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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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*Reserved on: 21.11.2023
Pronounced on: 01.12.2023*

+ **CRL.M.C. 362/2023 & CRL.M.A. 1441/2023**

AKBAR ALI

..... Petitioner

Through: Mr. Haneef Mohammad,
Advocate

versus

STATE OF NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Satish Kumar, APP for the
State.

Mr. Javed Ali and Mr. Akash
Vajpayi, Advocates for
respondent No. 2

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C') has been filed by the petitioner seeking quashing of criminal complaint bearing no. 1759/2019 titled as "Imran vs. Akbar Ali" for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 ('NI Act'), as well as the summoning order dated 09.09.2019 and notice framed under Section 251 of Cr.P.C. vide order dated 15.03.2022, passed by learned Metropolitan Magistrate-01, North East, Karkardooma Courts, Delhi.



2. Brief facts of the case, as per the complaint filed under Section 138 of NI Act, are that accused Akbar Ali, who was having cordial relations with the complainant, had approached the complainant and had offered to sell a property bearing number B-80/13 Rakba 89 (2 Bed Room Flat, First Floor, Rajat Vihar, Sector 62, Noida, U.P), citing his dire need of money. It is stated that the complainant, being a considerate friend, understood the situation of the accused and when the accused had shown that the title documents of the above mentioned property were in the name of accused himself, the complainant had got ready to purchase the said property from him. For the said purpose, he had signed an agreement dated 05.06.2014 with the accused for an agreed sum of Rs. 61,00,000/- and the said amount had been paid as a lump sum cash amount of Rs. 61,00,000/- in one go, despite the fact that the complainant had to borrow Rs. 50,00,000/- from his cousin uncles, namely Mukammil Khan and Late Muzammil Khan, to ensure a quick and successful completion of the said deal. Once the money was paid by the complainant, the accused had sought time of three months for execution of sale deed on 06.07.2014. It is stated that even after 06.07.2014, the accused had kept postponing the execution of the sale deed on one pretext or another. Despite all the excuses given by the accused to the complainant, the complainant had shown empathy and had kept on agreeing to the requests of the accused for postponing the date of execution of sale deed. Finally, the complainant had approached the accused on 22.10.2015 to merely warn him that since more than one year had lapsed, the accused should transfer the said property in his



name as agreed between them or else return the consideration money i.e. Rs. 61,00,000/-, otherwise he would be compelled to file a complaint against the accused. As alleged, the accused had suddenly become aggressive, and while verbally abusing the complainant, the accused had told him that he had already sold the said property, and he had also threatened to shoot the complainant. Thereafter, the complainant had lodged a complaint against the accused at P.S. Gokul Puri, New Delhi for the offence of cheating, breach of trust, threatening and fraud. Thereafter, the complainant had filed a complaint case under Section 156(3) read with Section 200 of Cr.P.C. before learned Chief Metropolitan Magistrate, Karkardooma Courts, Delhi, whereby the complainant was allowed to lead evidence in Pre-Summoning stage. It is stated that on 29.05.2019, after the complainant had examined himself before the Court as CW-1 and had corroborated all the allegations levelled by him in complaint, the accused had come forward to enter into a compromise with the complainant. Thereafter, the matter was settled in presence of respectable persons of society, in view of which the accused had offered to pay back a sum of Rs. 45,00,000/- as against the actual consideration amount of Rs. 61,00,000/-. In view of the aforesaid compromise between the accused and the complainant, the accused had handed over three cheques, each dated 01.06.2019, bearing No. 017042, 017036 and 017038, drawn on HSBC Advance, of amounts Rs. 20,00,000/-, Rs. 15,00,000/- and Rs. 10,00,000/- respectively (total sum amounting to Rs. 45,00,000/-). It was further agreed that once these cheques would get honored, the complainant would



withdraw all pending cases and complaints against the accused. Thereafter, the complainant had deposited aforesaid cheques with his banker for realization of the amounts, however, they had got dishonored for the reasons 'Stop Payment' on 16.07.2019. The complainant had again urged the accused to make the payment but he had failed to do so, despite issuance of legal notice dated 28.07.2019. Upon failure on part of accused to make the payment, the present case under Section 138 of the NI Act was filed before the learned Trial Court by the complainant.

