

SUPREME COURT OF INDIA

Sampelly Satyanarayana Rao

Vs.

Indian Renewable Energy Development Agency Limited

Crl.A.No.867 of 2016

(Dipak Misra and Adarsh Kumar Goel,JJ.,)

19.09.2016

JUDGMENT

Adarsh Kumar Goel,J.,

SLP.(Crl.)No.5410 of 2014

1. This appeal has been preferred against the judgment and order dated 8th May, 2014 passed by the High Court of Delhi at New Delhi in Writ Petition (Criminal) No.1170 of 2011.

2. Question for consideration is whether in the facts of the present case, the dishonour of a post-dated cheque given for repayment of loan installment which is also described as "security" in the loan agreement is covered by Section 138 of the Negotiable Instruments Act, 1881 ("the Act").

3. The appellant is Director of the company whose cheques have been dishonoured and who is also the co-accused. The company is engaged in the field of power generation. The respondent is engaged in development of renewable energy and is a Government of India enterprise. Vide the loan agreement dated 15th March, 2001, the respondent agreed to advance loan of Rs.11.50 crores for setting up of 4.00 MW Biomass based Power Project in the State of Andhra Pradesh. The agreement recorded that post-dated cheques towards payment of installment of loan (principal and interest) were given by way of security. The text of this part of the agreement is quoted in the later part of this order. The cheques carried different dates depending on the dates when the installments were due and upon dishonour thereof, complaints including the one dated 27th September, 2002 were filed by the respondent in the court of the concerned Magistrate at New Delhi.

4. The appellant approached the High Court to seek quashing of the complaints arising out of 18 cheques of the value of about Rs.10.3 crores. Contention of the appellant in support of his case was that the cheques were given by way of security as mentioned in the agreement and that on the date the cheques were issued, no debt or liability was due. Thus, dishonour of post-dated cheques given by way of security did not fall under Section 138 of the Act.

Reliance was placed on clause 3.1 (iii) of the agreement to the effect that deposit of post-dated cheques toward repayment of installments was by way of "security". Even the first installment as per the agreement became due subsequent to the handing over of the post-dated cheque. Thus, contended the appellant, it was not towards discharge of debt or liability in presenti but for the amount payable in future.

5. The High Court did not accept the above contention and held :-

"10. In the present case when the post-dated cheques were issued, the loan had been sanctioned and hence the same fall in the first category that is they were cheque issued for a debt in present but payable in future. Hence, I find no reason to quash the complaints. However, these observations are only prima facie in nature and it will be open for the party to prove to the contrary during trial."

6. We have heard learned counsel for the parties.

7. It will be appropriate to reproduce the statutory provision in question which is as follows :

"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 provisions 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.

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

8. Clause 3.1(iii) of the agreement may also be noted :-

“ 3.1 SECURITY FOR THE LOAN The loan together with the interest, interest tax, liquidated damages, commitment fee, up front fee prima on repayment or on redemption, costs, expenses and other monies shall be secured by ;

(i) xxxxx

(ii) xxxxx

(iii) Deposit of Post dated cheques towards repayment of installments of principal of loan amount in accordance with agreed repayment schedule and installments of interest payable thereon.”

9. Reference may now be made to the decision of this Court in *Indus Airways Private Limited versus Magnum Aviation Private Limited*¹, on which strong reliance has been placed by learned counsel for the appellant. The question therein was whether post-dated cheque issued by way of advance payment for a purchase order could be considered for discharge of legally enforceable debt. The cheque was issued by way of advance payment for the purchase order but the purchase order was cancelled and payment of the cheque was stopped. This Court held that while the purchaser may be liable for breach of the contract, when a contract provides that the purchaser has to pay in advance and cheque towards advance payment is dishonoured, it will not give rise to criminal liability under Section 138 of the Act. Issuance of cheque towards advance payment could not be considered as discharge of any subsisting liability. View to this effect of the *Andhra Pradesh High Court in Swastik Coaters (P) Ltd. versus Deepak Bros.*², *Madras High Court in Balaji Seafoods Exports (India) Ltd. versus Mac Industries Ltd.*³, *Gujarat High Court in Shanku Concretes (P) Ltd. versus State of Gujarat*⁴ and *Kerala High Court in Supply House versus Ullas*⁵ was held to be correct view as against the view of Delhi High Court in *Magnum Aviation (P) Ltd. versus State*⁶ and *Mojj Engg. Systems Ltd. versus A.B. Sugars Ltd*⁷. which was disapproved.

10. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in *Indus Airways* (supra) with reference to the explanation to Section 138 of the Act and the expression “for discharge of any debt or other liability” occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for “discharge of debt or liability” depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.

