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

% Date of decision: 29.02.2024

\+ **CRL.M.C. 1636/2023 and CRL.M.A. 6214/2023 (stay)**

GEETA OJHA ..... Petitioner
Through: Mr.Kushdeep Gaur, Advocate

versus

STATE (GOVT.) NCT OF DELHI & ANR. ..... Respondents
Through: Mr. Laksh Khanna, APP for State
Mr.Raj Vardhan and Ms.Rashmi Raj Vardhan, Advocates for respondent No.2

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 482 Cr.P.C., petitioner seeks quashing of the Criminal Complaint No.11453/2018 instituted under Section 138 of Negotiable Instruments Act (hereafter, *'NI Act'*), titled as *'Smt. Sunita v. Sh. Sanjeev Kumar Ojha & Another'* pending before the learned Metropolitan Magistrate, Patiala House Courts, New Delhi.

2. The facts in nutshell are that, in the criminal complaint filed before the trial court, respondent No.2 (complainant) alleged that the petitioner and her husband were her family friends knowing each other for more than 5 years and expressed their financial distress. Petitioner's husband namely *Sanjeev Kumar Ojha* requested for a friendly loan of Rs.5 lacs from respondent No.2. The said loan was given in cash on 20.12.2013 for a period of 3 years. It was alleged that the present petitioner stood as surety towards repayment of the loan. After a period of 3 years, when respondent No.2 demanded repayment of the loan, *Sanjeev Kumar Ojha* issued a cheque

dated 13.12.2017 bearing No.775235 drawn on Punjab National Bank, Central Ordinance Depot, Delhi Cantt., New Delhi towards discharge of his debt/liability against the said loan. The cheque when presented for encashment, was dishonoured vide return memo dated 14.12.2017. It was re-presented on 22.02.2018, when it was again dishonoured vide return memo of the same date. The cheque was again presented for the third time on 08.03.2018, when it was again dishonoured vide return memo of the same date. Each time, the return memo showed the remarks *'Kindly contact Drawer/Drawee Bank and please present again'*.

3. Subsequently, respondent No.2 issued a legal notice to *Sanjeev Kumar Ojha* only and demanded the amount under the cheque. When no payment was received, the subject criminal complaint came to be filed. The only issue that requires consideration is whether the criminal complaint against the present petitioner is maintainable when no legal notice has been issued, especially when the criminal complaint has been filed under Section 138 NI Act.

4. The petition is resisted by learned counsel for respondent No.2 by contending that the loan was given on the joint request of the parties and resultantly, petitioner as well as her husband have joint liability to repay the same.

5. 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;*
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> *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."

6. Concededly, in the present case, Section 141 of the NI Act is not attracted as the subject complaint is not in the context of an offence by a company. The petitioner as well as the co-accused *Sanjeev Kumar Ojha,* 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 it is only when the drawer receives the notice and fails to make the payment within the time provided by the statute, does the dishonour become an offence. A perusal of the criminal complaint as well as legal notice would show that it is the admitted case of the complainant that the said loan was advanced on the specific request of co-accused *Sanjeev Kumar Ojha*.

7. In the present case, the criminal proceedings initiated by respondent No.2 are liable to be quashed on two grounds. Firstly, it is the conceded position that no demand notice was issued to the present petitioner. The demand notice was issued only to *Sanjeev Kumar Ojha.* 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 cheque, copy of which has been placed on record, was signed only by *Sanjeev Kumar Ojha,* and as such, the petitioner is not even the signatory of the subject cheque. Further, the account from which the cheque was issued was also not a joint account.

8. 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 are extracted below:-

> *"xxx*
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> *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.*
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> *xxx"*

9. To the same extent is the decision of this Court in Smt. Maya Tyagi *v.* Mr. Simmer Sahni[3], which is also squarely applicable to the facts of the present case.

10. In view of the above, the criminal complaint filed against the present petitioner is clearly an abuse of process of law and the same is liable to be

[1] M/s Laxmi Dyechem *v.* State of Gujarat & Ors., (2012) 13 SCC 375
[2] (2021) 4 SCC 675
[3] Judgement dated 16.01.2024 passed in CRL.M.C.169/2023

quashed and set aside. Consequently, the present petition is allowed and the criminal complaint is set aside.

11. The petition is disposed of alongwith the pending application.

MANOJ KUMAR OHRI
(JUDGE)

FEBRUARY 29, 2024
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