



IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:03.07.2023

+ **CRL.M.C. 3066/2022, CRL. M.A. 12913/2022 & CRL. M.A. 14722/2022**

VIHAN EXIMS COMPANY PVT. LTD. & ORS.

..... Petitioners

versus

STATE, GOVT OF NCT OF DELHI & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. Anuj Jain, Advocate

For the Respondents :Ms Priyanka Dalal, APP for the State

CORAM

HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petition has been filed under Section 482 of the Code of Criminal Procedure,1973('CrPC'), *inter alia*, praying for quashing of impugned notice framed under Section 251 of the CrPC vide order dated 03.03.2022 and for setting aside of summoning order dated 26.08.2021 passed by Ld. Metropolitan Magistrate (NI Act), Digital Court-02, South East District, Saket Courts, New Delhi (hereafter '**the learned MM**') in a complaint filed by Respondent No. 2 being CC NI Act 1768/2021, titled '*Vivek Sapra vs. Vihan*



EximsCompany Pvt. Ltd. &Ors.’, taking cognizance for the offence under Section 138 of the Negotiable Instruments Act, 1881 (**‘NI Act’**).

2. The brief facts of the case as alleged in the complaint are that the petitioners herein are engaged in the business of manufacturing ornaments out of gold and diamonds. They specialise in manufacturing customised jewellery based upon orders from the customers. Respondent No.2 is engaged in the business of trading bullion in exchange for new jewellery and making customised jewellery on order.

3. It is alleged that the petitioners and Respondent No.2 entered into an agreement *vis-à-vis* a Memorandum of Understanding (**‘MOU’**) dated 16.02.2020, outlining the rights and liabilities of each party. In terms of the MoU, Respondent No. 2 is to supply 2000 grams of gold bullion (of 995 purity) in weight to be converted by the petitioners into gold/diamond jewellery/ornaments of 18k within a stipulated time period and a charge of ₹10/- per gram of gold was agreed to be paid by Respondent No. 2 to the petitioners.

4. The said MOU was signed by Petitioner No.3 (Accused no.3 in the complaint), being one of the Directors (authorised signatory) of Petitioner No.1 company. In terms thereof, Respondent No.2 supplied the petitioners with gold bullion equivalent to 2000 grams (of 995 purity) in weight. The parties agreed on the job work charges at ₹10 per gram of gold against which Respondent No.2 gave an advance of ₹3 lakhs vide a cheque bearing no. 635843 drawn on Yes Bank, to the petitioners. The cheque was cleared on 18.02.2020, and the amount



was credited into the account of M/s Vihaan Exims Company Pvt. Ltd. (Petitioner No.1 company).

5. According to clause 7 of the said MOU, the parties agreed to a fixed period depending on the article under production, within which the finished jewellery was to be delivered. The first order was placed with the petitioners on the same day, and it was decided that the finished articles would be delivered within 25 days of finalisation of the quality of the diamonds, which were to be approved by Respondent No.2 on the petitioners showing them the same.

6. It is further claimed that Petitioner No.1 issued two security cheques bearing no. 857711 and 857712 for a sum of ₹50,00,000/- each, respectively, drawn on Yes Bank, Pitampura Branch, New Delhi, duly signed by Petitioner No.3 to the respondent to cover the total value of the gold delivered to the petitioners.

7. It is claimed that the petitioners, in the month of July 2020, issued another security cheque bearing no.857719 for a sum of ₹20 lakhs towards the inflated price of the gold since they were unable to discharge their liability in time and sought an extension taking refuge under the excuse of lockdown imposed by the Government of India to contain the spread of COVID 19 pandemic, claiming that the consignment had to come from Bombay.

8. It is alleged that Respondent No.2 approached the petitioners for the finished goods several times till 15.12.2020, but they failed to deliver the same. Hence, as per the agreed terms of the MOU, on 16.12.2020, Respondent No.2 presented the cheque bearing no.857711 for a sum of ₹50,00,000/- for encashment, but the same was



returned unpaid vide return memo dated 16.12.2020 with remarks “Funds Insufficient” on 17.12.2020.

9. It is further claimed that after repeated reminders and requests with respect to the dishonour of the aforementioned cheque, Respondent No.2 sent a legal notice dated 28.12.2020 to the petitioners on 29.12.2020, and the same was also served through WhatsApp and email on 31.12.2020.

