

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

+ CRL.M.C. 2348/2011

Date of Decision: 12.09.2012

DEEPSHIKA KUMARI Petitioner

**Through: Mr. Prashant Bhushan,
Advocate**

Versus

LEELA INFRASTRUCTURE & MINING PVT LTD .. Respondent

Through: Mr. Mohit Mathur, Adv.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J. (Oral)

1. This petition under Section 482 Cr. P.C. assails order dated 26.06.2010 and also seeks quashing of criminal complaint No. 463/2011 titled as "Leela Infrastructure & Mining Pvt. Ltd. Vs. Ms. Deepshikha Kumari", pending in the Court of Metropolitan Magistrate-03, South-West.

2. The petitioner is facing prosecution in the afore-said criminal complaint filed against her by the respondent under Section 138 of Negotiable Instruments Act (for short, 'the Act'), on the allegations that a cheque of Rs.2.5 crore, given by her towards discharge of her liabilities of self, and also as guarantor of her brother Shri Sangram Vijay Singh and sister Smt. Deepanjali Singh, was dishonoured on account of "insufficient funds" and, that she has not paid the cheque

amount despite legal notice dated 06.05.2010. The petition is filed for quashing of the aforesaid criminal complaint, as also the impugned order dated 26.06.2010 of the learned MM, whereby she has been ordered to be summoned. The grounds on which the quashing of the complaint and also the impugned order are sought are that the cheque in question was issued not towards discharge of any legally recoverable debt or liability for herself or as a guarantor, as alleged, for her brother and sister, but it was issued as a financial arrangement, that was arrived at between the parties by a Memorandum of Understanding (MOU) dated 05.10.2009. It was submitted that the presentation of the cheque in question was subject to contingency of encashment of cheque of Rs.75.00 lakh given by the respondent in the name of Smt. Madhuri Singh and, further the receipt of sale proceeds of the property bearing No. 54, Friends' Colony (East), New Delhi, in the account of the party of the First Part of the MOU. It was also submitted that the cheque in question was dated 05.10.2009, which was tampered with as dated 15.10.2009.

3. On the other hand, the submission of learned counsel for the respondent was that the cheque was given by the petitioner towards discharge of her liability and, that of other persons named in the MOU. It was submitted that as per Section 138 read with Section 139 of the Act, there was a presumption of the cheque having issued by the petitioner towards discharge of her legally recoverable debt or liability and thus, the onus to rebut the presumption was on the

petitioner. It was also submitted that the defence which was sought to be taken by the petitioner could not be gone into at this stage and, could only be proved by trial.

4. For better understanding the controversy, it may be briefly noted that undisputedly MOU dated 05.10.2009 was arrived at between the petitioner and her other family members (as party of the First Part), and the respondent through its Chairman (as party of the Second Part) and Smt. Madhuri Singh (as party of the Third Part i.e. the Confirming Party). There was some dispute between the parties of the First Part and the Third Part i.e. the Confirming Party with regard to property bearing No. 54, Friends' Colony (East), New Delhi. The parties of the First Part and the Third Part were having several litigations with regard to this property. Ultimately, a settlement was sought to be arrived at between the parties for the sale of this property to the party of the Second Part i.e. the respondent and, that is how this MOU came to be executed between the three parties. Since this MOU is not in dispute and is the genesis of the cheque in question, it would be instructive to extract the relevant parts of the said MOU as under:

“And whereas the Parties of the First Part and the Confirming Party have arrived at an amicable settlement whereby the said Confirming Party has agreed to withdraw her application, accept and confirm the relinquishment deed dated 28th November, 1988 and treat the Memorandum of Family Settlement as satisfied and implemented on payment of a sum of Rs. 75,00,000/- (Fupees Seventy Five Lacs only) which

amount the Parties of the First Part have agreed to pay to maintain family relations.

And Whereas the Party of the Second Part has agreed to finance the said payment of the Parties of the First Part, by release of the said amount on terms and conditions agreed upon.

