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

% ***Judgment delivered on: 27th October, 2017***

\+ CRL.M.C. 5041/2015 & CRL.M.A.18145/2015

OMWAY BUILD ESTATE PVT. LTD. ..... Petitioner No.1

JANAK GOYAL ..... Petitioner No.2

NEELAM GOYAL ..... Petitioner No.3

Through: Mr. J.P.Sengh, Sr. Adv. with Mr. Ashish Aggarwal, Ms. Manisha Mehta, and Mr. Arun Kumar Tewari, Advs.

versus

SATYENDRA JAIN ..... Respondent

Through: Mr. Rakesh Mittal, Adv. with Mr. Vikrant Yadav, Adv.

CORAM:
HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

I. S. MEHTA, J.

1. By way of the above captioned petition, the petitioners invoke the inherent jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 to set aside the order dated 30th March, 2015 passed by the Metropolitan Magistrate, Saket District Court, New Delhi in Criminal Complaint No. 2492 of 2015 (old no. 991/11)

thereby dismissing the application of the petitioners for stay of the proceedings; to quash the Criminal Complaint No. 2492 of 2015 (old no. 991/11) and to set aside the order dated 13th December, 2010 passed in Criminal Complaint No. 2492 of 2015 (old no. 991/11) passed by the Metropolitan Magistrate by virtue of which the petitioners were summoned as accused for offence punishable under Section 138 of the Negotiable Instruments Act.

2. The brief facts stated are that the respondent- Satyendra Jain had filed a complaint under Section 138 read with Section 141 of the Negotiable Instrument Act, 1881*(hereinafter referred to as NI Act*) on 30th November, 2010 in the Court of the Additional Chief Metropolitan Magistrate, Saket Courts, New Delhi. It is alleged in the complaint that Mr. Janak Goyal/petitioner no.2, who is the Director of M/s Omway Buildestate Private Limited having its registered office at 3 – Local Shopping Complex, Sharda Chamber, K Block, Kalkaji, New Delhi-110019 and the complainant/respondent were known to each other and in the month of January, 2010 Mr. Janak Goyal/petitioner no.2 requested the complainant/respondent for a loan of Rs. 4,35,00,000/- (Rupees Four Crores Thirty Five Lakhs Only) for a period from 20.01.2010 to 31.05.2010 which was extendable upto 30.09.2010 with interest thereon for the said period, being the last date to re-pay the loan along with interest. Thereupon, the Company/petitioner no.1 i.e. Omway Buildestate Private Limited and the complainant/respondent entered into a Loan Agreement dated 20.01.2010. As per the Loan Agreement, the complainant gave Rs. 4,35,00,000/- (Rupees Four Crores Thirty Five Lakhs Only) to the

accused/petitioners No.1 – 3, by way of three cheques bearing no.s 508629 dated 19.01.2010, 5555761 dated 20.01.2010 and 5555763 dated 20.01.2010, for a period from 20.01.2010 to 31.05.2010 which was extendable upto 30.09.2010, along with interest thereon. The said cheques were duly encashed by the Company.

3. It is further alleged in the complaint that under the loan agreement the Company agreed that the Company would issue post dated cheques as security for re-payment of the loan amount along with interest thereon, which would be presented for payment if the Company defaults in the re-payment of the loan amount. The Company issued two cheques in favour of the complainant and the details are as follows:

i. Cheque No. 504080, dated 30.09.2010 drawn on Bank of Baroda, for an amount of Rs. 4,35,00,000/- (Rupees Four Crores Thirty Five Lakhs Only) towards payment of the principal amount.

ii. Cheque No. 504081, dated 30.09.2010 drawn on Bank of Baroda, for an amount of Rs. 97,69,266/- (Rupees Ninety Seven Lakhs Sixty Nine Thousand Two Hundred Sixty Six Only) towards payment of interest on the principal amount.

4. The petitioners/accused persons defaulted in repayment of the total principal and interest thereon, within the period i.e. 31.05.2010 or the extended period i.e. 30.09.2010.

5. Consequently, the complainant presented the above two cheques to Bank of Baroda, Lajpat Nagar Branch on 15.10.2010, for encashment, however, the said two cheques were dishonoured vide dishonor memo dated 15.10.2010 in respect of cheque no. 504080 and dishonor memo dated 16.10.2010 in respect to cheque no. 504081 with the remarks "Funds Insufficient". Thereafter, the complainant/respondent issued two legal demand notices dated 26.10.2010 in respect of the two dishonoured cheques which was duly served upon the petitioners. However, when the petitioners failed to make the payment despite expiry of 15 days notice period, the respondent filed a complaint under Section 138 of NI Act in the Court of the Additional Chief Metropolitan Magistrate, Saket Courts, New Delhi, on 30.11.2010.

6. The learned Metropolitan Magistrate vide order dated 13th December, 2010 took cognizance of the offence punishable under Section 138 of the NI Act and issued summons to the petitioners/accused persons.