10. It is also alleged that on 30.12.2020, Respondent No.2 presented the other two cheques bearing no. 857712 and 857719 for a sum of ₹50,00,000/- and ₹20,00,000/- respectively hoping that the petitioners must have maintained the requisite funds, but the same were also returned unpaid vide separate return memos dated 31.12.2020 with remarks “Funds Insufficient”.

11. Pursuant thereto, Respondent No.2 again sent a legal notice dated 08.01.2021 which was served upon the petitioners through WhatsApp and email on 09.01.2021 and was sent through registered post on 12.01.2021, demanding the total cheques amount of ₹70,00,000/- to be paid within 15 days from the date of receipt of the legal notice but the petitioners failed to make necessary payment thereby, causing wrongful gain to themselves and wrongful loss to the respondent.

12. The petitioners, in response to the aforesaid legal notices, sent a reply dated 12.01.2021. They denied the allegations and claimed that the cheques were given as security and not for the payment of any amount of money in discharge of any debt or other liability.



13. Consequently, Respondent No.2 was constrained to file a complaint under 138 and 141 of the NI Act before the Court of learned Chief Metropolitan Magistrate, South East District, Saket Courts, New Delhi. After considering the material on record and pre-summoning evidence, the learned Trial Court thought it fit to summon the petitioners vide order dated 26.08.2021.

14. The learned Trial Court on 28.09.2021, granted bail to Petitioner No.1, 2 & 3 for the offence being bailable, issued bailable warrant against Petitioner No.4, stating that he has been deliberately avoiding the appearance, and referred the matter to the mediation.

15. In the meantime, Respondent No.2 also filed an application dated 15.02.2022 under Section 143A of the NI Act, seeking interim compensation, and the same is pending adjudication before the learned Trial Court.

16. The learned Trial Court, vide order dated 03.03.2022, framed notice under Section 251 of the CrPAct taking cognizance of the offence punishable under Section 138 of the NI Act, qua the petitioners.

17. The petitioners, feeling aggrieved, filed the present petition invoking the jurisdiction of this Court under Section 482 of the CrPC.

SUBMISSIONS

18. Learned counsel for the petitioners submitted that the summoning order and the notice so framed are erroneous, perverse, bereft of reasons and have been passed in a mechanical manner, and there is no legally enforceable debt or liability for which the respondent can demand any amount. He further submitted that the same is an abuse of the process of law, the prime argument being that



the cheque in question did not represent an amount that could be termed as “legally enforceable debt or other liability”. He places reliance on *Indus Airways Private Limited and Others vs. Magnum Aviation Private Limited and Another: (2014) 12 SCC 539* and *Pine Product Industries and Anr. v. R.P. Gupta & Sons & Anr.:2006 SCC OnLine Del 1514*.

19. Learned counsel submitted that on a bare perusal of the order dated 03.03.2022, it can be seen that none of the aforesaid contentions of defence of the petitioner were considered and/or adjudicated by the learned MM. He claimed that the said order lacks reasons and is a non-speaking order.

20. Learned counsel submitted that admittedly, all three cheques were security cheques without any dates and dates i.e., 16.12.2020 and 30.12.2020 were filled up later by Respondent No.2. He further averred that the cheques were not issued for the payment of any amount in discharge, in whole or in part of any debt or other liability.

21. He submitted that MOU dated 16.02.2020 did not authorise Respondent No.2 to present the cheques for encashment.

22. He claimed that the present case is a business transaction for the return of bullion/jewellery. Accordingly, Respondent No.2 is entitled to civil remedy, and criminal liability under Section 138 of the NI Act, is not made out.

23. He submitted that the entire complaint and legal notice are bereft of details and have failed to crystallize any amount of debt payable and make out the case as to how on 16.12.2020 or 30.12.2020,



Respondent No.2 was entitled to a sum of ₹50 lakhs and ₹70 lakhs respectively.

24. He submitted that Respondent No.2 had also initiated other proceedings before different forums for the same transaction. Firstly, he filed a false arbitration claim to adjudicate the alleged dispute, which he failed to pursue. Secondly, Respondent No.2 filed another petition under Arbitration & Conciliation Act, 1996 seeking interim relief, which was dismissed by the Court of Sh.Vinod Kumar, District Judge (Comm.), Rohini Courts, New Delhi.

