SMT JUSTICE T. RAJANI

CRIMINAL PETITION Nos.6675, 6814 and 7020 of 2011

COMMON ORDER:

Since the petitioner and the complainant are one and the same and since the cause of action arises out of the same business transaction, the criminal petitions are disposed of together by this common order.

2. CRLP.No.6675 of 2011 is filed, seeking for quash of the proceedings in CC.No.222 of 2010; CRLP.No.6814 of 2011 is filed, seeking for quash of the proceedings in CC.No.286 of 2010 and CRLP.No.7020 of 2011 is filed, seeking for quash of proceedings in CC.No.285 of 2010, against the petitioner, on the file of Judicial Magistrate of First Class, Nandikotkur, Kurnool District. The offence alleged is under Sections 138 of the Negotiable Instruments Act (for short 'the Act').

3. Heard the counsel for the petitioner, the counsel for the first respondent and the learned Public Prosecutor, appearing for the second respondent.

4. The facts of the case, as reflected in the complaint, are that on 05.02.2010 and 10.03.2010, the accused borrowed an amount of Rs.20,00,000/- and Rs.12,00,000/- respectively for his business necessities and executed a promissory note in favour the complainant agreeing to repay the same with interest at 24% per annum on his demand or his order. For the security of the said amounts, the accused also passed cheques. On 03.07.2010 and 02.09.2010, the complainant

presented the above cheques for encashment of the amount but, the same were dishonoured on the ground of 'Funds Insufficient'. The notices were issued to the accused but one of the notices returned with an endorsement 'Now Left'. Hence, the complaints are filed.

5. The main grounds on which these petitions are filed are that the Court below did not apply its mind while issuing summons. There is no debt or liability against the petitioners and they are not liable to pay any money whatsoever. There is no cause of action to file the complainants as per the judgment of the Supreme Court in *HARMAN ELECTRONICS PVT. LTD. v. NATIONAL PANASONIC PVT. LTD.* [(2009) 1 SCC 720]. Hence, the order of taking cognizance is erroneous and it has to be quashed.

6. The contention of the counsel for the petitioner is that promissory notes were executed for the debt and even according to the contents of the complaint, the debt under the promissory notes becomes payable only on a demand made by the holder of the same or to his order. The averments in the complaint do not anywhere disclose that any such demand was made before the cheques were presented. The counsel relies on a decision of this Court in TAHER N. KHAMBATI v. M/S. VINAYAK ENTERPRISES[1], which also dealt with a case wherein the respondents therein borrowed certain amounts and gave blank signed cheque. It was held that the cheque cannot be said to be a bill of exchange prior to its presentation in bank. The appellant therein also took the blank signed cheque from respondents 1 and 2 as

[1] 1995 1 APLJ 43

security, with an understanding that if the respondents fail to pay interest, the appellant can present the cheque in the bank, for the amount due on that date, under the pronote. The respondents paid the interest for about 8 months and thereafter, they stopped payment. So the appellant filled the blanks under the cheque and presented the same. It was held that the appellant has obtained the blank signed cheque with a view to make use of it with the threat to the respondents, for realizing the amount and so it can be construed that the respondents had issued the cheque voluntarily for discharge of debt or liability as envisaged under Section 138 of the Act. It was also observed that if the sort of practice, which was adopted in the case, was allowed, every creditor would abuse the provisions of Section 138 of the Act, by obtaining blank cheque and putting the debtors in fear of prosecution gist on discharge of the debt at any time. It was also observed that that would not have been the intention of the Legislature while incorporating Section 138 of the Act.

The counsel for the petitioner also relied upon a decision of this Court in LAXMINIVAS AGARWAL v. ANDHRA SEMI CONDUCTORS PVT. LTD.[2], wherein also the cheques were issued as security. It was observed that there was no debt by the date of issue of three cheques by the accused and that they were taken as security deposit by the complainant, therefore, Section 138 of the Act is not applicable.

