

* **HIGH COURT OF DELHI : NEW DELHI**

Crl.M.C.No. 2883 of 2007

% Judgment reserved on: 4th October, 2007

Judgment delivered on: 8th January, 2008

Saheb Singh, Proprietor
M/s. Jai Jagdamba Enterprises
4/24, Sector-2, Rajinder Nagar,
Sahibabad, Ghaziabad, U.P. ... Petitioner

Through: Mr.R.N.Mittal, Sr.Adv. with
Mr.Pradeep Sharma &
Mr.Satyapal Singh, Advs.

Vs.

1.State (NCT of Delhi)
Through Standing Counsel (Criminal)

2.M/s Skol Breweries Ltd.
Through its Managing Director
Regd. Office At No.1, Mahal Industrial Estate
Mahakali Road, Andheri (E)
Mumbai

Corporate Office at:
Jalahali Camp Road
Yeshwantpur, Bangalore

Regional Office at:
10th Floor, Orchid Square
Block-b, Sushant Lok-I
Gurgaon, Haryana

... Respondents

Through: Nemo

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B. GUPTA, J.

Present petition has been filed under Section 482 Cr.P.C. seeking quashing of the impugned summoning order dated 8th January, 2007 and proceedings arising out of criminal complaint case No.1955/1, under Section 138/141/142 of Negotiable Instrument Act (in short as Act) pending before the court of Sh.Rakesh Pandit, M.M., New Delhi.

2. Respondent No.2 (M/s Skol Breweries Ltd.) the complainant had filed complaint under Section 138, 141 & 142 of the Act read with Section 420 IPC against the present petitioner as well as one Mohd. Raiz. The case of respondent No.2 is that this company is engaged in the business of manufacturing, selling, supply of different brands of beers and also disposes of Spent Grain to interested parties. M/s Jai Jagdamba Enterprises (accused

No.1) was a proprietorship concern and petitioner Saheb Singh (accused No.2) was its proprietor. The petitioner on behalf of the accused No.1 was buying goods from the units of complainant company and as per agreement dated 1st May, 2005, an outstanding of Rs.62,52,028 had accrued against the accused Nos.1 and 2 towards the price of said goods.

3. During the course of business, M/s Jai Jagdamba Enterprises (accused No.1) was converted into partnership with petitioner (accused No.2) and accused No.3 , i.e. Mohd. Raiz as its partner. Both of them assured the complainant company that they will clear the outstanding dues as soon as possible and in this respect Mohd Raiz (accused No.3) sent letters dated 2nd March, 2006 and 7th March, 2006 through fax to the complainant company wherein they further assured that they will clear the outstanding till 15th March, 2006 but they failed and neglected to do so. Thereafter, respondent No.2 insisted for clearing their outstanding dues and consequently Mohd. Raiz on behalf of M/s Jai Jagdamba Enterprises

entered into an agreement wherein accused persons acknowledged and admitted the aforesaid outstanding of Rs.62,52,028/- and assured respondent No.2 to clear the same and agreement dated 6th April, 2006 to this effect was executed.

4. Thereafter, the accused persons had further purchased goods from respondent No.2 and a further sum of Rs.26,51,598/- has accrued against them. Thus, the accused persons became liable to make payment of Rs.89,03,656/- to respondent No.2. The above named accused persons issued cheques bearing No.744222 and 744223 dated 10th August, 2006 each for a sum of Rs.62,52,058 and Rs. 26,51,598/- towards price of the said goods and in discharge of their legally payable debt/liability. The impugned cheques were deposited in the bank but were got dishonoured and returned unpaid with the reason "Funds Insufficient". Thereafter, a statutory legal notice was issued to the accused persons calling upon them to make the payment but they did not make any payment and sent a reply dated 11th September,

2006 wherein accused No.1 & 2 categorically denied their liability, and even have gone to the extent by saying that the accused No.3 has no concern with them.

5. Later on, respondent No.2 filed criminal complaint before the Metropolitan Magistrate and vide impugned order, the accused persons have been summoned to face trial under Section 138 of the Act.

6. It appears that instead of appearing before the trial court, the present petitioner has filed the present petition seeking quashing of the complaint under Section 482 Cr.P.C.

7. In the present petition, it has been stated by the petitioner, that petitioner who is the sole proprietor of M/s Jai Jagdamba Enterprises, entered into three separate agreements/contract, out of which two were with M/s Skol Breweries and third agreement with M/s. Rochees Breweries Ltd. As per the agreements, petitioner was to purchase spent grains from the complainant. The petitioner deposited four cheques for a sum of Rs. 5 lacs each as refundable security with the complainant. During

the period of the contract, petitioner could not purchase any quantity of spent grain due to some unfortunate incident in his family and as such there was no transaction between the petitioner and the complainant. In the month of May, 2005, petitioner informed the complainant about his inability to make any transaction and requested the complainant to refund the security amount of Rs.20 lacs. Instead of refunding the security amount to the petitioner, the complainant served the legal notice with regard to dishonour of two cheques in question. The petitioner replied to the said legal notice.

8. It has been contended by learned counsel for the petitioner that petitioner did not purchase any quantity of spent grain from the complainant and as such question of issuing any such cheque to the complainant does not arise at all. Further, it is contended that present complaint case has been filed on the basis of forged and fabricated documents by the complainant in connivance with accused No.3 Mohd Raiz who has been shown as a partner of the petitioner firm's in one of the agreements, which itself is a

white lie as the firm of the petitioner, that is, M/s Jai Jagdamba Enterprises is a sole proprietorship firm and was never converted into a partnership firm by making any person as a partner and the letters dated 2nd March, 2006 and 7th March, 2006 and agreement dated 6th April, 2006 have been written and executed by accused No.3 showing him to be a partner, are forged and fabricated one. Further, the dishonoured cheques in question have not been issued either by the petitioner or from the account of the firm of the petitioner and the same have been issued from the individual account of accused No.3 who has no concern with the firm of the petitioner or with the business though, he was made a witness in one of the agreements entered by the petitioner with the complainant, dated 1st May, 2005. Under these circumstance, no case is made out against the petitioner and the present complaint is not maintainable and liable to be quashed.

