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IN THE HIGH COURT OF DELHI AT NEW DELHI

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*Reserved on: 02.11.2023**Pronounced on: 17.11.2023*

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CRL.M.C. 1566/2023, CRL.M.A. 5958/2023 & 12000/2023

SH. PREMANAND PRUSTY

..... Petitioner

Through: Mr. Anil Kumar, Advocate.

versus

SMT SITA DEVI

..... Respondent

Through: Mr. Feroze Ahmad, Advocate.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') read with Article 227 of Constitution of India, on behalf of the petitioner seeking following reliefs:

- i. Setting aside of summoning order dated 03.08.2022;
- ii. Setting aside of order dated 06.12.2022 *vide* which notice under Section 138 Negotiable Instruments Act, 1881 ('NI Act') has been framed against the petitioner.
- iii. Quashing of criminal proceedings in criminal complaint bearing no. 4763/2022 titled as '*Smt. Sita Devi v. Sh. Premananda Prusty*' filed under Section 138 of NI Act,



pending before learned Metropolitan Magistrate-01 (NI Act)/Digital Court, Central, Tis Hazari Courts, Delhi (*Trial Court*).

2. Brief facts of the case, as per the complaint filed under Section 138 of NI Act, are that the complainant had been was approached by the accused i.e. petitioner herein and his wife namely Smt. Damayanti Prusty, through complainant's son namely Manish Bhardwaj, for seeking an urgent loan. It is alleged that the accused had shown to the complainant that he was a very high-ranking officer in Government of Delhi and there was no chance of losing the money. The complainant and the petitioner had entered into an agreement and all the documents including promissory note, undertaking and post-dated cheque with interest had been signed and issued in presence of witnesses. Thereafter, the petitioner had handed over cheque bearing no. 289174, dated 28.02.2022, amounting to Rs.7,40,000/-, drawn on Syndicate Bank, Delhi Secretariat, I.P. Estate Branch, New Delhi, to the complainant. However, upon its presentation, the cheque had got dishonoured and had returned with remarks "the clearing portal is not accepting the MICR Code in the cheque". The complainant had received the information regarding the dishonoured cheque in question on 08.03.2022 from the bank. The complainant had then sent a legal notice dated 04.04.2022 to the petitioner, asking him to make the payment. However, upon the petitioner's failure to make payment, the complainant had failed the present complaint under Section 138 of NI Act.



3. Learned counsel for the petitioner, who seeks quashing of proceedings in this case, argues that the bank had not issued a cheque returning memo, but a certificate dated 08.03.2022 mentioning that the portal of the bank was not accepting the MICR Code on the cheque, and thus, the cheque in question has not been dishonoured at any stage as per provisions of Section 138 of NI Act. It is stated that Syndicate Bank, where the cheque in question was drawn, had merged with Canara Bank on 01.04.2020, and therefore, cheques issued by Syndicate Bank had become invalid with effect from 01.07.2021 as per the notice issued by Canara Bank. Hence, the cheque in question which is alleged to have been issued on 28.02.2022 was not a valid cheque at the time of its presentation, and thus, its non-encashment cannot fall within the purview of Section 138 of NI Act. It is also stated by the learned counsel that petitioner has no liability towards the complainant, and that no specific amount of loan is mentioned in the complaint. It is further stated that some financial transaction had taken place between the petitioner and the complainant's son a few years back when he had issue a cheque and the complainant has misused the cheque in question. It is argued that learned Trial Court has erred in summoning the petitioner and framing the notice under Section 251 of Cr.P.C. against him since the cheque in question was not a valid cheque, therefore, question of dishonour of cheque does not arise.

4. Learned counsel for the complainant/respondent, on the other hand, argues that the learned Trial Court has rightly summoned the petitioner and framed notice against him, for offence under Section



138 of NI Act. It is stated that petitioner had signed and executed the documents at the time of borrowing money from the complainant. It is also stated that there is no difference between a cheque returning memo and a certificate because both are one and the same thing, which was issued when a cheque is not honoured or encashed. It is further stated that once a cheque is issued, it remains valid till its period and in case it was not honoured, it was the duty of the petitioner to clear his liability towards the complainant after receiving the information and the legal notice sent by the complainant.

5. This Court has heard arguments addressed by the learned counsel for petitioner and the learned counsel for respondent, and has gone through the material on record.

6. At the outset, this Court deems it fit to refer to Section 138 of NI Act, which provides 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 bank 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.

