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

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Reserved on: 25.09.2023
Pronounced on: 17.10.2023

+ **CRL.M.C. 5315/2023 & CRL.M.A. 20212/2023**

RAJENDRA PRASAD MITTAL AND ANR. Petitioners
Through: Mr. Tanmaya Mehta, Mr.
Shubhanshu Gupta, Mr. Anand
Singh Mr. Rajeev Yadav,
Advocates

versus

MANISH GARG AND ANR. Respondents
Through: Mr. Rajiv Aggarwal, Ms.
Yogita Rana, Advocates

+ **CRL.M.C. 5316/2023 & CRL.M.A. 20215/2023**

RAJENDRA PRASAD MITTAL AND ANR. Petitioners
Through: Mr. Tanmaya Mehta, Mr.
Shubhanshu Gupta, Mr. Anand
Singh Mr. Rajeev Yadav,
Advocates

versus

PARKER BUILDERS PVT. LTD. AND ANR.
..... Respondents
Through: Mr. Rajiv Aggarwal, Ms.
Yogita Rana, Advocates

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT



SWARANA KANTA SHARMA, J.

1. By way of these petitions filed under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C'), the petitioners seek following reliefs:

- i. In Crl.M.C.5315/2023, quashing of Complaint Case No. 5892/2020, titled 'Manish Garg v. Arcity Infrastructure Pvt. Ltd. & Ors.' pending before learned Metropolitan Magistrate (NI Act), North West, Rohini Courts, Delhi, and setting aside of order dated 25.08.2022 *vide* which notice was framed under Section 251 of Cr.P.C. against the petitioners in the said case;
 - ii. In Crl.M.C.5316/2023, quashing of Complaint Case No. 5888/2020, titled 'Parker Builders Pvt. Ltd. v. Arcity Infrastructure Pvt. Ltd. & Ors.' pending before learned Metropolitan Magistrate (NI Act), North West, Rohini Courts, Delhi, and setting aside of order dated 25.08.2022 *vide* which notice was framed under Section 251 of Cr.P.C. against the petitioners in the said case;
2. In both these petitions, the petitioner no. 1 i.e. Rajendra Prasad Mittal (*accused no. 2 in complaint cases*) and petitioner no. 2 i.e. Arun Mittal (*accused no. 3 in complaint cases*) are the erstwhile Directors of respondent no. 2 i.e. Arcity Infrastructure Pvt. Ltd. (*accused no. 1 in complaint cases*). In Crl.M.C.5315/2023, the respondent no. 1 i.e. Manish Garg is the Director of 'Parker Builders Pvt. Ltd.' which is respondent no. 1 in Crl.M.C.5316/2023.



3. Brief facts of the case, as per the complaints filed under Section 138/141/142/143A of the Negotiable Instruments Act, 1881 ('*NI Act*') are that petitioners alongwith Smt. Saroj Mittal, Smt. Akanksha Mittal and R.P. Mittal HUF, who were the owners of units nos. 301-305, Krishna Apra Business Square, Plot No. 4, 5 & 6, Wazirpur District Centre, Netaji Subhash Place, Pitampura, Delhi, had come in contact with the complainant Manish Garg and had communicated their desire to sell the said property as they were in dire need of money. The petitioners had represented that the said units were free from all encumbrances, legal defects, etc. except a pending loan of Rs.4,10,11,438/- with M/s. Dewan Housing Finance Ltd. ('*DHFL*'). On these representations, the complainant Manish Garg had become interested in buying the said property and accordingly, an agreement to sell dated 06.04.2018 had been executed between the parties for a consideration of Rs.4,50,00,000/-. As per the terms of agreement, the complainant Manish Garg had paid an earnest amount of Rs.40,00,000/- to the petitioners and other aforesaid owners of the property, and had agreed to pay the remaining amount of Rs. 4,10,00,000/- directly to DHFL. Thereafter, he had paid a sum of Rs.96,83,738/- to DHFL as repayment of loan from the account of the complainant company i.e. Parker Builders Pvt. Ltd. However, subsequently, the petitioners had informed the complainant Manish Garg about their disinterest to continue the sale of the property as they were getting more consideration for the same property from some other buyer. The petitioners had also promised him that they shall refund the earnest money of Rs.40,00,000/- to him



