



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

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Date of Decision:16.01.2024

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CRL.M.C. 6853/2023 & CRL.M.A. 25617/2023

JITENDRA BHATI

..... Petitioner

Through: Mr. Nilesh Kumar, Mr. Nimesh Kumar & Mr. Sunil Kumar, Advocates.

Versus

SANTOSH DEVI

..... Respondent

Through: Mr. Avinash Kumar, Mr. Amarjeet, Mr. Nitish Kumar & Mr. Tarun Bhati, Advocates.

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CRL.M.C. 6863/2023 & CRL.M.A. 25649/2023

JITENDRA BHATI

..... Petitioner

Through: Mr. Nilesh Kumar, Mr. Nimesh Kumar & Mr. Sunil Kumar, Advocates.

Versus

SANTOSH DEVI

..... Respondent

Through: Mr. Avinash Kumar, Mr. Amarjeet, Mr. Nitish Kumar & Mr. Tarun Bhati, Advocates.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petitions filed under Section 482 Cr.P.C., the



petitioner seeks quashing of the Complaint Case Nos. 9213/2019 and 9214/2019 filed under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'NI Act') both titled as 'Santosh Devi v. M/s. Synergy Earth Movers' pending before learned Metropolitan Magistrate, (North-West), District Court Rohini, Delhi.

2. Considering that the facts and the parties are common as well as the fact that the learned counsels for the parties have also addressed common submissions, both the cases are taken up together and disposed of vide this common judgment.

3. Briefly, the facts as available from the material placed on record are that the respondent has alleged that M/s Synergy Earth Movers is a proprietorship firm and the petitioner is the director/proprietor of the said firm, looking after its day-to-day affairs. Further, it is alleged that the petitioner approached the respondent through an offer letter providing machinery for a project on Yamuna Expressway, and the same was accepted by the respondent. As per the terms of the offer letter, payment would be made by M/s Synergy Earth Movers and petitioner on the basis of the bills raised by the respondent. In response to the bills raised by the respondent, following 3 cheques were issued:-

- a. *Cheque No.-365721, dated 20.08.2009, amounting to Rs.1,40,000/-, SBI Bank, Branch- Dankaur,*
- b. *Cheque No.-365727, dated 13.10.2009, amounting to Rs. 1,00,000/-, SBI Bank, Branch- Dankaur and*
- c. *Cheque No.-365728, dated 20.09.2009, amounting to Rs. 1,00,000/-, SBI Bank, Branch- Dankaur.*

4. The aforesaid cheques, when presented for encashment, were



dishonored with the remarks '*insufficient funds*' vide a return memo dated 06.03.2010, leading to filing of the complaint in question. It was also alleged that though statutory notice was issued asking the petitioner s to make good the payment however, upon his failure to pay, the complaints in question were filed before the trial court. While the first complaint case relates to Cheque No. 365721, the second complaint case relates to the other two cheques bearing No.365727 and No.365728. The petitioner has raised multifold contentions. The first contention relates to limitation inasmuch as the demand notice was issued beyond the statutory period of 30 days. Secondly, the petitioner is not signatory/author of the subject cheque, the same having been being issued by one *Smt. Shalley*, the sole proprietor of the firm. The cheques were also not issued from any joint account.

5. Learned counsel for the respondent, on the other hand, while opposing the petition has contended that the petitioner while raising invoices, has admitted himself to be the proprietor of the firm. In his bail application, he had taken a stand that the cheque book from which the subject cheques were issued, belonged to him and that the same was lost. At the time of accused evidence, the defence taken was that the cheque was issued as a security cheque. The petitioner had further approached the Allahabad High Court seeking compounding of the offence. All these pleas taken at different times by the petitioner are self-contradictory and thus would require trial. It is submitted that requirement to issue of notice was dispensed with in terms of Section 98, NI Act.

6. The cheques were presented for encashment in January, 2010 when they were dishonoured through return memo dated 03.02.2010. Concededly, a legal notice was issued on 18.03.2010. For appreciation of contention of



limitation, Section 138 of the NI Act is extracted hereunder:-

“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 be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

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, 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.”

7. From a reading of the provision and clause (b) of the proviso thereof, it is crystal clear that the payee or the holder in due course is required to raise a demand for payment of amount of money by giving a statutory notice



in writing to the drawer of the cheque within 30 days of receipt of the information from the bank regarding its dishonor. Although the complainant in her demand notice had statedly mentioned the date of return memo as 06.03.2010 however, a perusal of the return memo, a copy of which has been placed on record, shows that the same was dated 03.02.2010. There is no averment either in the notice or in the complaint that the return memo was not received on the said date but on any other later date.

