IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 938 OF 2022

Jaspal Alagh Prop. of M/s. Jaslon Overseas ...Applicant
Versus
State of Maharashtra & Anr. ...Respondents

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Mr. Rahul Moghe i/by Ms. Kalyani Rathod, Advocate for the Applicant.

Ms. Anoushka Goyal a/w Mr. Shashank Sardesai i/by Paradigm Law Associates, Advocate for Respondent No.2.

Mr. Arfan Sait, APP for Respondent - State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 29th JANUARY, 2024.

P.C.:

1. The Applicant has invoked inherent powers of this Court under Section 482 of Code of Criminal Procedure challenging the Order issuing process dated 21st March, 2022 passed by learned Metropolitan Magistrate 44th Court Andheri, Mumbai and the proceedings in Criminal Case No.355/SS/2021.

2. The complaint was filed by Respondent No.2 for an offence under Section 138 of Negotiable Instruments Act, 1881.

SUNNY ANKUSHRAO THOTE Digitally signed by SUNNY ANKUSHRAO THOTE Date: 2024.04.28 19:18:27 +0530

3. The allegations in the complaint can be briefly summarized as under :

i. The Accused approached the complainant for availing receivables purchase factoring services. The Accused stated that it has certain receivables from exports of goods and in order to manage its cash flows, the Accused intends to assign such receivables to complainant on full recourse basis against receipt of advance payment from complainant towards such receivables.

ii. The Accused and complainant entered into a term sheet dated 15th January, 2020 and a full recourse amount purchase and Security agreement dated 13th February, 2020 read with demand promissory note dated 13th February, 2020.

iii. At the request of Accused, the amount under the facility was enhanced from USD 2,00,000 to USD 15,00,000 vide scheduled dated 3rd November, 2020 in lieu of seeking enhanced facility from complainant.

iv. Under the master agreement, the receivables of the Accused were assigned to complainant on full recourse basis.

v. As per Section 13 of the master agreement, the complainant was appointed as the collection and process agent by both. The complainant was authorized to receive in its own name, any document, record, notices, cheuqes, guarantees, assurance etc. from the Accused or any other person with respect to the master agreement.

vi. in terms of clause 7 of the master agreement, the Accused is required to pay the complainant immediately upon the receipt of demand from complainant.

vii. The Accused also offered to adequately secure the repayment of all assigned receivables in the form of assigned undated cheques from the Accused alongwith undertaking in favour of complainant.

viii. The Accused gave nine signed undated cheques Bearing Nos. 065409, 065410, 065404, 065405, 554184, 554185, 554186, 554587 and 554188 drawn on Yes Bank Limited alongwith undated cheque undertaking dated 13th February, 2020 and 17th November, 2020 in favour of complainant.

ix. The UDC undertaking executed by the Accused clearly mentioned that the undated cheque issued by the Accused are intended to be used at any time towards recover of any outstanding payable to complainant and the complainant entitled to encash the undated cheque towards satisfaction of such outstanding amounts.

x. Since, the Accused failed to pay under the invoice, as per the master agreement, the complainant vide notice dated 5th May, 2021 called upon the Accused to make payment of USD 557,261/- equivalent to Rs.4,17,49,994/- within three days from the date of demand notice.

xi. Certain additional amounts became due and hence vide demand notice dated 8th November, 2021, the complainant called upon the Accused to make payment of USD 1,407,429.00 equivalent to Rs.10,54,44,580/- within seven days from the date of demand notice. However, no such payment was received by the complainant.

xii. In view of terms of USD undertaking, the complainant proceeded to deposit the cheques on 14th October, 2021 deposit seven cheques viz. Cheque No.065404 for Rs.44,02,800/-, Cheque No.065405 for Rs.44,02,800/-, Cheque No.554184 for Rs.28,00,000/-, Cheque No.554185 for Rs.28,00,000/-, Cheque No.554186 for Rs.28,00,000/-, Cheque No.554187 for Rs.28,00,000/-, Cheque No.554188 for Rs.28,00,000/-. The complainant deposited two cheques Bearing No.065409 for Rs.7,44,20,000/- and Cheque No.065410 for Rs.81,26,637/- towards repayment the amount advanced by complainant under the master agreement and purchase recourse.

xiii. Cheques were deposited on 14th October, 2021 and 20th October, 2021. The complainant received cheque return memo from the bank on 16th October, 2021 in respect to seven cheques with remarks “account blocked (situation covered in 21-25)”. Complainant received return memo of two cheques with marks “account blocked (situation covered in 21-25)”.

xiv. The cheques were isued and singed by the Accused in discharge of liability towards the complainant. On 27th October, 2021 statutory notice under Section 138 of N.I. Act was sent to the Accused and it is proprietor calling upon them to pay the amount of nine cheques being Rs.10,53,52,237/- within 15 days of receipt of the demand notice.

xv. The demand notice was received by the Accused on 30th October, 2021 letter dated 8th November, 2021 was received from the Accused contending that the Accused is not liable to pay. Complaint was filed.