7. Subsequently, the petitioners filed an application under Section 309 of Cr.P.C. for adjournment/stay of the proceedings under Section 138 of NI Act. The learned Metropolitan Magistrate dismissed the said application vide order dated 30.03.2015.

Hence the present petition.

8. The learned counsel appearing on behalf of the respondent has submitted that the petitioners no.1-3 had obtained a loan of Rs. 4,35,00,000/- (Rupees Four Crores Thirty Five Lakhs Only) from

respondent for a short period i.e. January, 2010 to May, 2010 which could be extended upto 30th September, 2010 with interest thereon. The petitioner had also entered into a loan agreement with the respondent on 20.01.2010.

9. He has further submitted that the loan was given by the petitioners through three cheques i.e. Cheque no. 508629 dated 19.01.2010, cheque no. 5555761 dated 20.01.2010. cheque no. 5555763 dated 20.01.2010. The said cheques were encashed by the petitioners. It was agreed that the petitioners will give post dated cheques along with interest. The petitioners issued two cheques in favour of the complainant/respondent. First cheque i.e. cheque no. 504080 dated 30.09.2010 of Rs. Rs. 4,35,00,000/- (Rupees Four Crores Thirty Five Lakhs Only) towards payment of principal amount and second cheque, i.e. cheque no. 504081 dated 30.09.2010 of Rs. 97,69,266/- (Rupees Ninety Seven Lakhs Sixty Nine Thousand Two Hundred Sixty Six Only) towards payment of interest on the principal amount. However, the petitioners defaulted in paying the total amount i.e. total amount with interest and cheques were dishonoured with remarks 'funds insufficient' by Bank of Baroda, Lajpat Nagar branch.

10. The respondent sent legal notice dated 26.10.2010 in pursuance of that the respondent filed the present case in year 2010. Thereafter, the petitioners moved application under Section 309 Cr.P.C. contending that there is a stay by various Court on various assets of petitioner and same be adjourned.

11. The learned MM vide order dated 30.03.2015 dismissed the application filed under Section 309 Cr.P.C. with the observations that:

> "*The present case has been filed in the year 2010 and the accused persons while framing the notice had raised the defence that the cheque in question was given as security and to be presented for payment in case of failure on the part of the accused persons to abide by the terms and conditions of the agreements executed between the accused persona and the complainant. It was never the defence of the accused persons, that they are unable to make the payment of the cheque in question due to several restraining orders of the various Hon'ble Courts. Even in the statement u/s 313 Cr.PC r/w 281 Cr.PC, the accused persons has stated that there were no loan transaction between the complainant and the accused persona and have denied the liability towards the complainant. Such a defence, has surfaced only in this application moved today and it appears to be an after though an only with the ulterior motive to delay outcome of the present case. Strength is also drawn from judgment of the Hon'ble Supreme Court delivered in Vinod Kumar Vs. State of Punjab Crl. Appeal No. 554 of 2012 delivered on 21.01.2015 wherein trial courts have been directed to follow the command of the procedure relating to trial and not yield to the request for grant of adjournment for non acceptable reasons.*"

12. The petitioners had moved another application for adjourning the matter which was also dismissed by the learned Metropolitan Magistrate and a cost of Rs. 10,000/- was also imposed upon the petitioners.

13. By way of the present petition, the petitioners have challenged the order dated 30.03.2015 passed by the learned Metropolitan Magistrate, South-East District, Saket Court, New Delhi. The petitioners have also prayed to set aside the summoning order dated 13.12.2010 passed in Criminal Complaint No. 2492/2015 filed by the respondent under Section 138 of N.I. Act.

14. The learned counsel for the complainant/respondent has submitted that the accused Nos. 2 & 3/petitioners No. 2 & 3 are in-charge and responsible for the business of the accused No. 1 /petitioner No. 1 Company and its day to day business. The respondent invoked the provisions of Section 141 of the Negotiable Instruments Act, 1881. The relevant paragraphs of the complaint are reproduced hereunder:-

> *"2. The Accused Nos. 2 and 3 are the Directors of the Accused No. 1 Company (the "Company"), which has its registered office at 3 – LSC, Shahdara Chamber, K Block, Kalkaji, New Delhi- 110019 and are the persons in charge and responsible for the Company's business and its day to day affairs. The Company is in the business of construction and building development"*

15. The petitioners entered into a loan agreement dated 20th January, 2010 with the complainant/respondent and took the amount of Rs. 4,35,000,00/- (Rupees Four Crores Thirty Five Lakhs Only) from the complainant/respondent. Against the said loan, the petitioners mortgaged their certain properties situated in the District Alwar, Rajasthan. In clause 6.1 of the Loan Agreement, the petitioners had undertaken that there is no suit pending in any Court of law in respect of the property to be mortgaged nor the borrowers i.e. the petitioners have been served with any notice for infringing the provisions of Municipal Act or any Act relating to the Local Bodies or Gram Panchayat or Local Authorities or within any other process under any of these Acts.

