

\$~15

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

+ **CRL. M.C. 2385/2022**

JEEVESH SABHARWAL Petitioner
Through: Mr. Adit S. Pujari and
Ms. Aparajita Sinha,
Advocates

versus

ARUNA GUPTA & ANR. Respondents
Through: Mr. Naveen Pandey, Advocate
for R-1 and 2.

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

ORDER
30.08.2022

%

CRL. M.C. 2385/2022 & CRL.M.A. 10072/2022 (interim relief)

1. Through the present petition, the petitioner seeks quashing the impugned order dated 03.03.2022 passed by the learned Metropolitan Magistrate ('MM'), Negotiable Instruments Act ('NI Act') Saket District Court (South District) in Complaint Case (CC) No. 13445/2017 (*Aruna Gupta v. Concept Horizon Infra. Pvt Limited & Ors*) and all proceeding emanating therefrom.

2. The background facts leading to the present case are that respondent No.1 filed a complaint under Section 138 read with Sections 141 and 142 of NI Act against the petitioner herein, i.e.,

Jeevesh Sabharwal, Mr. Suninder Sandha, Concept Horizon Infra Pvt. Ltd. ('CH IPL'), one Mr. Nitant Verma (also a Director of CHIPL) and M/s Karvy Private Wealth on 23.11.2017. It is stated in the complaint that CHIPL had approached respondent no. 1 herein through M/s Karvy Private Wealth for booking of a banquet admeasuring 256sq.ft. under an assured buy-back scheme along with profits in the project 'Orrizonte'. It is further stated that that respondent No.1 booked the aforesaid banquet by allegedly paying a sum of Rs. 9,71,667 along with a sum of Rs. 40,810 towards service tax to CHIPL. For this purpose, Mr. Sandha, in his capacity as the then director of CHIPL had signed a Memorandum of Understanding ('MOU') dated 22.07.2015 with respondent No.1 along with her son Amit Gupta/respondent No.2 herein. A per Clause 2 of the said MOU, it was agreed that upon expiry of 24 months from the date of execution of the said MOU, respondent no. 2 would receive a complete refund of the aforesaid amount paid by her along with a premium of Rs. 1,55,467. Pursuant to this, respondent No.1 alleged that CHIPL issued 24 post-dated cheques towards the refund, which were allegedly dishonoured when presented for realization. Respondent No.1 thereafter issued a legal notice dated 14.10.2017 served upon the accused person by registered AD through her counsel. Respondent no. 1 having failed to receive reply from the accused and proceeded to file the complaint on 23.11.2017. It is pertinent to note that there is no specific assertion as to the knowledge of Mr. Amit Gupta/Respondent No.2 in the said transaction.

3. It is stated that when the matter was heard before the learned MM on 14.03.2018, an affidavit by way of evidence of respondent no. 1 along with documents were taken on record, following which the pre-summoning evidence was closed. The learned MM held that there were sufficient grounds for proceeding against the petitioner herein, along with the other accused except M/s. Karvy Private Wealth and directed that the accused persons be summoned.

4. It is further stated that on 11.12.2019 the petitioner filed an application under Section 145(2) NI Act seeking an opportunity to cross-examine respondent No.1 and submitted that there was no legally subsisting debt as on the date of deposit of the cheques in question since it was a buyback scheme subject to certain conditions in the MOU which had not been met by respondent No.1, including, *inter alia*, undertaking to return/hand over all receipts issued by to her. The petitioner subsequently found out that Mr. Suninder Sandha was perpetuating a series of frauds upon the petitioner, CHIPL as well as their customers at the time of signing the MOU, for which he and CHIPL took immediate criminal as well as civil legal remedies. Thus, the petitioner wanted to adduce the necessary documentary and oral evidence to establish their defence, and also sought an opportunity to cross-examine her (respondent no. 1 herein).

5. It is stated that by an order dated 9.10.2021 while allowing the Petitioner's application under Section 145 (2) of NI Act, the learned MM took the view that "*given the nature of the accusation made by the complainant and the defence taken by the accused, it would be undesirable that the accused shall be tried summarily and since the*

Court has already allowed recalling of the complainant for the purpose of cross-examination by the accused, therefore, the case shall now be proceeded as a summons trial in accordance with the second proviso to Section 143 (1) of the NI Act.” The learned MM directed the matter to be listed for cross-examination of the complainant on 06.01.2022 on which date the matter was put up for the same purpose on 03.03.2022 as the proceedings were being conducted through Video Conferencing (‘VC’).

6. On the next date of hearing, i.e., 03.03.2022 before the learned MM, it is submitted by learned counsel for the complainant/respondent no.1 herein that the complainant was suffering from serious ailments and that she will not be able to conduct the present case personally. It is further submitted that complainant/respondent No.1 herein had authorised her son Amit Gupta/respondent No.2 herein Special Power of Attorney (‘SPA’) holder to conduct the prosecution on her behalf with the permission of the Court and placed on record a copy of the special power of attorney dated 02.03.2022 (SPA) along with her medical documents.