11. Reference to the facts of the present case clearly shows that though the word “security” is used in clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. It is undisputed that the loan was duly disbursed on 28th February, 2002 which was prior to the date of the cheques. Once the loan was disbursed and installments have fallen due on the date of the cheque as per the

agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.

12. Judgment in *Indus Airways (supra)* is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of *Indus Airways (supra)* where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also described as "security" in the loan agreement. In applying the judgment in *Indus Airways (supra)*, one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque. .

13. Crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying as can be discerned from discussion of the said cases in the judgment of this Court.

14. In *Balaji Seafoods (supra)*, the High Court noted that the cheque was not handed over with the intention of discharging the subsisting liability or debt. There is, thus, no similarity in the facts of that case simply because in that case also loan was advanced. It was noticed specifically therein - as was the admitted case of the parties - that the cheque was issued as "security" for the advance and was not intended to be in discharge of the liability, as in the present case.

15. In *HMT Watches Ltd. versus M.A. Abida*⁸, relied upon on behalf of the respondent, this Court dealt with the contention that the proceedings under Section 138 were liable to be quashed as the cheques were given as "security" as per defence of the accused. Negating the contention, this Court held :-

"10. Having heard the learned counsel for the parties, we are of the view that the accused (Respondent 1) challenged the proceedings of criminal complaint cases before the High Court, taking factual defences. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the

disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties. The High Court further erred in observing that Section 138(b) of the NI Act stood uncomplained with, even though Respondent 1 (accused) had admitted that he replied to the notice issued by the complainant. Also, the fact, as to whether the signatory of demand notice was authorised by the complainant company or not, could not have been examined by the High Court in its jurisdiction under Section 482 of the Code of Criminal Procedure when such plea was controverted by the complainant before it.

11. In *Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd.*⁹ this Court has made the following observations explaining the parameters of jurisdiction of the High Court in exercising its jurisdiction under Section 482 of the Code of Criminal Procedure: (SCC pp. 685-87, paras 17 & 22)

"17. The parameters of jurisdiction of the High Court in exercising its jurisdiction under Section 482 of the Code of Criminal Procedure is now well settled. Although it is of wide amplitude, a great deal of caution is also required in its exercise. What is required is application of the well-known legal principles involved in the matter.

22. Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of the said jurisdiction. Yet again, the High Court at that stage would not ordinarily enter into a disputed question of fact. It, however, does not mean that documents of unimpeachable character should not be taken into consideration at any cost for the purpose of finding out as to whether continuance of the criminal proceedings would amount to an abuse of process of court or that the complaint petition is filed for causing mere harassment to the accused. While we are not oblivious of the fact that although a large number of disputes should ordinarily be determined only by the civil courts, but criminal cases are filed only for achieving the ultimate goal, namely, to force the accused to pay the amount due to the complainant immediately. The courts on the one hand should not encourage such a practice; but, on the other, cannot also travel beyond its jurisdiction to interfere with the proceeding which is otherwise genuine. The courts cannot also lose sight of the fact that in certain matters, both civil proceedings and criminal proceedings would be maintainable."

12. In *Rallis India Ltd. v. Poduru Vidya Bhushan*¹⁰ this Court expressed its views on this point as under: (SCC p. 93, para 12)

"12. At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court. The High Court could not have discharged the respondents of the said liability at the threshold. Unless the parties are

given opportunity to lead evidence, it is not possible to come to a definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the respondents ceased to be the partners of the firm."

16. We are in respectful agreement with the above observations. In the present case, reference to the complaint (a copy of which is Annexures P-7) shows that as per the case of the complainant, the cheques which were subject matter of the said complaint were towards the partial repayment of the dues under the loan agreement (para 5 of the complaint).

17. As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

18. In *Rangappa versus Sri Mohan*⁹, this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment .

19. Thus, the question has to be answered in favour of the respondent and against the appellant. Dishonour of cheque in the present case being for discharge of existing liability is covered by Section 138 of the Act, as rightly held by the High Court.

20. Accordingly, we do not find any merit in this appeal and the same is dismissed. Since we have only gone into the question whether on admitted facts, case for quashing has not been made out, the appellant will be at liberty to contest the matter in trial court in accordance with law.

Judgment Referred.

¹(2014) 12 SCC 0539

²(1997) CrL LJ 1942 (AP)

³(1999) 1 CTC 0006 (Mad)

⁴(2000) CrL LJ 1988 (Guj)

⁵(2006) CrL LJ 4330 (Ker)

⁶(2010) 172 DLT 0091: (2010) 118 DRJ 505

⁷(2008) 154 DLT 0579

⁸(2015) 11 SCC 0776

⁹(2008) 13 SCC 0678

¹⁰(2011) 13 SCC 0088

¹¹(2010) 11 SCC 0441