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

DATE OF DECISION: 06th DECEMBER, 2013

+ **CRL.M.C. 3746/2013**

ADIGEAR INTERNATIONAL & ORS. Petitioner
Through Mr. Sandeep Sethi, Sr. Advocate
with Mr. Nilesh Sawhney, Advocate

versus

STATE & ANR. Respondent
Through Ms. Kusum Dhalla, APP
Mr. Neeraj Kishan Kaul, Sr.
Advocate with Mr. Vikramjeet
Bakshi and Mr. Rajnish Gaur,
Advocates for R-2

+ **CRL.M.C. 3756/2013**

ADIGEAR INTERNATIONAL & ORS. Petitioner
Through Mr. Sandeep Sethi, Sr. Advocate
with Mr. Nilesh Sawhney, Advocate

versus

STATE & ANR. Respondent
Through Ms. Kusum Dhalla, APP
Mr. Neeraj Kishan Kaul, Sr.
Advocate with Mr. Vikramjeet
Bakshi and Mr. Rajnish Gaur,
Advocates for R-2.

+ **CRL.M.C. 3757/2013**

ADIGEAR INTERNATIONAL & ORS. Petitioner
Through Mr. Sandeep Sethi, Sr. Advocate
with Mr. Nilesh Sawhney, Advocate

versus

STATE & ANR. Respondent
Through Ms. Kusum Dhalla, APP
Mr. Neeraj Kishan Kaul, Sr.
Advocate with Mr. Vikramjeet
Bakshi and Mr. Rajnish Gaur,
Advocates for R-2.

+ **CRL.M.C. 3758/2013**

ADIGEAR INTERNATIONAL & ORS. Petitioner
Through Mr. Sandeep Sethi, Sr. Advocate
with Mr. Nilesh Sawhney,
Advocate.
versus

STATE & ANR. Respondent
Through Ms. Kusum Dhalla, APP
Mr. Neeraj Kishan Kaul, Sr.
Advocate with Mr. Vikramjeet
Bakshi and Mr. Rajnish Gaur,
Advocates for R-2.

+ **CRL.M.C. 4619/2013**

M/S ADIGEAR INTERNATIONAL & ANR. Petitioner
Through Mr. Sandeep Sethi, Sr. Advocate
with Mr. Nilesh Sawhney,
Advocate.
versus

STATE & ANR. Respondent
Through Ms. Kusum Dhalla, APP
Mr. Neeraj Kishan Kaul, Sr.
Advocate with Mr. Vikramjeet
Bakshi and Mr. Rajnish Gaur,
Advocates for R-2.

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Vide this common order, I shall dispose of Cr.M.C.Nos.3746/2013, 3756/2013, 3757/2013, 3758/2013 and 4619/2013, as all these petitions are between the same parties and substantially common question of law and facts are involved in them. For the sake of convenience, I shall take up Crl.M.C No.3746/2013.

2. By virtue of this petition, the petitioners are seeking quashing of the impugned summoning order dated 08.04.2013 passed by the learned Metropolitan Magistrate, Dwarka Courts, New Delhi in Complaint Case No.229/13 titled The Hongkong and Shanghai Banking Corporation Ltd v. M/s Adigear International & Ors., complaint and proceedings emanating therefrom, inter alia, on the allegations that the petitioners are arrayed as accused in the said complaint u/s 138 of the Negotiable Instruments Act (for short 'N.I Act') filed by respondent no.2 pleading that in partial discharge of their liability, the petitioner no.1 through petitioner no.2 issued a cheque dated 15.12.2012 for Rs.50 lakhs drawn on State Bank of Bikaner and Jaipur in favour of respondent no.2. The said cheque was dishonoured by the banker of petitioner no.1 for the reason "payment stopped by drawer". A legal demand notice dated 18.12.2012 was sent, followed by a complaint u/s 138 of the N.I Act. After the respondent tendered pre-summoning evidence, vide impugned order dated 08.04.2013, the learned Trial Court took cognizance of the offence u/s 138 of the N.I Act and the petitioners were summoned.

