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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 21.10.2024

+ **CRL.M.C. 4453/2019 & CRL.M.A. 35165/2019**

SUSHILA BADOLA

..... Petitioner

versus

TUSHAR PATNI

..... Respondent

+ **CRL.M.C. 4885/2019 & CRL.M.A. 36875/2019**

SUSHILA BADOLA

..... Petitioner

versus

TUSHAR PATNI

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Madhav Khurana, Mr. Nishaank Mattoo, Mr. I.K. Dubey, Mr. Risabh Munjal and Ms. Sanjivani Patt Joshi, Advocates

For the Respondent : Mr. Alok Kumar Pandey and Ms. Muskaan Dewan, Advocates

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HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petitions are filed against the order dated 08.01.2019 (hereafter '**impugned orders**') passed by the learned Metropolitan Magistrate, NI Act, Karkardooma Courts whereby notice under Section 251 of the Code of Criminal Procedure, 1973 ('**CrPC**') was framed against the petitioner in CC Nos. 47151/2016 and 47152/2016 under Section 138 of the Negotiable Instruments Act, 1881 ('**NI Act**').

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2. Complaint under Section 138 of the NI Act was filed by the respondent alleging that he had advanced a friendly loan for a sum of ₹2 crores on the assurance of the petitioner that the same would be returned after the expiry of 6 months. It is alleged that post the expiry of 6 months, despite numerous requests and demands, the petitioner failed to return the said amount. It is alleged that thereafter the petitioner issued a duly signed cheque dated 04.10.2007 for a sum of ₹2 crores in discharge of the debt, and had also allegedly assured that the same would be honored on presentation. It is alleged that the said cheque on presentation was returned back with the remark "*Insufficient funds.*" It is alleged that thereafter, a legal notice was sent, and upon the subsequent non-payment of the loan amount, the respondent through a power of attorney, filed a complaint under Section 138 of the NI Act.

3. It is stated that after the receipt of summons, and during the pendency of that complaint being CC No. 2675/01/07 for the alleged dishonour of the cheque issued by the petitioner for a sum of ₹2 crores, a compromise deed dated 15.11.2008 was allegedly executed between the petitioner and respondent through his authorized representative, whereby the petitioner had allegedly undertaken to return ₹3 crores to the respondent as full and final settlement. Consequently, the respondent had withdrawn the earlier complaint being CC No. 2675/01/07 in view of the compromise deed entered into between the parties.



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4. It is alleged that pursuant to the compromise deed, four cheques each for a sum of ₹75,00,000/- bearing nos. 200451, 200452, 200453, and 200454 were advanced by the petitioner. The proceedings *qua* the first cheque no. 200451 were quashed by this Court *vide* order dated 22.01.2015. This Court, on that occasion, noted that the learned Trial Court committed an error in proceeding with a private complaint filed by Power of Attorney on the strength of the Special Power of Attorney which was not attested by the Indian Embassy at Abu Dhabi, UAE.

5. It was noted that the Special Power of Attorney in the absence of valid attestation by the requisite authority lacked authentication. It was noted further that the learned Trial Court, framing notice under Section 251 of the CrPC, and asking the petitioner to face trial without valid authority, is contrary to the provision of Section 145 of the NI Act and Section 200 of the CrPC since there was no valid Power of Attorney before the court when the order dated 06.04.2010 framing notice was passed. It was noted that the learned Trial Court failed to consider that in the pre/post summoning evidence, the Power of Attorney did not claim that he had personal knowledge of the transaction in question. It was noted that the pre-summoning evidence of the complainant under Section 200 of the CrPC was given by the Power of Attorney by way of Affidavit on behalf of the complainant. It was noted that the complainant was not examined on oath in accordance with Section 145 of the NI Act. It was further noted that even at the post-summoning stage, the learned Trial Court had not considered that Power of Attorney holder is not entitled to give



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evidence on affidavit under Section 145 of the NI Act on behalf of the complainant, and that the complainant failed to take the permission of the Court under Section 302(2) of the CrPC for prosecuting the case through attorney.

