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

\+ CRL.M.C. 1008/2023, CRL.M.A. 28894/2023

K SWAMINATHAN .....Petitioner

Through: Mr. Sriharsha Peechara, Ms. Vandana Sehagal and Ms. Harshita Gupta, Advocates.

versus

STATE OF NCT OF DELHI & ANR. .....Respondents

Through: Mr. Aashneet Singh, APP for State with Mr. Harsh Sehrawat, Mr. Durga Dass, Mr. Sanjeev Kumar and Mr. Jharna Sharma, Advocates.

\+ CRL.M.C. 1369/2023, CRL.M.A. 5260/2023, CRL.M.A. 28889/2023

S VISALAKSHI .....Petitioner

Through: Mr. Sriharsha Peechara, Ms. Vandana Sehagal and Ms. Harshita Gupta, Advocates.

versus

STATE OF NCT OF DELHI & ANR. .....Respondents

Through: Mr. Aashneet Singh, APP for State with Mr. Harsh Sehrawat, Mr. Durga Dass, Mr. Sanjeev Kumar and Mr. Jharna Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

O R D E R

% **16.07.2024**

1. This order shall dispose of CRL.M.C. 1008/2023 and CRL.M.C. 1369/2023, along with pending applications, arising out of common set of facts, contentions and prayer.

2. By way of the present petitions, the petitioners seeks quashing of the complaint case No. 17879/ 2019 titled as *'Kotak Mahindra Bank Ltd. Vs. K. Swaminathan'* and complaint case No. 17878/ 2019 titled as *'Kotak Mahindra Bank Ltd. Vs. S. Visalakshi'* pending, before the Metropolitan Magistrate (NI Act)-01, Rouse Avenue Court Complex, New Delhi, alongwith the summoning order dated 29.11.2019 and order framing notice dated 26.02.2020.

3. The facts in a nutshell are that in the complaint, the respondent/complainant alleged that being a banking company, they had advanced a working capital loan aggregating to Rs.11,10,00,000/- to M/s.Ultra Tile Pvt Ltd (Borrower), wherein the present petitioners stood as guarantors. Upon the borrower committing default in repayment of the credit facilities, the complainant issued a Notice dated 21.10.2019 under Section 13 (2) of the ("SARFAESI Act") to the Borrower and the four Guarantors including the present petitioners for demand of Rs.8,19,21,359.06/-. In lieu of the aforesaid, towards the discharge of partial liability, two cheques were issued by the petitioners, which upon presentation were dishonoured for the reason "Funds Insufficient". Subsequently, the complainant bank sent a legal demand notice to the petitioners, requesting for payment of the cheque amount, however, even after the lapse of 15 days from the date of service of the demand notice, the petitioners failed to make the payment for the same and hence the subject complaint case came to be filed.

4. Learned counsel for the petitioners contented that the petitioners had only stood as guarantors, as also mentioned in the subject complaint and that they had no transaction whatsoever with the respondent bank. It is stated that without waiting for the 60-day period given via the notice issued under

Section 13(2) of the SARFAESI Act, Respondent No. 2, without informing the petitioners, deposited the cheque given as security by the guarantors. It is the case of the petitioners that the Respondent bank fraudulently entered the amount of Rs.2 crores, self-dated and deposited the cheque.It is further stated that proceedings for recovery of the above amount have been initiated and a recovery of Rs 7,93,98,810/- out of Rs. 8,19,21,359/- has already been made and thus, continuation of the present proceedings against the petitioners would be an abuse of the process of law.

5. On the other hand, learned counsel for the respondent No. 2 contended that the proceedings under Negotiable instruments Act were initiated against the Guarantors whereas, the SARFAESI proceedings were only initiated against the borrower/mortgagor. Therefore, the present proceeding is not governed by provisions of SARFAESI Act. Additionally, it is also stated that the Insolvency proceedings were initiated in the year 2019 against Borrower company and thus, there was no requirement as per law to make the borrower company as co-accused. It is further stated that submission of the petitioner that only debt of Rs.25,22,549/- is recoverable,has been wrongly stated.