25. He stated that the petitioner had filed a criminal complaint dated 20.07.2021 at PS Netaji Subhash Place, New Delhi, against Respondent No.2 for misusing the MOU and cheques, fabrication of documents, and giving a false statement on oath before various forums.

26. He submitted that the learned Trial Court failed to consider that there was no subsisting liability at the time of drawal of the cheques, and hence no case under Section 138 of the NI Act is made out.

27. Learned counsel had further placed reliance upon the following judgments to advance his case:

i. ***Dashrathbhai Trikamhai Patel v. Hitesh Mahendrabhai Patel and Another: (2023) 1 SCC 578*** to contend that the dishonoured cheque must represent the legally enforceable debt as on the date of presentation.

ii. ***Sripati Singh (Since Deceased) Through His Son Gaurav Singh v. State of Jharkhand and Another : 2021 SCC OnLine SC 1002*** to contend that prior to the security cheque presentation date, if there



is any altered situation, the same cannot be presented,cheques issued as security cannot be presented prior to the loan maturity.

iii.***Pine Product Industries and Anr. v. R.P. Gupta & Sons &Anr.:2006 SCC OnLine Del 1514***to contend thatwhen the complaint is bereft of any specific debt amount or the amount to be paid, the same is not maintainable and is liable to be dismissed.

28. *Per contra*, learned counsel for Respondent No.2 at the outset vehemently opposed the present petition submitting to the effect that the disputed facts are matter of trial and cannot be adjudicated in a petition invoking the jurisdiction of High Court under Section 482 of the CrPC.

29. He further submitted that the High Court while exercising power under Section 482 of the CrPC, ought not to examine the truthfulness of the averments in a complaint under Section 138, NI Act as the same would amount to usurping the power of the learned Trial Court.

30. Learned counsel further submitted that the dishonour of cheques issued as a security attracts offences under Section 138, NI Act, and the said issue is no more *res integra*. The Hon'ble Supreme Court in the case of ***Sripati Singh (Since Deceased) Through His Son Gaurav Singh v.State of Jharkhand and Another(supra)***, held that a cheque issued as security cheque could not be considered as a worthless piece of paper and can attract an offence under Section 138 of the NI Act.

31. The Hon'ble Supreme Court further in the case of ***Sunil Todi and Others v. State of Gujarat and Another: 2021 SCC OnLine SC***



1174, held that once the time for which the security cheques are issued is over, the security cheques become mature for presentation and would attract the offence stated under Section 138 of the NI Act.

32. He submitted that Respondent No.2 is not bound to specify the subsisting liability. The burden of the same is on the accused to prove otherwise, and the onus cannot be shifted to the complainant. The said burden is further to be discharged by the complainant during the trial. The reliance is placed on *M.M.T.C Ltd. and Anotherv. Medchl Chemicals & Pharma (P) Ltd. and Another* : (2002) 1 SCC 234.

33. Learned counsel had further placed reliance upon the following judgments to advance his case:

- i. *M/s Awadh Constructions v. M/s Amarpreet Shuttering*. :Crl. M.C. No. 2840/2021.
- ii. *State of Haryana and Ors. v. Bhajan Lal and Ors.* :1992 Supp (1) SCC 335
- iii. *Sumit Bhasin v. State of NCT of Delhi &Anr.* :Crl. M.C. No. 296 of 2021.

ANALYSIS

34. The rival contentions raised by the counsels for the parties have been heard, and the material placed on record has been perused.

35. In the instant case, the Respondent No.2/complainant had filed a complaint under Section 138 read with Section 141 of the NI Act on 09.02.2021. The learned MM relying upon the complaint, which was supported with pre-summoning evidence given by the respondent/complainant, took cognizance under Section 138 of the NI



Act, passed the summoning order dated 26.08.2021, and framed notice under Section 251 of the CrPC vide order dated 03.03.2022.

36. In the instant case, the issuance of the cheques is not disputed by the petitioners and there is no dispute that the cheques belong to the petitioners.

37. The issue to be addressed in the instant case is whether summon, and notice framed under Section 251 of the CrPC be quashed based on factual defences, i.e., whether the security cheques given by the petitioners were towards any future consideration or legally enforceable debt.

