

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Date of Decision: 09th March, 2017**

+ CRL.M.C. 310/2015 & CRL.M.A.1200/2015
SHAHNE ALAM Petitioner
Through: Mr.A.H.Pasha, Adv.

versus

M/S I.K POLYMERS PVT. LTD. Respondent
Through: Mr.Pranay Trivedi, Adv.

CORAM:
HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

I.S. MEHTA, J.

1. The instant petition under Sections 482 Cr.P.C. is preferred by the petitioner for setting aside the summoning order dated 29.08.2012 passed by the learned Metropolitan Magistrate, NI Act (West)/Delhi in C.C. No. 3871/1 and further delete/remove the name of the petitioner in C.C. No 3871/1 wherein the learned Metropolitan Magistrate has framed notice under Section 251 Cr.P.C. against the petitioner arrayed as accused No. 3.
2. The brief facts stated are that a complaint under Section 138 of the Negotiable Instruments Act, 1881 was filed by the respondent/complainant on 05.10.2011 before the Court of learned Additional Chief Metropolitan Magistrate, (West) Delhi, against the

Company M/s Sabreen & Co., the present petitioner/Shane Alam and one Ishtiaq Ahmed as partners of the said Company respectively.

3. The basis of the complaint under Section 138 NI Act as alleged is that the petitioner had issued two post dated cheques, i.e. Cheque No. 056187 of Rs. 6,42,600/- and Cheque No. 056167 of Rs. 12,80,100/-, drawn on Oriental Bank of Commerce, Gejha Bhangel, Noida-201304 on behalf of the Company- M/s Sabreen & Co. in favour of the respondent in furtherance of the sales invoices. However, the said cheques were dishonoured on presentation vide return memo dated 18.08.2011 with the remarks "Exceeds Arrangement". Thereafter the respondent issued legal demand notices under Section 138 NI Act dated 29.08.2011 to the present petitioner as well to the Company- M/s Sabreen & Co. and Ishtiaq Ahmed and when the petitioner failed to repay the cheque amounts within 15 days notice period it led to the filing of a complaint case under Section 138 NI Act before the Court of Additional Chief Metropolitan Magistrate, (West) Delhi.
4. On the basis of the documents available on record the learned MM NI Act (West)/Delhi issued the impugned summoning order against the petitioner vide order dated 29.08.2012.
5. Thereafter, the learned MM NI Act (West)/Delhi vide order dated 27.11.2013 dismissed the application moved by the petitioner under Section 245(2) Cr.P.C. and issued notice under Section 251 Cr.P.C. against the petitioner.

Hence the present petition.

6. The learned counsel for the petitioner has submitted that the

impugned order dated 29.08.2012 as well as order dated 27.11.2013 are bad in law. He has further submitted that the petitioner is not a partner in the Company- M/s Sabreen & Co. neither there is any signature on the partnership deed nor the cheques in question were issued by the present petitioner. Therefore, the petitioner is not liable to make any payment to the respondent and the allegations qua against the petitioner are false and relied upon following judgment:

- i. ***Monaben Ketanbhai Shah & Anr. vs. State of Gujarat & Ors; MANU/SC/0596/2004.***
- ii. ***Vinod Zaveri & Ors. vs. M/s Metallica Industries Ltd.; MANU/DE/2255/2009.***

7. The learned counsel for the petitioner has submitted that the petitioner's name is also deleted which is between the same parties in the civil case dated 12.03.2016.
8. The learned counsel for the petitioner further submits that the Company- M/s Sabreen & Co. belongs to the father and the brother of the petitioner, i.e. namely Istiyar Ahmad & Anjum Pravez, respectively and they are the partners of the Company- M/s Sabreen & Co. and the petitioner is not connected anywhere with the Company.
9. The learned counsel for the petitioner has submitted that the petitioner has taken the plea at the time of framing the notice under Section 251 Cr.P.C. that the petitioner does not plead guilty and the cheques in question does not bear his signatures. It is further submitted that the petitioner is Shahne Alam and the signature is of Shanu Malik on the Form-C dated 18.01.2013.

10. On the contrary the learned counsel for the respondent/complainant has submitted that the impugned summoning order is dated 29.08.2012 and the present petition was filed somewhere in 2015. It is further submitted that the partnership document is forged and fabricated and the plea of the present petitioner does not lie as the petitioner has issued Form-C to the respondent somewhere in 2013 and he has also written a letter dated 09.06.2011 and he made a statement on oath that he will settle the matter alongwith his father and on behalf of the Company- M/s Sabreen & Co.
11. The learned counsel for the respondent has further submitted that the notice under Section 251 Cr.P.C. in the present case has already been framed on 27.11.2013 and the said plea was not taken by the present petitioner in the Court below. Thereafter the petitioner had filed an affidavit and the case was fixed for DE and against that also revision is pending.
12. The learned counsel for the respondent submitted that determination of the partnership is to be determined during the trial and not at this stage as it was the petitioner who has filed annexure P-2 which is the partnership document.
13. The learned counsel for the respondent has submitted that Form C dated 18.01.2013 is filed by the present petitioner to the sales tax department as in the name of Shanu Malik and the goods supplied are 1-7 which is claimed to be defective by the petitioner. It is further submitted that the goods supplied to the petitioner is qua against Shanu Malik.

