

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

+ **Crl.M.C. 3220/2003**

% Date of reserve: 28.07.2009
Date of decision: 07.08.2009

M/S SUMMIT INFOTECH LTD. & ORS. ...PETITIONERS
Through: Mr. Mahipal, Mr. Dinesh Kr. Gupta,
Advocates

Versus

M/S KODAK INDIA LTD. ...RESPONDENT
Through: Mr. Shishir Mathur, Advocate

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

MOOL CHAND GARG, J.

1. By this petition the petitioners have assailed the order dated 20.11.2002 passed by the concerned court dismissing their application for recalling the summoning order dated 15.01.2002 in Complaint Case No. 1602/2002 which had been filed by the respondent under Section 138 of the Negotiable Instruments Act after the dishonor of three cheques bearing Nos. 081593, 081646 & 081647 totaling Rs. 23,30,700/- as the payment was stopped by the drawer.

2. It is the case of the petitioners that the aforesaid three cheques were post-dated cheques and were not to be presented by the

respondent in view of the letters dated 3.08.2001 and 10.08.2001, whereby the respondents were advised not to present the same. It is stated that the respondents were even asked to take away the material which was lying with the petitioners because they were going to discontinue the distribution business as conveyed by their letter dated 13.8.2001.

3. Briefly stating, the facts giving rise to the filing of this petition are:

- i. Pursuant to an agreement for supply of goods dt. 01.05.2001, the petitioners placed various purchase orders of digital cameras upon the respondent along with post-dated cheques which were to be presented in terms of the aforesaid agreement. Even earlier an order was placed by the petitioners upon the respondent on 18.6.2001 along with post dated cheque dated 7.8.2001 for Rs.5,20,000/-, which was encashed.
- ii. However, the dispute arose between the parties when purchase order dated 28.06.2001 was placed upon the respondent and two post dated cheques i.e. cheque bearing no. 081646 dated 15.08.2001 for Rs.6,37,500/- and another cheque bearing No. 081647 dated 16.09.2001. for a sum of Rs. 11,73,000/- were issued by the petitioners.
- iii. Pursuant to the aforesaid purchase order, the goods were supplied by the respondent to the petitioners vide invoice no. 870 for Rs. 18,10,500/- on 29.06.2001. In this manner, in a short period of 3 months, 140 digital cameras were supplied by the respondent to the petitioners for a value of Rs. 23,30,700/-
- iv. On 03.08.2001 petitioners advised the respondent not to deposit the cheques and asked the banker to stop payment of the cheque before their due date. On 10.08.2001 also

they advised the respondent to return the three cheques which were lying with them and to collect the material lying with the petitioner company. On 13.08.2001 they advised the respondent company to return the cheques and to collect the material lying with the petitioners and also to settle the accounts.

- v. That the respondent did file a Suit no. 1856/2001 dated 10.09.2001, inter alia, for recovery of Rs. 21,49,065/- along with an application to restrain the petitioners from selling the digital cameras supplied by them till further orders and accordingly this Court restrained the petitioners from selling the goods lying with them.
- vi. The respondent presented all the 3 cheques on 17.09.2001. It is submitted that in view of the prior intimation and keeping of cheques for a considerably long time by the respondent, these cheques ceased to be cheques and only remained as a bill of exchange.
- vii. Since the payment of the cheques was stopped on 19.09.2001, despite their being a balance in the bank account, these cheques could not be encashed.

4. On 27.09.2001 the respondent gave a notice to the petitioners under Section 138 of the N.I. Act which was replied to by them vide their letter dated 12.10.2001.

5. Thereafter the complaint was filed by the respondent under Section 138 r/w Section 141 of the Negotiable Instruments Act on the basis of which summons were issued to the petitioners, who wanted recall of the summoning order and for which, they have moved an application. After the contest, the said application was dismissed and now this petition is filed before this Court.

6. It has been submitted that during the pendency of those

proceedings the I.A.No. 9300/2001 filed by the respondent in the civil suit was disposed of by the Hon'ble High Court vide order dated 12.12.2001 by which the respondent was allowed to take back their goods lying with the petitioners and the value of the goods was assessed to Rs. 16,91,534/-, which amount was deposited with the High Court of Delhi.

