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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: August 03, 2023**Decided on: September 05, 2023**

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CRL.M.C. 3542/2019, CRL.M.A. 31737/2019 & CRL.M.A. 19613/2021**TOPLINE BUIDTECH PVT. LTD. & OTHERS****..... Petitioners**

Through: Mr. Puneet Mittal, Senior Advocate
with Ms. Vasudha Bajaj, Mr. Pratap
Singh Mr. Rupendra Pratap Singh
and Ms. Sakshi Mehendiratta,
Advocates

V**THE STATE (GNCT OF DELHI) & ANOTHER Respondents**

Through: Mr. Utkarsh, APP for the State/R-1.
Ms. Lalit Mohini Bhat and
Mr. Siddharth Agarwal, Advocates for
R-2.

CORAM**HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN****J U D G M E N T**

1. The present petition is filed under section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as **“the Code”**) to set aside the summoning order dated 06.03.2019 passed by the Court of Ms. Kadambari Awasthi, MM-04 (North), Rohini Courts, Delhi in Complaint bearing no 705/2019 titled as **M/s Maple Technologies Ltd. V M/s Topline Buildtech**

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Pvt. Ltd. & others under section 138 of Negotiable Instruments Act, 1881 (hereinafter referred as “**NI Act**”) along with consequential proceedings.

2. The respondent no.2/complainant filed the present complaint by alleging that the petitioner no 1 is a company incorporated under the Companies Act, 1956. The petitioner no 2 is the Managing Director of the petitioner no 1. The petitioner no 3 is the Vice President of the petitioner no.1 and also one of the signatory of the cheques subject matter of present Complaint. The petitioners no 2 and 3 are in charge of and responsible for the day to day affairs for the petitioner no 1.

2.1 The petitioners approached the respondent no 2 for advancing loan for the purpose of urgent business requirements and assured the respondent no 2 to repay loan amount and proposed to issue post-dated cheques as security /guarantee. The respondent no.2 advanced loan amounting to Rs.5,00,00,000/- (five Crores only) to the petitioner no 1 through RTGS on various dates i.e. Rs.1,00,00,000/- (one crore) on 11.10.2012, Rs.50,00,000/- (fifty lakhs) on 18.10.2012, Rs.50,00,000/- (fifty lakhs) on 29,10,2012, Rs.50,00,000/- (fifty lakhs) on 3.11.2012, Rs.50,00,000/- (fifty lakhs) on 10.11.2012, Rs.50,00,000/- (fifty lakhs) on 21.11.2012, Rs.50,00,000/- (fifty lakhs) on 15.12.2012, Rs.50,00,000/- (fifty lakhs) on 21.12.2012,



Rs.28,00,000/- (twenty eight lakhs) on 2.1.2013 and Rs.22,00,000/- (twenty two lakhs) on 4.1.2013 through the bank account of the respondent no 2 operational in Indian Overseas Bank, Prashant Vihar, Rohini, Delhi. The petitioner no 1 issued post-dated cheques towards return of the loan amount and as a guarantee / security of the loan including cheques bearing no 997638 amounting to Rs.1,00,00,000/- and bearing no 997639 amounting to Rs.70,00,000/- drawn on State Bank of India, Bhikaji Cama Place branch. New Delhi,

2.2 The respondent no.2/complainant filed the present complaint against the petitioners under section 138 read with section 141 of NI Act on the basis of two post-dated cheques bearing no 997638 amounting to Rs.1,00,00,000/- and 997639 amounting to Rs.70,00,000/- dated 20.12.2018 given by the petitioner no.1 towards part discharge liability and these cheques were got dishonoured when presented for encashment on the ground of “Payment Stopped by Drawer” vide Cheque Returning Memos dated 31.12.2018. The petitioners did not pay the cheque amount despite the notice dated 01.01.2019. Hence, the respondent no.2 filed the complaint under section 138 of NI Act.

3. The court of Ms. Kadambari Awasthi, MM-04 (North), Rohini Court,



Delhi vide order dated 06.03.2019 took cognizance for the offence punishable under section 138 of NI Act and accordingly summoned the petitioners. The order dated 06.03.2019 reads as under:

It is prima facie clear that the cheques in question have dishonoured due to 'payment stopped by drawer' in the bank account of the accused and the accused has failed to pay the cheque amount despite service of the statutory notice. From the perusal of complaint, affidavit in evidence and documents filed on record I am satisfied that prima facie case u/s 138 of the Negotiable Instrument Act has been made out against the accused. Accordingly, I take cognizance of the offense.

Affidavit in chief tendered. Documents exhibited. Vide separate statement, Pre summoning evidence is closed.

Arguments on summoning of accused heard. Record Perused.