and shall also refund the sum of Rs.96,83,738/- paid by complainant company Parker Builders Pvt. Ltd., alongwith interest @ 24% per annum from the date of its payment, from the sale proceeds of sale of the property. On such assurances and representation, the complainant Manish Garg had handed over the physical, peaceful and vacant possession of the property to the petitioners and had also cooperated in its sale to third party. In discharge of the liability of Rs.96,83,738/, the petitioners had refunded a sum of Rs.27,37,000/- on 12.02.2019 and Rs.27,37,695/- on 21.02.2019 to the complainant company Parker Builders Pvt. Ltd. As per complainant, for the discharge of remaining liability, the petitioners had issued two cheques, which are subject matters of two complaint cases. The petitioners, towards discharge of remaining liability out of aforesaid Rs.96,83,738/-, had issued cheque bearing no. 944327, dated 31.03.2020, drawn on Indian Bank, Pitampura, Delhi, in favour of complainant company Parker Builders Pvt. Ltd. for a sum of Rs.58,50,000/- from the account of respondent no. 2/accused no. 1 company i.e. Aarcity Infrastructure Pvt. Ltd., on the representation that they had transferred their funds in the said company which was a family owned and family run company. Further, the petitioners had also issued a cheque bearing no. 944329, dated 31.03.2020, drawn on Indian Bank, Pitampura, Delhi, in favour of complainant Manish Garg for a sum of Rs.40,00,000/-from the account of respondent no. 2/accused no. 1 company i.e. Aarcity Infrastructure Pvt. Ltd. However, upon presentation, both these cheques had got dishonored for the reasons 'Funds Insufficient' *vide* return memo(s) dated



06.06.2020. Thereafter, the complainants had issued statutory legal notices dated 25.06.2020 to the petitioners and accused company Aarcity Infrastructure Pvt. Ltd. calling upon them to make payment of the aforesaid amounts. Upon failure on part of accused persons to make payment, the Complaint Case No. 5892/2020 was filed by the complainant Manish Garg for dishonor of cheque of Rs.40,00,000/-, and the Complaint Case No. 5888/2020 was filed by the complainant company Parker Builders Pvt. Ltd. for dishonor of cheque of Rs.58,50,000/-. Thereafter, the learned Trial Court had issued summons against the accused, and notice under Section 251 of Cr.P.C. was framed against the petitioners *vide* orders dated 25.08.2022 in both the cases. Aggrieved by the same, the present petitions have been filed before this Court.

4. The case set out by the petitioners, contrary to the claims of complainants, is that the complainant Manish Garg had approached the petitioners and other owners of the aforesaid property and had shown his interest in buying the same, and accordingly, the agreement to sell dated 06.04.2018 had been entered into. It is stated that in July, 2018, the complainant Manish Garg had communicated to the petitioners that he wished to sell the property to a third party so as to accrue and realize some substantial monetary profit. In February, 2019, he had informed the petitioners that the sale deed for the transfer of the property had to be executed in favour of a third party personally known to him and the petitioners had thus, executed the sale deed in favour of the third party for a total consideration of Rs. 4,09,86,000/-. It is stated that the sale consideration received