38. It is contended by the learned counsel for the petitioner that the complainant in the present case has not been able to establish a legally enforceable debt owed by the petitioners. The cheques were admittedly issued as a security and were not given towards any future consideration payable by the petitioners. The petitioners were not liable to pay any amount and, therefore, the cheques could not have been presented for encashment. He further submitted that the MOU itself recorded that the cheques were given as security for the alleged gold handed over by the complainant for making the jewellery. The petitioners at no stage were required to make any payment that could be construed as a legally enforceable debt enabling the complainant to present the cheques in question.

39. The maintainability of a complaint on dishonour of a post-dated cheque or an unfilled cheque has come up for consideration before this Court as well as the Hon'ble Apex Court in several cases.



40. In the case of ***Indus Airways Private Limited and Others v. Magnum Aviation Private Limited and Another*** (*supra*), the Hon'ble Apex Court, in the facts of that case, held that a post-dated cheque issued by way of advance payment against a purchase order cannot be considered as a cheque issued towards the discharge of legally enforceable debt. In the said case, it was admitted between the parties that the purchase order was cancelled. The Hon'ble Apex Court held that in such circumstances, the cheque could not be held to have been presented for encashment for discharge of legally enforceable debt or liability.

41. In the case of ***Sripati Singh (Since Deceased) Through His Son Gaurav Singh v. State of Jharkhand and Another*** (*supra*), where the complainant allegedly advanced a loan to the accused, and the post-dated cheques presented for realization on non-payment of the loan were dishonoured, the Apex Court 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.

10. While considering the above aspects, it is evident that the learned Magistrate having referred to the complaint and sworn statement of the complainant and the witnesses has taken cognizance, issued summons and has consequently arrived at the conclusion that the discharge as sought by the respondent No. 2 cannot be accepted. The High Court on the other hand having referred to the rival contentions has concluded as follows:—

“20. From the aforesaid facts and from the documents of the complainant, this Court finds that long standing 'business transaction and inability of refunding a loan has been given a colour of criminal offence of cheating punishable under Section 420 of the Penal Code, 1860. A breach of trust with mens rea gives rise to a criminal prosecution. In this case when I go through the evidence before charge of the complainant and the documents of the complainant, I find that there were long standing business transactions between the parties. Since 2011 money was advanced by the complainant and his family members to the accused and the complainant witness admits that money was also transferred from the account of the accused to the account of daughter of the complainant. From the evidence, I find that there is no material to suggest existence of any mens rea. Thus, this case becomes a case of simplicitor case of non-refunding of loan, which cannot be a basis for initiating criminal proceeding. The Hon'ble Supreme Court in the case of Samir Sahay alias Sameer Sahay v. State of UP reported in (2018) 14 SCC 233 held that when the dispute between the parties was ordinarily a civil dispute resulting from a breach of contract on the part of the appellant by nonrefund of amount advanced, the same would not constitute an offence of cheating. In this case also, I find that it is true case that the amount of loan has not been refunded, thus, this cannot come within the purview of



cheating, though the complainant by suppressing the material facts, has tried to give a different colour. Thus, I find that no case punishable under Section 420 of the Penal Code, 1860 can be made out in this case.

21. *Further, I find that it is the documents of the complainant, which show that the cheques were given by way of security. Even if I do not believe the statement of the accused, the documents of the complainant cannot be brushed aside. As held earlier, supported by the decision of the Hon'ble Supreme Court in the case of "Sudhir Kumar Bhalla" (supra) a cheque given by way of security cannot attract Section 138 of the Negotiable Instruments Act. Since the cheques were given by way of security, which is evident from the complainant's documents (though this fact has also been suppressed in the complaint petition), I find that Section 138 of the Negotiable Instruments Act is also not attracted in this case."*

11. *In the background of what has been taken note by us and the conclusion reached by the High Court, insofar as the High Court arriving at the conclusion that no case punishable under Section 420 IPC can be made out in these facts, we are in agreement with such conclusion. This is due to the fact that even as per the case of the appellant the amount advanced by the appellant is towards the business transaction and a loan agreement had been entered into between the parties. Under the loan agreement, the period for repayment was agreed and the cheque had been issued to ensure repayment. It is no doubt true that the cheques when presented for realisation were dishonoured. The mere dishonourment of the cheque cannot be construed as an act on the part of the respondent No. 2 with a deliberate intention to cheat and the mens rea in that regard cannot be gathered from the point the amount had been received. In the present facts and circumstances, there is no sufficient evidence to indicate the offence under Section 420 IPC is made out and therefore on that aspect, we see no reason to interfere with the conclusion reached by the High Court.*

