

(2012) 12 DEL CK 0052

In the Delhi High Court

Case No : Criminal M.C. 4687-90 of 2006

M/s. IKF Technologies Ltd. and Others

APPELLANT

Vs

Sasi Bhusan Raju

RESPONDENT

Date of Decision : 17-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 482
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 2 BC 564

Hon'ble Judges : Pratibha Rani, J

Bench : Single Bench

Advocate : Chetan Sharma, with Mr. Sushil K. Pandey, for the Appellant; R.K. Sharma, for the Respondent

Final Decision : Allowed

Judgement

Pratibha Rani, J.—By this petition u/s 482 Cr.P.C., the petitioners seek quashing of summoning order dated 20.05.2006 passed by learned M.M. in Complaint Case No. 2819/1/06 filed u/s 138 of N.I. Act by the respondent (complainant), who himself was Director in M/s IKF Technologies Ltd./petitioner No. 1 company herein. The question required to be dealt with in this petition is whether the cheque in question was issued in discharge of existing debt or liability so as to attract criminal action u/s 138 of NI Act.

2. In brief the case of respondent, as made out in the complaint C.C. No. 2819/1/06 filed by him, is that on 07.07.2005 petitioner No. 1/company entered into MOU with the respondent which was signed on behalf of company by its representative and whole time Director Mr. Sunil Kumar Goel and by the respondent. The respondent was appointed as Chief Executive Officer (CEO) for management of the project Jatropa Plantation in Meghalaya.

3. As per Clause (vii) of the MOU the respondent was to receive :

(a) 10% share from the profits of the project of Jatropa Plantation Project or any

other such profit as and when acquired by company even before the actual tentative period of two years. This profit and 10% which may be paid to Shri Raju or his nominee by virtue of power of attorney. This will continue till the project lasts.

(b) Salary Rs. 25,000/- p.m. will be paid which is subject to review by the Board of Management from time to time as per the exigencies of the responsibilities.

(c) Shri Raju shall be entitled to draw actual expenses as such travelling, boarding, incidentals, telephones, Insurance etc.

4. It is the case of the respondent/complainant that he worked for the company but the company did not honour the agreement to run the project successfully thus putting the respondent/complainant to harassment. The respondent/complainant served a legal notice dated 29.12.2005 demanding his salary till his superannuation and future share profit of the project which came around jointly to Rs. 1,36,20,000/-. The respondent/complainant received post dated cheque bearing No. 692299 dated 23.02.2006 drawn on ICICI Bank Ltd., which was dishonoured on presentation for the reason "insufficient funds". After serving statutory notice dated 13.03.2006, complaint u/s 138 N.I. Act was filed.

5. It is further averred in the complaint that in the meantime the respondent received reply dated 31.01.2006 to the legal notice dated 29.12.2005 sent by him and in the reply the respondent/complainant was asked to resume the duties. Thereafter he received another reply dated 29.03.2006 from the company handed over by his own counsel as well as through registered post and speed post. The above replies sent by the company are self-contradictory and inconsistent to the cheque in question dated 23.02.2006.

6. The respondent led pre-summoning evidence by way of affidavit in Complaint Case No. 2819/1/06. On finding prima facie that offence u/s 138 N.I. Act is made out against the petitioners who were arrayed as accused in the complaint case, they were ordered to be summoned for committing offence u/s 138 N.I. Act.

7. I have heard Sh. Chetan Sharma, Senior Advocate for the petitioner and Sh. R.K. Sharma, Advocate for the respondent. Both parties have also filed brief synopsis.

8. On behalf of the petitioner it has been submitted that the respondent was appointed as Chief Executive Officer for Jatropa Plantation Project in Meghalaya as per MOU dated 07.07.2005. The respondent committed certain irregularities and vide communication dated 13.10.2005, those irregularities were pointed out to him instructing him to do the needful on war footing and submit the progress report.

