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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Criminal M.C. No.244 of 2009

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27.08.2010

MAGNUM AVIATION (PVT.) LTD. Petitioner
Through: Mr. Ashim Vachher, Advocate.

Versus

STATE & ORS. Respondents
Through: Mr. O.P. Saxena, APP for the State.
Mr. M.L. Mahajan & Mr. Gaurav Mahajan,
Advocates.

Reserved on: 30th July, 2010
Pronounced on: 27th August, 2010

JUSTICE SHIV NARAYAN DHINGRA

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

J U D G M E N T

1. This petition has been preferred against an order dated 2nd September, 2008 passed by learned Additional Sessions Judge on a revision petition filed by the respondent (petitioner herein) assailing summoning order under Section 138 of Negotiable Instruments Act.

2. Learned Additional Sessions Judge set aside the summoning order on the ground that the cheques issued by the respondent at the time of entering into contract for supply of equipment were not the cheques issued against any debt or liability which existed as on the date of issuance of cheques since supplies were to be made later on. Thus, the presumption envisaged under Section 139 of Negotiable Instruments Act (hereinafter referred to as 'the Act') stood rebutted and the ingredients of Section 138 of the Act were

not attracted. So, the respondent could not be summoned.

3. Brief facts relevant for the purpose of deciding this petition are that on 19th February, 2007 and on 26th February, 2007, respondent placed two separate purchase orders upon the petitioner after finalization of terms and conditions of the contract for supply of aircraft parts. One of the term and condition of the contract was that the entire payment would be given to the petitioner in advance as the petitioner had to procure the parts from abroad. Under this contract two cheques dated 15th March, 2007 and 20th March, 2007 were given to the petitioner. These cheques got dishonoured when they were presented to the bank on the ground that respondent had stopped payment. The petitioner received a letter dated 22nd March, 2007 from the respondent which reads as under :-

“Date : 22nd March, 2007

To,
Magnum Aviation Pvt. Ltd.
S-241, Panchsheel Park,
New Delhi-110017

KIND ATTN.: VISHAL VARSHNEI

Dear Vishal,

This is with reference with the Purchase Order given to you against the purchase of Brake Assy of US \$ 35,500.00 (Thirty Five Thousand Five Hundred Only) & PDU of amount USD 77100.00 (Seventy Seven Thousand One Hundred Only). We have issued two cheques for the same to Magnum Aviation but unfortunately we have to stop the payment against both the cheques as we come to know from other vendors that price quoted by you was quite higher than them.

We therefore cancel our purchase order raised against the above mentioned items and it is requested to return our both the cheques failure to which we will apply to Court of Law.

Thanking You

With Regards”

4. The contention of the petitioner is that the moment purchase order was signed, since the orders were of urgent nature and second order was also placed within a week of the first order, the petitioner placed orders for procurement of these parts with its suppliers overseas and made substantial advance payments to the overseas suppliers. The goods were procured by the petitioner. When the cheque of respondent No.2 got dishonoured on 15th March, 2007, the petitioner informed respondent No.2 about dishonour of the cheque as well as that the shipment was ready and requested the respondent to make payment as per terms of purchase order so that the shipment could be sent to him. Even the second cheque dated 20th March, 2007, got dishonoured. It is only after two days, that is, on 22nd March, 2007 that the petitioner received aforesaid letter from the respondent. After receipt of this letter, the petitioner immediately responded vide letter dated 23rd March, 2007 that the order could not be cancelled since the material has already been procured and the petitioner had already made payment to the foreign suppliers. It is thereafter that the petitioner sent a legal notice calling upon the respondent to make payments against the cheques.

5. The only issue which this petition raises is whether the cheques issued at the time of signing the contract, as a condition of the contract, can be said to be against a liability or they are the cheques issued for no liability. The liability as per dictionary meaning is the state of being liable, that is, for which one is responsible or liable or has obligation. Liability and legal debt are two different terms. Legal debt is one which is recoverable at a point of time. A debt is a liability owing from one person to another person, however, a liability may be incurred without a debt being in existence. It is not necessary that while incurring a liability debt should already be there. A liability can be incurred without a debt being there. It is not necessary that a cheque is always issued against debt. A

cheque can be issued against liability also. This liability may be in respect of a contract which is entered into by the person for purchase as an advance payment so that seller either procures the material or manufactures it.

6. Learned Additional Sessions Judge had relied upon *Shanku Concretes Pvt. Ltd. & Others vs. State of Gujarat & Anr.*; 2000 CLJ 1988 wherein the Gujarat High Court observed that the trial court will have to decide whether there was an existing liability on the part of the petitioner which required due discharge within the meaning of Section 138 of the Act and whether bounced cheques were issued to discharge such existing liabilities. The other case relied upon is *Supply House, Represented by Managing Partner vs. Ullas*; 2006 CLJ 4330 (Kerala) wherein cheques were issued by the accused at the time of placing order for 28 number of mixies. The order was placed on 9th February, 1998 and cheque was of 24th March, 1998. The cheque was got 'stop payment' and the accused informed the complainant not to present the cheques to the bank as the complainant had failed to supply the items in time. The Kerala High Court observed that the accused had not incurred liability for the amount covered by the post-dated cheque and unless the complainant proves that the liability to be settled was to the tune of the amount of the cheque, he could not have made use of the cheque. The court further observed that cheque cannot be stated to have been issued in discharge of the liability.

