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

% *Order delivered on: 22nd January, 2015*

\+ **CRL. M.C. NO.1396/2010**

MRS. SUSHILA BADOLA ..... Petitioner
Through Mr.Gaurav Puri, Adv. with Ms. Nupur Pandey, Mr.Varun Bhardwaj, Advs.

versus

SHRI TUSHAR PATNI & ANR. ..... Respondents
Through Mr.Satish Tamta, Adv. with Ms.Nisha Narayanan, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 482 of Cr.P.C. for quashing the Complaint Case No.21/1 dated 8th February, 2010 and the notice under Section 251 Cr.P.C. dated 6th April, 2010 and further proceedings arising out of the complaint pending before learned Metropolitan Magistrate.

2. The Criminal Complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "Act") for a sum of Rs.75 lacs against alleged liability to pay an amount of Rs.3,00,00,000/- filed by respondent No.1 through respondent No.2 Mr. Prashant Mamgain who is allegedly holding a Special Power of Attorney of Mr. Tushar Patni/respondent No.1. It was claimed in the

complaint that the respondent No.1 had given a friendly loan of Rs.2,00,00,000/- in cash way back on 10th May, 2006 to the petitioner. It is alleged by the petitioner that she has never seen respondent No.1 in her life and therefore, the question of taking friendly loan to the extent of Rs.2 Crores in cash, does not arise. It is averred in the petition that on 12th March, 2010, the petitioner received NBW which was issued against her for 18th March, 2010 for bouncing a cheque No.200451 dated 1st December, 2009 for an amount of Rs.75 lacs by the Court of MM, Dwarka Courts, New Delhi. It is averred that she is a permanent resident of Flat No.A-212, Samachar Apartments, Mayur Vihar, Phase-I Extension, Delhi-110091. The respondent No.2 is a resident of Flat No.C-2/26, Mangal Apartments, Vashundra Enclave, Delh-110096. The address of respondent No.1 is P.O. Box No.880, Abu Dhabi, UAE, as given by respondent No.2. The petitioner has never met respondent No.1.

3. The brief facts as per petitioner are that the petitioner appeared before Metropolitan Magistrate on that day with an application for cancellation of NBW and grant of bail, who admitted the petitioner on bail on furnishing a personal bond of Rs.1 lakh with a surety of the like amount. The counsel for the complainant was directed to furnish the complete set of papers to the counsel representing the petitioner herein. He was then given the documents against the acknowledgment relating to the complaint in question.

4. The trial court on 6th April, 2010 framed notice under Section 251 Cr.P.C. for offence under Section 138 of the Act against the petitioner as she did not plead guilty and claimed trial.

After framing of the notice, it was disputed by the petitioner that the Special Power of Attorney signed by a resident of UAE was not attested and the Power of Attorney did not also claim for personal knowledge of the case in the pre/post summoning evidence.

5. It is alleged by the petitioner that from the complaint, the petitioner came to know that previously also, some complaint No.2675/01/07 - dated 27th November, 2007 under Section 138 of Act was filed before Addl. Chief Metropolitan Magistrate, Patiala House Courts, New Delhi by the respondent No.2 as authorized attorney of respondent No.1. In the complaint, it was claimed that complainant-respondent No.1 had given a friendly loan of Rs.2,00,00,000/- in cash to the petitioner herein for a period of 6 months on 10th May, 2006 believing that the same amount would be "returned by the petitioner on 10th November, 2006 on the personal assurance given by the petitioner.

