# HIGH COURT OF JUDICATURE FOR RAJASTHAN
# BENCH AT JAIPUR

S.B. Criminal Miscellaneous (Petition) No. 7269/2021



1. Lakhani Builders Pvt. Ltd, A Company Duly Registered And Incorporated Under The Companies Act, 1956, Having Its Office At, 1801, Sector 19/d, Vashi, Navi Mumbai- 400703.
2. Shri. Vijay Lakhani,
3. Shri. Sunder Lakhani

----Petitioners

Versus

1. State Of Rajasthan, Through The Public Prosecutor, High Court, Jaipur, Rajasthan.
2. Dr. Anoop Pitambardas Sharma

----Respondents

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| For Petitioner(s) | : | Mr. Sarthak Rastogi<br>Mr. Nand Kishore Dadhich |
| For Respondent(s) | : | Mr. Sher Singh, PP<br>Mr. Alok Chaturvedi for complainant. |

**HON'BLE MR. JUSTICE ANIL KUMAR UPMAN**

**Order**

**17/08/2023**

By way of this misc. petition under Section 482 Cr.P.C. the accused petitioners have sought prayer for quashing of the entire criminal proceedings pending against them in the court of learned Special Judicial Magistrate (N.I. Act Cases) No.4, Ajmer, Rajasthan bearing CIS No.2469/2021 : Dr. Anoop Sharma vs Lakhani Builders Pvt. Ltd. & Ors.

It is contended by learned counsel for the petitioners that the petitioner No.1 is a company engaged in construction of residential and commercial establishments and the petitioner nos. 2 & 3 are the Directors of the petitioner No.1. The respondent No.2 booked Flat No.403 in Lakhani's Skyways, Plot No.7, Sector 5 Ulwe, Navi Mumbari and a total payment of Rs.85,00,000/- has been allegedly made by him. Counsel further contends that the respondent No.2/complainant cancelled the aforesaid booking was cancelled and requested for refund of payment which was accepted by the petitioners and a 'settlement note' was also executed between the parties wherein it was agreed by both the parties that after deducting taxes of Rs.2,40,000/-, an amount of Rs.78,19,367/- would be the final amount to be paid to the complainant. In lieu of the aforesaid payment, the petitioners issued two cheques of Rs.15,00,000/- and Rs.63,19,367/-. He contends that a cheque bearing No.000685 dated 21.04.2021 drawn on Bank of Baroda, Vashi, Navi Mumbai Branch for a sum of Rs.63,19,367 was issued in favour of the complainant. However, on presentation of the cheque, it got dishonoured on account of 'funds insufficient'. Thereafter, the respondent No.2 issued a legal notice to the petitioners. On receipt of such notice, the petitioners gave their reply wherein it was specifically averred that out of two cheques issued to the complainant, one cheque of Rs.15,00,000/- had already been honoured and as regards the second cheque (No.000685), it was stated in the reply that it was agreed by the respondent No.2/complainant himself that he would not deposit it and would hold it for some time as covid pandemic was prevalent at the relevant point of time. The respondent-complainant was

further informed that they have kept ready two cheques of Rs.31,59,683.50/- each both drawn on Bank of Baroda, Sector-6, Vashi Branch, Navi Mumbai in full and final payment of the dishonoured cheque. Since, no one came to receive these cheques from the complainant side, the petitioners remitted a sum of Rs.31,59,683.50/- each (aggregating to Rs.62,59,367) through RTGS on 09.06.2021 and 06.07.2021 respectively and thus, the entire amount has been paid by the petitioners. It is contended by learned counsel for the petitioner that by suppressing the material facts of this case, the complainant-respondent filed a complaint case under Section 138 N.I. Act against the petitioners in the court of learned Special Judicial Magistrate (N.I Act Cases), No.4 Ajmer wherein vide order dated 05.07.2021, cognizance has been taken by learned trial court. He also contends that apart from filing of the complaint case under Section 138 of the N.I. Act, the complainant-respondent has also filed an FIR No. 354/2021 at Police Station Panchsheel for offence under Section 420 IPC against the petitioners in which, the police after investigation filed negative final report and when the complainant-respondent filed a protest petition, the learned court below also rejected the protest petition. Learned counsel contends that there is a statutory presumption that the sum drawn in the cheque is a debt or liability that is owed by the drawer of the cheque to the drawee whereas the petitioners have already paid the entire agreed amount via RTGS. He thus, submits that continuation of the criminal proceedings against the petitioners would be nothing but gross misuse of process of law. He thus craves indulgence of this court to quash the entire proceedings arising out of the complaint filed

by the complainant-respondent by exercising this Court's inherent powers under Section 482 Cr.P.C.

