IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-10830-2019 (O&M)
Date of decision : 29.08.2023

CHAMAN LAL

... Petitioner(s)

Versus

CAPITAL FIRST LIMITED

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Swaran Tiwana, Advocate
for the petitioner(s).

Mr. D.K.Singla, Advocate and
Mr. Rahul Garg, Advocate
for the respondent.

JASJIT SINGH BEDI, J.

CRM-24460-2019

The present application has been filed by the applicant-respondent for substituting the applicant i.e. Kotak Mahindra Bank Ltd., registered office at 27, BKC, C-27, G Block, Bandra Kurla Complex, Bandra (E) Mumbai in place of the respondent herein.

Allowed as prayed for subject to all just exceptions.

CRM-M-10830-2019

The prayer in the present petition under Section 482 Cr.P.C. is for quashing of the complaint No.COM/15735/2014 dated 17.12.2014 titled as “Capital First Limited Vs. Jatin Ispath Pvt. Ltd. & others” under Section 138 of the Negotiable Instruments Act and the order dated 27.11.2015 passed by the JMIC, Ludhiana (Annexure P-2) whereby the petitioner and his co-accused have been summoned to face trial under the provisions of the Negotiable Instruments Act.

2. The brief facts of the case as emanating from the pleadings are that the petitioner-Chaman Lal along with his co-accused Usha Rani and Puneet Tuteja, the Directors of Jatin Ispat Pvt. Ltd. approached the Capital First Limited for the grant of loan against property vide loan application dated 27.12.2013. Accordingly, the Capital First Limited had sanctioned the loan vide sanction letter dated 27.01.2014 and agreed to grant an amount of Rs.2,65,70,103/- to the borrowers including the present petitioner. The said loan along with the accrued interest was to be repaid in 240 monthly instalments out of which a monthly instalment of Rs.1,60,451/- was to be paid from 05.03.2014 to 05.02.2019 and a monthly instalment of Rs.3,42,557/- was to be paid from 05.03.2019 to 05.02.2034. The loan application and the loan agreement dated 27.12.2013 and 03.01.2014 are annexed as Annexures R-1 (colly) and R-2 respectively.

3. In discharge of their liability, the accused issued an Electronic Clearing Service (hereinafter called "ECS") mandate in favour of the Capital First Limited whereby the petitioner along with the other co-borrowers undertook to make the payment of Equated Monthly Instalments (hereinafter called "EMIs") through ECS but the same was returned by the bankers by stating 'invalid account number'. Thereafter, when the Capital First Limited approached the borrowers and asked about the same, the borrowers are stated to have asked Capital First Limited to present the security cheque No.806978 dated 04.08.2014

amounting to Rs.66,42,526/- in order to clear the dues. However, the said cheque was returned back by the banker of Capital First Limited being dishonoured. Proceedings under Section 138 NI Act were initiated.

4. Thereafter, the petitioner along with the co-borrowers Usha Rani and Puneet Tuteja are stated to have approached the respondent/complainant to present the security Cheque No.000001 dated 04.10.2014 for a sum of Rs.2,65,70,103/- drawn on the Kotak Mahindra Bank, Ludhiana so as to clear the outstanding dues. On presentation of the cheque, the same was returned back with the endorsement "Insufficient Funds" vide return cheque memo dated 07.10.2014.

5. Thereafter, a legal notice dated 31.10.2014 was sent to the petitioner, co-borrowers Usha Rani, Puneet Tuteja and the company Jatin Ispat Pvt. on 03.11.2014. Despite receipt of the notice, the petitioner, his co-borrowers and the company failed to make a payment of the amount of the cheque within the stipulated period leading to the filing of the complaint under Section 138 of the Negotiable Instruments Act on 17.12.2014. A copy of the complaint is attached as Annexure P-1 to the petition.

Based on the aforementioned, complaint, the summoning order was passed on 27.11.2015 vide order Annexure P-2.

The complaint dated 17.12.2014 (Annexure P-1) and the summoning order dated 27.11.2015 (Annexure P-2) are under challenge in the present petition.

