



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
06~01~2022	21~01~2022

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Crl.O.P.No.16046 of 2017 &
Crl.M.P.Nos.9925 & 9926 of 2017

1. Nandhi Dhall Mills,
270, Narasimhan Road,
Shevapet, Salem - 636 002.

2. S.A.Kumar ... Petitioners/Accused 1 & 2

Vs

M/s.Kotak Mahindra Bank Ltd.,
Represented by its Chief Manager,
Recovery, Agri Business Group,
12, Bharathi Street,
Swarnapuri, Salem - 636 004. ... Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records and quash the proceedings on the file of V Judicial Magistrate, Salem bearing C.C.No.18 of 2014 as against the petitioners for an offence under section 138 of Negotiable Instruments Act, 1981.

For petitioner : Mr.A.Ramesh, Senior Counsel
for Mr.B.A.Sujay Prasanna

For Respondent : Mr.E.Om Prakash, Senior Counsel
for M/s.Ramalingam Associates
Assisted by Mr.P.Elayarajkumar

O R D E R

This petition has been filed to quash the proceedings initiated under section 138 of the Negotiable Instruments Act in C.C.No.18 of 2014 on the file of the V Judicial Magistrate Court, Salem.

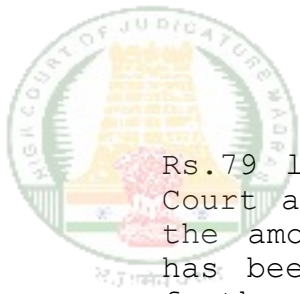
2. The crux of the complaint is that the respondent had extended financial facility in the form of short term loan to the petitioner company for the development of business. The accused have borrowed a sum of Rs.10 crores out of the



sanctioned limit of Rs.15 crores as a short term loan and also executed necessary documents for the above said loan as per the terms and conditions of the banking rules and regulations. The accused had also issued a cheque bearing No.72625 dated 02.04.2013 for a sum of Rs.2,90,81,000/-, drawn on ICICI Bank, Shevapet Branch, Salem towards part payment of the said loan amount. When the above cheque was presented for encashment on 03.04.2013, the same was dishonoured for 'funds insufficient' on 04.04.2013. Thereafter, the complainant issued statutory notice, which was received by the accused 1 and 2 on 06.04.2013. But no reply was sent. Hence the complaint. The learned Judicial Magistrate took cognizance of the above complaint. The same is sought to be quashed by the petitioners mainly on the ground that at the time of availing financial assistance from the respondent by the petitioners, the second petitioner has handed over undated cheques while sanctioning and disbursing the loan as demanded by the bank. One such cheque was used for the purpose of loan processing charges and the remaining cheque was used to initiate the proceedings. It is also stated that in April 2013, the account of the firm became non performing asset which lead to issuance of notice under section 13 [2] of the SARFAESI. As a short circuiting procedure, without even intimating the firm or its partners, the respondent/ complainant filled up the cheque in question, which has been given to the borrower at the time of loan processing fee and initiated the prosecution. Possession notice issued under SARFAESI Act has also been challenged before DRT. A stay was granted subject to the payment of Rs.25 lakhs and the same was also complied.

3. It is further stated that the petitioners periodically paid the dues and the liability has been gradually reduced. Hence, it is his contention that there is no legally enforceable debt subsisting on the date of presentation of the cheque. The present cheque in question is undated cheque which was obtained while sanctioning the loan. The complaint is also silent as to who has issued the cheque on 02.04.2013. It is his contention that the cheque issued in the year 2011 has been used for filing the present case.

4. In addition to the grounds raised in the petition, it is the main contention of the learned Senior Counsel appearing for the petitioner that even the loan sanctioning letter vouch the fact that undated cheques have been collected by the bank. Therefore, the very allegation in the complaint that the cheque was issued on 21.04.2013 for a sum of Rs.2,90,81,000/- is an after thought and the same has been pressed into service only for maintaining the complaint. Hence, it is contended that the cheque in question has been issued as a security and the same cannot be enforced in the eye of law for prosecution under section 138 of the Negotiable Instruments Act. It is further contended that towards the loan amount, before the complaint, a sum of Rs.15,52,14,902/- was paid and thereafter



Rs.79 lakhs has been paid in pursuant to the Order of this Court and totally Rs.16,31,14,902/- has already been paid and the amount payable is only Rs.21,31,490/-. Whereas, cheque has been filled for a huge sum of Rs.2,90,81,000/-. It is further contended that the possession notice was issued under the SARFAESI Act dated 08.04.2013 issued by the bank and that itself clearly show that the liability is only Rs.2,16,77,293.27 as on 08.07.2013. Therefore, the cheque filled for Rs.2,90,81,000/- on the date of 02.04.2013 is against unenforcible liability. Therefore, such a complaint is not maintainable in the eye of law.

