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Crl.O.P.Nos.26751, 26752 & 26758 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.09.2022

DELIVERED ON : 20.10.2022

CORAM:

THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.Nos.26751, 26752 & 26758 of 2018

and

Crl.M.P.Nos.15416, 15415 & 15421 of 2018

R.L.Steels & Energy Ltd.,
Rep by Amit Chaturvedi,
Senior General Manager (Commercial),
Gut No.78 to 81, Pangrashivar,
Paithan Road, Chitegaon,
Aurangabad – 431 107.

... Petitioner/A-1 in
Crl.O.P.No.26751/2018

Narendrakumar Raghunandanlal Gupta,
Director,
R.L.Steels & Energy Ltd.,
58-59, N-1, CIDCO,
Aurangabad – 431003,
Maharashtra.

... Petitioner/A-2 in
Crl.O.P.No.26752/2018

1.Raghunandanlal Gupta
Director,
R.L.Steels & Energy Ltd.,
58-59, N-1, CIDCO,
Aurangabad – 431003,
Maharashtra.



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2.Sunil Todi,

Director,
R.L.Steels & Energy Ltd.,
58-59, N-1, CIDCO,
Aurangabad – 431003,
Maharashtra.

3.Nitin Gupta

Director,
R.L.Steels & Energy Ltd.,
58-59, N-1, CIDCO,
Aurangabad – 431003,
Maharashtra.

4.Pradeep Nijampurkar

Director,
R.L.Steels & Energy Ltd.,
Plot No.60, Jaivishwa Bharti Colony,
Aurangabad - 431 003,
Maharashtra.

5.Shilpa Vijayakumar Sharma

Director,
R.L.Steels & Energy Ltd.,
137, N-1/A, Sector CIDCO,
CIDCO Colony,
Aurangabad – 431003,
Maharashtra.

... Petitioners/A - 3 to 7 in
Crl.O.P.No.26758/2018

Versus

M/s.OPGS Power Gujarat Pvt. Ltd.,
Having its Power Plant at Village Bhadreshwar,
Taluka Mundra, District Kachchh,
Gujarat and
Having its registered office at
No.6, Sardar Patel Road,



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Guindy, Chennai – 600 032
Represented by its S.Swaminathan,
Senior Manager (Accounts)

... Respondent in all Crl.O.Ps.

Common Prayer: Criminal Original Petitions filed under Section 482 of the Code of Criminal Procedure to call for the relevant records relating to private complaint in C.C.No.1698 of 2018 on the file of the Metropolitan Magistrate, (Fast Track Court-III), Saidapet, Chennai and quash the entire proceedings against the petitioners.

For Petitioners : Mr.Pankaj Jain, Senior Counsel
in all Crl.O.Ps. for Mr.Arun Dhanapalan

For Respondent : Mr.Rahul Balaji
in all Crl.O.Ps. For Mr.R.Parthasarathy

COMMON ORDER

These petitions have been filed to quash the complaint against the petitioners/Accused Nos.1 to 7 in C.C.No.1698 of 2018 pending on the file of Metropolitan Magistrate, (Fast Track Court-III), Saidapet, Chennai.

2. The petitioners/Accused Nos.1 to 7, in a criminal complaint filed by the respondent against them for the offence punishable under Section 138 and 141 of the Negotiable Instrument Act pending trial in C.C.No.1698 of 2018 before the learned Metropolitan Magistrate (Fast Track Court-III), Saidapet, Chennai have filed these quash petitions.



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3. Since all the O.Ps. pertain to quashing of common complaint in C.C.No.1698 of 2018, this Court disposes of all the Criminal Original Petitions by way of a common order. For the sake of clarity and brevity, the petitioners are referred to as they are referred as per their rank before the trial Court.

4. The complainant-M/s.OPGS Power Gujarat Pvt. Ltd., who is having its power plant at Bhadreshwar Village, Mundra Taluk, Kutch District in the State of Gujarat and having its registered office at No.6, Sardar Patel Road, Guindy, Chennai – 600 032 has filed this complaint against R.L.Steels & Energy Limited and its Directors, who are Accused Nos.1 to 7 herein. One Chandra Prakash, Director of first accused-company, who is the eighth accused in the complaint had not preferred any quash petition.