6. Meanwhile, as per Clause 12(b) of the Mortgage Loan Agreement dated 03.01.2014 (Annexure R-2 hereinafter known as the

MLA) Capital First Limited vide deed of assignment dated 21.07.2016 assigned the entire debt/amount payable by the petitioner and the other co-borrowers in respect of the said credit/financial assistance granted along with the underlying security and security interest in respect of the mortgaged property in favour of the Kotak Mahindra Bank Ltd. Intimation is stated to have been sent to the petitioner-Chaman Lal and all other co-borrowers about the said assignment by Capital First Limited vide letter dated 08.02.2016 and also by the Kotak Mahindra Bank vide intimation letter dated 09.02.2016. Thus, Kotak Mahindra Bank stepped into the shoes of Capital First Limited and became a lender of financial assets in place of Capital First Limited. The assignment deed dated 21.07.2016 and the intimation letters dated 08.02.2016 and 09.02.2016 are attached as Annexures R-3, R-4 and R-5 respectively to the petition.

An application dated 27.09.2017 was also filed by the Kotak Mahindra Bank before the Court of Vijay Singh, Ld. JMIC, Ludhiana seeking substitution in place of Captial First Limited so that the said Bank would continue with the proceedings of the complaint against the accused. The same was also allowed by the Magistrate vide order dated 21.10.2017. The application dated 27.09.2017 and the order dated 21.10.2017 are annexed as Annexures A-1 and A-3 along with an application for substitution which has been allowed.

Thereafter, the instant petition came to be filed.

7. The learned counsel for the petitioner contends that a ‘security cheque’ which has been presented for encashment and came to

be dishonoured leading to the filing of the instant complaint cannot be said to have been issued in the discharge of a legal enforceable debt. No notice had been issued by the lender before the security cheque was presented for encashment. Since a substantial amount of money had been repaid, the security cheques could not have been presented for encashment. The lender could have sold the mortgaged property under the provisions of the SARFAESI Act and recovered the loan amount. There was no need to deposit the security cheque and institute proceedings under the Negotiable Instruments Act. In fact, in October, 2018, the mortgaged property had been repossessed and subsequently sold. He, therefore, contends that the instant complaint and summoning order were liable to be quashed. To substantiate his arguments, he placed reliance on the judgments in ***Matheson Bonsaquet Enterprises Ltd. Versus K.V. Manjunatha, 2010(5) R.C.R. (Criminal) 656*** and ***Sami Labs Limited Versus M.V. Joseph, 2019 ACD 290.***

8. The learned counsel for respondent No.2-Kotak Mahindra Bank, on the other hand, contends that as the borrowers had defaulted in making the payment of the instalments in terms of Clause 7 of the MLA, the entire loan was recalled in terms of Clause 8 of the MLA. In that scenario, the accused/borrowers had asked the lender to present the two security cheques for encashment so as to repay the dues. However, both had come to be dishonoured. He contends that an initial security cheque becomes one issued in the discharge of a legally enforceable debt once an amount becomes due and the borrower refuses to pay the said amount due under the loan agreement. In the instant case, as the borrower was

repeatedly defaulting in making payments of the instalment amounts, the loan was recalled leading to the presentation of the security cheque for encashment on the asking of the accused. He further contends that the averments in the petition that a substantial amount had been paid by the accused towards the instalments is absolutely incorrect. In fact, the borrowers had only paid a sum of Rs.4,81,353/- because of which on the default in repayment of the monthly instalments, the loan was recalled. In that situation, the security cheque for amount of Rs.2,65,70,103/- was presented for encashment only as part-payment of the total debt to be recovered which would include interest and other charges over and above the principal amount of Rs.2,65,70,103/-. Therefore, merely because a paltry amount of Rs.4,81,353/- had been paid by the borrower did not preclude the complainant/lender from presenting the security cheque for encashment. He contends that the conduct of the petitioner can be seen from the fact that despite knowing that the loan had been assigned to the Kotak Mahindra Bank, he had deliberately chosen not to make the said Bank a party respondent and it was only the original lender i.e. Capital First Limited which has been made a respondent. In order to buttress his arguments, he placed reliance on the judgments in ***Sampelly Satyanarayana Rao Versus Indian Renewable Energy Development Agency Ltd., 2016(4) R.C.R. (Criminal) 385***, ***Sripati Singh (since deceased) through his son Gaurav Singh Versus The State of Jharkhand & another, 2021(4) R.C.R. (Criminal) 620*** and ***Sunil Todi & others Versus State of Gujarat & another, 2022(1) R.C.R. (Criminal) 395.***

