



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

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Date of Decision: 04.04.2024

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CRL.M.C. 1733/2023, CRL.M.A. 6649/2023

FIRST CRUSH CAFE PVT. LTD & ANR. Petitioners

Through: Mr. Amit Kaushik, Advocate.

versus

SH. SHUBHAM JAIN

.... Respondent

Through: Mr. Vipin Dilawari, Advocate.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 482 Cr.P.C., the petitioners seek quashing of Complaint Case No. 52/2021 titled “Shubham Jain vs First Crush Café Pvt. Ltd.” arising out of proceedings filed under Section 138/142 of the Negotiable Instruments Act, 1881 (‘NI Act’) read with Section 420 IPC and pending before learned MM (NI West), Tiz Hazari Courts, New Delhi as well as summoning order dated 01.02.2021.

2. The facts as discernible from the record reveal that in the subject complaint, it was alleged that *Deepak Kadian @ Aryan*/petitioner No.2 being the Director and Authorised Signatory of *M/s First Crush Café Pvt. Ltd.*/petitioner No.1 approached the complainant/respondent and one *Mr. Amit Kumar Goyal* for business investment with the promise of providing commission on a monthly basis to them. The complainant and *Amit Kumar*



Goyal agreed for the same and an Agreement in this regard was entered into on 06.09.2018. As per the Agreement, both the complainant and *Amit Kumar Goyal* invested Rs.10 lacs each in the business of petitioner No.2. Upon failure of the petitioners to comply/fulfil the terms and conditions of the agreement, the complainant and *Amit Kumar Goyal* terminated the agreement vide legal notice dated 13.10.2020. It has been further alleged that petitioner No.2, at the time of execution of Agreement, had handed over postdated cheque ('PDC') bearing No. 000040 for Rs.10 lacs dated 05.11.2020 drawn on RBL Bank, Panipat Branch, Panipat. The said cheque, when presented for encashment, was dishonoured with the remarks 'account blocked' vide return memo dated 06.11.2020. Consequently, a demand notice was issued on 19.11.2020 asking petitioner No.2 to make good the payment under the cheque. Upon failure to repay the amount under the cheque, the subject complaint under Sections 138/142 read with Section 420 IPC came to be filed, in which the Trial Court has taken cognizance and summoned the petitioner.

3. Learned counsel for the petitioners has impugned the criminal complaint as well as summoning order on following grounds, which are also recorded in the order dated 15.03.2023:-

2.1 That the criminal complaint pending before the learned Magistrate relates to the alleged dishonour of cheque bearing No. 000040 dated 05.11.2020 for Rs.10 lacs drawn on RBL Bank, Panipat Branch favouring Shubham Jain (cf. paras 10 and 11 of the complaint) however the statutory notice dated 19.11.2020 based on which the criminal complaint is being filed, refers to cheque bearing No. 000041 dated 05.11.2020 for Rs.10 lacs drawn on RBL Bank Ltd., Panipat Branch favouring Amit Goyal;



2.2 That furthermore, statutory notice dated 19.11.2020 aforesaid has been issued on behalf of Amit Kumar Goyal alias Amit Goyal but the criminal complaint has been filed by Shubham Jain;

2.3 That accordingly, the criminal complaint is not based upon a validly issued statutory notice, either in terms of the cheque number, or of the persons on whose behalf the notice has been issued.

4. It is also contended that petitioner No.1 is a company having registered address at Subhash Colony, Panipat whereas petitioner No.2 is a resident of Dehradun, Uttarakhand and as such the Trial Court was required to conduct an inquiry under Section 202 Cr.P.C., which it has failed to conduct. Failure to conduct said inquiry is a material defect, which further substantiates that the summoning order was passed in a mechanical/cursory manner.

5. Learned counsel for the respondent, on the other hand, has supported the impugned order. It is submitted that petitioners have entered into an Agreement with the respondent as well as *Amit Kumar Goyal* and had issued two postdated cheques bearing Nos. 000040 and 000041 for a sum of Rs.10 lacs each both dated 05.11.2020 drawn on RBL Bank, Panipat Branch. It is further submitted that though two separate complaints were filed before two separate Courts qua the two PDCs, however, inadvertently legal notice of one case was filed in the other case.

6. I have heard the learned counsels for the parties and have also perused the material placed on record.

7. Indeed, summoning of an accused in a criminal case is a serious matter. Before summoning an accused, the Trial Court has to carefully scrutinise the evidence brought on record and may even put questions to the



complainant and witnesses to elicit answers, in order to find out the truthfulness of the allegations and then examine if any prima facie case exists against all or any of the accused. [Ref.: Pepsi Foods Ltd. & Anr v. Special Judicial Magistrate & Ors.¹]

8. In N. Harihara Krishnan v. J. Thomas², it has been held that:-

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26. The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are : (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the

¹ (1998) 5 SCC 749

² (2018) 13 SCC 663



cheque to prove that he had in fact made the payment pursuant to the demand.

27. By the nature of the offence under Section 138 of the Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of the Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide “cause of action for prosecution”. Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint.

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9. While the criminal complaint in the present case is pending before



learned M.M. (N.I. West), Digital Court-01, Tis Hazari Court, Delhi, the other criminal complaint is stated to be pending before learned M.M. (N.I. Act), Digital Court, East, KKD Courts, Delhi. Concededly, the respondent has not taken corrective steps qua the aspect of attaching of incorrect legal notice till date.

Be that as it may, it is a recognized principle of law that at the time of issuance of summons, the Trial Court is required to apply its judicial mind. The complaint has to be mandatorily preceded by steps as stipulated in the proviso to Section 138, in order to contend that the offence is made out. The first condition is that the cheque 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.³, Charanjit Pal Jindal v. L.N. Metalics⁴ and N. Harihara Krishnan v. J. Thomas (Supra).

10. In the present case, the subject complaint came to be filed on behalf of

³ (2013) 1 SCC 177

⁴ (2015) 15 SCC 768



respondent whereas the legal notice filed alongwith it, was issued on behalf of *Amit Kumar Goyal*. The subject complaint relates to cheque bearing No. 000040, whereas the legal notice attached with it, is with respect to another cheque bearing No. 000041. Apparently, the Trial Court did not apply its mind to the said documents and issued the summoning order in a cursory manner.

11. In view of the aforesaid discussions, it can be observed that the subject complaint as well as the summoning order suffers from a material defect inasmuch as the complaint has been filed and the summoning order has been issued based upon an incorrect demand notice. While the respondent has contended that correct demand notice was issued to the petitioners, and that inadvertently, the incorrect notice has been attached with the complaint, however, till date no corrective steps have been taken. Further, the name of complainant also differs in the complaint and the demand notice. In light of the same, this Court is of the considered opinion that the summoning order has been passed in a mechanical manner and the same is set aside.

12. Petition is disposed of in the above terms alongwith miscellaneous application.

MANOJ KUMAR OHRI
(JUDGE)

APRIL 04, 2024

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