5. The gist of the complaint is that the complainant is engaged in the business of generating electricity power. The first accused company represented by the Directors/Accused 2 to 8, had approached the complainant for purchasing electricity and have entered into a Power Supply Agreement



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with the complainant vide agreement dated 24.07.2016. As per the agreement, the complainant has to raise the monthly bills for the power consumed by the first accused company from time to time and the complainant has maintained ledger account in the accused company name with respect to the said agreement in its books of accounts. According to the said agreement, billing will have to be done on the first day of every calendar month for the energy scheduled in total. Any adjustments for over injunction or any other charges will have to be done on the subsequent month billing duly reconciled with the billing done by the state utility. Further, the terms of the said agreement also provides for any delay in payment beyond the due date, a late payment to be charged at the rate of 15% per annum. As per the ledger maintained by the complainant in its books of accounts, a sum of Rs.6,02,91,089/- remains outstanding against the accused-company. As against the total dues of this amount, the second accused on behalf of first accused-company issued a cheque to the complainant bearing No.013287 dated 01.09.2017 for a sum of Rs.1,33,92,000/- drawn on Karur Vysya Bank, Aurangabad Branch towards its part liability. The second accused, who is authorised signatory of the first accused-company had signed the cheque. At the time of issuance of the cheque, the Accused 2 to 8 had promised that they



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are having sufficient funds in their account and the above cheque would be honoured on due presentation. Believing their representation, the complainant presented the cheque with its banker, M/s.Punjab National Bank, Mylapore Branch on 12.09.2017. To their shock and surprise, the cheque was returned by the banker of the accused, namely, M/s.Karur Vysya Bank for the reason “payment stopped by the drawer” and returned to the complainant on 13.09.2017. The complainant thereafter issued a legal notice demanding payment of the amount covered by the above cheque on 26.09.2017. Accused 1 to 5 received the notice and Accused 6 to 8 returned the statutory notice. The accused belatedly sent a reply dated 18.10.2017 informing that the statutory notice was received by them on 04.10.2017. From the reply it was seen that the accused had given incorrect, false particulars and was given only to evade the payment not willing to discharge their legal liability and the accused never settled the above cheque amount. Hence, a complaint was filed before the learned Metropolitan Magistrate (Fast Track Court-III), Saidapet, Chennai. The trial Court after perusal of complaint, documents and sworn statement of the complainant, finding *prima-facie* case has been made out, issued summons to the accused. The accused on the receipt of summons had immediately rushed to this Court and



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obtained interim stay and thereafter the case has been kept pending without any progress from the year 2018 onwards.

6. The contention of the petitioner/A-1 is that the petitioner-R.L.Steels and Energy Limited is a leading Alloy Steel Plant in western part of India. It is specialised in manufacturing of various grade steels i.e. Carbon, Alloy, Spring and Special Steel products in rounds, squares, flats and special profiles with a total capacity of 15000 MT per month. These products are major raw material for Automobile, Engineering and Forging industries. Further, A-1 company exports large quantity to various countries and has successfully implemented requirements of ISO 9001:2000 and accredited by IRQS for the quality standards having excellent technology, infrastructure, highly skilled professionals and competes with the best in steel industry. The major customers of the accused company include Indian defence, Indian Railways, Mahindra, Ashok Leyland, Eicher Motors and other automobile spares manufacturing companies. A mutual understanding arrived between the Director in-charge, namely, N.K.Gupta of the accused company and the Managing Director, namely, Mr.Aravind Gupta of the respondent's company, which is revealed from the e-mail dated 30.04.2016, wherein both the parties



