IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 959 OF 2018

1. Kriti Global Pvt. Ltd.
2. Kriti Inter Trade
3. Mr. Sadeesh Premananth ...Petitioners

Versus

1. M/s. Kalyani Maxion Wheels (p) Ltd.
   Through its Power of Attorney
   Narendra Patil
2. The State of Maharashtra. ...Respondents

Mr.Rajiv Chavan Senior Advocate i/by Mr. Rohan P. Surve and Mr. Kunal Naik, Advocate for the Petitioner.
Adv. M. S. Mohite, Senior Advocate i/by Adv. V.S. Babar, Advocate for Respondent.
Mr. S. R. Agarkar, APP for Respondent-State.

CORAM : PRAKASH D.NAIK, J.

DATE : 17th AUGUST 2022

<u>P.C.</u>:-

1. The Petitioners are prosecuted for an offences under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as N.I. Act.) vide S.C.C. No.22230 of 2017 pending in the Court of learned Judicial Magistrate, First Class, 22nd Court, Pune. Vide order dated 22nd August 2017, the learned Magistrate had issued process against the Petitioners/accused for offence under Section 138 read with Section 141 of the Negotiable Instruments Act.

2. The Petitioners have invoked powers under Article 227 of the Constitution of India and Section 482 of Cr.P.C. challenging the impugned proceedings initiated against them at the instance of Respondent No.1 and the order issuing process passed by the trial Court in the said proceedings.

3. The brief fact as spelt out in the complaint filed by Respondent No.1 are as follows.

(i) Complainant is the company registered under the Companies Act, 1956. The accused No.1 is the authorized distributor of Shung Dar, Taiwan for India. Accused No.2 is the Associate Company of accused No.1. Accused No.3 is the Managing Director of Kriti Group. All the accused were in-charge and responsible for the management of day to day activities and conduct the affairs of business of the said company.

(ii) The complainant had placed order with accused for supply 'cut to length' machine/machinery manufactured by Shung Dar, Taiwan along with technical specifications of the said machine vide its purchase order No.10042250 dated 7th May 2016 for the amount USD 345,000/- on the terms and conditions more particularly specified and mentioned therein.

(iii) The accused have accepted the same vide their order acceptance letter dated 7th June 2016.

(iv) All the accused represented that, they shall adhere to the terms and conditions of the said purchase order placed on accused by the complainant and believing the same, the complainant had placed the said purchase order.

(v) The complainant made advance payment of USD 103,500/- to accused in terms of purchase order and the accused have approved and accepted the same.

(vi) The terms of delivery of machinery was FOB Taiwan and port of discharge was JNPT, Mumbai. The complainant placed container through forwarding company Dachser India (P) Ltd. for the same. The company moved the machinery by cargo and handed over original bill of lading to Shung Dar. Accused No.1 Kriti Global Pvt. Ltd. is mentioned as 'shipper' on the bill of lading. The complainant made balance payment of amount USD 241,500/- to accused on 7th February 2017 and the receipt of payment is acknowledged by them.

(vii) The accused No.2 has issued security cheque bearing No.548942 dated 15th February 2017 of Rs.1,64,292/- drawn on Canara Bank, Mid Corporate Branch Faridabad to the complainant in terms of purchase order placed on accused by complainant. At the relevant time, the accused had represented complainant that, there was sufficient fund in their bank account and the said cheque would be definitely honoured by banker of the accused on presentation. Believing the same, the complainant accepted the cheque issued by accused.

(viii) The machinery reached India and Dachser India (P) Ltd. being a regular importer for complainant, released delivery order of the same without original bill of lading. Since, the complainant has already made payment to accused, they got custom clearance and machine has been installed at the works of complainant.

(ix) It appears from the correspondence between accused and Shung Dar that, though the payments were made to Shung Dar, their official mail-id was hacked and incorrect bank details were provided and the money has been deposited in wrong account. Shung Dar has not received any payment and there are holding original bill of lading. Shung Dar are clearing the ownership of goods and demanding money or goods back from forwarding company Dachser.