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*



non-refunding 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 prima-facie established. The only question that therefore needs consideration at our hands is as to whether the contention put-forth 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.*

14. *In fact, it would be apposite to take note of the decision of this Court in the case of Sampelly Satyanarayana Rao (supra) wherein this Court while answering the issue as to what constitutes a legally enforceable debt or other liability as contained in the Explanation 2 to Section 138 of N.I. Act has held as hereunder:—*



“10. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in Indus Airways (supra) with reference to the explanation to Section 138 of the Act and the expression “for discharge of any debt or other liability” occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for “discharge of debt or liability” depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.

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.

12. Judgment in Indus Airways (supra) is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways (supra), where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been



issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan instalment which had fallen due though such deposit of cheques towards repayment of instalments was also described as “security” in the loan agreement. In applying the judgment in Indus Airways (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

13. Crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court.”

(emphasis supplied)

15. The said conclusion was reached by this Court while distinguishing the decision of this Court in the case of Indus Airways Pvt. Ltd. v. Magnum Aviation Pvt. Ltd. (2014) 12 SCC 539 which was a case wherein the issue was of dishonour of post-dated cheque issued by way of advance payment against a purchase order that had arisen for consideration. In that circumstance, it was held that the same cannot be considered as a cheque issued towards discharge of legally enforceable debt.

16. Further, this Court in the case of Womb Laboratories Pvt. Ltd. (supra) has held as follows:—

“5. In our opinion, the High Court has muddled the entire issue. The averment in the complaint does indicate that the signed cheques were handed over by the accused to the complainant. The cheques were given by way of security, is a matter of defence. Further, it was not for the discharge of any debt or any liability is also a matter of defence. The relevant



facts to countenance the defence will have to be proved-that such security could not be treated as debt or other liability of the accused. That would be a triable issue. We say so because, handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques.

6. Suffice it to observe, the impugned judgment of the High Court cannot stand the test of judicial scrutiny. The same is, therefore, set aside.”

17. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. ‘Security’ in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified 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.

18. When a cheque is issued and is treated as ‘security’ towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as ‘security’ cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued 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.

19. *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.*

20. *In the background of the factual and legal position taken note supra, in the instant facts, the appellant cannot be non-suited 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 inter-alia 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.””

42. In the case of ***Sunil Todi and Others v. State of Gujarat and Another*** (*supra*), the cheques were issued by the accused as a security deposit under a power supply agreement, and on non-payment of the amount, the cheques were dishonoured on its presentation. It was contended on behalf of the accused that the cheques were intended at all material times to be security towards debt and were not intended to be deposited and would not attract the provisions of Section 138 of the Negotiable Instruments Act on its dishonour. The Apex Court, after considering the earlier judgments on the issue, held as under :

“23. Besides the distinguishing features which were noticed in Sampelly,, there was another ground which weighed in the judgment of this Court. The Court adverted to the decision in HMT Watches v. MA Habidato hold that whether the cheques were given as security constitutes the defense of the accused and is a matter of



trial. The extract from the decision in HMT Watches, which is cited in the decision in Indus Airways is thus:

“10. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties.

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33. At this stage, it would be instructive to note the order of a two judge Bench of this Court in Womb Laboratories Pvt. Ltd. v. Vijay Ahuja. In that case, the High Court had quashed proceedings initiated against the first respondent for offences punishable under Section 138 of the NI Act merely on the basis of the assertion in the complaint that “security cheques were demanded” in response to which the accused had issued three signed blank cheques with the assurance that if the amount was not returned, the cheques could be encashed. The High Court held that the cheques were given only by way of security and therefore not towards the discharge of a debt or liability on the basis of which the complaint was quashed. Allowing the appeal by the drawee, this Court observed:

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

34. 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.

35. 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.

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54. In the present case, it is evident that the principal grounds of challenge which have been set up on behalf of the appellants are all matters of defence at the trial. The Magistrate having exercised his discretion, it was not open to the High Court to substitute its discretion. The High Court has in a carefully considered judgment, analysed the submissions of the appellants and for justifiable reasons has come to the conclusion that they are lacking in substance.”