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had agreed to the explicit terms “.....PDC or any instrument just to show bank not for use as informed by Arvind Ji..... prepare MOU or letter of understanding which will be signed by me n arvindji also”. In furtherance to the same on 30.06.2016, A-1 company had issued two post dated cheques signed by its Director, N.K.Gupta, including the cheque in question bearing No.13827 dated 01.09.2017 amounting to Rs.1,33,92,000/- only for security deposit for the energy to be scheduled along with a letter dated 30.06.2016 addressed to the Director of the respondent, wherein, the issuance of cheque for security is also recorded as “.... we are issuing two cheques only for security deposit. To be deposited after getting confirmations only”. This has been acknowledged by the respondent on 04.07.2016. Thereafter, the accused-company and the complainant entered into the Power Supply Agreement (PSA) dated 24.07.2016, whereby the complainant was required to supply electricity as a captive power plant pursuant to the provision of Section 3 of the Electricity Act, 2005 r/w Electricity Rules, 2005 upon payment of consideration to be made by 90 days letter of credit (LOC), which is opened within 7 days from the date of receipt of power bill. This being so, the complainant had filed the above complaint projecting that the accused were due and liable to pay to the complainant a sum of



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Rs.6,02,91,089 and in discharge of the same, the cheque in question for a sum of Rs.1,33,92,000/- was issued. The complainant suppressing the material facts about the issuance of two post dated cheques bearing Nos.013286 and 013287 that these cheques were issued as security deposit as per the Power Supply Agreement and the communications prior to it is now projected a case that the cheques were issued in discharge of liability. In the Power Supply Agreement (PSA), there is no mention about the issuance of cheque. In the Power Supply Agreement, nowhere it is stated that it is a condition precedent that only after issuance of cheque, the power supply would be made. After confirming the same the cheques were issued as security. The complainant is required to supply electricity as a captive power plant pursuant to the provisions of Section 3 of the Electricity Act, 2005 r/w Electricity Rules, 2005 and the complainant having the permission for open access issued by the Maharashtra State Electricity Distribution Company Ltd. (MSEDCL). The formalities of MSEDCL could not be completed till the order dated 09.01.2018 and 09.06.2018 issued by the Appellate Tribunal for Electricity, New Delhi. Hence, the permission for open access is still not available with the complainant and the complainant had falsely induced the accused-company to enter into an agreement suppressing these vital facts.



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The complainant had filed Corporate Insolvency Petition before the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016 with false affidavit and pleading before the NCLT in Form 5, Part V. This petition was ultimately dismissed by NCLT, Delhi (Bench-III) finding the conduct of the complainant in suppressing the vital facts about initiation of proceedings against the accused company. While dismissing the petition of the complainant, NCLT by order dated 03.04.2018 had imposed cost of Rs.1 lakh. The complainant had filed an appeal before the National Company Law Appellate Tribunal, New Delhi and the same was also dismissed on 01.08.2018 confirming the order of NCLT dated 03.04.2018. Further submitted that there is also proceedings pending before the Maharashtra Electricity Regulatory Commission due to the non fulfillment of the statutory obligations under the Electricity Act. The accused-company have been charged additional charges of Cross Subsidy Surcharge to the tune of Rs.48,96,378.10. Suppressing all these facts, the complainant had filed the above complaint. It is to be seen that two cheques were given as security. The complainant had filed one cheque before the learned Judicial Magistrate (Fast Track Court) Mundra, for cheque bearing No.013286 and the present complaint is for cheque No.013287, which would clearly show that this case



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has been filed as harassment. The learned Judicial Magistrate failed to follow the mandatory provision under Section 202 Cr.P.C., no preliminary enquiry was conducted, knowing well that the accused hail from far place, decided the jurisdiction of the Court. Further, the accused had filed a typed set enlisting the email dated 13.04.2016 from N.K.Gupta to the complainant, wherein, the fixation of rate as well as issuance of post dated cheques for the purpose of bank and not to be used in any manner is confirmed. Further, the letter dated 13.06.2016 of the accused-company to the complainant giving details of the cheque with confirmation that the cheques to be used only as security. The order passed by NCLT, wherein the complainant is shown as Operational Creditor and the accused-company is shown as Corporate Debtor before NCLT confirmed that the complainant has filed false affidavit suppressing the vital facts to cause harassment to the accused-company and NCLT by a detailed order dated 03.04.2018, dismissed the petition filed by the complainant. He has also produced the order passed by the Maharashtra Electricity Regulatory Commission in Case No.48 of 2018 dated 18.08.2018 to confirm that there has been dispute with regard to the imposition of Cross Subsidy Surcharge and additional surcharge by the Maharashtra State Electricity Distribution Company Ltd. The complainant failing fulfillment of



