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

% Judgment delivered on: 27.07.2018

+ **CRL.M.C. 1605/2018**

SUNIL GUPTA Petitioner

versus

STATE & ANR Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Shiv Chopra with Mr. Mayank Mishra,
Advocates.

For the Respondent: Ms. Neelam Sharma, APP for State.
Mr. Dhananjay Puri, Advocate for R-2.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

27.07.2018

SANJEEV SACHDEVA, J. (ORAL)

CRL.M.C. 1605/2018 & CrI.M.A.5834/2018 (stay)

1. The petitioner impugns order dated 12.02.2018, whereby, the Revisional Court has dismissed the revision petition filed by the petitioner. The petitioner also impugns order dated 12.07.2017, whereby, the application of the petitioner under Section 251 Cr.P.C. seeking discharge in a complaint filed under Section 138 Negotiable Instrument Act, 1881 (hereinafter referred to as the Act) was

dismissed.

2. Learned counsel for the petitioner submits that the subject complaint was not maintainable inasmuch as the complainant, who has filed the complaint, was neither the payee of the subject cheques nor the holder in the due course of the subject cheques.

3. Learned counsel for the respondent/complainant submits that the complaint was maintainable inasmuch as the complainant was the Director of the payee Company and had been authorised by the payee Company to file the complaint.

4. The payee named in the subject cheques, in respect of which the complaint under Section 138 of the Act has been filed, is "*Friends Motels Pvt. Ltd.*". The respondent/complainant "*Mr. Arun Dwivedi*" has filed the complaint in his own individual name though in the Memo of Parties it is stated as under:-

*"Mr. Arun Dwivedi,
S/o Late Sh. Jagdish Prasad
Director M/s Friends Motels Pvt. Ltd.
Regd. Office 104 Babar Road
New Delhi.
ALSO AT
N-119, Greater Kailash-I,
New Delhi 110048"*

5. The averments in the complaint are that the complainant/lessor is one of the Directors of the Company, the absolute legal and

beneficial owner of the premises bearing No.104, Babar Road, New Delhi, identified as in the lease deed signed and registered on 27.03.2014 between the complainant and the accused persons. The copy of the lease deed dated 27.03.2014 annexed with the complaint shows that the Lessor described therein is *Friends Motels Private Limited*.

6. The accused are stated to be the tenants of the subject property and are alleged to be in arrears of rent. It is alleged that when rent was demanded, in discharge of their liability towards arrears of rent, subject cheques had been issued.

7. It is an admitted position that the landlord of the property is *Friends Motels Pvt. Ltd.* The payee in the subject cheques is also *Friends Motels Pvt. Ltd.* The complaint does not state as to how the complainant *Mr. Arun Dwivedi* has become the holder in due course or is entitled to receive the amount payable in the cheques. There is no further averment as to how a presumption under 139 of the Act would arise in favour of the complainant. Even on the cheques, there is no endorsement that the same were negotiated/indorsed in favour of the complainant.

8. The Statutory legal notice under Section 138 of the Act has also been issued by *Mr. Arun Dwivedi* in his own name. Notice is also silent as to how he is the holder in due course or is entitled to receive the amount payable in the cheques.

9. Section 138 of the Act lays down 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 provision 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 tank 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 of other liability” means a legally enforceable debt or other liability.”

10. Proviso (b) of section 138 stipulates that nothing in the section 138 shall apply unless 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.

11. For section 138 to apply the demand and the complaint has to be made by the payee or the holder in due course. Even Section 142 stipulates that no court shall take cognizance of an offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque.

12. Section 7 of the Act defines “Payee” as the person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid. Section 9 defines “Holder in due course” as the person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order.

13. The Complainant is neither the payee nor the holder in due

course of the subject cheques and thus not entitled to either issue the statutory notice or file the complaint under section 138 of the Act. Since no demand was made by the payee or holder in due course, of the subject cheques, by issuance of a statutory notice under section 138, the petitioner has not committed any offence under section 138 of the Act. Since no complaint has been filed by either the payee or the holder in due course, the court could not have taken cognizance of the alleged offence under section 142 of the Act.

14. Reliance placed by the learned counsel for the respondent/complainant on the Resolution of the Board of Directors of *Friends Motels Pvt. Ltd.*, annexed with the complaint, is of no consequence, inasmuch as the resolution resolves “*Resolved that the company has to file court case against M/s Supertrack Hotel Pvt. Ltd., Babar Road, New Delhi against dis-honoured cheques, hence Mr. Arun Dwivedi, Director of the Company is hereby authorized to sign, submit any document/Vakalatnama, plaint, replies or any other document as per the requirement in the court of Delhi jurisdiction.*”

15. The Resolution states that the Company intends to file a court case against the accused No.1 Company. The complaint has not been filed in the name of the Company but has been in the individual name of Mr. Arun Dwivedi, the Director, which is not as per the resolution.

16. In view of the above, I find that the petitioner was entitled to a discharge under Section 251 Cr.P.C., as the basic ingredients of

Section 138 of the Act are not satisfied.

17. In view of the above, the impugned orders dated 12.02.2018 and 12.07.2017 are set aside.

18. The petition is allowed. The petitioner is discharged of the alleged offence under section 138 of the Act.

19. Since I have held that the offence under section 138 of the Act is not made out, the other issue raised by learned counsel for the petitioner with regard to lack of territorial jurisdiction of the concerned court is not being gone into.

20. Order *Dasti* under signatures of Court Master.

JULY 27, 2018
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SANJEEV SACHDEVA, J