Ghuge

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.3937 OF 2021

M/s. Shirdi Industries Ltd and Ors … Petitioners
V/s.
State of Maharashtra and Anr … Respondents

Mr. P.D. Patil with Mr. Rajan Dwivedi i/b Dwivedi Law Co. for the petitioners.

Mr. Ashwin Shete with Abhay Dhadiwal with Priyank Daga i/b Jayakar & Partners for respondent No.2.

Mr. Arfan Sait APP/respondent No.1 for the State.

CORAM : AMIT BORKAR, J.

DATED : APRIL 20, 2023

P.C.:

1. The petition is directed against the order of issuance of process in a proceeding under Section 138 of the Negotiable Instruments Act, 1881.

2. The contentions raised on behalf of the petitioner to challenge issuance of process is to the effect that the cheques in question were issued as a security. On the date of deposit of cheque substantial payment were made by the petitioner and, therefore, the security cheques needed to be returned by the complainant. However, by misusing the same the complainant present with the banker and the cheques were dishonored.

3. The position of law as regards cheques issued as a security has been crystallized. The recent judgment on the point is in the case of **Sunil Todi and Ors Vs. State of Gujrat and Another,** reported in 2021 SCC OnLine 1174 the Apex Court in the paragraph Nos. 30, 31 and 32 has held as under :-

> **30.** Thus, the term debt also includes a sum of money promised to be paid on a future day by reason of a present obligation. A post-dated cheque issued after the debt has been incurred would be covered by the definition of 'debt'. However, if the sum payable depends on a contigent event, ten it takes the color of a debt only *after* the contingency has occurred. Therefore, in the present case, a debt was incurred after the second respondent began supply of power for which payment was not made because of the non-acceptance of Lcs'. The issue to be determined is whether Section 138 only covers a situation where there is an outstanding debt at the time of the drawing the cheque or includes drawing of a cheque for a debt that is incurred before the cheque is encashed.
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> **31.** The object of NI Act is to enhance the acceptability of cheques and inculcate faith in the efficiency of negotiable instruments for transaction of business. 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. In *Indus Airways,* advance payments were made but since the purchase agreement was cancelled, there was no occasion of incurring any debt. The true purpose of Section 138 would not fulfilled, if 'debt or other liability' is interpreted to include only a debt that exists as on the date of drawing of the cheque. Moreover, Parliament has used the expression 'debt or liability'. The expression "or other liability" must have a meeting of its own, the legislature having used two distinct phrases. The expression 'or other liability' has a content which is broader than 'a debt' and cannot be equated with the latter. In the present case, the cheque was issued in close proximity with the commencement of power supply. The issuance of the cheque in the context of a commercial transaction must be understood in the context of the business dealings. The issuance of the cheque was followed

> close on its heels by the supply of power. To hold that the cheque ws not issued in the context of a liability which was being assumed by the company to pay for the dues towards power supplied would be to produce an outcome at odds with the business dealings. If the company were to fail to provide a satisfactory LC and yet consume power, the cheques were capable of being presented for the purpose of meeting of outstanding dues.
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> **32.** According to the complainant, the Lcs' were not in a format agreed to by their bankers. The cheques which were initially towards security could not have been presented before the payments under the PSA fell due. Moreover, if the company were to discharge its liability to pay the outstanding dues under the power supply agreement through the agreed modality of an LC to the satisfaction of the second respondent's bankers, there would be no occasion to present the cheque thereafter. In other words, once payments for electricity supply became due in terms of the PSA and the company failed to discharged dues, the second respondent was entitled in law to present the cheque for payment. Merely labeling 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 had been provided for which there were monies due and payable. <u>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.</u>

4. Hence, issuance of cheques as a security by itself is not sufficient to dismiss the complaint under Section 138 of the Negotiable Instruments Act, 1881 if the complainant proves that on the date of offence, the cheque amount was the regally recoverable liability. The question as to whether on the date of offence the cheque amount was legally recoverable liability needs to be adjudicated during the trial. At the stage of issuance of process, considering the scope of judicial review, this Court will have to accept the averments in the complaint as true to proceed against the accused. At this stage truth or otherwise all the allegations need not be considered.

5. Learned advocate for the petitioner, submitted that the account extract produced by the accused shows that substantial payment was made. The account extract produced by the accused is not incontrovertible document therefore, such document or any other document to show part payment of the cheques needs to be proved during the trial, at this stage such document cannot be considered. No other submissions is made. There is no merit in the petition. The writ petition stands dismissed. No costs.

(AMIT BORKAR, J.)