

(2012) 03 DEL CK 0209

In the Delhi High Court

Case No : Criminal M.C. 2960 of 2008 and Criminal M. As. 10891 of 2008, 13225 of 2010 and Criminal M.C. 2961 of 2008 and Criminal M. As. 10893 of 2008, 13229 of 2010

Anil Metre

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 14-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 141

Citation : (2012) 2 BC 482

Hon'ble Judges : M.L. Mehta, J

Bench : Single Bench

Advocate : M.S. Vinaik, for the Appellant; M.N. Dudeja, APP and Mr. Vijay Aggarwal, Advocate for R2, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Mehta, J.—These petitions u/s 482 Cr.P.C. are filed assailing the summoning order dated 29th April, 2008 in complaints u/s 138 read with section 141 of Negotiable Instrument Act (for short "the Act").

2. The respondent/complainant company had filed the aforesaid complaints, through its authorized person Mr. Kailash Nath Jasoria on the averments that they had jointly given loan of Rs. 20,00,000/- to the petitioner on the terms and conditions as per the agreement executed between them on 16th November, 2001. The loan was given for a period of 12 months which was to be repaid along with interest @ 24% per annum. The petitioner/accused executed demand promissory note jointly in favour of the company and Mr. Jasoria. In discharge of the aforesaid liability towards the payment of the outstanding dues, the petitioner/accused issued two cheques bearing No. 294664 and 294663 of Rs. 7,50,000/- and Rs. 12,50,000/- respectively, both dated 12.09.2004. Since the cheques on presentation were dishonoured on account of "insufficient fund", the

respondents issued legal notice dated 23rd September, 2004 to the petitioner. The petitioner having failed to make payment of the cheques amounts, complaints were filed for prosecution. The MM vide the impugned order summoned the accused/petitioner and the said order is assailed by these petitions.

3. Based on the averments in the petitions, the submissions of the learned counsel for the petitioner are that in lieu of the loan of Rs. 20,00,000/- taken by the petitioner from the respondent/complainant, he had pledged shares of his company Spectrum Magazines Ltd. of the face value of Rs. 25,00,000/- as security as per the tripartite agreement executed between the parties on 16th November, 2001. It was submitted that since the petitioner was borrowing the money, he also, as desired, gave the aforesaid cheques as security in addition to several Post Dated Cheques of the period from 19.11.2001 to 01.03.2002 towards periodical payment of interest on the loan amount. It was submitted that the petitioner having pledged and handed over the shares, as above, to the respondent/ complainant, its liability towards the loan amount stood discharged and there being no liability, the respondents were not entitled to encash the cheques given to them as security. It was submitted that when the petitioners company went into liquidation, the respondent/complainant took over his company and has become its Director. It was submitted that as per Clause (5) of the agreement the respondent/complainant had full right to sell, dispose off, transfer to its nominees or realise the said securities in discharge of the loan amount. It was also submitted that both these cheques were dated 16.11.2001, but the respondent /complainant altered and modified the dates by changing the dates from 16.11.2001 to 12.09.2004.

4. Per contra, the submission of learned counsel for the respondent/ complainant was that the issues raised by the petitioner being triable, this Court need not exercise the power u/s 482 Cr.P.C. It was submitted that since the cheques in question were given by the petitioner in discharge of his liability towards repayment of loan, there was a presumption u/s 139 of the Act that these cheques were given towards discharge of his legal liability. It was submitted that if shares were pledged as submitted, then why the petitioner would have given the cheques.

5. I have heard learned counsel for the parties and perused the records.

6. Admittedly, loan of Rs. 20,00,000/- was taken by the petitioner from the respondent/ complainant vide agreement dated 16.11.2001. Clauses 4, 5 and 9 of the agreement being relevant are reproduced here:

4. In consideration of the said loan/finance facility, shares of the face value of Rs. 25,00,000/- (Rupees Twenty Five Lakhs only) of Spectrum Magazines Ltd. appearing in the name of the Borrower in the records of the Company and as per the certificate numbers as mentioned in the Annexure attached to this agreement are hereby pledged by the Borrower in favour of LEPL and the Joint

Lender as an exclusive charge towards repayment of the interest and principal amount, costs and any other charges etc. due to LFPL and the Joint Lender under the present agreement.

