



2024:DHC:7253



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:20.09.2024

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CRL.M.C. 4294/2024, CRL. M.A. 16288/2024, CRL. M.A. 16289/2024 & CRL. M.A. 16290/2024

MR. ANIL KULSHRESTHA

..... Petitioner

versus

M/ S FIITJEE LTD.

..... Respondent

Advocates who appeared in this case:

For the Applicant : Ms. Archana Pathak Dave, Senior Advocate with Mr. Kumar Prashant, Mr. Avnish Dave and Mr. Parmod Kumar Vishnoi, Advs.

For the Respondent : None.

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petition is filed challenging the order dated 28.08.2023 (hereafter '**the impugned order**') passed by the learned Metropolitan Magistrate (**MM**) (NI Act) Digital Court-03, Saket Courts, New Delhi in a complaint filed by the respondent being CC NI Act No. 2369/2023, under Section 138 Of Negotiable Instruments Act, 1881 ('**NI Act**').



2. The learned MM, by the impugned order, has taken cognizance of the complaint filed by the respondent and issued summons against the accused/petitioner.

3. The case of the complainant is that the complainant is a well-known institute that undertakes coaching in the name of FIITJEE Ltd. for students for various competitive exams. The accused/petitioner was appointed as Assistant Professor in the Mathematics Department on 02.06.2022. The terms and conditions of employment of the accused were contained in the 'Service Contract Manual for the Employees' which were duly accepted by the accused and he furnished two cheques bearing no. 121010 and 121011 both drawn on Axis Bank, Morena, MP for a sum of ₹2,92,800/- and ₹8,47,200/- respectively in lieu of the said acceptance. It is alleged that in terms of the Service Manual, the complainant had implied authority to fill in the date in the said cheques, in case of any violation of terms of the service manual.

4. The accused failed to report with effect from October, 2022, absented himself from duty, and abandoned the job. The accused thus caused breach of terms and conditions and became liable to pay pre-estimated and pre-determined damages in terms and conditions governing him.

5. The complainant, thereafter, served the accused with a letter dated 07.01.2023 asking him to keep his account funded to honour the cheques in question.



6. According to the complainant, the aforesaid cheques when presented for realisation, were received back dishonoured vide bank return memo dated 17.01.2023 with the remarks 'Payment Stopper by the Drawer'. Consequentially, a legal notice dated 13.02.2023 was served by the complainant upon the accused calling upon the accused to make the payment towards the cheque amount in question within 15 days of receipt of the notice. According to the complainant, the said notice was duly served upon the accused but no payment against the above dishonoured cheques was made by the accused within the statutory period. Hence the present complaint.

7. The cognizance of offence under Section 138 of the NI Act was taken by the learned MM and the accused was summoned *vide* the impugned order dated 28.08.2023. The learned MM noted as under:

"After having perused the complainant evidence by way of affidavit and the documents exhibited in it and treating them as evidence, there remains no need for examination of other witness in person or on affidavit; examination of complainant affidavit and exhibited documents is sufficient enquiry in this case. The ingredients of section 138 NI act stands prima-facie satisfied. Therefore, there appears sufficient grounds for proceeding against the accused for offence punishable under section 138 of NI act.

Hence, issue summons against the accused through SHO concerned on filing of PF returnable on or before NDOH. The process server is directed to serve the summons by way of affixation, in case premises found closed or the same could not be served personally or on any adult male member after ascertaining the address from two respectable inhabitants of the locality."

8. It is the case of the petitioner that the respondent has sought to abuse the process of law as they base their case on the service manual, the terms of which are opposed to public policy, and violative of the settled principles of law, equity, and natural rights.



9. The learned senior counsel for the petitioner submitted that the service contract so entered into is invalid, as his consent was obtained through undue influence. The HR representative at the respondent institute made the petitioner sign the service contract while hurriedly flipping through the pages, disallowing the petitioner the opportunity to peruse the contents thereof and he was not given a copy of the agreement.

10. She submitted that the respondent exercised its position of power and authority to acquire two blank signed cheques from the petitioner. The amount and date on these cheques were filled by the respondent institute pursuant to the resignation tendered by the petitioner. She alleged that the respondent has falsely claimed to issue the legal notice under Section 138 of the NI Act. She has relied on judgment dated 04.03.2015 in the case of ***Vivek Rai Vs Aakash Institute : 2015:DHC:2095*** wherein this Court found a similar clause requiring submission of undated blank cheques by an employee of the coaching institute to be unconscionable and opposed to public policy, therefore, hit by Section 23 of the Contract Act, 1872 (hereafter '**the Contract Act**').

