BEFORE THE MADURAI BENGH OF MADRAS HIGH COURT

Reserved on : 27.09.2019
Pronounced on : 04.10.2019

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P (MD) No.6025 of 2019
and
Crl.M.P.(MD) Nos.3886, 3887 & 7964 of 2019

1.Burmeister and Wein Energy
Project Office, rep. by its
Authorized Signatory
Mr.Alberto Mistrangelo,
having its registered office at
II Floor, GUNA TOWERS,
No.2, North Boag Road, T.Nagar,
Chennai - 600 017.

2.Mr.Alberto Mistrangelo,
Authorized Signatory,
Burmeister and Wein Energy
Project Office,
II Floor, GUNA TOWERS,
No.2, North Boag Road, T.Nagar,
Chennai - 600 017. ... Petitioners/A5 and 6

Vs

M/s.GEECO Enercon Pvt. Ltd.,
rep. by its Chief Manager,
Mr.C.Jaisankar,
having its office at D/C.6,
SIDCO Industrial Estate,
Thuvakudy, Trichirappalli - 620 015. ... Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to call for the records in C.C.No.467 of 2018 pending on the file of the Judicial Magistrate No.II, Tiruchirapalli and to quash the same as against the petitioners.

For Petitioners : Mr.G.Kalyan Jhabakh for
M/s.Surana alias Surana

For Respondents : Mr.K.Nirmal Kumar

O R D E R

This petition has been filed to quash the proceedings in C.C.No.467 of 2018, arising out of the Negotiable Instrument Act, for the offence under Section 138 of the Negotiable Instrument Act, initiated by the respondent herein.

2.The learned counsel appearing for the petitioners submitted that there are totally six accused, in which, the petitioners are arraigned as A5 and A6. The respondent is the Manufacturer of Rotor Assembly for the Thermal Power Plant. In the course of business, the 1st petitioner placed a purchase order with the respondent for manufacture and supply of Rotor Assembly for their Thermal Power Plant Project at Meja, Uttar Pradesh and the said purchase order was signed by the Authorised signatory of the petitioner organization, who is A6. During the course of business, the petitioners had issued post dated cheque to the respondent drawn on Kotak Mahindra Bank. The respondent is well aware that the said alleged post dated cheques was given for security purpose and it could be presented for encashment only upon fulfilling of the contractual responsibilities and obligations arising out of the said purchase order.

3.He further submitted that the respondent, by delivering certain goods under the said purchase order, informed that as their contractual obligation has been fulfilled, they are going ahead with the presenting the cheque issued by the petitioners for encashment. However, verifying the goods delivered by the respondent, the petitioners found that there was a shortfall of 903 kgs instead of contractual quantity of 1200 kgs and on noticing the discrepancy, the petitioners sent an email to the respondent stating that till fulfilling the contractual obligation, not to present the cheque and they also issued stop payment to their banker. Without considering the said request, the respondent presented the said cheque and got dishonoured and issued statutory notice. After receipt of the notice, they issued detailed reply and informed that without even fulfilling their contractual obligation, the cheque was presented for collection and hence, no offence is made out as against the petitioners under the Negotiable Instrument Act.

4.He further submitted that there was a shortfall on the goods delivered by the respondent and the same was duly informed to the respondent by way of email and thereafter, the petitioners informed and requested the respondent not to present the cheque and also issued stop payment for the said cheque to their banker. Therefore, the respondent did not approach the Judicial Magistrate with clean hands and there is no bonafide in the allegations alleged in the complaint. He further submitted that the alleged cheque was issued during the course of business and it was never issued for discharge of any debt or liability either in full or part. Therefore, the offence under Section 138 of the Negotiable Instrument Act is not at all attracted as against the petitioners. He further submitted that the respondents lodged the complaint alleging that there is a legal dischargeable debt, which does not actually exist and hence, the basic ingredients as required to prosecute the petitioners under Section 138 of the Negotiable Instrument Act does not exist and as such, the entire criminal proceedings is vitiated and is liable to be quashed.

5.He further submitted that the respondent never fulfilled their contractual obligation and without fulfilling their supply of goods as per the purchase order placed by the petitioners, they are not entitled for any payment. Further, he submitted that without supplying the entire goods as agreed by them as per the purchase order, they have no right to present the cheque for collection. He further submitted that in fact the petitioner also issued stop payment letter to their bank for valid reasons and as such, the offence is not at all attracted as against the petitioners and hence, he prayed for quashment of the entire criminal proceedings. In support of his contention, he relied upon the decision of the Hon'ble Supreme Court dated ***07.04.2014*** made in ***Crl.A.No.830 of 2014*** in the case of ***Indus Airways Pvt. Ltd. and Ors. Vs. Magnum Aviation Pvt. Ltd. and Ors.***

6.Per contra, the learned counsel appearing for the respondent/complainant filed counter and submitted that on the order placed by the petitioners, the respondent delivered the goods for their Thermal Power Plant Project. After receipt of the entire goods, the petitioners issued the cheque and on their instructions, it was presented for collection and the same was returned for the reasons that the petitioners stopped payment. Therefore, after causing statutory notice, the respondent proceeded with the complaint for the offence under Section 138 of the Negotiable Instrument Act. He further submitted that the petitioners conveniently suppressed the vital document of communication being an email dated 26.03.2018. However, the respondent categorically and specifically stated that upon completion of the commercial obligation, the cheque was presented for collection. The petitioners, after knowingly very well, wantonly issued direction to their banker to stop payment on the cheque issued by them.