5. In case of expiry of the term or in case of any of the events happening as stated in this Agreement, LFPL and the Joint Lender would have the full rights to sell, dispose off, transfer in its nominees name or realise the said Securities on such terms and for such price that LFPL and the Joint Lender think fit, and apply the net proceeds towards the satisfaction of the loan including interest charges expense etc. and the balance, if any left shall be given to the Borrower.

9. The said pledged securities and promissory note executed by the Borrower would be a continuing security to LFPL and Joint Lender for all nominees which are due from the Borrower. The Borrower hereby indemnifies and keep LFPL and Joint Lender fully indemnified against all costs, charges, expenses, claims, demands that LFPL or Joint Lender may incur or be put to by reason of any third party claiming any right, title or interest in respect of such securities. The said securities are the absolute and exclusive property as owner thereof of the Borrower.

7. From the above, it would be seen that the petitioner had pledged the shares of Spectrum Magazines Ltd. as towards repayment of the interest and principal loan amount etc. The respondent/complainant enjoyed right to sell, dispose of or transfer the shares and realise the amounts in the event of the petitioner failing to repay the loan and the interest within one year. The shares and the promissory notes (not placed on record) were towards continuing security to the respondent for all monies due from the petitioner. Further, as per Clause (10) of the agreement also it was reiterated the same to be continuing security and enforceable for all monies due from the petitioner.

8. It is settled law that power u/s 482 Cr.P.C. of this Court are wide and amplitude, but, these cannot be exercised for the purpose of determining the questions of facts. From the above, it is seen that there is no mention in the agreement about the above said two cheques having been given by the petitioner to the respondent/ complainant either as security or towards discharge of loan liability. The averments of the petitioner that since he had borrowed money from the petitioner he had given several cheques including the two cheques in question to the complainant/ respondent and also that both the cheques were dated 16.11.2001, but were altered to 12.09.2004, are triable questions. If the aforesaid two cheque's would have been given as security on 16.11.2001 when the agreement was executed, this would have prima facie found mentioned in the said agreement also. The possibility cannot be ruled out of these cheques having been given in addition to the shares by some separate instrument. On the other hand, the possibility also cannot be ruled out of both these cheques also having been given in addition to the shares as security or towards discharge of liability. All these required to be determined by Trial Court and cannot be determined in these proceedings.

9. Prima facie, there existed presumption of cheque's having been given towards discharge of loan liability as these are of the equivalent amount, but at the same time, the presumption is rebuttable and the onus lies upon the petitioner to rebut the same. That can only be done in the course of trial. Further the plea which have been taken by the petitioner that the shares have been pledged and the loan amount realized by the respondent/complainant can only be raised before the Trial Court. This court cannot examine the documentary and the oral evidence which may have to be led by the petitioner before the trial court. Further it was also a matter of evidence whether the cheques were dated 16.11.2001 and were altered by the respondent to 12.09.2004. This is another disputed fact which cannot be resolved in these proceedings u/s 482 Cr.P.C. The Supreme Court in the case of State of Madhya Pradesh Vs. Awadh Kishore Gupta 2004 (2) CRJ 161, while dealing with the power of this Court u/s 482 Cr.P.C. with regard to the material that could be seen by this Court observed as under:

while exercising jurisdiction u/s 482 of the Code, it is not permissible for the Court to act as if it was a trial Judge. Even when charge is framed at that stage, the Court has to only prima facie be satisfied about existence of sufficient ground for proceeding against the accused. For that limited purpose, the Court can evaluate material and documents on records but it cannot appreciate evidence. The Court is not required to appreciate evidence to conclude whether the material produced are sufficient or not for convicting the accused. In Chand Dhawan (Smt.) vs. Jawahar Lal and Ors. (1992 (3) SCC 3317) it was observed that when the materials relied upon by a party are required to be proved, no inference can be unacceptable. The Court should not act on annexures to the petitions u/s 482 of the Code, which cannot be termed as evidence without being tested and proved.

10. In view of the above, I do not see any infirmity or illegality in the impugned orders. The petitions have no merit and are dismissed.