3. Learned counsel for the petitioner argues that as per allegations made in the complaint, on the face of it, the present complaint is not maintainable as no case under Section 138 of NI Act is made out from bare reading of the allegations since the alleged debt for which the alleged cheques were issued is not a legally recoverable debt. It is argued that as per allegations made in the complaint, the agreement for sale was executed on 05.06.2014, the date for execution of sale deed was allegedly fixed as 06.07.2014, and thus, the limitation to file suit for specific performance or recovery suit arose on 06.07.2014, which had expired on 06.07.2017. It is stated that the alleged cheques in question, issued on 01.06.2019, are towards discharge of time barred liability, and thus, the same cannot be said to have been issued for any legally recoverable debt, and hence, no case under Section 138 of NI Act is made out in. It is stated that the learned Trial Court has committed a grave error while passing the impugned summoning order and by framing of notice under Section 251 of Cr.P.C. against the petitioner.



4. On the other hand, learned counsel for respondent no. 2 submits that the present petition filed by the petitioner is liable to be dismissed since the issues raised herein are all matter of trial and cannot be adjudicated upon by this Court in a petition filed under Section 482 of Cr.P.C. It is argued that the question as to whether the debt is legally recoverable or not or whether it is time barred has to be decided on the basis of evidence, by the Trial Court, and the complaint cannot be quashed on such grounds, especially when the petitioner has admitted in his signatures on the cheques.

5. This Court has heard arguments addressed by learned counsel for the petitioner and learned counsel for the respondent, and has perused the material on record.

6. The issue for consideration before this Court is that whether the present complaint filed under Section 138 of NI Act can be quashed on the ground that the alleged cheques in question were issued against time barred debt, and thus there was no legally recoverable debt.

7. Before averting to the merits of the case, this Court deems it fit to discuss the law on Section 138 of NI Act. The essentials to constitute an offence under Section 138 of NI Act were discussed by Hon'ble Apex Court in case of ***Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel*** (2023) 1 SCC 578, which are reproduced as under for reference:

“11. Section 138 of the Act provides that a drawer of a cheque is deemed to have committed the offence if the following ingredients are fulfilled:



(i) A cheque drawn for the payment of any amount of money to another person;

(ii) **The cheque is drawn for the discharge of the ‘whole or part’ of any debt or other liability. ‘Debt or other liability’ means legally enforceable debt or other liability;** and

(iii) The cheque is returned by the bank unpaid because of insufficient funds.

However, unless the stipulations in the proviso are fulfilled the offence is not deemed to be committed. The conditions in the proviso are as follows:

(i) The cheque must be presented in the bank within six months from the date on which it was drawn or within the period of its validity;

(ii) The holder of the cheque must make a demand for the payment of the ‘said amount of money’ by giving a notice in writing to the drawer of the cheque within thirty days from the receipt of the notice from the bank that the cheque was returned dishonoured; and

(iii) The holder of the cheque fails to make the payment of the ‘said amount of money’ within fifteen days from the receipt of the notice...”

(emphasis supplied)

8. Thus, there is no dispute regarding the arguments raised by learned counsel for respondent that to constitute an offence under Section 138 of NI Act, the cheque in question should have been issued in discharge of some legally enforceable debt.