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captive eligible criteria is confirmed and there is a dispute with regard to the same. Further, there is also a Civil Suit filed by the accused-company in C.S.No.4590 of 2017 making counter claim for recovery of Rs.19,59,98,528 and the suit is pending before the Commercial Court, Commercial Division and Commercial Appellate Division, Aurangabad, Maharashtra. Complainant has also filed a Civil Suit in C.S.No.236 of 2017 before this Court, which is pending. Further, the specific case of the accused is that the cheque was given only as security and not in discharge of any liability. On the date of issuance of cheque there was no subsisting liability. Further due to complainant's own act of non complying with the eligibility criteria of captive generating plant, ought not to have filed the above case using the security cheque issued by the accused to the complainant. Further various litigations pending before various forum, which has to reach its logical conclusion. Thereafter only liability or otherwise for the cheque can be decided. Hence, prayed for quashing of the complaint.

7. The petitioner/A2 in Crl.O.P.No.26752 of 2018 assailing the same arguments of first accused. Further submitted that the lower Court had proceeded to issue summons dated 25.06.2018 without even requiring the



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complainant to produce reliable documentary evidence to show the debt or other liability, which was subsisting on the date of drawing of the cheque.

Further, the learned Magistrate accepted the allegations made in the complaint and proceeded to issue summons without verification, against the accused-company and other Directors on erroneous, appreciation of facts invoking vicarious liability under Section 141 of the N.I. Act. Further, the learned Magistrate failed to consider the dictum of the Hon'ble Apex Court in the cases of *Pepsi Food Vs. Special Judicial Magistrate* reported in (1998) 5 SCC 749, *State of Haryana Vs. Bhajan Lal* reported in (1992) Supp 1 SCC 335 and *Balaji Sea Food Exports Vs. Mac Industries Ltd.* in *Crl.M.P.No.6854 of 1997*, wherein, the Hon'ble Apex Court and this Court quashed the proceedings under Section 138 N.I. Act holding that an undated cheque given only as security, the provision of Section 138 of the N.I. Act will not get attracted and for the proposition that initiation of criminal complaint is a serious one. The Magistrate ought to have applied its mind before issuance of summons and to the proposition that the case has been filed to spite, vengeance with an ulterior motive. Further, he placed reliance on the judgment in the case of *Indus Airways Pvt. Ltd. and Others Vs. Magnum Aviation Pvt. Ltd.* reported in (2014) 12 SCC 539, wherein the



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Hon'ble Apex Court had held 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. Further relied on the judgment in the case of ***State of Karnataka Vs. L.Muniswamy*** and others reported in ***AIR 1977 SC 1489*** stressing that High Court can quash the proceedings in appropriate cases, if ends of justice required. Further relied on the judgment in the case of ***Madhaorao J. Scindhia Vs. Sambhaji Rao*** reported in ***AIR 1988 SC 709*** for the principle that the dispute involved between the accused and complaint is predominantly civil in nature and that the parties should be given a chance to reach a compromise.

8. The Petitioners/Accused 3 to 7 in Crl.O.P.No.26758 of 2018 assailing the same arguments of A1 and further submitted that these petitioners were not authorised signatories to the cheque. In the complaint except in paragraph 12 making bald allegation that the accused 2 to 8 had approached the complainant for purchasing electricity and entered into Power Supply Agreement, there is no specific overt act averred anywhere in



the complaint. Further, the Power Supply Agreement was not signed by the accused. The company is being managed by a professional executives and these petitioners since hail from the same family or holding shares, have been made as Directors of the first accused company. Other than that they do not take part in the day to day affairs of the first accused company.

