

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.12.2021

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Crl.O.P.Nos.16445, 19526 & 21288 of 2017
and

Crl.M.P.Nos.10122,10123, 11795, 11796, 12545 and 12546 of 2017

1. Dr. Sundarakrishnan G
2. Dr. Kanthamani S
3. M/s. Krishna Eye & ENT Hospital
Represented by its Partner
Dr. Sundarakrishnan G
No.39, Burkit Road, T.Nagar
Chennai 600017

...Petitioners/Accused [in all Crl.O.Ps.]

Vs

M/s. Reliance Home Finance Pvt. Ltd.,
Represented by its Collection Manager
Mr.R.Frazer
No.5, Haddows Road,
Nungambakkam, Chennai 600006.

...Respondents/Complainant [in all Crl.O.Ps.]

PRAYER: Criminal Original Petitions filed under Section 482 of Criminal Procedure Code, to call for the records in CC.No.4615 of 2016 pending on the file of XVIII Metropolitan Magistrate, Saidapet, CC.No.323 of 2017 pending on the file of Metropolitan Magistrate, Fast Track Court No.III, Saidapet and C.C.No.4438 of 2017 pending on the file of XVIII Metropolitan Magistrate, Saidapet, Chennai and quash the same.

For Petitioners : Mr.S. Kamalakannan
[in all Crl.O.Ps.]

For Respondents : Mr.K.J.Parthasarathy
[In all Crl.O.Ps.]

C O M M O N O R D E R

These three petitions have been filed to quash the proceedings initiated under Section 138 of the the Negotiable Instruments Act.

2. The case of the complainant is that the Respondents/Petitioners herein availed loan under the scheme `Housing Loan` under Agreement No.RHHLCHE000009671. The 1st Accused / 1st Petitioner herein is borrower; 2nd Accused / 2nd Petitioner herein is co-applicant and the 3rd Accused is company. The Accused promised to repay the loan amount as stipulated in the agreement. The 3rd Accused had arranged Auto Debit/ECS with their banker, monthly instalment of Rs.2,41,056/-. The same was dishonoured on 05.07.2016, 05.10.2016 and 09.03.2017 respectively, when the cheque was deposited for ECS with the banker with endorsement of Miscellaneous and insufficient funds. After complying the statutory notice, three private complaints have been filed under Section 138 of the Negotiable Instruments Act.

3. The quash petitions are filed mainly on the ground that the Petitioners / accused have obtained housing loan of Rs.2,00,95,000/- on 15.07.2011 from the Respondent by entering into a loan agreement for purchase of the property situated at Plot 7, Balaji Nagar, 21st Street, Velacherry, Chennai. The said amount was payable with monthly rests (EMI) of Rs.2,22,130/- and with an EMI of Rs.2,41,056/- with interest revision payable in 180 equated monthly instalments. The petitioners also executed a mortgage in favour of the Respondent over the property and the Petitioners also regularly remitting the monthly EMI rests for the said Loan Account until 2014.

4. When the matter stood thus, it has come to the notice of the petitioners that the property was acquired by the Government prior to their purchase for the purpose of MRTS usage. They have challenged the 4(1) notification of the State Government under the Land Acquisition Act before this Court in W.P.No.6406 of 2014 wherein the respondent sought the withdrawal of the compensation award as a secured creditor in lieu of the loan amount challenging the right of the petitioners to claim the award. Hence, it is the contention as the compensation received by the respondent, the complaint is not maintainable.

5. Learned counsel appearing for the Petitioners submitted that as the property was acquired and the compensation was paid to the Secured Creditor, there cannot be criminal prosecution u/s. 138 of the N.I. Act. Though the Petitioners have raised objections for withdrawal of the compensation, since the Respondent sought to discharge of entire loan outstanding in the

Section 138 N.I.Act proceedings in CC No.3769 of 2015 and the same came to be dismissed for want of jurisdiction. The Respondent claimed compensation with respect to said property secured in November 2018 by releasing the title deed and other original documents pertaining to the property. Hence it is his contention that as the compensation has been paid, there is no legally enforceable debt. It is his further contention that pursuant to the notification under Section 4(1) of the Land Acquisition Act, any transaction after the notification is void ab initio. The Collector ought to have made reference to the concerned court under Section 18 of the L.A. Act. However, the 1st and 2nd petitioners permitted to withdrawal of compensation by the Respondent in good faith without objections. Whereas the Respondent did not seek further enhancement of the compensation as contemplated under Section 18 of L.A. Act within the period of six months from the date of Collector's Award. Therefore, it is his contention that once the amount has been discharged, there cannot be any prosecution and the secured assets already repossessed and amount has been realised no offence under Section 138 of Negotiable Instruments Act is attracted.