9. I have summoned the trial court record and have gone through the same.

10. The present petition has been filed under Section 482

Cr.P.C. which reads as under:-

“482. Saving of inherent power of High Court – Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”

11. This provision of law envisages three circumstances under which the inherent jurisdiction may be exercised, namely -

- i)to give effect to an order under the code,
- ii)to prevent abuse of the process of court, and
- iii)to otherwise secure the ends of justice.

12. Further to seek interference under this Section, three conditions are to be fulfilled, namely -

- i) the injustice which comes to light should be of a grave and not of a trivial character;
- ii)it should be palpable and clear and not doubtful; and
- iii) there exists no other provisions of law by which the party aggrieved could have sought relief.

13. The case of the petitioner is that he is sole proprietor

of M/s Jai Jagdamba Enterprises and it was never converted into a partnership firm nor accused No.3 Mohd. Raiz, is partner of this firm.

14. On the other hand, as per averments made in the complaint, it has been stated that accused No.1 was a proprietorship concern and accused No.2, i.e., Mr.Saheb Singh, was its proprietor and during the course of business, accused No.1 M/s Jay Jagdamba was converted into partnership with accused No.2 Saheb Singh and accused No.3 Mohd. Raiz as its partner.

15. So, in view of the denial made by the petitioner, it is a triable issue and is a matter of evidence, as to whether M/s Jay Jagdamba Enterprises is a sole proprietorship concern or is a partnership concern and this question can be decided only after recording of evidence in this case.

16. With regard to the execution of the cheques in question, admittedly, petitioner had executed certain agreements with respondent No.2 for purchase of spent grains and according to the petitioner, he could not purchase any quantity of spent grains.

17. Respondent No.2 has placed on record, in the trial court, the original agreements made between the parties and according to the petitioner, he executed four cheques towards security amount of Rs. 20 lacs whereas, the present complaint case is based on the two cheques which were dishonoured due to insufficient funds as mentioned above. So it is also a matter of evidence to be decided later on as to for what purpose, these two cheques had been issued in favour of respondent No.2 company.

18. In **Goaplast (P) Ltd. vs. Chico Ursula D'souza and another** 2003 SCC(Crl) 603 a question arose before Apex Court as to whether Section 138 of the Negotiable Instruments Act is applicable or not where the payment was stopped prior to the due date of the cheque. It was held that--

“In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. For the purpose of considering the issue, it is relevant to see Section 139 of the Act which creates a presumption in favour of the holder of a cheque. The said section provides that:

“139. 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.”

Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dates cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an

action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in *Modi Cements Ltd. vs. Kuchil Kumar nandi*. On same facts is the decision of this Court in *Ashok Yeshwant Badave vs. Surendras Madhavrao Nighojakar*. The decision in *Modi case* overruled an earlier decision of this Court in *Electronics Trade & Technology Development Corpn. Ltd. vs. Indian Technologists & Engineers (Electronics)(P) Ltd.* which had taken a contrary view. We are in respectful agreement with the view taken in *Modi case*. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date."

19. In *I.C.D.S. Ltd. vs. Beena Shabeer and Anr.* 2002 *Crl.L.J.* 3935, a question arose before the Apex Court to the effect as to the maintainability of a proceedings under Section 138 of the Negotiable Instrument Act, 1881, vis-a-vis a guarantor. The High Court has negated it. However, the Apex Court has held that:-

"In order, however, to appreciate the

contentions raised in the matter, it would be worthwhile at this juncture to notice Section 138 for its true terms, scope and effect as also to assess the situation ourselves. Section 138 of the Negotiable Instruments Act, 1881 reads as below:

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 extend to one year, 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 fifteen 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.

Explanation. --- For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability."

3. It is on the basis of the provisions as above, the High Court came to a conclusion when a cheque was issued as security, no complaint will lie under Section 138 of the Act since the cheque issued cannot be said to be for the purpose of discharging any debt or liability."

20. Further held:-

"9. As noticed hereinbefore, the principal reason for quashing of the proceeding as also the complaint by the High Court was by reason of the fact that Section 138 of the Act provides for issuance of a cheque to another person towards the discharge in whole or in part of any debt or liability and on the factual context, the High Court came to a conclusion that issuance of the cheque cannot be co-related for the purpose of discharging any debt or liability and as such complaint under Section 138 cannot be maintainable.

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 be 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.

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."

21. Now, the question to be seen here in the present case is as to whether these two cheques which have been issued by the partnership firm are in discharge of liability due towards respondent No.2 or not, is a matter of evidence

and this issue cannot be decided by this Court.

22. The complaint case filed by respondent No.2 is at very initial stage and only summons have been issued and all the points which have been urged in the present petition, can be taken by the petitioner, before the trial court during the course of trial.

23. Under these circumstance, the present petition is wholly misconceived and is not maintainable and the same is, hereby dismissed with costs of Rs.5,000/-

24. The cost of Rs.5,000/- be deposited by the petitioner with the trial court within one month from today failing which the trial court shall recover the same in accordance with law.

25. Trial court record be sent back forthwith.

January 08, 2008
Bisht

V.B.GUPTA, J.