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

\+ CRL.M.C. 1241/2022 & CRL.M.A. 5413/2022

PREETI KUMAR @ PREETI AILAWADI .....Petitioner

Through: Mr. Deepak Kumar, Advocate.

versus

ARUN KHANNA & ANR. .....Respondents

Through: Mr. Shoaib Haider, APP for the State.
Mr. Mukesh Kumar, APP for the State.
Mr. Amit Negi, Advocate.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

<u>O R D E R</u>

% **05.09.2024**

1. The Petitioner has approached this Court for quashing the proceedings arising out of a criminal complaint being CC No.1268/2021 filed under Section 138 of the Negotiable Instruments Act.

2. Material on record discloses that the Complainant is a partner in M/s AR Exports having his office at 1/3A, Ground Floor Kundan Nagar, Street No.7, Near Laxmi Nagar, Delhi-110092 and carries on the business of processing all types of cloths including dying and printing on job work basis.

3. It is stated that the Petitioner herein approached the Complainant on behalf of Prret Fusion (I) Private Limited for the purpose of a job work of processing cloths including dying and printing.

4. It is stated that the Complainant carried out the job work and delivered the processed clothes and fabrics as per the terms and conditions which were agreed upon by the Complainant and the Petitioner herein.

5. It is stated that in lieu of the services rendered by the Complainant, a sum of Rs.92,131/- was due and outstanding towards the principal amount on 18.07.2020. The Petitioner issued a cheque bearing No.1583 dated 13.05.2021 for an amount of Rs.30,000/- drawn on HDFC Bank, Nehru Place, Delhi in favour of the partnership firm of the Complainant towards part payment of her liability.

6. The cheque was signed by the Petitioner on behalf of a sole proprietor concern called as Prret 3. The Complainant presented the aforesaid cheque with Axis Bank Limited, Vivek Vihar. On 09.06.2021, the cheque was returned dishonoured with remark 'account closed'. The requisite notice under Section 138 of the NI Act dated 23.06.2021 has been issued in the name of the Petitioner as a partner Prret Fusion (I) Private Limited. The said notice was replied to resulting in the instant complaint.

7. Initially, the complaint was filed making Prret Fusion (I) Private Limited as accused No.1 and the Petitioner as accused No.2 showing her to be the director of Prret Fusion (I) Private Limited. However, subsequently, the memo of parties was amended wherein only the Petitioner who is the director of Prret Fusion (I) Private Limited and proprietor of Prret 3 was arraigned as the accused without making the Company as an accused. Vide Order dated 16.08.2021, summons have been issued on the said complaint.

8. The short contention of the learned Counsel for the Petitioner is that the cheque had been given by the Petitioner in the capacity of the proprietor of Prret 3. No notice under Section 138 of the NI Act has been given to Prret 3, who was the drawer of the cheque. In the absence of a legal notice to Prret 3, the drawer of the cheque of which the Petitioner is the proprietor, the complaint against the Petitioner is not maintainable as necessary ingredients under Section 138 of the NI Act are not fulfilled.

9. It is stated that since legal notice has been issued to Prret Fusion (I) Private Limited and the liability was of Prret Fusion (I) Private Limited. The drawer cheque being Prret 3 had not been issued notice, and therefore, the complaint under Section 138 of the NI Act could not have been maintainable against the Petitioner.

10. *Per contra*, learned Counsel for the Respondent, contends that it was only a mere typographical error and the notice was indeed sent to the Petitioner since the cheque was drawn by Prret 3 which is the sole proprietorship firm of the Petitioner and therefore the argument raised by the Petitioner can be decided only at the stage of trial and not at this stage.

11. Heard learned Counsel for the parties and perused the material on record.

12. Section 138 of the NI Act reads as under:-

> *"**138.** Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for 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, 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 by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to 68[two] years, or with fine which may extend to twice the amount of the cheque, or with both:*
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> *Provided that nothing contained in this section shall apply unless—*

(a) the cheque has been 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;*

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 69[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

13. The Apex Court in a number of judgments has succinctly laid down as to how an offence under Section 138 of the NI Act is made out. The proviso to Section 138 of the NI Act lays down the conditions before which a complaint can be filed. The proviso to Section 138 contains the preconditions which must be fulfilled before an offence under the provision is made out. These conditions are : (i) presentation of the cheque to the bank within six months from the date on which it is drawn or within the period of its validity, whichever is earlier; (ii) a demand being made in writing by the payee or holder in due course by the issuance of a notice in writing to the drawer of the cheque within thirty days of the receipt of information from the bank of the return of the cheques; and (iii) the failure of the drawer to

make payment of the amount of money to the payee or the holder in due course within fifteen days of the receipt of the notice. [Refer to:-Himanshu v. Shivamurthy & Anr., **(2019) 3 SCC 797**]

14. Undisputedly, the cheque has been issued by Prret 3 a sole proprietorship firm of which the Petitioner is the sole proprietor. The fact that the cheque was issued to clear the liability of Prret Fusion (I) Private Limited is of no consequence for the purpose of an offence under Section 138 of the NI Act.

15. Since no notice has been given to the drawer, i.e., Prret 3, which is the sole proprietorship firm and the Petitioner as the sole proprietor of Prret 3 and notice having been issued only to the Petitioner in the capacity of a director of Prret Fusion (I) Private Limited, the ingredients under Section 138 of the NI Act have not been satisfied and resultantly the complaint is not maintainable.

16. The petition is allowed and the complaint stands quashed. Pending application(s), if any, stands disposed of.

SUBRAMONIUM PRASAD, J

SEPTEMBER 5, 2024
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