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

+ Crl. M.C. No.2543/2008

Date of Decision : September 29, 2008

M/s. MOJJ Engineering Systems
Ltd. & Ors. .....Petitioners

Through : Mr. Ajay K. Gupta,
Sr. Advocate with
Ms. Bela Maheshwari &
Mr. K.S. Ramarao,
Advocates

Versus

M/s A.B. Sugars Ltd. .....Respondent

Through : Nemo

CORAM :

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

SUDERSHAN KUMAR MISRA, J.

1. The petitioners have moved this Court under Section 482 of the Code of Criminal Procedure. They pray that the summoning order issued by the Metropolitan Magistrate, Patiala House, New Delhi on 11.04.2008, in criminal complaint No.399/1 of 2007, under Sections 138, 139 and 141 of the Negotiable Instruments Act, 1881, be quashed.

2. The first petitioner is a Company registered under the Companies Act. Its registered office is at Pune. Petitioners No.2 and 3 are the Directors of the first petitioner. The respondent is also a company. It is registered at New Delhi. A contract was entered between the first petitioner and the respondent whereby the first petitioner was to set up a 'Mutli Effect Evaporater Distillation Plant for Bio-Methanated Spent Wash' for the respondent. By way of security for due performance of that contract, the first petitioner issued an undated cheque favoring the respondent for Rs.29,50,000/- drawn on Bank of Maharashtra, Model Colony Branch, Pune. This cheque is stated to have been handed over to the respondent company on 15.10.1995.

3. The petitioners allege that although they fulfilled their commitment for which the undated cheque was given as a security, the respondent never returned the cheque. It is the petitioners' case that instead of returning the cheque, the respondent entered the date 28.1.2008 on that cheque and presented it for collection through HDFC Bank Ltd, New Friends Colony, in February, 2008. On 6.02.2008 the said cheque was returned unpaid with the remarks "Payment Stopped by the Drawer." Thereafter on 16.2.2008, a notice under Section 138, Negotiable Instruments Act was sent by the respondent to the petitioners demanding payment of the

cheque amount of Rs.29,50,000/- within 15 days of receipt of the notice. No reply was sent by the petitioners to this notice. Thereafter on 7.4.2008, the respondent filed the impugned criminal complaint. On 11.4.2008, the Ld. Metropolitan Magistrate took cognizance of the case and issued the impugned order summoning the petitioners under Sections 138, 139 and 141, Negotiable Instruments Act.

4. It is the petitioners' case that the Trial Court has failed to appreciate the fact that even if the allegations in the complaint are taken on their face value and accepted in their entirety, they do not constitute the offence as alleged and that therefore, no prima facie case is made out against them. Learned counsel for the petitioners contends that the cheque in question was actually without consideration because, according to him, the cheque was issued by his clients to ensure supply of the goods and not for guaranteeing the erection, commissioning and performance of the plant and machinery. He states that therefore, the respondent had no right to encash the said cheque for any perceived deficiency in performance of the plant and machinery.

5. Be that as it may, the tendering of the cheque was a condition precedent for the execution of the contract. Even according to the petitioners themselves, this cheque constituted part of a promise made by the petitioners to the

complainant. However, according to counsel for the petitioners, the complainant was entitled to encash the cheque, only in case the complainant failed to receive the goods and equipment envisaged, and not otherwise. Looking to these facts, it is clear that when the cheque was made out and handed over to the complainant, it was admittedly against a valid consideration. Whatever may have been the status of the cheque thereafter is for the petitioners to prove in their defence.

6. Learned counsel for the petitioners further contends that even according to the respondent, the cheque was issued in the year 2005 and presented in February, 2008, and therefore, in view of proviso (a) to Section 138 of the Negotiable Instruments Act, the complaint is not maintainable as the cheque was presented beyond the period of 6 months from the date it was drawn. Proviso (a) to Section 138 on which the petitioners are relying, reads as follows:

> "Provided that nothing contained in this section shall apply unless –
>
> (a) the 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."