9. The learned Senior Advocate further submitted that instead of doing the needful, the respondent sent a notice dated 29.12.2005 which was duly replied vide reply dated 31.01.2006 wherein it was specifically pointed out that company had suffered huge loss due to delay in implementation of the Plantation Project,

further informing him that he was not attending his duties without any permission or intimation thereby calling upon him to resume duties after providing details of funds used and return of company records.

10. The respondent was also informed vide reply dated 29.03.2006 to the legal notice dated 13.03.2006 sent by the respondent that the cheque in question i.e. cheque No. 692299 was handed over by petitioner No. 3/Mukesh Kumar to the respondent in May" 2005 for the express purpose of purchase of seeds for plantation, the cheque was given blank for the reason that the name of the final vendor and the amount was not finalized and left to be filled by the respondent at the time of making the payment for the above purpose. It has been submitted that the claim amount in the complaint is not in respect of any existing debt or liability hence merely because the cheque has been mis-utilized by the respondent by filling in the blanks and an imaginary figure in his own favour, would not bring the offence within the purview of Section 138 N.I. Act. Learned counsel for the petitioners has submitted that the cheque was not given for any existing debt or liability to the respondent hence the proceedings initiated against the petitioners on the basis of such a cheque and the summoning order may be quashed.

11. On behalf of the respondent it has been submitted that the cheque in question was given to him in discharge of the liability of the company towards the respondent who was appointed as Chief Executive Officer for the project. The respondent had to sacrifice his career to join the project and in the circumstances, when he was not allowed to continue as Director and discharge his duties as Chief Executive Officer of the project, the petitioner No. 1/company became liable to pay him the amount as calculated towards profit as well salary by him in the complaint till he attain the age of superannuation.

12. It has been further submitted that the petitioner No. 1 is a public limited company and could not have handed over undated unnamed cheque or blank cheque without taking any receipt from him in that regard. Further the petitioner while refuting the allegations in the legal notice dated 29.12.2005 sent by the respondent through its reply dated 31.01.2006 asked the respondent to join but there was no mention of the blank cheque at that time. The cheque was presented after 54 days from the date of notice sent by the respondent and 23 days after the reply received from the petitioner. The petitioner could have instructed the bank to stop the payment in that circumstance, which was not done. It was further submitted that even if it is assumed that blank cheque was given, he could have, after verifying from the bank, fill the amount which could be encashed and for remaining he would have filed money suit which has not been done by the respondent and it shows that he was not holding blank cheque. It has been submitted that the said cheque was duly issued by petitioner No. 1/company towards their obligation and liability. The respondent has made various payments on behalf of the company and spent amount of Rs. 15 lacs towards other incidental expenses including payment of wages to the workers but the

vouchers have not been filed because of the voluminous nature of the documents.

13. On behalf of the respondent, it has been further submitted that since the cheque has been given by the petitioners in discharge of their liability, they have been rightly summoned for the offence and the matter in issue can be decided only during trial and not in a petition u/s 482 Cr.P.C. hence the petition may be dismissed. The respondent has relied upon *Signaps and Another Vs. Bumpy Udyog*, *Shri Pankaj Narang Vs. State and Another*, *R.P. Kapur Vs. The State of Punjab*, *Krishna Janardhan Bhat Vs. Dattatraya G. Hegde*, *Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others*, *Suryalakshmi Cotton Mills Ltd. Vs. Rajvir Industries Ltd. and Others*, *M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another*, *K.N. Beena Vs. Muniyappan and Another*, *ICDS Ltd. Vs. Beena Shabeer & Anr. in Crl.A. No. 797 of 2002 decided on 12.08.2002 (SC)*, *Rajesh Agarwal Vs. State and Another*, *Hiten P. Dalal vs. Bratindranath Banerjee in Crl.A. No. 688 of 1995 decided on 11.07.2011 (SC)* in support of his submissions.