(x) It also appears that, Shung Dar has filed case against Dachser in Taiwan Court and Dachser India (P) Ltd. has issued a letter to complainant asking them to submit original bill of lading. The accused are supposed to hand over the original bill of lading to complainant. The complainant followed up the matter with accused on several occasions. The accused have committed breach of terms and conditions of purchase order in question. As per agreement, the accused are required to hand over the machinery along with all necessary documents (which includes original bill of lading) to ensure that, the complainant has completed ownership and title in respect of the said machine, delivery can only be deemed to have completed once the bill of lading and other documents of ownership and title were received by complainant.

(xi) The complainant deposited the security cheque drawn on Canara Bank, Mid Corporate Branch, Faridabad issued by the accused in its account with State Bank of India, IFB, Shivajinagar, Pune. The cheque was dishonored and returned unpaid to complainant for want of sufficient balance in the account of accused with remark “payment stopped by drawer” on 16th May 2017.

(xii) The representations made by all the accused were false to their knowledge and the same were made with sole intention to cheat the complainant. The complainant would not have placed on order for supply of machinery. The complainant suspected foul play.

(xiii) The complainant sent legal notice dated 14th June 2017 through its lawyer to the accused and demanded the amount of dishonoured cheque. The notice was received by accused. However, the accused did not comply with the same. Complaint was filed for an offence under Section 138 of the N.I. Act.

4. Learned JMFC, Pune vide order dated 22nd August 2017 issued process for an offence under Section 138 read with 141 of N.I. Act against the accused. While issuing process it is observed that, complainant has fulfilled the mandate required for taking cognizance of offence under Section 138 read with 141 of N.I. Act.

5. Learned Senior Advocate for the Petitioners Mr. Chavan submitted that, the Petitioner No.1 is the certified authorized re-seller of machinery/equipment manufactured by Shung Dar industrial Company Ltd., Taiwan in India. The Petitioner No.1 purchases machinery/equipment from Shung Dar and re-sells the same to customers in India. The Petitioner No.1 enters into back to back agreements with Shung Dar and buyers in India. There is no privity of contract between such Indian buyers and Shung Dar. The Respondent No.1 intended to purchase 'cut to length' line model SNR8-600 machinery along with allied equipment manufactured by Shung Dar. Respondent No.1 placed purchase order dated 7th May 2016 on the Petitioner No.1 for purchasing the said equipment for an amount of USD 345,000/-. The purchase order contained the terms and conditions for the supply of the said equipment and order acceptance dated 12th May 2016 was issued by the Petitioner No.1, which concluded the supply contract between the Petitioner No.1 and Respondent. In terms of clause 4 of the said order acceptance, the payment of USD 345,000/- was to be made by Respondent No.1 to the

Petitioner No.1 in 3 installment viz. 15%, 15% and 70% respectively. The Indian entity had to secure first two installments of 15% each. The final installment of 70% was to be made by Respondent No.1 by way of irrevocable transferable letter of credit and no security cheque was required to be given for final 70% payment. On 16th May 2016, the petitioner No.2 issued e-mail to Respondent No.1 allotted attaching letter dated 16th May 2016 and the first post dated security cheque dated 16th August 2016 for Rs.34,54,877/- issued by petitioner No.2 in favour of Respondent No.1. Along with said e-mail, the Petitioner No.2 attaching letter dated 1st January 2016 of Shung Dar confirming that Petitioner No.1 is the authorized re-seller for the Indian market that, and Petitioner No.2 would provide after sales support during and after warranty period. On 16th August 2016 the Petitioner No.2 sent letter e-mail to Respondent No.1 attaching letter dated 16th August 2016 and the second post dated security cheque dated 15th November 2016 for Rs.34,58,204/-. The original letters and cheques were sent by courier to the Respondent. The respondent No.1 did not produce two security cheques in its bank for encashment and the same has lapses. However, the cheques were not returned to Petitioner No.2. Payment of final installment of 70% was to be made by Respondent No.1 by way of irrevocable transferable letter of credit and no security cheque was to be given for final 70% payment. However, in order to avoid letter of credit charges, offered to make the payment of remaining 70% in similar manner by which the earlier two installments of