5. It is the further contention of the learned Senior Counsel that when there is a dispute over payment of interest and already proceedings have been initiated under the SARFAESI Act and sufficient security is already executed in favour of the bank by way of mortgages, the cheque issued for security cannot be enforced in the eye of law. It is his further contention that the circular issued by the Reserve Bank of India is with regard to interest application and the same indicate that when the account has been classified as NPA and the interest has not been received for 90 days or more, the bank need not debit interest in the said account for subsequent quarters. Therefore, it is his contention that the cheque in question cannot be enforced in the eye of law. In support of his submissions he placed reliance on the following judgments :

Angu Parameswari Textiles [P] Ltd. and others
Vs. Sri Rajam and Co. reported in 2001 SCC OnLine
Mad 922

M/s.Pawan Enterprises Vs. Satish H.Verma
reported in 2003 SCC OnLine Bom 1174

Alliance infrastructure Project Pvt. Ltd. and
others Vs. Vinay Mittal reported in 2010 [115] DRJ
241

Indus Airways Private Limited and others Vs.
Magnum Aviation Private Limited and another reported
in [2014] 12 Supreme Court Cases 539

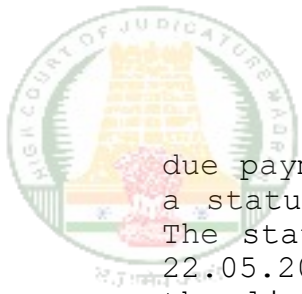
Sampelly Satyanarayana Rao Vs. Indian Renewable
Energy development Agency Limited reported in [2016]
10 Supreme Court Cases 458

Starkey Laboratories India Pvt Ltd. Vs. Sanjay
Gujral in CrI.O.P.No.492 of 2017 dated 24.09.2019 of
the High Court of Delhi at New Delhi

Sunil Todi and others Vs. State of Gujarat and
another reported in 2021 SCC OnLine SC 1174

Sripati Singh [Since Deceased] Through His Son
Gaurav Singh Vs. State of Jharkhand and another
reported in 2021 SCC OnLine SC 1002

6. The learned Senior Counsel Mr.Om Prakash appearing
for the respondent contended that the cheque was issued for



due payment of the loan account. The same was dishonoured and a statutory notice was issued for a sum of Rs.2,90,81,000/-. The statutory notice has not been replied. By a letter dated 22.05.2013, the petitioner has also acknowledged and admitted the liability. It is contended that the circular issued by the Reserve Bank of India is only for banking regulations and it cannot be taken advantage by the petitioner to contend that once account has been classified as NPA, the interest is not chargeable. Hence, submitted that the disputed question of facts cannot be gone into at this stage and it is a matter of trial. Hence, opposed for quashing the complaint. He has also placed reliance on the judgment of the Apex Court in

S.Thangamani Vs. R.S.T. Steels reported in 2000 SCC OnLine Mad 924

M.M.T.C. Ltd. and another Vs. Medchl Chemicals and Pharma [P] Ltd. and another reported in [2002] 1 Supreme Court Cases 234

M.s.Synergy Credit Corporation Limited Vs. M/s.Midland Industries Limited & others reported in 2006 SCC OnLine Mad 1225

Shri Mukund Zingdo Naik Vs. Shri Durganand Dinkar Parab, Prop. M/s.Durga Cement Moulding Works and another reported in 2009 SCC OnLine Bombay 288

HMT Watches limited Vs. M.A.Abida and another reported in [2015] 11 Supreme Court Cases

Sampelly Satyanarayan Rao Vs. India Renewable Energy Development Agency Limited reported in [2016] 10 Supreme Court Cases 458

7. The main contention of the petitioner is that undated cheques have been given at the time of sanctioning loan and the same has been filled in the year 2013 for excess amount as against the admitted liability and the prosecution has been launched. Issuance of undated cheque while availing the loan facility is not disputed. The only contention of the petitioner is that the loan amount has been paid and only a sum of Rs.21,31,490/- has to be paid by them. Therefore, the cheque filled at later date for Rs.2,90,81,000/- is not maintainable. It is relevant to note that the prosecution is proceeded under the premise that the cheque was issued on 02.04.2013 for the said sum of Rs.2,90,81,000/- and when the cheque was presented for encashment, the same got dishonoured and the complaint has been filed. The statutory notice issued in this regard dated 04.04.2013 indicate the nature of due payable. The same has not been disputed. As rightly pointed out by the learned Senior Counsel for the respondent, the petitioner addressed a letter dated 22.05.2013, wherein they have not disputed the amount payable and infact they have sought 30 days further time to settle all the dues with the bank. Further, possession notice has also been issued under the SARFAESI Act dated 25.06.2013 wherein also the amount is shown as Rs.2,93,41,763.14 and the principal amount is shown as Rs.2,27,03,851.27/-. This possession notice is subsequent to the statutory notice issued under the Negotiable