7. On the basis of these judgments, learned Additional Sessions Judge came to the conclusion that post-dated cheque issued at the time of placing order is not a cheque against liability. I consider that the above view is contrary to the provisions of Section 138 of the Act. Section 138 of the Negotiable Instruments Act provides that the cheque should have been issued for discharge in whole or in part of any debt or any liability. The explanation states the liability means a legally enforceable liability.

8. If at the time of entering into a contract it is one of the conditions of the contract that the purchaser has to pay the amount in advance then advance payment is a liability of the purchaser. The seller of the items would not have entered into contract unless the advance payment was made to him. A condition of advance payment is normally put by the seller for the reason that the purchaser may not later on retract and refuse to take the goods either manufactured for him or procured for him. Payment of cost of the goods in advance being one of the conditions of the contract becomes liability of the purchaser. The purchaser who had issued the cheque could have been asked to make payment either by draft or in cash. Since giving cheque is a mode of payment like any other mode of payment, it is normally accepted as a payment. The issuance of a cheque at the time of signing such contract has to be considered against a liability as the amount written in the cheque is payable by the person on the date mentioned in the cheque. Where the seller or manufacturer, on the basis of cheques issued, manufactures the goods or procures the goods from outside, and has acted upon the contract, the liability of the purchaser gets fastened, the moment the seller or manufacturer acts upon the contract and procures the goods. If for any reason, the seller fails to manufacture the goods or procure the goods it is only under those circumstances that no liability is created. However, where the goods or raw material has been procured for the purchaser by seller or goods have been manufactured by the seller, it cannot be said that the cheques were not issued against the liability. I consider that if the liability is not construed in this manner, the sole purpose of making dishonour of the cheque as an offence stands defeated. The purpose of making or enacting Section 138 of the N.I. Act was to enhance the acceptability of cheque in settlement of commercial transactions, to infuse trust into commercial transactions and to make a cheque as a reliable negotiable instrument and to see that the cheques of business

transactions are not dishonoured. The purpose of Negotiable Instrument Act is to make an orderly statement of rules of law relating to negotiable instruments and to ensure that mercantile instruments should be equated with goods passing from one hand to other. The sole purpose of the Act would stand defeated if after placing orders and giving advance payments, the stop payments are issued and orders are cancelled on the ground of pricing of the goods as was done in this case.

9. This court in *Mojj Engineering Systems Limited & Ors. Vs. A.B. Sugars Ltd.*; 154 (2008) Delhi Law Times 579 had observed as under :-

“7. Even otherwise, *prima facie*, it was the petitioners who had handed over the undated cheque for a certain amount to the respondent in terms of a contract between the parties. Since an undated cheque cannot be encashed, it can only mean that the petitioners had authorized the complainant to enter an appropriate date on it. In **Young Vs. Grote (1827) 4 Bing. 253** it was held that when a blank cheque is signed and handed over, it means the person signing it has given an implied authority to any subsequent holder to fill it up. Similarly, in **Scholfield Vs. Lord Londesborough (1895-1899) All ER Rep 282** it was held that whoever signs a cheque or accepts a bill in blank, and then puts it into circulation, must necessarily intend that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. This common law doctrine was also affirmed by Justice Macnaghten in **Griffiths Vs. Dalton [1940] 2 KB 264** where it was held that the drawer of an undated cheque gives a *prima facie* authority to fill in the date. This aspect has also been incorporated in Section 20 of the Negotiable Instruments Act, which deals with Inchoate Stamped Instruments. The Supreme Court in **T.Nagappa Vs. Y.R.Murlidhar, (2008) 5 SCC 633** while discussing the scope of Section 20 held that by reason of this provision, a right has been created in the holder of the cheque. *Prima facie*, the holder thereof is authorized to complete the incomplete negotiable instrument. In that view of the matter, all further issues that may be raised by the petitioners regarding the nature and scope of the authority of the respondent to put any particular date on the cheque in question, are all matters for trial.

8. It is not as if the cheque came to be issued without any consideration whatsoever in the first place or that there was such a glaring defect in the complaint that the decision of the Trial Court

to issue summons has *ex facie* resulted in miscarriage of justice or an abuse of the process of Court, and therefore interference under Section 482 Cr.P.C. to quash the proceedings is warranted in the interest of justice. The question whether the consideration for which the cheque was issued was ultimately satisfied or whether the cheque was wrongly sought to be encashed, are all issues that must also be decided at the trial. The Supreme Court in the case of **M.M.T.C. Ltd. and Another Vs. MEDCHL Chemicals and Pharma (P) Ltd. and Another**, (2002) 1 SCC 234 held as follows:

“13.....the well-settled law that the power of quashing criminal proceedings should be exercised very stringently and with circumspection. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability.”

The Court further held that:

“17. There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability.”

10. In view of my above discussion, I consider that the order of learned Additional Sessions Judge was not tenable and this petition is liable to be allowed. The order of learned Additional Sessions Judge dated 2nd September, 2008 is hereby set aside. Learned Metropolitan Magistrate shall proceed with the complaint as per law. The parties are directed to appear before Ld. MM on 7th September, 2010.

SHIV NARAYAN DHINGRA
[JUDGE]

AUGUST 27, 2010
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