14. The learned counsel for the respondent has further submitted that the Court below has rightly appreciated the facts on record and the impugned summoning order dated 29.08.2012 and the subsequent order of notice under Section 251 Cr.P.C. dated 27.11.2013 are just and proper, and that the same requires no interference by this Court.
15. The whole dispute hinges around whether the petitioner is jointly & severally responsible for the day to day conduct of the business of the Company- M/s Sabreen & Co. as alleged by the respondent/complainant in the complaint under Section 138 NI Act?
16. The allegations in the complaint under Section 138 NI Act are that the petitioner in discharge of his legally enforceable liability issued the cheques in question from the account pertaining to the Company- M/s Sabreen & Co. which were dishonoured on presentation therefore, the petitioner, the Company and the other partners of the Company are equally, jointly & severally responsible & punishable for the offence under Section 138 NI Act.
17. The notice under Section 251 Cr.P.C. qua against the petitioner was framed on 27.11.2013 wherein the petitioner has accepted that he has received a legal demand notice dated 29.08.2011 issued by the respondent/complainant and has taken the defence to lead defence evidence.
18. The present petitioner did not replied to the said legal demand notice dated 29.08.2011 saying that he is not the partner of the company- M/s Sabreen & Co. and he is not responsible for the day to day affairs of the Company therefore, he has no liability qua against the respondent/complainant.

19. The inclusion of the petitioner's name in the legal demand notice dated 29.08.2011 has arisen by virtue of a letter on behalf of the Company- M/s Sabreen & Co. dated 09.06.2011 which is reproduced as under:

Date. 9.06.2011

It was made a final discussion with Sabreen and Co. and I.K. polymers (North) Pvt. Ltd. that the payment (Rs. 25,04600) against the plastic raw material supply was not clear on its due date due to some funding issue of Sabreen & Co.

They confirm the payment was block in market due to material supply is not regular.

Now it was finally discuss that Sabreen & Co. will made the payment in 5 segment. Each segment will be 15 days. He will made payment 5 lacs in each segment. Total outstanding balance Rs. 25,04600 will be clear with in the period of 75 days.

After one payment clear will start to supply material as per our payment term and condition (40 days to 50 days PDC currently)

Sabreen & Co. will pay 1% interest on overdue payment.

sd/-

I K polymers(North) Pvt Ltd

sd/-

*For SABREEN & Co.
Partner*

20. The Form C dated 18.01.2013 shows one Shanu Malik as a partner of the Company- M/s Sabreen & Co. and the signature on the letter dated 09.06.2011 made by the partner on behalf of the Company- M/s Sabreen & Co. resembles with the signature of the present petitioner's signature made on the petition as well as on the vakalatnama.

21. The plea taken by the respondent/complainant is that Shanu

Malik and Shahne Alam are the same person. The partnership deed placed on record is of the year 1999 and Form C is of the year 2013. There is no Form C filed by the parties for the relevant period, i.e. for the year 2011 when the alleged offence was committed.

22. The determination of whether the petitioner was the partner of the Company- M/s Sabreen & Co. or he was responsible for the day to day affairs of the Company in presence of the letter dated 09.06.2011 would be determined after leading the evidences by the parties in the trial. Mere taking of the plea by the petitioner that he was not the partner of the Company- M/s Sabreen & Co. *ipso facto* does not dispels him from the alleged allegation under Section 138 NI Act.
23. The allegations alleged by the respondent/complainant are disputed questions of fact which cannot be looked into at this stage and the onus for proving otherwise lies on the petitioner which can only be discharged at the trial. Reliance is placed on the judgment of this Court in the case ***MOJJ Engineering Systems Ltd. & Ors. vs. A.B. Sugars Ltd.; 2009 (107) DRJ 142.***
24. Therefore, in presence of the letter dated 09.06.2011 the plea taken by the petitioner loses its significance. Consequently, the impugned summoning order dated 29.08.2012 as well as the order on notice dated 27.11.2013 passed by the learned Metropolitan Magistrate, NI Act (West)/Delhi in C.C. No. 3871/1 does not warrant any interference by this Court to invoke inherent powers under Section 482 Cr.P.C. and the present petition is dismissed.
25. One copy of this judgment be sent to the concerned Court(s). LCR file be sent back to the concerned Court.

26. All the pending application(s) are disposed of accordingly. No order as to costs.

I.S.MEHTA, J

MARCH 09, 2017/km