14. The case law *Signaps & Anr. Vs. Bumpy Udyog 2005*, *Pankaj Narang vs. State*, *R.P. Kapur vs. State of Punjab*, *K.L.E. Society vs. Siddalanges*, *Zandu Pharmaceuticals Works Ltd. Vs. Mohd. Sharaful Haque*, *Suryavanshi Cotton Mills Ltd. Vs. Raj Vir Industries Ltd. & Ors.*, *MMTC Ltd. & Anr. Vs. Medchl Chemicals & Pharma (P) Ltd. (Supra)* relied upon by the respondent mainly deal with the scope of power vested in High Court to be exercised u/s 482 CrPC but here the question to be determined is whether the cheque given by the petitioner to the respondent was in discharge of any existing debt or liability.

15. In order to appreciate whether the cheque in question has been issued in discharge of existing debt or liability, it is necessary to refer to the notice dated 29.12.2005 wherein in para Nos. 16, 17 and 18 and in the complaint, the claim was made as under :-

16. It is brought to your notice that since you have displayed your malafide intention to dishonour the MOU with my client by causing an imperative loss of Rs. 24 lakhs over and above his loss on the head of not taking lucrative job in the Government department in view of the fulltime job being offered by you with various assurances and allurements. The Rs. 24 lakhs being assessed on the basis of salary amount till his superannuation at the age of 55 (Rs. 25,000/- per month X 12 months X 8 years)

17. It is brought to your notice that since your malafide intention being displayed against my client to run the avowed project till contemplated period he is restrained from enjoying the share profit of the project @ 10% as per the MOU for the period of 17 years by losing Rs. 1,12,20,000/- (Rupees one crore twelve lakhs and twenty thousand) which is jointly and severally recoverable from you and the company. (Total projected profit @ Rs. 22,000/- per annum on one hector of plantation X 300 hectares of land being planted under the project so far X 10 = 1,12,20,000/-)

18. That your attention is invited to reply to the demands of my clients within 30 days from the date of the receipt of this notice either contacting my client personally or sending reply in my address failing which I have clear instructions to take action in the proper court of law.

16. In reply dated 31.01.2006 sent by the petitioners to the notice dated 29.12.2005, the above averments were replied as under:-

As regards Point Nos. 16 to 19, the claims made by you are completely refuted. In fact it is the Company, which has suffered huge losses due to delay in implementation of Plantation Project. There are reports that unauthorized commission has been obtained by you from suppliers which the Company is investigating. As already mentioned, you are not attending the duties without any permission or intimation. The agreement executed between the Company and you clearly stipulate that you will devote your full time, expertise and attention for the aforesaid project.

You can resume duties after providing details of fund used and return of Company records.

17. Thereafter legal notice dated 13.03.2006 Annexure-P-7 was sent by the respondent after the dishonour of the cheque in question. The relevant averments in this regard are in para 4 & 5 of the notice, which are extracted hereunder:-

(IV) You, Mr. Mukesh Kumar being a Chartered Accountant by profession representing the company as the Director (Finance and authorized signatory of cheque, remitted a Cheque bearing No. 692299 of ICICI Bank Ltd. Vide you a/c No. 020205000649 Punjagutta Branch, Narella House No. 4, Nagarjuna Hills, Punjagutta, Hyderabad-5000082 drawn in favour of my client for an amount of Rs. 1,36,20,000/- to discharge the legal liabilities demanded by my client vide the legal notice Dated 29th December, 2005 besides other demands and claims being left open.

(V) That upon the said cheque being presented in the drawee bank of my client namely CANARA Bank, community Centre, Poc-A, Mayur Vihar-Ph II Delhi-110 091 on 23.02.2006 for collection, it was placed in the National Clearing House on 27.02.2006 which has returned the cheque vide return memo Dated 02.03.2006 with reason "Insufficient Funds". The said return memo along with the Debit advice memo were received by my client from the drawee Bank on 10.03.2006. The Drawee Bank of my Client has also debited an amount of Rs. 15,463/- from his account bearing No. 63596 towards the commission for the non-clearance of the cheque. In consequences thereof my client is not only defamed but also mentally tortured, for which you are also punishable under law.

