



* IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Date of Decision: 28.03.2024

+

CRL.M.C. 6017/2023 & CRL.M.A. 22555/2023

MRS SANTOSH RANI DHARIWAL

..... Petitioner

Through: Mr.R.S.Kundu, Mr.Kuldeep S.Rajput
and Mr.Amit Chaudhary, Advocates

Versus

STATE (GOVT. OF NCT OF DELHI) AND ANR

..... Respondents

Through: Mr. Sanjeev Sabharwal, APP for State
Mr.Madan Lal Kalkal and Mr.Deepak
Chopra, Advocate 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., the petitioner seeks setting aside of the summoning order dated 18.09.2018 passed by learned MM, Rohini Courts, Delhi in Complaint Case being CT Cases/4227/2018 titled as “M/s Sachdeva Land and Finance Pvt. Ltd. v. Mrs. Santosh Rani Dhariwal” and instituted under Section 138 of Negotiable Instruments Act, 1881 (‘NI Act’).

2. The facts, as discernible from the record, are that respondent No.2/complainant is an NBFC duly incorporated under the Companies Act, 1956 and also registered with RBI, and is engaged in the business of loan and finance. It is alleged that husband of the petitioner namely *Mr. Sandeep*



Singh Deswal approached the complainant and requested a loan of Rs.1 crore for his business purposes. A loan agreement was executed on 07.09.2015 between the petitioner's husband and the complainant. The loan document was accompanied by a Term Sheet, which was signed not only by *Mr. Sandeep Singh Deswal* but also by the petitioner. The petitioner also executed a surety bond on 07.09.2015, vide which she undertook to pay the loan amount with interest, costs and expenses to the complainant, in case the loan is not paid by *Mr. Sandeep Singh Deswal*. The petitioner had also given the original papers i.e. allotment letter, buyer and seller agreement and receipt in respect of her office bearing No.207, 2nd Floor, Palm Square, Gurgaon, Haryana as collateral security. Upon default in repayment of loan by petitioner's husband, petitioner's husband issued a cheque bearing No.000013 dated 02.06.2018 drawn on HDFC Bank, Vatika Atrium, A-Block Golf Course Road, Sector-53, Gurgaon-122002 for an amount of Rs.60 lacs towards part-payment of the dues. When the said cheque was presented for encashment, the same was returned dishonoured with the remark '*funds insufficient*' on 02.06.2018. A legal demand notice dated 28.06.2018 was issued to petitioner's husband and upon his failure to repay the cheque amount, respondent No.2 filed a case under Section 138 NI Act against *Mr. Sandeep Singh Deswal* vide CC No.3667/2018. In the meantime, the petitioner had taken back all the original documents in respect of the property that were given as collateral surety/mortgage, on the pretext of getting the property registered and also executed a receipt acknowledging receipt of the said documents. The petitioner had also handed over a separate cheque bearing number 000001 dated 02.07.2018 drawn on HDFC Bank, Vatika Atrium, A-Block Golf Course Road, Sector-53, Gurgaon-122002 for



Rs.25 lacs towards part payment of the loan taken by her husband. The said cheque, when presented for encashment, was dishonoured with the remarks '*funds insufficient*' vide return memo dated 03.07.2018. The complainant issued a demand notice dated 31.07.2018 and upon her failure to repay the cheque amount, the subject criminal complaint came to be filed, wherein the petitioner has been summoned by the impugned order.

3. Mr.R.S.Kundu, learned counsel for the petitioner submits that the cheque issued by the petitioner was not towards discharge of any legal liability but was issued as surety/security as she stood as a guarantor of the loan taken by her husband. In support of his submissions, he has relied upon the decisions in Pooja Ravinder Devidasani v. State of Maharashtra & Anr.¹ and Dilip Hariramani v. Bank of Baroda².

4. It is also contended that even otherwise a reading of the loan document would show that the petitioner only stood as a guarantor and that the loan was taken by her husband in the name of his firm, which is a sole proprietorship firm. Thus, without impleading her husband, proceedings would not lie against the petitioner.

