SMT JUSTICE T. RAJANI

Crl.P.Nos.13743 and 13749 of 2011

COMMON ORDER

Since these criminal petitions arise out of the same crime, they are being disposed of by this common order.

2. Crl.P.No.13743 of 2011 is filed by A1 to A3 and Crl.P.No.13749 of 2011 is filed by A4 to A6, seeking to quash the proceedings in C.C.No.170 of 2011, on the file of the II Additional Chief Metropolitan Magistrate, City Civil Courts, Nampally, Hyderabad, registered for the offence under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 (for short 'the Act').

3. The brief facts of the complaint are that A2-M/s.Vijay Kumar Sama is a Hindu Undivided Family, A3 is the kartha of the Hindu Undivided Family and A3 to A6 are the co-parceners of A2. A1-M/s.K.N.Petrochemicals, is owned by Hindu Undivided Family, of which A3 is kartha. A3 approached the complainant Bank for credit facilities, for the purpose of business carried by Hindu Undivided Family, in the name of M/s.K.N.Petrochemicals, for the limit of Rs.14,65,00,000/- on 05.01.2008 and executed the loan documents in favour of the complainant. A1 also executed a letter regarding Channel Financing Facilities, for utilizing the distributor finance scheme from the complainant and authorized M/s. Reliance Industries Limited to operate the current account No.00210440000450 of A1, through their authorized signatory, for the purpose of transfer of funds in the account of A1, to the

account of Reliance Industries. A1, in consideration of and as security for the aforesaid credit facilities, granted and agreed to be granted by the complainant, signed and delivered on the same day, the cheques bearing Nos.017420, 017421, 017422, 017423 and 017424, agreeing that in accordance with Section 20 of the Act, the complainant being the holder of the cheques, is authorized to fill the date and the amount on the said cheques and present the same for payment. A1 further agreed and acknowledged that any dishonour of the cheque would make it liable, including penalties under the provisions of Section 138 of the Act.

4. Considering the request of A1, the complainant has sanctioned credit facilities on 12.05.2008, by way of overdraft, for a limit of Rs.13,31,00,000/- valid up to 31.08.2008, for purchase of products from Reliance Industries Limited (Polymers Division) in Andhra Pradesh. A1 executed a letter dated 20.05.2008, in favour of M/s.Reliance Industries Limited, for utilization of the Electronic Payment Facility of Complainant and authorized Reliance Industries Limited to operate the current Account No.00210440000450. Further, A1 executed a letter of request/authority in favour of the complainant, authorizing it to debit the amounts from the said current account, payable to Reliance Industries Limited.

5. The complaint further shows that A1 requested the complainant to enhance and sanction the credit facilities for a limit of Rs.14,64,80,000/-. The said request was considered on 04.07.2008 and specific overdraft facility was given to A1 for the

said amount, which is valid up to 31.07.2009. Subsequently also, on the request of A1, the overdraft facility for an amount of Rs.14,65,00,000/- was permitted. A1 is a sole proprietary business, operated by A2 as per mandates held in the account and A3 is the Kartha of the Hindu Undivided Family. When the complainant presented the cheque dated 27.12.2010 for Rs.9,19,17,726.25 ps, for the amount outstanding in the account of A1 as on 01.07.2010, for collection to IDBI Bank Limited, on 28.12.2010, the same was returned unpaid on the same day, with a memo, stating 'account blocked' and the cheque was dishonoured. Thereupon, the complainant issued a notice on 11.01.2011, and in spite of receipt of said notice, no payment was made. Hence, the complaint.

6. Now, the present petitions are filed seeking to quash the said complaint on the ground that the cheques cannot be considered as having been issued towards legally enforceable debt, as they were taken by the complainant on the same day when the pronotes were executed i.e., on 05.01.2008 and when there was an agreement for sanction of amounts. No amount was sanctioned by the date of issuance of cheques. Hence, those cheques cannot be considered as having been issued towards legally enforceable debt.

7. Heard learned counsel for the petitioners, learned Public Prosecutor for the first respondent-State and the learned counsel for the second respondent-Bank.

8. The counsel for the petitioners has raised two contentions; one is that the cheques were not issued towards legally enforceable debt and second is that the petitioners in Crl.P.No.13749 of 2011, i.e., A4 to A6, cannot be prosecuted as they are not signatories to the cheques and they are only the members of Hindu Undivided Family, of which A3 is the Kartha.

9. A perusal of the complaint would show that the cheques were issued on 05.01.2008 itself without any date and amount, but with an authority to the complainant, to fill up the same in future. The complaint stipulates that the cheques were issued in consideration of the credit facilities already granted and agreed to be granted. The loan documents were executed on 05.01.2008. The complaint also shows that on 12.05.2008, credit facilities were sanctioned.

