



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

% Date of Decision: 03.05.2024

+ **CRL.M.C. 919/2023 and CRL.M.A. 3532/2023**

BARKAT HUSSAIN

..... Petitioner

Through: Mr. Sandeep Vishnu and Mr. Chirag
Goel, Advocates.

versus

PRABHAS NAIRAIN MISRA (HUF)

THRU PRABHAS N. MISRA

..... Respondent

Through: Mr. Deves Malan, Advocate

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 482 Cr.P.C., the petitioner seeks setting aside of the order dated 07.07.2022 passed by learned MM-01/NI Act (South), Saket Courts, Delhi in Ct. Case No. 6189/2020 vide which petitioner has been summoned in a case instituted under Section 138 of the Negotiable Instruments Act ('NI Act').

2. The facts, as discernible from the complaint, are that the respondent/complainant has alleged that the petitioner/accused being the proprietor of *M/s Wasi PSA Systems* placed purchase orders for supply of Kuraray-Japan Carbon Molecular sieves ('material'). The first order was placed on 07.01.2020 whereas the second was placed on 08.01.2020. However, on account of certain issues relating to payment of the first order, petitioner asked the respondent to hold the material procured towards the second order. Eventually, the petitioner issued two post-dated cheques, one of which was a cheque bearing No. 000021 for an amount of Rs.22,10,288/-.



The said cheque was presented for encashment twice and was dishonoured on both the instances, with the remark 'payment stopped' and 'payment stopped by drawer'. Based upon the assurance of the petitioner, the respondent presented the said cheque again on 22.05.2020. Upon presentation, the same was returned dishonoured with the remark 'payment stopped by drawer' vide return memo dated 23.05.2020. A legal demand notice dated 20.06.2020 was issued to the petitioner, and upon his failure to pay the amount under the cheque, the subject criminal complaint came to be filed.

3. Vide the impugned order, the petitioner was summoned in the said complaint case and notice under Section 251 Cr.P.C. was framed against him on 18.11.2022.

At this stage, the petitioner pleaded not guilty and claimed trial. He accepted that the details of the cheque had been filed by him, however, he stated that two purchase orders had been placed with the respondent against which two PDCs had been issued as security. He further stated that the purchase orders mentioned that after 30 days of the delivery of the material, the respondent would be entitled to encash the said cheque. While the material and payment w.r.t first purchase order was duly undertaken, however, no material had been supplied towards the second purchase order and yet the respondent had submitted the second cheque for presentation. An email was also sent by the petitioner in this regard to the respondent stating therein that the material under the second purchase order had not been supplied and for return of the subject cheque.

4. During the course of proceedings before this Court, learned counsel for the petitioner has raised the same contention as raised at the stage of



Section 251 Cr.P.C. notice. He has argued that the subject cheque had been issued as a security/advance towards the material to be supplied under the second purchase order and since no such material had been supplied, the petitioner had no existing 'debt or other liability' as envisaged under Section 138 NI Act, towards which the subject cheque was issued.

5. Learned counsel for the respondent, on the other hand, has disputed the contentions raised by the petitioner. He states that the learned MM has rightfully summoned the petitioner vide the impugned order, after due consideration of the facts and pre-summoning evidence. It is further stated that at Section 251 Cr.P.C. stage, the petitioner has admitted that he had filled the details and signed on the subject cheque.

6. The principal contention raised by the petitioner is that the subject cheque had been issued as security advance towards the material to be supplied under the second purchase order. However, considering that no material was supplied by the respondent in terms of the said purchase order, the dishonour of subject cheque, presented for encashment, would not give rise to an offence under Section 138 NI Act. The factum of issuance of cheque and the non-supply of material under the second purchase order are not disputed by the respondent.

7. The issue relating to issuance of PDC towards supply of goods/material in future is no longer res integra. The Supreme Court in Indus Airways Pvt. Ltd. & Ors. v. Magnum Aviation Pvt. Ltd. & Anr. reported as **(2014) 12 SCC 539**, observed as under:-

"1. Leave granted. The only question that arises for consideration in this appeal by special leave is, whether the post-dated cheques issued by the appellants (hereinafter referred to as "the purchasers") as an advance payment in respect of purchase



orders could be considered in discharge of legally enforceable debt or other liability, and, if so, whether the dishonour of such cheques amounts to an offence under Section 138 of the Negotiable Instruments Act, 1881 (for short “the NI Act”)...

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9... The Explanation leaves no manner of doubt that to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of an existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability.

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15... If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the NI Act... In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise



and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability.

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8. In view of the legal position expounded in the Supreme Court judgement in Indus Airways (Supra) as reproduced above, in the facts of the present case, it can be clearly observed that the subject cheque had been issued towards the payment of the material to be supplied under the second purchase order. Admittedly, the material under the second purchase order has not been supplied and despite the same, the respondent presented the subject cheque for encashment. Thus, the dishonour of such cheque, in such circumstances, cannot be considered to be against any legally enforceable ‘debt or other liability’.

9. In view of the aforesaid, this Court is of the considered opinion that continuation of the criminal complaint against the petitioner would amount to an abuse of process of law. Consequently, the petition is allowed and the complaint case against the petitioner is quashed. As a necessary sequitur, the summoning order dated 07.07.2022 is also set aside. Pending application is disposed of as infructuous.

**MANOJ KUMAR OHRI
(JUDGE)**

MAY 3, 2024

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