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

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Reserved on: August 03, 2023

Decided on: September 05, 2023

+ **CRL.M.C. 3008/2019, CRL.M.A. 12183/2019 and**
CRL.M.A. 19843/2021

M/S TOPLINE BUILDTECH PVT. LTD & OTHERS

..... Petitioners

Through: Mr. Puneet Mittal, Senior Advocate
with Ms. Vasudha Bajaj, Mr. Pratap
Singh, Mr. Rupendra Pratap Singh
and Ms. Sakshi Mehendiratta,
Advocates

V

STATE AND ANOTHER

..... Respondents

Through: Mr. Utkarsh, APP for the State/R-1.
Ms. Lalit Mohini Bhat and
Mr. Siddharth Agarwal, Advocates
for R-2.

CORAM

HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

J U D G M E N T

1. The present petition is filed under section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “**the code**”) to set aside the impugned summoning order dated 22.03.2019 passed by the Court of Sh. Vikram, MM-01, North, Rohini Courts, Delhi in Complaint Case

CRL.M.C. 3008/2019

Page 1 of 16



bearing no 654/2019 titled as **M/s Golden Equity Pvt. Ltd. V Topline Buildtech Pvt. Ltd. & Others** under section 138 of Negotiable Instruments Act, 1881 (hereinafter referred as “**NI Act**”) along with consequential proceedings.

2. The respondent no.2/complainant (hereinafter referred to as “**the respondent no 2**”) filed the present complaint on the basis of two cheques bearing no 997643 amounting to Rs. 1,00,00,000/- (one crore) and 997644 amounting to Rs. 75,00,000/- (Seventy five lakhs) drawn on State Bank of India, Bhikaji Cama Place Branch issued on behalf of the petitioner no 1/accused no.1 in favour of the respondent no.2 towards the discharge of liability which were got dishonoured when presented for encashment on the ground of “Payment Stopped by Drawer” vide cheque returning memo dated 31.12.2018. The petitioners did not pay the cheques amount despite the notice dated 01.01.2019 which was replied vide reply dated 12.01.2019. Hence, the respondent no.2 filed the present complaint under section 138 of NI Act.

3. The Court of Sh. Vikram, MM-01, North, Rohini Courts, Delhi vide order dated 22.03.2019 took cognizance for the offence punishable under section 138 of NI Act and accordingly summoned the petitioners. The order dated



22.03.2019 reads as under:-

Pre-summoning evidence by way of affidavit has been tendered.

I am satisfied that the present case comes within the ambit of Section 138 N.I. Act.

Complaint as well as relevant documents perused.

I am satisfied that the present complaint has been filed within limitation and within jurisdiction as well.

Prima facie, case seems to be made out against the accused.

Cognizance of offence is taken U/s 138 N.I. Act.

Issue summons against the accused on filing PF/RC/Speed post for 31.05.2019.

If service of summons could not be effected by any of the above said means then the concerned process server is directed to affix the copy of the same on some conspicuous part of the premises wherein the person summoned ordinarily resides, in terms of Section 65 Cr.P.C.

4. The petitioners stated that in September, 2014 four cheques bearing nos. 997642, 997643, 997644 and 997645 belonged to the petitioner no.1 were found to be stolen. The petitioner no.2 on behalf of the petitioner no.1 fearing misuse of undated signed blank cheques directed its banker that any payment against these cheques be stopped. The petitioner no 2 on behalf of petitioner no.1 also wrote a complaint to the Station House Officer, Police Station Mehrauli, New Delhi on 27.9.2014 informing that the four cheques bearing nos. 997642, 997643, 997644 and 997645 of State Bank of India have been stolen and said information was recorded vide NCR bearing no 1361/2014 dated 01.10.2014. The petitioners no.1 and 2 were shocked after

CRL.M.C. 3008/2019

Page 3 of 16



receipt of legal notice dated 28.08.2018 on behalf of Pankaj Jain, Director of M/s Host Finance and Investment Pvt. Ltd. under section 138 of NI Act wherein it was alleged that the cheque bearing no.997645 allegedly issued by the petitioner no.1 to the respondent company for the discharge of a debt or liability amounting to Rs.75 lakhs deposited by respondent with J&K Bank, Branch Office at Cheeni Chowk, Anantnag, Kashmir was dishonoured by the bankers of the petitioner no.1 for the reason "insufficient funds" and threatened to initiate complaint case under section 138 NI Act against petitioner no 1. The cheque bearing no 997645 was one of the 4 cheques which were found missing/stolen from the office of the petitioner no.1 office in 2014 and in respect of which NCR No. 1361/2014 dated 01.10.2014 was registered at PS Mehrauli, New Delhi. The petitioner no 1 vide its reply dated 20.09.2018 placed correct facts. M/s Host Finance and Investment Pvt. Ltd. through its manager Sania Fayaz filed a private criminal complaint no 194/2018 against the petitioners no.1 and 2 before the court of CJM, Anantnag on the basis of the aforesaid cheque bearing no 997645 seeking to take cognizance against the office bearers of the petitioner under sections 420/109/120B/34/403/406/ 506/507, Ranbir Penal Code. The petitioner no.1 came to know that M/s Host finance and