10. The counsel for the petitioners contends that when there is no amount due as on the date of issuance of cheques, they cannot be held as having been issued towards legally enforceable debt. He placed reliance on the judgment of the Apex Court in **M.S.Narayana Menon Alias Mani v. State of Kerala and another**[1], wherein it was observed at paragraph No.52, as under:

> "We, in the facts and circumstances of this case, need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be a part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The appellant clearly said that nothing is due and the cheque was issued by

[1] (2006) 6 SCC 39

> way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefor cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of **Section 138** of the Act.

Learned counsel also relied upon the judgment of the Apex Court in **Sudhir Kumar Bhalla v. Jagdish Chand and others[2],** wherein it was observed at paragraph No.22, as under:

> "On examination of the above stated findings of the learned Single Judge in the judgment impugned before us, we find that the learned Single Judge has not addressed himself on the legal question raised before him by the appellant that the criminal liability of the appellant under the provisions of **Section 138** of the Act are attracted only on account of the dishonour of the cheques issued in discharge of liability or debt, but not on account of issuance of security cheques. The learned Single Judge has also not given cogent, satisfactory and convincing reasons for disbelieving and discarding the pre-charge evidence of the appellant corroborated by the evidence of the expert opinion in regard to the interpolation in and fabrication of the cheques by adding one more figure '0' to make Rs.30,000/- to Rs.3,00,000/- and similarly adding one more figure '0' to make Rs.40,000/- to Rs.4,00,000/-.

Learned counsel submits that having observed so, the matter was remitted to the High Court to decide the appeals afresh.

11. With regard to the liability of A4 to A6, the counsel for the petitioners has relied on the judgment of the Apex Court in **MRS. Aparna A. Shah v. M/s.Sheth Developers Private Limited and another[3].** The facts of the said case are that a cheque was issued by one of the joint holders of the account and the Court held that the other joint holders of the account cannot be prosecuted for a

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[2] (2008) 7 SCC 137
[3] 2013(8) SCALE

cheque issued by one of the joint holders. At paragraphNo.22, the Apex Court held as under:

> **"**In the light of the above discussion, we hold that under Section 138 of the Act, it is only the drawer of the cheque who can be prosecuted. In the case on hand, admittedly, the appellant is not a drawer of the cheque and she has not signed the same. A copy of the cheque was brought to our notice, though it contains name of the appellant and her husband, the fact remains that her husband alone put his signature. In addition to the same, a bare reading of the complaint as also the affidavit of examination-in-chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque."

12. Learned counsel for the second respondent-Bank, on the other hand, relies on the judgment of the Apex Court in **Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited**[4], wherein it was held in paragraph Nos.9 to 12 as under:

> **"**We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in Indus Airways (supra) with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.
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> Reference to the facts of the present case clearly shows that though the word "security" is used in clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. It is undisputed that the loan was duly disbursed on 28th February, 2002 which was prior to the date of the cheques. Once the loan was disbursed and installments have

[4] (2016) 10 SCC 458

> fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.
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> The judgment in Indus Airways (supra) is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also described as "security" in the loan agreement. In applying the judgment in Indus Airways (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.
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> The crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court.

The counsel, while relying on the aforesaid judgment, contends that the date put up on the cheque by the complainant is by virtue of the implied authority given by the accused under Section 20 of the Act and that has to be considered as the date, on which the question of existence of legally enforceable debt should be examined. The findings of the Supreme Court at paragraph No.10 of the said judgment would show that by considering that the amount became due, the moment the loan is advanced and the instalment fell due before the disbursement of the amount, which was prior to the date of issuance of cheques, it was held that the cheques were issued towards legally enforceable debt. At paragraph No.11 of the said judgment, the Apex Court observed that the dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question.

13. In the present case also, on the date of issuance of cheques, there was an agreement for providing credit facility. Whether the credit facility was provided by the date of issuance of cheques or not, though is not clear from the contents of the complaint, the contents nevertheless are to the effect that the cheques were issued for the credit facilities granted and agreed to be granted. Hence, in view of the averments in the complaint, the trial becomes necessary to prove the facts, which would show that the credit facility was already granted by the date of issuance of cheques.

