(2013) 01 DEL CK 0101

In the Delhi High Court

Case No : Criminal M.C. No''s. 905 and 906 of 2012

Krish International P. Ltd. and Others — APPELLANT

Vs

State and Another — RESPONDENT

Date of Decision : 30-01-2013

Acts Referred:

Citation : (2013) 2 BC 340 : (2013) 179 CompCas 210 : (2013) 4 CompLJ 104 : (2013) 2 ILR Delhi 945 : (2013) 1 JCC 62

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Vikas Gupta with Mr. Nakul Ahuja, for the Appellant; Rajdipa Behura, APP for State, Mr. M.S. Vinaik Advocate and Mr. Deepak Bashta, for R-2, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—These two Petitions raise a very interesting question for consideration, viz. whether a cheque issued by the Client (the borrower) in a Factoring Agreement is towards liability or security. The facts of the case are not very much in dispute. The Petitioner Company (M/s. Krish International Pvt. Ltd.) approached Respondent No. 2 IFCI Factors Limited to grant it domestic factoring facilities. Respondent No. 2 by an Agreement dated 18.02.2010 allowed the factoring facility to the maximum pre-payment amount of Rs. 5 crores. M/s. Koutons Retails India Limited (Koutons) was approved as debtor in terms of Clause 4(i) of the Agreement. The approved terms of trade was 90 days or less from invoice date as was to be approved by Respondent No. 2 (the factor). A copy of the Factoring Agreement dated 18.02.2010 has been placed on the paper book by the Petitioners as well as by Respondent No. 2.

2. The Petitioner was granted pre-payment (after deducting the commission) to the extent of Rs. 3 crores. The cheques for this sum of Rs. 3 crores issued by the debtors (Koutons) were dishonoured. The Respondent No. 2 presented the cheques bearing Nos. 541554, 541555, 541556, 541557, 541558 and 541559,

dated 15.12.2010, all drawn on Punjab National Bank, New Rajendra Nagar, New Delhi of amount Rs. 50 lacs each, which got dishonoured on presentation. A legal notice u/s 138 of the Negotiable Instruments Act, 1881 (the Act) dated 17.01.2011 was served upon the Petitioners calling upon them to make the payment of the cheque amounts along with interest failing which a complaint under the Act was to be filed against the Petitioners.

3. On failure to pay the amount, Respondent No. 2 filed two separate Complaints u/s 138 of the Act (in respect of three cheques each).

4. By order dated 09.03.2011, the learned Metropolitan Magistrate (''MM'') took cognizance and ordered issuance of the summons against the Petitioners.

5. The following contentions are raised on behalf of the Petitioners:-

(i) Admittedly, the cheques issued by Koutons were dishonoured. Notice u/s 138 of the Act was issued to Koutons and on failure to pay the amount, complaints u/s 138 of the Act was instituted against M/s. Krish International Pvt. Ltd. and the officers responsible for the conduct of its business. These facts were not disclosed by Respondent No. 2 in the criminal complaint filed against the Petitioners and thus, the Court of learned ''MM'' was mislead in issuance of summons.

(ii) The Petitioners were wrongly described as borrowers in the Complaint when in fact they were not the borrowers.

(iii) The cheques given by the Petitioners were by way of security and thus in case of dishonour of cheque, the Petitioners were not criminally liable u/s 138 of the Act. The learned counsel for the Petitioners places reliance on Collage Culture and Others Vs. Apparel Export Promotion Council, ; Exports India & Anr. v. State & Anr. 2007 (3) JCC (NI) 252; and M.C.D. Vs. State of Delhi and Another, .

6. On the other hand, learned counsel for the Respondent contends that there was no misrepresentation by Respondent No. 2. The Petitioners were rightly described as borrowers as the amount was paid by Respondent No. 2 to Petitioner No. 1.