7. It is submitted that there is no clause in the SPA which authorizes the SPA Holder to lead evidence on behalf of the complainant/respondent no. 2 herein. It was however submitted that in case the complainant/respondent no. 2 is unwell or infirmed, the Court can appoint a Commission under Sections 283/284 of the Code of Criminal Procedure 1973 (‘CrPC’) which ought to have been done in the present case in view of Section 142(1)(a) NI Act, which prohibits a Court from taking cognizance of any offence punishable

under Section 138 NI Act except upon a written complaint by the payee or holder in due course of the cheque.

8. However, the learned MM, after perusing the SPA and documents annexed therewith, granted permission to the SPA Holder/respondent No.2 to prosecute the matter on her behalf under Section 302 CrPC and directed the SPA Holder to file his evidence on affidavit. The matter was fixed on 19.05.2022.

9. Today learned counsel for the petitioner produces an order dated 19.05.2022 passed by the learned trial Court and also challenges it to show that the SPA holder examined in chief and cross-examination deferred at the request of learned counsel for the accused. The said order is taken on record. The order dated 19.05.2022 reads as under:

“Counsel for accused has moved exemption application on behalf of accused 3 & 4. The same is allowed subject to the condition that they shall not dispute the proceedings of the day.

SPA holder examined in chief. Cross-examination deferred at the request of learned counsel for the accused as she was not supplied with an advance copy of the evidence by way of affidavit.

Put up for cross-examination for SPA holder on 05.09.2022.”

10. At the first hearing of the present petition on 23.05.2022, the matter was adjourned to 29.07.2022 for non-appearance of learned counsel for the Petitioner. On 29.07.220 notice was accepted by learned counsel for the respondents who sought time to file reply and

the matter was adjourned for today, i.e., 29.08.2022.

11. In reply to the present petition, it is stated that respondent No.1 aged about 74 years, is suffering from "Severe Rheumatoid Arthritis with Spinal Scoliosis" due to which she is unable to personally attend to her cases pending adjudication before various Courts. It is further stated that she executed SPA dated 02.03.2022 in favour of her son, Mr. Amit Gupta (respondent no. 2 herein) as he is also a joint applicant/allottee in the cases. He is, therefore, well acquainted with the transactions as well as the facts and circumstances of the cases. It is further stated that the said MOU dated 22.07.2015 bears the name of both the respondents and they were the joint allottees in the project of CHIPL. It is evident that respondent no. 2 herein is also fully aware of the transaction with CHIPL. Respondent No.1 has also filed copies of emails along with the reply to show that respondent no. 2 has been an active participant in the transaction between the parties since at the very beginning.

12. This Court has heard the submissions of learned counsel for the parties and perused the record.

13. Learned counsel for the Petitioner submits that respondent no.2 (SPA holder) has neither appeared nor averred at the time of passing of the impugned order that he had personal knowledge about the transactions or cheques in question. There was no assertion as to his specific knowledge in the complaint and therefore, he cannot be cross-examined in place of respondent no. 1 herein. He further submits that there is no clause in the SPA which authorizes the SPA Holder to lead evidence on behalf of the complainant/respondent no.1

herein. He further submits that the medical documents filed along with the SPA related to the period from July to September 2021, the last dated 03.09.2021, well before the date on which the Petitioner was granted the right to cross-examine Respondent No.1. No recent medical document indicating recent change in health/medical conditions was filed alongwith the SPA. Even the complainant/respondent no. 1 did not file any application along with the SPA seeking to authorize respondent No.2 to proceed with the case on her behalf.

14. Learned counsel for the petitioner, however submits that in case the complainant/respondent no. 2 is unwell or infirmed for any reason, the Court can appoint a Commission under Sections 283/284 CrPC which ought to have been done in the present case in view of Section 142(1)(a) NI Act, which prohibits a Court from taking cognizance of any offence punishable under Section 138 NI Act except upon a written complaint by the payee or holder in due course of the cheque.

15. Learned counsel for the petitioner relies upon the decision in *State of Karnataka v. Byrappa @ Byregowda ILR 2006 Kar 3091* and submits that the Court has to exercise its power to examine the witness by issuing a Commission under Section 284 CrPC and to ensure that no miscarriage of justice takes place. He has also placed reliance upon the decision of the Supreme Court in *State of Maharashtra v. Dr. Praful B. Desai 2003 4 SCC 601* wherein it was held that given the advancement of science and technology, evidence of a necessary witness can also be recorded by way of Video

Conferencing after issuing a Commission under Section 284 CrPC.