from the third party had either been paid directly to DHFL or at times to Manish Garg for the amount paid by him to DHFL in terms of the Agreement. It is stated that one such amount of Rs.54,74,695/- received *vide* Demand Drafts dated 02.02.2019 from third party to the petitioners, were paid to complainant company Parker Builders Pvt. Ltd. via RTGS on 12.02.2019 and 21.02.2019. It is the case of petitioners that on the request of complainant Manish Garg, the accused company i.e. had issued two cheques dated 31.03.2020 in favour of the complainants on his request and on the bald assurance that Manish Garg and Parker Builders Pvt. Ltd. had disbursed the partial loan amount to the tune of Rs. 98,50,000/- in favour of DHFL in accordance with the terms and conditions recorded in the Agreement to Sell dated 06.04.2018 and that the third party shall reimburse the cheque amount in favour of the petitioners and accused company between February-March, 2020. It is stated that the petitioners had proceeded in the identical manner as they had in case of the aforesaid Demand Drafts and had issued the cheques in question to the tune of Rs.40,00,000/- in favour of complainant Manish Garg and to the tune of Rs.58,50,000/- in favour of complainant Parker Builders Pvt. Ltd. in order to remit the future payment which the petitioners were bound to receive in February-March, 2020 from the third party in whose favour the sale deed had been executed.

5. Learned counsel for the petitioners argues that the allegations in the complaints, even if taken at their face value and presumed to be correct, do not disclose commission of any offence under the



provisions of the NI Act. It is stated that the learned Trial Court failed to appreciate that on the date of issuance of cheque i.e. in June, 2019 and even on the date of deposit of cheque or its dishonor, there existed no legal debt or liability. It is stated that repayment obligation by the accused company towards the complainant company never arose as there was no receipt of any amount by the accused company from the complainant company. It is further submitted that the cheque issued by the accused company in favour of the complainants were without any consideration as the accused company and the petitioners as directors of the accused company were not party to the Agreement to Sell, from which the instant dispute arises. It is submitted that the cheque was issued on the bald assurance of complainant Manish Garg whereby it was assured to the petitioners that third party shall reimburse some amount to the Petitioners, which is to be transferred to Manish Garg. It is also argued that even as per the balance sheet of complainant Parker Builders Pvt. Ltd., the amount due from accused company was Rs.42,09,043/-, which is less than the amount of cheque of Rs.58,50,000/-. It is also submitted that though the complaint mentions about some interest to be paid by the accused persons, the agreement to sell does not mention any such clause regarding payment of interest. Therefore, it is stated that the cheques in question did not represent any outstanding liability and the dishonour would not fall within the purview of Section 138 of NI Act, and therefore, the present petitions be allowed.

6. On the other hand, learned counsel for respondents/complainants argues that the present petitions are devoid of any merit



and all the issues raised before this Court are a matter of trial. It is stated that the complaints filed under Section 138 of NI Act contains clear and specific averments qua the role of accused persons/petitioners as well as all the details of the transactions that had taken place between the parties. It is stated that the petitioner had to pay the outstanding amount alongwith interest @ 24% per annum and thus, the amount of cheque included the principal amount as well as amount of interest. It is also submitted that the presumption of Section 139 of NI Act is in the favour of complainants and thus, impugned proceedings cannot be quashed by this Court at this stage. Thus, it is prayed that present petitions be dismissed.

7. This Court has heard arguments addressed on behalf of petitioners and respondents, and has perused the material placed on record.

8. In a nutshell, the controversy in the present case revolves around the issue as to whether the cheques in question were issued towards discharge of any legally enforceable debt by the petitioners and the accused company, and as to whether the amount due and payable on the part of petitioners towards the complainants, even as per the case of complainants, was less than the amount of cheques in question.

9. The essentials to constitute an offence under Section 138 of NI Act were discussed by Hon'ble Apex Court in case of *Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel (2023) 1 SCC 578*, which are reproduced as under for reference:



“11. Section 138 of the Act provides that a drawer of a cheque is deemed to have committed the offence if the following ingredients are fulfilled:

(i) A cheque drawn for the payment of any amount of money to another person;

(ii) **The cheque is drawn for the discharge of the ‘whole or part’ of any debt or other liability. ‘Debt or other liability’ means legally enforceable debt or other liability;** and

(iii) The cheque is returned by the bank unpaid because of insufficient funds.