5. The petition is contested by the complainant/respondent No.2, who submits that petitioner's liability stands covered under the expression 'other liability' appearing in Section 138 of the NI Act and in this regard, he has relied upon the decision of the Supreme Court in ICDS Ltd. v. Beena Shabeer and Anr.³ and Four Seasons Energy Ventures Pvt. Ltd. & Ors. v. State of NCT of Delhi & Anr.⁴

¹ (2014) 16 SCC 1

² 2022 SCC OnLine SC 579

³ (2002) 6 SCC 426

⁴ 2012 SCC OnLine Del 3361



6. Pertinently, the principal borrower i.e. the proprietorship firm of petitioner's husband had issued a cheque of Rs.60 lacs towards part payment of its liability and upon dishonour of the said cheque, proceedings under section 138 NI Act were initiated vide CC No.3667/2018, which are pending consideration. Statedly, the petitioner has not been arrayed as an accused in the said proceedings. The present proceedings are with respect to a cheque of Rs.25 lacs issued by the petitioner, in the capacity of guarantor of the loan taken by her husband. The subject cheque has been issued by the petitioner from her individual account and she is the signatory of the same. Indeed, in terms of the decision in Pooja Ravinder Devidasani (Supra), the personal guarantor, who in that case was a former Managing Director, cannot be proceeded against under Section 141 NI Act and made vicariously liable unless specific averments are made leading to reasonable inference that the person was in-charge or involved in day-to-day affairs of the accused company. However, in case of a separate cheque issued by the guarantor, upon dishonour of the same, the presumption under Section 139 NI Act comes into the picture. No doubt, the said presumption is rebuttable, however, the same can only be rebutted by leading evidence and due consideration of the said evidence, which can only be done during trial.

7. Pertinently, the fact relating to loan taken by the petitioner's husband as well as the issuance of the cheque by the petitioner are not disputed. The petitioner has indeed accepted that the said cheque was issued by her as security for the loan taken by her husband. The factum of dishonour of the cheque issued by the petitioner as well as the receipt of legal notice consequent to such dishonour are also not in dispute in the present proceedings. The only contention that has been raised before this Court is



that since the petitioner had only stood as guarantor and it was her husband who had actually taken the loan, proceedings against her could not be continued in the absence of her husband being impleaded as a party.

8. The Supreme Court in ICDS Ltd. (Supra), while dealing with the issue of Section 138 NI Act vis-à-vis a guarantor, observed as under:-

“xxx

10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the section stands with the words “Where any cheque”. The abovenoted three words are of extreme significance, in particular, by reason of the user of the word “any” — the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.

11. The issue as regards the coextensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. “Any cheque” and “other liability” are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. Any contra-interpretation



would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus do not lend any assistance to the contentions raised by the respondents.

xxx”

9. From the above extract, it can be seen that the expression ‘other liability’ encompasses all distinct forms of liabilities including but not limited to the liability undertaken as a guarantor. Once the same is clarified, and considering the fact that the subject cheque is admitted to have been issued by the petitioner as well as the fact that the legal notice was received by the petitioner and that she had failed to make due payment, the ingredients of the offence under Section 138 NI Act are fulfilled.

Upon consideration of the same, the presumption under Section 139 NI Act comes into action and while the same is rebuttable, it requires leading and appreciation of evidence, which can only be undertaken during trial. This Court, in its jurisdiction under Section 482 Cr.P.C., cannot undertake a detailed appreciation of the evidence and only has to form a prima facie view.

10. In view of the discussion hereinabove, this Court is of the considered opinion that the petitioner has failed to make out a prima facie case thereby seeking setting aside of the summoning order dated 18.09.2018. Consequently, the petition is dismissed alongwith pending application.

MANOJ KUMAR OHRI
(JUDGE)

MARCH 28, 2024/rd