7. In these circumstances, it is submitted by the petitioners that the proceedings initiated by the respondent are mis-conceived and are liable to be set aside, inter alia, on the following grounds:

A. Because the three cheques which are the subject matter of the complaint were issued specifically against the goods supplied vide Invoices No.866 and 870 dated 27.6.2001 and 29.6.2001.

B. Because the cheques having been issued specifically against specific invoices and were the post dated cheques, hence cannot be adjusted against any other account.

C. Because the goods delivered to the petitioner by the respondent after taking three post dated cheques against invoice No.866 and No.870 have been partly seized by the Local Commissioner and the same have been received back by the respondents after depositing Rs.16,91,534/-, therefore, the cheques issued by the petitioners stands to have been issued without any consideration.

D. Because the post dated cheques delivered to the applicant on the day of presentation i.e. 17.9.2001 ceases to be cheques in view of the letter dated 3.8.2001 return by the petitioner to the respondent as well as in view of the restraining order dated 10.9.2001 whereby the petitioners were restrained from selling the goods by the Hon'ble

High Court of Delhi and as such the same is to be treated only to be a bill of exchange.

E. Because the Ld.Trial Court failed to appreciate that the points raised in the application by the petitioners require no determination or evidence to prove the same as they were the facts which were admitted by the respondent.

F. Because the respondent failed to explain as to why the respondent did not bring the factum of filing of suit and the restraint order by the Hon'ble High Court to the Ld.Trial Court while filling the complaint.

G. Because the respondent also failed to explain as to why he did not bring the factum of having received the goods from the Hon'ble High Court of Delhi at the time of obtaining summoning order.

H. Because in view o the restraint order and in view of the fact that the respondent has already received the goods there remains no legally recoverable debt/liability arising out of the issuance of three cheques.

I. Because in the event Hon'ble High Court comes to a conclusion that the respondent is entitled to receive back the amount deposited by him then there remains no liability against the petitioners.

J. Because existence of the legally recoverable debt against the abovesaid cheques is a condition fo proceeding under Section 138 and there being no existing legally recoverable debt proceedings under Section 138 cannot continue.

K. Because the value of goods returned is yet to be determined which admittedly cannot be less than the admitted value by the respondent and even if the value of the goods is decided to be the same as assessed by the respondent, even in that case about 75% of the liability shall stand discharged.

L. Because the petitioners cannot be penalised by deprivation of goods supplied against the abovesaid cheques and to face the prosecution also.

M. Because the respondent is trying to twist the arm of the petitioner under the garb of the criminal prosecution to forego all his rights arising all his rights to claim the amount arising out of the debt notes and to make the payments which in fact are not due.

N. Because the continuation of the proceedings before the Ld.Trial Court on the basis of the admitted facts shall be an abuse of process of law and, therefore, the complaint filed by the respondent is liable to be quashed.

O. Because the goods supplied by the respondent against the cheques presently is in custody of the respondent who has a right to sell the same in the open market, therefore, admittedly on the face of it there exists no liability of the petitioners and the respondent thus is neither entitled to encash the cheques nor entitled to prosecute the petitioners on the basis of return of the said cheques and thus the complaint is liable to be quashed.

P. Because the Ld.Trial Court failed to appreciate that the proceedings arising out of the abovesaid complaint cannot continue in view of the admitted facts.

Q. Because the respondents cannot have both ways they want to have the stocks and at the same time also want the value of the stocks, this cannot be permitted in law and the amount of cheques will not construed a legally enforceable debt in view of this position or other liability.

R. Because the Ld.Trial court failed to appreciate that there was a dispute regarding the existence of liability arising out of the issuance of cheques and that there was sufficient balance at the time when the cheques were presented and that the cheques were not returned for

insufficient funds and the same were returned as payment was stopped and intimation regarding which was given much before the due date to the respondent.

8. Refuting the aforesaid submission made on behalf of the petitioners, the learned counsel for the respondent has submitted that the remedy under Section 138 of the Negotiable Instruments Act is an independent remedy and is available notwithstanding any other action which may be taken by the complainant for enforcing his rights against the drawer of the cheque. It has been submitted that once the cheques were issued by the petitioners in favour of the respondent for supply of goods and which were to be encashed only after the supply of goods, the cheques even issued earlier became cheques issued in respect of an enforceable debt, the dishonour thereof by stopping the payment of the cheque by the petitioners makes out a case under Section 138 of the Negotiable Instruments Act. It is submitted that action taken by the respondent in filing of a suit for the recovery of its dues, obtaining stay order against the petitioners in respect of the goods lying with them or selling the same under the orders of the Court and depositing the money in the Court in no way takes away the criminal liability of the petitioners on account of dishonour of cheques.