A "cheque" under Section 6 of the Act means a bill of exchange which is drawn on a banker and is not expressed to be payable otherwise than on demand. Thus a bill of exchange

acquires the status of a cheque when it is payable on demand. For example, a 'postdated cheque' when it is drawn, is only a bill of exchange and is not payable till the date which is specified on it. The Supreme Court in ***Anil Kumar Sawhney Vs. Gulshan Rai (1993) 4 SCC 424*** while deciding the question of the date from which the period of six months contemplated under Section 138(a) of the Act is to be reckoned in case of a post dated cheque, held as follows;

> "14. An offence to be made out under the substantive provisions of Section 138 of the Act it is mandatory that the cheque is 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. It is the cheque drawn which has to be presented to the bank within the period specified therein. When a postdated cheque is written or drawn it is only a bill of exchange and as such the provisions of Section 138(a) are not applicable to the said instrument. The postdated cheque becomes a cheque under the Act on the date which is written on the said cheque and the six months period has to be reckoned for the purposes of Section 138(a) from the said date. One of the main ingredients of the offence under Section 138 of the Act is, the return of the cheque by the bank unpaid. Till the time the cheque is returned by the bank unpaid, no offence under Section 138 is made out. A postdated cheque cannot be presented before the bank and as such the question of its return would not arise. It is only when the postdated cheque becomes a "cheque", with effect from the date shown on the face of the said cheque, the provisions of Section 138 come into play. The net result is that a postdated cheque remains a bill of exchange till the date written on it. With effect from the date shown on the face of the said cheque it becomes a "cheque" under the Act and the provisions of Section 138(a) would squarely be attracted. In the present case the postdated cheques were

> drawn in March 1990 but they became "cheques" in the year 1991 on the dates shown therein. The period of six months, therefore, has to be reckoned from the dates mentioned on the face of the cheques."

In ***N. Sivalingam Vs. A. V. Chandraiyar, (1996) 86 Comp. Cas. 167***, it was held that a post-dated cheque is deemed to be drawn on the date it bears and the six months period for the purposes of Section 138 is to be reckoned from that date. Similarly, in ***Salar Solvent Extractions Ltd. Vs. South india Viscose Ltd., (1994) 3 Crimes 295 (Mad)***, it has been held that only the dates which the cheques bear are relevant dates and on those dates they would assume the character of a cheque. On a parity of reasoning, in the case at hand, the instrument in question became a cheque only on the date written thereon, i.e. 28.1.2008, and the period of six months mentioned in Section 138 has to be reckoned from that date. In that view of the matter, the impugned complaint is within time.

7. Even otherwise, prima facie, it was the petitioners who had handed over the undated cheque for a certain amount to the respondent in terms of a contract between the parties. Since an undated cheque cannot be encashed, it can only mean that the petitioners had authorized the complainant to enter an appropriate date on it. In ***Young Vs. Grote (1827) 4 Bing. 253*** it was held that when a blank cheque is signed and

handed over, it means the person signing it has given an implied authority to any subsequent holder to fill it up. Similarly, in ***Scholfield Vs. Lord Londesborough (1895-1899) All ER Rep 282*** it was held that whoever signs a cheque or accepts a bill in blank, and then puts it into circulation, must necessarily intend that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. This common law doctrine was also affirmed by Justice Macnaghten in ***Griffiths Vs. Dalton [1940] 2 KB 264*** where it was held that the drawer of an undated cheque gives a prima facie authority to fill in the date. This aspect has also been incorporated in Section 20 of the Negotiable Instruments Act, which deals with Inchoate Stamped Instruments. The Supreme Court in ***T.Nagappa Vs. Y.R.Murlidhar, (2008) 5SCC 633*** while discussing the scope of Section 20 held that by reason of this provision, a right has been created in the holder of the cheque. Prima facie, the holder thereof is authorized to complete the incomplete negotiable instrument. In that view of the matter, all further issues that may be raised by the petitioners regarding the nature and scope of the authority of the respondent to put any particular date on the cheque in question, are all matters for trial.

8. It is not as if the cheque came to be issued without any consideration whatsoever in the first place or that there was such a glaring defect in the complaint that the decision of the Trial Court to issue summons has ex facie resulted in miscarriage of justice or an abuse of the process of Court, and therefore interference under Section 482 Cr.P.C. to quash the proceedings is warranted in the interest of justice. The question whether the consideration for which the cheque was issued was ultimately satisfied or whether the cheque was wrongly sought to be encashed, are all issues that must also be decided at the trial. The Supreme Court in the case of ***M.M.T.C. Ltd. and Another Vs. MEDCHL Chemicals and Pharma (P) Ltd. and Another,(2002) 1 SCC 234*** held as follows:

> **"13.....**the well-settled law that the power of quashing criminal proceedings should be exercised very stringently and with circumspection. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability."

The Court further held that:

> **"17.** There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not

> have concluded that there was no existing debt or liability."

