* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 14th August 2024***
Pronounced on: 19th September 2024

\+ **CRL.L.P. 56/2021**

ARUN KUMAR GUPTA (D) THR-LRS .....Petitioner

Through: Mr. Shekhar Prit Jha and Ms Preeti Advocates.

versus

TAMA JAWAHAR .....Respondent

Through: Mr. P. Sureshan, Advocate.

\+ **CRL.L.P. 57/2021**

ARUN KUMAR GUPTA (D) THR-LRS .....Petitioner

Through: Mr. Shekhar Prit Jha and Ms Preeti Advocates.

versus

TAMA JAWAHAR .....Respondent

Through: Mr. P. Sureshan, Advocate.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

CRL.L.P. 56/2021 & CRL.L.P. 57/2021

1. These petitions have been filed seeking leave to appeal against the two judgments dated 29th January 2021 ('**impugned orders'**) passed in CC No. 5475 of 2016 (in CRL.L.P. 56/2021) and in CC No. 6241 of 2016 (in CRL.L.P. 57/2021) by the MM-05 (North West) Rohini, Delhi. CC No. 5475 of 2016 was filed in respect of two cheques bearing no. 538220 dated

5.1.2008, and 538221 dated 12.1.2008 of Rs. 25,00,000/- and Rs. 30,00,000/- respectively. CC No. 6241 of 2016 was filed in respect of cheque bearing no. 538222 dated 20.1.2008 of Rs. 30,00,000/-. The respondent/accused was acquitted of offence under Section 138 of Negotiable Instruments Act, 1881 ('**NI Act**').

2. Leave to appeals granted.

3. Petitions are disposed of.

CRL.A. /2024 & CRL.A. /2024 (to be numbered by the Registry)

1. Having heard the parties substantially on the petitions, the Court granted leave to appeal and the matter was heard on the substantive issues arising out of the said appeals. Replies and rejoinder have already been filed by parties.

Factual Background

2. The petitioners are legal heirs of the original complainant who had filed the complaint under Section 138 of NI Act for dishonour of cheques amounting to Rs. 25 lakhs, Rs. 30 lakhs and Rs. 30 lakhs; bearing no. 538220, 538221 and 538222; dated 15th January 2008, 12th January 2008 and 20th January 2008, respectively.

3. As per the complainant (father of the petitioners), the respondent was awarded a tender by Trivandrum Rubber Works Limited for disposal of machineries, buildings and related material for a consideration of Rs. 3,06,00,000/- (*Rs. 3.06 crores only*). The respondent could arrange funds of

Rs. 1.1 crores and for the balance amount of Rs. 2 crore approached the complainant. A Memorandum of Understanding ('**MoU**') was executed on 5th December 2007 between the complainant and the respondent, whereby, complainant paid a sum of Rs. 2 crores to the respondent as a loan. As per the terms of the MoU, the respondent agreed to pay a minimum profit margin of Rs. 60 lakhs within 45 days from date of payment.

4. In acknowledgment of the term**s** of the MoU, 10 cheques, totalling to Rs. 2.6 crores, were issued by the respondent against the refund of the principal amount and the profit margin to the complainant, which are tabulated as under:

Sr. No.	Ch.No.	Dated	Amount (in Rs.)	Banks Name
1	538213	10.12.2007	25,00,000	ICICI Bank, Tenkasi Branch
2	538214	13.12.2007	25,00,000	ICICI Bank, Tenkasi Branch
3	538215	17.12.2007	25,00,000	ICICI Bank, Tenkasi Branch
4	538216	20.12.2007	25,00,000	ICICI Bank, Tenkasi Branch
5	538217	24.12.2007	25,00,000	ICICI Bank, Tenkasi Branch
6	538218	27.12.2007	25,00,000	ICICI Bank, Tenkasi Branch
7	538219	01.01.2008	25,00,000	ICICI Bank, Tenkasi Branch
8	538220	05.01.2008	25,00,000	ICICI Bank, Tenkasi Branch
9	538221	12.01.2008	30,00,000	ICICI Bank, Tenkasi Branch
10	538222	20.01.2008	30,00,000	ICICI Bank, Tenkasi Branch
		TOTAL	2,60,00,000	

5. Out of this, complainant received a sum of Rs. 2,01,60,511/-. After reconciliation of accounts, the respondent/accused was liable to pay a sum of Rs. 91,47,363/- to the complainant which was settled at Rs. 85,00,000/, thereby reducing the final liability to the 3 cheques of Rs. 25 lakhs, Rs. 30 lakhs and Rs. 30 lakhs, respectively, as noted above. It was agreed that the presentation of the 3 cheques totalling to Rs. 85 lakhs would be in discharge of full and final settlement of the liability of the respondent.

