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

\+ **CRL.M.C. 5021/2019&CRL.M.A. 37406/2019**

THE INDIA FITNESS CONNECT PVT LTD & ORS

.....Petitioners

Through: Mr. Ankur Mittal, Mr. Abhay Gupta, Mr. Sanjivan Chakraborty & Mr. Shikhar Prakash, Advs.

versus

OZONE SPA PVT. LTD.

.....Respondent

Through: Ms. BeenashawSoni, Mr. Rajesh Mahendru, Ms. Mansi Jain & Ms. Anu Joseph.

**CORAM:**
**HON'BLE MR. JUSTICE AMIT MAHAJAN**

**O R D E R**

% **14.11.2024**

1. The present petition is filed against the order dated 01.07.2019 (hereafter '**impugned order**') passed by the learned Additional Sessions Judge ('**ASJ**'), South East District, Saket Court, New Delhi in Criminal Revision No. 302/2017 titled *The India Fitness Connect Pvt. Ltd. &Ors. v. Ozone Spa Pvt. Ltd.*

2. By the impugned order, the learned ASJ dismissed the revision petition filed by the petitioners challenging order dated 05.04.2017 passed by the learned Metropolitan Magistrate ('**MM**') whereby cognizance of offence under Section 138 of the NI Act was taken and the petitioners were summoned.

3. The respondent is engaged in the business of providing health care and fitness products under the brand of "*Ozone*". It is the case of the respondent/complainant that the respondent was approached by the petitioners with the desire to display their "*Precor*" brand products at the premises of the respondent. It is averred that the petitioners offered to pay charges for displaying their products. The respondent was already using the said product in its premises where the health club and fitness centre was being run. Consequently, an agreement dated 21.04.2016 was executed between the petitioners and the respondent whereby it was agreed that the petitioners would use the aforesaid premises of the respondent for advertising its equipments till 01.09.2020 and will pay a total sum of ₹2,51,23,590/- to the respondent as expense for the usage of the said premises for 53 months.

4. Accordingly, it is the case of the respondent that in consonance with the agreement, they advertised petitioner's equipments, and allowed the use of the space at their premises for the purpose of advertisement, and allegedly as on the date of the filing of the complaint, the petitioners were still advertising their equipments. Cheques given by the petitioners for the period May 2016 to October 2016 were honoured and credited. The cheque dated 01.02.2017 for a sum of ₹4,65,750/- issued by the petitioners for the month of February 2017 was, however, dishonoured with remarks *"payment stopped by drawer"*. On the failure to make payment within the statutory period after the receipt of demand notice, the respondent filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 ('**NI Act**').

5. The learned counsel for the petitioners submits that the agreement dated 21.04.2016 had already been terminated, and no liability was owed to the respondent. He submits that since the

agreement had already been terminated by Petitioner No. 2 *vide* letter dated 26.10.2016, the respondent ought not to have presented the cheque for encashment since no liability on date was owed to the respondent.

6. The learned counsel for the respondent submits that at the stage of issuance of summons, the learned MM only has to consider the complaint and take into account whether the ingredients of Section 138 of the NI Act are met. She submits that the arguments raised by the petitioner, at this stage, are in the nature of defence, and ought to be considered only after the evidence is led.

7. She submits that the petitioner had issued 53 post dated cheques, and 18 complaints in respect of the dishonour of the cheques have been filed by the respondent. She submits that the petitioner has challenged the summoning order in relation to only one complaint. She submits that there are several civil litigations pending between the parties.

8. She submits that the petitioners have also filed a suit for declaration that the agreement with the respondent is null and void *ab initio*, being without consideration and induced by fraud and deception. She submits that the petitioners, in that suit, have also sought a decree of mandatory injunction directing the respondent to handover all the cheques issued by the petitioners, and to injunct the respondent and their representatives from presenting the cheques for payment. She submits that therein the petitioners had filed an application seeking interim injunction after referring to the agreement dated 21.04.2016 and the said IA was dismissed by the learned Single Judge who observed that the petitioners had not *prima facie* been able to discharge the onus and establish that the agreement dated 21.04.2016 was vitiated and void. She

submits that a challenge to the said order was also dismissed by the Hon'ble Division Bench of this Court *vide* order dated 25.05.2018.

9. I have heard the counsels for both the parties and perused the material on record.

10. At the outset, it is relevant to note that this Court can quash the summoning orders issued in NI Act cases in the exercise of its inherent jurisdiction under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) if such unimpeachable material is brought forth by the accused persons which indicates that they were not concerned with the issuance of the cheques or that no offence is made out from the admitted facts. The Hon'ble Apex Court in the case of ***Rathish Babu Unnikrishnan v. State (NCT of Delhi)* : 2022 SCC OnLine SC 513** had discussed the scope of interference by the HighCourt against the issuance of process under the NI Act as under:

> *"8. The issue to be answered here is whether summons and trial notice should have been quashed on the basis of factual defences. The corollary therefrom is what should be the responsibility of the quashing Court and whether it must weigh the evidence presented by the parties, at a pre-trial stage.*
> *xxxxxxxxxxxx*
> *16.* ***The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.***
> ***17. The consequences of scuttling the criminal process at a pretrial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process.*** *Also because*

*of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.*

*18. Situated thus, to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the trial court will not in our opinion be judicious. Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited."*

(emphasis supplied)

11. In line with the dictum of the Hon'ble Apex Court in ***Rathish Babu Unnikrishnan v. State (NCT of Delhi)*** *(supra),* thus, while exercising the power under Section 482 of the CrPC to quash a summoning order, it is pertinent for this Court to examine whether the factual defence is of such unimpeachable nature that the entire allegations made in the complaint is disproved.

