

Cnh Industrial Capital (India) Private ... vs . Jitesh B. Raikundli 1 Of 22 on 15 December, 2022

IN THE COURT OF RAHUL JAIN,
METROPOLITAN MAGISTRATE - 04, N. I. ACT,
SOUTH-WEST DISTRICT, DWARKA DISTRICT COURTS, DELHI.

JUDGMENT

CNH Industrial Capital (India) Private LimitedComplainant Versus Jitesh B. Raikundliya
.....Accused PS - Dwarka Under Section 138 of N. I. ACT, 1881

a) Sl. No. of the case : CC No. 15019/2020

b) Name of the complainant : CNH Industrial Capital (India) Private Limited, having registered office at 4th Floor, Rectangle No.1, Behind Marriot Hotel, Commercial Complex, D-4, Saket New Delhi.

c) Name of the accused person(s) : Jitesh B. Raikundliya, Proprietor of M/s Ram Motors Vinayaka layout , Having office at Warora, Tah Warora, District-Chandrapur-442907 (MH)

d) Offence complained of : Under Section 138 of N. I. Act, 1881

e) Plea of accused : Pleaded not guilty

f) Final order : Convicted

g) Date of such order : Dec' 15, 2022 BRIEF STATEMENT OF THE REASONS FOR DECISION : □

1. Vide this judgment, this Court shall dispose off complaint for offence punishable under Section 138 of The Negotiable Instruments Act, 1881 filed by the complainant CNH Industrial Capital (India) Private Limited against accused namely Jitesh B Raikundliya Proprietor of M/s Ram Motors. In gist, it is alleged in CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 1 of 22 the complaint that complainant is licensed as a Non-Banking Financial company under Reserve Bank of India Act, 1934 and is engaged in financing of Agricultural and Construction Equipment purchased by the Borrower/accused and supports the Borrower/accused in financing the purchase of equipments manufactured by the complainant (hereinafter referred to as "the Manufacturer") with tailored financial solutions by offering a full range of retail and wholesale financing programs. It is further alleged in the complaint that on 14.05.2018, accused Jitesh B Raikundliya, Propertor of M/s Ram Motors approached the complainant for availing a revolving credit facility for Rs. 2,25,00,000/-(Two Crores twenty five lac only) to facilitate the purchase of the equipment and goods manufactured and traded by the Manufacturer and pursuant to the application dated 14.05.2018 (Ex. CW1/4) along with the requisite documents for availing revolving credit facility, the complainant sanctioned a revolving loan facility of Rs. 2 Crores vide sanction letter dated

23.05.2018. It is further stated in the complaint that in furtherance to the aforesaid sanction letter, a Loan Agreement dated 24.05.2018 (Ex. CW1/5) for Rs. 2,00,00,000/□(Rupees Two Crore Only) was executed between the complainant and the accused for disbursing on a notice/request alongwith purchase order to be raised by the accused requesting that all or a portion of the loan be disbursed/paid directly to the Manufacturer on behalf of the accused towards purchase by the accused of the products manufactured by the Manufacturer alongwith such other terms and conditions as mentioned in the Loan Agreement. The parties to the Loan Agreement expressly agreed to abide by the terms and conditions of the said loan agreement. As per Schedule I of the Loan Agreement, a sum of Rs. 2 Crore was to be extended during the availability period by the complainant to the accused at the rates of interest as mentioned therein (Clause 1.1(d)) CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 2 of 22 till 06.04.2020 for the products manufactured/ traded by the manufacturer. It is further stated in the complaint that the complainant in terms of the Loan agreement advanced to the accused a loan facility of Rs. 39,14,896.58/□(Rupees Thirty Nine Lacs Fourteen Thousand Eight Hundred Ninety Six & Fifty Eight only) from 24.05.2018 to 13.07.2020. The loan disbursement were made as per Clause 2.3 of the Loan agreement alongwith the Drawdown requests of the accused in terms of Section 4 of the Loan Agreement. Further, as per the terms of the Loan Agreement, a sum of Rs.

