

**HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR
(SINGLE BENCH : HON'BLE SHRI JUSTICE J.P.GUPTA)**

M.Cr.C.No. 21862/2017

Nike India Private Limited and Others

Vs.

My Store Private Limited

Shri Abhishek Dutta, Shri Prateek Jain, Shri Sayli Petiwale, Shri Yashowardhan Shukla, Shri Niki Kantawala, Advocates for the petitioners.

Shri Anil Khare, learned Senior Advocate with Shri Anurag Gohil, Shri Priyank Agrawal and Shri Sahil Sharma, Advocate for the respondent.

ORDER
(08.08.2019)

This petition under Section 482 of the Cr.P.C. has been filed by the petitioners seeking quashment of the order dated 3.6.2017 passed by learned JMFC, Bhopal whereby cognizance for an offence punishable under Sections 409 read with Section 120-B of the IPC has been taken against the petitioners.

2. In this case it is not disputed that the respondent / complainant company has got franchise from petitioner no. 1 Company with regard to business of shoes and garments and the complainant company is operating its business at 21 places in India. Between petitioner no. 1 and the complainant company there was a dispute with regard to account of transactions which was settled amicably on 7.12.2015 and according to settlement in first step Rs.2,97,00,000/- was to be paid by the respondent / company to petitioner no. 1 company and for the payment of the aforesaid amount, 22 post-dated cheques were given and the some disputes remained pending.

3. On behalf of the complainant / respondent a complaint has been filed before the JMFC, Bhopal on 22.11.2016 stating that out of the

aforesaid 22 cheques, the amount of 10 cheques was paid to petitioner no. 1 Company through RTGS. There were changes in the Rules and Regulations with regard to encashment of the cheques by the bank, therefore, 5 more cheques were given to petitioner No. 1 Company. The amount of 10 cheques were paid through RTGS and 5 cheques given later-on in place of remaining cheques were not encashable and no criminal proceeding with regard to dishonor of the aforesaid cheques can be taken against the complainant company and the cheques were returnable but the same were not returned despite of the demand and were presented before the bank for encashment and on dishonor of the cheques a criminal proceeding has been started against the complainant company with ulterior motive by the petitioner no. 1 Company which is operated by petitioners no. 6 to 8 and other petitioners have knowledge and connivance in the aforesaid act, therefore, the petitioners are liable to be punished. Learned JMFC took cognizance of the offence under Section 409 read with Section 120-B of the IPC against the petitioners. Hence, this petition.

4. This petition has been preferred on the ground that the order of learned JMFC is illegal and contrary to law. Prima-facie no offence under Section 409 r/w. Section 120-B of the IPC is made out. The alleged act is purely a civil nature dispute and criminal colour has been given on account of the proceeding started by the petitioners company to recover the amount by filing the complaint under Section 138 of the Negotiable Instruments Act and also started proceedings before the Arbitration Tribunal. In respect of this commercial dispute, the Arbitration Tribunal headed by Former Chief Justice of Karnataka has also passed the award in favour of the petitioners company, in which, the aforesaid cheques were also disputed and these facts are not disclosed deliberately by the complainant. Further contended that there is a presumption with regard to the cheques that those have been given for due con-

sideration and there was no relationship of the trust between the petitioners and respondent complainant and therefore, no criminal breach of trust is made out and petitioners no. 2 to 8 have been made accused without any necessary averment in the complaint. They are not vicariously liable for the action of petitioner no. 1 Company as there is no specific allegation as to how and what manner they played any role in the alleged commission of the crime. Apart from it, the cheques were presented for encashment in the Bangalore; the court situated in Bhopal had no jurisdiction to take any cognizance with regard to alleged offence. Accordingly, the proceeding of the aforesaid criminal case deserves to be set-aside.