7.He further submitted that in fact the petitioners sent email on 26.03.2018 and they issued stop payment with an intention to cheat the respondent/defacto complainant. He further submitted that the points raised by the petitioners have to be considered only during the trial before the trial Court, since all the grounds are mixed question of fact and it cannot be decided under Section 482 of Cr.P.C.

8.He further submitted that there are totally 6 accused in C.C.No.467 of 2018, in which, already, A1 to A4 filed quash petition before this Court in Crl.O.P.(MD) No.18805 of 2018 and this Court, by order dated 30.01.2019, quashed the entire proceedings as against A1 to A4 for the reason that the 1st accused is being a company and A2 to A4 are Directors. This Court further directed the trial Court to continue with the trial as against A5 and A6 in C.C.No.467 of 2018. This fact has been completely suppressed by the petitioners herein and mislead this Court and obtained interim order. Therefore, he prayed for dismissal of this petition. In support of his contention, he relied on the following decisions of the Ho'ble Supreme Court of India:

1.***M.M.T.C.Ltd. V. Medchi Chemicals & Pharma (P) Ltd. (SC) - 2001 (4) CTC 749.***

2.Pulsive Technologies Private Limited V. State of Gujarat - (2014) 13 Supreme Court Cases 18.

3.Sampelly Satyanarayana Rao V. Indian Renewable Energy Development Agency Ltd. - (2016) 10 Supreme Court Cases 458.

9.Heard the learned counsel appearing for the petitioners and the learned counsel appearing for the respondent and perused the materials available on records.

10.The petitioners are arraigned as A5 and A6. A5 is the company and A6 is the authorized signatory of A5. The petitioners placed orders to purchase Rotor Assembly for their Thermal Power Plant Project at Meeja, Uttar Pradesh by the purchase order No.BWEPO-17521-005-15 dated 21.04.2015. As per the purchase order, the respondent delivered the goods to the petitioners. Towards the payment of the goods purchased by them, the petitioners issued cheque for a sum of Rs.32,53,678/- and on the instructions of the petitioners, the respondent deposited the amount with their banker and the same was returned dishonoured with an endorsement payment stopped by the drawyer by the return memo dated 03.04.2018. After issuance of statutory notice, the respondent initiated proceedings under Section 138 of the Negotiable Instrument Act as against the petitioners and others.

11.According to the petitioners, during the business transaction, they issued post dated cheque to the respondent and it could be encashed only upon fulfilling of the contractual responsibilities and obligations arising out of the purchase order. Further, as per the purchase order, the respondent did not fulfill their contractual obligation, since on verifying the delivered goods, it was found that one critical item was found to be shortfall of 903 kgs. instead of contractual quantity of 1200 kgs.

12.Admittedly, as per the purchase order, the respondent delivered the goods. Thereafter, it was found to be discrepancy from their purchase order. When the goods delivered, the contractual responsibilities and obligations were fulfilled by the respondent and as such, they are entitled to present the cheque. It cannot be said that the cheque was not issued for any legal enforceable debt. Further, the issuance of cheque is not amount to security purpose. That apart, the petitioners wantonly suppressed the fact that already A1 to A4 approached this Court in Crl.O.P.(MD) No.18805 of 2018 to quash the entire proceedings, in which, A2 is also one of the party representing as Chief Executive Officer and Director of M/s.BWE Energy India Private Limited. Therefore, the second petitioner herein is well aware of the fact that they already approached this Court to quash the proceedings, in which, this Court, by order dated 30.01.2019, quashed the entire proceedings as against A1 to A4 and directed the trial Court to proceed with A5 and A6 in accordance with law, since the cheque was issued on behalf of A5 by A6 viz., the second petitioner herein. Therefore, the petitioners did not approach this Court with clean hands and one way or other, they want to protract the proceedings initiated by the respondent before the trial Court.

13.The learned counsel appearing for the petitioners relied upon the judgment of the Hon'ble Supreme Court of India passed in the case of ***Indus Airways Pvt. Ltd. and Ors. Vs. Magnum Aviation Pvt. Ltd. and Ors*** in ***Crl.A.No.8304 of 2014 dated 07.04.2014,*** wherein, the Apex Court has held as follows:

> *"13. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an exiting debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability.*
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> *19. The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the N.I. Act.*

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 and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the N.I. Act. The Delhi High Court has traveled beyond the scope of Section 138 of the N.I. Act by holding that the purpose of enacting Section 138 of the N.I. Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability."