1,37,467.94/□(Rupees One Lac Thirty Seven Thousand Four Hundred and Sixty Seven and Ninety Four only) was payable towards interest as per section 3 read with Schedule□ of the Loan Agreement. Hence, as on 13.07.2020, the accused was liable to pay a total sum of Rs. 40,52,364.52/□(Rupees Forty Lac Fifty Two Thousand Three Hundred and Sixty Four & Fifty Two only) to the complainant in terms of the Loan Agreement. The aggregate outstanding amount of Rs. 40,52,364.52/□(Rupees Forth Lac Fifty Two Thousand Three Hundred and Sixty Four and Fifty Two only) comprised of Rs. 40,52,364.52/□(Rupees Forty Lac Fifty Two Thousand Three Hundred and Sixty Four and Fifty Two only) (including interest) towards loan taken for purchase of equipment under the whole good loan account and Rs. NIL (including interest) towards loan taken for purchase of Spare Parts and the accused gave a cash security of Rs. 6,00,000/□to the complainant and out of which Rs. 5,00,000/□was adjusted towards the loan taken for whole goods and Rs. 1,00,000/□towards spare parts as per the Loan Agreement.

It is further stated in the complaint that the accused was not regular in repayment of the loan amount and in view of the this, the complainant requested the accused number of times to clear the outstanding amounts advanced under the Loan CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 3 of 22 Agreement at the earliest and that the Statement of Account with respect to the Loan advanced and the interest break up was regularly and periodically sent to the accused but all was in vain and the accused despite numerous reminders and requests did not clear the balance outstanding amounts. It is alleged that as per Clause 15.1(e) of the Loan Agreement read with other Clauses of the event of default ,the accused was in default in repayment. The accused gave balance confirmation dated 27.06.2019 confirming the amount payable to the complainant. The accused as the proprietor of the Proprietorship firm namely M/s Ram Motors under his signatures had given three cheques, one of them is the cheque in question bearing No. 009296 which is Ex. CW□1/9 towards discharge of the liability under the loan agreement and to pay the outstanding amount to the complainant under the Loan agreement if any default occurs in the repayment of the

sanctioned loan and the cheque was given when the revolving credit facility was extended to him and the loan was sanctioned with the clear understanding that the said cheque was to be banked on occurrence of default of repayment of the debt and liability. It is also submitted in the complaint that on 13.07.2020, a sum of Rs. 40,52,364.52/□ was due and payable by the accused to the complainant under the loan agreement.

It is further stated that in view of the aforesaid factual matrix and commercial arrangement both written and oral between the accused and the complainant and since the accused was not clearing the loan amount despite numerous request, the complainant in terms of clause 16.1(a) of the Loan Agreement duly filled the part outstanding amount of Rs. 40,52,363.33/□ the amount due and payable by the accused to his client under the aforesaid loan agreement and the cheque got dishonoured on presentation vide return memo dated 15.07.2020 Ex. CW□/10 with the remarks "funds CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 4 of 22 insufficient". Therefore, complainant sent a legal notice dated 11.08.2020 Ex. CW□1/11, however, accused did not make payment within statutory period of legal demand notice, hence, this complaint.

PRE-SUMMONING EVIDENCE & NOTICE

2. Accused was summoned for offence punishable under Section 138 of The Negotiable Instruments Act, 1881 without pre summoning evidence being led upon consideration of the complaint and other documents along with evidence affidavit. After appearance of accused, it was ensured that copy of complaint has been supplied. Notice was put to the accused for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 on 04.12.2021 to which accused pleaded not guilty and claimed trial. It was stated by accused that he had some transaction with the complainant and he is liable to pay to the complainant but not the amount mentioned in the complaint. Thereafter, matter was fixed for complainant's evidence and accused side was granted opportunity to cross-examine the complainant's evidence.

COMPLAINANT'S POST NOTICE EVIDENCE

3. The Portfolio Manager for the complainant examined as CW□, adopted affidavit of evidence reiterating almost all facts of complaint, stating all exhibits available on record and in gist in his cross-examination, he deposed that the complainant company provides finance only for the products manufactured by the complainant company and voluntarily said that they support OEM (Original equipment manufacture) and they give finance for tractor and agricultural equipment which are manufactured by the complainant company and that "Tailored Finance" is a one stop solution to provide finance for OEM. He denied the suggestion that the CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 5 of 22 accused never approached the complainant for loan facility and it was forced upon him. He voluntarily said that they have received a written application for accused which is documented in the present case. He admitted that as per complaint, the principal amount was Rs. 39,14,896.58/□ and the interest was Rs, 1,37,467.94/□ He also admitted that they adjusted the security based on the dealer condition and they received a request from the manufacturer for full and final settlement. He voluntarily said that as per agreement clause, they can adjust the security available in dealers account against the outstanding based on

dealer behavior. He further stated that the mode of request is email or letter and that there is no request filed on record.