6. In the complaint, it was also mentioned that when the aforesaid amount was not given back, on the expiry of aforesaid period of 6 months, the petitioner issued a cheque bearing No.773308 dated 4th October, 2007 for a sum of Rs.2 crores drawn on the Nainital Bank Ltd., P-37, Pandav Nagar, Patparganj, Delhi-92 to discharge in whole of the said debt. However, the abovesaid cheque on being presented, the complainant received a returning memo dated 6th October, 2007

from his Banker i.e. Bank of Baroda, Naryana, New Delhi with the remark of 'Insufficient Funds'. Therefore, a legal notice was sent to the petitioner on 23rd October, 2007 to pay the aforesaid amount within the statutory period under the Act. However, inspite of the receipt of the said legal notice, the petitioner did not pay the amount. Thereafter, the petitioner came to know from the present complaint that again for the offences under Section 138 read with Section 141 of the Act that the complaint filed in 2007 was withdrawn by respondent No.1 through his Power of Attorney-respondent No.2 in view of the compromise deed allegedly executed between the parties and one lawyer appeared on her behalf and made a statement that the matter was resolved between the parties as per the compromise deed for a sum of Rs.3 crores, although, the total liability of the petitioner was Rs.2 crores as per own admission of the complainant.

7. The petitioner has denied the fact that she ever engaged any lawyer on her behalf to represent before the MM and never authorized him to make the statement regarding compromise of the matter as she never borrowed or took any friendly loan from respondent No.1.

8. It is argued by Mr. Gaurav Puri appearing on behalf of the petitioner that from the copy of the complaint filed, it is not clear that the respondent No.2 has any personal knowledge about the transaction or he was connected in any manner about the disputes between the parties. Counsel for the respondent has not disputed that the Power of Attorney is unregistered as per law.

9. The petitioner in the present petition has challenged the legality

of the order dated 6th April, 2010 for framing of notice under Section 251 Cr.P.C. as well as the maintainability of the complaint under Section 138 of the Act inter-alia mainly on the ground that a Power of Attorney cannot depose on behalf of the complainant in a complaint under Section 138 of the Act. The Special Power of Attorney signed by a resident of UAE was not attested and the Power of Attorney/respondent No.2 does not claim that he has any personal knowledge of the transaction. It is submitted by Mr. Puri, learned counsel for the petitioner that as per settled law the petitioner is entitled to raise the objection after the framing of issues and for fixing the date for cross-examination of respondent No.2 i.e. Power of Attorney holder.

10. The law on the issue has been quite settled in certain decisions :

i) In the case of ***Shambhu Dutt Shastri Vs. State of Rajasthan***, (1986) 2 WLN 713 (Raj) wherein Rajasthan High Court has taken a view that a General Power-of-Attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different Act.

ii) The view taken by Rajasthan High Court has been approved by Supreme Court of India in the case of ***Janki Vashdeo Bhojwani and Anr., Vs Indusind Bank Ltd. & Ors.,*** (2005) 2 SCC 217. In this case the Supreme Court has approved the similar view taken by Bombay High Court in the case of ***Dr. Pradeep Mohanbay Vs. Minguel Carlos Dias*** wherein the Goa Bench of Bombay High Court held that power-of-attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

14. It is argued by the petitioner that after framing of notice on the strength of the pre-summoning evidence of Power of Attorney, the trial court has no jurisdiction to go ahead with the trial when the complainant/respondent No.1 has not filed his post-summoning affidavit, the same is only filed by his Power of Attorney/respondent No.2 by way of post summoning affidavit on behalf of the complainant and the same is not permissible in law.

15. Section 145 of the Act and Section 200 of the Code of the Criminal Procedure, 1973, the said provisions mandatorily required the complainant only to give his evidence on affidavit.

16. Section 145 of the Act and Section 200 of Criminal Procedure Code are reproduced for ready reference:

Section 145 of N.I. Act.- Evidence on affidavit:

(1) Notwithstanding anything co11tained in the Code of Criminal Procedure, 1973 (2. of 197 4), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

Section 200 of Criminal Procedure Act -Examination of the complainant:

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate.

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official' duties or a Court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192.

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re examine them.

