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

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Reserved on: 01.08.2023
Pronounced on: 12.10.2023

+ **CRL.M.C. 1420/2020 & CRL.M.A. 5455/2020**

SOUTH DELHI MOTORCYCLES & ANR. Petitioners

Through: Mr. Ritesh Kumar Chowdhary
and Mr. Niyas Valiyathodi,
Advocates

versus

IDFC FIRST BANK LTD. Respondent

Through: Mr. Jatin S. Sethi, Mr. Mani
Wahia and Ms. Jasvinder
Sharma, Advocates

+ **CRL.M.C. 1421/2020 & CRL.M.A. 5457/2020**

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CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT



SWARANA KANTA SHARMA, J.

1. By way of present petition filed under Section 482 of the Code of Criminal Procedure, 1973, ('Cr.P.C. '), the petitioners seek quashing of summoning order dated 20.08.2019 passed by learned Metropolitan Magistrate (NI Act)-01, South-West, Dwarka, Delhi in Complaint Cases bearing numbers 30937/2019 and 30938/2019, and quashing of these complaints filed under Section 138 of Negotiable Instruments Act, 1881 ('NI Act').

2. Brief facts of the case, as per complaints filed by the complainant/respondent, are that the accused/petitioners had applied for grant of INFTA DF Loan facility to the erstwhile Capital First Ltd. and had availed the said loan facility on 31.03.2017 *vide* loan account/agreement number 19564356, for Rs.1,50,00,000/- and upon petitioners agreeing upon specific terms and conditions, the erstwhile Capital First Ltd. had disbursed the loan amount. As stated, the petitioners had agreed to repay the loan amount together with interest in equated monthly installments. It is stated that in partial discharge of loan liability, the accused/petitioners had issued two cheques bearing no. 350 for Rs.45,00,000/- and cheque no. 1122 for Rs.35,00,000/- both dated 14.06.2019 and drawn on HDFC Bank. It is stated that in the meanwhile, Capital First Ltd. had amalgamated into complainant/respondent bank i.e. IDFC First Bank Ltd. *vide* order dated 12.12.2018 passed by Hon'ble NCLT, Chennai whereby all loans availed by borrowers including loans availed by petitioners were transferred/assigned to complainant/respondent bank. When the complainant i.e. IDFC First Bank Ltd. (erstwhile Capital First Ltd.)



had presented the cheques for encashment with its banker, the same had got dishonoured *vide* return memo dated 14.06.2019 for the reasons 'Insufficient Funds'. Thereafter, the complainant had issued legal notice dated 10.07.2019 to the petitioners asking them to make the payment of cheque amount, however, they had failed to do so. Accordingly, the complainant/respondent had filed the impugned complaints i.e. complaint cases bearing nos. 30937/2019 and 30938/2019 for dishonour of cheque bearing no. 1122 and 350 respectively. The learned Trial Court had issued summons against petitioners *vide* order dated 20.08.2019.

3. Learned counsel for the petitioners argues that the petitioner had earlier entered into an agreement for trade advance facility with the Capital First Ltd. in the year 2013 for an amount of Rs.30,00,000/- wherein a security cheque bearing no. 1122 had also been handed over by the petitioner, and this loan had been repaid and settled, but the said cheque had remained with the bank. It is stated that thereafter in the year 2017, the petitioner and Capital First Ltd. had entered into a fresh loan agreement wherein other security cheque bearing no. 350 had been handed over to the complainant. It is stated that these undated security cheques had been misused by the complainant at a later stage when there was no existing legally enforceable debt or liability, at the time when cheques in question were drawn or dishonoured. It is also stated that the cheques were payable to Capital First Ltd. and not to the complainant herein, and the cheques have not been endorsed by either the drawer of the cheque or the holder in favour of the complainant, and therefore, the



complainant is neither the payee nor the holder in due course. It is, thus, prayed that present petition be allowed and summoning orders and complaint cases be quashed.

4. On the other hand, learned counsel for the respondent/complainant submits that *vide* order dated 12.12.2018 passed by Hon'ble NCLT, Chennai Bench, Capital First Ltd., First Home Finance Ltd. and Capital First Securities Ltd. had collectively amalgamated with IDFC Bank Ltd. and thereafter, its name had further been changed to IDFC First Bank Ltd. It is stated that at the time of amalgamation, all the loans availed by various borrowers had also been transferred/assigned to IDFC Bank Ltd. It is stated that the petitioners by way of present petitions have raised disputed question of facts which can only be adjudicated after leading of evidence before the learned Trial Court, and this Court under Section 482 of Cr.P.C. cannot interfere with the summoning order or quash the complaints in question. It is also stated that all necessary averments have been made in the complaints, and thus, the present petition ought to be dismissed.

5. This Court has heard arguments addressed on behalf of petitioners as well as respondent and has perused the case file.

6. At the outset, this Court deems it fit to refer to Section 138 of NI Act, which provides as under:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other



liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless --

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes 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 of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.--For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability."

7. The Hon'ble Apex Court in *Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel*(2023) 1 SCC 578, has held that to constitute an offence under Section 138 of NI Act, following ingredients are to be fulfilled:

"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...”