Investment Pvt. Ltd. company and its representatives had criminally misappropriated / stolen 4 cheques including the cheque bearing no 997645. The petitioner no.1 filed a complaint dated 19.09.2018 on 26.09.2018 vide entry no 57B before SHO, Police Station Mehrauli and accordingly FIR no 732/2018 under section 380 IPC dated 12.11.2018 was got registered against Pankaj Jain and Ashok Kumar, Directors of M/s Host Finance and Investment Pvt. Ltd. M/s Host Finance and Investment Pvt. Ltd. on 15.10.2018 filed a complaint case no 219/2018 under section 138 NI Act on basis of dishonour of cheque no 997945 titled **Pankaj Jain V Topline Buildtech Pvt. Ltd. & Others** before the District Mobile Magistrate Traffic, Anantnag District Courts, Kashmir, arraying the petitioner no.1 as accused but none of its directors / office bearers were arrayed as a party nor there is any specific allegation against its directors / office bearers in the said complaint. The High Court of Jammu and Kashmir at Srinagar vide order dated 11.12.2018 passed in Cr.M.C. No. 479/2018 stayed the proceedings in the private criminal complaint no. 194/2018. The High Court of Jammu and Kashmir at Srinagar vide order dated 03.04.2019 passed in Cr.M.C. No.92/2019 stayed the proceedings in complaint case bearing no.219/2018. The petitioners no.1 and 2 were shocked to receive the legal notice dated

CRL.M.C. 3008/2019

Page 5 of 16



01.01.2019 which was issued on behalf of the respondent under section 138 of NI Act on basis of cheque bearing no 997643 amounting to Rs1,00,00,000/- dated 20.12.2018 and the cheque bearing no 997644 amounting to Rs.75,00,000/- dated 20.12.2018. These cheques were 2 cheques out of the 4 cheques which were missing/stolen from the office of the petitioner no 1. The petitioners replied notice dated 01.01.2019 vide reply dated 12.01.2019 wherein mentioned true and correct facts. The present complaint is filed by Pankaj Jain as an authorized representative of the respondent against whom the petitioner no.1 has lodged FIR no. 732/2018 under section 380 IPC dated 12.11.2018 in PS Mehrauli and is also the Director of M/s Host Finance and Investment Pvt. Ltd.

4.1 The petitioners impugn complaint bearing no. 654/2019 and summoning order dated 22.03.2019 on grounds which are cheques in question bearing no 997643 and 997644 are not valid negotiable instrument as cheque amounts exceed the special endorsement on the face of the instrument i.e. its value cannot exceed beyond Rs.50 lakhs. The respondent has concealed the fact that the authorized representative of the respondent had also filed complaint case bearing no 219/2018 titled as **Pankaj Jain V Topline Buldtech Pvt. Ltd. & others** before the court of CJM, Anantnag with respect to dishonour



of one of the cheques bearing no 997645 which was stolen from the office of the petitioner no 1 in the year 2014 and the High Court of Jammu and Kashmir at Srinagar stayed the trial in the said complaint case vide order dated 03.04.2019. There is no specific details and allegations against any of the directors or office bearers of the petitioner no 1. The authorized representative of the respondent filed the present complaint only with the sole motive to extort money from the petitioners without any legally enforceable debt against them. The respondent had not mentioned or enclosed any document or agreement against which the alleged loan was tendered to the petitioner no 1. The present complaint filed is *mala fide* in as the respondent and M/S Host Finance and Investments Pvt. Ltd. are sister concern companies and Pankaj Jain is prosecuting person in both companies against whom FIR bearing no 732/2018 under section 380 IPC dated 12.11.2018 was registered in PS Mehrauli. The petitioners made following prayers:-

It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:

- (a) Set aside summoning order dated 22.03.2019 passed by Sh. Vikram Ld. MM-01, North, Rohini Court, Delhi**
- (b) Quash the Complaint case no. 654/2019, titled "M/s Golden Equity Ltd. Vs. Topline Buildtech Pvt. Ltd. & others" pending before Sh. Vikram Ld. MM-01, North, Rohini Court, Delhi and all**



**other proceedings emanating from the above said complaint case;
and**

(c) Pass any other or further orders as this Hon'ble Court may deem fit and appropriate in the facts and circumstances of the case.