7. As per the terms of the Agreement dated 18.02.2010 entered into between the parties, the Petitioners were liable to make the payment in case of non performance of the obligation by Koutons. A personal undertaking dated 18.02.2010 was also given by Alok Aggarwal (Petitioner No. 2) whereby he undertook to make the payment for our standing prepayments or values of reassigned. Petitioner No. 2 also undertook to keep sufficient balance in the account and to honour the cheques when presented. It is urged that the Petitioners'' liability was co-extensive with the debtor M/s. Koutons Retails India Limited. Learned counsel for Respondent No. 2 places reliance on a judgment of this Court in Dhanjit Singh Nanda Vs. State and Another and a judgment of the Punjab & Haryana High Court in Shree Bhagwati Apparels India Limited & Ors. v. M/s. Bibby Financial Services India Pvt. Ltd. Crl. Misc. No. M-31977 of 2010

decided on 25.04.2011.

8. There is no dispute about the proposition of law as laid down in M/s. Collage Culture that a cheque issued not for an existing due but issued by way of security would not attract the provisions of Section 138 of the Act. In M/s. Collage Culture the learned Single Judge of this Court (Pradeep Nandrajog, J.) drew distinction between a cheque issued for a debt in present but payable in future and second for a debt which may become payable in future upon the occurrence of a contingent event. Paras 20 to 24 of the report in M/s. Collage Culture are extracted hereunder:-

20. A post dated cheque may be issued under 2 circumstances. Under circumstance one, it may be issued for a debt in present but payable in future. Under second circumstance it may be issued for a debt which may become payable in future upon the occurrence of a contingent event.

21. The difference in the two kinds of post-dated cheques would be that the cheque issued under first circumstance would be for a debt due, only payment being postponed. The latter cheque would be by way of a security.

22. The word ''due'' means ''outstanding at the relevant date''. The debt has to be in existence as a crystallized demand akin to a liquidated damages and not a demand which may or may not come into existence; coming into existence being contingent upon the happening of an event.

23. Section 138 of the Negotiable Instruments Act 1881 reads as under:-

138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing returned by the bank unpaid, either because of the amount of money standing returned by the bank unpaid, either because of the amount of money standing returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both: 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;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

24. It would be relevant to note that the statute does not refer to the debt being payable, meaning thereby, a post dated cheque for a debt due but payment postponed at a future date would attract Section 138 of the Negotiable Instruments Act 1881. But the cheque issued not for an existing due, but issued by way of a security, would not attract Section 138 of the Negotiable Instruments Act 1881, for it has not been issued for a debt which has come into in existence.

9. Similarly in Exports India & Anr. A.K. Sikri, J. (as his Lordship then was) while relying on M/s. Balaji Seafoods Exports (India) Ltd. and another Vs. Mac Industries Ltd., held that where a cheque was given as a security against the agency agreement its dishonour would not entail the criminal consequences u/s 138 of the N.I. Act.

10. Thus, there is no dispute about the proposition which is well settled that wherever a cheque is given purely as a security, its dishonour would not make the drawer of the cheque criminally liable for an offence u/s 138 of the Act.

11. Before adverting to the facts whether the cheque in the instant case was given as a security or it was towards liability to the Petitioners, I would refer to the contention raised by the Petitioner about misrepresenting the Court of learned ''MM'' or playing fraud by Respondent No. 2. In Para 3 of the Complaint it was clearly stated by Respondent No. 2 that the Complainant, that is, Respondent No. 2 had agreed and made available the factoring facilities to the Petitioners for an amount of Rs. 5 crores.

12. Thus, the factum of factoring agreement was not concealed by Respondent No. 2. Thus, it would be difficult to hold that the summoning order was obtained by misrepresentation or by playing any fraud upon the learned ''MM''.

13. At this stage, it would be appropriate to refer to the factoring agreement. The learned counsel for the Petitioners urged that recourse and set off is provided under Clause 11 of the Agreement. If the cheques issued by Koutons were dishonoured, Respondent No. 2 was at liberty to have recourse as mentioned in the Agreement. Para 11 of the Agreement as relied upon by the learned counsel for the Petitioners is extracted hereunder:-

11. RECOURSE AND SET-OFF

(1) As regards each receivable which the Debtor is or claims to be unable to pay

whether by reasons of legal constraints or acts or orders of government or for any other reason whatsoever and each receivable in respect of which the Debtor or his legal representative has disputed liability. The Factor shall have recourse to the Client as follows:-

(a) On the expiry of notice to the Client of the length specified in paragraph 14 of the Schedule or (b) on the insolvency of the debtor whichever is the earlier.

