

ALKA KHANDU AVHAD

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v.

AMAR SYAMPRASAD MISHRA & ANR.

(Criminal Appeal No.258 of 2021)

MARCH 08, 2021

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**[DR. DHANANJAYA Y. CHANDRACHUD AND
M. R. SHAH, JJ.]**

Negotiable Instruments Act, 1881 – s.138 r/w S.141 – Complaint filed against appellant – High Court refused to quash the same – On appeal, held: Dishonoured cheque was issued by original accused no.1-husband of the appellant – It was drawn on his bank account and was signed by him – Appellant-original accused no.2 was neither the signatory to the cheque nor the dishonoured cheque was drawn from her bank account – Account in question was not a joint account – s.138 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 offence u/s.138 – Appellant cannot be convicted with the aid of s.141 either – High Court committed grave error in not quashing the complaint against the appellant – Impugned judgment set aside – Complaint case filed by respondent no.1-original complainant is quashed.

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Allowing the appeal, the Court

Held: 1.1 The dishonoured cheque was issued by original accused No. 1 – husband of the appellant. It was drawn from the bank account of original accused No. 1. The dishonoured cheque was signed by original accused No. 1. The appellant herein-original accused No. 2 is neither the signatory to the cheque nor the dishonoured cheque was drawn from her bank account. That the account in question was not a joint account. 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: i) that the cheque is drawn by a person and on an account maintained by him with a banker; ii) for the payment of any amount of money to

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- A another person from out of that account for the discharge, in whole or in part, of any debt or other liability; and iii) 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. 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. [Paras 6,7][637-G-H; 638-A-G]
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- 1.2 Section 141 of the NI Act is relating to the offence by companies and it cannot be made applicable to the individuals. 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 r/w Section 141 of the NI Act. The impugned judgment and order dated 21.08.2019 passed by the High Court refusing to quash the criminal complaint against the appellant for the offence
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punishable under Section 138 read with Section 141 of the NI Act is hereby quashed and set aside. The complaint case pending in the Court of the learned Metropolitan Magistrate filed by respondent No.1 – original complainant being C.C. No. 2802/SS/2016 is hereby quashed and set aside. [Paras 8, 8.1][639-A-F]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 258 of 2021

From the Judgment and Order dated 21.08.2019 of the High Court of Judicature at Bombay in Cr. Writ Petition No. 2595 of 2019.

Samarth S. Karmarkar, Jamnesh Kumar, Ms. Supriyanka Karmarkar, Himanshu Shekhar, Advs. for the Appellant.

Zulfiker Ali P. S, Adv. for the Respondents.

The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 21.08.2019 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 2595 of 2019, by which the High Court has dismissed the said application preferred by the appellant herein under Article 226 of the Constitution of India and has refused to quash the complaint filed against the appellant for the offences punishable under Section 138 r/w Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the ‘NI Act’), the original accused No. 2 has preferred the present appeal.

2. That respondent No. 1 herein has filed a criminal complaint against the appellant and her husband for the offences punishable under Section 138 r/w Section 141 of the NI Act in the Court of the learned Metropolitan Magistrate, 43rd Court at Borivali, Mumbai, which has been numbered as C.C. No. 2802/SS/2016. That respondent No. 1 – original complaint (hereinafter referred to as ‘the original complainant’) is a practicing advocate and partner in a solicitor firm in Mumbai. As per the case of the complainant, both the accused who are husband and wife, approached the original complaint in a legal matter. That the original complainant assisted accused Nos. 1 and 2 in preparing replies and notice of motion, conference, coordinating with counsel, filing Vakalatnamas and appearing through advocates’ office and also as counsel in Summary Suit. That the original complainant raised a professional bill for the legal

A work done by him to represent accused Nos. 1 and 2 in the legal proceedings. That, thereafter, original accused No. 1 – husband of the appellant herein handed over to the complainant a post-dated cheque dated 15.03.2016 bearing No.227050 drawn on Union Bank of India for Rs.8,62,000/-. The said cheque was presented for encashment and the same came to be returned unpaid with the endorsement “funds insufficient”. That, thereafter, the original complainant served a legal notice dated 21.05.2016 calling upon the accused to pay the amount of Rs.8,62,000/- within 15 days from the date of receipt of the said notice. That the said notice was duly served upon the accused, however, the accused neither replied the said notice nor made the payment of the aforesaid dishonoured cheque. Therefore, the complainant filed a complaint against both the accused – husband and wife for the offence punishable under Section 138 of the NI Act. That the learned Metropolitan Magistrate, 43rd Court, Borivali, Mumbai directed to issue process against both the accused for the offence punishable under Sections 138 r/w Section 141 of the NI Act.