6. First, the two cheques totalling to Rs. 55 lakhs were deposited by the complainant which were returned on account of stop payment, and then the third cheque of Rs. 30 lakhs was also deposited but dishonoured on the same account. Notice was served on 30thJuly 2008, which was responded to on 30th August 2008. The accused/respondent contended that the liability of Rs. 2.6 crores had been paid and there was only subsisting liability of Rs.15 lakhs, for which respondent had sent articles for Rs. 15,34,080/- and discharged the liability. Complaints were filed and the cases were jointly tried and common evidence was led.

Impugned orders

7. The MM dismissed the complaints, on the ground that complainant failed to prove its case, that dishonoured cheques were given for discharge of legal debt or liability and the respondent was able to rebut the presumption under section 139 of NI Act. The statement of accused was recorded under Section 313 CrPC and accused did not lead any defence evidence.

8. The impugned order noted the submission of the complainant that the MoU contained the signature and stamp of the accused and the amount was

ascertained, post taking the investment amount. The accused had not brought out any statement of account, in order to substantiate his defence. The accused, however, assailed the MoU and said, it could not be relied upon.

9. Trial Court disbelieved the complainant in that he failed to adduce explanation as to how the interest amount of Rs.26,60,511/- was arrived at. As regards the agreement between the parties that the accused would pay interest @ 4% from the date of actual payment, was never reduced to writing. Any alteration/change in terms and conditions have not been reduced in writing, as noted by the Trial Court and there being no proof of the same, was hit by Section 92 of Indian Evidence Act, 1872.

10. Trial Court noted that the accused had maintained a consistent stand stating that the entire liability towards the complainant has been discharged. Arguments of the accused that the MoU was hit by Section 29 of the Indian Contract Act, 1872, was however, rejected.

Submissions on behalf of petitioner

11. Counsel for petitioner effectively relied on the MoU which was signed and executed between the parties. The terms of the MoU categorically stated that the finance of Rs. 2 crores had been given by the complainant to the respondent and there was promise to return back the principal amount within 30 days of the receipt along with minimum profit margin of Rs. 60 lakhs on specific terms and conditions. For this, the accused had given 10 cheques as noted above.

12. Reliance was placed on the response in the statement under Section 313 CrPC by the accused, where he stated that the MoU was not executed in his

presence and no witness had been found in his presence. This argument by the accused was not sustainable, as per the petitioner, since signatures were apparent on the MoU itself.

13. The suggestions which have been put to the complainant in the cross-examination also adverted to the lack of signatures of witness on the agreement, which were denied by the complainant.

Submission on behalf of respondent

14. As per the respondent, transactions entered between the parties were trade advances, the complainant was a scrap dealer and respondent was involved in the business of dismantling factories, companies, etc. The petitioner received various scrap materials against an advance amount of Rs. 2 crores. It is contended by the complainant that there was no MoU and an amount of Rs. 2 crores were received with the understating, that scrap materials removed from the Trivandrum Rubber Works Limited will be given to the complainant on a reduced and prefixed rate. The goods were agreed to be delivered as & when the dismantling process was completed. On this basis 2 Crores were paid by complainant as trade advance against the scrap material to be supplied. The MoU was not valid as no contesting witness had been called or examined before the Trial Court.The process of dismantling was based upon various other circumstances and there was no question of returning money within 30 days and there was no agreement for fixation of uniform rate as profit margin.