3. The impugned order is challenged, inter alia, on the ground that the same has been passed in a mechanical and cyclostyled manner without considering the relevant record. Before summoning the accused, it should be considered as to whether an offence has been made out or not. The requirement of Section 138 of the N.I Act is that the person sought to be made liable should have issued cheque in favour of another person. When the averments of fact in this regard are lacking, the summoning order cannot be sustained. Had the learned M.M perused the record, he would have come to know that the original cheque is not issued by petitioner no.2 on behalf of petitioner no.1 in favour of respondent no.2 but in favour of petitioner no.1 itself i.e self drawn cheque thereby transferring funds from one of its accounts in State Bank of Bikaner and Jaipur to its own account maintained with HSBC Ltd i.e. respondent no.2. No case is made out against the petitioners and, therefore, the petitioners cannot be made to suffer the ignominy of protracted trial, as such the impugned summoning order dated 08.04.2013, complaint and proceedings emanating therefrom be quashed/set aside.

4. When the matter first came up for hearing, vide order dated 11.09.2013 it was ordered that the Trial Court shall adjourn the matter to some other day after the date fixed in this case and notice was ordered to be issued to respondent no.2 Respondent no.2 moved an application bearing Crl.M.A.15633/13 for vacation of the order dated 11.09.2013.

5. I have heard Mr. Sandeep Sethi, Senior Advocate for the petitioners duly assisted by Mr. Nilesh Sawhney, Advocate and Mr. Neeraj Kishan Kaul, Senior Advocate for respondent no.2 duly assisted by Mr. Vikram Singh Bakshi, Advocate, at great length and have perused the record.

6. It was submitted by learned counsel for the petitioners that a complaint u/s 138 of the N.I Act can be filed either by the payee or holder in due course. He referred to Sections 9, 13, 15 and 16 of the N.I Act. It was submitted that the cheque was in favour of the petitioners and did not bear any endorsement, much less in favour of the complainant. The complaint is completely silent that they are holders in due course or that there was any endorsement on the cheque in their favour. Rather the averments made in the complaint are to the effect that the complainant is the payee of the cheque which is not borne out from the cheque itself. Therefore, the complaint itself is not maintainable. Reliance was placed on *National Small Industries Corporation Ltd v. State (NCT of Delhi) & Anr*, 2009 Cri.L.J.1299 SC; *M/s Shankar Finance & Investments v. State of Andhra Pradesh & Ors*, 2008(3) Civil Court Cases 586 (SC); *Vishnupant s/o Chaburao Khaire v. Kailash S/o Balbhir Madan*, 2010 Cri.L.J.2166; *M/s Jayaram Finance, Kancheepuram & Anr v. Jayaprakash*, 2010 Cri.L.J 3323 (Mad HC); *Anil Kumar v. Ramakrishna Kartha*, 2009(2) Civil Court Cases 535(Kerala); *Morepen Finance Ltd v.*

Reserve Bank of India, 116(2005) DLT 129 and ***Kuruvilla v. Sathi Rajan Rajeev Nivas***, II(2013) BC 120.

7. It was further submitted that the complaint also lacks in material particulars, inasmuch as, although the complaint has been filed against as many as five petitioners but it is merely alleged that they are involved in the day-to-day affairs of the company which does not meet the requirements of law. Specific averments are required to be made in order to fasten liability on the petitioners, as such, in the absence thereof also, the complaint and the proceedings emanating therefrom are liable to be quashed. Reliance was placed on ***Central Bank of India v. Asian Global Ltd. and Ors.***, AIR 2010 SC 2835; ***National Small Industries Corporation Ltd v. Harmeet Singh Paintal & Another***, (2010) 3 SCC 330; ***Saroj Kumar Poddar v. State (NCT of Delhi & Anr)***, (2007) 3 SCC 693.