6. In the case at hand, firstly, neither the signatures of the petitioners on the cheques nor the liability for which the cheques were issued has been denied. In regard to the submission relating to filling of particulars, the said issue is no longer res integra. The Supreme Court, in various decisions, clearly laid down that even in such situations, Section 138 NI Act would be attracted. In Bir Singh v. Mukesh Kumar[1] , it has been observed that:—

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[1] (2019) 4 SCC 197

"33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted."

7. The said legal position has been reiterated by the Supreme Court in Oriental Bank of Commerce v. Prabodh Kumar Tewari[2] and K. Ramesh v. K. Kothandaraman[3]. In Oriental Bank of Commerce (Supra), the Supreme Court observed:—

"18. For such a determination, the fact that the details in the cheque have been filled up not by the drawer, but by some other person would be immaterial. The presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert. Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the defense whether cheque was issued towards payment of a debt or in discharge of a liability.

19. Undoubtedly, it would be open to the respondents to raise all other defenses which they may legitimately be entitled to otherwise raise in support of their plea that the cheque was not issued in pursuance of a pre-existing debt or outstanding liability."

8. In view of the above extracted position of law, the submission made on behalf of the petitioners that date and particulars on the said cheques are not filled by the petitioners, would not make any difference to the liability of the drawer. The respondent bank had taken security cheques with a clear

[2] 2022 SCC OnLine SC 1089
[3] 2024 SCC OnLine SC 531

understanding that the same will be encashed in case of default in repayment of dues.

9. Insofar as the other contentions raised by the petitioner are concerned, before dealing with them, it would be apposite to reiterate the legal position qua offences under Section 138 NI Act. An offence under Section 138 NI Act is made out, when the conditions stipulated in the proviso to Section 138 are satisfied. The first condition is that the cheque, which has been drawn on an account maintained by the drawer, ought to be 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. The second condition is that the payee or the holder in due course of the cheque, as the case may be, must make a demand for the said money by giving a notice in writing to the drawer of the cheque within 30 days of receiving the information from the bank regarding the dishonour of the cheque. The third condition states that there should be a failure on the part of the drawer of cheque to make the payment of the amount under the cheque to the payee or the holder in due course, as the case may be, within 15 days of the receipt of the said notice. When all these three conditions are fulfilled, then only an offence under Section 138 of the NI Act can be said to have been committed by the person issuing the cheque [Ref: MSR Leathers v. S. Palaniappan& Anr.[4], Charanjit Pal Jindal v. L.N. Metalics[5] and N. Harihara Krishnan v. J. Thomas[6].]

10. The case of the petitioner that they were merely a guarantor does not merit the consideration of this court at this stage in as much they were

[4](2013) 1 SCC 177
[5](2015) 15 SCC 768
[6](2018) 13 SCC 663

proceeded against their capacity as drawer of the subject cheques. Further, the Deed of Guarantee dated 20.02.2018, executed between the petitioners and the complainant makes it clear that petitioners acknowledge the issuance of said cheques towards the discharge of the liability on behalf of the borrower.

11. As regards to the other contention of the petitioners that the petitioners have paid a substantial amount under the cheques, has not been dealt with either before the presentation or before filing of the complaint. There is no record of any document/evidence to substantiate the aforesaid submission. In light of the aforesaid, the exact amount becomes a question of fact which would require evidence to be led by both sides at the time of trial. Moreover, the respondent has disputed the payment made by the petitioners and has stated that an amount of approx. Rs. 3,17,25,439 remains pending.

12. In light of the discussion above, this Court finds no merit in the said petitions and therefore, both the petitions stand dismissed. The petitions alongwith pending applications is disposed of in the above terms.

MANOJ KUMAR OHRI, J

JULY 16, 2024

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