He further stated that the revolving credit facility of Rs.2 crores is never disbursed in a single transaction but the loan amounts were disbursed according to the tractor value and the request of the accused and admitted that no formal drawn down request is on record but the disbursement of the loan can be collated from the statement of account which is Ex. CW-1/6 (Colly). Further, he was questioned that "did you intimate the accused before presenting the security cheque" on which he answered that "it was a repayment cheque and we inform to dealer through telephonically or other modes of communication but the dealer did not respond, so we presented the cheque". He was also questioned that "you have charged principal amount with interest for faulty tractor which the accused received and returned to the manufacturer" and he answered in affirmative and stated that "there is no such request received from dealer or manufacturer that there is a faulty tractor which has been returned and if we had received any communication, we definitely would have reconciled our accounts." He also stated that the rate of interest is not fixed and it is category wise depending upon the dealer as mentioned in the loan agreement and the interest rate is 12.25% and 3% extra penal interest. He denied that the loan agreement CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 6 of 22 was signed as blank papers and the hand written entries in the loan agreement are by complainant without any knowledge and approval of the accused dealer. He also denied the suggestion that accused never demanded credit facility for Rs.2 crores and for which he could not provide the bank guarantee and therefore they charged additional 3% penal interest for not providing bank guarantee. He voluntarily said that Penal interest is applicable for past repayment behaviour and not for security. He also denied the suggestion that before putting the cheque, the complainant did not adjust the amounts mentioned in schedule 2 clause no. 3 of the loan agreement and stated that "We reconcile account post adjustment of security and credits". He stated that the manufacturer never informed him not to charge interest for the faulty tractor returned by the accused. He denied the suggestion that as on 13.07.2020 the accounts were not reconciled but admitted that they were not reconciled with the manufacturer. He voluntarily said that he had not received any instructions from the manufacturer for reconciliation.

4. Complainant closed his post notice evidence vide order dated 10/05/2022 and thereafter, matter was fixed for recording statement of accused.

STATEMENT OF ACCUSED

5. The statement of accused was recorded under Section 313 of The Code of Criminal Procedure, 1973 read with Section 281 of The Code of Criminal Procedure, 1973 separately vide order dated 10/05/2022. Incriminating evidence was put to him. The accused reiterated his stand that there was a faulty tractor by the manufacturer i.e. CNH Industrial (India) P. Ltd. of Rs.6,89,000/- which was returned to the manufacturer. The complainant should have adjusted the same in the cheque amount after reconciling the amount. The same was not done and a higher amount was demanded in the cheque. He admitted his signatures on loan application form Ex. CW- 1/4 (OSR) and loan agreement CW1/5 but stated that they were taken on the blank CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 7 of 22 agreement. Accused denied that the signature on the

balance confirmation Ex. CW-1/8 (OSR) and with regards to the statement of accounts Ex. CW-1/6 (Colly) regarding outstanding liability, the accused stated that the statement of account used to come on emails and were prepared unilaterally and that there was no communication with him regarding the same He further reiterated in his stand that he had issued three cheques including cheque in question as blank signed security cheque with only the name of payee written on the cheque and that same were issued at the time of signing the agreement in May, 2018. He stated that he is not sure whether he had received legal notice or not but the address mentioned in the legal demand notice was correct.

Accused was given opportunity to lead defence evidence and he came into the witness box. He reiterated his defence that he did not accept the amount mentioned in the cheque. The complainant has misused his security cheque without settling the account and without intimation.