liability, the prosecution is not maintainable under section 138 of the Negotiable Instruments Act. When the cheque amount exceeds the liability, the cheque cannot be enforced. The only contention of the petitioner is that they are liable to pay only Rs.21,31,490/-. Therefore, whether or not, the cheque has been presented for excess liability is a matter of evidence. This Court while exercising the power under section 482 Cr.P.C. cannot make a roving enquiry into the disputed facts. Therefore, the contention of the learned Counsel for the petitioner that the cheque in question was filled for excess amount other than the liability cannot be gone into at this stage and the same cannot be a ground to quash the proceedings.

10. With regard to the other aspects that the cheque issued as a security has been filled and presented for encashment and therefore, the same is not enforceable in the eye of law, it is relevant to note that in a judgment in M.M.T.C. Ltd. and another Vs. Medchl Chemicals and Pharma [P] Ltd. and another reported in [2002] 1 Supreme Court Cases 234, the Apex Court has held that the High Court cannot examine merits of the complaint and merely because the petition contain specific allegation to the contrary, it cannot be said that the cheques cannot be issued for the existing liability and this they have to discharge in the trial. In the above judgment, the Apex Court has clearly held that there is no requirement for the complainant that they must specify that there was subsisting liability. The burden of proving that there was no existing liability is on the respondent and the same has to be discharged in the trial.

11. In the judgment in M/s.Synergy Credit Corporation Limited Vs. M/s.Midland Industries Limited & others reported in 2006 SCC OnLine Mad 1225, it is held that merely because the accused had paid the amount, the same will not absolve him from the legally enforceable liability in respect of the portion of the dishonoured cheque amount. In HMT Watches limited Vs. M.A.Abida and another reported in [2015] 11 Supreme Court Cases, the 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 be determined only by the trial Court after recording evidence of the parties. In Sampelly Satyanarayan Rao Vs. India Renewable Energy Development Agency Limited reported in [2016] 10 Supreme Court Cases 458, the Apex Court has held that once the loan was disbursed and the instalments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under section 138 of the Negotiable Instruments Act.

12. In the above case, the Apex Court has also distinguished the judgment of the Single Judge in Indus Airways and the judgment of the Gujarat High Court in Shanku Concretes [P] Ltd. Vs. State of Gujarat reported in 1999 SCC



OnLine Guj 366 and Kerala High Court in Supply House Vs. Ullas reported in 2006 SCC OnLine Ker 533 and the Apex Court has held that when it is agreed to repay the loan within a specific time and issued cheques towards security and the loan instalment falls due on the date of the cheque, the cheque can be presented for encashment. In the judgment in Sampelly Satyanarayan Rao Vs. India Renewable Energy Development Agency Limited the Apex Court has held as follows :

"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].

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."

Hence, the Apex Court considering various other judgments has held that the cheque issued as a security in a loan transaction can be enforced. Though it is stated that undated cheques were issued at the time of sanctioning the loan, it is to be noted that undated cheque will remain as a Bill of Exchange till it is filled. Therefore, when the loan amount or amount payable is due, such cheques are certainly enforceable in the eye of law. Therefore, considering the judgments of the Apex Court and the fact that the liability is also admitted in one of the letter as discussed above, whether or not cheque amount exceeds the liability are the disputed facts and the same can be gone into only during the trial and not in a petition filed under section 482 of Cr.P.C. In such view of this matter, merely there is a dispute with regard to the payment of interest and immovable properties have already been mortgaged and proceedings under the SARFAESI Act has also been initiated, those proceedings is no way relevant to quash the proceedings under section 138 of the Negotiable Instruments Act and this petition filed to quash the proceedings is liable to be dismissed.

13. Accordingly, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petitions are closed. The trial Court is directed to expedite trial and dispose of the case in C.C.No.18 of 2014 within a period of four months from the date of receipt of a copy of this Order.



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14. After pronouncing the Orders, learned Senior Counsel appearing for the petitioners sought indulgence of this Court to dispense with the personal appearance of the petitioners before the trial Court.

15. Accordingly, personal appearance of the petitioners before the trial Court is dispensed with except for examination of the accused, questioning under section 313 Cr.P.C. or any other date that may be fixed by the trial Court and on the date of judgment.

Sd/-

Assistant Registrar (CS-CCC)

//True copy//

Sub Assistant Registrar

vrc

To

The Judicial Magistrate No.V,
Salem.

+2ccs to M/s.Ramalingam Associates, Advocate SR.No.3665

Cr1.O.P.No.16046 of 2017 &
Cr1.M.P.Nos.9925 & 9926 of 2017

CA (CO)
GMY (02/02/2022)