9. However, it is also well-settled through precedents of Hon’ble Apex Court that the issue as to whether or not a cheque was issued in discharge of legally recoverable debt is to be decided during the course of trial and the proceedings under Section 138 of NI Act ought not to be quashed on such grounds at pre-trial stage. In this regard, this Court deems it appropriate to refer to the decision of Hon’ble



Apex Court in case of *Rathish Babu Unnikrishnan v. State (NCT of Delhi)* 2022 SCC OnLine SC 513, wherein it was observed as under:

“6. As noted earlier, the **appellant's basic contention is that the cheque in question was not issued in discharge of “legally recoverable debt”**. They also raised a contention on the obligation of the complainant to transfer the concerned shares. A defence plea is raised by the appellant to the effect that the cheques in question were issued as “security” and not in discharge of any “legally recoverable debt”.

7. The learned Judge of the Delhi High Court while considering the petition under Section 482 Cr.P.C kept in mind the scope of limited enquiry in this jurisdiction by referring to the ratio in *HMT Watches Limited v. M.A. Abida*¹, and in *Rajiv Thapar v. Madan Lal Kapoor*² and opined that the exercise of powers by the High Court under Section 482 Cr.P.C, would negate the complainant's case without allowing the complainant to lead evidence. Such a determination should necessarily not be rendered by a Court not conducting the trial. Therefore, unless the Court is fully satisfied that the material produced would irrefutably rule out the charges and such materials being of sterling and impeccable quality, the invocation of Section 482 Cr.P.C power to quash the criminal proceedings, would be unmerited. Proceeding on this basis, verdict was given against the appellant, who was facing the proceeding under Section 138 of the N.I. Act. With all liberty given to the appellant to raise his defence in the trial court, his quashing petition came to be dismissed.

8. The issue to be answered here is whether summons and trial notice should have been quashed on the basis of factual defences. The corollary therefrom is what should be the responsibility of the quashing Court and whether it must weigh the evidence presented by the parties, at a pre-trial stage.

10. It is also **relevant to bear in mind that the burden of proving that there is no existing debt or liability, is to be discharged in the trial**. For a two judges Bench in *M.M.T.C. Ltd. v. Medchl Chemicals and Pharma (P) Ltd.*³, Justice S.N. Variava made the following pertinent observation on this aspect:—



“17. There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability.”

11. The legal presumption of the cheque having been issued in the discharge of liability must also receive due weightage. In a situation where the accused moves Court for quashing even before trial has commenced, the Court's approach should be careful enough to not to prematurely extinguish the case by disregarding the legal presumption which supports the complaint. The opinion of Justice K.G. Balakrishnan for a three judges Bench in *Rangappa v. Sri Mohan*⁴ would at this stage, deserve our attention:—

“26. ... we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.”

12. At any rate, whenever facts are disputed the truth should be allowed to emerge by weighing the evidence. On this aspect, we may benefit by referring to the ratio in *Rajeshbhai Muljibhai Patel v. State of Gujarat*⁵ where the following pertinent opinion was given by Justice R. Banumathi:—

“22.When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the NI Act ought not to have been quashed by the High Court by taking recourse to Section 482 CrPC. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the NI Act on the legal issues like limitation, etc. criminal complaint filed under Section 138 of the NI Act against Yogeshbhai



ought not to have been quashed merely on the ground that there are inter se disputes between Appellant 3 and Respondent 2. Without keeping in view the statutory presumption raised under Section 139 of the NI Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in CC No. 367 of 2016 filed under Section 138 of the NI Act.”

16. The proposition of law as set out above makes it abundantly clear that the **Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter.** What is also of note is that the **factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations** made in the complaint.

17. The **consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable.** Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an unmerited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.

18. Situated thus, **to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the trial court will not in our opinion be judicious.** Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited...”

(emphasis supplied)

10. Thus, in view of the law laid down by Hon’ble Apex Court, it is undisputed that whether the debt was legally recoverable or not is



to be decided during the course of trial and not at pre-trial stage. At the stage of filing of complaint and issuing of summons, only a *prima facie* view has to be taken by the Courts when considering quashing of such a complaint, which can be done only in case when the petitioner is able to prove, by bringing on record material of sterling quality, that the essential ingredients of offence under Section 138 of NI Act are not made out from the bare reading of the complaint.