9. I have heard the learned counsel for the parties at length.

10. Before proceeding further it would be pertinent to examine the judgments cited by the parties.

In ***Matheson Bonsaquet Enterprises Ltd. Versus K.V. Manjunatha, 2010(5) R.C.R. (Criminal) 656***, it was held as under:-

> *" 6. As against the above contention, the learned Counsel for the respondent- accused strongly contended as under :*
>
> *(i) The complainant-company has not whispered anything in its complaint as to the transactions between itself and the accused in respect of the said quarry. The evidence of P.W. 1 in his examination-in-chief is totally contrary to the averments in the complaint. Besides this, P.W. 1 has clearly admitted in his cross-examination that the said two cheques were issued by the accused to the complainant-company as security towards discharge of his obligation of quarrying or extracting granite blocks belonging to the complainant and therefore, the trial Court was quite justified in dismissing the complaint and acquitting the accused based on the said evidence.*
>
> *(ii) The complainant miserably failed to establish that there was any existing debt as on the dates of the said two cheques and therefore, the trial Court has rightly acquitted the accused of the said offence."*
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> *** ***
>
> *18. If a cheque is issued by the borrower to the lender admittedly towards discharge of any existing debt or liability, the same can be presented to the Bank by the lender without any intimation to the borrower. But, where a cheque is taken by the lender from the*

borrower 'as security' towards repayment of the loan advanced by the former to the latter such cheque cannot be said to have been issued by the borrower to the lender towards discharge of the existing debt unless there is any agreement between the lender and the borrower that in the event of failure on the part of the borrower to repay the loan amount on or before a specified date, the lender would be entitled to present the said cheque to the Bank for its encashment. In the absence of such an agreement, in order to enforce the liability of the borrower to repay the loan amount, the lender has to demand the repayment of the loan from the borrower by issuing him a notice in writing or by making oral demand, duly intimating the borrower that if the loan amount, towards repayment of which the cheque was given by him (borrower) to the lender as security, is not repaid as agreed, the said cheque will be encashed by him (lender) by presenting it to the Bank. If the borrower does not repay the loan amount to the lender despite such demand being made against him by the lender, then only the lender would become entitled to present the said cheque to the Bank for its encashment. Further, if the said cheque is not honoured for want of funds in the account of the borrower or for any such other valid reason, and if the borrower further fails to comply with the statutory notice issued to him by the lender pursuant to dishonour of the said cheque, cause of action would accrue to the lender to prosecute the borrower for the offence under Section 138 of the Neotiable Instruments Act. The lender has to establish beyond reasonable doubt, all these facts, in order to bring home the guilt of the borrower for the said offence.

19. Similarly where a cheque is issued by one of the parties to an agreement to the other party, as security towards performance of his part of the agreement with an understanding that in the event of failure on the part of the party issuing cheque to perform his part of the agreement on or before a specified date, the other party would get the right to get the said cheque encashed by presenting it to the Bank, on the default being committed by the party issuing cheque in performing his part of the agreement within the specified date, the other party may present the said cheque the Bank for its encashment. If such cheque is returned dishonoured by the Bank to the drawee by reason of 'insufficiency of funds' in the account of the drawer or for any such other valid reason and, the drawer fails to comply with the statutory notice issued to him by the drawee pursuant to such dishonour, then only the cause of action would accrue to the drawee (i.e., the party who received the cheque) to prosecute the party who issued the cheque, for the offence under Section 138 of the Neotiable Instruments Act. In such a case also, the complainant (the party receiving such cheque) has to establish beyond reasonable doubt all these facts, in order to bring home guilt of the party issuing the cheque (accused) for the said offence. It is pertinent to note that as could be seen from the averments in the complaint, it is not the case of the complainant that the accused issued the said cheques 'as security' towards performance of his part of the agreement and he failed to perform it and therefore he presented the said cheques to the Bank in exercise of his right under the agreement to get the said cheques encashed. On the other hand it is the specific case of the complainant, as averred in the complaint, that the accused issued both *the cheques in question towards repayment of loan. It is the settled principle that in a criminal case, the complainant has to prove, beyond reasonable doubt, his case against the accused 'as alleged in his complaint' but not a case which is contrary to the one alleged in the complaint.*