After the exercise of recourse by the Factor in respect of any such receivable the Factor will credit the Client with all sums subsequently recovered by the Factor in respect of it as the result of enforcement or realization of any associated rights. The said receivable and any associated rights relating thereto shall, unless otherwise determined by the Factor remain vested in the Factor until the repurchase price has been fully discharged, whether by payment to the Factor or by set off of an amount payable to the Client under the provisions of this Agreement.

(2) The Factor may set off against any sum payable to the Client the amount of any liability the Client to the Factor, whether under this Agreement or otherwise, whether existing, future or contingent and whether by way of debt damages or restitution.

14. Thus, Respondent No. 2 was entitled to have recourse to the Client, that is, the Petitioners on the expiry of notice to the Client of the length specified in paragraph 14 of the Schedule or (b) on the insolvency of the debtor whichever was earlier. As per Para 14 of the Schedule ''''Recourse to the Client will be automatic on the expiry of 30 days from the due date of payment by the Debtor, or earlier, as advised by IFCI Factors Limited for each Debtor from time to time. "

15. Thus, recourse to the Client was automatic on the expiry of 30 days from the due date of payment by the debtors, that is, Koutons or earlier as advised by IFCI Factors, i.e. Respondent No. 2 for each debtor from time to time.

16. The Petitioners have placed on record a copy of the complaint u/s 138 of the Act filed by Respondent No. 2 against Koutons and its Managing Director, etc. The due dates of payment were ranging between May to September, 2010. Thus, the period of 30 days had already expired from the due date of payment by the debtors, i.e. Koutons and, therefore, recourse to the Client, i.e. the Petitioners was automatic after the expiry of 30 days. In the instant case, the cheques issued by the Petitioners were presented only in the month of December, 2010. Moreover, as per the Clause 14 of the Schedule to the Agreement, the expiry period of 30 days from the due date of payment by the debtor was not mandatory in as much as Respondent No. 2 was at liberty to curtail this period and thus serving of notice dated 17.01.2011 was sufficient to the Petitioners and they could have avoided prosecution by immediately paying the amount on receipt of the notice dated 17.01.2011.

17. In the case of C.C. Alavi Haji Vs. Palapetty Muhammed and Another, the

Appellant disputed the service of the statutory notice u/s 138 of the N.I. Act. The Supreme Court observed that any drawer (of cheque) who claims that he did not receive the notice sent by post, can within 15 days on receipt of summons from the Court in respect of complaint u/s 138 of the N.I. Act, may make payment of the cheque amount and submit to the Court that he had made payment within 15 days on receipt of the summons and, therefore, the complaint is liable to be rejected. Thus, applying the analogy of C.C. Alavi Haji when the Petitioners became aware of the presentation of the cheques issued on behalf of Petitioner No. 1 on receipt of notice dated 17.01.2011; it could have made the payment within a period of 30 days and similarly informed the learned ''MM'' for dismissal of the complaint.

18. It is very strenuously canvassed by the learned counsel for the Petitioners that the cheques issued by the Petitioners were only by way of security. I have earlier referred to the terms of the Agreement including clause 11 recording recourse as relied on by the learned counsel for the Petitioners. The tanner of the Agreement was that the amount was advanced by Respondent No. 2 to the Petitioners, thus, the amount was borrowed by the Petitioners and it was at Petitioners'' behest and on their undertaking that cheques issued by the Petitioners'' debtor i.e. Koutons were accepted on the condition that it will be honoured on presentation. It was the term of the factoring agreement that in case the Petitioners'' debtor was unable to pay, the Petitioners would pay the amount (which obviously had been received by Petitioner No. 1 from Respondent No. 2). A personal guarantee for payment of all the amounts payable by the obligate in respect of purchase of receivables was also given by Petitioner No. 2 (Alok Aggarwal). Petitioner No. 2 on behalf of Petitioner No. 1 also undertook the payment of the outstanding pre-payments or for values of reassigned. He, further, undertook to keep sufficient balance in the account and to honour the cheques on presentation. Thus, factoring agreement along with undertaking and the Bond of guarantee clearly indicates that the cheques had not been given by the Petitioners as security but towards the liability which was co-extensive with that of the debtor.

