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

% Date of Decision: 16.01.2024

\+ **CRL.M.C. 169/2023 and CRL.M.A. 682/2023 (stay)**

SMT MAYA TYAGI ..... Petitioner

Through: Mr. Manoj Kumar Tyagi, Mr.Sandeep Tyagi and Mr. Shekhar Tyagi, Advocates (M:9811108413).

Versus

MR. SIMMER SAHNI ..... Respondent

Through: Mr. Rajan Sabharwal, Mr. Shashwat Pratyush, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 482 Cr.P.C. read with Article 227 of the Constitution of India, the petitioner who has been summoned as an accused in Complaint Case No.42908/2019 instituted under Section 138 of Negotiable Instruments Act (hereafter, *'NI Act'*), P.S. New Friends Colony, has assailed the summoning order dated 02.12.2019.

2. Briefly, the facts as available from the material placed on record are that the respondent/complainant, purchased a piece of land from the present petitioner and her son namely *Mr. Gagandeep Tyagi,* for a sum of Rs.1,70,68,800/- vide Agreement to Sell dated 21.04.2017 (registered on 24.04.2017). The complainant paid Rs.20,00,000/- as earnest money vide two demand drafts of Rs.10,00,000/- each, both dated 21.04.2017. Subsequently, it came to the complainant's knowledge that the land was under acquisition by Ghaziabad Development Authority, and subsequently a

Memorandum of Understanding (*'MoU'*) dated 23.07.2019 was executed between the parties for cancellation of the Agreement to Sell. In pursuance of the same, two cheques bearing No.119788 and 119789 each for a sum of Rs.27,50,000/- (thereby totalling Rs.55,00,000/-) dated 01.08.2019 drawn on Canara Bank, Shahpur Nij Morta, Ghaziabad Branch were issued in favour of the respondent. The said cheques, when presented for encashment, were dishonoured with the remarks *'payment stopped by drawer'* vide return memo dated 26.09.2019.

3. Thereafter, the respondent issued legal notice dated 12.10.2019 and upon the failure of the petitioner to make good the demand, the respondent filed complaint under Section 138 NI Act read with Section 420 of the Indian Penal Code (hereinafter referred to as *'IPC'*) before the concerned Court.

4. Learned MM summoned the present petitioner and *Mr. Gagandeep Tyagi* under Section 138 NI Act.

5. The petitioner's sole contention is premised on the ground that prior to filing of the complaint, no demand notice was issued to her. Further, the cheques have been issued only by co-accused namely *Mr. Gagandeep Tyagi* and the signatures of the petitioner also do not appear on the subject cheques. Also, the account from which the subject cheques have been issued, is not a joint account.

6. Learned counsel for the respondent, on the other hand, has opposed the petition and submitted that the initial complaint was filed under Section 138 NI Act as well as Section 420 IPC. It is further submitted that both **,** the petitioner as well as *Mr. Gagandeep Tyagi,* were jointly liable to pay the amount as the MoU was executed by both of them.

7. Before proceeding further, let me recapitulate the legal position involved in the present case. Prosecution under Section 138 of the NI Act requires the following conditions to be satisfied:-

> *"i) that the cheque is drawn by a person and on an account maintained by him with a banker;*
>
> *ii) for the 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; and*
>
> *iii) the said cheque 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."*

8. Concededly, in the present case, Section 141 of the NI Act is not attracted as the same is not an offence by a company. The petitioner as well as the co-accused *Mr. Gagandeep Tyagi,* have been impleaded in their individual capacity. The liability under Section 138 NI Act arises on account of dishonour of cheque issued for the discharge, in whole or in part of any debt or other liability. Further, for initiation of prosecution under Section 138 NI Act, a statutory notice is mandatorily required to be given to the drawer, to make good the payment of the amount mentioned in the cheque and only when the drawer receives a notice and fails to make the payment within the time provided by the Statute, does the dishonour become an offence.

9. In the present case, the criminal proceedings initiated by the respondent are liable to be quashed on two grounds. Firstly, it is conceded that no demand notice was issued to the present petitioner. The demand notice was issued only to *Mr. Gagandeep Tyagi.* The petitioner not having

been issued any statutory notice and not called upon to make good the payment covered under the cheque, cannot be proceeded against in the criminal complaint.[1] The learned MM erred in satisfying himself with this basic prerequisite before issuing summons. The proceedings are also liable to be quashed on the ground that the impugned cheques, copy of which have been placed on record, were signed only by *Mr. Gagandeep Tyagi,* and as such, the petitioner is not the signatory of the subject cheques. Even the account from which the cheques were issued was also not a joint account.

10. The present fact situation stands squarely covered by the decision of the Supreme Court in Alka Khandu Avhad *v.* Amar Syamprasad Mishra & Anr.[2] The relevant observations from the said case are extracted below:-

> *"xxx*
>
> *10. Therefore, a person who is the signatory to the cheque and the cheque is drawn by that person on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. Section 138 of the NI Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 of the NI Act. A person might have been jointly liable to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque.*
>
> *xxx"*

11. In view of the above, the criminal complaint filed against the present

[1] M/s Laxmi Dyechem *v.* State of Gujarat & Ors., (2012) 13 SCC 375

petitioner is clearly an abuse of process of law and the same is liable to be quashed and set aside. Consequently, the present petition is allowed and the summoning order is set aside.

MANOJ KUMAR OHRI
(JUDGE)

JANUARY 16, 2024/na

[2] (2021) 4 SCC 675