

Court No. - 92

Case :- APPLICATION U/S 482 No. - 17464 of 2024

Applicant :- Vijay Kumar

Opposite Party :- State Of Up Another

Counsel for Applicant :- Ashish Kumar Pandey, Nandini Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Arun Kumar Singh Deshwal, J.

1. Heard learned counsel for the applicant and Sri Raj Bahadur Verma, learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed to quash the summoning order dated 07.02.2024 as well as entire proceeding of Complaint Case No.6594 of 2023 (Rahul Vs. Vijay Kumar), under Section 138 of N.I. Act, Police Station Kotwali, District Ghaziabad, pending in the court of learned Civil Judge (S.D.) F.T.C., Ghaziabad.

3. Opposite party no.2 had filed a complaint against applicant under Section 138 N.I. Act with the allegation that opposite party no.2 had given Rs.3,00,000/- on the request of applicant in the month of October, 2022, thereafter, just to repay that amount applicant issued a Cheque No.737727 dated 04.07.2023 of Rs.3,00,000/- from his account maintaining by him in Shivalika Mercantile Co-operative Bank Ltd. Branch Bhatiya Road, Ghaziabad, same was presented before the bank on 11.07.2023, but the same was returned by the bank on 12.07.2023 with the endorsement 'account closed'. Thereafter, opposite party no.2 sent registered notice on 09.08.2023 to the applicant demanding the payment of cheque amount within 15 days, but applicant has not paid any amount, therefore, the complaint was filed and statement under Section 200 Cr.P.C. was also filed on affidavit and the learned Magistrate on the basis of material on record, summoned the applicant by order dated 07.02.2024 after condoning the delay in filing the complaint by order dated 08.11.2023 which is impugned in the present case.

4. Contention of learned counsel for the applicant is that the cheque in question was missing cheque for which the applicant has already filed a police report on 13.07.2022 and also filed

complaint for stopping the payment, but the opposite party no.2 has misused the cheque and filed the complaint, therefore, the cheque cannot be said to be issued in discharge of any liability. The impugned proceeding deserves to be quashed on this ground itself. Second contention of learned counsel for the applicant is that the cheque in question was returned by the bank with the endorsement 'account closed', not for insufficiency of fund, therefore, no liability under Section 138 of N.I. Act is attracted.

5. Per contra, learned A.G.A. for the State has submitted that the defence raised by learned counsel for the applicant are disputed question of fact, same can be decided during the trial and on this ground proceeding cannot be quashed.

6. After considering the rival submissions of learned counsel for the parties and on perusal of record, this Court is of the view, whether the cheque was missing cheque, this question is disputed question of fact, same can be decided during trial. Even otherwise police complaint regarding missing of cheque was not lodged as per the procedure but a simple application was submitted before S.H.O. of the concerned police station.

7. So far as the second contention of learned counsel for the applicant is concerned, the cheque has been bounced and returned by the bank with the endorsement of 'account closed'.

8. Hon'ble the Apex Court in the case of ***Electronics Trade And Technology Development Corporation, Ltd. Secunderabad Vs. Indian Technologists and Engineers (Electronics) Pvt. Ltd. and another***, reported in ***1996 (2) SCC 739***, observed that if cheque is returned by the bank which was issued in discharge of any liability with the endorsement, (1) 'refer to the drawer of cheque' (2) 'instructions for stop payment' and (3) 'exceeds arrangements'. Even then same will amount to dishonour within the meaning of Section 138 N.I. Act., if the drawer of cheque fails to pay the cheque amount within 15 days from the receiving of demand notice. Paragraph no.5 of judgment passed in the case of ***Electronics Trade And Technology Development Corporation, Ltd. Secunderabad (supra)*** is being quoted as under:-

"5. It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case, "refer to the drawer" (2) "instructions for stoppage of payment" and stamped (3) "exceeds arrangement", it amounts to dishonour within the meaning of Section 138 of the Act. On issuance of the

notice by the payee or the holder in due course after dishonour, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied."

9. Hon'ble Apex Court in the case of ***M/S. Modi Cements Ltd. Vs. Shri Kuchil Kumar Nandi*** reported in (1998) 3 SCC 249, observed that if the cheque is returned by the bank with the endorsement 'stop of payment', even then the liability under Section 138 N.I. Act will be attracted because of presumption of under Section 139 N.I. Act, when despite receiving the demand notice drawer of cheque fails to pay the cheque amount. Hon'ble the Apex Court also observed in that case if the reason for stop payment is excluded under Section 138 N.I. Act, then same would be contrary to the object of Section 138 and 139 of N.I. Act and that will make Section 138 N.I. Act a dead letter. Paragraph nos.16, 18, 20 and 21 of the judgement passed in the case of ***M/S. Modi Cements Ltd. (supra)*** are quoted as under:-

*"16. We see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The object of Chapter XVII, which is intituled as "Of Penalties in Case of Dishonour of Certain Cheques for Insufficiency of Funds in the Accounts" and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this Court in *Electronics Trade & Technology Development Corpn. Ltd. [(1996) 2 SCC 739 : 1996 SCC (Cri) 454]* in para 6 to the effect "Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted", does not fit in with the object and purpose for which the above chapter has been brought on the statute-book.*

*18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in *Electronics Trade & Technology Development Corpn. Ltd. [(1996) 2 SCC 739 : 1996 SCC (Cri) 454]* (SCC p. 742)*

"Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due

course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly"

(emphasis supplied)

in our opinion, do not also lay down the law correctly.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and, therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above.