9. Respondent has also submitted that the cheques were issued by the petitioners in lieu of the payments which they were to make to the respondent towards the goods already supplied. Accordingly, the cheques were presented. The dispute which was sought to be raised vide letters dated 10.08.2001 or 13.08.2001 was non-existent inasmuch as the reason for asking the respondent to take back the goods is spelt out in the letter dated 13.08.2001. The reason given is

obvious that the petitioners were not interested in continuing with their distribution business, but this cannot be a reason for not honouring the cheques, which were issued for the specific purpose.

10. It is submitted that by not honouring the cheques when they were presented for encashment the petitioners became liable to be punished under Section 138 of the Negotiable Instruments Act. The complaint filed by the respondent was filed in accordance with law after serving proper legal notice and by giving an opportunity to the petitioners to make the payment of the dishonoured cheques.

11. As regards the defence of the petitioners, it is submitted that the petitioners ought to have raised the defence during the course of trial and that they cannot raise those issues in a proceeding which has been initiated before this Court under Section 482 Cr.P.C. It is submitted that even if the case of the petitioners is taken at the highest the facts disclosed by them have no bearing on the merits of the complaint.

12. Respondent has also submitted that in a case where disputed question on facts are involved, there cannot be any interference under Section 482 of Cr.P.C. and they have relied upon the judgment of the Apex Court in State of Orissa Vs. Debendra Nath Padhi AIR 2005 SC 359.

13. It is also submitted on behalf of the respondent that even earlier goods were supplied to the petitioners against which a sum of Rs.87,11,077/- is outstanding and it was for that reason, the new arrangement was entered into between the parties when it was agreed to by the petitioners that in future they would secure supplies of

issuing post dated cheques along with their purchase orders. But they have not even honoured those cheques and are trying to take an advantage of their letters dated 10.08.2001 and 13.08.2001 which clearly goes to show that the entire attempt on the part of the petitioners is that they want to utilize the money belonging to the respondent and as such. it is a fit case where the petition filed by the petitioner needs to be decided in favour of the respondent/complainant and against the petitioner. They have also relied upon the following judgments:

i. **State of M.P. v/s Awadh Kishore Gupta, (2004) 1 SCC 691** that the court should not act on annexure to the petition under Section 482 of the Code of Criminal Procedure which cannot be termed as evidence without being tested and proved. That the respondent further submits that documents annexed by the petitioners with the present petition cannot be allowed to be relied by them at this stage. It is humbly submitted that the same are to be tested during the trial of the present case.

ii. **N.Rangachari Vs. Bharat Sanchar Nigam Ltd. Air 2007 SC 1682**, it was held by the Apex Court: "A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position."

14. I have heard the submissions made by the parties and have also gone through the records. At this juncture, it would be appropriate to take note of the contents of the letter dated 10.08.2001 issued by the

petitioners to the respondent, which reads as under:

August 10, 2001

Ms. Manisha Sood
Kodak India Ltd.
New Delhi

Re.: Return of material.

Dear Ms. Sood,

This is to inform that as discussed with yourself and Mr. Puneet Gupta during your visit to our office, we wish to return some of the material that is available in our stock. The material is being returned as it cannot be sold in the market any longer.

The total value of material being returned is Rs. 21,49,065.00. The material is available at our warehouse in Bangalore and can either be collected by you or we can send to you based on your instructions by courier.

As you may be aware you're presently holding 3 cheques issued by us on account of various outstanding payments of ours. With the return of material herewith all our payment liabilities stand executed, in fact we'll now have amounts receivable from your side.

1. Central Bank Cheque No. 081593 dt. 07.08.2001 for Rs. 5,20,200.00
2. Central Bank Cheque No. 081646 dt. 15.08.2001 for Rs. 6,37,500.00
3. Central Bank Cheque No. 081647 dt. 07.08.2001 for Rs. 11,73,000.00

You are hereby requested to return these cheques to us at the time of collecting the material.