However, unless the stipulations in the proviso are fulfilled the offence is not deemed to be committed. The conditions in the proviso are as follows:

(i) The cheque must be presented in the bank within six months from the date on which it was drawn or within the period of its validity;

(ii) The holder of the cheque must make 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 from the receipt of the notice from the bank that the cheque was returned dishonoured; and

(iii) The holder of the cheque fails to make the payment of the ‘said amount of money’ within fifteen days from the receipt of the notice...”

(emphasis supplied)

10. Thus, there is no dispute regarding the arguments raised by learned counsel for respondent that to constitute an offence under Section 138 of NI Act, the cheque in question should have been issued in discharge of some legally enforceable debt.

11. However, it is also well-settled through precedents of Hon’ble Apex Court that the issue as to whether or not a cheque was issued in discharge of legally recoverable debt is to be decided during the course of trial and the proceedings under Section 138 of NI Act ought not to be quashed on such grounds at pre-trial stage. In this regard, this



Court deems it appropriate to refer to the decision of Hon'ble Apex Court in case of *Rathish Babu Unnikrishnan v. State (NCT of Delhi)* 2022 SCC OnLine SC 513, wherein it was observed as under:

“6. As noted earlier, the **appellant's basic contention is that the cheque in question was not issued in discharge of “legally recoverable debt”**. They also raised a contention on the obligation of the complainant to transfer the concerned shares. A defence plea is raised by the appellant to the effect that the cheques in question were issued as “security” and not in discharge of any “legally recoverable debt”.

7. The learned Judge of the Delhi High Court while considering the petition under Section 482 Cr.P.C kept in mind the scope of limited enquiry in this jurisdiction by referring to the ratio in *HMT Watches Limited v. M.A. Abida*¹. and in *Rajiv Thapar v. Madan Lal Kapoor*² and opined that the exercise of powers by the High Court under Section 482 Cr.P.C, would negate the complainant's case without allowing the complainant to lead evidence. Such a determination should necessarily not be rendered by a Court not conducting the trial. Therefore, unless the Court is fully satisfied that the material produced would irrefutably rule out the charges and such materials being of sterling and impeccable quality, the invocation of Section 482 Cr.P.C power to quash the criminal proceedings, would be unmerited. Proceeding on this basis, verdict was given against the appellant, who was facing the proceeding under Section 138 of the N.I. Act. With all liberty given to the appellant to raise his defence in the trial court, his quashing petition came to be dismissed.

8. The issue to be answered here is whether summons and trial notice should have been quashed on the basis of factual defences. The corollary therefrom is what should be the responsibility of the quashing Court and whether it must weigh the evidence presented by the parties, at a pre-trial stage.

10. It is also **relevant to bear in mind that the burden of proving that there is no existing debt or liability, is to be discharged in the trial**. For a two judges Bench in *M.M.T.C. Ltd. v. Medchl Chemicals and Pharma (P) Ltd.*³, Justice S.N. Variava made the following pertinent observation on this aspect:—



“17. There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability.”

11. **The legal presumption of the cheque having been issued in the discharge of liability must also receive due weightage. In a situation where the accused moves Court for quashing even before trial has commenced, the Court's approach should be careful enough to not to prematurely extinguish the case by disregarding the legal presumption which supports the complaint.** The opinion of Justice K.G. Balakrishnan for a three judges Bench in *Rangappa v. Sri Mohan*⁴ would at this stage, deserve our attention:—

“26. ... we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.”