5. The learned Senior Counsel for the petitioners argued that it is evident from the reply dated 12.01.2019 that the cheques bearing no 997643 and 997644 were stolen/lost in the year 2014 from the office of the petitioner no 1 and for which a complaint was made to the SHO, PS Mehrauli on 27.09.2019 vide NCR bearing no 1361/2014 dated 01.10.2014 under section 155 of the Code regarding 4 stolen cheques including two cheques basis of present complaint. The petitioner no1 also issued instructions of “**Stop Payment**” to its banker in respect of the stolen cheques. The stolen cheques do not fall under ambit of “negotiable instrument”. The respondent no 2 with *mala fide* intention tried to encash cheques bearing no 997643 and 997644 after 4 years and never contacted the petitioners during 2014-2018 to demand the cheque’s amount.

5.1 The cheques bearing no 997643 and 997644 as per special endorsement made on the cheques were only valid for amount up to Rs.50 lakhs but cheques in question were stated to be issued for amount more than Rs. 50 lakhs and as such the cheques bearing no 997643 and 997644 were not



validly issued on behalf of the petitioner no 1 and are invalid instruments. The cheques in question were not issued towards discharge of legally enforceable debts.

5.2 The High Court of Jammu & Kashmir in Writ Petition (Criminal) bearing no.2322/2019 had directed to constitute SIT to carry out and monitor investigation in FIR bearing no 0069/2019 under sections 420/467/468 Ranbir Penal Code registered at P.S. Anantnag against the officials of respondent no 2. Pankaj Jain who is the Director of the respondent no.2 and other companies had filed the cases against the petitioners to extort money from them. The learned Senior Counsel referred **Sangeeta V State**, 2002 (3) AD (Delhi) 1109, **State of Haryana V Bhajan Lal**, 1992 Supp 1 SCC 335, **State of Orissa V Debendra Nath Padhi**, AIR 2005 SC 359, **Pepsi Foods Ltd. V Special Judicial Magistrate**, (1998) 5 SC 749.

6. The respondent no 2 filed reply to petition.

7. The Supreme Court in **Kusum Ingots & Alloys Ltd. V Pennar Peterson Securities Ltd. & others**, (2000) 2 SCC 745 laid down the following ingredients for taking cognizance under sections 138 NI Act:-

(i) A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to



another person from out of that account for the discharge of any debt or other liability

(ii) That cheque has been presented to the bank within a period of six months from the date on which it is drawn of within the period of its validity, whichever is earlier

(iii) That cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank

(iv) The payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid

(v) The drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course within 15 days of the receipt of the said notice

(vi) The complaint is to be filed within one month from the date of expiry of the 15 days from the receipt of the notice.

8. The Supreme Court in **Pepsi Foods Ltd. V Special Judicial Magistrate**, regarding summoning observed as under:-

28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the



evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

9. The Supreme Court in **Tedhi Singh V Narayan Dass Mahant**, Criminal Appeal No.362 of 2022 (arising out of SLP (Crl) No.1963 of 2019) decided on referred **Basalingapa V Mudibasappa**, (2019) 5 SCC 418 wherein it was observed as under:-

25. We having noticed the ratio laid down by this Court in the above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:

25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

10. The petitioners primarily impugned summoning order dated 22.03.2019

CRL.M.C. 3008/2019

Page 11 of 16



on the grounds that the cheques bearing no 997643 and 997644 which are basis of present complaint were found to be stolen/lost in the year 2014 along with two other cheques bearing no 997642 and 997645 and these cheques were prepared in November, 2013 to meet out emergency expenses of petitioner and were kept at the offices of petitioner no 1. The petitioners to substantiate plea of lost cheques also stated additional facts that the petitioner no 2 on behalf of the petitioner no 1 fearing misuse of these undated signed blank cheques has intimated vide letter dated 27.09.2014 to its bankers directing that any payment against these cheques be stopped and also wrote a complaint to the SHO, Police Station Mehrauli, New Delhi on 27.9.2014 and thereafter First Information Report in respect of non-cognizable offence under section 155 of the Code bearing NCR No. 1361/2014 dated 01.10.2014 was also recorded. The petitioners no 1 and 2 also receipt of legal notice dated 28.08.2018 on behalf of Pankaj Jain, Director of M/s Host Finance and Investment Pvt. Ltd. under section 138 of NI Act in respect to cheque bearing no 997645 which was allegedly dishonoured by the bankers of the petitioner no 1 on ground of "insufficient funds". M/s Host Finance and Investment Pvt. Ltd. filed a private criminal complaint no 194/2018 against the petitioners no 1 and 2 before the court of