8. In the present case, it is alleged that the petitioners and complainant had entered into a loan agreement for an amount of Rs.1.5 crore and in discharge of partial liability, the petitioners had issued the cheques in question, which had got dishonored upon presentation. As apparent from the records of the case, the complainant in the complaint under Section 138 of NI Act has specifically averred that the petitioners had issued the cheques in question and petitioner no. 2 was its authorised signatory, who was in control of and responsible for the conduct and affairs of accused/petitioner no. 1.

9. As far as the contentions raised on behalf of petitioners regarding cheques in question being issued as security cheques and misused at later stage are concerned, this Court is of the view that



such issues can only be decided and appreciated at the stage of trial after evidence is led by both the parties, and this Court in a petition under Section 482 of Cr.P.C. cannot adjudicate upon the said issue. In this regard, this Court deems it appropriate to refer to the decision of Hon'ble Apex Court in case of *Sunil Todi v. State of Gujarat* 2021 SCC OnLine SC 1174, whereby it has been held as under:

“29. The order of this Court in Womb Laboratories holds that the issue as to whether the cheques were given by way of security is a matter of defence. This line of reasoning in Womb Laboratories is on the same plane as the observations in HMT Watches, where it was held that **whether a set of cheques has been given towards security or otherwise or whether there was an outstanding liability is a question of fact which has to be determined at the trial on the basis of evidence. The rationale for this is that a disputed question of this nature cannot be resolved in proceedings under Section 482 CrPC, absent evidence to be recorded at the trial.**”

(emphasis supplied)

10. Similarly, the issue of existence of legally enforceable debt or liability is also a disputed question of fact and when the complainant has averred in the impugned complaint that the petitioners herein had obtained a loan facility to the tune of Rs.1.5 crores, which is also not disputed by the petitioner, and that petitioners had issued the cheques in question in partial discharge of the said liability, and further when the signatures on the cheque have not been disputed, this Court is of the opinion that it cannot come at any conclusion in a petition under Section 482 of Cr.P.C. that there was no legally enforceable debt or liability, which is also a matter of trial. In this context, a reference can be made to the observations of Hon'ble Apex Court in *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 un-merited 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)

11. Moving further, on the issue of ‘amalgamation’, some observations of the Hon’ble Apex Court in *Principal Commissioner of Income Tax (Central)-2 v. M/s Mahagun Realtors (P) Ltd.* 2022



SCC OnLine SC 407 will be relevant to be taken note of, which are extracted hereunder:

“17. The amalgamation of two or more entities with an existing company or with a company created anew was provided for, statutorily, under the old Companies Act, 1956, under Section 394 (1) (a). Section 394 empowered the court to approve schemes proposing amalgamation, and oversee the various steps and procedures that had to be undertaken for that purpose, including the apportionment of and devolution of assets and liabilities, etc. Section 394 (2) provided as follows:

Section 394 (4) (a) defined “property” for the purpose of devolution of assets and liabilities:

‘394....(4) In this section-

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.’

(a) " property" includes property, rights and powers of every description and " liabilities" includes duties of every description; and..”

18. Amalgamation, thus, is unlike the winding up of a corporate entity. In the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues – enfolded within the new or the existing transferee entity. In other words, the business and the adventure lives on but within a new corporate residence, i.e., the transferee company.”

12. In the present case, the petitioners herein had entered into a loan agreement with the erstwhile Capital First Ltd. in March, 2017. However, in 2018, Capital First Ltd. had amalgamated with IDFC Bank Limited by virtue of amalgamation order dated 12.12.2018



passed by Hon'ble NCLT, Chennai Bench. After the amalgamation, all the loans availed by various borrowers including the loan availed by the petitioners herein was also transferred to IDFC Bank Limited, and further that all the properties, rights, liabilities and duties of Capital First Ltd. were vested in IDFC Bank Limited including all contractual liabilities owed by the present petitioners to Capital First Ltd. It has been specifically averred by the complainant that the accused/petitioners had entered into contractual relations with Capital First Ltd., and after the said amalgamation, the actionable claim including any claims with respect to loan availed by the petitioners is that of IDFC Bank Ltd., which had later changed its name to IDFC First Bank Ltd. and a fresh certificate of incorporation had also been issued. Thus, the contentions regarding complaint in question being not maintainable since it was filed by IDFC First Bank Ltd. and not Capital First Ltd. in whose name the cheques had been issued, cannot be appreciated at this stage when the complainant has *prima facie* shown that the erstwhile Capital First Ltd. had amalgamated into the present complainant company alongwith all properties, rights, asset, liabilities including contractual liabilities such as the present loan facility.

13. Thus, in view of the foregoing discussion, this Court finds no ground to quash summoning order dated 20.08.2019 passed by learned Trial Court against petitioners in both the Complaint Cases, without affording an opportunity to the complainant to present its case before the learned Trial Court.



14. However, the petitioners shall be at liberty to raise all such issues during the course of trial and the learned Trial Court shall consider and adjudicate upon the same on the basis of evidence brought on record by the parties, as per law, and without being influenced by any of the observations made in this judgment, which have only been made for the purpose of deciding present petitions.

15. Accordingly, the present petition along with pending application stands disposed of.

16. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

OCTOBER 12, 2023/ns