17. Similar issue came before the Supreme Court in Crl. Appeal No.73/2007 and Crl. Appeal arising out of SLP (Crl.) No.2724/2008 in the case of ***A.C. Narayanan vs. State of Maharashtra & Anr. and Shri G. Karmalakar vs. Ms. Surana Securities Ltd. and Anr.*** respectively wherein it was held as under :

"23 In the light of the discussion, we are of the view that the power of attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the N.I. Act. An

> exception to the above is when the power of attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant-payee and the attorney holder alone is personally aware of the transactions, there is no reason why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the Power of Attorney holder about the transaction in question must be specified in the complaint. On this count, the fourth question becomes infructuous."

18. In the light of the above, it is clear that unless the competency of power of attorney for giving evidence on behalf of the complainant is decided by the court, the accused would be handicapped to cross-examine such a witness.

19. The trial court has incorrectly rejected the submissions of the petitioner to discharge her at the stage of framing of notice under Section 251 Cr.P.C. for offence under Section 138 the Act even after pointing out that the attorney was not duly authorized person as the Special Power of Attorney was not attested and complaint itself was not signed by the complainant but the trial court has recorded that complaint was duly signed by the complainant along with counsel. Though the complaint is filed only by attorney.

20. In the present case, it is apparent that the trial court has committed an error in proceeding ahead with the private complaint filed by Power of Attorney on the strength of the Special Power of Attorney which is not attested by Indian Embassy at Abu Dhabi, UAE as the Power of Attorney itself claims that respondent No.1 is resident of P.O.Box No.880,

Abu Dabhi, UAE. On the basis of the Special Power of Attorney, filed the present complaint instituted by the respondent No.2 would not be maintainable. In other words, the alleged Special Power of Attorney is not authenticated one in the absence of valid attestation by the authority concerned. The trial court has thus framed a notice under Section 251 Cr.P.C. and asked the petitioner/accused to face trial without valid authority is contrary to the provision of Section 145 of the Act and Section 200 of the Cr.P.C. as there was no valid Power of Attorney before Court when such order dated 6th April, 2010 was passed.

21. The trial court did not consider that in the pre/post-summoning evidence, the Power of Attorney/respondent No.2 does not claim that he has any personal knowledge of the transaction in question. The pre-summoning evidence of the complainant under Section 200 of the Code of Criminal Procedure was given by the Power of Attorney by way of an affidavit on behalf of the complainant. The complainant was not examined on oath as envisaged under Section 145 of the Act. The trial court without complying the provisions of Section 200 of the Code of Criminal Procedure had passed the impugned order.

22. Not only at pre-summoning stage, even at the post-summoning stage, the trial court had not considered that Power of Attorney holder is or is not entitled to give evidence on affidavit under Section 145 of the Act on behalf of the complainant and that the complainant failed to take permission of the Court under Section 302 (2) Cr.P.C. for prosecuting the case through attorney. Furthermore, the petitioner had also not authorized any lawyer including Mr. Vijay Nath to file an application for exemption on her behalf and make statement for

settlement in the previous complaint. Therefore, the petitioner is also going to file a civil suit for declaration of the alleged compromise deed as null and void.

23. The trial court while passing the impugned order did not appreciate that how the amount of Rs.2,00,00,000/- has been given to a person i.e. petitioner in cash who has alleged that she has never seen or/met him in her life. Therefore, while framing the notice and putting up the matter of complainant's evidence through attorney who has no personal knowledge about the transaction was without application of mind.

24. In the abovesaid facts and circumstances of the case, I am of the considered view that as far as present complaint is concerned, the same is not maintainable in view of valid authorisation.

25. With regard to merit of the matter as to whether the complainant is entitled to recover the friendly loan from the petitioner by way of filing of criminal complaint or civil suit, the said remedy is always available to the complainant who may initiate the same in accordance with law and even through valid Power of Attorney.

26. I allow the prayer of the petition by quashing the Complaint Case No.21 /1 dated 8^{th} February, 2010 and the notice under Section 251 Cr.P.C. dated 6^{th} April, 2010 and all proceedings arising out of the complaint pending before MM, Patiala House Court, New Delhi.

27. No costs.

(MANMOHAN SINGH)
JUDGE

JANUARY 22, 2015