6. It was noted that the learned Trial Court did not appreciate how the amount of ₹2 crore had been given to the petitioner in cash, since the petitioner claimed that she never met the respondent. In that light, it was noted that the framing of notice and putting up the matter for complainant's evidence through attorney where the attorney had no personal knowledge about the transaction, was without application of mind. This Court, however, noted that the respondent is entitled to recover the friendly loan from the petitioner by way of filing of criminal complaint or civil suit, and that the respondent may initiate the same in accordance with law and even through valid Power of Attorney. In the light of the aforesaid, the proceedings *qua* the first cheque bearing no. 200451 were quashed by this Court *vide* order dated 22.01.2015.

7. The present proceedings stem from the alleged dishonour of the second and the third cheque bearing nos. 200452, and 200453 dated 01.03.2010 and 01.06.2010 respectively, each for a sum of ₹75,00,000/- allegedly advanced by the petitioner in accordance with the compromise deed dated 15.11.2008. It is the case of the complainant that the subject cheques were presented for encashment by the complainant which returned back unpaid by the bankers with the remarks "*Stop by the drawer.*" It is alleged that thereafter legal



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notices were sent to the petitioner in respect of cheque no. 200452 on 21.09.2010, and cheque no. 200453 on 27.12.2010 through Speed Post/UPC/Courier and the petitioner despite the alleged service of notice, failed to make the payment in respect of the subject cheques within the statutory period of 15 days, which culminated into the present complaints under Section 138 of the NI Act.

8. The learned counsel for the petitioner submitted that the petitioner has been falsely implicated in the present case. He submitted that the petitioner is not acquainted with the respondent or any transactions as alleged by the respondent. He submitted that the present proceedings constitute a second round of litigation between the parties in respect of the subject cheques. He submitted that the first round of litigation was filed on 27.11.2007 by Sh. Prasant Mamgain authorized by the Power of Attorney dated 18.11.2007 which was an invalid document since the same was not attested by the Indian Embassy.

9. He placed reliance on the judgment of the Hon'ble Apex Court in *A.C. Narayanan & Ors. vs. State of Maharashtra : (2015) 12 SCC 203* to contend that the power of attorney holder can only appear, plead and act on behalf of the party, and not depose as a witness on behalf of the executor of Power of Attorney. He submitted that even otherwise, the power of attorney must have personal knowledge of the transaction to give evidence. He submitted that in the present case the respondent is relying upon the Power of Attorney dated 07.09.2010 and the same does not mention that the power of attorney has personal



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knowledge of the case or the alleged transaction. He consequently submitted that the authorized representative could not have tendered an affidavit by way of evidence, and further submitted that the proceedings before the learned Trial Court including the order framing notice under Section 251 of the CrPC is void.

10. He submitted that the pre-summoning evidence by the authorized representative does not mention the mode in which the loan amount was advanced, or the place or time in which the alleged transaction took place. He submitted that the same does not even state that the authorized representative had witnessed the alleged transaction.

11. He submitted that the power of attorney has been executed only for the purposes of filing the complaint, and Sh. Prashant Mamgain is not privy to the details of the alleged transaction since the subject cheques are dated after the execution of the power of attorney. He submitted that even otherwise, the power of attorney does not state that the attorney is authorized to tender on behalf of the respondent.

12. He submitted that the compromise deed is a fabricated document, and even if the same is taken at face value still the compromise deed itself restricts the respondent from initiating fresh proceedings, and instead provides for revival of complaint no. 2675/1/2007 should there be any breach. He submitted that, in any event, the alleged compromise dated 15.11.2008 was itself entered into on the strength of the power of attorney dated 18.11.2007 which was an invalid document because the same was not duly attested by



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the Indian Embassy. He further submitted that the complainant failed to take permission from the Court under Section 302(2) of the CrPC for prosecuting the case through attorney, and consequently submitted that the entire proceedings before the learned Trial Court are illegal.