11. In the present case, it is the contention of the petitioner that the debt is not legally recoverable since it is time barred and thus the complaint be quashed on this ground. However, the law on the same has been discussed by the Hon'ble Apex Court in the case of ***Yogesh Jain v. Sumesh Chadha SLP (Crl.) 1805-1806/2020*** which reads as under:

“...Once a cheque is issued and upon getting dishonoured a statutory notice is issued, it is for the accused to dislodge the legal presumption available under Sections 118 and 139 reply of the N.I. Act. Whether the cheque in question had been issued for a time barred debt or not, itself *prima facie*, is a matter of evidence and could not have been adjudicated in an application filed by the accused under Section 482 of the CrPC...”

12. The Hon'ble Apex Court in the case of ***K. Hymavathi v. The State of Andhra Pradesh and Ors. 2023 SCC OnLine SC 1128*** also has observed that whether a debt or liability is barred by limitation is an issue which is to be considered based on evidence adduced by parties. The relevant portion of the judgment reads as under:

“...10. From a perusal of the legal position enunciated, it is crystal clear that this Court keeping in perspective the nature of the proceedings arising under the NI Act and also keeping in view that the cheque itself is a promise to pay even if the



debt is barred by time has in that circumstance kept in view the provision contained in Section 25(3) of the Contract Act and has indicated that if the question as to whether the debt or liability being barred by limitation was an issue to be considered in such proceedings, the same is to be decided based on the evidence to be adduced by the parties since the question of limitation is a mixed question of law and fact. It is only in cases wherein an amount which is out and out non-recoverable, towards which a cheque is issued, dishonored and for recovery of which a criminal action is initiated, the question of threshold jurisdiction will arise. In such cases, the Court exercising jurisdiction under Section 482 CrPC will be justified in interfering but not otherwise. In that light, this Court was of the view that entertaining a petition under Section 482 CrPC to quash the proceedings at the stage earlier to the evidence would not be justified...”

13. Thus, in view of the aforesaid law laid down by the Hon’ble Apex Court, it is clear that whether a debt is legally enforceable or not can be decided only based on evidence adduced by parties since the question of limitation is a mixed question of law and fact.

14. In the present case, the quashing has been sought by the petitioner at a pre-trial stage on the ground that the debt against which the cheques were issued, is time barred. At the pre-trial stage, this Court has to see whether the allegations leveled in the complaint are specific or not, and the issue of whether the debt is time barred or not is to be decided only at the stage of trial based on evidence adduced by the parties. This Court has also perused the complaint filed by the complainant which attributes specific role and allegations against the petitioner, that he had issued cheque towards discharge of his liability and the same had got dishonored upon its presentation and thereafter, the complainant had also issued statutory legal notice and on failure to pay the amount, the present complaint had been



filed. As reflected from notice framed under Section 251 of Cr.P.C., the petitioner has admitted the issuance of cheques and his signatures on the same, though he had disputed the purpose for which the same were handed over to the complainant and had stated that the same were issued as blank security cheques. Thus, *prima facie*, the basic essentials of Section 138 NI Act are fulfilled in the present case, and this Court at a pre-trial stage cannot decide whether the debt is legally enforceable or not.

15. In view of the overall facts and circumstances of the case, and that the complaint contains specific averments against the present petitioner and the signatures on the cheques have not been disputed by the petitioner, and that at pre-trial stage, this Court cannot decide the issue of legal enforceability of the debt, this Court is not inclined to allow the present petition for quashing of the complaint filed under Section 138 of NI Act and subsequent proceedings thereto.

16. Accordingly, the present petition stands dismissed along with pending application, if any.

17. It is however, clarified that the petitioner shall be at liberty to raise all the issues raised in this petition, before the learned Trial Court at appropriate stage, which shall be considered by the learned Trial Court as per law, and without being influenced by any of the observations made hereinabove.

18. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

DECEMBER 1, 2023/zp