During the cross-examination, he stated that he was in business with the manufacturer i.e. CNI Industrial India Pvt. Ltd. since 2014 and a group of dealer were asked to sign blank papers for a loan facility which had some hidden clauses. He admitted that he had signed and stamped on all 40 pages Ex. CW-1/5 i.e. the loan agreement. He stated that he informed about tractors sold to me which were faulty to the manufacturer During the subsequent cross-examination, accused was shown invoice no. G1071 Ex. DW-1/1(Colly) regarding the faulty tractor and was asked a question regarding supplying of tractors in March on which the accused had answered that this invoice is of return of tractor and he could not show in the documents Ex. DW1/1 (Colly) as to when the tractor was supplied but he stated that the tractor was billed in March. He further deposed that he had informed the manufacturer verbally about the faulty tractor but he might have some written intimation but he could not tell that exactly right now. He further deposed that he did not inform to the complainant about faulty tractor and voluntarily said that he has no dealings with the complainant. He admitted that he had received the legal notice Ex. CW-1/11 from the complainant.

He admitted that he did not inform to the complainant about discrepancy as alleged in the statement of account even after receiving the legal notice as Covid period had started thereafter and voluntarily said that he was in contact with the CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundliy 8 of 22 manufacturer only and not the complainant since he started business with the manufacturer. He stated that he has a separate dealer agreement with the manufacturer and he was not aware that the dealer agreement with the manufacturer contains a clause called legal remedy through arbitration. He stated that the faulty tractor was billed by the manufacturer and that he has not taken any action against the manufacturer with respect to the faulty tractor. He voluntarily said that he was dealing with the manufacturer since 2014 on good faith . He further deposed that the complainant is a financier and not a manufacturer and the complainant has no role to play in the sale and purchase of the tractor. He deposed that he had informed the complainant verbally number of times to settle the accounts.

He chose to close his DE and a separate statement was recorded on 14/11/2022.

6. Final arguments were heard on 19.09.2022. Case file perused.

POINTS FOR DETERMINATION : ☐7.1 Whether the complainant has been able to establish ingredients of offence punishable under Section 138 of The Negotiable Instruments Act, 1881 beyond shadow of reasonable doubt against the accused or not?

7.2 Final order.

APPRECIATION OF FACTS/CONTENTIONS/ANALYSIS & FINDINGS

8. To bring home conviction for offence punishable under Section 138 of The Negotiable Instruments Act, 1881, the complainant is obliged to prove : ☐

(a) The cheque(s) was/were drawn/issued by the accused person(s) to the complainant on an account maintained by him/her/them/it with the bank for discharge, in whole or in part, of any debt or liability.

(b) The cheque(s) was/were presented to the bank within a period of six months or within period of its/their validity.

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(c) The cheque(s) so presented for encashment was/were dishonored.

(d) The payee/complainant of the cheque(s) issued a Legal Demand Notice within 30 days from the receipt of information from the bank regarding dishonourment of the cheque(s).

(e) The drawer of the cheque(s) failed to make the payment within 15 days of receipt of afore~~said~~ Legal Demand Notice.

(f) The complaint was presented within 30 days after the expiry of above 15 days.

UNDISPUTED/UNCONTROVERTED FACTS

9. At the outset, it is pertinent to mention herein that it is not in dispute that cheque in question belong to the accused, it bears his signatures, it was drawn on an account maintained by the accused with a bank, cheque in question was dishonored as alleged, legal demand notice was sent to correct address of accused, accused received the legal notice but he failed to make the payment of cheque in question till date. So, there is no need of discussion qua said ingredients and same can be regarded as being duly proved on record and being non~~controverted~~.

CONTENTIONS QUA CONSIDERATION 10.1(a) The contentions which have been raised by defence are twofold. He has stated that cheque amount was more than the outstanding liability. The complainant didn't issue notice in writing before presenting the cheque as per terms of the agreement and also that he didn't reconcile the accounts with the manufacturer which was also a breach of clause 4.8 of the agreement. It is the contention of defence that CNH Industrial Capital

(India) Private Limited Vs. Jitesh B. Raikundli 10 of 22 accused side has been able to rebut the presumption of consideration available in favour of the complainant as consideration qua cheque in question is more than outstanding liability. It is contended that accused should be acquitted in this matter.