13. The learned counsel for the respondent submitted that this Court while quashing the complaint case no. 21/10, qua the first cheque *vide* order dated 22.01.2015, did not go into the merits of the case. He submitted that on that occasion the complaint was quashed merely due to the non-existence of a valid authorization. He submitted that this Court while quashing the complaint granted liberty to the respondent to recover the loan amount by filing criminal complaint through valid power of attorney in accordance with law.

14. He submitted that the respondent through his valid Power of Attorney deposited the second and third cheque of ₹75 lakhs each, which too, on presentation, were dishonored. He submitted that consequently the subject complaints were filed under Section 138 of the NI Act. He submitted that the complaint cases were filed through valid authorization duly attested through the Indian Embassy in UAE stating that the authorized representative had personal knowledge regarding the facts of the case. He submitted that the same was also mentioned in the complaint case, and the pre-summoning evidence under Section 138 of the NI Act. He submitted that the compromise deed dated 15.11.2008 executed between the petitioner and the respondent had been challenged by the petitioner, and the said petition was dismissed by this Court *vide* order dated 08.05.2019.



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15. He submitted that while issuing summons, the Court has to only see whether a *prima facie* case has been made out against the accused under Section 138 of the NI Act.

Analysis

16. The petitioner has approached this Court under Section 482 read with Section 483 of the CrPC seeking quashing of the impugned orders and the complaint proceedings in criminal complaints bearing CC Nos. 47151/2016 and 47152/2016. At the outset, it is relevant to note that this Court can quash complaints under the NI Act at the pre-trial stage in the exercise of its inherent jurisdiction under Section 482 of the CrPC if such unimpeachable material is brought forth by the accused persons which indicates that they were not concerned with the issuance of the cheques or that no offence is made out from the admitted facts. The Hon'ble Apex Court in the case of ***Rathish Babu Unnikrishnan v. State (NCT of Delhi) : 2022 SCC OnLine SC 513*** had discussed the scope of interference by the High Court against the issuance of process under the NI Act as under:

“8. The issue to be answered here is whether summons and trial notice should have been quashed on the basis of factual defences. The corollary therefrom is what should be the responsibility of the quashing Court and whether it must weigh the evidence presented by the parties, at a pre-trial stage.

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16. The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal



presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

17. The consequences of scuttling the criminal process at a pretrial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.

18. Situated thus, to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the trial court will not in our opinion be judicious. Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited.”

(emphasis supplied)

17. In line with the dictum of the Hon’ble Apex Court in ***Rathish Babu Unnikrishnan v. State (NCT of Delhi)*** (*supra*), thus, while exercising the power under Section 482 of the CrPC to quash a complaint at the pre-trial stage, it is pertinent for this Court to examine whether the factual defence is of such impeachable nature that the entire allegations made in the complaint is disproved.

18. The main thrust of the petitioner’s argument is that since the authorized representative did not have personal knowledge of the



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alleged transaction, he does not possess the power to tender an affidavit by way of evidence, and the proceedings before the learned Trial Court including the summoning order/ the order of framing notice under Section 251 of the CrPC are illegal. Much emphasis has been placed by the petitioner on the fact that the Power of Attorney holder can only appear, plead, and act on behalf of a party. Reliance has been placed on the case of **A.C. Narayanan (supra)** to argue that the power of attorney holder cannot depose as a witness on behalf of the executor of power of attorney. It has been argued that if the power of attorney holder has rendered some acts pursuant to a power of attorney, then he may depose for the principal in regard to such acts, however, he cannot depose for the principal for the acts done by the principal and not him. It is argued that the power of attorney does not mention that the attorney has personal knowledge of the case, and that the pre-summoning evidence of the attorney does not state the attorney has himself witnessed the alleged transaction or not.