7. The Hon'ble Apex Court in case of ***Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel (2023) 1 SCC 578***, has held that to constitute an offence under Section 138 of NI Act, following ingredients are required to be fulfilled:

"11. Section 138 of the Act provides that a drawer of a cheque is deemed to have committed the offence if the following ingredients are fulfilled:

- (i) A cheque drawn for the payment of any amount of money to another person;
- (ii) The cheque is drawn for the discharge of the 'whole or part' of any debt or other liability. 'Debt or other liability' means legally enforceable debt or other liability; and
- (iii) The cheque is returned by the bank unpaid because of insufficient funds.

However, unless the stipulations in the proviso are fulfilled the offence is not deemed to be committed. The conditions in the proviso are as follows:

- (i) The cheque must be presented in the bank within six months from the date on which it was drawn or within the period of its validity;
- (ii) The holder of the cheque must make 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 from the receipt of the notice from the bank that the cheque was returned dishonoured; and



(iii) The holder of the cheque fails to make the payment of the said amount of money' within fifteen days from the receipt of the notice..."

8. In the present case, the allegations against the petitioner in brief are that he had issued a cheque bearing no. 289174, dated 28.02.2022, for a sum of Rs.7,40,000/- in favour of discharge of legally enforceable debt i.e. the loan which he obtained from the complainant and for which he had executed certain documents, however, the cheque had got returned unpaid with the remarks "clearing portal not accepting MICR Code" and despite service of legal notice dated 04.04.2022, the petitioner had failed to make payment within 15 days of the receipt of legal notice.

9. The attention of this Court was drawn towards the documents filed alongwith the complaint under Section 138 of NI Act before the learned Trial Court. A perusal of the same reveals that the petitioner had allegedly executed two promissory notes dated 07.12.2013, for an amount of Rs.2,50,000/- each, i.e. total amount of Rs. 5,00,000/- which he had allegedly obtained as loan in cash from the complainant. It is further revealed from the records that complainant had also filed two Undertakings, executed by the petitioner herein, in each of which he had stated that he had obtained a sum of Rs.2,50,000/- from the complainant at 1.75% interest per month.

10. This Court has also gone through the statement of the petitioner recorded under Section 294 of Cr.P.C., wherein the petitioner has admitted his signatures on all the relevant documents i.e. the promissory notes, the undertakings, and the cheque in



question, though he denies the contents of these documents.

11. Now, it is the case of petitioner that Syndicate Bank had merged with Canara Bank on 01.04.2020 and therefore, cheques issued by Syndicate Bank had become invalid with effect from 01.07.2021 as per the notice issued by Canara Bank and hence, on the alleged date of issuance of cheque in question, i.e. on 28.02.2022, the cheque was not a valid cheque and its non-encashment could not fall under Section 138 of NI Act.

12. However, it is important to consider that the petitioner has not denied his signatures on either the cheque in question or on the promissory notes or undertakings, before the learned Trial Court. This clearly reflects, *prima facie*, that the cheque in question was issued towards discharge of legally enforceable debt.

13. The Hon'ble Apex Court in case of ***Oriental Bank of Commerce v. Prabodh Kumar Tewari*** 2022 SCC OnLine SC 1089 has held that a drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in discharge of a liability. The relevant portion is reproduced as under:

“16. A drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in discharge of a liability. The presumption arises under Section 139”

14. Even the petitioner before this Court has mentioned in the pleadings that whether or not there was any liability towards the



complainant and that cheque in question was issued towards any such liability, are questions of merits, and he is not insisting upon the same before this Court.

15. In this regard, this Court finds merit in the contention of the learned counsel for the complainant that even if the cheque was not encashed and had returned unpaid for the reasons that Bank was not accepting the MICR Code, the petitioner after receipt of legal notice could have made the payment to the complainant or could have issued a fresh cheque towards the discharge of his liability. The fact remains that the cheque in question, which has been undisputedly signed by the petitioner, was presented for encashment with the Bank by the complainant towards discharge of debt, which the complainant claims is reflected from the promissory notes and undertakings signed by the petitioner, and upon its presentation, the cheque had been returned unpaid by the Bank to the complainant. Thereafter, the petitioner had also failed to make payment of the amount in question to the complainant after service of legal notice and therefore, the present complaint was filed under Section 138 of NI Act.

16. In these circumstances, this Court finds no reason to quash the impugned orders and the complaint case, pending before the learned Trial Court.

17. However, it is clarified that the petitioner shall be at liberty to raise all these issues raised before the learned Trial Court at appropriate stage, and the learned Trial Court shall decide the case pending before it on its own merits, and without being influenced by any of the observations made hereinabove by this Court since the



same are only for the purpose of deciding the present petition.

18. Accordingly, the present petition stands dismissed alongwith pending applications.

19. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

NOVEMBER 17, 2023/MR