6. In support of his contention he relied upon the following judgements:

1. N. Rajangan vs. Centurian Bank Ltd., [2001-1-L.W.(Cr1) 831]
2. Rajkumar Sharma vs. Shriram Finance Co. Ltd., [2014 (143) AIC 682]
3. Prakash Finacne vs. R. Babu [2018-2-L.W.(Cr1) 419]
4. Sudha Beevi vs. State of Kerala [2004 (21) AIC 336]

7. It is his further contention that if there had been a valid mortgage, the compensation amount received by the Respondent is a security substituted in the place of the original mortgage property as contemplated under Section 73 of Transfer of Property Act. It is further contention that even the right of the Respondent exist under Section 73 of the T.P. Act, the enhancement of compensation not been claimed by the Respondent, it is not open to the Respondent to claim insufficient amount due under the mortgage. Hence, submitted that the cheque in question is not enforceable. In support of his contention he also relied upon the Honourable Apex Court judgment in Krishna Prasad and ors. vs. Gauri Kumari Devi [AIR 1962 SC 1464] and Sundaram Finance Ltd., vs. State of Kerala and Ors. [AIR 1966 SC 1178]. Therefore, submitted that entire proceedings has to be quashed.

8. Learned counsel appearing for the Respondent submitted that the plea sale and mortgage void after issuance of 4(1)

Notification is unsustainable. The sale after Section 4(1) notification is at the risk of the purchaser and only after under Section 6 declaration the land vest with the State. He has also contended that the purchaser after 4(1) notification would not be entitled to challenge the acquisition, however, he would be entitled to compensation or enhanced compensation as lawful owner. Hence the sale and mortgage are valid and binding. It is his further contention that under Section 73(2) of the Transfer of Property Act, the mortgagee shall be entitled to claim payment of the mortgage money in whole or in part out of the amount due to the mortgager as compensation. The right/remedy to the mortgage is statutory and the Petitioners cannot raise any objection to the same. Hence it is the contention that as against the sanctioned loan amount of Rs.2,00,95,000/- the compensation received is only Rs.56,14,840/-. Since there is a shortfall and it has to necessarily be discharged/collected only from the borrowers/Petitioners. Therefore, it is his contention that the debt and liability of the Petitioners/Accused does not get discharged on receipt of the compensation amount and the shortfall of the amount the mortgagee is entitled to proceed for recovery against the borrowers. Therefore, he submitted that there exist a legally enforceable debt as there is a shortfall and the debt had not been discharged fully from the compensation amount.

9. Learned counsel further submitted that the proceedings under Section 138 of N.I. Act is a penal provision, at this stage the same cannot be quashed. The alleged plea of legally enforceable debt or not though is untenable and unsustainable in the above case, it at all to be considered can only be a defence before the trial court. Hence opposed the quashing of the proceedings.

10. In support of his contention he has also relied upon the following judgments:

1. M.M.T.C. Ltd., & Another vs. M/s. Medchi Chemicals & Pharma Pvt. Ltd., [(2002) 1 SCC 234]
2. Sampelly Satyanarayanan Rao vs. Indian Renewable Energy and Development Agency Ltd., [(2016) 10 SCC 458]
3. Sripati Singh (since deceased) vs. The State of Jharkhand [2021 SCC Online SC 1002]

4. M/s.Synergy Credit Corporation Limited vs.
M/s.Midland Industries Limited & Others
[2006 Crl.L.J.3267]

5. Krishna Prasad and others vs. Gaurikumari
Devi [AIR 1962 SC 1464]

11. Heard both side arguments and materials perused. The borrowal of the loan of Rs.2,00,95,000/- is not in dispute. Similarly, prior to the Notification under Section 6 of the Land Acquisition Act, the property has been mortgaged in favour of the Respondent is also not in dispute. The fact remains that the property has been acquired, acquisition also put in challenge in a writ petition, which is also not disputed. The Respondent being a secured creditor was paid a compensation amount of Rs.56,14,840/-. Much emphasis have been made by the learned counsel for the Petitioner that as the acquired property Compensation has already been paid and cheque issued towards the such loan is not enforceable and there is no legal encroceable debt. Much reliance has been placed in the Judgment of the Kerala High Court in Sudha Beevi vs. State of Kerala [2004 Crl.L.J. 3418] wherein it is held that once the financier/owner under hire purchase agreement exercised the option of seizure of the vehicle, the post dated cheques obtained from the hirer cannot be presented for encashment after the seizure. The owner has to take recourse to other legal remedies for recovery of the balance amount. If and when the vehicle is sold subsequently, the owner can recover the balance amount after adjusting the sale proceeds of the vehicle.