NOW THEREFORE this Memorandum of Understanding records as under:

3. *That the Party of the Second Part has advanced and paid the said sum of Rs.75,00,000/- (Rupees Seventy Five Lacs only) to the Confirming Party vide cheque No. 825502 dated 3rd October, 2009 drawn on Central Bank of India, New Delhi South Extension, New Delhi-110049 at the request of the Parties of the First Part, to maintain cordial family ties with Parties of the First Part.*

4. *That it is agreed that an amount of Rs. 2,50,00,000/- (Rupees Two crores and Fifty Lacs only) will be paid by the Parties of the First Part to the Party of the Second Part from the sale proceeds of the property being 54, Friends Colony, East, New Delhi. The Parties of the First Part have handed over a cheque No. 948060 dated 5th October, 2009 for a sum of Rs. 2,50,00,000/- (Rupees Two crores and Fifty Lacs only) drawn on Syndicate Bank, Hauz Khas, New Delhi-110016 which Cheque will be presented for encashment by the Party of the Second Part only after the share of the sale proceeds of the property are received in the account of the Parties of the First Part.*

5. That the Party of the Second Part has represented that he has arrived at an understanding with Shri Biswajeet Singh and Smt. Vijay Kumari, Plaintiff and Defendant No. 3 respectively in Suit bearing C.S.(OS) No. 3235 of 1988 who jointly own 50 percent of the said property to purchase their collective share at the price of Rs.37,50,00,000/- (Rupees Thirty Seven crore Fifty Lacs only). The parties on the First Part on the said representation also agree and consent to sell their share to the Party of the Second Part at the same price, subject to deduction of a sum of Rs.2,50,00,000/- (Rupees Two crores and Fifty Lacs only) in the event of the Party of the Second part purchasing the entire property.

6. That it is represented by the Party of the Second Part that Shri Biswajeet Singh will file an application in C.S.(OS) No. 3235 of 1988 to the effect that he agrees to sell his share to the Party of the Second Part. It is agreed that on such an application being made, the Parties of the First Part will also consent to and agree to the sale of their share of the Property being 54, Friends Colony, East, New Delhi to the Party of the Second Part.

7. That this agreement is dependent upon the Confirming Party withdrawing her application No. 4552 of 2008 in C.S.(OS) No. 3235 of 1988 and confirming the validity and legality of the Relinquishment Deed dated

28th November, 1988 and on Shri Biswajeet Singh and Smt. Vijay Kumari agreeing in Court to sell their shares to the Party of the Second Part. “

5. From the above, it would be seen that cheque in question dated 5th October, 2009, given by the petitioner was to be presented by the respondent not only on the contingency of the sale of the share of the persons of the First Part, but after the receipt of the sale proceeds in their account. Further, the sale of their share was also subject to the other shareholder Biswajeet Singh agreeing to sell his share in the property in the manner as stipulated in Clause 6, as noted above. Not only this, this was also subject to the payment of cheque of Rs.75.00 lakh by the respondent to the Confirming Party as stipulated in Clause 3 above. Still further, as per Clauses 3 and 7 of the MOU, the entire agreement was dependent upon the Confirming Party taking steps in the civil suit that was pending in this Court and, both Biswajeet Singh and Vijaya Kumari agreeing in the Court to sell their shares to the second party i.e. the respondent. From this, it would be apparently seen that the cheque in question was not given in discharge of any debt or liability, but as a financial arrangement and, was contingent upon the happening of all that was stipulated in the MOU.

6. In fact, the respondent had also, in his complaint, admitted all these facts. Para 3 of the complaint makes the things crystal clear, in that according to the respondent also, the cheque in question was

given not towards any existing debt or liability; but for the purpose of securing sale of share of the party of the first part to the MOU; and which was also subject to the happening of certain events as stipulated in the MOU, as noted above, Para 3 of the complaint reads thus:

“That accused for herself, on behalf of her brother Sh. Sangram Vijay Singh and Smt. Deepanjali Singh approached the complainant to finance a sum of Rs.75 lacs to them, which was to be paid to Smt. Madhuri Singh in settlement towards the satisfaction of her claim over the property so that the said property can be disposed off. The accused represented to the complainant that in consideration of its financing of Rs. 75 lacs and in consideration of their efforts and help to them, accused, her brother Sh. Sangram Vijay Singh and Smt. Deepanjali Singh agreed to pay Rs. 2.5 crores from the sale proceeds of the aforesaid property to the complainant. In order to make the complainant to believe her version, accused, for herself and guarantor of her brother Sh. Sangram Vijay Singh and Smt. Deepanjali Singh, issued a cheque bearing no. 948060 dt. 15.10.2009 for a sum of Rs.2.5 crores, drawn on Syndicate bank, No. 2, Kaushalya Park, Hauz Khas, New Delhi-16 in favour of the complainant. Considering the relations with the accused and his family, complainant agreed to finance Rs. 75 Lacs to them and handed over a cheque bearing no. 825502 dt. 3.10.2009 for Rs. 75 Lacs, drawn on Central Bank of India, South Extension, New Delhi-49 to the accused for

handing over the same to Smt. Madhuri Singh. A Memorandum of Understanding dt. 5.10.2009 was also executed between the parties.”