43. This Court, in the case **Suresh Chandra Goyal v. Amit Singhal :2015 SCC OnLine Del 9459** had an occasion to deal in detail with the circumstances where the debt in question can be interpreted to be owed by the accused to the complainant for the purpose of Section 138



of the Negotiable Instruments Act. The Court interpreted the term legally enforceable debt when the cheques are issued as a security. It was held that the expression security cheque is not a statutorily defined expression in the Act. There can be a situation where the cheques are given to provide an assurance or comfort to the drawee that in case of failure to pay the primary consideration on the due date, the security may be enforced. It held as under :

“50. In Indus Airways Pvt. Ltd. v. Magnum Aviation Pvt. Ltd., IV (2014) SLT 321, the question that arose for consideration before the Supreme Court was, whether the post dated cheques issued by the appellants (purchasers) as an advance payment in respect of purchase orders could be considered in discharge of a legally enforceable debt or other liability and, if so, whether the dishonour of such cheques amount to an offence under Section 138 of NI Act. The appellants before the Supreme Court were the purchasers who had placed purchase orders and issued post dated cheques in favour of the respondent towards advance payment. One of the terms and conditions of the contract was that the entire payment would be made to the supplier in advance. The supplier claimed that the advance payment had to be made, as it had to procure the parts from abroad. The cheques were dishonoured upon presentation on the ground that the purchasers had stopped payment. Thereafter, the purchasers cancelled the purchase orders and requested for return of the cheques. The respondent/seller insisted on collecting payment and initiated a complaint under Section 138 of NI Act after sending a demand notice.

51. This Court, following its decision in Moji Engineering Systems Ltd. v. A.B. Sugars Ltd., 154 (2008) DLT 579, held that the issuance of a cheque at the time of signing such a contract has to be considered against a liability, as the amount written in the cheque is payable by the person on the date mentioned in the cheque.

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61. Thus, in my view, it makes no difference whether, or not, there is an express understanding between the parties that the security may be enforced in the event of failure of the debtor to pay the debt or discharge other liability on the due date. Even if there is no such



express agreement, the mere fact that the debtor has given a security in the form of a post dated cheque or a current cheque with the agreement that it is a security for fulfillment of an obligation to be discharged on a future date itself, is sufficient to read into the arrangement, an agreement that in case of failure of the debtor to make payment on the due date, the security cheque may be presented for payment, i.e. for recovery of the due debt. If that were not so, there would be no purpose of obtaining a security cheque from the debtor. A security cheque is issued by the debtor so that the same may be presented for payment. Otherwise, it would not be a security cheque. As observed above, the MOU (Ex.CW-1/4) does not expressly, or even impliedly states that the security cheques are not to be used to recover the installments, even in case of failure to pay the same by the respondent/debtor.

62. Section 138 of NI Act does not distinguish between a cheque issued by the debtor in discharge of an existing debt or other liability, or a cheque issued as a security cheque on the premise that on the due future date the debt which shall have crystallized by then, shall be paid. So long as there is a debt existing, in respect whereof the cheque in question is issued, in my view, the same would attract Section 138 of NI Act in case of its dishonour.”

44. Section 138 specifically mentions that the cheque must have been issued for discharge of not only any debt but can also be for “other liability”. It is therefore, not necessary that when the cheques are issued, the drawer had any debt to discharge on the date of issuance. The debt or any liability is to exist when the cheque in question is presented for encashment.

45. The Hon’ble Apex Court in the case of ***M.M.T.C Ltd. and Another v. Medchl Chemicals & Pharma (P) Ltd. and Another*** (*supra*) held as under:

“13. The learned Judge has next gone into facts and arrived at a conclusion that the cheques were issued as security and not for any debt or liability existing on the date they were issued. In so doing the learned Judge has ignored the well-settled law that the power



of quashing criminal proceedings should be exercised very stringently and with circumspection. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability.”

46. As discussed above, the allegations made in the complaint, at the stage when the complaint is sought to be quashed at the initial stage, are to be taken as correct unless evidence of unimpeachable character has been produced. The defence taken by the petitioner is that it had not received any gold from the complainant and that the liability has not been crystalized so as to attract the provisions of Section 138 of the Negotiable Instruments Act. Considering the principle as noted above, whether any gold was received or not would be subject matter of trial and cannot be gone into by this Court at this stage. As far as the argument that no liability was crystalized so as to attract provisions of Section 138 of the Negotiable Instruments Act is also meritless.