19. It is pertinent to mention that the Hon'ble Apex Court in the case of **A.C. Narayanan (supra)** clarified the position with respect to the power of the holder of the power of attorney to pursue a complaint under Section 138 of the NI Act. The Hon'ble Apex Court observed as under:

“33.1. Filing of complaint petition under Section 138 of the NI Act through power of attorney is perfectly legal and competent.

33.2. The power-of-attorney holder can depose and verify on oath before the court in order to prove the contents of the complaint. However, the power-of-attorney holder must have witnessed the



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transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

33.3. It is required by the complainant to make specific assertion as to the knowledge of the power-of-attorney holder in the said transaction explicitly in the complaint and the power-of-attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

33.4. In the light of Section 145 of the NI Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the NI Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the NI Act.

33.5. The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.”

20. The position with respect to the power of the holder of power of attorney in initiating a criminal complaint is no longer *res integra*. In line with the dictum of the Hon’ble Apex Court in **A.C. Narayanan (supra)**, the power of attorney is competent to file a complaint petition under Section 138 of the NI Act. Further the power of attorney can depose and verify on oath so as to prove the contents of the complaint. The requisite, however, is that the power of attorney holder must either have witnessed the transaction or possess due knowledge regarding the said transactions. The complainant however has to make a specific assertion regarding the knowledge of the power of attorney holder in the transaction in the said complaint. It is the petitioner’s case that the power of attorney holder does not mention



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how the authorized representative has knowledge of the said transaction or that he is being appointed in his capacity as such because he has personal knowledge of the case or the transaction.

21. From a perusal of the complaint, it transpires that the complaint mentions that the authorized representative is fully competent to file and sign the complaint and is competent to file evidence by way of affidavit, and do all other acts to pursue the case. The complaint also mentions that attorney possessed personal knowledge of the case. Further, as was noted by the learned MM, the pre summoning evidence by way of affidavit also states that the attorney possessed personal knowledge about the transaction and the facts of the case.

22. The petitioner has further relied upon the order of the learned MM dated 16.09.2019 where the application filed under Section 209 of the IPC read with Section 340 of the CrPC filed by the petitioner was disposed of. It was argued that the learned MM also noted that merely mentioning a single line that the authorized representative had personal knowledge of the case does not conclude that the person possessed personal knowledge. The authorized representative was consequently directed to file a fresh affidavit by making a clarification as to how he gained personal knowledge of the facts of the case. It was noted that in case the authorized representative failed to clarify or did not possess personal knowledge, he cannot depose on behalf of the complainant, and the complainant itself has to stand in the witness box and examine.



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23. During the pendency of the present proceedings, the petitioner had preferred a revision petition before the learned Appellate Court, who *vide* order dated 21.04.2022, allowed the revision petition and set aside the direction given by the learned MM to the authorized representative of the complainant to file a fresh affidavit. The learned Appellate Court noted that the opportunity to file a 'fresh' affidavit could not have been given without affording any opportunity of hearing to the petitioner on the said aspect. The learned counsel for the petitioner contended that the said order has not been challenged by the respondent, and the same has attained finality.

24. The learned counsel for the petitioner essentially relies upon the order dated 16.09.2019 passed by the learned MM, and the order dated 21.04.2022 passed by the learned Appellate Court to contend that since the petitioner was summoned on the basis of pre-summoning evidence by way of affidavit by the authorized representative which merely stated that the authorized representative possessed personal knowledge of the facts of the case and not what knowledge, and the learned MM itself *vide* order date 16.09.2019 noted that merely stating personal knowledge is not enough, the summons issued to the petitioner was invalid.