8. Rebutting the submission of learned counsel for the petitioners, it was submitted by learned Senior counsel for respondent no.2 that the complaint gives a detailed account regarding the role played by each and every petitioner. He referred to various documents such as Trade Financing General Agreement, Agreement for Overdraft/Cash Credit facility, Demand Promissory Note, Letter of Continuity, Agreement for Working Capital Loan, Deed of Hypothecation, Hypothecation of Stocks, Deed of Guarantee executed by accused nos. 2 to 5 for submitting that specific averments have been made in the complaint from para 5 to para 15

giving the details of the roles played by each and every accused. Moreover, *Asian Global*(supra), *Harmeet Singh Paintal*(supra) and *Anil Kumar*(supra) does not help the petitioners because all these authorities pertain to a company where merely disclosing that the Directors were in charge of and responsible for the conduct of its business, is not sufficient. There should be specific averments in the complaint about the part played by the Directors in the transaction. It was submitted that petitioner no.1 is a firm. Petitioners 2 to 5 are its partners, that being so, the partners are liable for the acts of the firm. Even otherwise in the instant case, role of each and every petitioner has been specified in the complaint.

9. As regards the submission that the complainant/respondent is not a “holder in due course” or that no endorsement was made in favour of the complainant, reference was made to Sections 9, 118(g), 138 and 139 of the N.I Act. Reliance was placed on *Mahadev Corporation vs. Allahabad Bank*, (2005) 120 DLT 135; *Bank of India v. State and Ors*, 2010(119) DRJ 401; *Punjab and Sind Bank vs. Vinkar Sahakari Bank Limited and Others*, (2001) 7 SCC 721; *U.Ponappa Moothan Sons, Palghat v. Catholic Syrian Bank Limited and Others*, (1991) 1 SCC 113; for submitting that substantially similar plea was taken in these cases and were repelled by the Courts.

10. Rebutting the submissions of learned counsel for the petitioners that the cheque was not endorsed in favour of the complainant, it was

submitted by learned senior counsel for respondent no.2 that the bank was possessor of the cheque for consideration. Therefore, it was holder in due course and onus is on the petitioners to rebut it during the trial and for that reason the complaint cannot be quashed at the initial juncture. It was further submitted that *M/s Jayaram Finance*(supra) and *Anil Kumar* (supra) relied upon by counsel for the petitioners does not help him inasmuch as in those cases, the cheque was in possession of a third party and, therefore, endorsement was essential and in the absence of the same, complaint u/s 138 of the N.I Act was not maintainable.

11. Lastly, relying upon the judgments *in M/s Intech Net Limited and Ors. v. State and Anr.*, 2007 CrI.L.J.216, *Iridium India Telcom Limited v. Motorola Incorporated and Others*, (2011) 1 SCC 74 and *M.M.T.C Ltd and Another vs. Medchl Chemicals and Pharma (P) Ltd and Another*, (2002) 1 SCC 234, it was submitted that at this stage, the Court cannot go into the disputed questions of facts and there is no justification for embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. As such the petition is liable to be dismissed.

12. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have perused the record.

13. Before coming to the factual matrix of the case, the relevant provisions of law incorporated in Sections 9,13, 15, 16, 118(g),138 and 139 are reproduced as under:-

“ 9. Holder in due course.-

“Holder in due course” means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorse thereof, if [payable to order] before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.”

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“13. Negotiable instrument.-[(1) A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Explanation (i).- A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (ii).- A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsements is an endorsement is an endorsement in blank.

Explanation (iii) Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.]

(2) A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one or two, or one or some of several payees.]

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15. Endorsement.- When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the endorser.

16. Endorsement “in blank” and “in full”-“endorsee”-¹[(1)] If the endorser signs his name only, the endorsement is said to be “in blank”, and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the endorsement is said to be “in full”, and the person so specified is called the “endorsee” of the instrument.

²[(2) The provisions of this Act relating to a payee shall apply with the necessary modifications to an endorsee.]

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118.Presumptions as to negotiable instruments.-

(g) that holder is a holder in due course – that the holder of a negotiable instrument is a holder in due course; provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

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138. Dishonour of cheque for insufficiency, etc., of funds in the accounts-

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 extend to two year], 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 induce 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, ³["within thirty days"] of the receipt of information by him from the bank regarding the return of the cheques 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 purpose of this section, "debt or other liability" means a legally enforceable debt or other liability].

