HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 14.03.2022
Pronounced on:17.03.2022

CRM(M) No.308/2021

MOHAMMAD SHAFI WANI …PETITIONER(S)

Through: Mr. Mudasir Bin Hassan, Advocate.

Vs.

NOOR MOHAMMAD KHAN ….RESPONDENT(S)

Through: Mr. Hilal Ahmad Mir, Advocate.

CORAM:HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) Petitioner has challenged the complaint filed by the respondent against him for offence under Section 138 of Negotiable Instruments Act (hereinafter for short "the NI Act") pending before the Court of Judicial Magistrate, 1st Class (1st Additional Munsiff), Srinagar. Petitioner has also challenged order dated 26.07.2019, whereby the learned Magistrate has, after taking cognizance of the offence, issued process against the petitioner.

2) It appears from the record that respondent has filed a complaint against the petitioner alleging that a cheque bearing No.406696 dated 01.03.2019 for an amount of Rs.5.00 lacs, issued by petitioner in his favour which was drawn on J&K Bank Branch unit Habbak Crossing,

Srinagar, was returned unpaid by the concerned bank with the remarks "funds insufficient and drawer's signature differs". The respondent is stated to have served a legal notice of demand upon the petitioner and when the petitionerfailed to make the payment within the statutory period, the complaint, which is subject matter of this petition, came to be filed before the trial Magistrate. The learned Magistrate, after recording the preliminary evidence, took cognizance of the offence and issued process against the petitioner in terms of its order dated 26.07.2019. The complaint and the order issuing process against the petitioner is under challenge before this Court.

3) The petitioner has urged two grounds, one that the complaint and the order of issuing process are not legally tenable as the dishonour of cheque was due to difference in drawer's signatures and, as such, offence under Section 138 of NI Act is not made out against the petitioner. The other ground that has been urged by the petitioner is that the cheque in question was given by the petitioner to the respondent as a security pursuant to a memorandum of understanding executed by the parties on 30th November, 2017, and not in discharge of any legally outstanding amount or in discharge of any debt.

4) I have heard learned counsel for the parties and perused the record.

5) The first question that falls for determination in the instant petition is as to whether dishonor of a cheque for the reason that there was difference of signatures appearing on the cheque constitutes an offence under Section 138 of the NI Act. In order to determine this question, the

provisions contained in Section 138 are required to be noticed. It reads as under:-

> ***"138. Dishonour of cheque for insufficiency, etc., of funds in the account.****—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years', or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *Provided that nothing contained in this section shall apply unless—*
>
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
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> *Explanation.—For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability".*

6) From a perusal of the aforesaid provision, it is clear that an offence under Section 138 of the NI Act is constituted when a cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge of any debt, is returned by the bank unpaid either because the

amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank. At first blush, it appears that it is only in two situations that Section 138 of the NI Act is attracted, firstly when there are insufficient funds available in the bank account of the person who is drawing the cheque and secondly where it exceeds the arrangement. However, the provision has been interpreted by the Supreme Court in a number of judgments in a manner so as to include within its ambit even the cases where the dishonor of cheque has taken place for the reasons other than the aforesaid two reasons.

7) In **NEPC Micon Limited And Others vs. Magma Leasing Limited, (1999)4 SCC 253,** the Supreme Court rejected the contention that Section 138 of the NI Act has to be interpreted strictly or in disregard of the object sought to be achieved by the Statute. Relying upon its earlier judgment in the case of **Kanwar Singh vs Delhi Administration, AIR 1965 SC 871** and **Swantraj and Others Vs. State of Maharashtra 1975(3) SCC 322**, the Court held that a narrow interpretation of Section 138 would defeat the legislative object underlying the said provision. The Supreme Court relied upon its own decision in **State of Tamil Nadu Vs. M. K. Kandaswami and Others 1974(4) S.C.C. 745,** and it was observed that while interpreting a penal provision which is also remedial in nature a construction that would defeat its purpose or have the effect of scrapping it from the statute book, should be avoided and that if more than one constructions are possible,

the Court should choose to adopt construction that would preserve the workability and efficacy of the Statute and avoid an interpretation that would render the provision sterile. The Court, accordingly, held that when a cheque is returned by the banker of a drawer with the comments "account closed" the same would constitute an offence under Section 138 of NI Act.

8) In **Modi Cements Ltd vs. Kuchil Kumar Nandi, (1998) 3 CC 249,** the Supreme Court, while considering the question whether dishonor of a cheque on account of stoppage of payment by the drawer would constitute an offence under Section 138 of the NI Act, observed as under:

> ***"****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. "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 limit extent as indicated above."*

9) The question whether stop payment instructions, which result in dishonor of a cheque, would amount to an offence under Section 138 of the NIA Act, was considered by the Supreme Court in **M. M. T. C. Ltd. Vs. M/S Medchl Chemicals, (2001) 1 SCC 234**, and it was held that same would come within the ambit of definition of offence under Section 138 of the NIA Act. Similar view was taken by the Supreme Court in the case of **Goaplast (P) Ltd vs. Chico Ursula D'Souza, (2003) 3 SCC 232**.

10) In the face of foregoing discussion, it is clear that the Supreme Court has interpreted the provisions contained in Section 138 of the NI Act in a liberal manner so as to achieve the object for which the said provision has been enacted. Not only the cases of dishonour of cheques on account of insufficiency of funds or on account of exceeding of arrangement but the cases involving dishonour of cheques on account of "stop payment" and "account closed" have also been brought within the ambit of offence under the aforesaid provision.

11) In **Vinod Tanna vs. Zaheer Siddiqui, (2002) 7 SCC 541,** the Supreme Court, while dealing with a case where the cheque drawn by the accused was not been honoured by the bank on account of drawer's signatures being incomplete, held that dishonour of cheque for the aforesaid reason would not constitute an offence under Section 138 of

the NI Act and, accordingly, the criminal proceedings against the accused were quashed.