25. It is thus pertinent to note that the only short point for determination by this Court is whether merely stating that the authorized representative has personal knowledge of the transaction, and not stating how the authorized representative has personal knowledge of the said transaction is sufficient compliance of the



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dictum of the Hon'ble Apex Court in *A.C. Narayanan (supra)*. For the determination of the said question, reliance may be placed on the decision of the Hon'ble Apex Court in *TRL Krosaki Refractories Ltd. v. SMS Asia (P) Ltd : (2022) 7 SCC 612*. The Hon'ble Apex Court, while dealing with a similar question in respect of an authorized representative on behalf of a company observed as under:

“25. In that view, the position that would emerge is that when a company is the payee of the cheque based on which a complaint is filed under Section 138 of the NI Act, the complainant necessarily should be the company which would be represented by an employee who is authorised. Prima facie, in such a situation the indication in the complaint and the sworn statement (either orally or by affidavit) to the effect that the complainant (Company) is represented by an authorised person who has knowledge, would be sufficient. The employment of the terms “specific assertion as to the knowledge of the power-of-attorney holder” and such assertion about knowledge should be “said explicitly” as stated in A.C. Narayanan [A.C. Narayanan v. State of Maharashtra, (2014) 11 SCC 790 : (2014) 4 SCC (Civ) 343] cannot be understood to mean that the assertion should be in any particular manner, much less only in the manner understood by the accused in the case. All that is necessary is to demonstrate before the learned Magistrate that the complaint filed is in the name of the “payee” and if the person who is prosecuting the complaint is different from the payee, the authorisation therefor and that the contents of the complaint are within his knowledge. When, the complainant/payee is a company, an authorised employee can represent the company. Such averment and prima facie material is sufficient for the learned Magistrate to take cognizance and issue process. If at all, there is any serious dispute with regard to the person prosecuting the complaint not being authorised or if it is to be demonstrated that the person who filed the complaint has no knowledge of the transaction and, as such that person could not have instituted and prosecuted the complaint, it would be open for the accused to dispute the position and establish the same during the course of the trial. As noted in Samrat Shipping Co. [Samrat Shipping Co. (P) Ltd. v. Dolly George, (2002) 9 SCC 455 : 2003 SCC (Cri) 1224] , dismissal of a complaint at the



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threshold by the Magistrate on the question of authorisation, would not be justified. Similarly, we are of the view that in such circumstances entertaining a petition under Section 482 to quash the order taking cognizance by the Magistrate would be unjustified when the issue of proper authorisation and knowledge can only be an issue for trial.”

26. In line with the dictum of the Hon'ble Apex Court in ***TRL Krosaki Refractories Ltd. (supra)***, there is no specific manner in which the averment regarding personal knowledge of the transaction ought to be made in the complaint. In the event that the person prosecuting the complaint is different from the 'payee', all that is required to be demonstrated is that the authorization, and the contents of the complaint are within his knowledge. It is further the position that if at all there is any serious dispute with regard to the person filing the complaint not having personal knowledge of the transaction, the same is open to be disputed by the accused during the course of trial. While this Court is cognizant that such an observation was made with regard to an authorized representative on behalf of a company, the position is not stated to be different in case of a private complaint.

27. The learned counsel for the petitioner also contended that since the petitioner was summoned on the basis of pre-summoning evidence by way of affidavit by the authorized representative which merely stated that the authorized representative possessed personal knowledge of the facts of the case and not what knowledge, and the learned MM itself *vide* order date 16.09.2019 noted that merely stating personal knowledge is not enough, the summons issued to the petitioner was invalid. It is argued that order dated 16.09.2019 to the extent that it



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allowed the authorized representative to file a fresh affidavit demonstrating his personal knowledge has also been set aside by the learned Appellate Court.

28. In the present case from a perusal of the complaint and the pre-summoning evidence, it is evident that the same contains an averment that the authorized representative does possess personal knowledge of the alleged transaction. The degree of knowledge or whether the authorized representative even possess any personal knowledge with regard to the alleged transaction as alleged by the petitioner is a subject matter of trial and cannot be looked into at this stage to quash the complaint and framing of notice under Section 251 of the CrPC. Merely because the complaint, or the pre-summoning evidence by way of affidavit does not detail what knowledge or the extent of knowledge possessed by the authorized representative, this Court does not deem it expedient to quash the complaint and notice under Section 251 of the CrPC, especially on the ground of extent of knowledge of the authorized representative. The same is a subject matter of trial and cannot be looked into at this stage. The learned MM after giving the accused an opportunity to be heard may to its satisfaction determine whether the attorney possessed personal knowledge of the said transaction. At the pre-summoning stage, the learned MM only ought to be satisfied whether there exists a *prima facie* against the petitioner.