5. Learned counsel appearing on behalf of the respondent / Complainant Company has contended that the averments in the complaint and the evidence produced before learned JMFC prima-facie establishes that an offence punishable under Section 409 read with Section 120-B of the IPC is made out against the petitioners. The ground that the allegations also disclosed civil dispute is not relevant and sufficient to set-aside the proceedings started on the complaint if the alleged acts also come in purview of crime. In such situation, both the proceedings may be continued simultaneously and there are specific averments about the act and role of petitioners no. 2 to 8 in connection with the aforesaid alleged act. So far as the arbitration proceeding is concerned, against the award an appeal is pending, therefore, the award cannot be deemed to be final and the finding of the award cannot be considered here. So far as the objection with regard to territorial jurisdiction is concerned, the cheques were given in Bhopal and the cheques are related to the bank account situated in Bhopal and the money through RTGS were also transferred from Bhopal, therefore, it cannot be said that learned JMFC, Bhopal has no jurisdiction to take

cognizance in the offence, therefore, the petition deserves to be dismissed.

6. Having considered the contentions of learned counsel for the parties and on perusal of the record, it is found that the award dated 16.9.2018 passed by Former Chief Justice Shri N. K. Sodhi has dealt with the aforesaid transaction of the cheques and payment through RTGS and found that the complainant company is liable to pay Rs.11,94,27,832/- to petitioner no. 1 company and directed to make the aforesaid amount with the cost of the award by the end of November, 2018. It is not disputed that against the aforesaid award an appeal has been filed by the respondent / company but the stay order has been passed with the condition to pay 50% amount of the award within the stipulated period but no such amount has been paid. Therefore, the award is executable.

7. Learned counsel appearing on behalf of the complainant/ respondent has submitted that this award is not a part of the proceeding of the Magistrate and the validity of the order passed by JMFC has been challenged here. The document which was not before the authority that passed the order cannot / should be considered to adjudicate the validity of the order.

8. This contention has no force as it is settled law that in the proceeding under Section 482 of Cr.P.C. with regard to quashment of the proceeding of the trial court the documents which are unimpeachable can be considered with a view to whether continuity of the proceeding would be meaningful or mere wastage of the time etc.; or the proceeding has been launched to take vengeance or malice. Learned counsel appearing for the respondent / complainant Company has placed reliance on a judgment of **State of Orissa vs. Debendra Nath Padhi (2005) 1 SCC 568**, in which it is held that at the time of framing of

the charge or taking cognizance accused has no right to produce any material. Therefore, the aforesaid award cannot be considered with regard to test the legality of the impugned order. This contention has no substance. In this regard, reference to a judgment of the Apex court in the case of **Suryalakshmi Cotton Mills Limited vs. Rajvir Industries Limited and others (2008) 13 SCC 678** would be relevant, in which, para 22 is relevant here as under :-

22. “Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of the said jurisdiction. Yet again, the High Court at that stage would not ordinarily enter into a disputed question of fact. It, however, does not mean that documents of unimpeachable character should not be taken into consideration at any cost for the purpose of finding out as to whether continuance of the criminal proceedings would amount to an abuse of the process of Court or that the complaint petition is filed for causing mere harassment to the accused. While we are not oblivious of the fact that although a large number of disputes should ordinarily be determined only by the civil courts, but criminal cases are filed only for achieving the ultimate goal namely to force the accused to pay the amount due to the complainant immediately. The Courts on the one hand should not encourage such a practice; but, on the other, cannot also travel beyond its jurisdiction to interfere with the proceeding which is otherwise genuine. The Courts cannot also lose sight of the fact that in certain matters, both civil proceedings and criminal proceedings would be maintainable.”

Similarly another judgment of the Apex court in the case of **Rajiv Thapar v. Madan Lal Kapoor (2013) 3 SCC 330** is also attracted, in which, para 30 is relevant here as under :-

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under [Section 482](#) of the Cr.P.C.:-

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of

power vested in it under [Section 482](#) of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused.

9. In view of the aforesaid pronouncement of the law, in the proceeding under Section 482 of Cr.P.C. the documents filed by the accused / petitioners, if they are unimpeachable, can be considered to arrive at judicial conclusion.