Issue summons to all the accused persons on filing of PF/RC/SP alongwith copy of complaint within seven days from today, returnable on 28.06.2019. Affixation be done as per law.

As per the guidelines laid down in the case titled as “Damodar S. Prabhu Vs. Sayed Babalal H”, AIR2010(SC)1907, Ahlmad is directed to make a mention on the summons issued against the accused (By adding separate sheet, if required) that “accused can make an application for compounding of the offence at the first and second hearing of the case and if such an application is made, compounding may be allowed by the court without imposing any costs on the accused”.

4. The petitioners alleged that Pankaj Jain who is the authorized representative of the respondent no.2 filed number of criminal cases against the petitioner no.1 to harass and extort money. The police of Jammu & Kashmir lodged FIR bearing no. 0069/2019 against the authorized representative of respondent no 2 and their associates involved in the said *CRL.M.C. 3542/2019*



racket and investigation is under progress. The petitioner no 2 had preferred a Writ Petition (Criminal) bearing no.2322/2019 before the High court of Jammu & Kashmir at Srinagar for constituting SIT.

4.1 The cheques in question are not valid negotiable instruments as they exceed the special the endorsement written on the face of the instrument i.e. its value cannot exceed beyond Rs.50 lakhs.

4.2 The petitioner no.1 had issued four undated cheques bearing no.997635, 997637, 997638 and 997639 drawn on State Bank of India, Bhikaji Cama Place, Delhi in favour of the respondent no.2 as a security against loan with understanding that these cheques would not be presented to the bank by the respondent no.2. The last financial transaction with regard to the repayment of the loan amount by the petitioner no.1 to respondent no.2 was made in 2014 and the respondent no 2 was in possession of the four undated cheques issued on behalf of the petitioner no 1. However the respondent no 2 presented these four undated cheques cheques with its bank after more than four years. It was agreed between the parties that the loan was not liable to be repaid by the petitioners to the respondent no.2. The Income Tax Scrutiny Assessment Proceedings vide letter dated 31.12.2015 issued to the respondent no 2 against the petitioner no1 made aware that the petitioner no



1 had claimed that the loan amount has been added back as income. The respondent no 2 vide letter dated 07.01.2016 in reply to said letter dated 31.12.2015 had refuted the petitioner's claim by stating that the respondent no 2 has not given consent to written off any amount due to the petitioner no.1 and a sum of Rs.3,69,72,250 with interest is still due as on 31.12.2015. The respondent no.2 did not disclose before the assessing officer that the respondent no.2 is in possession of four undated cheques of the petitioner no 1. The respondent no 2 in 2016 was aware that the petitioner no.1 has treated said loan amount against which the four undated cheques were issued as written back and the respondent no.2 chose to sit till 2018 to present in its bank the undated cheques in question. The Income Tax Appellate Board vide its judgement dated 13.4.2018 had accepted the submission of the petitioner no 1 company and had held that the loan extended by respondent no.2 to the petitioners has been written back. Hence there is no legally enforceable liability of petitioners towards respondent no.2. It is prayed that the complaint bearing no 705/2019 and summoning order 06.03.2019 dated be set aside.

5. The respondent no 2 filed reply to the petition.

6. The learned Senior Counsel appearing on behalf of the petitioners argued



that it is reflected from the reply dated 14.01.2019 to the legal notice dated 01.01.2019 that the four undated cheques including the cheques in question bearing nos. 997638 and 997639 were issued by the petitioner no.1 to the respondent no. 2 as security against loan with an understanding that these cheques will not be presented to the bank by respondent no.2. The loan amount was added back as the income of the petitioners in its income tax return for the year 2013-14 but despite this the respondent no 2 did not return the cheques in question to the petitioner no.1. The petitioner no 1 as such issued direction to the bank to “Stop Payment” against the undated security cheques.

6.1 The learned Senior Counsel further argued that vide letter dated 31.12.2015 issued in the Income Tax Scrutiny Assessment proceedings, the respondent n. 2 was made aware that the petitioner no 1 had claimed amount against which four undated cheques were issued, has been added back as income.

6.2 The cheques in question were only valid for an amount of up to Rs. 50 lakhs but were issued for amounts more than Rs.50 lakhs and as such the cheques in question were not validly issued on behalf of the petitioner no.1. Therefore, the cheques in question bearing nos. 997638 and 997639 do not



fall within the ambit of NI Act.

7. The Supreme Court in **Kusum Ingots & Alloys Ltd. V Pennar Peterson Securities Ltd. & others**, (2000) 2 SCC 745 laid down the following ingredients for taking cognizance under sections 138 NI Act:-

- (i) A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability
- (ii) That 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
- (iii) That cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank
- (iv) The payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid
- (v) The drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course within 15 days of the receipt of the said notice
- (vi) The complaint is to be filed within one month from the date of expiry of the 15 days from the receipt of the notice.