29. The learned counsel for the petitioner has also challenged the maintainability of the complaint on the strength of the alleged compromise deed dated 15.11.2008. It is argued that the alleged



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compromise deed is a fabricated document. It is pointed out that the petitioner had also challenged the validity of the compromise deed dated 15.11.2008 before this Court, and the challenge was rejected *vide* order dated 08.05.2019. It was noted that the challenge if any to the compromise deed filed in a Court even if it is exercising jurisdiction under the NI Act and the Code of Criminal Procedure, 1973 would lie in that Court only wherein the proceedings culminated into accepting the compromise, and not before any other Court in consonance with the principle under Order XXIII Rule 3 of the Code of Civil Procedure, 1908. It was noted that the jurisdiction to enter into the legality of the proceedings before it would be of the same Court in which the compromise under challenge was filed. It was noted that only if any remedy is preferred against the order of that Court would this Court as Appellate/Revisional or Writ Court have jurisdiction to go into the findings of that Court. It was noted that placing the compromise before a complaint court cannot be an act of empty formality especially when the Court has acted upon the same, and permitted the complaint to be withdrawn. In that light, it was noted that in the event that the petitioner approached the complaint court, and the complaint court found merit in the challenge, the complaint court would be entitled to set aside the compromise deed. The challenge to the validity of the compromise deed would be decided after the evidence is lead by the parties and cannot be commented upon at this stage and this Court does not deem it apposite to comment or consequently quash the present petition on such ground.



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30. Much emphasis has also been placed on the fact that the proceedings *qua* the first cheque have already been quashed by this Court *vide* order dated 22.01.2015, and that this is the second round of litigation between the parties in respect of the same proceeding. It is pertinent to mention that the complaint proceedings *qua* the first cheque was quashed noting the learned Trial Court proceeded with a private complaint filed by the Power of Attorney on the strength of Special Power of Attorney which is not attested by the Indian Embassy at Abu Dhabi, UAE. It was noted that the complaint instituted by the attorney would not be maintainable in the absence of authentication. In the present case, however, the learned MM *vide* order dated 16.09.2019, noted that the GPA placed on record by the authorized representative is executed by the respondent in favour of the authorized representative. It was noted that the GPA revealed that the authorized representative has been duly authorized by the respondent to file any case against the accused, and the same was also duly attested by the Indian Embassy on 07.09.2010. In that light, it was rightly noted that had the GPA not been attested by the Indian Embassy or the same had been executed and attested after the filing of the complaints, the same would not have been maintainable.

31. It is pertinent to mention that the petitioner has approached this Court under Section 482 of the CrPC. While it is trite that the power of this Court under Section 482 of the CrPC is wide, and may be exercised to quash a complaint even at the pre-trial stage, the same ought to be exercised only if the factual defence of the petitioner is of



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such nature so as to disprove the allegations levelled in the complaint. In the present case, while the petitioner has raised questions regarding the incapability of the attorney to file the complaint, or lead pre-summoning evidence on the strength of the Power of Attorney, or the maintainability of the complaint on the basis of a fabricated compromise deed, the same is not impeachable in nature and does not disprove the allegations levelled against the petitioner in the complaint. Such questions can well be determined by the learned MM during the course of trial. The learned MM would arrive at a decision after considering the allegations, and counter allegations raised by the parties, and considering the evidence on record.

32. This Court finds that the petitioner has, at best, raised questions of fact mixed with law which cannot be examined by this Court while exercising jurisdiction under Section 482 of the CrPC since it is expedient that the same be left to be adjudicated at the stage of trial when the parties have led their evidence.

33. The present petitions are accordingly dismissed.

AMIT MAHAJAN, J

OCTOBER 21, 2024