9. Similarly, the Supreme Court in ***M. Gurunathan Vs. R. Amutha,(2005) 13 SCC 58*** while dealing with an appeal under Section 138 of the Negotiable Instruments Act held that:

> "4……. Be that as it may, if any defence on facts has to be raised, it could not be made a ground for quashing the proceedings, being a disputed question of fact."

10. The law with regard to the exercise of power of quashing under Section 482 is well settled. In ***R.P. Kapur Vs. The State of Punjab AIR 1960 SC 866*** the Supreme Court held that:

> "6……..It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage….."

11. In ***State of Punjab Vs. Kasturi Lal (2004) 12 SCC 195***, the Supreme Court discussing the scope of Section 482 of the Code held that:

> "10. The section does not confer any new powers on the High Court. It only saves the inherent power which the court possessed before the enactment of the Code. It

> envisages three circumstances under which the inherent jurisdiction may be exercised, namely: (*i*) to give effect to an order under the Code, (*ii*) to prevent abuse of the process of court, and (*iii*) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction……. While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist……. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complainant, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

12. Similarly, in ***Vir Prakash Sharma Vs. Anil Kumar Agarwal, (2007) 7 SCC 373***, the Supreme Court held that:

> "7**.** The principle underlying exercise of jurisdiction by the High Court under Section 482 of the Code of Criminal Procedure is now well settled viz. that the allegations contained in the complaint petition even if given face value and taken to be correct in its entirety do not disclose an offence or not is the question."

13. In **N*. Rangachari Vs. Bharat Sanchar Nigam Ltd. (2007) 5 SCC 108***, the Apex Court was of the view that if, on reading the complaint as a whole, all the elements of the offence under Section 138 and 141 of the Negotiable Instruments Act are made out, then any pleas put forward by the appellant and the defences sought to be put forward by the accused, can only be looked into after the trial is concluded.

14. In ***M.N. Damani Vs. S.K. Sinha and Others (2001) 5 SCC 156***, the Supreme Court held that for deciding whether the criminal proceedings should be quashed or not "two aspects are to be satisfied: (*1*) whether the uncontroverted allegations, as made in the complaint, prima facie establish the offence, and (*2*) whether it is expedient and in the interest of justice to permit a prosecution to continue." It was thus held that where a prima facie case is made out on reading the allegations in the complaint, and there is nothing to indicate that it is not expedient and in the interest of justice to permit the prosecution to continue, the summons issued by the magistrate were wrongly quashed by the Single Judge of the High Court.

15. It is noteworthy that in the instant case, notice of demand sent by the complainant in terms of Section 138 of the Negotiable Instruments Act, did not elicit any response.

Furthermore, even before this Court, counsel for the petitioners has not explained why his clients failed to make any specific demand in writing for return of the cheque since, according to them, its purpose had already been served, and the contract for which the cheque was issued, was over. Furthermore, as held by the Supreme Court in ***Modi Cements Ltd. Vs. Kuchil Kumar Nandi, AIR 1998 SC 1057***, once a cheque is issued by the drawer, a presumption under Section 139 must follow, and merely because the drawer thereafter issues a notice to the bank for stoppage of payment, it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course.

16. To sum up, in the case at hand, admittedly the cheque was given for consideration. Whether it was for timely supply of the goods as claimed by the petitioner or for guaranteeing the erection, commissioning and performance of the plant machinery as allegedly claimed by the complainant respondent, is a disputed question of fact which cannot be looked into at this stage. The respondent has tried to encash that cheque against consideration which, according to the respondent, was due to it. In addition, Section 139 of the Negotiable Instruments Act, 1881, also creates a presumption in favour of the complainant. Under the circumstances, the onus for proving otherwise lies on the petitioners and can only

be discharged at the trial. Furthermore, as discussed above, merely because the cheque in question was undated at the time it was handed over does not mean that it was given without consideration. There is also nothing in law to presume that a cheque, which happens to be a negotiable instrument, must be deemed to have been drawn on the date the undated cheque was handed over. On the contrary, as per the ratio of ***Anil Kumar Sawhney Vs. Gulshan Rai*** (supra), the cheque is deemed to be drawn on the date mentioned on the cheque. Lastly, the notice under Section 138 of the Negotiable Instruments Act, issued by the respondent, was admittedly received by the petitioners but they did not bother to reply. Looking to the totality of the circumstances, it cannot be said that no prima facie case is made out or that interference with the proceedings before the Ld. Metropolitan Magistrate is warranted in the exercise of this Court's jurisdiction under Section 482 Cr.P.C.

17. The petition is, therefore, dismissed.

Sudershan Kumar Misra, J.

September 29, 2008
mb