19. A reference may be made to a report of the Supreme Court in I.C.D.S. Ltd. Vs. Beena Shabeer and Another, wherein the Supreme Court interpreted the words "where any cheque" and "other liability" as used in Section 138 of the N.I. Act and held that the cheque issued by a guarantor would be deemed to be issued against any other liability. Paras 10 and 11 of the report are extracted hereunder:-

10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the section stands with the words "Where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability,

the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.

11. The issue as regards the coextensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the statue depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. "Any cheque" and "other liability" are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statue. Any contra-interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor''s liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus do not lend any assistance to the contentions raised by the respondents.

20. The case is also squarely covered by a judgment of the Division Bench of this Court in Collage Culture and Others Vs. Apparel Export Promotion Council, where it was held that a cheque issued towards debt which is due but whose only payment is postponed would attract Section 138 of the N.I. Act.

21. The question of issuance of the cheque towards liability or merely as a security fell for consideration before a learned Single Judge of Punjab & Haryana High Court in a factoring Agreement in Shree Bhagwati Apparels India Limited & Ors. v. M/s. Bibby Financial Services India Pvt. Ltd. Crl. Misc. No. M-31977 of 2010 decided on 25.04.2011. Facts in Shree Bhagwati Apparels India Limited are extracted from Paras 4 and 5 of the judgment hereunder:-

4. The petitioners were granted domestic factoring facilities on 18.03.2011 by the respondent to the tune of Rs. 2,00,00,000/- with the condition of maximum pre-payment of 80%. The petitioner gave the cheques of security amounting to Rs. 2,00,00,000/- without date towards guarantee as guarantee of Liverpool Retail India Limited. On 09.06.2009, M/s. Liverpool Retail India Limited was supplied goods and their invoices were discounted and M/s. Liverpool Retail India Limited too issued the cheques for the said amount. The cheques were of different dates i.e. 14.09.2009 to 16.12.2009. On 05.11.2009, the said cheques were dishonoured for insufficient funds. Thereafter, the respondent had no choice but to deposit the cheques given by the petitioners as guarantee. Their cheques were dishonoured. Hence, on 20.04.2010, the respondent filed the complaint

against M/s. Liverpool Retail India Limited and its Directors. Thereafter the complainant deposited the cheques issued by the petitioner as guarantor of the said amount. The cheques issued by the petitioner were also dishonoured. Accordingly, the second complaint was filed on 28.07.2010 u/s 138 of the Negotiable Instruments Act against the petitioners. The petitioners were summoned vide order dated 28.07.2010.

5. While praying for quashing of the complaint and the summoning order, learned counsel for the petitioners raised following arguments:--

(i) that the post dated cheques were given towards security, therefore, no complaint u/s 138 of the Negotiable Instruments Act is maintainable. Reliance was placed on the judgments of Hon''ble the Apex Court rendered in the case titled as M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, . and the judgment of Delhi High Court rendered in the case titled as Collage Culturev. Apparel Export Promotion Council passed in Crl M.C. No. 3011/2004.

(ii) The respondent has already preferred a complaint u/s 138 of the Negotiable Instruments Act against M/s. Liverpool Retail India Limited whose invoices were financed by the respondent and who duly acknowledged the domestic factoring facilities and in response thereto issued the cheques for the whole amount of the invoices. Therefore, the respondent cannot maintain two complaints for same liabilities.

(iii) that no notice as per the terms and conditions of the settlement was issued to the petitioners and, therefore, the complaint was not maintainable.

22. The Punjab and Haryana High Court in Shree Bhagwati Apparels India Limited held as under:-

7. After hearing learned counsel for the petitioners, the first issue that requires to be decided is as to whether the cheques, in dispute, were towards security or the word used is a misnomer in the undertaking.