18. This notice was replied vide reply dated 29.03.2006 and the circumstance in which this cheque was with the respondent was brought to his notice informing him as under:-

8. That there were sometimes occasions when to facilitate the operations and on specific request of a Co-Director Mr. Mukesh Kumar would issue a blank cheque for payment to critical vendors where all the payment details were not fully known in advance. Mr. Mukesh Kumar ensured that such blank cheque was handed over personally to only very senior officers of the Company.

9. That the cheque in question (No. 692299) was one such cheque which was handed over by Mr. Mukesh Kumar to your client Mr. S.B. Raju (who was and continues to be Director of the Company and Co. for the Shillong Project) in May 2005 for the express purpose of purchase of seeds for plantation. As neither the names of the final vendor nor the amounts were finalized at the time of issue of the cheque, these items were left blank on the cheque to be filled by your client Mr. S.B. Raju at the time of making the payment.

10. That on being informed by your client Mr. S.B. Raju that the concerned vendors were not accepting cheque payment Mr. Mukesh Kumar sent Bank Drafts dated 19th May, 2005 of the amounts Rs. 70,000/- and Rs. 5,000/- favour M/s Spice & Herbs Pvt. Ltd. and Shri Deepak Shukla respectively. The blank unutilized cheque in question (No. 692299) remained with your client who as a responsible officer and Director of the Company was expected to return back that but apparently he did not do that.

19. In the complaint u/s 138 NI Act filed against petitioner No. 1 company and its Directors, the relevant averments made in paras 5 and 6 of the complaint are extracted as under :

5. That the complainant was put to harassment to run the project by the company not paying the expenses of the project, salary and other incidental expenses. The complainant issued legal notice to the company on 29th Dec., 2005 demanded his salary till his superannuation and the future share profit of the project which come around jointly Rs. 1,36,20,000/ (Rupees One Crore Thirty-Six Lacs Twenty Thousand only) as the stake of the career of the complainant. The copy of legal notice dated 29th Dec., 2005 is exhibited as Exhibit No. C-3.

6. That, the complainant duly received a post dated cheque bearing No. 692299 dated 23/2/2006 of the ICICI Bank Ltd., Punjagutta Branch, Nerelli House No. 4, Nagarjuna Hills, Punjgutta Hyderabad # 500 082 for Rs. 1,36,20,000/- signed duly by the Director (Authorised Signatory) Mr. Mukesh Kumar the accused No. 3.

20. A perusal of the notice dated 29.12.2005 reveals that it was in reaction to the communication dated 13.10.2005 pointing out certain irregularities alleged to have been committed by the respondent. In the notice dated 29.12.2005, the respondent has infact assessed and calculated the damages calculating salary for eight years i.e. till the respondent attains the age of 55 years and also profit @ 10% for a period of 17 years.

21. The very basis of calculation of the amount in the notice dated 29.12.2005 is

towards "damages" only and not any existing debt or liability. The notice was duly replied by the petitioners informing him that the company is suffering losses because of delay in implementation of the plantation project and the demands made in the said notice were refuted. Not only that, the respondent was called upon to provide details of the funds used, return the company records and then resume duties.

22. In the statutory notice dated 13.03.2006, it is nowhere mentioned as to when, where and under which settlement/MOU, the cheque No. 692299 of ICICI Bank Ltd. was handed over to the respondent. The MOU dated 07.07.2005 entered into between the parties is not disputed under which the petitioner was to get only Rs. 25,000/- per month and 10% of the profit. But within three months of his joining as Director/CEO, his performance was not considered upto the mark as glaring irregularities were noticed and pointed out to him in writing in October 2005 itself.