10.1(b) On the other hand, it is the contention of the complainant side that accused has admitted the loan agreement and has rejected that there was any need to reconcile accounts or issue any notice in writing before presenting the cheque. He has submitted the outstanding liability is as per statement of account and cheque amount was as per the statement of account. Also, accused failed to prove that he had paid his dues as the statement of account.. Legal demand notice was issued and received by accused side, hence, all ingredients of commission of offence punishable under Section 138 of The Negotiable Instruments Act, 1881 stands established on record, therefore, accused should be held guilty in this matter.

10.2 Submissions of both side considered.

Section 118 (a) of The Negotiable Instruments Act, 1881 provides as under : □"Section 118. Presumption as to negotiable instruments.□Until the contrary is proved, the following presumption shall be made:□

(a) of consideration□that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, was indorsed, negotiated or transferred for consideration;....."

Section 139 of The Negotiable Instruments Act, 1881 provides as under : □"Section 139 Presumption in favour of holder.□It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

In matter of "Krishna Janardhan Bhat Vs. Dattatraya G. Hegde"

(2008) 4 SCC 54, Hon'ble Supreme Court of India has observed : □CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 11 of 22 "32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different."

"34. Furthermore, whereas prosecution must prove the guilty of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is 'preponderance of probabilities'. 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 he relies."

In matter of "Mallavarapu Kasivisweswara Rao Vs. Thadikonda Ramulu Firm" (2008) 7 SCC 655, Hon'ble Supreme Court of India (though it was a civil matter related to promissory note, but is relevant to refer herein) has held : ¶17. Under Section 118 (a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal."

In matter of "Bharat Barrel & Drum Mfg. Co. V. Amin Chand Payrelal" (1999) 3 SCC 35, Hon'ble Supreme Court of India (though it was also a civil matter related to promissory note, but is relevant to refer herein) has held : ¶12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118 (a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under the law to rely upon all the CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundliy 12 of 22 evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118 (a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

In matter of "Rangappa Vs. Sri Mohan" (2010) 11 SCC 441 which is a Full Bench Decision, Hon'ble Supreme Court of India while discussing above said provisions, judgments and other case law on the point has held : ¶26. In light of these extracts, 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. To the extent, the impugned observations in Krishna Janardhan Bhat may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. 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".

"27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant/accused cannot be expected to discharge an unduly high standard or proof."

"28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 13 of 22 under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

10.3 So, precisely there is initial presumption of legally enforceable debt or liability against the accused side, but same is rebuttable. The standard of proof for rebuttal is preponderance of probabilities. Accused side can lead evidence in defence, even can rely on materials submitted by complainant and can rely upon circumstances also to show non-existence of consideration or it being improbable and need not adduce evidence of his own for the same.

10.4 The defence of the accused side considered in view of above-cited case laws. The main defence of accused is that the cheque amount is more than his outstanding liability. Accused has deposed that there was a faulty tractor given by the manufacturer i.e CNH Industrial (India) Pvt. Ltd. Of Rs. 6,89,000/- which was returned to the manufacturer. His further submission was that the complainant should have adjusted the same in the cheque amount after reconciling the accounts with the manufacturer. The same was not done and a higher amount was demanded in the cheque. It is admitted position that complainant did not reconcile the accounts with the manufacturer. Clause 4.8 of the Loan agreement specifically states that records and accounts maintained by manufacturer and lender regarding the disbursement shall form the evidence in respect of the amount payable.

Issue no. 1 Whether there was a mandatory requirement upon the complainant to reconcile the accounts with the manufacturer before banking the cheque to arrive at the outstanding liability/ Amount Payable ?

The complainant in his written arguments pointed out that Clause 4.8 covers Terms of Disbursements and relevant Clauses read as under : □CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 14 of 22 4.7 The Borrower hereby irrevocably and unconditionally agrees and authorizes the Lender to utilize the available Loan to make payments to the Manufacturer for and on behalf of the Borrower towards the outstanding invoices raised in relation to purchase of Products and all such disbursements by Lender shall be deemed to be disbursements made to the Borrower and the applicable Interest and repayment obligation on such amounts shall be in accordance with the Loan Agreement.

4.8 The records and accounts maintained by the manufacturer and Lender regarding the aforesaid disbursements shall form the evidence in respect of the Amounts Payable.