8. The Managing Director of the petitioner firm-Shri Bhagwati Apparels India Limited gave an undertaking on 30.03.2009. Learned counsel for the petitioners referred to Clause 2 of the Undertaking to show that the cheques were towards security. The same reads as under:--

2. That in consideration of you, Bibby Financial Services (India) Private Limited, a company incorporated under the Companies Act, 1956 having its office at Plot No. 121, First Floor, Sector 44, Gurgaon, Haryana sanctioning factoring facilities upto a Prepayment Limit of Rs. 2,00,00,000/- (Rupees Two Crores only) ("Facility") to the Borrower, the Executant deposits herewith post dated/security cheques, details whereof are mentioned in Schedule 1 attached hereto for a total amount of Rs. 2,00,00,000/- only, favouring yourself. In case the Borrower fails to make payment of the amount outstanding under the Facility within a period of seven days after a demand is made by you for the said amount you shall have a right to present the cheques issued by the Executant for the said amount.

9. No doubt, the cheques are stated to be mentioned as given towards security as per the under taking and there is also no dispute that the cheques that were deposited were the same as mentioned in the said Schedule. However, at the same time, we cannot loose sight of the fact that they were submitted in pursuance to the liability, which is apparent from perusal of the same Undertaking given by the Managing Director of the petitioner''s firm, which reads as under:--

3. That neither the Executant nor any other authorized representative/official of the Borrower shall issue stop payment instructions to the banker in respect of the cheque/s issued to you, and affirm that the Executant or anybody else authorized by the Borrower shall not intimate the bankers to stop the payment due on the said cheque/s. The Executant agrees to ensure the availability of adequate funds in the bank account of the Borrower on which these cheques favouring Bibby Financial Services (India) Private Limited are issued, and undertake that the bank account shall not be closed, without prior intimation to you.

10. In fact, the said paragraph further goes on to read that in the event the Borrower defaults in honouring any of the cheque/s, the respondent, herein, shall be at liberty to initiate proceedings under the relevant provisions of the Negotiable Instruments Act, the Indian Penal Code, and/or any other enactment/s.

11. Thus, the entire undertaking has to be read a whole to arrive at the conclusion that the cheque is towards security or liability.

12. Further, an agreement had been executed between the parties i.e. the petitioner No. 1 as Borrower and the respondent as Factor. Clause 9.1(xviii) of the Agreement reads as under:--

9.1 The Borrower hereby warrants, agrees and undertakes as under:--

(xviii) that the Borrower shall at all times ensure that sufficient funds are made available in his bank account, on which the post dated/security cheques issued by the Borrower to Bibby have been drawn. Bibby shall not be required to give any notice to the Borrower before presenting the post dated/security cheques. In the event Bibby presents the post dated/security cheques furnished to it and the same are dishonoured for any reason whatsoever Bibby shall inter alia, have a right to proceed against the Borrower under the Negotiable Instrument Act, 1881;

13. Thus, the cheques were issued by the petitioners were actually subject to the terms of the Undertaking dated 30.03.2009 and conditions in the Agreement also of the same date.

14. Moreover, as per the nature of the transaction between the parties, the Borrower who in the present case, happens to be the petitioner No. 1 makes itself liable for rendering all outstanding amounts to the Factor i.e. the respondent in the event of the purchaser of goods i.e. Ms Liverpool Retail India

Limited defaulting in making payment.

15. In view of the above, it cannot be said, at this stage, that the cheques were towards security. The said fact being disputed and debatable, it is a matter to be decided in trial.,,,,

23. I am in respectful agreement with the view taken by the learned Single Judge of Punjab & Haryana High Court in Shree Bhagwati Apparels India Limited. In my view, at this stage, it cannot be said that the cheques issued by the Petitioners were only towards security. Prima facie, the same were towards the Petitioners'' liability which was co-extensive with the debtor, i.e. Koutons.

24. The Petitions are devoid of any merit; the same are accordingly dismissed. The above observations were necessary for disposal of the instant Petitions and the same will not amount to expression of any opinion on the merits of the case pending before the learned ''MM''. The learned ''MM'' shall be entitled to take any view without being influenced by observations made hereinabove.