9. Learned counsel appearing for the respondent/complainant submitted that the complainant's power plant is located in Bhadreshwar Village, Mudra Taluk, Kutch District in the state of Gujarat. They were approached by the accused during December 2015 and sought for supply of electricity. After some discussions, the terms for supply of electricity was finalised. During the course of such discussion, various emails exchanged between the parties. The email dated 29.04.2016 is one such email, where the complainant mailed to the petitioner, in relation to the terms and conditions to be incorporated in a draft Power Supply Agreement. One of the clause in the draft agreement was with respect to the issuance of cheques for the amount equivalent to the quantum of energy to be scheduled for 45 days. In response to the said e-mail, the petitioner vide email dated 30.04.2016 specified that the post dated cheques are only for the purpose of bank use and



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not for realization by the complainant. The complainant, however, did not agree or consent to the said condition and no confirmation was communicated to the accused-company. Thereafter, the complainant and the accused entered into the Power Supply Agreement dated 24.07.2016, in which, clause (2) of the agreement superseded all previous understanding and documents entered into between the parties. Hence, the Power Supply Agreement is binding on both the parties and no other document, communication or understanding can be relied on by the parties. As per clause 2.5.1 of the said Power Supply Agreement, the accused was required to pay consideration equivalent to the quantum of energy to be consumed for a period of 45 days in advance. In terms of Clause 2.1.2(d) it was agreed between the parties that the total consumption of the accused on a given date will be 192000 KWH. It was further agreed in Clause 2.1.1 that each unit of power at the delivery point would be for Rs.4.65 exclusive of electricity duty and other taxes. Therefore, the consideration as contemplated in the Power Supply Agreement for a period of 45 days is Rs.4,01,76,000/-, i.e. 1,92,000 units x 45 days = 86,40,000 units, 86,40,000 units x Rs.4.65 = Rs.4,01,76,000/-. As per Clause 2.5.1 of Power Supply Agreement, the consideration of Rs.4,01,76,000/- was paid by the petitioner by way of



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cheques, viz., (i) Cheque No.013287 for Rs.1,33,92,000/- and (ii) Cheque No.013286 for Rs.2,67,84,000/- drawn on Karur Vysya Bank. Hence, it is clear that the cheque issued by the accused is for consideration in terms of discussion recorded in Email dated 29.04.2016, which was adopted in the Power Supply Agreement. The complainant never contemplated any cheques as security. After obtaining consent from MSEDCL by completing all the formalities for supplying power, the complainant commenced supply of electricity to the accused from 01.07.2016. The complainant supplied power to the accused without any interruption from July 2016 to September 2016. The complainant raised invoices on the accused for the supply of electricity for the above said period, as per the terms of the Power Supply Agreement. As per the Power Supply Agreement, the complainant was required to raise monthly bills on the first date of every calendar month for the energy consumed in the previous month. The accused was required to clear the monthly bills raised by the complainant within the due date and any supplementary bills by way of Letter of Credit for a period of 90 days. As per the Power Supply Agreement, late payment charges were leviable on the outstanding payments. The accused utilised the power supplied by the complainant and failed to make payments to the complainant. The accused



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failed to issue Letter of Credit as per the requirement and format required by the bank. It is not in dispute that accused made any payment for utilisation and consumption of electricity, generated and transmitted by the complainant. Further the accused failed to discharge its liability under the Power Supply Agreement, despite several requests and reminders from the complainant. As per the ledger maintained by the complainant, a sum of Rs.6,02,91,089/- was due and payable by the accused for the electricity supplied by the complainant from July 2016 to September 2016. The complainant had raised invoices, viz., (i) Invoice dated 27.08.2016 for Rs.1,66,48,028/-, (ii) Invoice dated 01.09.2016 for Rs.2,17,24,875/- and (iii) Invoice dated 01.10.2016 for Rs.2,19,18,186/-. To discharge part liability a cheque No.013287 dated 01.09.2017 for Rs.1,33,92,000/- issued, utilised, deposited with their banker, Punjab National Bank, Mylapore Branch on 12.09.2017. Thereafter they came to know that stop payment instruction was issued by the accused. Thereafter following the statutory conditions complaint was filed. The complainant also initiated proceedings under Section 9 of the Insolvency and Bankruptcy Code, 2016, after issuing a demand notice dated 12.09.2017 to the accused company. The accused to evade its liability under the Power Supply Agreement, raised a debit note for