The complainant further argues that the reliance of the accused on Clause 4.8 is misplaced and erroneous. Clause 4.8 covers Terms of Disbursements and not terms of Repayment as portrayed by the Accused. The reference to the "records and accounts" mentioned in sub section 4.8 is with respect to Terms of Disbursements and is only with respect to the Loan Amounts disbursed and nothing else. The Accused is deliberately trying to twist the facts and put meanings to the Clause when the same do not exist. Clause 4.8 is with respect to the disbursements and states that records and accounts maintained by the Manufacturer and Lender regarding the disbursements shall form the evidence in respect to Amounts Payable i.e. it is specifically for the specific disbursement of Loan Amount to the Borrower/ Accused and/or to the Manufacturer on behalf of the Borrower/ Accused towards purchase of the products manufactured/ traded by the Manufacturer against the relevant invoice raised by the Manufacturer. From a bare reading of the said Clause 4.8 under the "Terms of Disbursement", it is evident that the reconciliation is specifically in reference to the specific loan disbursements so that the Amount Payable against such disbursement is crystalized for repayment by the Borrower as defined in the Loan Agreement. There is no onus upon the Complainant to reconcile the accounts with the Manufacturer for arriving at final debt amount and/or outstanding amount recoverable from the Accused. The reconciliation under Clause 4.8 is only to the extent of determining the loan amount against specific disbursement and what amount would be the Amount Payable under such disbursement by the Accused/ Borrower.

Decision on issue no. 1 CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 15 of 22 I have gone through the arguments of both the parties and the terms of the loan agreement on this issue. This issue is decided in favor of the complainant. It is clear that "records and accounts maintained" was in reference to the disbursements of loan amount which shall form evidence in respect of Amount Payable. It is to say that the records of the invoices and accounts maintained by the lender and manufacturer regarding the disbursements shall form evidence for amount to be payable in terms of the loan.

Amount Payable as per definition clause Section 1.1(c) means and includes the outstanding principal amount of the Loan, Additional Loan, accrued Interest, Enhanced Interest, prepayment charges, together with all other interest, fees, costs, charges, expenses, stamp duty, penalties under this Loan Agreement and all other sums whatsoever payable by the Borrower to Lender in accordance with this Loan Agreement and related transaction documents;

It means that the record and accounts maintained by manufacturer and lender were to form evidence for the disbursements part of the Amount Payable. The term Amount Payable also includes interest payment and other miscellaneous payments like penalties , fees and cost for which there was no requirement for reconciliation with the complainant as it was the domain of the complainant himself who was the lender.

Issue no. 2 Whether there was mandatory requirement to issue a notice in writing before presenting the cheque on question which was a security cheque under clause 15.3 of the loan agreement ?

The second issue raised by the defence was that the complainant did not issue written notice to the accused before presenting the security cheque. As per clause 15.3 of the loan agreement "Without prejudice to or affecting or diluting the rights of the Lender under the Loan Agreement or under any Financing Document, if any Event of Default occurs or is outstanding, the Lender may at any time with immediate effect by notice in writing to the Borrower:

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(a) Cancel the Loan, whereupon no further Drawdown, if any, may be made of the Loan; and / or

(b) Declare all Amounts Payable / monies / amounts due, owing or outstanding (whether or not then otherwise due) under the Loan as being immediately due and payable or otherwise payable on demand;

and / or

(c) enforce the security / security interest created under the Financing Documents and / or.

The accused argued that the complainant was under contractual duty to issue notice in writing to the borrower before presenting the security cheque. The said clause gives the lender multiple rights in case of event of default which includes default in repayment of loan. The said clause mentions that the lender may at any time with immediate effect by a notice in writing to the borrower enforce the security created under the financing documents. Thus, notice was a mandatory requirement before presenting the security cheque.

Per contra, the complainant argued that as per Clause 15.7, the Borrower agrees that the above powers may be exercised without prior notice to the Borrower and further agrees to ratify and confirm all that Lender or any substitute appointed by the Lender lawfully do or cause to be done in exercise of the aforesaid powers. The Borrower agrees to give full assistance to Lender or any other person appointed by Lender for performing the aforesaid powers.

Thus on a coJoint reading of Clause 15.3 which is " Without prejudice to or affecting or diluting the rights of the Lender" and " may" (which is discretionary and not mandatory) alongwith Clause 15.7 it is amply clear that there is no mandatory requirement under the Loan Agreement to give written

notice as averred by the Accused.