12. Similar view also taken by the Chattisgarh High Court at Bilaspur in Rajkumar Sharma vs. Shriram Fianance and Co.Ltd., [MANU/CG/0171/2014 = 2014 (143) AIC 682].

13. In Shiv Kumar and Anr vs. Union of India and Ors [(2019) 10 SCC 229] the Honourable Apex Court relying upon the previous judgment of the Supreme Court in M. Venkatesh & Ores vs. Commissioner, Bangalore Development Authority etc., [(2015) 17 SCC 1] in which it is held that after the notification under Section 4(1) is published in the gazette, any encumbrance created by the owner does not bind the Government and the purchaser does not acquire any title to the property. Further he cannot question proceedings of taking possession. In the above judgment it is also held that after notification, acquisition cannot be challenged by the purchaser.

14. This Court also in Prakash Finance vs. R. Babu [2018-2-L.W.(Cr1.) 419] has held that once the vehicle is repossessed there cannot be any prosecution under Section 138 of the Negotiable Instruments Act. Similar views also taken by Madurai Bench of this Court in N. Rajangan v. Centurian Bank Ltd., [2010-1-LW (Cr1) 831].

15. The Apex Court in Krishna Prasad and Others vs. Gouri Kumari Devi [AIR 1964 SC 1464] has held that the provision under section 24(5) of the Land Acquisition Act is some what similar to the provision of section 73(2) of the Transfer of Property Act which provides, inter alia that where the mortgaged property is acquired under the Land Acquisition Act, or any other enactment for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation. In a sense, the compensation amount payable to the respondent may prima facie, be treated to be like a security substituted in the place of the original' mortgaged property under section 73(2) of the Transfer of Property Act. However that may be, the terms of the decree require that the appellants must first seek their remedy from the said compensation amount before they can proceed against the non- mortgaged property of the respondent. The relevant directions in the decree do not justify the appellants' contention that because the mortgaged property has vested in the State, they are entitled to execute the personal decree without taking recourse to the remedy available to them under section 24(5) of the Act. The Apex Court in the above judgment makes it very clear that for the remaining amount mortgage is entitled to proceed against the mortgager.

16. In Sundaram Finance Ltd., vs. State of Kerala and Ors. [AIR 1966 SC 1178] the Apex Court has held that the intention of the appellants in obtaining the hire-purchase and the allied agreement was to secure the return of loans advanced to their customers, and no real sale of the vehicle was intended by the customer to the appellants. The transactions were merely financing transactions.

17. As per the dictum of the Apex Court in the Hire Purchase Agreement the ownership retained such agreement is only to intend to secure the loan not intend to sale of vehicle and such contracts made were merely a financial transaction. Whereas in the given case it is the admitted case that there was a mortgage executed between the parties. Though it is contended that the petitioner that such mortgage itself is not void, this Court cannot go into the issue at present. Whether the mortgage is affected after notification u/s 4(1) or u/s. 6 Declaration is not an issue before this Court. It is admitted case of both

sides that there was mortgage in favour of the Respondent, after the acquisition, the Respondent has obtained the compensation of Rs.56,14,840/- as indicated above.

18. Sub-clause 2 Section 73 of the Transfer of Property Act makes it very clear that where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894 (1 of 1894); or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

19. A careful perusal of the above provision makes it clear that the above merely enacts the principle of substituted security, that is to say, not taking for the purpose of the security entitled not only to proceed against the mortgage property but anything that is substituted for it. The mortgagee certainly recover for remaining amount also other than the compensation amount. Therefore, merely because compensation withdrawn and challenge has not made to refer the matter to the Land Acquisition Tribunal, it cannot be said that the entire proceeding has been discharged.

20. Be that as it may. The main contention of the learned counsel for the Respondent is that as the compensation amount has been received which is lesser than the advance originally made to the tune of Rs.2 Crores, such receipt of lesser amount itself amounts to discharge of entire mortgage amount. Therefore, whether the receipt of the entire compensation towards the part of the loan will amount to clear the entire mortgage loan cannot be gone into at this stage. The Negotiable Instruments Act itself complete code. The special provision with regard to the issuance of the cheque, issuance of the cheque is not in dispute. Therefore, while exercising the power under section 482 Cr.P.C. Court cannot go into the issue as to legally enforceable debt, etc., In this regard the Honourable Apex Court in *Rajeshbhai Muljibhai Patel and others vs. State of Gujarat and Another* [(2020) 3 SCC 794] has held as follows:

"22. The High Court, in our view, erred in quashing the criminal case in C.C.No.367/2016 filed by appellant No.3-Hasmukhbhai under Section 138 of N.I. Act. As pointed out earlier, Yogeshbhai has admitted the issuance of cheques. When once the issuance of cheque is admitted/established, the presumption would arise under Section 139 of the N.I. Act in favour of the holder of cheque that is the complainant-appellant No.3. The nature of

presumptions under Section 139 of the N.I. Act and Section 118(a) of the Indian Evidence Act are rebuttable. Yogeshbhai has of course, raised the defence that there is no illegally enforceable debt and he issued the cheques to help appellant No.3-Hasmukhbhai for purchase of lands. The burden lies upon the accused to rebut the presumption by adducing evidence. The High Court did not keep in view that until the accused discharges his burden, the presumption under Section 139 of N.I. Act will continue to remain. It is for Yogeshbhai to adduce evidence to rebut the statutory presumption. When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the N.I. Act ought not to have been quashed by the High Court by taking recourse to Section 482 Cr.P.C. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the N.I. Act on the legal issues like limitation, etc. Criminal complaint filed under Section 138 of the N.I. Act against Yogeshbhai ought not have been quashed merely on the ground that there are inter se dispute between appellant No.3 and respondent No.2. Without keeping in view the statutory presumption raised under Section 139 of the N.I. Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in C.C.No.367/2016 filed under Section 138 of N.I. Act."

21. In *Sripati Singh vs. The State of Jharkhand* [2021 SCC Online SC 1002] the Apex Court in Para 23 has held as follows:

"23. These aspects would prima facie indicate that there was a transaction between the parties towards which a legally recoverable debt was claimed by the appellant and the cheque issued by the respondent No.2 was presented. On such cheque being dishonoured, cause of action had arisen for issuing a notice and presenting the criminal complaint under Section 138 of N.I. Act on the payment not being made. The further defence as to whether the loan had been discharged as agreed by respondent No.2 and in that circumstance the cheque which had been issued as security had not remained live for payment subsequent

thereto etc. at best can be a defence for the respondent No.2 to be put forth and to be established in the trial. In any event, it was not a case for the Court to either refuse to take cognizance or to discharge the respondent No.2 in the manner it has been done by the High Court. Therefore, though a criminal complaint under Section 420 IPC was not sustainable in the facts and circumstances of the instant case, the complaint under section 138 of the N.I Act was maintainable and all contentions and the defence were to be considered during the course of the trial."

22. In M.M.T.C. Ltd. & Another vs. M/s.Medchi Chemicals & Pharma (P) Ltd., [(2002) 1 SCC 234] the Honourable Apex Court has held that the High Court while exercising jurisdiction under section 482 Cr.P.C. cannot examine merit of the complaint and also held that the burden of proving that there was no existing debt or liability was on the respondents. They have to discharge in the trial.

23. In Sampelly Satyanarayanan Rao vs. Indian Renewable Energy and Development Agency Limited [(2016) 10 SCC 458] the Honourable Apex Court has held that Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 Cr.P.C. of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out.

24. Considering the above substantive provision of Transfer of Property Act as the mortgage has already executed, though its validity is questioned before this Court, this Court cannot make a roving enquiry. Therefore, this Court cannot go into the merits whether there is legally enforceable debt or not, it has to be discharged only by the accused before the trial Court. In such a view of the matter, the petitions filed to quash the proceedings in CC.No.4615 of 2016, CC.No.323 of 2017 and C.C.No.4438 of 2017 are liable to be dismissed.

25. Accordingly all the three Criminal Original Petitions are dismissed. Consequently connected M.Ps are closed.

26. At this stage, the learned counsel appearing for the petitioner seeks the indulgence of this court for dispensation of the personal appearance of the petitioners in all three

cases, as they are senior citizens. Accordingly, the personal appearance of the petitioners/Accused before the trial Court in the above cases is dispensed with, except for receipt of copies, answering the charges, questioning under Section 313 Cr.P.C., passing of judgment, or on any other date, as may be required by the trial Court

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

ggs

To

1. The XVIII Metropolitan Magistrate,
Saidapet, Chennai.
2. Do-Through,
The Chief Metropolitan Magistrate,
Egmore, Chennai - 8.
3. The Metropolitan Magistrate,
Fast Track Court, No.III,
Saidapet, Chennai.

+1cc to M/s.K.J.Parthasarathy, Advocate, S.R.No.68974

Crl.O.P.Nos.16445, 19526 & 21288 of 2017 and
Crl.M.P.Nos.10122,10123, 11795,
11796, 12545 and 12546 of 2017

BS (CO)
SU(28/04/2022)