139. Presumption in favour of holder -It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, or any debt or other liability]."

14. The basic submission of learned counsel for the petitioners is that the respondent was not the "holder in due course" of the cheques in question; there are no allegations in the complaint to the effect that the respondent was holder in due course of the cheques. The petitioners had drawn the cheques in its own name, therefore, it cannot be said that the respondent became holder in due course of the cheques in question, as the same were never transferred nor endorsed in their favour. The respondent bank was merely a collecting bank and could not, in any circumstance, be termed as holder in due course of the cheque. Reliance was placed on *National Small Industries Corporation Ltd v. State* (supra) for submitting as to who

can file a complaint u/s 138 of the N.I Act. In that case, it was observed that the term `complaint' is not defined under the Code. Section 142 of the N.I Act requires a complaint u/s 138 of the Act, to be made by the payee (or by the holder in due course). It is thus evident that in a complaint referring to dishonour of the cheque (which has not been endorsed by the payee in favour of anyone), it is the payee only who can be the complainant. To the similar effect was the view taken in *M/s.Shankar Finance Investments*(supra). Reliance was placed on *Vishnupant* (supra), *Jayaram Finance*(supra) and *Anil Kumar*(supra) for submitting that in the absence of endorsement, as contemplated u/s 50 of the Act, mere delivery of the cheque is not sufficient. However, all these authorities are not applicable inasmuch as in *Vishnupant*(supra), the respondent complainant was not the person named in the instrument nor he was the person to whom or to whose order, money by the instrument was directed to be paid. There was no endorsement on the cheque by the deceased paying in favour of the respondent-complainant, as such, it was held that the amount under the instrument was not directed to be paid to him. The complainant being not the payee nor "holder in due course" had no authority to demand money and lodge complaint as he cannot give valid discharge for payment made to him. Similarly in *Jayaram Finance*(supra) the instrument in question was given in favour of one Ganavel. No endorsement was made on the cheque for transfer enabling the complainant to possess the same in

his own name so as to receive the contents thereof from the accused. As such, it was held that the complainant could not be considered to be “holder” much less “holder in due course”. In *Anil Kumar*(supra) also, on facts it was found that the respondent was not a “holder in due course”.

14. On the other hand, in *Mahadev Corporation*(supra) relied upon by learned counsel for the respondent, substantially similar facts were involved. In that case also substantially similar plea was taken that the respondent was not the holder in due course of the cheque in question; there were no allegations in the complaint to the effect that the respondent was holder in due course; the cheques were drawn by the petitioner in its own name. Repelling the contention, it was observed by this Court that the respondent is a person who is a holder in due course of the cheques, as definition of holder in due course, clearly envisages that any person who for consideration became possessor of promissory note, bill of exchange or cheque shall be holder in due course. As the cheques were issued by the petitioner in its own name but were ultimately to be credited in the account of the respondent and thus respondents were to be benefited of such payment and now since they have been put to disadvantage because of dishonour of such cheques, the petitioners cannot agitate that since the cheque in question was not issued in the name of respondent but in the name of petitioners themselves, therefore, provisions of Section 138 are not attracted to the case, the respondent being not holder in due course of

cheques. In that case also, the order of summoning passed by the Magistrate was sought to be challenged by way of revision petition which was dismissed.

15. In ***Bank of India***(supra), the Director of the company had issued cheques from his personal account in favour of the company so that the amount deposited in the account of the company that had availed overdraft and other facilities from the bank is utilised for discharging dues of the bank. On dishonour of the cheque, the bank filed a complaint claiming itself to be the “holder in due course”. While the learned Metropolitan Magistrate issued a notice u/s 251 Cr.P.C on the accused persons, in revision, the learned Additional Sessions Judge observed that the bank was not a holder in due course since there was no endorsement u/s 16 of the N.I. Act made on the cheque and the status of the complainant bank, under these circumstances, cannot be treated as “holder in due course”. After referring to Section 9 of the N.I. Act which defines holder in due course, it was observed as under:-