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22. In view of my foregoing discussion, I am of the considered view that both the said cheques were not issued by the accused either towards repayment, or as a security for the repayment, of any debt but they were issued as security for the performance of his part of contract entered into between himself and the complainant under the memorandum of understanding (Ex. D. 1) i.e., excavation of the granite blocks for and on behalf of the complainant- company at the cost of Rs. 1,40,000/-. Further, it is not the case of the complainant as averred in the complaint that the accused committed breach of contract and as such the complainant acquired, as per the terms of the said memorandum of understanding, right against the accused to get the said cheques encashed and therefore the complainant presented the same to the Bank for their encashment. Therefore, following the observations of Hon'ble Supreme Court in the case of M.S. Narayana Menon @ Mani, I hold that no offence under Section 138 of the Neotiable Instruments Act was committed by the respondent-accused and as such, the trial Court did not commit any illegality in acquitting him of the said offence.

(emphasis supplied)

In ***__Sami Labs Limited Versus M.V. Joseph, 2019 ACD 290__***, held as under:-

> *"23. In the instant case, when the housing loan disbursed to the accused in full, was a sum of Rs. 5,00,000/- and since it is established that a portion of it has already been repaid by the accused or has already been recovered by the complainant company from out of the salary of the accused, then the total outstanding liability would be any sum lesser than the cheque amount. Thus, when any sum issued in the cheque is for an higher amount than the outstanding liability and if that excess amount is also not towards any interest, cost, penalty etc., but remains unexplained, then Section 138 of the N. I. Act cannot be said to be applicable.*

(emphasis supplied)

The Hon'ble Supreme Court in ***__Sampelly Satyanarayana Rao Versus Indian Renewable Energy Development Agency Ltd., 2016(4) R.C.R. (Criminal) 385__***, held as under:-

> *"11. Reference to the facts of the present case clearly shows that though the word "security" is used in clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of instalments. The repayment becomes due under the agreement, the moment the loan is advanced and the instalment falls due. It is undisputed that the loan was duly disbursed on 28th February, 2002 which was prior to the date of the cheques. Once the loan was disbursed and 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 Act. The cheques undoubtedly represent the outstanding liability.

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16. We are in respectful agreement with the above observations. In the present case, reference to the complaint (a copy of which is Annexures P-7) shows that as per the case of the complainant, the cheques which were subject matter of the said complaint were towards the partial repayment of the dues under the loan agreement (para 5 of the complaint).

17. As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

18. In Rangappa v. Sri Mohan, 2010(3) RCR (Criminal) 164 : 2010(3) RCR (Civil) 197 : 2010(3) Recent Apex Judgments (R.A.J.) 415 : (2010) 11 SCC 441 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 recognised mode of payment Goaplast (P) Ltd. v. Chico Ursula D' Souza 2003(2) RCR (Criminal) 131 : (2003) 3 SCC 232.

19. 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.*

20. Accordingly, we do not find any merit in this appeal and the same is dismissed. Since we have only gone into the question whether on admitted facts, case for quashing has not been made out, the appellant will be at liberty to contest the matter in trial court in accordance with law.