8. The Supreme Court in **Pepsi Foods Ltd. V Special Judicial Magistrate**, (1998) 5 SCC 749 regarding summoning observed as under:-

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28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

9. The Supreme Court in *Tedhi Singh V Narayan Dass Mahant*, Criminal Appeal No 362 of 2022 (arising out of SLP (Crl) No.1963 of 2019) decided on referred *Basalingapa V Mudibasappa*, (2019) 5 SCC 418 wherein it was observed as under:-

25. We having noticed the ratio laid down by this Court in the above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:

25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely



on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

10. In Sripati Singh (since deceased) through his son Gaurav Singh V The State of Jharkhand & another, Criminal Appeals no 1269-70 of 2021 decided on 28th October, 2021 by the Supreme Court, it was contended that the learned Judge of the High Court had in fact committed an error in arriving at the conclusion that the cheque issued by the respondent no 2 was towards 'security' and that the same could not have been treated as a cheque issued towards the discharge of legally recoverable debt. The Supreme Court observed as under:-

16. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences



contemplated under Section 138 and the other provisions of N.I. Act would flow.

17. When a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security' cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a sine qua non to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in a proceedings initiated under Section 138 of the N.I. Act. Therefore, there cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an 'on demand promissory note' and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation.

11. The respondent no 2 alleged that the respondent no.2 advanced loan amounting to Rs. 5,00,00,000/- (Rupees five Crores only) to the petitioner no.1 through RTGS on various dates as detailed hereinabove. The petitioner



no.1 issued four post-dated cheques towards return of the loan amount and as a guarantee / security of the loan including cheques bearing no 997638 amounting to Rs.1,00,00,000/- and 997639 amounting to Rs.70,00,000/- drawn on State Bank of India, Bhikaji Cama Place branch, New Delhi which are the foundation of the present complaint. These cheques were got dishonoured when presented for encashment on the ground of “Payment Stopped by Drawer” vide Cheque Returning Memos dated 31.12.2018. The petitioners did not pay the cheque amount despite the notice dated 01.01.2019.

11.1 The petitioners alleged that the petitioner no1 had issued four undated cheques bearing no 997635, 997637, 997638 and 997639 in favour of the respondent no.2 as a security against loan with understanding that these cheques would not be presented to the bank by the respondent no.2 as it was agreed between the parties that the loan was not liable to be repaid by the petitioners to the respondent no.2. There was no legally enforceable liability of petitioners towards respondent no.2.

11.2 It is reflected that the respondent no.2 advanced loan of Rs.5,00,00,000/- to the petitioner no 1 on various dated. The petitioner no 1 issued four undated cheques including cheques in question bearing



no.997638 and 997639. The petitioners claimed that loan of Rs.5,00,00,000/- was not required to be repaid but this fact is not admitted by the respondent no 2. The issues raised by the petitioners can only be decided during trial and after evidence to be led by the petitioners and the respondent no 2. The cheques in question at this stage cannot be stated as not issued in discharge of legally enforceable debt and no liability can be fastened on basis of these cheques. The cheques in question issued as security cheques cannot be considered as mere waste paper and worthless of claiming enforcement of liability or right arising out of these cheques particularly advancement of loan by the respondent no 2 is not disputed by the petitioners. The cheques in question have become enforceable when the petitioners did not repay the loan amount as claimed by the respondent no 2. The proposed defence of the petitioners cannot be legally considered at time of taking cognizance by the trial court which is obliged to take cognizance merely on basis of allegations as made in complaint and pre summoning evidence if any.

12. The learned Senior Counsel for the petitioners also argued that the cheques in question are not valid legal instruments as these cheques as per special endorsement made on them were only valid for amount up to Rs.50



lakhs but cheques in question were stated to be issued for amount more than Rs.50 lakhs. The argument so advanced by the learned Senior Counsel is without legal force and sanctity. The cheques in question were allegedly issued by the petitioner no.1 with the knowledge that these cheques are valid only for an amount of upto Rs.50 lakhs.

13. On the basis of pleas as taken in the present petition and arguments advanced by the learned Senior Counsel for the petitioners, the summoning order dated 06.03.2019 cannot be recalled. The petition is devoid of any merit. Hence, the present petition along with pending applications, if any, stands dismissed. Interim stay, if any, stands vacated. However, the petitioners shall be at liberty to raise all the pleas and contentions, as mentioned in the petition during the trial.

DR. SUDHIR KUMAR JAIN, J

SEPTEMBER 05, 2023

j/am