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

Order reserved on :22/11/2022
Order pronounced on :29/11/2022

+ **CRL.M.C. 1281/2022 & CRL. M.A. 5631/2022**

MANOJ KUMAR BISHT Petitioner

Through: Mr. K.S. Negi and Mr. Manav
Sabharwal, Advs.

versus

ANKIT SOMANI Respondent

Through: Mr. M.N. Siddiqui, Advocate.

CORAM:
HON'BLE MS. JUSTICE POONAM A. BAMBA

ORDER
29.11.2022

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1.0. Vide this petition under Section 482 Cr.P.C, the petitioner has sought setting aside of the order dated 19.11.2019 of Ld. Magistrate, NI Act, South District, Saket Courts, New Delhi whereby the petitioner was summoned (“**impugned order**” in short) in complaint case no. 36939/2019 under Section 138 read with Section 142 of Negotiable Instrument Act, 1881 (“**NI Act**” in short) and quashing of the proceedings arising therefrom.

2.0. It is submitted that the aforesaid complaint has been filed by the complainant/respondent through his special power of attorney holder (‘**SPA**’ in short) on the ground that the respondent is working in Dubai with M/s M.K.B Public Network Services,

L.L.C, U.A.E. But the SPA holder, neither in the complaint nor in the affidavit of pre-summoning evidence, has stated that she has personal knowledge of the transaction between the complainant/respondent and the petitioner. Therefore, in view of the settled position of law as laid down in **A.C Narayan Vs. State of Maharashtra and Anr. [(2014) 11 SCC 790]**, the Ld. Magistrate erred in summoning the petitioner herein on the basis of hearsay evidence. The impugned order thus calls for setting aside.

- 3.0.** On the other hand, Ld. counsel for the respondent submitted that the SPA duly mentions that the complainant Sh. Ankit Somani has appointed/nominated his mother-in-law Smt. Shanti Mehrotra, as his attorney, who is well versed with the entire matter/case. Therefore, the SPA holder is duly authorized and competent to file the complaint under NI Act and to pursue the same on the complainant's behalf. The Ld. Magistrate after considering the material on record and pre-summoning evidence, has rightly summoned the petitioner herein.
- 3.1.** Ld. counsel for the respondent further submitted that the petitioner would have all the opportunity to put his defence to the SPA holder/PW-1 in cross-examination.
- 4.0.** I have duly considered the submissions made by both the sides.
- 5.0** It would be pertinent to refer at the outset to Section 142 NI Act, which provides for cognizance of offences under the Act. It reads as under:

“142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) –

- (a) no court shall take cognizance of any 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;*
- (b) ”*

6.0 As per the above provision, the complaint under Section 138 NI Act can be made by the payee or the holder in due course. Learned counsel for the petitioner argued that though the complaint can be filed by the payee through attorney, there has to be specific averment in the complaint that the attorney has personal knowledge of the transaction between the parties, as laid down by the Hon’ble Supreme Court in A.C Narayan’s case (supra).

7.0 Let me now revert to the facts of the present case. The complainant Ankit Somani filed the complaint under Section 138 NI Act through his special power of holder/his mother-in-law Ms Shanta Mehrotra.

7.1 The relevant part of the Special Power of Attorney reads as under:

*“I, Ankit Somani, S/o Sh. Shiv Shankar Somani R/o J4/68-D, II Floor, Khirki Ext, Malviya Nagar New Delhi-110017, am unable to appear and look after legal proceedings to be initiated against Sh. Manoj Kumar Bisht, U/s 138 NI Act as **I have to frequently travel abroad due to work and therefore hereby appoint, nominate my mother-in-law Mrs. Shanta Mehrotra, as my attorney as she is well versed with the entire matter/case to appear before the competent court of law***

for initiation of appropriate proceedings under the provisions of Negotiable Instrument Act and any other lawful proceedings.”

7.2 The complaint in question was filed through SPA holder Ms Shanta Mehrotra mentioning in the complaint, that she is authorized, empowered and competent to sign, verify and present the complaint, to pursue it and lead evidence and to do all acts, deeds in general for due prosecution of the complaint vide Special Power of Attorney dated 08.11.2019. SPA Holder also filed evidence by way of affidavit reiterating the factum of being the Special Power of Attorney holder of the complainant Ankit Somani and placed on record, the aforesaid Special Power of Attorney as Exhibit CW1/A, besides other documents

8.0 It may be mentioned that in **A.C Narayan’s case (supra)** (relied upon by the petitioner herein), the Hon’ble Supreme Court while replying to a reference, noted that the complaint under Section 138 NI Act can be filed through Power of Attorney holder where the attorney holder is personally aware of the transactions. However, an assertion as to the knowledge of the Power of Attorney holder about the transaction must be made in the complaint. It is the case of the petitioner that such assertion has not been made either in the complaint or in the pre summoning evidence/affidavit.

9.0 As noted above, the Special Power of Attorney, (the relevant portion of which has been extracted above), specifically mentions that the attorney holder is well versed with the matter between the parties. Further, perusal of the record shows that along with her

evidence filed by way of affidavit, special power attorney holder while stating that she is competent to lead evidence etc. in the matter, she also placed on record, the Special Power of Attorney which is exhibited as Exhibit CW-1/A. Thus, by virtue of Ex. CW-1/A, the fact that the Special Power of Attorney holder is well versed with the entire matter, has come on record by reading of the complaint, affidavit (pre summoning evidence) along with the Special Power of Attorney/(Exhibit CW1/A).

- 9.1** It would be pertinent to mention here that while considering the similar contention, the Kerala High Court in *Abdul Gaffar v. State of Kerala [2016 SCC Online Ker 38581]*, observed that the question of competency of the attorney, as pleaded by the petitioner herein, would arise only when the attorney is sought to be examined. Relevant portion of the said judgment is reproduced hereunder:

“2. Smt. Molty Majeed, learned counsel for the petitioner, took me extensively through the complaint wherein there is absolutely no reference that the power of attorney had witnessed the execution. It is true that in the complaint there is no reference that power of attorney holder has witnesses the execution and he is personally aware of the transaction. However, this question of competency of the power of attorney to give evidence will arise only when the power of attorney holder is sought to be examined as such. Definitely a person who is conversant with the facts of the case can depose as a witness but when a power of attorney holder seeks to be examined on behalf of the complainant, the decision in A.C. Narayan’s case will apply.

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Further, the question whether the power of attorney holder is to be examined or not that too on behalf of the

complainant is a question that will actually arise only at the time of adducing the evidence. We cannot pre-empt that the power of attorney will be examined on behalf of the petitioner. Even in A.C. Narayan's case it was held that filing of a compliant under Section 138 Negotiable Instruments Act through a power of attorney holder is perfectly legal and competent. In the above circumstance, it appears that the contention of the petitioner herein is premature hence I am inclined to dismiss the Crl.M.C, however reserving the right of the petitioner to raise this contentions at appropriate stage.

3. Crl.M.C is dismissed as above."

10.0 For the aforesaid reasons, the complaint of the respondent under Section 138 NI Act, cannot be thrown away at the threshold.

11.0 The petition is accordingly dismissed.

12.0. Pending applications, if any, are closed.

POONAM A. BAMBA, J

NOVEMBER 29, 2022

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