Decision on issue no. 2 I have gone through the arguments of both the parties and the terms of the loan agreement. This "may" is related to the various rights which the lender might enforce against the borrower/accused. But the issuing of a notice in writing is not a pre-requisite before enforcing any of the rights as clause 15.7 also provides the power to the complainant to use these powers under clause 15.3 without issuing notice.

CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 17 of 22 Also, the complainant has argued that the cheques were not security cheques rather cheques given towards repayment of the loan facility and thus they don't come under clause 15.3 (c). The relevant definition of Financing documents contains the meaning of the cheques which includes cheque in question which has been reproduced here as under : 1.1(1) "Financing Documents" mean I,.....

Ii,.....

vii. 3 (Three) Nos. cheques obtained towards repayment of the facility.

After going through the same, I am in agreement with the complainant that the cheques which were given were to be used for repayment of the loan facility.

They were not a security as regards clause 15.3 (c). That security under the financing documents means Deed of Hypothecation. This can be verified from Section 9 of the agreement which defines Security.

The financing documents include the three cheques which were given towards the repayment of facility which includes the cheque in question, thus the complainant presented the cheque in question without issuing notice in writing to the accused which he was well within his powers to do so.

This can also be verified from the terms of the loan agreement itself.

Section 16 - Power of Attorney 16.1 Lender is authorized as attorney for and in the name of the Borrower to carry out or implement all of the Borrower's covenants, which the Borrower is required and liable to perform (and strictly comply with) as per the Loan Agreement, in the event of any failure on part of the Borrower, for any reason whatsoever, to perform or strictly comply with such covenants. The Borrower irrevocably nominates, constitutes and appoints Lender (acting through any of its officers or authorised agents/ representatives) to be the true and lawful attorney of the Borrower to do, execute and perform all of the acts, deeds, matters and things as set out below in these presents in the name of, and for and on behalf of, the Borrower:

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(a) To fill in any or all relevant details in any cheques / instruments / documents, deposit / endorse such cheques submitted by the Borrower in any manner whatsoever as Lender shall deem fit or necessary.

It is clear from the plain reading of the aforesaid terms and conditions of the Loan Agreement that the Lender is within its right and is authorised to fill relevant details in the cheques submitted by the Accused in any manner as Lender shall deem fit or necessary.

Hence, this issue is also decided in favor of the complainant. He was well within his rights to bank the cheque without issuing a written notice.

Whether the outstanding liability was less than the cheque amount ?

The accused came into the witness box and submitted documents which included request letter dated 15.07.2019 and transport receipt dated 15.07.2019 alongwith other documents to prove that the faulty tractor was returned by the accused. It is the position of the accused that he was willing to pay his liability after adjusting the amount for the faulty tractor.

The accused argued that he had returned the faulty tractor on 15.07.2019 to the manufacturer but the complainant did not adjust the amount for the faulty tractor in the statement of account and before filling the amount in the cheque. If the complainant had either reconciled the accounts with the manufacturer or issued notice in writing to the borrower, he would have come to know about return of the faulty tractor. Thus, the complainant breached the terms and condition of the loan agreement and filled an amount in the cheque which was more than his outstanding liability.

The complainant has argued that the two transactions between the (i) Lender and Borrower towards the repayment of the outstanding amounts by Accused of Cheque of Rs. 40,52,363.33/□and (ii) Manufacturer and Borrower towards return of the alleged faulty Tractor of Rs. 6,89,013.17/□and adjusting the price of returned Tractor against payable in the Statement of Account of the Complainant are CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 19 of 22 independent, distinct and separate transactions and cannot be clubbed together and does not hold good by any stretch of imagination.

The same is further fortified from Section 20 of the Loan Agreement which reads as under :

Section 20 - Exclusion of Liability Borrower agrees and acknowledges that the transaction of purchase of Products by the Borrower from Manufacturer is a separate transaction from the borrowing obtained by the Borrower under this Loan Agreement.

20.2 The Borrower agrees that Lender shall not be liable for: (a) any delay in delivery or the quality/condition/fitness of the Product(s). (b) any representation or warranties whatsoever made by Manufacturer in respect of the Product(s).