CJM, Anantnag on the basis of cheque bearing no 997645 under sections 420/109/120B/34/403/406/ 506/507 Ranbir Penal Code. It was alleged that M/s Host finance and Investment Pvt. Ltd. company and its representatives had criminally misappropriated / stolen 4 cheques including the cheque bearing no 997645. FIR bearing no 732/2018 under section 380 IPC dated 12.11.2018 was got registered against Pankaj Jain and Ashok Kumar, Directors of M/s Host Finance and Investment Pvt. Ltd. M/s Host Finance and Investment Pvt. Ltd. on 15.10.2018 also filed a complaint case no 219/2018 under section 138 NI Act on basis of dishonour of cheque no 997945 titled **Pankaj Jain V Topline Buildtech Pvt. Ltd. & Others** before the District Mobile Magistrate Traffic, Anantnag District Courts, Kashmir against the petitioner no 1. It is also pleaded that the High Court of Jammu and Kashmir at Srinagar vide order dated 11.12.2018 passed in Cr.M.C. no 479/2018 stayed the proceedings in the private criminal complaint no. 194/2018 and vide order dated 03.04.2019 passed in Cr.M.C. no 92/2019 stayed the proceedings in complaint case bearing no 219/2018.

11. The Supreme Court in Raj Kumar Khurana V State of (NCT of Delhi) & another, Criminal Appeal No 913 of 2009 decided on 5th May, 2009 considered issue whether return of a cheque by the bank on the ground
CRL.M.C. 3008/2019

Page 13 of 16



that it was reported lost by the drawer would attract the penal provisions contained in Section 138 of the Negotiable Instruments Act, 1881. It was observed that the parameters for invoking the provisions of Section 138 of the Act being limited, the refusal on the part of the bank to honour the lost cheque would not bring the matter within the provisions of Section 138 of the Act. The Allahabad High Court in **Bobby Anand @ Yogesh Anand V State of U.P. and another**, Application under section 482 bearing no 7631 of 2008 decided on 17th May, 2023 after referring **Raj Kumar Khurana V State of (NCT of Delhi)** observed that if a cheque is returned by the bank on the ground "cheque reported lost" would not bring the matter within the penal provisions of Section 138 N.I. Act. A coordinate bench of this court in **Rajeev Ranjan Sinha V Sushil Kumar Saxena**, 2022 SCC OnLine Del 1577 decided on 26-5-2022 observed that it was for the petitioner to prove the plea that the cheque had been reported 'lost'. He would have an opportunity to cross-examine the bank officials to establish that they had an obligation to have refused honouring the cheque on the ground that the cheque had been reported 'lost' by the drawer, to get the benefit of the decision in **Raj Kumar Khurana V State of (NCT of Delhi)**, (2009) 6 SCC 72. It was further observed that the trial Court was right in holding that



the loss of cheque could be ascertained only during trial.

12. It is apparent that cheques bearing no 997643 and 997644 which are basis of present complaint are dated 20.12.2018 while the petitioner no 1 through the petitioner no 2 intimated its banker vide letter dated 27.09.2014 to stop any payment against these cheques and made a complaint to the SHO, Police Station Mehrauli, New Delhi on 27.9.2014 vide NCR No. 1361/2014 dated 01.10.2014 i.e. much prior from alleged dates of issuance of cheques bearing no 997643 and 997644. However plea of the petitioners that cheques bearing no 997643 and 997644 which are basis of present complaint were lost in year 2014 much prior to issuance of these cheques in favour of the respondent no 2 can only be established during trial and on basis of the evidence to be led by the petitioners and the respondent no 2. The proposed defence of the petitioners as detailed hereinabove cannot be legally considered at time of taking cognizance by the trial court which is obliged to take cognizance merely on basis of allegations as made in complaint and pre summoning evidence if any.

13. The learned Senior Counsel for the petitioners also argued that the cheques bearing no 997643 and 997644 are not valid legal instruments as these cheques as per special endorsement made on them were only valid for



amount up to Rs.50 lakhs but cheques in question were stated to be issued for amount more than Rs.50 lakhs. The argument so advanced by the learned Senior Counsel is without legal force and sanctity. The cheques in question were allegedly issued by the petitioner no.1 with the knowledge that these cheques are valid only for an amount of upto Rs.50 lakhs.

14. On the basis of pleas as taken in the present petition and arguments advanced by the learned Senior Counsel for the petitioners, the summoning order dated 22.03.2019 cannot be recalled. The petition is devoid of any merit. Hence, the present petition along with pending applications, if any, stands dismissed. Interim stay, if any, stands vacated. However, the petitioners shall be at liberty to raise all the pleas and contentions, as mentioned in the petition during the trial.

DR. SUDHIR KUMAR JAIN, J

SEPTEMBER 05, 2023

j/am