14.In the above case, the Supreme Court has held that the distinction between the civil liability and criminal liability at the time of enter into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then the purchaser may have to make good the loss that might have occasioned to the seller but that does not create any criminal liability under Section 138 of the Negotiable Instrument Act. In the case on hand, the petitioners placed purchase order on which, the respondent also delivered the goods. Therefore, the above judgment is not at all applicable to the case on hand.

15.In the decision relied upon by the learned counsel appearing for the respondent in ***M.M.T.C.Ltd. V. Medchi Chemicals & Pharma (P) Ltd. (SC) - 2001 (4) CTC 749***, the Hon'ble Supreme Court has held as follows:

"12.In the case of Maruti Udyog Ltd. v. Narender reported in (1999) 1 SCC 113, this Court has held that, by virtue of Section 139 of the Negotiable Instruments Act, the Court has to draw a presumption that the holder of the cheque received the cheque for

discharge of a debt or liability until the contrary is proved. This Court has held that at the initial stage of the proceedings the High Court was not justified in entertaining and accepting a plea that there was no debt or liability and thereby quashing the complaint.

13.A similar view has been taken by this Court in the case of K. N. Beena v. Muniyappan reported in 2001 (7) SCALE 331, wherein again it has been held that under Section 139 of the Negotiable Instruments Act the Court has to presume, in a complaint under Section 138, that the cheque had been issued for a debt or liability.

14.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 basis of averments in the Petitions filed by them the High Court could not have concluded that there was no existing debt or liability."

16.In the case in ***2.Pulsive Technologies Private Limited V. State of Gujarat - (2014) 13 Supreme Court Cases 18***, the Hon'ble Supreme Court has held as follows:

"7. *The High Court, in our opinion, fell into a grave error when it proceeded to quash the complaint. Even "stop payment" instructions issued to the bank are held to make a person liable for offence punishable under Section 138 of the NI Act in case cheque is dishonoured on that count.*

10.We find that the High Court has relied on M.M.T.C. Ltd. and Modi Cements and yet drawn a wrong conclusion that inasmuch as cheque was dishonoured because of "stop payment" instructions, offence punishable under Section 138 of the NI Act is not made out. The High Court observed that "stop payment" instructions were given because the complainant had failed to discharge its obligations as per agreement by not repairing/replacing the damaged UPS system. Whether complainant had failed to discharge its obligations or not could not have been decided by the High Court conclusively at this stage. The High Court was dealing with a petition filed under Section 482 of the Code for quashing the complaint. On factual issue, as to whether the complainant had discharged its obligations or not, the High Court could not have given its final verdict at this stage. It is matter of *evidence. This is exactly what this Court said in M.M.T.C. Ltd. Though the High Court referred to M.M.T.C. Ltd., it failed to note the most vital caution sounded therein."*

17.In the case in ***Sampelly Satyanarayana Rao V. Indian Renewable Energy Development Agency Ltd. - (2016) 10 Supreme Court Cases 458***, the Hon'ble Supreme Court has held as follows:

> *"16.As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.*
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> *17.In Rangappa versus Sri Mohan[9], this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment[10].*
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> *18.Thus, the question has to be answered in favour of the respondent and against the appellant. Dishonour of cheque in the present case being for discharge of existing liability is covered by Section 138 of the Act, as rightly held by the High Court.*
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> *19.Accordingly, we do not find any merit in this appeal and the same is dismissed. Since we have only gone into the question whether on admitted facts, case for quashing has not been made out, the appellant will be at liberty to contest the matter in trial court in accordance with law."*

18.In all the above judgements, the Hon'ble Supreme Court has held that there is no requirement that the complainant must specifically allege in the complaint that there was an subsisting liability. The burden of proving that there was no existing debt or liability was not on the respondent. Therefore, the burden of proof that there was no existing debt or liability was on the petitioners and they have to establish before the trial Court during the trial and on factual issue as to whether the complainant had discharged his obligations or not, this Court cannot have given its final verdict at this stage. Further, all the points raised by the petitioners are disputed question of fact and it cannot be decided here. Once the issuance of cheque and signature thereon are admitted, presumption of legal enforceable debt in favour of the holder of the cheque arises. It is for the petitioners to rebut the said presumption though they need not adduce their own evidence and can rely upon the materials submitted by the respondent.

19.In view of the above discussion, this Court is of the view that this petition is devoid of merits and the same is liable to be dismissed. Accordingly, this criminal original petition is dismissed. The trial Court is directed to complete the trial and dispose of the case in C.C.No.467 of 2018 on the file of the Judicial Magistrate No.II, Tiruchirappalli, within a period of six months from the date of receipt of a copy of this order.

Sd/-
Assistant Registrar(CO)

/TRUE COPY/

Sub Assistant Registrar

Arul

To

The Judicial Magistrate No.II, Tiruchirapalli

+1 CC to M/s.SURANA & SURANA, Advocate (SR-91459[F] dated 04/10/2019)

+1 CC to M/s.K.NIRMAL KUMAR, Advocate (SR-91404[F] dated 04/10/2019)

Order made in
CRL.O.P (MD) No.6025 of 2019
04.10.2019

JM/22.10.2019/9P/4C