The counsel for the petitioner also relied on a decision of the High Court of Karnataka in K. NARAYANA NAYAK v.

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[2] LAWS (APH) 2005 1227

M. SHIVARAMA SHETTY[3] wherein the cheques were issued as security and not for discharge of any existing debt. The complainant in that case purchased 20,000 shares and paid some amount on the same day by cash. At the time of the transaction, the complaint asked the respondent to give a blank cheque as guarantee and accordingly, blank cheque was issued and in those circumstances, it was held that dishonour of cheque was not in relation to any legally enforceable debt.

7. The counsel for the respondents, on the other hand, relied on a series of decisions as under:

UMASWAMY v. K N RAMANTH[4] wherein the contention that the cheque was issued only as security was considered as preposterous. It was held that the cheque, whether issued for payment of debt or as security, makes no distinction in law. The cheque is a negotiable instrument, it may be that some times the cheque is issued with a request on the part of the drawer, to defer the presentation of the cheque for some time, to enable the drawer to make payment by cash and take back the cheque or allow time to arrange funds for encashment of cheque. When the amount is not paid as per oral understanding, the payee is well justified to present the cheque for encashment. The cheque even if it is issued as a security for payment, it is a negotiable instrument and encashable security at the hands of payee. Therefore, merely because the drawer contends that it is issued as security, it is not a ground to exonerate the penal liability under Section 138 of the Act.

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[3] LAWS (KAR) 2008 48
[4] 2006 LAWSUIT (KAR) 838

A. REKHA BAI v. STATE OF ANDHRA PRADESH[5] wherein the cheque was issued for collateral guarantee. By placing reliance on the decision in *ICDS LTD. v. BEENA SHABEER* [2002 (2) ALD (CRL.) 481 (SC) = (2002) 6 SCC 426] it was held that the defence that the guarantor is not liable for the cheque issued in discharge of the principal debtor, if ultimately established, it may be a ground for acquittal, but that being predominantly a question of fact, it may not be just and proper to interfere under Section 482 Cr.P.C.

M/S. M.M.T.C. LTD. v. M/S. MEDCHL CHEMICALS AND PHARMA (P) LTD.[6] was relied upon to contend that the complaint cannot be quashed by using inherent powers on the ground that the cheques were not given for any debt or liability and that the complainant must specifically allege in the complaint that there was a subsisting liability. It was observed that there is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proof that there was no existing debt or liability was on the respondents and they have to discharge the said burden in the trial and merely on the basis of the averments in the petitions filed by the complainant, the High Court could not have concluded that there was no existing debt or liability.

SAMPELLY SATYANARYANA RAO v. INDIAN RENEWBLE ENERGEY DEVELOPMENT AGENCY LIMITED[7] wherein the Supreme Court relied on its earlier decision in *SURYALAKSHMI COTTON*

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[5] 2010 (1) ALD (CRL.) 747
[6] AIR 2002 SC 182
[7] (2016) 10 SCC 458

MILLS LTD. v. RAJVIR INDUSTRIES LTD. [(2008) 13 SCC 678] wherein it was observed at para 22 as under:

> "*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."

8. Hence, from the above, it can be understood that the complainant is not obligated to specifically allege in the complaint that there was a subsisting liability. In this case, from the complaint, though it does not appear that any demand was made under the promissory note, the contention of the counsel for the respondent that there was a demand made by the complainant, cannot be brushed aside, when the Supreme Court says that no specific allegation in the complaint need to be made, that there was a subsisting liability. Hence, quashing of proceedings at the threshold, without rendering an opportunity to the respondents, to prove the existence of debt, would not be in the interest of justice.

In the light of the above, the criminal petitions are dismissed. It is needless to state that the observations made in these petitions would not have any effect on the appreciation of the evidence coming up during trial.

As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

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T. RAJANI, J

September 11, 2018
DSK