10. In the aforesaid award dated 16.9.2018 dispute with regard to transaction of the aforesaid cheques and dues has been considered and the finding of Para 13 shows that at the time of settlement occurred in December 2015, Rs.3,82,60,723/- was due and the cheques of Rs.2,97,00,000/- were given to discharge the aforesaid liability and as per Para 19 through RTGS, Rs.1,81,98,389/- was paid till March 24, 2016 against the dues amount of Rs.5,97,94,880/-; in other words more amount as paid through RTGS payable under the cheques was due against the respondent complainant. In the circumstances, whether not-returning the cheques and presenting before the bank for encashment is an act of criminal breach of trust is the sole question in this case.

11. In the complaint there are no specific averments that there was any direction to the petitioners that if the amount is paid through RTGS, the cheques would be returned unpaid. It is stated that after payment through RTGS the cheques should be returned as the complainant / respondent was not liable to pay further the amount of the cheques. In the circumstances, in view of this Court, not returning the cheques

and presenting the same for encashment cannot be said to be an act of criminal breach of trust. Learned counsel for the applicants has rightly placed reliance on a judgment of Bombay High Court passed in **Deochand Durlabhji Jogi vs. Madanlal Gopikisan Sharma, 1968 Mh.LR 113**, in which, in Para 12 it is held that “I am, therefore, inclined to infer that in order that a charge could be framed against the accused petitioner, it was primarily necessary to establish that there was an entrustment of property. Even if the complainant is taken at his words, it only means that he deposited the money on condition that it will be returned to him together with interest, as was customarily paid to others as and when the deposit amount is asked back by the complainant. It is not the term of the contract at all that the amount deposited by the complainant was to be kept as a separate fund or was to be specifically applied to a particular purpose. The accused acted as a banker so far as the deposit is concerned. As soon as the complainant deposited the money with the accused except with the obligation of returning that amount when demanded as per terms of the contract, the beneficial ownership in that money passed on to the accused who was entitled to make use of it for his own purpose. He could mix it with the general fund of his shop and could utilize that money as his normal revenue for the purpose of his business. It was not necessary for the accused to return the same money. He was only obliged to return an equal amount as and when demanded. The relationship that is created is only that of a creditor and debtor. If the debtor denies the debt and even if that denial is dishonest, it is difficult to infer that a criminal liability is incurred which could constitute an offence under [Section 405](#) of the Indian Penal Code. In this view of the matter, so far as the facts of this case are concerned even accepting the complainant at his word, no case is made out that a charge under [Section 406](#) of the Indian Penal Code requires to be framed. The learned Magistrate was, therefore, in error, in framing a charge even if the case of the complainant was not to be rebutted.”

12. In the present case, it cannot be said that the petitioners dishonestly misappropriated the property (“cheque”). First of all, the cheques were dishonored and they have not received any amount. Apart from it, the complainant company is liable to pay more amount of the cheques amount to the petitioners and the dispute is purely of civil nature. If an action owing to dishonor of the cheques under Section 138 of the NI Act has been taken, the respondent / complainant has right to raise the question that about the aforesaid cheques it cannot be said that the complainant company was liable to pay the amount to discharge legal liability or debt or was kept only for security and returnable after payment through RTGS but the complainant / respondent has no right to address its grievance leveling the charges of criminal breach of trust against the petitioners.

13. The contention of learned counsel for the respondent / complainant that the complainant disclosed the commission of offence of criminal breach of trust and the proceedings cannot be stopped merely on the ground that the same is civil dispute and reliance has been placed on a judgment of the Apex court in **Trisuns Chemical Industry vs. Rajesh Agarwal and others (1999) 8 SCC 686**, in which it is held that criminal prosecution with regard to cheating cannot be thwarted merely because civil proceedings are also maintainable. It is not a sufficient ground for quashing the complaint; and reliance has also been placed in another judgment of the Apex court in **Rajesh Bajaj vs. State NCT of Delhi and others (1999) 3 SCC 259**, in which it is held that if averments in complaint prima facie make out a case for investigation the High Court cannot quash the complaint merely because one or two ingredients of the offence have not been stated in detail. Quashing of complaint on ground that the complaint disclosed a commercial or money transaction not justified. Many a cheating is committed in the course of commercial or money transaction.”