4. The learned Metropolitan Magistrate vide Order dated 21st March, 2022 observed that *prima facie* the offence is made out against the Accused under Section 138 read with 141 of N.I. Act.

Process was issued for the said offence.

5. Learned Advocate Mr. Moghe appearing for the Applicant submitted that the proceedings under Section 138 of N.I. Act are not maintainable. The cheques were returned with remark “account blocked”. The Applicant had replied to the demand notice denying its liability and challenging the maintainability of notice. On 19th June, 2021 the Applicant had informed the complainant vide email that his GST and custom drawback refunds are blocked by the statutory authority i.e. CGST Department and therefore the same has became inoperative. The letter dated 11th February, 2021 addressed to Yes Bank by Principal Commissioner, CGST Delhi shows that the account maintained by the Applicant with Yes Bank from which the alleged cheques were issued and dishonored was provisionally attached for outward transaction and no debit shall be allowed to be made from the said account due to initiation of proceedings against the Applicant under Section 67 of the CGST/SGST Act. Though the Applicant complied with all the necessary formalities and requirement with respect to the said proceedings due to the ongoing pandemic (COVID-19), the matters were pending clearance of the government’s end. The Applicant forwarded email dated 16th October, 2021 and 21st October, 2021

and informed the complainant as regards continuation of the order of “debit freeze” by the statutory authority and accordingly called upon the complainant not to deposit the cheques issued from the said account. It was specifically stated that the copy of debit freeze has been physically handed over to the complainant. Despite being aware of the blocking of the account before depositing the said cheques, the complainant maliciously initiated the proceedings against the Applicant under Section 138 of N.I. Act. The order issuing process was passed without application of mind. It is further submitted that the cheques were deposited before the date of accrual. The proceedings are not maintainable in law.

6. Mr. Moghe has relied upon the following Judgments :

i. Asmita Sarang V/s. Yogesh Badoni and Another[1]

ii. Kusum Ingots & Alloys Ltd. V/s. Pennar Peterson Securities Ltd. And Others[2]

iii. Vijay Chaudhary V/s. Gyan Chand Jain[3]

iv. Onkar Nath Goenka V/s. Gujraj Lease Finance Ltd.[4]

v. Rajesh Meena V/s. State of Haryana and Others[5]

vi. M/s. Ceasefire Industries Ltd. V/s. State & Ors.[6]

1 2023 SCC OnLine Bom 528
2 (2002) 2 SCC 745
3 2008 (104) DRJ 349
4 2008 SCC OnLine Del 1593
5 2019 SCC OnLine P & H 6256
6 2017 SCC OnLIne Del 8280

7. Learned Advocate for Respondent No.2 submitted that the application is devoid of merits. The Applicant has not made any ground for quashing the proceedings. The Applicant had failed to appear once before the trial Court. The trial Court has issued warrant for the arrest of the Applicant vide Order dated 26th September, 2022. The plea of the Accused could not be recorded. The cheques were issued and signed by Applicant and discharge of liability towards complainant. In view of arrangement between the Applicant and Respondent No.2 and the master agreement and UDC undertaking, there is no room for doubt that the Applicant is liable to pay the outstanding sums of Respondent No.2 for which purpose the cheques had been issued. The Applicant had failed to disclose that there was no existing debt or liability at the time of presentment of cheuqe for encashment. Even, if the cheque is dishonored for any reason whatsoever, there is no legal impediment for the *bona fide* drawer to pay the amount covered under the cheque to the payee. If the case of Applicant was *bona fide* he would have demonstrated is interested to pay the outstanding amounts to Respondent No.2. The learned Magistrate has issued process on the basis of documents before the Court. *Prima facie* case was made out under Section 138 of N.I. Act for issuance of process against the Accused. In view of the understanding reached

between the Applicant and Respondent No.2 as set out in the master agreement, the Applicant is under contractual liability to fulfill his obligations. The Applicant had provided the subject cheques to the complainant with an executed undertaking stating that subject cheques are intended to be used at any time towards recovery of any outstanding dues payable to the complainant and the same would be honoured if presented for encashment. The complainant has paid the amount as required by the Applicant and it was for the Applicant to perform his contractual obligation.