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alleged losses due to non supply of power by the complainant company. The accused filed a civil suit in RCS No.15 of 2017 before the District Court, Aurangabad making allegation as though there was non supply of electricity. This has been defended by the complainant appropriately. The complainant also filed a civil suit in C.S.No.236 of 2019 before this Court and the same is pending. The accused to avoid and evade payment now takes a stand that the cheque pertaining to the above case is only a security cheque. It is admitted by the accused that two cheques were issued by them viz., (i) Cheque No.013287 for Rs.1,33,92,000/- and (ii) Cheque No.013286 for Rs.2,67,84,000/- drawn on Karur Vysya Bank, of which, Cheque No.013286 was deposited with the complainant bank at Gujarat and the same got dishonoured and a private complaint was filed by the complainant under Section 138 of N.I. Act before the learned Judicial Magistrate First Class, Mundra Kutch. Against which, the accused had filed a quash application in Special Criminal Application No.9754 of 2017. The learned Single Judge, High Court of Gujarat had dismissed the petition. Against which, one of the accused, namely, Sunil Todi/A-4 filed an appeal before the Hon'ble Apex Court in Crl.A.No.1446 of 2021. In the appeal, the Hon'ble Apex Court had framed the following issues:



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(i) Whether the dishonor of a cheque furnished as a 'security' is covered under the provisions of Section 138 of the N.I. Act;

(ii) Whether the Magistrate, in view of Section 202 Cr.P.C., ought to have postponed the issuance of process; and

(iii) Whether a prima facie case of vacarious liability is made out against the appellants.

Framing these issues, considering all the points raised by the accused, the Hon'ble Apex Court by judgment dated 03.12.2021, dismissed the appeal filed by the accused. He further submitted that the points raised herein are almost identical to the points raised before the Gujarat High Court and before the Hon'ble Apex Court. The Hon'ble Apex Court order is self explanatory. The complainant filing a petition as Operational Creditor before the NCLT and the accused, filing a petition before the Maharashtra Electricity Regulatory Commission, both considered by the Apex Court and finally dismissed the contention of the accused and directed the accused to face the trial before the Trial Court. Further he submitted that the complainant's company is now named as M/s.Bhadreshwar Vidyur Private Limited. He submitted that in view of Hon'ble Apex Court already dismissed the accused contention nothing survives in the above petition. Hence, on the same principle this petition to be dismissed.



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10. Heard the learned counsel appearing on either side and perused the materials available on record.

11. It is seen that the primary contention of the petitioner/accused is that two cheques were issued as security to the complainant and of which, one cheque was presented in Gujarat and the other cheque presented in Chennai. With regard to the dishonour of the cheque in Chennai, above case has been filed. It is seen that the petitioner had taken identical stand, for the cheque presented in Gujarat. Gujarat High Court dismissed the contention of the petitioner, against which, one of the accused preferred an appeal before the Hon'ble Apex Court. The Hon'ble Apex Court by its order dated 03.12.2021 in Crl.A.No.1446 of 2021, considered the petitioners contention in detail, the issue for consideration therein was (i) Whether the dishonor of a cheque furnished as a 'security' is covered under the provisions of Section 138 of the N.I. Act; (ii) Whether the Magistrate, in view of Section 202 Cr.P.C., ought to have postponed the issuance of process; and (iii) Whether a prima facie case of vicarious liability is made out against the appellants.



12. The primary contention of the accused therein is that the cheques were given as security and placed heavy reliance on the judgment of the Hon'ble Apex Court in the case of ***Indus Airways Private Limited vs. Magnum Aviation Private Limited*** reported in ***(2014) 12 SCC 539***. The relevant paragraph is extracted below:

“9. 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 a 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 an 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 existing 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.”

13. Further referred to the judgment of ***Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Limited*** reported in ***(2016) 10 SCC 458***, wherein the decision in ***Indus Airways*** was considered.