16. After taking the loan, the petitioners issued two post-dated cheques for the purpose of returning the loan. When the petitioners failed to repay the loan, the complainant/respondent checked the status of mortgage properties and found that there have been litigations with respect to the said properties.

17. It came to the notice of the complainant/respondent that the petitioners have played fraud upon the complainant/respondent from the very inception. Besides the complaint under Section 138 Negotiable Instrument Act, the complainant/respondent had filed a Civil Suit (OS) No.47 of 2011 in Delhi High Court, which was decreed in favour of the present respondent vide judgment and decree dated 19th March, 2013. The said decree was for a sum of Rs. 5,75,17,240/- with *pendente lite* interest @ 9% p.a. and future interest @ 15% p.a.

18. The Hon'ble Supreme Court upheld the said judgment and decree passed by this Court. All the grounds taken by the petitioners in the present petition were taken by them in their leave to defend application which was dismissed by this Court.

19. I have given my thoughtful consideration to the submissions made by learned counsel for both the parties and have also perused the material on record.

20. The whole dispute hinges around whether in presence of the final judgment and decree passed in Civil Suit (OS) No. 47 of 2011 of this Court, the impugned summoning order is bad in law?

The answer is:- **NO.**

21. The petitioners are invoking the jurisdiction under Section 482 of the Code of Criminal Procedure, 1973 to set aside the order dated 30th March, 2015 passed by the Metropolitan Magistrate, Saket District Court, New Delhi in Criminal Complaint No. 2492 of 2015 whereby the application of the petitioners for stay of the proceedings under Section 138 of NI Act was dismissed ; to quash the Criminal Complaint No. 2492 of 2015 and to set aside the order dated 13th December, 2010 passed by the Metropolitan Magistrate by virtue of which the petitioners were summoned as accused for offence punishable under Section 138 of the Negotiable Instruments Act.

22. In the instant petition, the complaint under Section 138 read with Section 141 of the Negotiable Instruments Act was filed

pertaining to dishonouring of the two cheques i.e. cheque no. 504080 dated 30.09.2010 of Rs. 4,35,00,000/- (Rupees Four Crores Thirty Five Lakhs Only) and second cheque no. 504081 dated 30.09.2010 of Rs. 97,69,266/- (Rupees Ninety Seven Lakhs Sixty Nine Thousand Two Hundred Sixty Six Only), which were dishonoured vide dishonor memo dated 15.10.2010 in respect of cheque no. 504080 and dishonor memo dated 16.10.2010 in respect to cheque no. 504081 with the remarks "Funds Insufficient". Thereafter, the complainant/respondent issued two legal demand notices dated 26.10.2010 in respect of the two dishonoured cheques which was duly served upon the petitioners.

23. The complainant/respondent at the same time also filed a Civil Suit (OS) No. 47 of 2011 for the recovery of Rs. 5,75,17,240/- before this Court and the same was decreed in favour of the present respondent on 19th March, 2013. The said decree was for a sum of Rs.5,75,17,240/- with *pendente lite* interest @ 9% p.a. and future interest @ 15% p.a.

24. The petitioners preferred a Special Leave Petition No. 9695 of 2015 against the judgment and decree passed in the Civil Suit (OS) No. 47 of 2011 in the Hon'ble Supreme Court of India and the same was dismissed as withdrawn on 23.11.2015. Consequently, the judgment and decree passed in Civil Suit (OS) No. 47 of 2011 became final between the parties.

25. The Hon'ble Supreme Court in the case of ***P. Swaroopa Rani v. M. Hari Narayana***, **AIR 2008 SC 1884,** has categorically held:

> *"11. It is, however, well settled that in a given case, civil proceedings and criminal proceedings can run simultaneously"*

26. Also, in ***Vishnu Dutt Sharma v. Smt. Daya Sapra,*** **2009 13 SCC 729**, the Apex Court has observed that:

> *"A creditor can maintain a civil suit for recovery of alleged loan amount and criminal proceedings under NI Act for dishonor of cheque at the same time - Both proceedings can run parellely."*

27. Since the judgment and decree in the Civil Suit (OS) No. 47 of 2011 has attained finality between the same parties with respect to the same transaction and the counsel for the petitioner has not argued the case on merit as observed in order dated 27.03.2017 before this Court, the plea taken by the petitioners in the present case loses significance and this Court finds no merit to interfere with the impugned summoning order dated 13th December, 2010 and with the impugned order dated 30th March, 2015 passed by the Metropolitan Magistrate, South East, Saket Court in Criminal Complaint No. 2492 of 2015.

28. Consequently, the present petition is dismissed and disposed of accordingly. All the pending application(s), if any are also disposed of. One copy of this judgment be sent to the concerned Court(s).

No order as to costs.

I.S.MEHTA, J

OCTOBER 27, 2017