12. In the present case, the learned ASJ noted that contrary to the contentions of the petitioners, the cheque in question was not a security cheque but rather a post dated cheque. It was noted that the liability on the part of the petitioners arose the moment the agreement dated 21.04.2016 was executed between the parties. The learned ASJ further noted that clause D of the agreement dated 21.04.2016 made it clear that the agreement could neither be terminated nor revoked until the entire payment that is ₹2,51,23,590/- inclusive of the service tax is paid. It was consequently noted that the contention of the petitioners that the agreement has been terminated, and hence the petitioners were under no liability to make the payment was untenable.

13. Much emphasis has been placed on the fact that since the petitioners have terminated the contract *vide* letter dated 26.10.2016, no liability to make any payment arose on the part of

the petitioners. The learned counsel for the petitioner, in support of his contention, has also relied upon the decision of the Hon'ble Apex Court in ***Indus Airways Private Limited and Others v. Magnum Aviation Private Limited and Another*** **: (2014) 12 SCC 539** to contend that since the contract had already been terminated, no liability to make the payment arose. The relevant extract is reproduced as under:

> "*15. The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the NI Act. 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. The Delhi High Court has travelled beyond the scope of Section 138 of the NI Act by holding that the purpose of enacting Section 138 of the NI Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. 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.*"

14. In line with the dictum of the Hon'ble Apex Court in ***Indus Airways Private Limited and Others v. Magnum Aviation Private Limited and Another*** *(supra)* if at the time of entering into the contract, one of the conditions is that the purchaser ought to pay the amount in advance, and there is a breach, no liability under

Section 138 of the NI Act would be created. It was further observed that if a cheque is issued as advance payment for purchase of goods and for some reason the purchase order is not carried either due to cancellation or otherwise, then the cheque cannot be said to have been drawn for an existing debt or liability.

15. The present case, however, is distinguishable on facts. From a perusal of the agreement dated 21.04.2016, it is evident that the agreement in itself does not make a mention of the issuance of cheques or that of any advance payment. The agreement under Clause B states as reproduced hereunder:

> *"B. WHEREAS as per the discussion and meeting held on 14.04.2016 at Ozone Spa Pvt Ltd, Defence Colony, New Delhi, wherein it was discussed and agreed that Second Part will use the space at Ozone Spa Pvt Ltd herein referred to as First Part for advertising its equipments till 01st September 2020 and that the Second Part in return will pay Rs. 2,51,23,590/- for 53 months i.e.Rs. 4,74,030/- per month including service tax @14.5% as expenses/rent for the usage of space for advertising the equipments at the premises of First Part i.e. D-27, Defence Colony, New Delhi 110024 till 53 months."*

16. In accordance with Clause B of the agreement, the petitioners were to use the space at the premises of the respondent for advertising its equipments till 01.09.2020, and in return, the petitioners were to pay ₹2,51,23,590/- for 53 months, that is, ₹4,74,030/- per month including service tax @14.5% as expenses/rent for the usage of space for advertising the equipments at the premises of the respondent.

17. Further, Clause D of the agreement states that the essence of the agreement is that the same can neither be revoked nor terminated until entire payment ₹2,51,23,590/- including service tax is paid. Without commenting on whether the said contract was valid or not, clause D of the contract explicitly provides that the contract cannot be terminated unilaterally unless the entire amount

is paid. The said amount is not intended as an advance payment as in the case before the Hon'ble Apex Court in ***Indus Airways Private Limited and Others v. Magnum Aviation Private Limited and Another****(supra).*

18. Whether the said contract was valid or whether the unilateral termination *per se* was valid or not is in the nature of defence and cannot be looked into at this stage. In any event, concededly, separate proceedings have already been initiated in respect of the contract by the parties.

19. At this stage, however, it cannot be overlooked that the petitioners had advanced 53 cheques of ₹4,74,030/- each inclusive of service tax payable as expense/rent for the use of the space for advertisement and equipments in consonance with the agreement dated 21.04.2016. It is also relevant to note that six cheques each for a sum of ₹4,74,030/- have been encashed. Further, in terms of the agreement, the petitioners could not have terminated the contract till the entire sum of ₹2,51,23,590/- inclusive of service tax is paid.

20. It has been pointed out that the petitioners had filed a suit for declaration that the agreement is null and void *ab initio*. It has further been pointed out that the interim injunction sought by the petitioners was dismissed by the learned Single Judge who observed that the petitioners have not been able to discharge the onus and establish that the agreement dated 21.04.2016 was vitiated and void. A challenge to the order refusing interim injunction was dismissed by the Hon'ble Division Bench of this Court *vide* order dated 25.05.2018.

21. Concededly, the cheques were issued by the petitioners, and the agreement, *prima facie* provides that the same cannot be terminated. This Court is in agreement with the contention of the

learned counsel for the respondent that at the stage of issuance of summons, the complaint ought to be considered on a demurrer, and the learned Magistrate ought to only be satisfied whether the ingredients of Section 138 of the NI Act are *prima facie* made out.

22. It is pertinent to note while exercising the power under Section 482 of the CrPC to quash a summoning order, it is imperative that the factual defence be of such unimpeachable nature that the entire allegations made in the complaint is disproved. From a consideration of the totality of circumstances, it is apparent that no such unimpeachable evidence has been produced by the petitioners that would warrant this Court to exercise jurisdiction under Section 482 of the CrPC.

23. All the defences raised by the parties would be considered in the trial after the evidence is led.

24. In view of the aforesaid, this Court does not find any reason to interfere with the impugned order, and the same cannot be faulted with.

25. The present petition is accordingly dismissed. Pending application(s) also stand disposed of.

**AMIT MAHAJAN, J**

**NOVEMBER 14, 2024**