**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO.1423 OF 2012**

Sushil Kumar Saxena ….. Petitioner
Versus
Mohammad Sami Ahmed & Anr. …. Respondents

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**WITH**
**CRIMINAL APPLICATION NO.246 OF 2017**
**IN**
**CRIMINAL WRIT PETITION NO.1423 OF 2012**

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Mr. Satish Chettiyar, Advocate a/w. Amol Wagh i/b. Sagar V. Kasar for the Petitioner.
Mr. Pankaj Thatte, Advocate for Respondent No.1.
Mr. Yogesh Y. Dabke, APP, for Respondent No.2-State.

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**CORAM : SARANG V. KOTWAL, J.**

**DATE : 26th SEPTEMBER, 2022**

**P.C. :**

1. This Writ Petition is filed challenging the order dated 2.11.2011 passed by the Metropolitan Magistrate, 48th Court, Andheri in C.C. No.2361/SS/2011 issuing process against the petitioner for commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1888

(for short, 'NI Act'). The respondent No.1 is the original complainant and the petitioner is the original accused.

2. Heard Shri Satish Chettiyar, learned counsel for the petitioner, Shri Pankaj Thatte, learned counsel for respondent No.1 and Shri Yogesh Dabke, learned APP for respondent No.2-State.

3. This Petition is pending since the year 2012 without any interim order; and yet, the trial has not progressed further. After issuance of process, an affidavit in the form of examination-in-chief is already tendered and the stage of trial was for cross-examination of the complainant. At this belated stage, the petitioner has approached this Court challenging the order of issuance of process.

4. The brief averments in the complaint are as under :

i. The respondent No.1–complainant was knowing the petitioner. On 27.11.2010, the petitioner executed a loan agreement with the respondent No.1 at Mumbai;

and as per the agreement a loan of Res.25 Lakhs was given to the petitioner for a period of eight months starting from 1.12.2010 upto 31.7.2011. The petitioner had duly received that amount.

ii. The petitioner issued a cheque for Rs.25 Lakhs bearing cheque No.809254 dated 31.7.2011 drawn on ICICI Bank, Noida Sector-61 branch in favour of the respondent No.1 being security of the said loan amount.

iii. After completion of eight months i.e. on 31.7.2011, the petitioner requested the respondent No.1 to deposit the cheque for repayment of the said loan amount. On 22.8.2011, the respondent No.1 presented the cheque with his banker i.e. State Bank of India, Four Bungalow Branch, Andheri (West), Mumbai. The cheque was dishonored with the remark ‘funds insufficient’.

iv. After stating these facts, the complaint further mentions that the petitioner had issued that cheque in favour of the respondent No.1 for discharge of his legal liabilities being repayment of the loan amount, as per the agreement and its terms and conditions, which was legally due and payable by him.

v. Thereafter, a statutory demand notice dated 31.8.2011 was sent. It was received as per the acknowledgment dated 5.9.2011; and after 15 days since the payment was not forthcoming this complaint was filed in October, 2011.

5. Learned Counsel for the petitioner submitted that the cheque in question was given by way of security and, therefore, dishonor of that cheque does not come within the purview of Section 138 of the NI Act. He submitted that the cheque cannot be utilized for any legally enforceable right. Giving cheque for security does not mean that it was in respect of any legally enforceable liability. He further submitted that the brother-in-law of the petitioner had stepped in his shoes and has paid Rs.10 Lakhs to the respondent No.1 and, therefore, the earlier cause of action stood extinguished and this complaint was not maintainable.

6. Learned counsel for the respondent No.1 submitted that the Petition is filed at a much belated stage. It is an abuse of process of law. He submitted that the loan was not repaid, the last date of repayment was on 31.7.2011 and the cheque was presented on 22.8.2011. Therefore, on that date the legally enforceable liability existed and the cheque cannot be termed as merely a security for repayment of the loan. He submitted that the petitioner is prolonging the matter on some pretext or the other and it has been ten years since the respondent No.1 has given his affidavit in the form of examination-in-chief. Since then there is no progress in the trial.

7. He submitted that the payment of Rs.10 Lakhs is a subsequent development. According to learned counsel for the petitioner the amount of Rs.10 Lakhs was paid on 30.1.2012. The present petition is filed on 3.4.2012 and no ground is taken in that behalf. Learned counsel for the respondent No.1 submitted that there is no merit in the Petition and it should be dismissed.