14. The aforesaid both cases would not give benefit to the respondent / complainant. The facts and circumstances of both the aforesaid cases are entirely different. In the aforesaid case, prima facie alleged offence was made out despite of civil nature of transaction and in view of the facts and circumstances of present case, prima facie it appears that in the present case, the dispute is purely of civil nature and it has been given colour of criminal case. With regard to the aforesaid contention it would be appropriate to consider the judgment of the Apex court in the case of **Indian Oil Corporation vs. NEPC India Ltd. And others (2006) 6 SCC 736**, in which, Paragraphs 12 (v), 13 and 14 are relevant here as under :-

12 (v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such

a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. [In G. Sagar Suri vs. State of UP](#), this Court observed: (SCC p.643, para8).

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under [Section 482](#) of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

14. "While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy

lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under [section 250](#) Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.”

15. In view of the aforesaid pronouncement of law and the facts of the case, it is clear that neither the complainant has disclosed necessary ingredients of an offence under Section 409 of IPC read with Section 120-B of IPC and the matter is purely civil nature and already adjudicated by the Arbitration Tribunal. Therefore, the present complaint has been filed maliciously giving colour of criminal offence.

16. So far as other contention of learned counsel for the petitioners is concerned, the contention that learned JMFC Bhopal has no territorial jurisdiction to take cognizance, has no substance as the Apex court in the case of **Trisuns Chemical Industry (supra)** also held that the complaint cannot be quashed on the aforesaid ground. The order of taking cognizance by Magistrate cannot be quashed by the High Court on the ground that no Magistrate had territorial jurisdiction to try the case. The power to take cognizance and to try the case is different. Hence, the impugned order cannot be quashed on the ground of lack of territorial jurisdiction and on the point whether JMFC has territorial jurisdiction or not, this court is not expressing any opinion and it is open to raise the question before the trial court at appropriate stage if need arises.

17. It is also contended by learned counsel for the applicants that in the complaint against applicants no. 2 to 8 nothing is specifically mentioned that what role was played by them individually in commission of alleged offence. There is no averment that to whom the cheques were given and by whom the cheques were presented for encashment and to whom the cheques were demanded which are necessary to constitute an offence of criminal breach of trust. Only the person to whom the property was entrusted is liable in case of breach of trust. There is no averment that to whom the cheques were entrusted. In the circumstances, applicants no. 2 to 8 cannot be held liable individually or vicariously for alleged criminal act. On account of aforesaid defect or lacuna, the order of Magistrate with regard to taking cognizance against applicants no. 2 to 8 is contrary to law.

18. Learned counsel for the complainant / respondent has submitted that in the complaint there is a specific averment with regard to applicants no. 2 to 8, therefore, aforesaid contention of the respondent is contrary to the averments made in the complaint. On perusal of the complaint and the statement of the respondent / complainant it appears that only against applicants no. 6 and 7 there is an averment that at the time of reconciliation meeting in December, 2015 in Bhopal, the cheques were given to them, therefore, it appears that the cheques were entrusted to applicants no. 6 and 7. In the circumstances, other applicants no. 2 to 5 and 8 cannot be said to be liable for the property entrusted to applicants no. 6 and 7 for the company the applicant no. 1; without alleging and establishing that they were also liable equally as the applicants no. 6 and 7 were liable. In the circumstances it can be said that against the applicants no. 2 to 5 and 8 summons have been issued without any averment and relevant material to establish the alleged facts prima facie.

19. Learned counsel appearing on behalf of the respondent has submitted that the provision of Section 482 of Cr.P.C. should not be exercised in routine manner it should be exercised only in the rare case in which there is no material to proceed against the applicants even if the allegation in the complaint is accepted as true and the present case is not of a such nature. It cannot be said that there is no material on record to prosecute the applicants for the alleged act and placed reliance in a recent judgment of the Apex court in the case of **Chilakamathi Venkateshwarlu and another vs. State of Andhra Pradesh and another in criminal appeal no.1082/2019 dated July 31, 2019**. The relevant paras of the aforesaid are 21, 22 and 23 are as under :

21. [In Dhanalakshmi v. R. Prasanna Kumar and Others](#) , 1999 Supp SCC 686, cited by the High Court, this Court held that:-
“[Section 482](#) of the Code of Criminal Procedure empowers the High Court to exercise its inherent powers to prevent abuse of the process of court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers under [Section 482](#). It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of

the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide frivolous or vexatious, in that event there would be no justification for interference by the High Court.”