23. In the reply dated 31.01.2006, all the averments made in the notice dated 29.12.2005 were not only refuted, he was also informed about the losses being suffered by the company. Thus, there was no question of handing over of cheque of huge amount of Rs. 1,36,20,000/- to him without there being any meeting or settlement talk/MOU under which just within a few months of joining the company, the respondent could have been given a cheque for a sum of Rs. 1,36,20,000/-. It is necessary to mention here that in the statutory notice dated 13.03.2006, the respondent has just mentioned that petitioner No. 3 Mukesh Kumar remitted a cheque bearing No. 692299 of ICICI Bank drawn in favour of respondent but while filing the complaint, in para 6 referred to above, he averred that he received a post dated cheque No. 692299 signed by petitioner No. 3 Mukesh Kumar.

24. The entire basis of calculation of amount of Rs. 1,36,20,000/- is on the assumption of a constant amount of profit earned by the petitioner No. 1 company for a particular period i.e. 17 years of which 10% has been calculated and salary of the respondent remaining constant at Rs. 25,000/- per month till he attain the age of 55 years which is even contrary to terms and conditions of MOU wherein it is specifically mentioned that salary of Rs. 25,000/- per month will be paid which is subject to review by the Board of Management from time to time as per the exigencies of the responsibilities. As per MOU, neither any age of superannuation i.e. upto 55 years was specified nor duration for which the project was to last, was specified.

25. Submissions of the petitioner is that the signed cheque was handed over to the respondent for purchasing seeds which has been utilized by him in his favour by filling his name, the amount and date. When the cheque was given for the above purpose, there was no debt or liability, hence complaint u/s 138 NI Act is not maintainable. Even on the basis of averments in the complaint, it cannot be said that the cheque was issued towards any existing debt/liability.

26. Submissions of the respondent is that it is subject matter of trial. During course of hearing, respondent was questioned as to on which date, under what settlement, to discharge which liability, he was handed over this cheque when in reply dated 31.01.2006 to his notice dated 29.12.2005 wherein there was no such proposal to settle the dispute. Legal notice dated 13.03.2006 was also duly replied on 29.03.2006. The respondent was unable to answer the above query.

27. The criminal liability u/s 138 NI Act is attracted only if the dishonoured cheque is issued in discharge of whole or part of any existing debt or liability. This Section does not apply to the cheque issued to meet some liability which may arise in future.

28. In the case of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, , the Apex Court, while dealing with the issue, inter alia, observed as under :

If the defence is acceptable as probable the cheque therefore cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.

29. In the case Jyoti Build Tech Pvt. Ltd. and Others Vs. Mideast Pipeline Products, , the cheque in question for a sum of Rs. 4.29 lacs was issued towards advance payment and adjustable to the final value of the work carried out, which got dishonored. A complaint u/s 138 NI Act was filed and from the averments made in the complaint, it could be made out that there was dispute between the parties with regard to the work performed by the complainant. While observing that the dispute between the parties was business related dispute and cheque was returned under the instructions that payment was stopped by the drawer, in para 10 to 12 of the report, it was observed as under :

10. The presumption that the cheque was for consideration has itself been rebutted by the complainant by making a truthful disclosure in the complaint, but unfortunately for the complainant this statement of truthfulness would be akin to a self goal. I repeat. The averments in para 5 of the complaint evidenced that the cheque was not for a valuable consideration when it was drawn. It was towards advance payment for work yet to be done and would have acquired a consideration only then.

11. Under the circumstances, it is apparent that the learned Metropolitan Magistrate who has taken cognizance of the complaint and summoned the accused has not applied himself correctly. It has been ignored by the learned Metropolitan Magistrate that it is not a case of a cheque being dishonored for lack of sufficient funds. It is not a case where the instruction to the banker to stop payment was a ruse to get over insufficiency of funds in the account. The statutory notice served and its response, which was before the learned Metropolitan Magistrate, has obviously not been perused by the learned Metropolitan Magistrate. If perused, the same would have revealed a business

dispute of a serious nature between the parties. That the cheque was dated 3.9.2003 but was presented for encashment on 23.9.2003 also reinforces the pleading in the complaint that the cheque was not for consideration on the date it was drawn. It was towards advance payment for the work yet to be done.

