

(2019) 01 DEL CK 0520

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 4377 Of 2016, Criminal
Miscellaneous Application No. 18257 Of 2016

EKO India Financial Services Pvt. Ltd. & Ors

APPELLANT

Vs

Tejswi Impex Pvt. Ltd

RESPONDENT

Date of Decision : 22-01-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138, 141
Code Of Criminal Procedure, 1973 — Section 482
Arbitration And Conciliation Act, 1996 — Section 34

Citation : (2019) 1 JCC 553

Hon'ble Judges : R.K.Gauba, J

Bench : Single Bench

Advocate : Vinay Kr. Garg, Sumit Roy, Anurag Kr. Agarwal, Manasi Bhushan

Final Decision : Dismissed

Judgement

1. The petitioners have been summoned as accused, by order dated 26.08.2016 of the Metropolitan Magistrate, on the criminal complaint (no. 1350/2016) instituted by the respondent (the complainant) alleging offence under Section 138, Negotiable Instruments Act, 1881 (NI Act) having been committed primarily on the allegation that they had failed to make any payment inspite of the notice of demand dated 20.02.2014, in the wake of dishonor of cheque bearing no. 991053 dated 01.02.2014 for Rs. 81 lakhs that had been issued and handed over by them against the account of first petitioner (company accused), the other petitioners having been summoned on account of they being the directors of the company, with reference to vicarious criminal liability under Section 141 of NI Act, 1881. By the petition at hand, presented by invoking the inherent power and jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.), prayer is made for setting aside of the summoning order and for quashing of the criminal complaint on the submission, inter alia, that the same are 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 or other liability" which was due. Reliance is placed on decisions of the Supreme Court in *Union of India vs. Raman Iron Foundry*, AIR 1974 SC 1265; *Indus Airways Pvt. Ltd. & Ors. vs. Magnum Aviation Pvt. Ltd. & Anr.* (2014) 12 SCC 539 and of a learned single Judge of this court in *Collage Culture & Ors. vs. Apparel Export Promotion Council* (2007) SCC Online Del 1407. The petition is resisted by the respondent.

2. Having heard both sides at length and having gone through the record, this Court finds that the petitioners at best raise questions of fact mixed with questions of law which cannot be examined or effectively addressed in the limited jurisdiction under Section 482 Cr.P.C., it being desirable that the same be left to be adjudicated upon on the basis of formal evidence led by both sides at the trial [*Rajiv Thapar and Ors. Vs. Madan Lal Kapoor*, (2013) 3 SCC 330]. The reasons may be set out hereinafter.

3. It is the admitted case of the petitioners that they had taken the property of the respondent (complainant) on lease for a period of nine years (three consecutive periods of three years each) by lease deed executed on 02.01.2013, the rental agreed upon being initially in the sum of Rs.13,50,000/- per month with provision for periodic increase.

The lease deed stipulated "lock-in period", two relevant clauses referred to by the petitioners reading thus:-

"4.2 In consideration of the effort and expense undertaken by Lessor stated above, the Lessee unequivocally undertakes not to terminate this lease deed for any reason whatsoever for a period of six years from the date of this Lease Deed (Lock-in Period)" subject however to clause 4.3, 12.4, 13.15 and clause 14.5 below.

4.3 In the unlikely event that Lessee breaches/ contravenes its lock in undertaking above; the parties agree that a sum of Rupees Two Crores Only shall be paid by the Lessee to the Lessor as a reasonable estimation of the loss incurred by the Lessor as a consequence of the Lessee's breach. In such case, the Security Deposit will be adjusted in part as compensation for loss suffered by lessor as a consequence of Lessee's breach and balance amount will be recovered from the lessee."

4. It appears the lessor (the complainant) was obliged to take certain measures in the nature of "fitting out". The first petitioner (lessee) also agreed to pay security deposit in the total sum of Rs. 1,62,00,000/-, the relevant clauses in that regard in the lease deed reading thus:-

"7.1 The Lessee has paid to the Lessor twelve months Rent amounting to Rs. 1,62,00,000/- (Rupees One Crore Sixty Two Lakhs Only) as a security deposit (the "Security Deposit") in the following manner:

7.1.1 Rs. 81,00, 000/- (Rupees Eighty One Lakhs only) simultaneously with execution of this Lease by cheque no. 821403 & 821423 dated 04.09.2012 and

08.10.2012 respectively both drawn on HDFC Bank, Suryakiran Building, KG Marg, New Delhi;

7.1.2 and balance Rs. 81,00,000/- (Rupees Eighty One Lakhs only) by way of a post-dated cheque dated twelve months from the possession date by way of Cheque no. 991053 dated 01.02.2014 drawn on HDFC Bank, Suryakiran Building, K G Marg, New Delhi.