8. I have considered these submissions. In this context, the observations of the Hon'ble Supreme Court in the case of **Sripati Singh (since deceased) through his son Gaurav Singh Vs. State of Jharkhand and another**[1] are important. In that case, the Hon'ble Supreme Court had considered dishonor of cheque which was given by way of security. In this context, the observations in paragraphs-17 to 19 are important which read thus :

> "17. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such

1 2021 SCC OnLine SC 1002

presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.

18. When a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security' cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a *sine qua non* to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in a proceedings initiated under Section 138 of the N.I. Act. Therefore, there cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an 'on demand promissory note' and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the

cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation.

19. If the above principle is kept in view, as already noted, under the loan agreement in question the respondent No. 2 though had issued the cheques as security, he had also agreed to repay the amount during June/July 2015, the cheque which was held as security was presented for realization on 20.10.2015 which is after the period agreed for repayment of the loan amount and the loan advanced had already fallen due for payment. Therefore, prima facie the cheque which was taken as security had matured for payment and the appellant was entitled to present the same. On dishonour of such cheque the consequences contemplated under the Negotiable Instruments Act had befallen on respondent No. 2. As indicated above, the respondent No.2 may have the defence in the proceedings which will be a matter for trial. In any event, the respondent No. 2 in the fact situation cannot make a grievance with regard to the cognizance being taken by the learned Magistrate or the rejection of the petition seeking discharge at this stage."

9. In paragraph-20, the Hon'ble Supreme Court has

further observed that the complainant cannot be non-suited for proceeding with the complaint filed under Section 138 of NI Act merely due to the fact that the cheques presented and dishonored were shown to have been issued as security, as indicated in the loan agreement. The Hon'ble Supreme Court further observed that such contention would arise only in a circumstance where the debt had not become recoverable and the cheque issued as security has not matured to be presented for recovery of the amount, if the due date agreed for payment of debt had not arrived. In the facts before the Hon'ble Supreme Court, the repayment as agreed by the accused was during June/July, 2015 and the cheque was presented by the complainant for relization on 20.10.2015. As on the date of presentation of the cheque for realization the repayment of the amount as agreed under the loan agreement had matured and the amount had become due and payable.

In the instant case before this Court as well, the loan amount had matured on 31.7.2011 and the cheque which was given at the time of execution of the loan agreement in November, 2010 was presented only on 22.8.2011 after the amount had become due and payable. Therefore as per the ratio of this judgment, the complaint was maintainable and the accused was liable to face the prosecution under Section 138 of NI Act. A copy of the loan agreement annexed to this Petition also mentions that the accused had agreed to repay the entire loan amount of Rs.25 Lakhs on or before 31.7.2011. At the time of execution of this agreement, the cheque in question was given.

Thus, by relying on the ratio of the Hon’ble Supreme Court in the case of **Sripati Singh** (supra), it is quite clear that the prosecution against the petitioner is maintainable and there is no infirmity in the order of issuance of process. Besides this, the petitioner has approached this Court at a much belated stage.

Affidavit in the form of examination-in-chief is already submitted by the respondent No.1. On this ground also, I am not inclined to entertain this petition.

10. As far as the contention that Rs.10 Lakhs have been paid subsequently by the brother-in-law of the petitioner is concerned, that payment was made, according to learned counsel for the petitioner on 30.1.2012. This petition is filed on 3.4.2012 and no such ground is taken in the petition. The petition is filed only on the ground that the cheque was given as security and, therefore, the prosecution was not maintainable. In any case, payment of Rs.10 Lakhs would be a totally different subject matter.

11. The original complaint which is subject matter of this petition is maintainable. The order of learned Magistrate issuing process against the petitioner does not suffer from any infirmity and, therefore, this Petition cannot be entertained and is accordingly dismissed. In view of disposal of main petition, nothing survives in Criminal Application No.246/2017 and the same stands disposed of accordingly.

12. Considering that the trial is pending since past more than ten years, learned trial Judge shall make all the efforts to conduct the trial expeditiously.

**(SARANG V. KOTWAL, J.)**

Deshmane (PS)

PRADIPKUMAR PRAKASHRAO DESHMANE

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Date: 2022.09.29 11:17:26 +0530