8. From the above, it is thus discernible that the legal notice issued on 18.03.2010 was much beyond the requisite period of 30 days. The decision of Supreme Court in Sivakumar v. Natarajan¹ is apt on the fact situation and the relevant extract reads as under:-

“xxx

8. By reason of the provisions of the Act, a legal presumption in regard to commission of a crime has been raised. The proviso appended thereto, however, states that nothing contained in the main provision would apply unless conditions specified in clauses (a), (b) and (c) thereof are complied with. Clauses (a), (b) and (c) of the proviso, therefore, lay down conditions precedent for applicability of the main provision. Section 138 of the Act being penal in nature, indisputably, warrants strict construction.

9. In Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd., [2008 (16) SCALE 317] this Court held:

“8. ... The proviso appended thereto imposes certain conditions before a complaint petition can be entertained.

9. Reliance has been placed by both the learned Additional Sessions Judge as also the High Court on a decision of this Court in K. Bhaskaran v. Sankaran

¹ (2009) 13 SCC 623



Vaidhyan Balan, (1999) 7 SCC 510. This Court opined that the offence under Section 138 of the Act can be completed only with the concatenation of a number of acts, namely, (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It was opined that if five different acts were done in five different localities, any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act and the complainant would be at liberty to file a complaint petition at any of those places. As regards the requirements of giving a notice as also receipt thereof by the accused, it was stated: (SCC pp. 518-19, para 18)

‘18. On the part of the payee he has to make a demand by “giving a notice” in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such “giving”, the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days “of the receipt” of the said notice. It is, therefore, clear that “giving notice” in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.’

* * *

13. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving



its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.”

Keeping in view the aforementioned legal principle, interpretation of clause (b) of the proviso appended to Section 138 of the Act has to be considered.

10. We may, however, at the outset notice that both clauses (a) and (b) of the proviso appended to Section 138 of the Act employed the term “within a period”. Whereas clause (a) refers to presentation of the cheque to the bank within a period of six months from the date on which it is drawn, clause (b) provides for issuance of notice “to the drawer of the cheque, within thirty days of the receipt of information”. The words “within thirty days of the receipt of information” are significant. Indisputably, intimation was received by the respondent from the bank on 3-12-2003.

11. Parliament advisedly did not use the words “from the date of receipt of information” in Section 138 of the Act. It is also of some significance to notice that in terms of Section 9 of the



General Clauses Act, 1897, whereupon reliance has been placed by the High Court, the statute is required to use the word “from” and for the purpose of including the last in a series of days or any other period of time, to use the word “to”. The departure made from the provisions of Section 9 of the General Clauses Act by Parliament, therefore, deserves serious consideration.

12. Indisputably, the notice was issued on the 31st day and not within a period of thirty days from the date of receipt of intimation from the bank. If Section 9 of the General Clauses Act is not applicable, clause (b) of the proviso appended to Section 138 of the Act was required to be complied with by the respondent for the purpose of maintaining a complaint petition against the appellant.

xxx”

9. Coming to the second contention, a perusal of the subject cheques would show that the same were signed by *Smt. Shalley* on behalf of M/s Synergy Earth Movers, which was proprietorship firm and not the present petitioner.

10. Concededly, in the present case, Section 141 of the NI Act is not attracted as the same is not an offence by a company. The petitioner was impleaded in his 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 only when the drawer receives a notice and fails to make the payment within the time provided by the Statute, does the dishonour become an offence.



11. In the present case, the criminal proceedings initiated by the respondent are liable to be quashed as the learned MM erred in not satisfying himself with this basic prerequisite before issuing summons. The impugned cheques, copy of which have been placed on record, were signed only by *Smt. Shalley*, and as such, the petitioner is not the signatory of the subject cheques. Even the account from which the cheques were issued was not a joint account.

12. Reference in this regard may also be made to the decision of the Supreme Court in Alka Khandu Avhad v. Amar Syamprasad Mishra & Anr.², wherein it was observed:-

“xxx

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.

xxx”

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

² (2021) 4 SCC 675



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quashed and set aside. Consequently, the present petitions are allowed and the summoning orders in both of aforementioned complaint cases are set aside. The pending applications are also disposed of as infructuous.

MANOJ KUMAR OHRI
(JUDGE)

JANUARY 16, 2024

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