16. A reliance is also placed by learned counsel for the Petitioner on the decision of the Madras High Court in *Mrs. Pankajam Ramaswamy v. Mrs. Elangovan 2009 SCC Online Mad 1332* wherein the Court observed that the Complainant had undergone knee replacement surgery on both legs and had sought for appointment of a Commission to examine her as a witness and directed that where respondent no. 1 resides in the territorial jurisdiction of the learned MM's court and as such the learned MM and accused persons may themselves go to the residence of respondent no. 1 for the purpose of recording her evidence.

17. On the other hand learned counsel for the respondents submits that respondent no. 1 is a senior citizen lady and is suffering from "severe rheumatoid arthritis with spinal scoliosis. She is unable to attend her cases before the various courts. He further submits that her son/respondent no. 2 is fully conversant with the facts of the present case as the said MOU bears the name of both the respondents and they were the joint allottees in the project of CHIPL. Learned counsel replied to the submissions of learned counsel as regards the medical documents and stated that such information had not been brought before the learned trial Court prior to 03.03.2022 as at the point of time the presence of respondent no.1 was not mandatory.

18. Learned counsel for the respondents relies upon the decision of the Hon'ble Supreme Court in *A.C.Narayanan v. State of Maharashtra (2014) 11 SCC 790* where it was held as under:

"26) While holding that there is no serious conflict between the

decisions in MMTC (supra) and Janki Vasheo Bhojwani (supra), we clarify the position and answer the questions in the following manner:

- (i) Filing of complaint petition under Section 138 of N. I. Act through power of attorney is perfectly legal and competent.
- (ii) 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 transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.
- (iii) 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.
- (iv) In the light of section 145 of N.I. 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 N.I. 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 N.I. Act.
- (v) 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."

19. This Court has considered the respective submissions of the parties and perused the paper book of the case.

20. The question of examining the witness on Commission arises in the case where such a witness is disabled to attend the Court due to old age or hazardous condition of her health, not in a position to move about or the witness is incapable of attending the Court for any other reason. In such cases, the Court has to exercise its power to examine the witness to see that no such miscarriage of justice does takes place.

21. It is seen that where it is not possible for a witness to attend the Court, the procedure contemplated is under Section 284 CrPC to examine the witness by the Court Commissioner. For this purpose, Section 284 CrPC reads as under:

"284. When attendance of witness may be dispensed with and commission issued.- (1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter:

Provided that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.

(2) The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution.”

22. In the case of **Ms. Pankajam Ramaswamy vs M.R.Elangovan** Criminal Revision Petition No.1330 of 2006 the Hon’ble High Court of Madras opined in a case where the complainant was the resident of Anna Nagar Chennai, the learned Metropolitan Magistrate, Chennai was himself directed to go to the place of the complainant and record her evidence. It was observed in the aforementioned case as under:

“...As per the above provision, when the Court feels that the witness cannot be procured without any inconvenience, the Court may dispense with the attendance of the witness and may issue commission for the examination of witness. Of course, recording of evidence on Commission in criminal cases should be most sparingly resorted to. In this case, as the Magistrate has also made up his mind and satisfied for appointment of Commissioner, this Court also feels considering the health condition of the complainant that appointment of a Commissioner to examine her is proper...”

23. A reading of Section 284 CrPC makes clear that where a witness could not be procured before the Court and that it is so

essential to meet the ends of justice, such witness can be examined through a Commissioner.

24. During the course of arguments, learned counsel for the complainant/respondent no. 1 herein stated that he has no objection to the respondent no. 1 being cross-examined by way of appointment of a Commission under Section 284 CrPC by the learned MM, upon an application being filed by the complainant.

25. Keeping in view the above facts and circumstances of the case, this Court allows the petition and the impugned order dated 03.03.2022 and the consequent order passed on 19.05.2022 stand set aside, partially. The learned MM will proceed in accordance with law, as provided under Section 284 CrPC, and pass an appropriate order, upon being an application filed, for appointment of Commission for cross-examination of the complainant/ respondent no. 1 herein. It is clarified that the orders dated 03.03.2022 and 10.05.2022 are set aside only to the extent of permitting the complainant to be cross-examined through appointment of a Commission.

26. The learned Trial Court will be at liberty to examine the fact as to whether the SPA filed by the SPA holder is as per law at the appropriate stage as deemed fit by it. The SPA holder is allowed to continue with the trial, as already held by the learned Trial Court.

27. The learned Trial Court is requested to expeditiously conclude the trial and decide the case. It is also clarified that neither party will take any unnecessary adjournments before the learned Trial Court nor they shall be burdened with costs as deemed appropriate by the

learned Trial Court.

28. With the above observations, the petition and the pending application stand disposed of.

29. The Registry is directed to send a copy of this order to the concerned Trial Court forthwith.

SWARANA KANTA SHARMA, J

AUGUST 30, 2022/ns

HIGH COURT OF DELHI



न्यायमेव जयते