15. Further, as per the respondent**,** the cheques were given only as counter guarantee to repay the amount of 2 crores by way of goods or cash. He stated

that the payment of Rs. 2,01,60,511/- received by the complainant was already more than the agreed amount and the calculation of Rs. 85 lakhs were a bogus amount, as no discussion took place nor was there any mutual settlement, and therefore, no further amount was payable by the respondent to the complainant. Respondent further stated, that he never requested the complainant to deposit the cheque of Rs. 30 lakhs in discharge towards part liability of Rs. 85 lakhs, as no amount was payable and that he suffered a loss of Rs. 50 lakhs on account of return of certain goods by Arun Sales Corporation, because of which the respondent made a request to the bank for a stop payment on 25th June 2008 with intimation to Arun Sales Corporation that no amount was payable.

Analysis

16. The issuance of the cheques was admitted by the respondent; however, it was stated that it was given for a security of Rs. 2 crores advance. Since the respondent/accused has not led any defence evidence, it was unclear how his stand, that it was given as a security for Rs. 2 crores, was to be substantiated. More so, the cheques were given for Rs. 2.6 crores instead of Rs. 2 crores which, as per the respondent, was agreed to be paid for the purposes of trade advance.

17. The whole case revolves on the Memorandum of Understanding dated 5th December 2007. A bare perusal of the signature on the agreement would show that the respondent's signature on the affidavit supporting the counter reply is same as that on the MoU, at least, on a bare perusal.

18. Even the defence taken regarding the MoU by the respondent that no witnesses had been present at the time of execution of the MoU is vague and ambiguous. The statements recorded under Section 313 CrPC, do not seem reliable, considering it skirts around the issue of the MoU having been executed. It focuses on the issue that witnesses were not present at the time the agreement was executed. In fact, this seems to point to the fact that the MoU had indeed been executed willingly by the parties.

19. Nevertheless, aside from these issues of signatures and witnesses, there is no explanation why the 10 cheques for Rs. 2.6 crores were tendered by the respondent, in the first place.

20. Taking the respondent's defence that he was given Rs. 2 crores towards trade advances, the reason for giving 10 cheques amounting to Rs. 2.6 crores, is not in sync with the circumstances that the respondent seems to allege.

21. The response to Question 11 in the statement recorded under Section 313 CrPC, where the accused is asked to state '*anything else*', he stated that, "*MoU was not executed in my presence and no witnesses had signed in my presence.*"

22. The insistence of the respondent to deny the MoU which seems *prima facie* validly executed with reasonable detail, followed by tendering of 10 cheques of a total of Rs. 2.6 crores, seem untenable and not believable. If therefore, the MoU subsisted, then the basis for liability of balance amount calculated as Rs. 85 lakhs, would be alive. Once the cheques were tendered for Rs. 85 lakhs, the statutory presumption, would apply against the respondent under Section 139 of NI Act.

23. For this to be rebutted, it would require a plausible explanation from the respondent, that the cheques were not rendered for any liability. The respondent in this effort simply and boldly just denies the MoU itself, which to this Court, is not digestible.

24. Considering that respondent is denying execution of MoU, this Court finds his assertion that Rs. 2.6 crores was given on an '*understanding'* is not tenable or with any modicum of truth. A huge amount of Rs. 2.6 crores being advanced without any written understanding or agreement, particularly when it was backed by a commercial transaction, is a contention that seems unmerited and unbelievable. Moreover, the respondent's contention that the amount was given only as security cheques, is also untenable in light of various decisions of this Court and other Courts in this regard. It is well settled, that a mere assertion that a cheque was given as security amount, must be proved by the accused under Section 138 NI Act proceedings, as statutory presumption works against the accused. The following judgments are referred to in this regard.

25. Division Bench of this Court in ***Chuni Lal Anand v Dr. Narendra*** 2000 SCC OnLine Del 761 held that the onus was upon the respondents to prove that amount was given by respondent to the appellant by way of security. The relevant paragraphs are extracted as under:

> *"8. ..The allegation of the respondents in the written statement was that the amount of Rs. 20,000/- was given by respondent No. 2 to the appellant as security in cash. However, the respondents have not been able to prove the payment of the security amount given to the appellant. In the cross-examination, respondent No. 2 admitted that he did not get any receipt from the appellant for this amount but stated*

that his father i.e. respondent No. 1 had obtained signatures of the appellant. However, no such receipt is produced evidencing the payment of Rs. 20,000/- allegedly given by the respondent No. 2 to the appellant by way of security money. Although the respondent No. 1 had also deposed as DW-2 but his testimony is totally silent about the alleged receipt. Since the receipt of the amount of Rs. 20,000/- by way of cheque by respondent No. 2 from the appellant was admitted by the respondents, the onus was upon the respondents to prove that any amount was given by respondent No. 2 to the appellant by way of security and this cheque was for repayment of the security amount. Onus of proof of issue No. 1 was clearly on the respondents. No evidence is led by them to discharge this onus…

…

11… It is held that cheque in question was issued by appellant by way of loan to the defendant/respondent No. 2 and it was not towards refund of any security. The appellant is held to be entitled to the amount in question given by him to defendant/respondent No. 2 by way of loan as defendant/respondent No. 2 failed to repay the same. Since, as per the agreement defendant/respondent No. 1 also undertook to repay the loan with interest in case of default by defendant/respondent No. 2, defendant/respondent No. 1 is also liable for repayment…"

(emphasis added)

26. A Coordinate Bench of this Court in ***Jal Singh Malik v Om Prakash*** 2023 SCC OnLine Del 8130 held that it was not understandable as to why the respondent issued the cheque in question in favour of the appellant as a security cheque and that the respondent was to understand that an instrument like a cheque, should not be issued in a casual manner. The relevant paragraphs are extracted as under:

> *"18…The defence as taken by the respondent is appearing to be highly probable. It is not understandable that why the respondent issued the cheque in question Ex. CW1/B in favour of the appellant in December, 2015 even as security cheque once amount of Rs. 6 lacs was not paid by the appellant as his share for purchase of the property. The defence of the respondent does not inspire any confidence appears to be sham and without any basis. The respondent was needed to understand that instrument like cheque should not be issued in such casual manner as once cheque is issued it carries serious legal consequences...*
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> *…*
>
> *21…The trial court shifted the entire burden on the appellant to prove issuance of cheque in question Ex. CW1/B for discharge of legally enforceable debt even the respondent admitted issuance of cheque in question Ex. CW1/B in favour of the respondent. The trial court also misread and misunderstood document Ex. CW2/D1 to the benefit of the respondent and did not consider defence of the respondent. The defence taken by the respondent in cross examination of CWs, statement under section 313 and by leading defence evidence does not inspire any confidence and cannot be accepted. The impugned judgment is not legally sustainable and is set aside…"*
>
> (emphasis added)

27. The High Court of Karnataka in ***Maheshwari Constructions Private Limited, Bangalore v Lords Palace and Resorts Limited, Bangalore and Anr.*** 2006 SCC OnLine Kar 699 held that the Court must presume the negotiable instrument to be for consideration unless the existence of consideration is disproved and held that respondents failed to disprove that the cheques were issued as a security. The relevant paragraphs are extracted as under:

"17. …So under Sections 118(a) and 139 of the N.I. Act, it is for the respondents to rebut the evidence of the complainant. It is the quality of the evidence which required to be considered, whether those three cheques were issued as a security or a legally enforceable debt or otherwise…

18. Taking into consideration the facts and circumstances of the case, the Trial Court ought to have presumed the negotiable instrument to be for consideration unless the existence of the consideration is disproved. But the respondents failed to disprove that the cheques issued by them not for cost of the construction work carried out by the appellant, but they were issued as a security.

19. …Therefore, the Trial Court is wrong in believing the version of the respondents. The issuance, of said three cheques were issued as a security after the execution of the Power of Attorney in favour of the Bank does not arise. The findings recorded by the Trial Court is totally perverse, illegal. Therefore, taking into consideration the facts and circumstances of the case this Court comes to the conclusion that the order of acquittal passed by the Trial Court is liable to be set aside and the respondents are to be convicted for the offence punishable under Section 138 of N.I. Act…"

(emphasis added)

28. In these circumstances and basis the analysis above, impugned orders dated 29th January 2021, acquitting the respondent, are set aside.

29. List on 7th October 2024 for further directions. Respondent be present on the next date scheduled.

30. Judgment be uploaded on the website of this Court.

ANISH DAYAL, J

SEPTEMBER 19, 2024/RK/na