
(2014) 05 DEL CK 0208

In the Delhi High Court

Case No : W.P. (Crl.) 1170/2011 & Crl. M.A. 9951/2011 (stay)

Sampelly Satanarayana Rao

APPELLANT

Vs

M/s. Indian Renewable Energy Development Agency Ltd.

RESPONDENT

Date of Decision : 08-05-2014

Acts Referred:

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

Citation : (2014) 212 DLT 689

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Kiran Suri, Sr. Advocate and Mr. Vivek Singh and Ms. Aparna Matto, Advocate for the Appellant; Sandeep Sethi, Sr. Adv., Mr. Vinod Kr., Mr. Abhishek Agarwal, Advocate for the Respondent

Judgement

Mukta Gupta, J.—By this petition the Petitioner seeks quashing of 18 complaints pending before the Court of Ms. Charu Gupta, Ld. M.M. arising out of the following cheque numbers.

2. The case of the Petitioner is that admittedly the cheques were given as security for the loan and when the cheques were issued, no debt or liability was due, hence the complaints u/s 138 Negotiable Instruments Act are not maintainable. Even in the complaint filed by the Respondent it is admitted that the loan was, inter alia, secured by mortgage of immovable properties, hypothecation of movable assets, personal guarantee, post-dated cheques towards payment of installment of principal loan and post-dated cheques towards payment of installment of interest, loan etc. The SSPL Ltd. issued post-dated cheques which bounced and hence the complaint. Learned counsel for the Petitioner fairly does not press other contentions as the same can only be raised in trial. Thus the Petitioner confines the relief only on this ground. Reliance is placed on M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, ; Collage Culture and Others Vs. Apparel Export Promotion Council, ; Shanku Concretes Pvt. Ltd. Vs. State of Gujarat, ; M/s. Balaji Seafoods Exports (India)

Ltd. and another Vs. Mac Industries Ltd., ; Jyoti Build Tech Pvt. Ltd. and Others Vs. Mideast Pipeline Products, .

3. Learned counsel for the Respondent on the other hand contends that the Petitioner in the petition has admitted that the Petitioner was Managing Director of the company when the cheques were issued. He admits signing the cheques. A total loan of Rs. 11.5 crores was sanctioned, however Rs. 6.94 crores was disbursed and thus a liability of Rs. 6.94 crores has been admitted. The loan agreement clearly notes that the borrower agrees to borrow from the Respondent and promises to repay back the loan with interest. Thus, the liability of the principal and interest are admitted. There is no material on record to show that when the cheques were issued, no debt was due and this issue can be adjudicated during the trial only, and thus this Court will not exercise jurisdiction under Article 226 read with Section 482 Cr. PC to quash the complaints and the proceedings pursuant thereto. Reliance is placed on *Magnum Aviation (Pvt.) Ltd. Vs. State and Others*, ; *Krish International P. Ltd. & Ors. Vs. State and Anr. Crl. M.C. 905/2012* decided on 30th January, 2013; *Rajat Pharmachem Ltd. & Ors. Vs. State Trading Corporation of India Ltd. Crl. M.C. 1951/2009* decided on 24th July, 2009; and *Mekservers Pvt. Ltd. and Another Vs. Hcl Infosystems Ltd.*, .

4. Heard learned counsel for the parties. The complainant/Respondent filed 18 complaints against M/s. Sri Satyanarayana Power (P) Ltd. (in short SSPP Ltd.) and the Petitioner, who was the Managing Director besides other accused u/s 138 Negotiable Instruments Act. M/s. SSPP Ltd. and the Respondent Indian Renewable Energy Development Agency Limited (IREDA) entered into a loan agreement on 15th March, 2001. As per the agreement, M/s. SSPP Ltd. agreed to borrow from IREDA a sum of Rs. 11.50 crores. M/s. SSPP Ltd. agreed to pay to IREDA interest on the principal amount of loan for the project @ 14% per annum exclusive of interest tax etc. The interest was to be payable quarterly on the 31st March, 30th June, 30th September and 30th December every year. Article 3 of the loan agreement, inter alia, contains the following sections:

3.1. SECURITY FOR THE LOAN

The loan together with the interest, interest tax, liquidated damages, commitment fee, up front fee prima on repayment or on redemption, costs, expenses and other monies shall be secured by;

i) Exclusive First charge by way of Mortgage in favour of IREDA in such form as IREDA may require on all the immovable properties of the Borrower including and pertaining to proposed 4.00 MW Biomass based Power Project at Brahmanpally Village, Atmakur Mandal, Warangal District, in the State of Andhra Pradesh.

ii) Exclusive First charge by way of hypothecation in favour of IREDA on all the Borrower's movable assets/properties (excluding Book Debts) both existing and future including and pertaining to proposed 4.00 MW Biomass based Power Project at Brahmanpally Village, Atmakur Mandal, Warangal District, in the State

of Andhra Pradesh (save and except book debts) subject to prior charge of Banks on Stocks of Raw Materials, finished/semi-finished goods and consumable stores.