15% each was paid. On 21st January 2017, the Petitioner No.2 send e-mail to Respondent No.1 attaching the letter dated 18th January 2017 of the Petitioner No.2 and the third post dated security cheque bearing No.548942 dated 15th February 2017 for Rs.1,64,34,292/- of Petitioner No.2 drawn on Canara Bank, Mid Corporate Branch, Faridabad singed by Petitioner No.3 as proprietor of Petitioner No.2 in favour of Respondent No.1. Three post dated cheque of Rs.1,64,34,292/- shortfall of 70% value of the equipment and there was shortfall Rs.2,15,975/-, the Petitioner No.2 sent e-mail to Respondent No.1 on 26th January 2017 attaching letter dated 25th January 2017 of Petitioner No.2 and the fourth security cheque bearing No.548944 dated 15th February 2017 for Rs.2,15,975/- in favour of Respondent No.1. Thus, cheque in question for Rs.1,64,34,292/- was not issued by Petitioner No.2 in discharge of any liability or legally enforceable debt and the same was issued only by way of security for securing the delivery of equipment by Petitioner No.1 to Respondent No.1. The respondent No.1 had nominated Dachser India Private Ltd. as freight forwarding agency for shipment of the said equipment from Taiwan to India. The Petitioner No.1 was shown as 'Shipper' and Respondent was shown as 'Consignee' in the original bill of lading. The Petitioner No.1 had forwarded all necessary documents to Respondent by e-mail after the said equipment had not sleep from Taiwan. Dachser India Private Ltd. release said equipment to the respondent of which delivery was taken by them on 11th February 2017 without original bill of lading. The installment of the said equipment in the premises of respondent No.1 was done by technical team of Petitioner No.2. The installment commenced on 16th February 2017 and completed on 27th February 2017. After installment, the Respondent No.1 had commenced commercial use of the said equipment. Upon delivery of the equipment in the premises of Respondent No.1 on 11th February 2017, purpose for which the post dated cheque dated 15th February 2017 for Rs.1,64,34,292/- and Rs.2,15,975/- representing 70% of the value of the said equipment had been issued by Petitioner No.2 to the Respondent stood satisfied and consequently the security cheques stood discharged. On 11th May 2017, the Petitioner No.2 informed Respondent No.1 by e-mail that, stop payment instructions were issued to the banker of Petitioner No.2 regarding two post dated cheques as there was no liability after delivery of the said equipment to Respondent No.1 and advised Respondent No.1 to return the original security cheques to Petitioner No.2. However, Respondent No.1 presented the cheque dated 15th February 2017 issued by Petitioner No.2 for Rs.1,64,34,292/- knowing fully well that, no financial liability or legally debt existed against the Petitioners. The cheque dated 15th February 2017 for Rs.2,15,975/- was not presented by Respondent No.1 and it has lapsed. In the absence of legally enforceable debt on the date of presentation of security cheque, there was no cause of action to initiate any legal action against Petitioners. The Petitioner lodged the complaint with Singapore Police on 10th February 2017 to recall transfer of funds to Sunshine's account in China. The complaint is not maintainable.

There was no legal enforceable debt or liability. The complaint is lodged with malafide intention to submit illegal demand of Respondent No.1.

6. Learned Advocate for the Petitioners has relied upon the following decisions:-

(i) Sudhir Kumar Bhalla Vs. Jagdish Chand and Ors.[1]

(ii) HMT Watches Limited Vs. M. A. Abida and Anr.[2]

(iii) Sunil Todi and Ors. Vs. State of Gujarat and Anr.[3]

7. Learned Advocate for the Respondent No.1 submitted that, the cheque issued by the accused has been dishonoured with remarks “stop payment by the drawer”. It is not in dispute that the cheque was signed by accused and issued in favour of the Respondent No.1. The contention of the Petitioners is that, cheque was issued by way of security and not in respect of legally enforceable debt or liability. *Prima facie* offence under Section 138 of the Negotiable Instruments Act is made out. Learned Magistrate had applied its mind to the documents on record and issued process against the accused. There is no infirmity in the order of issuing process. The grounds urged by Petitioners will have to be appropriated during the trial. At this stage, the proceedings cannot be quashed by considering submissions advance by learned Advocate for the Petitioners. The cheque was issued by way of security and it was permissible to the Respondent No.1 to deposit the same.