Per contra, learned counsel appearing for the respondent-complainant vehemently opposes the submissions made by the petitioners' counsel and submits that the learned Special Judicial Magistrate (N.I Act Cases), No.4 Ajmer has rightly taken cognizance against the petitioners as prima facie offence under Section 138 of the N.I. Act is made out. He thus, submits that there is no such material available on record which warrants exercise of this Court's power under Section 482 Cr.P.C.

I have heard and considered the submissions advanced at bar and have gone through the material available on record.

On perusal of the complaint filed under Section 138 N.I. Act supported by the affidavit of the complainant before the learned trial court, it is manifest that in para 9 of the complaint, the complainant has admitted receiving payment of Rs.31,59,683.50 through RTGS on 09.06.2021 from accused petitioners. However, in this complaint filed on 28.06.2021, he denied receiving second installment of Rs.31,59,683.50 from accused petitioners. The second payment of Rs.31,59,683.50 via RTGS was made on 06.07.2021 whereas the complaint case under Section 138 of the N.I. Act was filed on 28.06.2021. This admission of the complainant-respondent clearly reveals that the dishonoured cheque does not represent the enforceable debt. The complainant has filed the aforesaid complaint case regarding dishonour of cheque in question after having received first installment at his end. Further, the statement of account (Annex.6) filed along with this petition clearly reveals that payment of Rs.31,59,683.50 was

made twice in favour of the complainant on 09.06.2021 and 06.07.2021. Apart from that, on the FIR lodged by the complainant, police has filed negative final report and protest petition filed by the complainant has also been rejected.



The nature of offence under Section 138 of the N.I. Act is quasi- criminal in nature, where, it, though, arise out of civil wrong, the law imposes criminal penalty in the form of imprisonment as well as the fine. In the prosecution under Section 138 N.I. Act, the complainant is primarily concerned with the recovery of the money and conviction of the accused serves very little purpose. In the instant case, from the material available on record, it is clear that the accused petitioners have made payment of the entire cheque amount at very initial stage of proceedings. Thus, the complainant cannot be allowed to take undue advantage on the basis of technicalities. I fortify my views from Supreme Court judgment in the case of **M/s Gimpx Private Ltd. vs Manoj Goel reported in (2022) 11 SCC 705** wherein the Hon'ble Apex Court observed and held as under:-

"27. The nature of the offence under Section 138 of the NI Act is quasi-criminal in that, while it arises out of a civil wrong, the law, however, imposes a criminal penalty in the form of imprisonment or fine. The purpose of the enactment is to provide security to creditors and instill confidence in the banking system of the country. The nature of the proceedings under Section 138 of the NI Act was considered by a three judge Bench decision of this Court in P Mohanraj and Others v. Shah (1999) 7 SCC 510 PART C Brothers Ispat Private Limited 21, where Justice RF Nariman, after adverting to the precedents of this Court, observed that:

> "53. A perusal of the judgment in Ishwarlal Bhagwandas [S.A.L. Narayan Row v. Ishwarlal Bhagwandas,

MANU/SC/0160/1965 : (1966) 1 SCR 190 : AIR 1965 SC 1818] would show that a civil proceeding is not necessarily a proceeding which begins with the filing of a suit and culminates in execution of a decree. It would include a revenue proceeding as well as a writ petition filed under Article 226 of the Constitution, if the reliefs therein are to enforce rights of a civil nature. Interestingly, criminal proceedings are stated to be proceedings in which the larger interest of the State is concerned. Given these tests, it is clear that a Section 138 proceeding can be said to be a "civil sheep" in a "criminal wolf's" clothing, as it is the interest of the victim that is sought to be protected, the larger interest of the State being subsumed in the victim alone moving a court in cheque bouncing cases, as has been seen by us in the analysis made hereinabove of Chapter XVII of the Negotiable Instruments Act."

28. Given that the primary purpose of Section 138 of the NI Act is to ensure compensation to the complainant, the NI Act also allows for parties to enter into a compromise, both during the pendency of the complaint and even after the conviction of the accused. The decision of this Court in Meters and Instruments (P.) Ltd. v. Kanchan Mehta 22 summarises the objective of allowing compounding of an offence under Section 138 of the NI Act:

"18.2. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the court."