8. Learned Advocate for Respondent No.2 has relied upon the following decisions :

i. Maruthai V/s. Raja dated 31st March, 2023 passed by High Court of Judicature at Madras in Criminal Original Petition No.31188 of 2019.

ii. Naveen Kumar Sharma And Another V/s. State of U.P. and Another, Judgment dated 6th April, 2023 passed by Allhabad High Court.

iii. Guneet Bhasin V/s. State of NCT of Delhi and Others[7]

iv. M/s. GoGo International Pvt. Ltd. V/s. M/s. Lilliput Kidswear Ltd., passed by High Court of Karnataka at Bengaluru dated 24th January, 2019.

7 2022 SCC OnLine Del 3967

v. Display Service, Prop. Co-op Pvt. Ltd. V/s. State of West Bengal[8]

vi. Mrs. Avneet Bedi V/s. Navin Malik, passed by High Court of Karnataka at Bangalore.

vii. Pankaj Mehra And Another V/s. State of Maharashtra And Others[9]

viii. Rakesh Nemkumar Porwal V/s. Narayan Dhondu Joglekar and Anr. passed by the High Court of Bombay in Criminal Writ Petition No.561 of 1992 dated 29th July, 1992.

9. The factual matrix emanating from the complaint and the documents on record would indicate that the Accused had approached the complainant for availing receivables purchase factoring services. The Accused had assigned receivables to complainant against receipt of advance payment from the complainant towards such receivables. They executed term sheet dated 15th January, 2020 and the full recourse account purchase and security agreement dated 13th February, 2020. Under the master agreement the receivables of the Applicant were assigned to Respondent No.2 on full recourse basis. In order to secure the repayment of all assigned receivables under the master agreement,

8 2013 SCC OnLine Cal 23093
9 (2000) 2 SCC 756

the Accused issued nine cheques. The UDC undertaking executed by the Accused stated that the cheques issued by the Accused were undated to be used at anytime towards recovery of any outstanding dues payable to Respondent No.2 and the Respondent No.2 is entitled to encash the chques towards satisfaction of the outstanding amounts. It is apparent that the customer of the Applicant to fail to clear that the assigned invoices and the complainant exercised recourse and demanded the sums due assigned invoices. The Applicant was liable to honour the cheques when presented for payment. The cheques were dishonour with remark account blocked. The Respondent No.2 has already paid the amount as required by the Accused and the Respondent No.2 was entitled to recover the said amount.

10. The contention of the Applicant is that the account was blocked by GST authority. The blocking of account was beyond control of the Applicant. The reason for dishonour of cheuqe is not covered by the provisions of N.I. Act and hence, the proceedings are not maintainable in law. From the complaint it is evident that the cheques were deposited on 14th October, 2021 and 20th October, 2021. Communication dated 16th October, 2021 annexed to the Application was made to the complainant which indicate that the

GST verification is under process from 10th February, 2020. It is pertinent to note that the full recourse account purchase and security agreement (master agreement) was executed on 13th February, 2020. The demand promissory note dated 13th February, 2020. The additional demand promissory note dated 3rd November, 2020. Thus, although the verification was going on since February 2020, the cheques were forwarded by the Accused in view of understanding with the complainant while executing the aforesaid documents and providing right to the complainant to deposit the same in certain eventualities.

11. The grounds urged by the Applicant cannot be considered at this stage. The proceedings cannot be scuttled at preliminary stage. The complainant must be given an opportunity to prove its case.

12. In the case of *Asmita Sarang (supra),* the Court has observed that it would be important to find out the time when the offence under Section 138 can be said to have been committed by the company. The ingredients for constituting the offence offered post imposition of moratorium. The Accused cannot be blame.

13. In the case of *Kusum Ingots & Alloys Ltd. (supra),* It was observe that before the drawer of the cheque by the company or before expiry of notice period of 15 days prescribed under Section 138 of N.I. Act, direction not to dispose of assets is passed under Section 22-A by BIFR against the company, the offence under Section 138 cannot be said to be complete and proceedings would not be maintainable.