11. She submitted that the summoning order is erroneous, perverse, bereft of reasons, and has been passed in a mechanical manner, and there is no legally enforceable debt or liability for which the respondent can demand any amount. She 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'. She placed reliance on ***Indus Airways Private Limited and Others vs. Magnum Aviation Private Limited and Another: (2014) 12 SCC 539.***

12. It was submitted that the offence under Section 138 of the NI Act is not made out since the amount mentioned on the cheques was not in lieu of any debt owed to the respondent-institute. On the date of issuing the cheques, no liability existed against the petitioner. In the absence of any legally enforceable debt or liability against the drawer of the cheque, the offence under Section 138 of the NI Act will not be attracted.

13. Aggrieved by the aforesaid order, the petitioner has preferred the present petition seeking the quashing of the impugned order, and the criminal proceedings arising out of the complaint.

ANALYSIS

14. In the instant case, the respondent had filed a complaint under Section 138 of the NI Act on 17.03.2023. The learned MM relying upon the complaint supported by the affidavit of the complainant, took cognizance under Section 138 of the NI Act, and passed the summoning order dated 28.08.2023.

15. It is stated that when the cheques in question were given to the complainant, dates were not mentioned therein and they were given for security purposes. The core argument, upon which, the learned counsel for the petitioner argued is that since there was no legally enforceable debt or other liability at the time of drawal/issuance of the cheques, the provisions of Section 138 of the NI Act would not attract.



The second limb of her argument is that the clauses contained in the Service Rule Manual are unconscionable and contrary to public policy under Section 23 of the Contract Act.

16. The issue to be addressed in the instant case is whether summons issued can be quashed based on factual defences, i.e., whether the security cheques given by the petitioner were towards any future consideration or legally enforceable debt.

17. 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 petitioner. The cheques were admittedly issued as a security and were not given towards any future consideration payable by the petitioner. The petitioner was not liable to pay any amount and, therefore, the cheques could not have been presented for encashment. The petitioner at no stage was required to make any payment that could be construed as a legally enforceable debt enabling the complainant to present the cheques in question.

18. 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 High



Court 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.

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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 pre-trial 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.”

19. In the case of ***Sunil Todi and Others v. State of Gujarat and Another : (2022) 16 SCC 762***, 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 NI Act on its dishonour. The Hon'ble 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.”

20. 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 NI 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 was 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.”

21. Section 138 of the NI Act 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.

22. 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.

23. 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 the 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 Hon’ble Apex 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.”

24. 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 in dispute were issued with the consent and knowledge of the petitioner which were to be honoured in the event, the petitioner violated the terms of the service manual towards his liability in part or full. It is alleged by the complainant that the petitioner, unauthorizedly left, in the middle of the academic session without any intimation, information, permission or sanction of leave leading to gross violation of terms and conditions incorporated in the service manual. It is the case of the complainant that the petitioner is hence, liable for payment of damages to the complainant.

25. 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 CrPC should be exercised sparingly and with circumspection.

26. The learned counsel for the petitioner relied on the judgment passed by a coordinate bench of this Court in ***Vivek Rai v. Aakash Institute*** (*supra*), to contend that clauses contained in a similar Service Rule Manual pertaining to security cheques were deemed unconscionable and contrary to public policy under Section 23 of the Indian Contract Act.



27. At this stage, however, it is important to note that the petitioner had entered into a contract with the respondent regarding his employment, which was governed by certain terms and conditions. In accordance with the contract, the petitioner provided undated cheques as security, which were duly signed. When the petitioner allegedly breached the terms of the contract, the respondent presented the cheques, and upon their dishonour, initiated proceedings under Section 138 of the NI Act.

28. Whether the judgment relied upon by the petitioner in ***Vivek Rai v. Aakash Institute*** (*supra*) is applicable to the facts of the present case or whether the Service Manual signed by the petitioner was executed under coercion or deception—thereby vitiating the consent—are issues that necessitate a comprehensive examination during the trial. This determination would necessitate the court to adjudicate on the specific circumstances under which the contract was executed and to interpret the relevant clauses of the agreement. These are factual issues that serve as defences in the case and are not appropriate for determination under the powers conferred by Section 482 of the CrPC at this stage. It is well-established that the High Courts should refrain from expressing any views on disputed questions of fact in proceedings under Section 482 of the CrPC, as doing so would be preempting the trial.

29. In the wake of the aforesaid discussion, this Court finds that the petitioner, at best, has raised question of fact mixed with question of law which cannot be examined in the limited jurisdiction under



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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.

30. In view of the above, the petition is dismissed. Pending application(s) also stand disposed of.

AMIT MAHAJAN, J

SEPTEMBER 20, 2024
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