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In the case of **Sampelly**, the Hon'ble Apex Court held, after advertng to the decision in **Indus Airways** that if on the date of the cheque, a liability or debt exists or the amount has become enforceable, Section 138 would stand attracted and not otherwise. The decision in **Indus Airways** was distinguished in **Sampelly** on the ground that in that case, the cheque had not been issued for discharge of a liability but as advance for a purchase order which was cancelled. Further, they had also referred to the decision in **HMT Watches vs. MA Habida** reported in **(2015) 11 SCC 776**, wherein, it was held as follows:

“10. 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 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties.”

14. The Apex Court in the recent judgment in the case of **Sripati Singh Vs. State of Jharkhand** reported in **(2021) SCC Online SC 1002**, wherein, the Apex Court after considering and advertng to the earlier



decision of **Indus Airways** and the distinguishing features which were noticed in the decision in **Sampelly**. The Court observed as follows:

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

Moreover, as the Court explained:

"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



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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."

15. Further it detailed “debt or any other liability” by referring to the case of **Keshoram Industries vs. CWT** reported in **AIR 1966 SC 1370** and the decision of the Full Bench of the Calcutta High Court in **Banchharam Majumdar vs. Adyanath Bhattacharjee** reported in **(1909) ILR 36 Cal 936**. Further referred to the judgment of the Hon'ble Supreme Court of California in **People vs. Arguello** reported in **1869 37 Calif 524**. The relevant paragraph is extracted below:



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"Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: solvendum in praesenti and solvendum in future... A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt or does not become a debt until the contingency has happened."

16. Thus the Apex Court in an unequal terms had held that the issue to be determined with regard to cheque is whether Section 138 only covers a situation where there is an outstanding debt at the time of the drawing of the cheque or includes drawing of the cheque for a debt that is incurred before the cheque is encashed and also held that the purpose of the provision would become otiose if the provision is interpreted to exclude cases where debt is incurred after the drawing of the cheque but before its encashment. Further held that the true purpose of Section 138 would not be fulfilled, if “debt or other liability” is interpreted to include only a debt that exists as on the date of drawing of the cheque. Further, the expression “or other liability” has a content which is broader than a debt, which cannot be equated with the latter. The issuance of the cheque in the context of a commercial transaction must



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be understood in the context of the business dealings. Merely labelling the cheque as a security would not obviate its character as an instrument designed to meet a legally enforceable debt or liability, once the supply of power has been provided for which there were monies due and payable. There is no inflexible rule which precludes the drawee of a cheque issued as security from presenting it for payment in terms of the contract. It all depends on whether a legally enforceable debt or liability has arisen. Further, referred to the decision of two judge Bench of Apex Court in ***M/s.Womb Laboratories Pvt. Ltd. vs. Vijay Ahuja*** in ***Crl.A.Nos.1382 & 1383 of 2019*** dated 11.09.2019, wherein, it was observed as follows:

"5. In our opinion, the High Court has muddled the entire issue. The averment in the complaint does indicate that the signed cheques were handed over by the accused to the complainant. The cheques were given by way of security, is a matter of defence. Further, it was not for the discharge of any debt or any liability is also a matter of defence. The relevant facts to countenance the defence will have to be proved - that such security could not be treated as debt or other liability of the accused. That would be a triable issue. We say so because, handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques."



17. Thus, holding that whether the cheques were given by way of security is a matter of defence. The Apex Court had further observed that the legal requirement which Section 138 embodies is that a cheque must be drawn by a person for payment of money to another “for the discharge, in whole or in part, of any debt or other liability”. A cheque may be issued to facilitate a commercial transaction between the parties. Where acting upon the underlying purpose, a commercial arrangement between the parties has fructified, as in the present case by the supply of electricity under a Power Supply Agreement, the presentation of the cheque and the failure of the buyer to pay is a consequence, which would be within the contemplation of the drawer. The cheque, in other words, would in such an instance mature for presentation and in substance and in effect is towards a legally enforceable debt or liability. Thus the contention of the complainant that the supply of electricity during the period from July 2016 to September 2016 is not in dispute and it is apparent by records, the supply has been made through Maharashtra State Electricity Distribution Company Ltd. The only dispute as regards the accused is that due to the complainant failing to fulfill the captive eligibility criteria, a Cross Subsidy Surcharge and additional surcharge were imposed. It is never been seriously disputed by the accused that there was no