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2.1 That, thereafter, the appellant herein – original accused No. 2, wife of the original accused No. 1 filed Criminal Writ Petition No. 2595 of 2019 in the High Court to quash the criminal complaint filed against her mainly on the ground that the appellant was neither a signatory to the cheque dishonoured nor there was a joint bank account.

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2.2 It was further submitted that the appellant cannot be prosecuted for the offence punishable under Sections 138 r/w Section 141 of the NI Act.

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2.3 However, it was the case on behalf of the original complainant that it was the joint liability of both the accused Nos. 1 and 2 to pay the professional bill as the original complainant represented both the accused and therefore considering Section 141 of the NI Act, the appellant herein – original accused No. 2 is also liable for the offence punishable under Section 138 r/w Section 141 of the NI Act.

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2.4 By the impugned judgment and order, the High Court has refused to quash the criminal complaint filed against the appellant, giving rise to the present appeal.

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3. Learned counsel appearing on behalf of the appellant has vehemently submitted that the dishonoured cheque was issued by her husband and not the appellant and even the account in question was not

a joint account and that the appellant was neither the signatory to the cheque nor the cheque was drawn from the bank account of the appellant and therefore the appellant cannot be prosecuted for the offence punishable under Section 138 of the NI Act. It is vehemently submitted that the ingredients of Section 138 of the NI Act are not satisfied, and therefore, the High Court ought to have quashed the criminal complaint against the appellant.

3.1 It is further submitted by the learned counsel appearing on behalf of the appellant that, in the facts and circumstances of the case, even Section 141 of the NI Act shall not be applicable as the cheque was issued by a private individual.

4. The present appeal is vehemently opposed by the learned counsel appearing on behalf of respondent No. 1 – original complainant.

4.1 It is submitted that the liability to pay the debt towards the professional bill was the joint liability of both the accused as the complainant represented both the accused and, therefore, as rightly observed and held by the High Court, Section 141 of the NI Act shall be applicable.

4.2 It is submitted that when the Trial Court issued the summons against the appellant for the offence punishable under Section 138 r/w Section 141 of the NI Act after having come to the conclusion that a *prima facie* case has been made out, the High Court has rightly refused to quash the criminal complaint.

4.3 It is further submitted that as the cheque was issued towards discharge of legal liability of both the accused and thereafter when her husband issued the cheque, the High Court has rightly refused to quash the complaint.

5. Learned counsel appearing on behalf of the State has supported the impugned judgment and order passed by the High Court.

6. We have heard learned counsel appearing on behalf of the respective parties at length, considered material on record and also considered the averments and allegations in the complaint. It emerges from the record that the dishonoured cheque was issued by original accused No. 1 – husband of the appellant. It was drawn from the bank account of original accused No. 1. The dishonoured cheque was signed by original accused No. 1. Therefore, the dishonoured cheque was signed

- A by original accused No. 1 and it was drawn on the bank account of original accused No. 1. The appellant herein-original accused No. 2 is neither the signatory to the cheque nor the dishonoured cheque was drawn from her bank account. That the account in question was not a joint account. In the light of the aforesaid facts, it is required to be considered whether the appellant herein – original accused No. 2 can be prosecuted for the offence punishable under Section 138 r/w Section 141 of the NI Act?
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7. 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:

- C i) that the cheque is drawn by a person and on an account maintained by him with a banker;
- ii) 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; and
- D iii) 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.

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

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8.1 Section 141 of the NI Act is relating to the offence by companies and it cannot be made applicable to the individuals. 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 r/w Section 141 of the NI Act. The criminal complaint filed against the appellant for the offence punishable under Section 138 r/w 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.

In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order dated 21.08.2019 passed by the High Court in Criminal Writ Petition No. 2595 of 2019 refusing to quash the criminal complaint against the appellant for the offence punishable under Section 138 read with Section 141 of the NI Act is hereby quashed and set aside. The complaint case pending in the Court of the learned Metropolitan Magistrate filed by respondent No. 1 – original complainant being C.C. No. 2802/SS/2016 is hereby quashed and set aside. The appeal is allowed accordingly.