12. I lodge a caveat. A post dated cheque for a debt due but payable in future would have to be dealt with on different principles inasmuch as when the said cheque is drawn towards repayment, it is drawn towards a debt which is due, but payable in future. On the future date when the payment becomes payable, the twin requirement of the instrument being towards a debt due and payable would stand satisfied. Such cheque if returned by the banker on whom it is drawn upon the instruction "payment stopped by the drawer" would require a consideration by the learned Metropolitan Magistrate on the subject whether the same was a ruse to overcome deficiency of funds in the accounts.

30. In another case Exports India and Another Vs. State and Another, , the petitioner impugned the summoning order claiming that the cheque in question was given as a security of the agency agreement. The maintainability of the complaint u/s 138 NI Act was challenged, inter alia, on the ground that the cheque, when it was given, obviously there was no dues payable by the petitioner No. 1 even to M/s Bumpi Udyog and since there was no debt or liability when the cheque was handed over to M/s Bumpi Udyog, complaint u/s 138 could not have been filed on the basis of the said blank and undated cheque.

31. This Court, referring to the decision of Madras High Court in M/s. Balaji Seafoods Exports (India) Ltd. and another Vs. Mac Industries Ltd., , quashed the summoning order holding that when the cheque was handed over to the drawer, there was no debt or liability.

32. The case law K.N. Beena vs. Muniyappan, ICDS Ltd. Vs. Beena Shabeer & Anr., Rajesh Aggarwal vs. State & Anr., Hiten P. Dalal vs. Bratindranath Banerjee (Supra) relied upon by the respondent are not applicable to the facts of the present case wherein the question involved is whether the cheque was issued in discharge of existing debt or liability.

33. In the instant case, the averments made in the complaint case filed by the respondent u/s 138 NI Act are sufficient to come to the conclusion that the cheque in question was not issued in discharge of any existing debt or liability. In whatever capacity, the respondent might be having the cheque, it is clear from the various notices and the complaint that at no point of time, the parties had any meeting to discuss the issue of amount payable to the respondent if petitioners were not happy with the working of respondent as well as dissatisfaction of the respondent with the working conditions so as to arrive at a figure of Rs. 1,36,20,000/- to be payable to the petitioner for whatever services he had rendered during his short stint with the petitioners.

34. The calculated amount of Rs. 1,36,20,000/- does not fall in the category of existing debt or liability, but as if damages have been assessed by the

respondent. Had the statutory notice and its response been perused by the learned MM, it would have revealed that it was a dispute between the company and one of its Director and when the terms of appointment were in writing, the cheque for a huge sum of Rs. 1,36,20,000/- could not have been sent/handed over to the respondent/complainant without any settlement in writing to this effect. The complainant is silent as to when and where and by whom the cheque in question was given to him to settle his future dues. If any amount is calculated and claimed towards damages, then it being a purely civil dispute, provisions of Section 138 NI Act could not have been invoked by the respondent/complainant.

35. From the averments made by the respondent himself, in the notice dated 29.12.2005 and 13.03.2006 and in the complaint, it is clear that it is not a case of existing debt or liability. In these circumstances, the submission of the respondent that it is a subject matter of trial, is liable to be rejected.

36. In the case. State of Madhya Pradesh Vs. Awadh Kishore Gupta and Others, , while dealing with the scope of powers of High Court u/s 482 CrPC, the Apex Court observed as under :

It is fairly settled now that while exercising inherent jurisdiction u/s 482 or revisional jurisdiction u/s 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

37. In view of above discussion, the summoning order dated 20.05.2006 passed by learned M.M. in Complaint Case No. 2819/1/06 filed u/s 138 of N.I. Act, is quashed. Petition stands allowed. Copy of this order be sent to Trial Court for necessary information.