14. *Vijay Chaudhary V/s. Gyanchand Jain (Supra),* the Delhi High Court has observed that where the payment has to be stopped because of attachment of bank account on which the cheque is drawn by an order of the Court in respect of post dated cheque, which attachment has taken place between the date of issuance of the cheque and the date when the payment under the cheque became due, the offence under Section 138 of N.I. Act can be said to have been committed, if the chque is dishonoured for the reaons payment stopped by attachment order. The rope in the drawer of the cheuqe within the ambit of Section 138 of N.I. Act when the cheque is dishonoured for ostensible reasons different from those specifically provided under the Act, it is necessary to establish that the ostensible reason one attributable to voluntary act, omission of the drawer and that the same is merely a ruse to avoid payment of

the cheque and the real reason is the insufficiency of funds on the account or that the amount of the cheque exceeds the arrangement that the drawer has with the bank under an agreement. It was further observed that the provision has to be construed in meaningful way so as to advance the purpose for which it has been enacted. However, the interpretation of the Section cannot be stretched to such limits so as to render the drawer of a cheque liable for Penal action wherever the cheque has been returned from the bank unpaid for whatever reason. The Penal statutes have to be construed strictly. It was further observed that the objective of chapter XVII of the Act is not to provide a remedy for recovery of the amount due. It is not that the payee or the holder of the cheque in due course has no other remedy available in law to enforce is claim. He has a remedy by way of filing a Civil Suit to enforce his claim independently. He may initiate remedies available in law. The attachment by an order of the Court in that case was after issuance of cheque but prior to its presentation for encashment. The attachment of the bank account had disabled the Accused from operating account. Once the account has been attached by order of the Court the account could not be operated hence no offence under Section 138 of the N.I. Act was made out.

15. In the case of *Onkar Nath Goenka (supra),* the Delhi High Court had observed that penultimate issue in the matter is whether on the date of which the cheque is dishonoured and the payment in compliance of legal notice should have been made, where the Accused is incapable of making the payment on account of order of CBI. The Court held that the complaint for an offence under Section 138 of N.I. Act is required to be quashed.

16. In the case of *Rajesh Meena (supra),* had adjudicated the Petition challenging the complaint under Section 138 of N.I. Act. The Petitioner Accused had contended that the account of the company was blocked. It was held that the cheque issued by the account holder must be from the account maintained by account holder with the drawer bank for discharge in whole or in part or in debt or other liability. The account maintained by the account holder would mean the account is alight or operative.

17. In the case of *M/s. Ceasefire Industries Ltd. (supra),* the Delhi High Court was dealing with order of acquittal in the complaint under Section 138 of N.I. Act. In the said case demand notice issued after the dishonored of cheque it was stated that the cheque was returned as the account was freezed. The remark in the

return memo was that the accounts were blocked. The trial Court dismissed the complaint. It was held that complainant was aware that the account had been frozen by statutory authority and the reason for return of cheque unpaid being not what is envisaged in Section 138 of N.I. Act, the Petition was dismissed.

18. In the case of ***Dande Jewellers Pvt. Ltd. & Anr. V/s. Kanish Jewels & Anr., passed by the High Court of Bombay in Criminal Writ Petition No.1049 of 2022 dated 20th October, 2022***, this Court has dealt with the Petition challenging the proceedings under Section 138 of N.I. Act and the order issuing process. The contention of the Petitioner was that the account in relation to which the cheque was issued had been attached by the income tax authorities. The reason for dishonour was payment stopped by attachment of Court Order. It was therefore contended that the reaons for dishonor was not covered under Section 138 of N.I. Act. This Court referred the decision of ***Rakesh Nemkumar Prowal V/s. Narayan Dhondu Joglekar, (1993) MhLJ 630*** and the decision of the High Court in the case of ***NEPC Micon Limited V/s. Magma Leasing Limited (1994) 4 SCC 253*** and observed that if the account was attached due to non-payment of liability of tax, the Petitioner cannot get advantage of their own wrong. This Court also

considered the observations in the case of *Rakesh Nemkumar Poarwal (supra),* wherein it was observed that the reason for dishonor even if they be valid should not and cannot be taken into account by the Magistrate when complaint is presented. Hence, the order of issuance of process cannot be faulted.

19. In the case of *Rakesh Nemkumar Porwal (supra),* it was observed that the return of a cheque is itself and indication that funds are not forthcoming. The wording and endorsement from the bank or the circumstances under which the cheque is returned are not the guiding criterian but the fact that on presentation of the cheque, payment was not made. Dishonour implies insufficiency of funds. The grounds on which a cheque would be dishonoured are common place and in not having made any exception for such situations, the legislative intend behind Section 138 of the N.I. Act was that cases of dishonor of cheque would constitute a criminal offence unless payment was forthcoming within the prescribed period. The circumstances under which dishonor takes place are to be totally ignored and reasons for dishonor even if valid should not be taken into account by Magistrate when a complaint is presented under Section 138 of N.I. Act.