“5. It is apparent from this definition that for being a 'holder in due course' of a bill or a cheque it was not necessary that there should be an endorsement on the bill or cheque. 'Holder in due course' has been defined as any person, who for consideration, becomes the possessor of the promissory note or cheque. There is no doubt that endorsee or the payee of such a bill or cheque are also considered as 'holder in due course', but, it is not the case that payee or endorsee alone are holders in due course. A person whose banking account is overdrawn if negotiates with his bankers a cheque, drawn by a third party, to reduce the overdraft, the banker becomes a holder for value of the cheque. The pre-existing

debt of the overdraft is a sufficient consideration for the negotiation of a cheque to the banker. If a person handovers cheque to the bank with the clear understanding to the bank that cheque is towards the debt payable by the company, though the cheque remains in the name of the company but the bank becomes holder of the cheque in due course. What is to be seen is that whether the bank has come into possession of the cheque for a value pursuant to a contract between the parties express or implied..... Once it is established to the satisfaction of the Court that the cheques were issued for discharge of the debt of the company, the bank who had given this debt to the company would be considered as 'holder in due course'. The 'holder in due course' of cheque means any person entitled to receive or recover the amount due thereon from the parties thereto."

Therefore the order of the Session Court was set aside and complaint was held to be maintainable.

16. In *Punjab and Sind Bank*(supra) it was observed as under:-

"Section 142 of the Act envisages a complaint to be made in writing "either by the payee or the holder in due course of the cheque, as the case may be". Section 8 of the Act defines "holder" as any person entitled in his own name to the possession of the cheque and to receive or recover the amount due thereon from the parties thereto. We have no doubt that complainant-bank was well within its right to possess the cheque and to receive or recover the amount covered by the instrument. "Holder in due course" means a person who for consideration became the possessor of a cheque if payable to bearer before the amount became payable. (vide Sec. 9). In this context reference has to be made to Section 118(g) of the Act which contains a mandate that until the contrary is proved the holder of a negotiable instrument shall be presumed to be a holder in due course. Thus there is no escape for the court from drawing such presumption."

It was further observed that:

".....that the complainant-company is the holder of the instrument on its own right. As such it could be a holder in due course also until the concerned party adduces evidence to rebut the presumption. It is of course open to the respondents to rebut the

presumption in the trial but till then the High Court could not say that the complainant is not a holder in due course at all."

17. In *Ponnappa*(supra), it was observed that:

"The definition makes it clear that to be a 'holder in due course' a person must be a holder for consideration and the instrument must have been transferred to him before it becomes overdue and he must be a transferee in good faith and another important condition is that the transferee, namely, the person who for consideration became the possessor of the cheque should not have any reason to believe that there was any defect in the title of the transferor."

18. In *Durga Shah Mohan Lal Bankers vs. Governor General in Council & Ors*, AIR (39) 1952, Allahabad 590, it was observed:

"4. A cheque is under the law a negotiable Instrument. Its negotiability can be destroyed only if it is marked as "not negotiable" on its face; it is not destroyed by its simply being crossed whether generally or specially. The only effect of crossing a cheque is, as stated in Section 126, Negotiable Instruments Act, that the drawee bank must not pay it otherwise than to any banker if it is crossed generally, or to the particular banker if it is crossed specially There is no other effect of the crossing. In *Carlton v. Ireland* (1856) 25 LJQB 113 Coleridge J. stated at p. 114 :

"It may be that the effect of the crossing is to require caution on the part of the person taking it, & to throw upon him the obligation of showing that he had taken it bona fide, & had given value for it ; but it cannot be carried further without interfering with the negotiability of the instrument."

Lord Cairns C. said in *Smith v. The Union Bank of London* (1875) 1 QBD 31 that,

"Whatever may have been the effect of a crossing, the negotiability of the cheque was not thereby restrained."