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold."

10. Hon'ble Apex Court in the case of **NEPC Micon Limited and others Vs. Magma Leasing Limited** reported in **1999 (4) SCC 253**, observed that if the cheque is returned by bank with the endorsement 'account closed', it would amount to returning the cheque unpaid because the amount of money standing in the account of drawer is insufficient to dishonour the cheque as required under Section 138 of N.I. Act, therefore, it would be sufficient for issuing process under Section 138 N.I. Act. Hon'ble Apex Court also observed that Section 138 of N.I. Act is a penal statute, therefore, it is the duty of Court to interpret it consistent with the legislative intend and purpose to promote efficacy of banking in commercial or contractual transaction. Paragraph nos.14 and 15 of the case of NEPC Micon Limited and others (supra) are quoted as under:-

"14. Lastly, we would refer to the decision by a three-Judge Bench of this Court in the case of *Modi Cements Ltd. v. Kuchil Kumar Nandi* [(1998) 3 SCC 249] dealing with a similar contention and interpreting Section 138 of the Act. In that case, the Court referred to the earlier decisions in the case of *Electronics Trade and Technology Development Corpn. [Electronics Trade and Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 : 1996 SCC (Cri) 454]* and *K.K. Sidharthan v. T.P. Praveena Chandran* [(1996) 6 SCC 369 : 1996 SCC (Cri) 1340] and agreed that the legal proposition enunciated in the aforesaid decisions to the effect that if the cheque is dishonoured because of

"stop payment" instruction to the bank, Section 138 would get attracted. It also amounts to dishonour of the cheque within the meaning of Section 138 when it is returned by the bank with the endorsement like (i) in this case, "referred to the drawer" (ii) "instructions for stoppage of payment" and stamped (iii) "exceeds arrangement". The Court observed that the object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transaction in business on negotiable instruments and to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Thereafter, the Court disagreed with other views expressed in the aforesaid two cases and held that once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The Court further held that it will make Section 138 a dead letter if the contention that by giving instruction to the bank to stop payment immediately after issuing a cheque against the debt or liability, the drawer can easily get rid of the penal consequences notwithstanding the fact that deemed offence was committed. Finally, the Court held that Section 138 of the Act gets attracted only when the cheque is dishonoured.

15. In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above "brush away the cobweb varnish, and shew the transactions in their true light" (Wilmot, C.J.) or (by Maxwell) "to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited". Hence, when the cheque is returned by a bank with an endorsement "account closed", it would amount to returning the cheque unpaid because "the amount of money standing to the credit of that account is insufficient to honour the cheque" as envisaged in Section 138 of the Act."

11. Hon'ble the Apex Court in the case of **Laxmi Dyechem Vs. State of Gujarat** reported in (2012) 13 SCC 375, observed that even if a cheque is returned by the bank with the endorsement 'signature differ' even that is sufficient to issue process for Section 138 N.I. Act because after dishonouring the cheque, drawer gets statutory notice giving him opportunity to arrange the payment of amount covered by cheque and it is only when the drawer despite getting opportunity on receiving said notice failed to make the payment within 15 days, proceeding under Section 138 N.I. Act is initiated. Paragraph no.16.2 and 17 of the Laxmi Dyechem (supra) is being quoted as under:-

"16.2. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.

17. In the case at hand, the High Court relied upon a decision of this Court in Vinod Tanna case in support of its view. We have carefully gone through the said decision which relies upon the decision of this Court in Electronics Trade & Technology Development Corpn. Ltd. The view expressed by this Court in Electronics Trade & Technology Development Corpn. Ltd. that a dishonour of the cheque by the drawer after issue of a notice to the holder asking him not to present a cheque would not attract Section 138 has been specifically overruled in Modi Cements Ltd. case¹⁰. The net effect is that dishonour on the ground that the payment has been stopped, regardless whether such stoppage is with or without notice to the drawer, and regardless whether the stoppage of payment is on the ground that the amount lying in the account was not sufficient to meet the requirement of the cheque, would attract the provisions of Section 138."

12. From the above legal position, it is clear that if the cheque is dishonoured and returned with following endorsement, then it will be sufficient for *prima facie* case for issuing process under Section 138 N.I. Act:-

- (i) case referred to drawer
- (ii) instruction for stoppage of payment
- (iii) exceeds arrangement
- (iv) insufficient fund
- (v) signature differed or mismatch

(vi) account closed

13. Though, despite the above mentioned endorsement by the bank for returning the cheque summoning the drawer of cheque under Section 138 N.I. Act is proper but presumption under Section 139 N.I. Act or disputing the above endorsement on the part of the bank can always be raised during trial but same cannot be ground for quashing the complaint proceeding at initial stage.

14. In the present case also, the cheque in question was returned by the bank with the endorsement 'account closed', therefore, in view of above legal position, there is no illegality in summoning the application under Section 138 N.I. Act. Therefore, the present application fails and accordingly **dismissed**.

Order Date :- 23.5.2024

Atul