1 (2008) 7 SCC 137
2 (2015) 11 SCC 776
3 2021 8 Supreme 614

The Petitioners had not complied its obligation and therefore the Respondent No.1 was entitled to deposit the said cheque. Although, the machinery was installed, it was the duty of Petitioners to provide bill of lading to the complainant. The said obligation is not complied. Delivery is not complied without submission of bill of lading, title of the machinery is not transferred to the complainant. Thus, there was breach of undertaking of the accused. The entire amount was transferred to the account of accused for installation of machinery. In the absence of bill of lading, the ownership has not been transferred to Respondent No.1. There is constant demand of return of machinery by Dachser, who are demanding original bill of lading. The proceedings cannot be terminated on the basis of submissions advance by learned Advocate for Petitioners. The Petitioners are trying to avoid their liability in providing bill of lading in spite of receiving the huge amount from Respondent No.1. The Petitioners are trying to rely upon the document by filing additional documents, which cannot be termed. No case is made out for quashing proceedings. Despite question of facts are required to be dealt with during trial and the proceedings cannot be terminated abruptly without giving an opportunity to the complainant to adduce evidence and prove the change.

8. Learned Senior Advocate Mr. Mohite has relied upon following decisions:-

(i) Samplelly Satyanarayana Rao Vs. Indian Renewable Energy

Development Agency[4].

(ii) British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Others.[5]

(iii) Rathish Babu Unnikrishnan Vs. State (Gov. of NCT of Delhi) and Anr.[6]

9. The factual matrix from the documents on record indicate that, the Respondent No.1 had placed an order with accused for supply 'cut of length' machine/machinery manufactured by Shung Dar, Taiwan along with technical specifications of the said machine vide purchase order dated 7th May 2016 on the terms and conditions specified therein. The purchase order dated 7th May 2016 was placed with M/s. Kriti Global Pvt. Ltd. (Petitioner No.1). The Petitioner No.1 accepted the order which is apparent from order of acceptance dated 7th May 2016, the said document referred to payment terms viz. (1) 15% advance payment along with purchase order against order of acceptance (security cheque for 15% amount to be provided from Indian company), (2) 15% payment in July 2016 (security cheque for 15% amount to be provided from Indian company); (3) balance 70% by irrevocable transferable letter of credit. Respondent No.1 had nominated Dachser India Pvt. Ltd. as freight forwarding agency for shipment of the equipment from Taiwan to India. The Petitioners No.1 was shown as 'shipper' and Respondent was shown as 'consignee' in the original bill of lading. Dachser released the equipment to Respondent and its delivery was taken on 11th February 2017. Apparently, the

4 (2016) 10 SCC 458
5 (1990) 3 SCC 481
6 2022 SCC OnLine SC 513

delivery was accepted without original bill of lading. The installment of equipment was done in the premises of Respondent No.1. It was completed on 27th February 2017. It also appears that, the Respondent No.1 has commenced commercial use of the said equipment. The cheque dated 15th February 2017 bearing No.548942 for an amount of Rs.1,64,34,292/- was given by way of security, was deposited by the complainant. The documents on record reveals that, on 11th May 2017 the Petitioner No.2 had informed Respondent No.1 that, there was no liability in respect to the two security cheques after the delivery of equipment to Respondent No.1 and advised to return the same. E-mail dated 11th May 2017 has been annexed to the Petition. However, the respondent No.1 had deposited the said cheque, which was returned with remark "payment stopped by drawer". The respondent No.1 had forwarded notice dated 14th June 2017 to make the payment of Rs.1,64,34,292/-. The said notice was replied by Petitioner Nos.2 and 3 through their Advocate by stating that, the terms and conditions of supply of equipment were contained in purchase order and order of acceptance. The payment terms contained in clause 4 of order of acceptance provided that, the payment of USD 345,000/- had to be made by complainant in three installments i.e. 15%, 15% and 70%, respectively. The payment of first two installments of Rs.15% each by the complainant was to be secured by the security cheque to be issued by Indian entity and that, the payment of the final installment of 70% was to be made by complainant by way of irrevocable transferable letter of credit. No security cheque was to be given for the final 70% payment. As third security cheque amount of Rs.1,64,34,292/- had not represented entire 70% and there was shortfall to the instance of Rs.2,15,975/- and e-mail was sent by Petitioners on 26th January 2017 attaching scan copies of letter dated 25th January 2017 and fourth security cheque dated 15th February 2017 for Rs.2,15,975/-. The cheque in question had not been issued by the Petitioners in discharge of any debt or liability and had not issued only as security cheque. Respondent No.1 chose to deposit one of the two security cheques dated 15th February 2017, issued by the accused for Rs.1,64,34,292/- even in the absence of any legally enforceable debt and attempted recovery about 70% of the value of equipment while returning and using the same. Another reply dated 29th June 2017 was forwarded on behalf of Petitioner No.1 and it was stated that, full price of equipment was received by Petitioner No.1 and has paid the price of equipment and Shung Dar and its nominee. The respondent No.1 is not privy and to supply of the equipment between Shung Dar and Petitioner No.1.