(emphasis supplied)

In ***Sripati Singh (since deceased) through his son Gaurav Singh Versus The State of Jharkhand & another, 2021(4) R.C.R. (Criminal) 620*** , held as under:-

"9. In the light of the rival contentions, a perusal of the appeal papers would disclose that it is the very case of the appellant that he has advanced substantial amount of Rs. 2 crores to the respondent No.2 by way of financial assistance for business purpose. While taking note of the nature of the transaction and also the proceedings initiated, it is necessary for us to remain conscious of the fact that the proceedings between the parties is at the preliminary stage and any conclusive findings rendered in relation to the dispute between the parties would affect their case if ultimately the appellants were to succeed herein and the criminal proceedings are to be restored for further progress. Therefore, what is necessary to be examined herein is, as to whether the appellant has prima facie established a transaction under which there is a legally recoverable debt payable to the appellant by the respondent No.2 and as to whether the cheques in question relating to which the complaint has been filed by the appellant is issued towards discharge of such legally recoverable debt. In that regard, what is necessary to be considered is also as to whether the cheques in question are still to be considered only as `security' for the said

amount and whether it was not liable to be presented for recovery of the legally recoverable debt. The question which would also arise for consideration is as to whether the complaint filed by the appellant should be limited to a proceeding under section 138 of N.I. Act or on the facts involved, whether the invoking of Section 420 IPC was also justified.

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12. Having arrived at the above conclusion and also having taken note of the conclusion reached by the High Court as extracted above, it is noted that the High Court has itself arrived at the conclusion that the instant case becomes a simpliciter case of nonrefunding of loan which cannot be a basis for initiating criminal proceedings. The conclusion to the extent of holding that it would not constitute an offence of cheating, as already indicated above would be justified. However, when the High Court itself has accepted the fact that it is a case of nonrefunding of the loan amount, the first aspect that there is a legally recoverable debt from the respondent No.2 to the appellant is primafacie established. The only question that therefore needs consideration at our hands is as to whether the contention putforth on behalf of respondent No.2 that an offence under section 138 of the N.I. Act is not made out as the dishonourment alleged is of the cheques which were issued by way of `security' and not towards discharge of any debt.

13. In order to consider this aspect of the matter we have at the outset taken note of the four loan agreements dated 13.08.2014 which is the subject matter herein. Under each of the agreements, the promise made by respondent No.2 is to pay the appellant a sum of Rs.50 lakhs. Thus, the total of which would amount to Rs.2 crores as contended by the appellant. Towards the promise to pay, *the repayment agreed by the respondent No.2 is to clear the total amount within June/July 2015. Para 5 of the loan agreement indicates that six cheques have been issued as security. The claim of the appellant has been negated by the High Court only due to the fact that the agreement indicates that the cheques have been given by way of security and the complainant has also stated this fact in the complaint. Though the High Court has taken note of the decision in the case of Sudhir Kumar Bhalla (supra) to hold that the cheque issued as security cannot constitute an offence, the same in our opinion does not come to the aid of the respondent No.2. There is no categorical declaration by this Court in the said case that the cheque issued as security cannot be presented for realisation under all circumstances. The facts in the said case relate to the cheques being issued and there being alterations made in the cheques towards which there was also a counter complaint filed by the drawer of the cheque. Hence, the said decision cannot be a precedent to answer the position in this case and the High Court was not justified in placing reliance on the same.*

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

17. 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.*

18. 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.

19. In the background of the factual and legal position taken note supra, in the instant facts, the appellant cannot be nonsuited for proceeding with the complaint filed under section 138 of N.I. Act merely due to the fact that the cheques presented and dishonoured are shown to have been issued as security, as indicated in the loan agreement. In our opinion, such contention would arise only in a circumstance where the debt has 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 has not arrived. In the instant facts, as noted, the repayment as agreed by the respondent No.2 is during June/July 2015. The cheque has been presented by the appellant for realisation on 20.10.2015. As on the date of presentation of the cheque for realisation the repayment of the amount as agreed under the loan agreement had matured and the amount had become due and payable. Therefore, to contend that the cheque should be held as security even after the amount had become due and payable is not sustainable. Further, on the cheques being dishonoured the appellant had got issued a legal notice dated 21.11.2015 wherein interalia it has been stated as follows:*