14. The three Judges of the Supreme Court rendered a judgment in **Ashok Yeshwant Badave v. Surendra Madhavrao Nighojakar and another**[5], wherein it was held that when a post-dated cheque is written or drawn, it is only a bill of exchange payable at a future date. The Apex Court also observed at paragraph No.9 as under:

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[5] (2001) 3 SCC 726

> **"**The concept of post-dated cheque was well known even in common law and it was in effect a bill of exchange payable on demand with a post date upon which the demand was to be made. As far back as in 1776 and while the Law of Merchant was then in process of formation, it was held in Da Silva vs. Fuller, Sel. Ca.238 M.S. referred to in Chitty on Bills of Exchange, 11th Edition, (188) that a banker was not justified in paying a post-dated cheque before its actual date. In 1868 nearly a hundred years later, the Court of Queens Bench in Emanuel vs. Robarts, (1868) 9 B.&S. 121 observed that a banker was justified in refusing payment of a post-dated cheque before its due date and that the custom of banker to do so was a part of the contract between the banker and the customer. In Bull vs. O Sullivan, L.R. 6 Q.B.209 the Court laid down that a post-dated cheque payable to order was an instrument payable to order on demand on its date. Later, in 1877 in Gatty vs. Fry, 2 Ex.D. 265 the Court held that a post-dated cheque is not payable on the day it is issued but on the day of its date. All these cases were decided before the law was codified in England by the Bills of Exchange Act, 1882. After passing of the aforesaid Act, in the case of Palmer, (1882) 19 Chancery Division 409, it has been decided by the Court of Appeal that a post-dated cheque was equivalent to a bill of exchange payable on a future date, namely, the date of the cheque. In the case of Hinchcliffe vs. The Ballarat Banking Company, 1 V.R. (L) 229, the Court determined the exact point in question in the present case against the bank, holding that a post-dated cheque is a bill of exchange payable at a future date and that the banker may be liable to an action by the customer for negligence if he pays such cheque before the day it bears date.

At paragraph No.20, the Apex Court held that for prosecuting a person for an offence under Section 138 of the Act, it is inevitable that the cheque is presented to the banker within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. When a post-dated cheque is written or drawn, it is only a bill of exchange and so long the same remains a bill of exchange, the provisions of Section 138 of the Act are not applicable to the said instrument. The post-dated cheque becomes a cheque within the meaning of Section 138 of the Act on the date which is written thereon and the 6 months' period has to be reckoned for the purposes of proviso (a) to Section 138 of the Act from the said date.

That was a case where the cheque was presented prior to the date mentioned on the cheque.

15. Learned counsel for the second respondent also relied upon the judgment of the Supreme Court in **T. Nagappa v. Y.R.Muralidhar**[6] which dealt with the inchoate stamped instruments under Section 20 of the Act and held that by reason of the said provision only, a right has been created in the holder of the cheque, subject to the conditions mentioned therein. Thereby only a *prima facie* authority is granted, *inter alia,* to complete an incomplete negotiable instrument. However, the said ruling does not apply to the facts of this case as in the present case, the cheques were dated subsequent to the advancement of credit facility. Thee counsel further relied upon the judgment of the Apex Court in **M/s. Indus Airways Pvt. Ltd., and others v. M/s.Magnum Aviation Pvt. Ltd., and another**[7] , which is in respect of post-dated cheques issued as an advance payment, in respect of purchase orders which were subsequently cancelled. Hence, in those circumstances, the Apex Court held that the post-dated cheques cannot be held as having been issued towards legally enforceable debt. The said judgement is distinguished by the Supreme Court in Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited[4].

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[6] (2008) 5 SCC 633
[7] 2014(1) Decisions Today (SC) 126

16. From the above rulings, the understanding that flows is that, it is not the purpose for which the cheques were issued, but if there is an implied or express authority given to the complainant to fill up the cheques, when the amount falls due to the complainant, the cheques can be said to have been issued towards legally enforceable debt. Even if the cheques were issued for security purpose, if the amounts are advanced by the complainant and if there is an authority given by the complainant to use the said cheques for realisation of the amounts that fall due in future, the said cheques can be held to have been issued towards legally enforceable debt. The existence of legally enforceable debt has to be tested, with relevance to the date on the cheque and not with relevance to the date on which the cheques were handed over to the complainant. Hence, in view of the above and considering the facts mentioned in the complaint, this Court opines that it is not a fit case to quash the proceedings against the accused on that ground.

17. With regard to prosecuting A4 to A6, who are members of the Hindu Undivided Family, as against the ruling relied upon by the counsel for the petitioners in **MRS. Aparna A. Shah's** case, referred 3 supra, the counsel for the second respondent has relied upon the ruling of this Court in Crl.P.No.578 of 2004 in **Jagadish Rai Agarwal and others v. State of Andhra Pradesh and others.** The facts of that case are that the dishonoured cheque was drawn by the first petitioner therein only and petitioners 2 to 4 are not connected with the first petitioner. The contention of the respondents therein was that respondents 2 to 4 therein who

admittedly are the joint owners of the property, agreed to be sold to the petitioners and since the petitioners took possession of the land agreed to be sold by respondents 2 to 4, it is clear that the transaction of sale is almost complete, except obtaining of a registered sale deed, and since the amount covered by the dishonoured cheque was given towards the balance of sale consideration due and payable to respondents 2 to 4 from the petitioners under the agreements, since the word 'debt' is not defined in the Act, by giving a wider meaning to the word 'debt', it is to be taken that the dishonoured cheque was given towards a legally enforceable debt, i.e., the sale consideration due and payable to respondents 2 to 4 under the agreement of sale entered into by the petitioners. The concept of 'debt' was discussed, which is as follows at paragraph No.3;