10. Thus, undisputedly, the cheque in question was issued by way of security. The other security cheques were not deposited by Respondent No.1. The equipment was installed. Security cheques were re-called. However, the complainant did not return the security cheques. The documents relating to order of acceptance referred to terms of payment and the subject cheque is not recovered by the 70% payment stipulated therein. It is also apparent that,

there is no privity of contract and transaction between Petitioner No.1 and Shung Dar to constitute an offence under Section 138 of the Negotiable Instruments Act. The cheque must be issued for legally enforceable debt or liability. In the absence of legally enforceable debt or liability on the representation of the security cheque in question, there was no cause of action for Respondent No.1 to contemplate any legal action against Petitioners.

11. In the case of *Sudhir Kumar Bhall Vs. Jagdish Chand and Ors.* (supra) it was observed that, the criminal liability under the provision of Section 138 of the Act are attracted only on account of dishonoured of the cheque issued in discharge of liability or debt but not on account of assurance of security cheque. In the case of *HMT Watches Ltd. Vs. M. A. Abida and Anr.* (supra) it is held that, the High Court has enormous power under Section 482 but such power needs to be exercised cautiously. Defence of the accused, even though appearing plausible, cannot be considered for exercise of inherent powers. However, documents with unimpeachable character can be considered to decide about continuation of criminal proceedings or whether complaint had been filed only to harass accused. If complaint was with ulterior motive then power under Section 482 can be exercised to prevent abuse of process. In the case of *Sunil Tode and Ors. Vs. State of Gujarat and Anr.* (supra) it is observed that, if sum payable depends on a contingent event, then it takes colour of a debt only after contingency has occurred.

12. In the case of *British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Ors.* (supra) the Court explained the meaning of bill of lading filed distinguished from Negotiable Instruments Act it was observed that, the endorsement of bill of lading, endorsee derives the same right and title of the endorser and not a better right. Holder of bill of lading is *ex facie* bound by its terms. In the case of *Rathish Babu Unnikrishnan Vs. State (Govt. of NCLT of Delhi) and Anr.* (supra), the contention of the appellant was that, the post dated cheques drawn by him in favour of complainant were, contingent/security cheques for buyback of shares held by the complainant and therefore the cheques could not have been prematurely presented to the bank and should have been presented for encashment only after transfer of complainant's shareholding in the appellant's company. The contention of the complainant was that, when the cheques are issued and the signatures are thereon admitted, the presumption of legally enforceable debt will arise in favour of the holder of the cheque. It is for the accused to rebut legal presumption by adducing necessary evidence before the trial Court. It is obligatory for the Court to raise legal presumption against the accused when his cheque is dishonoured on presentation. It was observed that, the burden of proving that, there is no existing debt or liability is to be discharged in the trial. The legal presumption of the cheque having been issued in the discharge of liability must also receive due weightage. Quashing proceedings at preliminary stages will result in finality without the

parties having had an opportunity to adduce evidence and the consequence then is that, the trial Court is ousted from weighing the material evidence. In the case of *Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Ltd.* (supra) it is held that, while dealing with the quashing of complaints, Court has to proceed on the basis of complaints averments. The defence of the accused cannot be looked into at this stage and post dated cheque well-recognized mode of payment and presumption of legally enforceable debt or liability in favour of holder of cheque arises.

13. In the present case, there is no dispute that the cheque was issued by way of security. From the factual aspects of the matter and admitted documents between the parties it cannot be said that, impugned cheque was issued in discharge of legally enforceable debt or liability. In these circumstances it would be abuse of process of law to continue the said proceedings.

ORDER

(i) Writ Petition No.959 of 2018 is allowed and disposed off.

(ii) Impugned order for issuing process for offence under Section 138 of Negotiable Instruments Act, 1881 dated 22nd August, 2017 and the proceedings in S.C.C. No.22230 of 2017 pending before the Court of J.M.F.C. Pune are quashed and set aside.

(PRAKASH D. NAIK, J.)