7.2 The Security Deposit shall be retained by the Lessor for the entire tenure and no interest shall be payable on the Security Deposit.

7.3 Any adjustment made by Lessor from the Security Deposit shall be duly intimated to the Lessee and Lessee shall be liable to pay the amount of such adjustment to the Lessor within a period of 15 days of the receipt of such intimation so as to ensure that at all times Lessor holds Security. Deposit equivalent to initial twelve months Rent. Lessee's failure to make payment of an adjustment amount within prescribed and agreed period shall constitute a breach of this Lease Deed and would entitle the Lessor to terminate the lease and forfeit the Security Deposit and to claim for damages equivalent to the rent for the remaining tenure of Lock-in Period."

5. Pertinent to note that while the lessor (the complainant) acknowledged having received and the lessee (the first petitioner) declared to have "paid" the aforementioned security deposit, its payment was actually in two equal parts, the second one of Rs. 81 lakhs being "deferred payment" tendered by the cheque dated 01.02.2014, dishonour whereof is the subject matter of the criminal action.

6. The first petitioner took over the possession of the lease premises under the afore-mentioned lease terms on 25.02.2013. Some differences arose between the parties, and the lessee (the first petitioner) chose to opt out and bring premature termination of the lease contract. It issued notice dated 03.10.2013 to such effect to the lessor, the latter joining issue by reply dated 21.10.2013, declining, inter alia, to return the above-mentioned cheque and instead demanding payment, inter alia, of damages under the lease terms. It is undisputed that the lessee (the first petitioner) vacated the leased premises on 31.10.2013 which was taken over by the lessor (the respondent complainant), the dispute over claims and counter claims of both parties persisting.

7. Against the above backdrop, the afore-mentioned cheque dated 01.02.2014 was presented for payment by the respondent. But since the lessee (the first petitioner) had instructed the bank to stop the payment, the cheque was returned unpaid. It is on these facts that notice dated 20.02.2014 was issued and served, inter alia, making a demand in terms of Section 138 NI Act, the other demands made by the same notice concerning the claim of the lessor for damages.

8. It does appear that in terms of the arbitration clause in the lease deed, the parties went to arbitration which resulted in award dated 28.05.2016 being

passed by the sole arbitrator rejecting the contentions of the lessor (the complainant) as to their claim for damages or for retention of the amount of Rs. 81 lakhs which had been received as the first part of security deposit directing its refund forthwith to the petitioner. But, objections under Section 34 of Arbitration and Conciliation Act, 1996 against the said award are stated to be pending in the civil court and the proceedings in that regard are yet to attain finality.

9. The contention of the petitioners is that the amount of cheque represented a liability which was not due on the date of issuance of the cheque. This contention cannot be accepted as correct at this stage of the process without proper inquiry. Reliance on Raman Iron Foundry (supra) is misplaced inasmuch as the claim arising out of the dishonored cheque cannot be said by any stretch of reasoning to be a claim for "unliquidated damages". Similarly, the ratio of Indus Airways Pvt. Ltd. & Ors (supra) does not aid and assist the petitioners in raising a defence at this stage of the inquiry for the simple reason unlike the facts of that case involving "advance payment" for sale of goods, the cheque in question here was issued for payment of security deposit, liability in which regard had been acknowledged at the threshold under the lease terms, the cheque representing deferred instalment of an amount which was due at the time of execution that was declared to be due and payable at the time of execution of the lease contract. For these reasons precisely, the decision in Collage Culture & Ors (supra) rather negates the argument of the petitioners inasmuch as the issuance of the post-dated cheque here concerned an amount which was payable to discharge "debt in presenti but payable in future". A presumption arises from the act of issuance of cheque that it was "for the discharge in whole or in part, of" a debt or other liability and in terms of Section 139 NI Act, onus to prove facts to the contrary so as to rebut the said presumption would be of the petitioners.

10. For the foregoing reasons, this Court declines to interfere at this stage in the ongoing criminal prosecution of the petitioners on the complaint of the respondent.

11. The petition and the application filed therewith are dismissed.