22. The High Court also relied on [State of Karnataka v. L. Muniswamy and Others](#)⁹, (1977) 2 SCC 699, where this Court considered the scope of jurisdiction of the High Court under [Section 482](#) Cr.PC and held:-

“In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court’s inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these 9 (1977) 2 SCC 699 observations is that without a proper realisation of the object and purpose of the provision which seeks

to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.”

23. In this case, the High Court rightly refused to quash the criminal complaint, observing that it can exercise power under [Section 482](#) of the CrPC only in rare cases. The power to quash the proceedings is generally exercised when there is no material to proceed against the Petitioners even if the allegations in the complaint are prima facie accepted as true. The High Court in effect found, and rightly, that the allegations in the complaint coupled with the statements recorded by the learned Magistrate had the necessary ingredients of offences under [Sections 307, 323, 427, 447](#) and [506\(2\)](#) read with [Section 34](#) of the IPC.”

20. In the aforesaid case law it is held that the power to quash the proceedings is generally exercised when there is no material against the applicants even if the allegation is accepted as true. This proposition of law is very well applicable in the present case. As discussed earlier in the present case there is no such allegation or material on record if they are taken as it is no offence of criminal breach of trust is made out and apparently, the complaint has been filed as a counter blast in the wake of action of the applicants by filing of the complaint under Section 138 of the NI Act against the complainant maliciously to take wreaking vengeance. In such circumstances, the aforesaid judgment is also not beneficial to the respondent.

21. In view of the aforesaid discussions, in the opinion of this court, the petition deserves to be allowed and hence, it is allowed and

the impugned order dated 3.6.2017 is quashed and the proceedings of criminal case are set-aside.

(J.P.GUPTA)
JUDGE

JP/-

HIGH COURT OF MADHYA PRADESH : PRINCIPAL SEAT AT JABALPUR

1	Case Number	M.Cr.C. No.21862/2017
2	Parties Name	Nike India Private Limited and others Vs. My Store Private Limited.
3	Date of Judgment	8.8.2019
4	Bench Constituted of	Hon. Shri Justice J.P. Gupta
5	Judgment delivered by	Hon. Shri Justice J.P. Gupta
6	Whether approved for reporting	YES
7	Name of the counsel for the parties	Shri Abhishek Dutta, Shri Prateek Jain, Shri Sayli Petiwale, Shri Yashowardhan Shukla, Shri Niki Kantawala, Advocates for the petitioners. Shri Anil Khare, learned Senior Advocate with Shri Anurag Gohil, Shri Priyank Agrawal and Shri Sahil Sharma, Advocate for the respondent.
8	Law Laid down & Significant paragraph numbers	(i) A criminal proceeding cannot be quashed merely on the ground that the dispute is of civil nature unless it is established that accepting the case of the prosecution as it is, prima facie not disclosed the ingredients necessary for constituting the offence. Pars 13 to 15. (ii) The documents or the evidence produced by the accused may be considered in a proceeding under Section 482 of Cr.P.C. with a view to whether continuity of the proceeding would be meaningful or mere wastage of the time or the proceeding has been initiated with a view to take vengeance or malice. Para 8 & 9. (iii) If the cheques did not return despite of payment of the amount through RTGS and presented for encashment before the Bank for recovery of the dues in connection with the account of business with the drawer of the cheques is not an offence of criminal breach of

		<p>trust in absence of specific direction that the cheques would be returned. Para 11 & 12.</p> <p>(iv) If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate, the High court can quash the same in exercise of the inherent powers under Section 482 of Cr.P.C. Para 19 & 20.</p>
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(J.P.Gupta)
Judge

JP/--