12. **At any rate, whenever facts are disputed the truth should be allowed to emerge by weighing the evidence.** On this aspect, we may benefit by referring to the ratio in *Rajeshbhai Muljibhai Patel v. State of Gujarat*⁵ where the following pertinent opinion was given by Justice R. Banumathi:—

“22.When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the NI Act ought not to have been quashed by the High Court by taking recourse to Section 482 CrPC. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the NI Act on the legal issues like limitation, etc. criminal complaint filed under Section 138 of the NI Act against Yogeshbhai ought not to have been quashed merely on the ground that there are inter se disputes between Appellant 3 and Respondent 2. Without



keeping in view the statutory presumption raised under Section 139 of the NI Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in CC No. 367 of 2016 filed under Section 138 of the NI Act.”

16. The proposition of law as set out above makes it abundantly clear that the **Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter.** What is also of note is that the **factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations** made in the complaint.

17. The **consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable.** Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.

18. Situated thus, **to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the trial court will not in our opinion be judicious.** Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited...”

(emphasis supplied)

12. In light of the aforesaid observations of the Hon’ble Apex Court, this Court notes that in the present case, the petitioners herein have not disputed the issuance of cheques in question including the



signatures on the cheque, date on the cheque as well as the amount mentioned in the cheques, though they have disputed the purpose or reason behind issuance of cheques, which as per the petitioners, was not to discharge any liability or pay any legally enforceable debt. In these circumstances, there is merit in the argument of learned counsel for complainants that the presumption under Section 118(a) and 139 of NI Act shall be in the favour of complainants, since the issuance of cheques is not disputed and it has to be presumed that the cheques in question had been issued towards some legally enforceable debt. Needless to say, such a presumption can be rebutted by the accused by raising a probable defence. The law on this proposition is well-settled and for the same, a reference can be made to the decision of Hon'ble Apex Court in case of *Basalingappa v. Mudibasappa (2019) 5 SCC 418*, whereby it was held as under:

“25. We having noticed the ratio laid down by this Court in the above cases on Sections 118 (a) and 139, we now summarise the principles enumerated by this Court in following manner:

25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.



25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

25.5. It is not necessary for the accused to come in the witness box to support his defence...”

13. Furthermore, in the complaints which have been sought to be quashed by the petitioners herein, there are specific averments to the effect that the entire set of transactions and agreements had taken place between the complainant Manish Garg and petitioners herein, and Manish Garg had paid an amount of Rs.96,83,738/- to DHFL from his company's account, and Rs.40,00,000/- himself to the petitioners, and at a later stage, to return the said amount alongwith interest, the petitioners had issued cheques, in favour of complainants, drawn on the bank account of their company (accused company) on the pretext that the same was a family owned company and they had transferred all their funds into the bank account of company. It is also not the case of petitioners that they were not incharge of not responsible for the day-to-day affairs of the accused company.

14. As regards the amount of debt/liability, the complainants have averred in their complaints that the petitioners had assured that they would return the aforesaid amount alongwith interest, and as per complainant, the cheque amount includes the amount of interest alongwith principal amount. The case of petitioners is contrary to the same and as per them, the cheques had not been issued towards discharge of any legally enforceable debt. However, when there are clear and specific averments in the complaint in relation to



commission of offence under Sections 138/141 of NI Act, this Court is of the considered opinion, being guided by the principles of Hon'ble Apex Court, that such factual issues and the probable defence of the accused persons cannot be appreciated and adjudicated upon by this Court in a petition under Section 482 of Cr.P.C. since these issues are triable in nature and can only be decided on the basis of evidence and on touchstone of examination and cross-examination of witnesses.

15. Thus, in view of the aforesaid observations, this Court is of the opinion that the issues raised before this Court can only be decided by the learned Trial Court at appropriate stage, on their own merits. Since a *prima facie* case exists against the petitioners under Sections 138/141 of NI Act, there are no reasons to quash the impugned complaint cases and orders framing notice against the petitioners.

16. Accordingly, the present petitions, alongwith pending applications, stand dismissed.

17. Nothing expressed hereinabove shall tantamount to an expression of opinion on the merits of the case.

18. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

OCTOBER 17, 2023/dk