19. In *M/s Tailors Priya v. M/s Gulabchand Danraj*, AIR 1963 Calcutta 36, it was observed as under:-

“17. It is thus found that a cheque is a negotiable instrument and may be transferred or negotiated by indorsement and delivery, making the indorsee the holder in due course. But unlike other negotiable instruments, there are specific provisions with regard to crossed cheques. Those provisions have been mentioned above. If the words "not negotiable" are used with special crossing, then it is still transferable but not negotiable. The Negotiable Instruments Act does not provide specifically for a crossing, "a/c payee" or "a/c payee only". At one time it used to be thought in England that such indorsement had no legal effect and it was even thought that such indorsement invalidated a cheque. However, the practice of making such endorsements is so widespread and has been going on for such a length of time, that it can no longer be said that such a crossing would invalidate a cheque. But, there has really been no satisfactory decision with regard to the legal consequences of such crossing. The two cases mentioned above, which are always cited, do not specifically deal with such endorsements, except a passing observation of Lord Scrutton L J. in (1924) 1 KB 775. However, it seems that the text books are unanimous in their opinion that an indorsement or crossing containing the words "a/c payee" or "a/c payee only" does not restrict the negotiability of the cheque. It is only a direction on the collecting banker to put the money into the account of the person shown as the payee, on the face of the cheque. The result is this: Supposing A issues a cheque in favour of B and crosses it "a/c payee only". B may negotiate it in favour of C. and C may negotiate it in favour of D and so on. The only result of such crossing is that when it is put into the hands of the collecting banker, the Banker is put on notice that the money must be put into the account of B only and not in any other account, and if it puts the money into some other account with notice of the crossing, it will be liable for negligence. I however fail to see the merits of this curious procedure. In the illustration given above, C may take the cheque from B and become the holder for value and yet if he goes to his banker and asks the banker to collect the money, the duty of the banker would be, not to put the money into C's account but into B's account, and if B has no account then the banker may refuse to accept the cheque at all. Under such circumstances. I do not see what benefit C has got by negotiation. It amounts to this, that he becomes a holder for value but without the right of getting this banker to collect the money.”

20. In *British Bank of Middle East vs. Almal Brothers*, 66, CWN

285, it was observed:

“3. The cheque in suit is on the face of it, a bearer cheque. It is a bearer cheque as it is expressed to be so payable. It is also crossed "Account payee only." Does this crossing alter the position? Sections 46 and 47 of the Negotiable Instruments Act provide, "a cheque payable to bearer is negotiable by delivery thereof." It is well settled that crossing of a cheque does not restrain its negotiability, so that a crossed bearer cheque may pass from hand to hand without any endorsement, while a crossed cheque payable to order may be negotiated by endorsement as in the case of cheques uncrossed.....”

21. In view of the aforesaid, even if the cheques were issued by the petitioners in its own name but was in possession of the complainant who was entitled to receive or recover the amount due thereon, unless the contrary is proved by the petitioner, the complainant being the holder of the negotiable instruments shall be presumed to be the holder in due course.

22. As regards the submission that except for alleging in para 21 of the complaint that accused nos.2 to 5, being the persons responsible for the affairs of the accused no.1 and also being involved in day to day functioning of accused no.1 firm, they are jointly and severally liable to be prosecuted, there is no other averment against them, same is absolutely belied by the record that in as much as a perusal of the certified copy of the complaint filed by the petitioners themselves goes to show that paras 3 to 16 gives a detailed account regarding the role played by all the

petitioners and as to how they are jointly, severally and co-extensively liable to make payment to the complainant. It is alleged that petitioner no.1 is the partnership firm of which respondents 2 to 5 are the partners, who are responsible to petitioner no.1 firm for the conduct of its day to day business and are managing the affairs of the firm. Petitioner no.1 approached respondent no.2 to make available certain credit facilities in the nature of working capital finance and respondent no.2, vide Banking Facility Letter (for short 'BFL') dated 28.08.2008 had sanctioned various facilities to petitioner no.1, which is a partnership firm comprising of petitioner nos. 2 to 5 as its partners. The terms and conditions mentioned in the BFL were duly accepted by the petitioners. Not only that, petitioner no.1 firm executed various documents in the nature of Trade Financing General Agreement, Demand Promissory Note in the sum of Rs.7.50 crores, Letter of Continuity, Counter-Indemnity, Agreement for working Capital Loan, all dated 28.08.2008 and petitioners 2 to 5 executed their separate Deeds of Guarantee. Many other loan documents were also executed by the petitioners. Again, petitioner no.1 approached respondent no.2 for enhancement of credit facilities and respondent no.2 vide BFL dated 24.11.2009 sanctioned enhanced credit facilities and various documents were executed by the petitioners. The facilities were again enhanced from time to time. As per the statement of account maintained by respondent no.2, as on 30.11.2012, an amount of Rs.8,24,61,932.59