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supply of electricity. May be there could be some disputes with regard to the quantum and surcharges and after availing the electricity generated by the complainant there is no reason for the accused to withhold the payment and discharge its liability towards the complainant. As regards the submission with regard to Section 202 Cr.P.C., again the Hon'ble Apex Court had gone in detail and held that the purpose of postponing the issuance of process for the purpose of an enquiry or an investigation is to determine whether or not there is sufficient ground for proceeding. However, it is mandatory for the Magistrate to do so in a case where the accused is residing at a place beyond the area in which the Magistrate exercises jurisdiction. Further observing the rationale for the amendment by Act 25 of 2005 that false complaints are filed against persons residing at far off places as an instrument of harassment which had been referred in detail in the case of ***Vijay Dhanuka vs. Najima Mamtaj*** reported in ***(2014) 14 SCC 638*** and referring to the judgment in ***Mehmood UI Rehman vs. Khazir Mohammad Tunda*** reported in ***(2015) 12 SCC 420*** and ***Pepsi Foods Ltd. vs. Special Judicial Magistrate*** reported in ***(1998) 5 SCC 749*** and in the case of ***Abhijit Pawar vs. Hemant Madhukar Nimbalkar*** reported in ***(2017) 3 SCC 528***. In the case of ***Birla Corporation Ltd. vs. Adventz Investments and Holdings*** reported in ***(2019) 16 SCC 610***,



the Court held as follows:

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"33. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to the accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint, in Mehmood UI Rehman [Mehmood UI Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420: (2016) 1 SCC (Cri) 124]..."

18. This principle has been reiterated recently in the case of ***Krishna Lal Chawla vs. State of U.P.*** reported in **(2021) 5 SCC 435**. In that backdrop, the Hon'ble Apex Court referring to the Constitution Bench in **Re: Expeditious Trial of Cases under Section 138 of N.I. Act 1881 in Suo Motu Writ Petition (Crl) No.2 of 2020** dated 16.04.2021, wherein it was held that there was a divergence of view between the various High Courts that some High Courts held that it was mandatory for the Magistrate to conduct an enquiry under Section 202 Cr.P.C. before issuing process in complaints filed under Section 138. Finally, the Apex Court had held that Section 145 of the N.I. Act provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in an enquiry, trial



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or other proceeding notwithstanding anything contained in the Cr.P.C. and further observed that if the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. Consequently, it was held that Section 202 (2) Cr.P.C. is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. Further, the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202. The Apex Court had held against the accused holding that they have to take recourse during trial and finally held that the principal grounds of challenge which have been set up on behalf of the accused are all matters of defence at the trial. Further, it had not disturbed the quashing of the case against the nominee Director, who was not in-charge of the day-to-day management of the company and by a woman non Executive Director.

19. Considering the fact and circumstances of the case and following the decisions of the Hon'ble Apex Court, this Court is not inclined to entertain these petitions. Finding that the trial has been kept pending from the year 2018 without any progress, the trial Court is directed to give preference to this case and complete the trial without any further delay.



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20. As far as Accused No.7 is concerned, there is no specific averments made against her. Being the only woman Director, the complaint in C.C.No.1698 of 2018 on the file of the learned Metropolitan Magistrate (Fast Track Court-III), Saidapet, Chennai is hereby quashed against the Accused No.7 alone. As far as the other Accused, viz., Accused Nos.1 to 6 are concerned, these Criminal Original Petitions are dismissed. Consequently, connected miscellaneous petitions are closed.

20.10.2022

Index: Yes/No
Internet: Yes/No
rsi



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To

- 1.The Metropolitan Magistrate, (Fast Track Court-III),
Saidapet, Chennai.
- 2.The Public Prosecutor,
High Court, Madras.



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M.NIRMAL KUMAR, J.

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**Pre-delivery common order in
Crl.O.P.Nos.26751, 26752 & 26758 of 2018**

20.10.2022