iii) Deposit of Post dated cheques towards repayment of installments of principal of loan amount in accordance with agreed repayment schedule and installments of interest payable thereon.

iv) First charge on LC/Escrow Account/Special Bank Account to be opened for receipt of APTRANSCO/SEB/Third Party/Sister Concern payments to the satisfaction of IREDA. (necessary approvals from APTRANSCO/SEB/Third Party/Sister Concern/State Government shall be obtained)

v) Irrevocable Bank Guarantee/Fixed Deposit Receipts (FDR) from Scheduled Bank for an amount equivalent to 10% of IREDA's loan for the Project i.e. Rs. 108.00 Lakhs and that the Bank Guarantee shall remain in force until the entire Loan has been repaid in full. Bank Guarantee/FDR can initially be valid for a period of three years with a provision that on the expiry of initial period of three years, the Bank Guarantee unless invoked, will stand automatically renewed for a period/s of 3 years and as regards FDR, unless intimated otherwise, FDRs will stand automatically renewed for a further period of 3 years up till expiry of repayment period of loan. The Borrower shall further agree that in case the Bank providing Bank Guarantee/Issuing FDRs gives/pays higher rate of interest than as applicable to the Loan, the Borrower shall pay such higher rate of interest to IREDA on Loan for Margin Money i.e., whichever is higher of the two rates of interest. In case of less requirement of Margin Money, IREDA's loan shall stand reduced accordingly and the Borrower shall abide by the decision of IREDA.

vi) Pledge of Shares held/to be held by Promoters/Promoter-Director-Promoter Companies in the Share Capital of the Company as security for the Loan. The Borrower shall note the pledge of shares in favour of IREDA as soon as pledge is created and inform IREDA within 7 days from the date of creation of pledge of shares by the pledgers noting the pledge in favour of IREDA.

vii) Mortgage of immovable urban properties equivalent to value of Rs. 100.00 lakhs owned by the promoters/directors of the Borrower in their own name or in the name of close relatives and friends of the promoters as and by way of additional collateral security for the loan. The Borrower shall furnish (i) Report on Title by its Advocates on the Immovable properties owned by the Promoters and offered as security for the Loan and; (ii) Valuation Report as finalized by the Government approved Valuers certifying the value of the immovable properties offered as Collateral Security.

viii) The Promoters of the Borrower shall give Undertakings that i) they shall meet the shortfall, if any, occurring in the cost of the project and/or for working capital requirements; (ii) they shall not pledge/dispose off their share holdings in the company during the currency of IREDA loan. Further whole time directors shall give undertakings that they shall not resign their office/s as Managing Director/whole time director (s) without the approval, of IREDA.

5. The bone of contention is sub-section (iii) of Section 3.1 of the loan agreement. Learned counsel for the Petitioner contends that these post-dated cheques were deposited as security whereas learned counsel for the Respondent contends that the post-dated cheques were towards repayment of installment of principal of loan amount in accordance with the agreed repayment schedule and installment of the interest payable thereon.

6. A perusal of sub-section (iii) of Section 3.1 of the loan agreement shows that the post-dated cheques were deposited towards repayment of installment of the principal of the loan amount and the interest. Even though they may have been noted to be under the head of security being u/s 3.1 of the loan agreement, however it is abundantly clear that the post-dated cheques were for repayment and thus in discharge of a liability.

7. Learned counsel for the Petitioner further raised the issue that when the post-dated cheques were given, there was no debt due. Debt became due when the first payment was due as per Schedule 5 on 30th September, 2004. The loan was sanctioned in favour of the company on 15th March, 2001. Learned counsel for the Petitioner has strongly relied upon the decision of M/s. Collage Culture & Ors. (supra).

8. In M/s. Collage Culture (supra), this Court was dealing with a case of a firm which could not exhaust the quota allotted to the intending exporter for exporting garments within the stipulated time resulting in imposition of penalty. For the year 2003-04 the policy stipulated that the earnest money would have to be deposited in the form of security when quota was allotted. The security was liable to be forfeited if goods were not exported and in case of partial export proportionate penalty was to be levied with reference to the unexhausted quota. Realizing that the Petitioner therein would not be in a position to utilize quota for the year 2001 it sought extension to utilize the same and issued post-dated cheques in favour of the complainant as earnest money deposits. It is in this context that this Court held that the cheques which were issued were not for an existing due but were issued by way of security and would not attract Section 138 of the Negotiable Instruments Act as they had not been issued for a debt which had come into existence.

9. In M/s. Collage Culture (supra) the learned Single Judge of this Court 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 are as under:

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 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.

10. In the present case when the post-dated cheques were issued, the loan had been sanctioned and hence the same fall in the first category that is they were cheque issued for a debt in present but payable in future. Hence, I find no reason to quash the complaints. However, these observations are only prima facie in nature and it will be open for the party to prove to the contrary during trial.

11. Petition and application are dismissed.