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31. Thus, under the shadow of Section 138 of the NI Act, parties are encouraged to settle the dispute resulting in ultimate closure of the case rather than continuing with a protracted litigation before the court. This is beneficial for

the complainant as it results in early recovery of money; alteration of the terms of the contract for higher compensation and avoidance of litigation. Equally, the accused is benefited as it leads to avoidance of a conviction and sentence or payment of a fine. It also leads to unburdening of the judicial system, which has a huge pendency of complaints filed under Section 138 of the NI Act. In Damodar S. Prabhu vs Sayed Babalal H : reported in (2010)5SCC663, this Court had emphasised that the compensatory aspect of the remedy under Section 138 of the NI Act must be preferred and has encouraged litigants to resolve disputes amicably. The Court observed:

"18. It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect. There is also some support for the apprehensions raised by the learned Attorney General that a majority of PART C cheque bounce cases are indeed being compromised or settled by way of compounding, albeit during the later stages of litigation thereby contributing to undue delay in justice delivery. The problem herein is with the tendency of litigants to belatedly choose compounding as a means to resolve their dispute. Furthermore, the written submissions filed on behalf of the learned Attorney General have stressed on the fact that unlike Section 320 Cr.P.C., Section 147 of the Negotiable Instruments Act provides no explicit guidance as to what stage compounding can or cannot be done and whether compounding can be done at the instance of the complainant or with the leave of the court.

19. As mentioned earlier, the learned Attorney General's submission is that in the absence of statutory guidance, parties are choosing compounding as a method of last resort instead of opting for it as soon as the Magistrates take cognizance of the complaints. One explanation for such behavior could be that the accused persons are willing to

take the chance of progressing through the various stages of litigation and then choose the route of settlement only when no other route remains. While such behavior may be viewed as rational from the viewpoint of litigants, the hard facts are that the undue delay in opting for compounding contributes to the arrears pending before the courts at various levels. If the accused is willing to settle or compromise by way of compounding of the offence at a later stage of litigation, it is generally indicative of some merit in the complainant's case. In such cases it would be desirable if parties choose compounding during the earlier stages of litigation. If however, the accused has a valid defence such as a mistake, forgery or coercion among other grounds, then the matter can be litigated through the specified forums.

[..]

23. We are also in agreement with the learned Attorney General's suggestions for controlling the filing of multiple complaints that are relatable to the same transaction. It was submitted that complaints are being increasingly filed in multiple jurisdictions in a vexatious manner which causes tremendous harassment and prejudice to the drawers of the cheque. For instance, in the same transaction pertaining to a loan taken on an instalment basis to be repaid in equated monthly instalments, several cheques are taken which are dated for each monthly instalment and upon the dishonour of PART C each of such cheques, different complaints are being filed in different courts which may also have jurisdiction in relation to the complaint. In light of this submission, we direct that it should be mandatory for the complainant to disclose that no other complaint has been filed in any other court in respect of the same transaction. Such a disclosure should be made on a sworn affidavit which should accompany the complaint filed under Section 200 Cr.P.C. If it is found that such multiple complaints have been filed, orders for transfer of the complaint to the first court should be given, generally speaking, by the High Court after

imposing heavy costs on the complainant for resorting to such a practice. These directions should be given effect prospectively."

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37. Allowing prosecution under both sets of complaints would be contrary to the purpose of the enactment. As noted above, it is the compensatory aspect of the remedy that should be given priority as opposed to the punitive aspect. The complainant in such cases is primarily concerned with the recovery of money, the conviction of the accused serves little purpose. In fact, the threat of jail acts as a stick to ensure payment of money. This Court in R. Vijayan v. Baby 27 has MANU/SC/1245/2011 : (2012) 1 SCC 260 PART C emphasised how punishment of the offender is of a secondary concern for the complainant in the following terms:

"17. The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation Under Section 357(1)(b) of the Code. Though a complaint Under Section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged Under Section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque. Under Section 357(1)(b) of the Code and the provision for compounding the offences Under Section 138 of the Act most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the

cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under Section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary."



In view of above, I am of the opinion that it is a fit case warranting exercise of powers under Section 482 Cr.P.C. so as to quash the entire proceedings arising out of the complaint filed by the complainant under Section 138 N.I Act as continuation of the aforesaid proceedings would be nothing but an abuse of process of law. Accordingly, the misc. petition is allowed. The complaint case (CIS No.2469/2021) under Section 138 of the N.I. Act and all consequential proceedings arising thereto, pending in the court of learned Special Judicial Magistrate (N.I. Act Cases) No.4, Ajmer are quashed. Stay application is disposed of.

(ANIL KUMAR UPMAN),J

Sudhir Asopa/