20. In the case of *Naveen Kumar Sharma And Another (supra),* the Allahabad High Court as per with a similar situation the complaint was relating to the offence under Section 138 of N.I. Act. The chqeque was dishonored with remarks account blocked. The contention of the Accused was that the cheque was not dishonored on the ground of insufficiency of funds. The court observed that whether the amount of which the cheque was drawn word having sufficient balance to pay the amount gathered by the said cheque, whether the Petitioner having some amount apart form the account which was blocked on which the cheque was drawn, whether the Petitioner intended to get cheque encash, all the questions which has been decided during the trial.

21. In the case of *Guneet Bhasin (supra),* it was held that although the cheque was dishhonoured with remark account blocked, if it is presumed that there is any regularity or illegality in the format of the said cheque return memo then it can be addressed during the course of trial. The Accused had not dipsute the issuance of cheque under his signature of the dishonor of cheque by the banker.

22. In the case of *M/s. GoGo International Pvt. Ltd. (supra),*

several cheques were dishonoured with remarks “account blocked”. The contention of the Accused was that on the date of issuance of cheque and its presentation, sufficient amount was available to their credit and the cheque was dishonoured on account of supervising event which had taken place without the intervention of the Accused. The Karnataka High Court held that whether the amount was in fact lying to the credit of the Accused in their bank account as on the date of issuance of cheques as well as on the date of presentation of cheques is a question of fact which requires to be decided by the Court in order to determine whether the cheques in question were issued without having an intention to get them encahsed so as to render the Accused liable for the offence. Merely, on the basis of endorsement issued by the bank it cannot be concluded that the amount of money standing in that account was insufficient to honor the cheques or that it exceeded the arrangement made with the bank. The trial Court is required to record the evidence of the parties and arrived at a independent conclusion as to whether any offence under Section 138 of N.I. Act has been committed, or not.

23. In the case of *Display Service, Prop. Co-op Pvt. Ltd. (supra),* the Calcutta High Court had observed that the prosecution

is maintainable against the Accused under Section 138 of N.I. Act in the event the cheque is dishonoured with remark account closed. The dishonor of cheuqe with remark account blocked would also fall within ambit of Section 138 of N.I. Act. When there is no material on record to show that there was sufficient credit in the account at the time of presentation of the cheque.

24. The Applicant cannot be absolved of the prosecution by quashing the proceedings at this stage on the ground that the cheque was returned with remark account blocked. Whether there was any amount in the bank account of the Applicant at the time of dishonour of cheque and that the cheque was dishourned for the reason of beyond the control of Applicant will have to be determined during the trial. The Court is required to give effect to the intention of the legislature. The Division Bench of this Court in the case of *Rakesh Porwal* has observed that the circumstances under which the dishonor takes place are to be ignored and the reason for dishonor even if valid should not be taken into account. The law takes note of the fact that the payment has not been forthcoming and it matters little that any of the manifold reasons may have caused the situation. If for instance the closure of an account or stoppage of payment or any other common place reaons

for dishonor word to be justifiable, the the legislature would have set this in the Section as exceptions not constituting the offence. No such intention can be read into Section 138 as non exists.

25. The Hon'ble Supreme Court in the case of ***Kanwar Singh V/s. Delhi Administration, 1965 1 SCR 7,*** has observed that it is the duty of the Court in construing a statute to give effect to the intention of the legislature giving a literal meaning to a word use by the drafts man particularly in a penal statute, would defeat the object of the legislature which is suppress a mischief, the Court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will advance the remedy and suppress the mischief.

26. In the case of ***Swantraj & Ors. V/s. State Of Maharashtra, 1975 3 SCC 322,*** the Hon'ble Supreme Court has observed that every legislation is social document and judicial construction seeks to decipher the statutory mission, language, permitting, taking the one from the rule in Heydon's case of suppressing the evil and advancing the remedy. What must tilt the balance is the is the purpose of the statute, it potential, frustration and judicial avoidance of the mischief by construction whereby the means of

licensing meet the ends of ensuring pure and potent remedies for the people.

27. In view of the above, I am not inclined to quash the impugned proceedings. However, the non-bailable warrant issued against the Applicant can be quashed and set aside.

ORDER

i. Criminal Application No.938 of 2022 is rejected;

ii. Non-bailable warrant issued by the trial Court on 22nd September, 2022 stands cancelled.

iii. Application stands disposed off.

(PRAKASH D. NAIK, J.)