> "It would be profitable in this connection to refer to the concept of a debt, for a sum due is the same thing as a debt due. The classical definition of 'debt' is to be found in Webb v. Stenton (1883) 11 QBD 518 where Lindley L.J. said: .. a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation. There must be debitum in praesenti; solvendum may be in praesenti or in futuro-that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the judgment of the Supreme Court of California in People v. Arguello (1869) 37 Calif 524, which was approved by this Court in Kesoram Industries and Cotton Mills Ltd. V. Commissioner of Wealth-tax MANU/SC/0142/1965: (1966) 59ITR 767 (SC), clearly brings out the essential characteristics of a debt (page 779 of 59 ITR)":
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> Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. This passage indicates that when there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation is to pay a sum of money in praesenti it is a debt due. A sum due would, therefore, mean a sum for which there

is an existing obligation to pay in praesenti, or in other words, which is presently payable".

At paragraph No.6, this Court observed as under:

"I find force in the contention of learned counsel for respondent Nos.2 to 4 that since the word 'debt' used in Section 138 of the Act is not defined in the Act, it should be given a wider meaning and interpretation, and as held in Webb v. Stenton (1883) 11 QBD 518 (CA) referred to in Raman Iron Foundry case MANU/SC/0005/1974: (1974) 3SCR556 it should be taken to refer to a sum of money which is now payable or will become payable in the future by reason of a present obligation. In view thereof the amount payable by the purchaser to the vendor of a property under an agreement of sale can also be treated as a 'debt' especially when possession of the property agreed to be sold was delivered. Therefore, I am not able to agree with the contention of learned counsel for the petitioners that the proceedings have to be quashed because there is no 'legally enforceable debt' in this case, more so because as per Section 139 of the Act, the Court 'shall presume' that the dishonoured cheque was issued in discharge of a 'debt' or 'other liability', in whole or in part. So, if not towards 'debt' since the petitioners gave the cheque towards the balance due under the agreement of sale, it is covered under 'other liability' mentioned in Section 139 of the Act. The meaning of 'shall presume' as per Section 4 of the Indian Evidence Act, 1872, is that the Court has to presume a fact as proved till it is disproved. So, the burden would be on the petitioners to establish that the dishonoured cheque was not issued in discharge of 'debt' or 'other liability'. It is well known that when the burden of proof is on the accused, question of quashing the complaint does not arise. So, the complaint cannot be quashed on the ground that there is no legally enforceable debt".

This Court further held that respondents 3 and 4 therein are not the payees or holders in due course of the dishonoured cheque and hence, the complaint against them is liable to be quashed cannot be considered, because the fact that the persons, who are not payees or holders in due course of the cheque, also joined the payee of a dishonoured cheque, per se, is not a ground for quashing of the complaint. Considering the facts of the case, this Court held therein that the registered notice got issued by the petitioners through their advocate shows that respondents 2 to 4 are the owners of the property agreed to be sold and that all of them are entitled to the amount covered by the dishonoured cheque.

18. The facts of the present case are different. It was the locus of Respondents 2 to 4 to file the complaint, that was in question in the above case. Holding that they have an interest in the land agreed to be sold, the locus was upheld. In this case, the liability of A4 to A6 is in question, on the premise of they not being the drawers of the cheque. The word 'kartha' itself implies that the other members of the Hindu Undivided Family are not the decision makers in the family and they abide by the decision taken by the kartha of the Hindu Undivided Family. There is not even an iota of indication coming through the complaint, that A4 to A6 were involved in the business carried by A3 and that they had knowledge about the issuance of cheques by A3. Hence, the proceedings against A4 to A6 are liable to be quashed. However, the proceedings against A1 to A3 are required to be continued since A3 is the signatory of the cheques and the kartha of the Hindu Undivided Family, which is carrying on business in the name of M/s.K.N.Petrochemicals-A1.

19. In the result, Crl.P.No.13743 of 2011 is dismissed and Crl.P.No.13749 of 2011 is allowed, quashing the proceedings against the petitioners/A4 to A6 in C.C.No.170 of 2011 on the file of II Additional Chief Metropolitan Magistrate, City Civil Courts,

Nampally, Hyderabad. Miscellaneous petitions, if any, pending in these criminal petitions, shall stand closed.

JUSTICE T. RAJANI

Date:7th September, 2018
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