not an account holder. As such, in view of the provisions of Section 138 of the Act, the petitioner, under the present circumstances, cannot be held liable for something not concerning her. Further, though the petitioner, along with her brother, is a Director, shareholder and authorised representative of an entity, *namely, A.R. Restaurant India Pvt. Ltd.*, however, the respondent has not filed any complaint against the said entity. In view thereof, the petitioner has hardly any role to play qua the cheque involved in the present dispute. Thus, the petitioner ought not to have been made an accused in the complaint by the respondent. More so, whence no vicarious liability can be fastened upon the petitioner. The scheme of the Act is such that the same is silent regarding taking cognizance against a person, other than the *drawer* of the cheque. Reliance in this regard be placed upon

Aparna A. Shah (supra), wherein the Hon’ble Supreme Court, held as under:-

“20. Mr. Mukul Rohtagi, learned senior counsel for respondent No.1, by drawing our attention to the definition of “person” in Section 3(42) of the General Clauses Act, 1897 submitted that in view of various circumstances mentioned, the appellant herein being wife, is liable for criminal prosecution. He also submitted that in view of the explanation in Section 141(2) of the N.I. Act, the appellant wife is being prosecuted as an association of individual. In our view, all the above contentions are unacceptable since it was never the case of respondent No.1 in the complaint filed before learned Magistrate that the appellant wife is being prosecuted as an association of individuals and, therefore, on this ground alone, the above submission is liable to be rejected. Since, this expression has not been defined, the same has to be interpreted ejusdem generis having regard to the purpose of the principle of vicarious liability incorporated in Section 141. The terms “complaint”, “persons” “association of persons” “company” and “directors” have been explained by this Court in Raghu Lakshminarayanan vs. Fine Tubes, (2007) 5 SCC 103.”

11. If the cheque in question is returned unpaid on account of the conditions mentioned under Section 138 of the Act, such person alone is liable to be prosecuted for the offence under Section 138 of the Act. The same is apparent from the phraseology „...*such person shall be deemed to have committed the offence...*’ used in Section 138 of the Act. Proceedings and prosecution can only continue against the drawer of the cheque as the penal provisions have to be strictly construed as they are. It is, thus, that nobody barring the drawer of the cheque can be held criminally liable otherwise. It is trite law that penal provisions should be construed strictly and the emphasis is on the words, „*such person*“ which relates to the person, who has drawn the cheque in favour of the *payee*.
12. Reliance in this regard be placed upon ***Alka Khandu Avhad vs. Amar Syamprasad Mishra*** 2021 (4) SCC 675, wherein the Hon’ble Supreme Court, after dealing with similar facts, held as under:-

“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 in 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 accused.*

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.”
13. In view of the aforesaid, the present petition is allowed and the Complaint Case No.4061/2020, CC NI ACT 118/2021 dated 11.12.2020 titled ***“Ajay Chanana vs. Ayush Gupta & Anr.”***, filed by the respondent/ complainant against the petitioner and the other accused under Section 138 of the Act, pending before the learned Metropolitan Magistrate (NI Act), Rohini Courts, Delhi, is quashed qua the accused no.2 therein i.e. the petitioner herein.

14. Accordingly, the present petition alongwith the application, if any, is disposed of in the above terms.

© All Rights Reserved @ LAWYER E NEWS

*Disclaimer: Always compare with the original copy of judgment from the official website.