> *"You request to my client for loan and after accepting your word my client give you loan and advanced loan and against that you issue different cheque all together valued Rs. One crore and my client was also assured by you will clear the loan within June/July 2015 and after that on 26.10.2015 my client produce the cheque for encashment in H.D.F.C. Bank all cheque bearing No.402771 valued Rs. 25 Lakh, 402770 valued Rs.25 lakh, 402769 valued Rs. 50 lakh, (total rupees one crore) and above numbered cheques was returned with endorsement "In sufficient fund". Then my client feel that you have not fulfil the assurance."*

20. The notice as issued indicates that the appellant has at the very outset after the cheque was dishonoured, intimated the respondent no.2 that he had agreed to clear the loan by June/July 2015 after which the appellant had presented the cheque for encashment on 26.10.2015 and the assurance to repay has not been kept up.

21. In the above circumstance, the cheque though issued as security at the point when the loan was advanced, it *was issued as an assurance to repay the amount after the debt becomes due for repayment. The loan was in subsistence when the cheque was issued and had become repayable during June/July 2015 and the cheque issued towards repayment was agreed to be presented thereafter. If the amount was not paid in any other mode before June/July 2015, it was incumbent on the respondent No.2 to arrange sufficient balance in the account to honour the cheque which was to be presented subsequent to June/July 2015.*

22. These aspects would primafacie indicate that there was a transaction between the parties towards which a legally recoverable debt was claimed by the appellant and the cheque issued by the respondent No.2 was presented. On such cheque being dishonoured, cause of action had arisen for issuing a notice and presenting the criminal complaint under section 138 of N.I. Act on the payment not being made. The further defence as to whether the loan had been discharged as agreed by respondent No.2 and in that circumstance the cheque which had been issued as security had not remained live for payment subsequent thereto etc. at best can be a defence for the respondent No.2 to be put forth and to be established in the trial. In any event, it was not a case for the Court to either refuse to take cognizance or to discharge the respondent No.2 in the manner it has been done by the High Court. Therefore, though a criminal complaint under Section 420 IPC was not sustainable in the facts and circumstances of the instant case, the complaint under section 138 of the N.I Act was maintainable and all contentions and the defence were to be considered during the course of the trial.

(emphasis supplied)

In ***Sunil Todi & others Versus State of Gujarat & another, 2022(1) R.C.R. (Criminal) 395***, held as under:-

"23. In the present case, the PSA between the parties envisaged that the second respondent would supply power to the company of which the appellants are directors or as the case may be, managing director. The agreement postulated that payment for the power supplied would be made by means of LCs. Though, the LCs' were provided, they were allegedly not in a form acceptable to the bankers of the second respondent. The appellants do not dispute that prior to the termination of the agreement, power was supplied for a period of three months to the company. In other words, the agreement for the supply of power was acted upon and power was supplied to by the second respondent and consumed by the company.

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25. The explanation to section 138 of the NI Act provides that `debt or any other liability' means a legally enforceable debt or other liability. The proviso to Section 138 stipulates that the cheque must be presented to the bank within a period of six months from the date on which it is drawn or within its period of validity. Therefore, a cheque given as a gift and not for the satisfaction of a debt or other liability, would not attract the penal consequences of the provision in the event of its being returned for insufficiency of funds. Aiyar's Judicial Dictionary defines debt as follows: "Debt is a pecuniary liability. A sum payable or recoverable by action in respect of money demand." Lindey L.J in Webb v. Strention, 1888 QBD 518 defined debt as "... a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in praesenti, solvendum in futuro." The definition was adopted by this Court in Keshoram Industries v. CWT, AIR 1966 SC 1370. Justice Mookerjee writing for a

Full Bench of the Calcutta High Court in Banchharam Majumdar v. Adyanath Bhattacharjee, (1909) ILR 36 Cal 936 adopted the definition provided by the Supreme Court of California in People v. Arguello, 1869 37 Calif 524 :

> *"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."*

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 contingent event, then 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 the 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 of the cheque or includes drawing of a cheque for a debt that is incurred before the cheque is encashed.