47. The MoU executed between the parties categorically mentions that the complainant gave 2000 grams of gold to the accused. The complainant has averred explicitly that two security cheques for a sum of ₹50 lakhs each being the approximate value of the gold were handed over by the accused and were later presented to the bank for encashment on 16.12.2020 and 30.12.2020 respectively. It is also specifically averred that further, another security cheque of ₹20 lakhs was given by the accused since the value of the gold had increased



which was also presented to the bank for the encashment on 30.12.2020. The cheques together represented the value of the gold. The complainant has further alleged in the complaint that when the accused failed to return the gold on demand, it was constrained to present the cheques in question.

48. The legal presumption of the cheques 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 the trial has commenced, the Court's approach should be careful not to prematurely extinguish the case by disregarding the legal presumption supporting the complaint. The Supreme Court, in the case of **Bir Singh v. Mukesh Kumar** : (2019) 4 SCC 197, held as under:

“32. The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and fact that the cheque might be post-dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.”

49. The Hon’ble Supreme Court in a recent decision of **S.P. Mani and Mohan Dairy v. Dr.SnehalathaElangovan** : 2022 SCC OnLine SC 1238, had held that the provisions contained in the NI Act create a



statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issuance of notice. It further held that everything stated in the complaint is taken to be correct at the initial stages and the allegations made therein are to be liberally construed in favour of the complainant at the time of issuance of process. Once the basic averments which are sufficient to make out a case exist, the complaint cannot be quashed unless the evidence of a sterling and incontrovertible nature is produced before a Court and the High Court is convinced that the prosecution is merely an arm twisting tactic and the continuance of the proceedings would be an abuse of the process of the Court.

50. On a careful reading of the complaint and the order passed by the learned MM, what is apparent is that a possible view is taken that the cheques were drawn as a security towards the gold supplied by Respondent No. 2. The liability accrued once the demand for return of the gold was made by the complainant and the same was not returned by the accused.

51. When there is a legal presumption and where facts are contested, it would not be judicious for the Court to separate the wheat from the chaff under the garb of inherent powers. It has been held time and again that the power of quashing criminal proceedings while exercising power under Section 482 of the Cr.P.C should be exercised sparingly and with circumspection. The Court, at this stage is not to embark upon an inquiry as to the reliability or genuineness of the allegations made in the complaint. The Court, at the same time, is also not to go into the merits of the complaint to reach a conclusion that



there was any existing debt or liability. Furthermore, the burden of proving that there was no existing debt or liability is on the accused which is required to be discharged at the time of trial unless some evidence of unimpeachable and uncontroverted in nature is produced before the Court to take a different view. The presumption envisaged under Section 139 of the Negotiable Instruments Act is a rebuttal presumption at the time of trial. The Court can exercise power under Section 482 of the Cr.P.C, if the complaint on the face of it does not make out any case against the accused or if any evidence of an unimpeachable nature is produced.

52. In similar circumstances, in the case of ***HMT Watches Limited v. M.A. Abida and Another : (2015) 11 SCC 776***, the Hon'ble Apex Court held as under :

“10. Having heard the learned counsel for the parties, we are of the view that the accused (Respondent 1) challenged the proceedings of criminal complaint cases before the High Court, taking factual defences. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties. The High Court further erred in observing that Section 138(b) of the NI Act stood uncomplined with, even though Respondent 1 (accused) had admitted that he replied to the notice issued by the complainant. Also, the fact, as to whether the signatory of demand notice was authorised by the complainant company or not, could not have been examined by the High Court in its jurisdiction under Section 482 of the Code of Criminal Procedure when such plea was controverted by the complainant before it.”

(emphasis supplied)



53. This Court finds that the petitioners, at best, have raised questions of fact mixed with questions of law which cannot be examined in the limited jurisdiction under Section 482 of the CrPC, for it is desirable that the same be left to be adjudicated upon based on the evidence led by both sides at the trial.

54. In view of the above, the petition is dismissed.

JULY 3, 2023
SK / SS / UG

AMIT MAHAJAN, J