12) The aforesaid decision of the Supreme Court came up for consideration before the same Court in the case of **Laxmi Dyechem vs. State of Gujarat and others, (2012) 13 SCC 375.** The Court**,** after noticing its earlier decisions on interpretation of the provisions of Section 138 of the NI Act, made the following observations:

> *"**15.** A three-Judge Bench of this Court in Rangappa v. Sri Mohan [(2010) 11 SCC 441: (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] has approved the above decision and held that failure of the drawer of the cheque to put up a probable defence for rebutting the presumption that arises under Section 139 would justify conviction even when the appellant drawer may have alleged that the cheque in question had been lost and was being misused by the complainant."*

13) The Supreme Court in the aforesaid decision did not follow the ratio laid down in **Vinod Tanna's** case and observed that the ratio laid down in the said case is based upon the ratio laid down by the Supreme Court in ***Electronics Trade & Technology Development Corpn. Ltd.* v. *Indian Technologists and Engineers (Electronics) (P) Ltd.* (1996) 2 SCC 739,** which has been overruled by the Supreme Court in **Modi Cements Ltd** (supra). Para 16 of the judgment is relevant to the context and the same is reproduced as under:

> *"16. In the case at hand, the High Court relied upon a decision of this Court in Vinod Tanna's case (supra) 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 Corporation Ltd. (supra). The view expressed by this Court in Electronics Trade & Technology Development Corporation Ltd. (supra) 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. case (supra). 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."*

14) The Supreme Court on the basis of the aforesaid observations and the ratio, while dealing with a case in which the cheques were dishonoured by the bank on the ground that drawer's signatures were incomplete and that no image was found or that the signatures did not match, came to the conclusion that criminal prosecution against the accused in such cases should be allowed to proceed and the judgment and orders passed by the High Court quashing the criminal proceedings were set aside.

15) Both the judgments of the Supreme Court in **Vinod Tanna's** case as well as in **Laxmi Dyechem's** case (supra) have been rendered by the Benches of co-equivalent strength. The judgment rendered in **Laxmi Dyechem's** case is latest in point of time, wherein the ratio laid down in **Vinod Tanna's** case has been termed as *per incuriam*. Therefore, as per law of precedents, the ratio laid down in **Laxmi Dyechem's** case has to be followed. Accordingly, as per the ratio laid down in **Laxmi**

Dyechem's case, the contention of the petitioner that in the instant case offence under Section 138 of the NI Act is not constituted because the cheque was dishonoured on account of difference in signatures and not for the reason of insufficiency of funds or exceeding the arrangement, deserves to be rejected.

16) The other ground which has been urged by the petitioner is that the cheque in question was not given in discharge of any debt by the petitioner to the respondent but it was given only as security pursuant to the memorandum of understanding executed between the parties. According to the petitioner, since the cheque was not given in discharge of any debt, as such, offence under Section 138 of the NI Act is not made out.

17) The law on this aspect of the matter is no longer *res integra*. The Supreme Court in the case of **I. C. D. S. Ltd. vs. Beena Shabeer &anr. (2002) 6 SCC 25**, while setting aside the judgment of the Kerala High Court, whereby proceedings against the guarantor were quashed on the ground that a cheque from the guarantor could not be said to have been issued for the purposes of discharging any debt or other liability, observed as under:

> *"10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that*

> *for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.*
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> *11.The issue as regards the co-extensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act: 'Any cheque' and 'other liability' are the two key expressions which stands as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus does not lend any assistance to the contentions raised by the respondents."*

18) In **Sripati Singh vs. State of Jharkhand and Ors., 2021 SCC Online SC 1002**, the Supreme Court has, while dealing with the question whether dishonor of cheque given as security would constitute an offence under Section 138 of the NI Act, observed as under:

> *"16. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if*

> *the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.*
>
> *17. When a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security' cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a sine qua non to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in a proceedings initiated under Section 138 of the N.I. Act. Therefore, there cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an 'on demand promissory note' and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation."*

19) In view of the foregoing enunciation of law on the subject, it is clear that even if it is assumed that the petitioner had issued the cheque in favour of respondent as a security, still then it cannot be stated that no offence is made out, once the cheque issued by him has been dishonoured by the banker.

20) Even otherwise, the questions whether the petitioner had issued the cheque as a security pursuant to the memorandum of understanding executed between the parties and whether at the time when the cheque

was presented for its payment, it was not for discharge of any debt or any other liability cannot be determined either by the trial Magistrate at the time of taking of cognizance or by this Court in these proceedings. These are defences available to the accused/petitioner, veracity whereof can be determined during the trial of the case. Here it would be apt to quote para 5 of the judgment rendered by the Supreme Court in **M/S Womb Laboratories Pvt. Ltd. vs. Vijay Ahuja and anr., 2019 SCC Online 2086**

> *"5. In our opinion, the High Court has muddled the entire issue. The averment in the complaint does indicate that the signed cheques were handed over by the accused to the complainant. The cheques were given by way of security, is a matter of defence. Further, it was not for the discharge of any debt or any liability is also a matter of defence. The relevant facts to countenance the defence will have to be proved that such security could not be treated as debt or other liability of the accused. That would be a triable issue. We say so because, handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques."*

21) For the foregoing reasons, the petition is found to be devoid of merit and the same is, accordingly, dismissed. Interim order dated 29.09.2021 is vacated. The trial Magistrate is directed to proceed further in the matter in accordance with law.

22) A copy of this order be sent to the learned Magistrate for information and compliance.

(Sanjay Dhar)
Judge

Srinagar,
17.03.2022
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***