If you have any questions, please contact undersigned or Mr. Ajay Bhatia, Accounts Manager.

Sincerely,
For Summit Infotech Ltd.

15. A bare perusal of this letter goes to show that except showing their incapacity to sell the goods supplied by the respondent, no other reason has been mentioned therein. Accordingly, there was no reason for the petitioners to have stopped the payment of those cheques unless and until the respondent would have agreed to it.

16. The mind of the petitioners become more clear if one read the letter dated 13.08.2001, which is reproduced hereunder:

August 13, 2001

Ms. Manisha Sood
Kodak India Ltd.
22-A, Janpath
New Delhi 110001

Re: Discontinuation of business

Dear Ms. Sood,

This is to inform you that Summit Infotech Limited has incurred heavy losses in its distribution operations during the past year or so. The extent of losses has forced us to discontinue the business of distribution of Kodak and other products.

You are hereby requested to assist us as follows:

1. Send you complete account statement for reconciliation and settlement.
2. Take back the unsold Kodak stock available with us. Kindly instruct the modalities of this transaction.
3. Return back to us any undeposited cheques that we have issued to you, pending the final reconciliation and settlement of our accounts.

This is for your kind information and necessary action.

Sincerely
For Summit Infotech Ltd.

17. A reading of the aforesaid letter goes to show that it was only because the petitioners wanted to stop the business, they wanted the respondents to take back the goods, which again is not a justification for not honouring the cheques in question.

18. At this juncture, it would also be appropriate to take note of the contents of the reply made by the petitioners to the legal notice, where they have taken a different stand i.e.

You are aware of the fact that on account of the huge financial losses by our clients, they have decided to wind up their Distribution Division. At that time, stock worth Rs. 21,49,065/- was available with our clients and it was agreed and settled between our clients and you that you would take back the stock of Rs. 21,49,065/- and our clients were paying the balance of Rs. 1,81,635/- to you and you will hand over the aforesaid three cheques back to our clients. It was further agreed and settled between your company and our clients that the other disputes

would be sorted out separately.

Subsequently, you backed out from the agreed arrangement and with mala-fide intention, filed a suit before the Hon'ble High Court of Delhi, being Suit No. 1856/2001, wherein the prayer made is for the recovery of the amount of Rs. 21,49,065/- and for return of the goods valuing at Rs. 21,49,065/-. Obviously, the reliefs prayed are in the alternative. Even when the said suit was filed by you, the aforesaid cheques were not deposited. In the said suit filed by you before the Hon'ble Delhi High Court, the correct facts were not disclosed and by suppressing the material facts, your company was successful in obtaining an ex-parte injunction by misleading the Hon'ble Court. By the injunction order, our clients were restrained from selling the stock.

19. This goes to show that the petitioners only wanted to defend themselves by taking a contrary plea such as an agreement reached between the petitioners and the respondent regarding the 3 cheques and the issue of filing of a suit by the respondent against the petitioners in the High Court.

20. However, these were the issues which could have been raised by way of defence to the present complaint inasmuch as the language of Section 138 goes to show that the remedy available under 138 is notwithstanding any other action which the complainant could have taken against the petitioners. Insofar as the defences are concerned, that cannot be looked into by this Court at this juncture.

21. Having gone through the facts of this case and the law which has been cited at the bar, I am satisfied that the cheques in question were issued by the petitioners towards legally enforceable debt though those cheques were to be encashed on the dates given on those cheques. Stopping payment of those cheques after receiving goods from the respondent would not exonerate the petitioners of their liability under Section 138 of the N.I. Act. Filing of the civil suit by the

respondent against the petitioners would also not come in the way of their prosecution for the criminal offence committed by them. Of course, petitioners are entitled to plead their defences which are available to them during the course of trial. Even payment made, if any, can always be considered for the purpose of awarding sentence to the accused, if they are convicted of the offences.

22. Thus, I do not find any good reason as to why the present proceedings be quashed as prayed for by the petitioners by exercising powers under Section 482 Cr.P.C. Accordingly, the petition is dismissed.

Crl.M.A.4354/2003 (Stay)

In view of the orders passed above, the application is dismissed. Interim order, if any, stands vacated.

MOOL CHAND GARG, J.

AUGUST 07, 2009
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