7. In fact, in reply to the legal notice, the petitioner at the earliest had refuted that the cheque in question was given in discharge of debt or liability and, had elaborately explained the contents of the MOU and the purpose of giving the cheque in question.

8. The learned counsel for the petitioner submitted, and which was not controverted, that the cheque of Rs.75.00 lakh , which was given by the respondent in the name of Mrs. Madhuri Singh, the 3rd and the confirming party to the MOU, was dishonoured on presentation. Because of the dishonour of this cheque, the Confirming Party Mrs. Madhuri Singh had the grievance and neither she, nor the other parties acted upon the MOU and ultimately this MOU never came to be acted upon. It is also noted that not only it was stipulated in the MOU, but on the back side of the cheque also it was mentioned that the encashment of this cheque was subject to the receipt of the sale proceeds of their share by the parties of the First Part. Thus, it could be said that the said cheque was to be encashed under two contingencies, namely, on encashment of cheque of Rs.75.00 lakh, which was issued by the respondent in favour of Ms Madhuri Singh, and on the receipt of the sale proceeds of their share in the property, by the party of the First Part. The respondent was well aware that neither of the two contingencies had occurred and that rendered the cheque without any consideration and

unenforceable, and resultantly null and void. The dishonour of this kind of cheque could not draw any adverse presumption against the drawer under Section 139 of the Act.

9. Another important aspect, which was pointed out by learned counsel for the petitioner, and rightly so, is that as per MOU, the cheque bearing No. 948060 of Rs. 2.50 crore given by the petitioner to the respondent, was dated 05.10.2009. However, the cheque which was presented by respondent No. 2 for encashment, bearing the same number, was dated 15.10.2009. This was also so mentioned in the legal notice, as also in paragraph 3 of the complaint. This could not be explained by the learned counsel for the respondent as to how the cheque which was dated 05.10.2009, would have borne the date of 15.10.2009. The learned counsel for the petitioner seems to be having a point that the date was tampered with from 05.10.2009 to 15.10.2009. However, much is not required to be commented here on this issue in the present proceedings.

10. It is settled proposition of law that the presumption under Section 139 of the Act can be drawn only in cases where factual basis for drawing presumption exists and that the complainant, who seeks to draw such presumption is bound to establish the basis for drawing presumption. In this regard reliance is placed on the 3 Judges Bench decision of the Supreme Court in the case of **Hiten P. Dalal Vs. Bratindranath Banerjee, 2001 (5) JT 385 : Cri L J.**

4647. The relevant portion from the said decision can be extracted as hereunder:

“It is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established.... In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the Court, but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary.”

11. It is also settled law that under Section 138 of the Act, a cheque drawn by a person for the discharge in whole or in part of any existing debt or liability would mean only the past and current liability at the time when the cheque is issued. The cheque issued in respect of uncertain future liabilities would not attract the applicability of Section 138 of the Act.

12. This Court in the case of **Ravi Kumar D. Vs. State of Delhi & Anr., in Crl. M.C. 4378/2009, decided on 01.03.2011** held that:-

“Plain reading of the above provision of law shows that criminal liability under Section 138 N.I. Act is attracted only if the dishonoured cheque was issued for the discharge in whole or in part of any existing debt or liability. The Section does not apply to a cheque issued to meet future liability which may arise on happening of some contingency. Thus, it is clear that a post-

dated cheque, if issued for discharge of a debt due, in the event of dishonour, would attract Section 138 of the N.I. Act, but a cheque issued not for an existing debt/liability, but issued by way of security for meeting some future contingency would not attract Section 138 of the N.I. Act.”

13. It is a known fact that cheque may be issued for several types of transactions other than only towards discharge of debt or liability. For example, a cheque may be issued towards reciprocal promises or as security or failed consideration, or as contingent on the drawee doing certain acts. All these categories of cheques may not fall within the rigour of Section 138 of the Act. It will all depend upon the facts and circumstances, under which the cheque in question is given. The test would be as to whether the cheque in question strictly falls within the provisions of Section 138 of the Act or not.

14. It is settled law that a complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in entirety, do not constitute any offence or make out a case alleged against the accused. A mere look at paragraph no. 3 of the complaint itself, as reproduced above, would show it to be a clear abuse of the process of the Court and initiation of criminal proceedings with some ulterior motives and intentions. The allegations in the complaint do not disclose any element of criminal offence under Section 138 of the Act. The remedy, if any, the

respondent had, was not by way of criminal proceedings, but somewhere else.

15. In view of my above discussion, I, in exercise of power under Section 482 Cr. P.C., quash the complaint as also the impugned order dated 26.06.2010. The petition stands disposed of accordingly.

M.L. MEHTA, J.

SEPTEMBER 12, 2012

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