along with future interest was recoverable from the petitioners. In part discharge of their liabilities, five cheques including the cheque in question was issued by the petitioners and handed over to respondent no.2, which on presentation was dishonoured. A legal notice dated 18.12.2012 was issued to which they did not send any reply and thereafter the complaint was filed. Respondent no.2 was holder in due course and have received the documents from the petitioners in discharge of their liabilities. As such specific averments have been made against the petitioners for showing that they are jointly and severally liable to be prosecuted. Moreover *Harmeet Singh Paintal*(supra), *Saroj Kumar Poddar*(supra) and *Asian Global Ltd.*(supra) are of no help to the petitioner since these cases pertain to Director of company. Needless to say, a company is an entity distinct from its members whereas partnership is not a juristic person.

23. Lastly there is force in the submission of learned senior counsel for respondent no.2 that the case is at its initial stage. Only summons has so far been issued to the petitioners. Time and again it has been held by Hon'ble Supreme Court that power to quash proceedings at initial stage have to be exercised sparingly, with circumspection and in rarest of rare cases. In *Iridium* (supra), it was observed as under:-

“44. This Court has repeatedly held that power to quash proceedings at the initial stage have to be exercised sparingly with circumspection and in the rarest of the rare cases. The power is to be exercised ex debito justitiae. Such power can be exercised

where a criminal proceeding is manifestly attended with malafide and have been instituted maliciously with ulterior motive. This inherent power ought not to be exercised to stifle a legitimate prosecution. In the present case, the parties are yet to place on the record the entire material in support of their claims. The issues involved are of considerable importance to the parties in particular, and the world of trade and commerce in general.

45. In such circumstances, in our opinion, the High Court ought to have refrained from indulging in detailed analysis of very complicated commercial documents and reaching any definite conclusions. In our opinion, the High Court clearly exceeded its jurisdiction in quashing the criminal proceeding in the peculiar facts and circumstances of this case. The High Court noticed that while exercising jurisdiction under Section 482 Cr.P.C. "the complaint in its entirety will have to be examined on the basis of the allegations made therein. But the High Court has no authority or jurisdiction to go into the matter or examine its correctness. The allegations in the complaint will have to be accepted on the face of it and the truth or falsity cannot be entered into by the Court at this stage...."

24. Substantially similar view was taken in *MMTC Ltd* (supra), where it was observed:-

"13. 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 conclusion that there was no existing debt or liability."

25. In *Intech Net Limited* (supra), it was observed:-

"Once the issuance of the cheques is admitted and as the words "or bearer" have not been struck off, the complainant is held to be the holder of the said cheques in due course though it was written as self and thus he is entitled to receive the cash and on dishonouring of the said cheques, he can very well file the complaint. The contention of the petitioners that the said cheques was issued in the process of transaction between the first

petitioner and the complainant for supply of goods has to be substantiated during the course of trial by the petitioners by leading evidence. Under these circumstances, I see no ground to quash the impugned proceedings at this stage.”

26. This being the legal position, the allegations in the complaint will have to be accepted on the face of it and the truth or falsity cannot be entered into by this Court at this stage. That being so, there is no ground to quash the summoning order or the complaint or the proceedings emanating therefrom. As such, application moved by respondent no.2 is allowed and all the petitions are dismissed. It is, however, clarified that nothing stated herein shall have any reflection on the merits of the case.

**SUNITA GUPTA
(JUDGE)**

DECEMBER 06, 2013

as