26. The object of the 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 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. Moreover, Parliament has used the expression `debt or other liability'. The expression "or other liability' must have a meaning 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 was 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 the outstanding dues.*

27. 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 discharge its dues, the second respondent *was entitled in law to present the cheque for payment. 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 had 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.*

*** ***

30. The submission which has been urged on behalf of the appellants, however, is that the fact that the cheques in the present case have been issued as a security is not in dispute since it stands admitted from the pleading of the second respondent in the suit instituted before the High Court of Madras. The legal requirement which Section 138 embodies is that a cheque must be drawn by a person for the 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 PSA, the presentation of the cheque upon 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. This precisely is the situation in the present case which would negate the submissions of the appellants.

(emphasis supplied)

11. Coming back to the facts of the instant case, as the accused had defaulted in making the payments of the instalments, then, in terms

of Clause 7 and 8 of the MLA, the entire loan was recalled after due notice and in that scenario the accused had asked the complainant/lender to present the two security cheques for encashment on account of the discharge of the legally enforceable debt. Thus, the cheque which had been initially given as a security cheque became one issued in the part discharge of a debt/legal liability once the accused had refused to make the payments of the instalments under the loan agreement. Therefore, the judgment in ***Matheson Bonsaquet Enterprises Ltd.*** (supra) will not apply to the facts of the present case and the judgments of the Hon'ble Supreme Court in ***Sampelly Satyanarayana Rao*** (supra), ***Sripati Singh (since deceased) through his son Gaurav Singh*** (supra) and ***Sunil Todi*** (supra) would apply on all fours.

Further, merely because an amount of Rs.4,81,353/- had been paid uptil 31.08.2014, did not mean that the proceedings under the Negotiable Instruments Act could not have been initiated on the dishonour of the cheque amounting to Rs.2,65,70,103/- as the said cheque was presented for the part discharge of a debt/liability which would exceed the said amount (Rs.2,65,70,103/-) along with interest and other charges. Even otherwise, if this argument of an accused was accepted that some amount had been paid and therefore, the cheque for the complete discharge of a debt/liability could not be presented for encashment so as to initiate proceedings under the Negotiable Instruments, then it would have bizarre consequences. The accused would make part-payment and then refuse to honour a cheque for the full amount due stating that the said cheque could not be presented for encashment under the Negotiable Instruments Act. Therefore, once the execution of the cheque is admitted then a presumption arises that it has been issued in the discharge of a debt/liability and the said presumption can be rebutted during the course of the trial. At best the affect of a part-payment may be considered by a Trial Court post-conviction at the time of imposition of sentence etc. Therefore, the judgment in ***Sami Labs*** (supra) will not apply to the facts of the instant case. However, even if the argument of the petitioner was to be accepted, even then, the judgment in ***Sami Labs*** (supra) would not apply because in that case, it was a case of an appeal against acquittal after a trial had been conducted and the total amount found to be due was Rs.5,00,000/- out of which some amount had been repaid. In the instant case, the total amount due was in excess of Rs.2,65,70,103/- including interest and other charges and an amount of Rs.4,81,353/- only was paid.

As regards the recovery/SARFAESI proceedings vis-a-vis proceedings under Section 138 of the Negotiable Instruments Act, it may be pointed out that the proceedings under the Negotiable Instruments Act are completely independent of those under the SARFAESI Act. The present proceedings were initiated in 2014 whereas SARFAESI proceedings began only in the year 2018. While the present proceedings are penal in nature, proceedings under the SARFAESI Act are primarily for recovery. Therefore, merely because recovery proceedings can be resorted to under the SARFAESI Act does not preclude a lender from initiating proceedings under the Negotiable Instruments Act.

12. In view of the aforementioned discussion, the offence against the accused is *prima facie* established for which the holding of a Trial is imperative and the question of scuttling the same by resorting to summary proceedings under Section 482 Cr.P.C. does not arise.

13. In view of the above, I find no merit in the present petition. Therefore, the same stands dismissed.

14. The Trial Court is directed to conclude the Trial as expeditiously as possible but in any case not later than six months from the next date fixed before it.

(JASJIT SINGH BEDI)
JUDGE

29.08.2023
JITESH

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No