© loss or destruction or damage to Product(s) occasioned by theft, pilferage, robbery, fire, riot, strike, civil commotion or otherwise.

20.3 The Borrower absolves Lender from any liability in respect of the above and that the Borrower shall not withhold repayment of Amounts Payable on the ground that the Products has not been delivered by Manufacturer or any alleged claim/dispute in respect of the Products is ongoing.

Thus the complainant has argued that it is also manifestly clear that the Borrower cannot hold repayment of Amounts Payable on the ground that the Products has not been delivered by the Manufacturer or any alleged claim / dispute in respect of the products is ongoing. Hence, the accused cannot absolve his liability for repayment of availed loan under the Loan Agreement on the pretext of faulty tractor being delivered by or returned to the Manufacturer.

Apart from the above, as per Section 2 of the Loan Agreement, the Borrower's obligation to pay interest and all other amounts / monies payable under or pursuant to the Loan Agreement including repayment of the Loan, shall be subject to terms and conditions contained herein and shall not be affected by:

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(i) Any set off, counterclaim, recoupment, defence or other right which the Borrower may have against the Lender, or any other person for any reason whatsoever;

The complainant argues that from the above it is also amply clear that the obligation of the Borrower is independent of any set off, counter claim etc which the Borrower may have against the Lender or any other person whatsoever which includes the Manufacturer too.

Decision regarding Issue no. 3 It is pertinent to mention here that the amount was filled in the Cheque towards the outstanding amount due and payable by the Borrower/Accused in terms of the Statement of Account maintained by the Lender for the Loan Account of the Borrower/Accused in the normal course of its business. The accused had stated that the statement is an unilateral account maintained by the complainant. But the same is the only evidence available on record to verify the outstanding liability. There is no other account statement produced by the accused which challenges the statement produced by the complainant.

Now, the date of the cheque is 13.07.2020 and the amount mentioned in the cheque is Rs. 40,52,363.33/□ and the liability of the accused as per the statement of account on 01.07.2020 was Rs. 42,93,970.54. The liability as on 15.07.2020 was 40,52,364.52/□ as per the statement of account Ex. CW□/6 filed by the complainant as the accused made a payment of Rs. 2,41,606.02 on 15.07.2020. This is very pertinent to note that the accused made a payment towards the loan amount even after returning the faulty tractor.

I have gone through the arguments of both the parties and arrived at a conclusion that complainant is correct here as well. The accused as per the loan agreement absolves the lender in regards of any claim of the borrower with the manufacturer regarding faulty tractor. His disputes regarding set off

to be claimed regarding the faulty tractor is separate from his obligation under the loan agreement. He has admitted that he didn't inform about the faulty tractor to the complainant. He didn't even file a reply to the legal notice objecting the claim.

FINAL CONCLUSION CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 21 of 22

12. It stands established on record in the form of evidence of the complainant given vide affidavit (which can be read in evidence at all stages as per judgment of "Rajesh Agarwal Vs. State & Anr." 171 (2010) DELHI LAW TIMES 5), documents exhibited in evidence, admission(s) of accused during notice/accusations explained to him and statement of accused recorded under Section 313 of The Code of Criminal Procedure, 1973 read with Section 281 of The Code of Criminal Procedure, 1973 that complainant proved the dishonor of the cheque, sending and receipt of legal notice and the liability of the accused of the cheque amount beyond reasonable doubt and hence the foremost ingredients of offence punishable under Section 138 of The Negotiable Instruments Act, 1881 is established.

FINAL ORDER

13. In view of the aforementioned facts and circumstances, this Court is of the opinion that complainant has been able to prove its case against the accused for offence punishable under Section 138 of The Negotiable Instruments Act, 1881 beyond shadow of any reasonable doubt. Accordingly, accused namely Jitesh B. Raikundli proprietor of M/s Ram Motors stands convicted for offence punishable under Section 138 of The Negotiable Instruments Act, 1881.

Announced in the open Court on December 15, 2022.

(RAHUL JAIN) MM (NI) ACT-04, DWARKA COURTS NEW DELHI CNH Industrial Capital (India) Private Limited Vs. Jitesh B. Raikundli 22 of 22