

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C.No.2224/2009**

% Reserved on: 12th January, 2010
Date of Decision: 18th January, 2010

M/s Alliance Infrastructure Project Pvt. Ltd. and Ors.
..... Appellant

! Through: Ms. Rebecca M. John and
Mr. Shivam Sharma, Adv.

versus

\$ Vinay Mittal Respondent

^ Through: Mr. H. Hariharan, Adv.

+ **Crl.M.C.No.2225/2009**

M/s Alliance Infrastructure Project Pvt. Ltd. and Anr.
..... Appellant

! Through: Ms. Rebecca M. John and
Mr. Shivam Sharma, Adv.

versus

\$ Sanjeev Kapur Respondent

^ Through: Mr. H. Hariharan, Adv.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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

: **V.K. JAIN, J.**

1. This order will dispose of the above referred petitions.

Petitioner No.1 Alliance Infrastructure Project Private Ltd.,

issued a cheque dated 2nd May, 2008 for a sum of Rs.30,86,000/- and another cheque of the same date for Rs.12 lakhs in favour of the complainant/respondent. The cheques, when presented for encashment, were returned unpaid with the remarks "signature different". When the complainant/respondent approached the petitioners in this regard, they issued three other cheques, one for Rs.12 lakhs, second for Rs.3,29,000/- and the third for Rs.31,91,650/- in lieu of the previously dishonoured cheques. The cheques for Rs.12 lakhs and Rs.3,29,000/- were encashed when presented to the bank, but the cheque for Rs.31,91,650/- was returned unpaid with the remarks "stop payment by the drawer". A legal notice dated 23rd January, 2009 was sent to the petitioners calling upon them to make payment within 15 days from the receipt of notice. The petitioners, however, did not make the payment whereupon a complaint under Section 138/141 of Negotiable Instruments Act read with 141 thereof and also under Section 420 of IPC was filed against them. The petitioners, however, have been summoned only under the provisions of Negotiable Instruments Act. Being aggrieved, the petitioners have filed Criminal Misc. Case

2225/2009 assailing the summoning order.

2. Petitioner No. 1 had also issued two other cheques both dated 5th May, 2008; one of Rs.47,84,000/- and the other for Rs.18,60,000/- to the respondent. The cheque for Rs.18,60,000/- was honoured, but the cheque for Rs.47,84,000/- was returned unpaid. When the complainant/respondent approached the petitioners in this regard, they promised to pay the cheque amount within two-three days and thereafter issued another cheque for Rs.49,47,600/- in lieu of the previous cheques. The cheque of Rs.49,47,600/-, when presented to the bank, was returned with remarks "funds insufficient". Consequently, the complaint subject matter of criminal case No. 2224/2009 was filed by the respondent against the petitioners, who were summoned under the provisions of Negotiable Instruments Act.

3. It is an admitted case that after issue but before presentation of cheque of Rs.49,47,600/-, petitioner No.1 paid a sum of Rs.16,50,000/- to the complainant/respondent on 7th of October, 2008 by way of RTGS transfer. Though the receipt of the aforesaid amount of Rs.16,50,000/- has not

been acknowledged in the legal notice dated 19.12.2008 issued by the respondent through his counsel Mr.Vijay Kumar, when the complainant came in the witness box before the trial court on 11th of September, 2009, he admitted receipt of this payment and also stated that after the receipt of the aforesaid amount on 7th of October, 2008 a sum of Rs.32,97,600/- remained due to him. Admittedly, cheque of Rs.49,47,600/- was presented to the bank much after the receipt of the aforesaid sum of Rs.16,50,000/-, the cheque having been returned vide memo dated 22.12.2008. As is evident from the legal notice itself, the complainant required the petitioner to make payment of Rs.49,47,600/-, though the amount due to him on that date, as per his own showing, was only Rs.32,97,600/-. Thus, not only the complainant presented the cheque of Rs.49,47,600/- for encashment but he also made a demand for the said amount despite the fact that the amount payable to him even on the date of presentation of the cheque was only Rs.32,97,600/-.

4. As regards the cheque of Rs.31,91,650/- which is the subject matter of Cr1.M.C.2225/09, admittedly, after this cheque was returned, for the first time, vide memo dated

4.10.2008, the petitioner made a payment of Rs.10,50,000/- to the complainant/respondent on 20th of October, 2008. The receipt of this payment has been acknowledged in para 7 of the legal notice dated 23.1.2009 sent by the complainant/respondent to the petitioner. After receipt of aforesaid payment of Rs.10,50,000/-, admittedly, the complainant/respondent again presented the cheque of Rs.3191,650/- to the bank for encashment though the amount due to him on that date was only Rs.21,41,650/- However, in the legal notice the complainant demanded only the sum of Rs.21,41,650/- which was the amount due to him, after giving credit for the payment of Rs.10,50,000/-, received by him on 20th of October, 2008.

5. The first contention raised by the learned counsel for the petitioners is that since the amount due and payable to the complainant was much less than the amount represented by the cheque, on the date these cheques were presented for encashment, the petitioners were not legally required to honour these cheques and, consequently, no offence under Section 138 of the Negotiable Instruments Act is made out against them. It has been further contended by the learned

counsel for the petitioners that in the criminal complaint which is subject matter of CrI.M.C.2225/09 and even in the legal notice dated 19.12.2008, the complainant called upon the petitioners to pay a sum of Rs.49,47,000/- despite the fact that the amount due on that date was only Rs.32,97,600/- and the notice calling upon the petitioners to pay more than the amount due from them being illegal and invalid, no offence under Section 138 of the Negotiable Instruments Act is made out against them.

6. Section 138 of Negotiable Instruments Act reads as under:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the accounts

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

provisions of this Act, be punished with imprisonment for [a term which may extend 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 induce 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 cheques 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.

7. The following are the components of the offence punishable under Section 138 of Negotiable Instrument Act:-

(1) drawing of the cheque by a person on an account maintained by him with a banker, for payment to another person from out of that account for discharge in whole/part any debt or liability, (2) presentation of the cheque by the payee

or the holder in due course to the bank, (3) returning the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque, (4) giving notice in writing to the drawer of the cheque within 15 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount, (5) failure of the drawer to make payment to the payee or the holder in due course of the cheque, of the amount covered by the cheque within 15 days of the receipt of the notice.

8. The question which comes up for consideration is as to what the expression 'amount of money' means in a case where the admitted liability of the drawer of the cheque gets reduced, on account of part payment made by him, after issuing but before presentation of cheque in question. No doubt, the expression 'amount of money' would mean the amount of the cheque alone in case the amount payable by the drawer, on the date of presentation of the cheque, is more than the amount of the cheque. But, can it be said the expression 'amount of money' would always mean the amount of the cheque, even if the actual liability of the drawer of the cheque has got reduced on account of some

payment made by him towards discharge of the debt or liability in consideration of which cheque in question was issued. If it is held that the expression 'amount of money' would necessarily mean the amount of cheque in every case, the drawer of the cheque would be required to make arrangement for more than the admitted amount payable by him to the payee of the cheque. In case he is not able to make arrangement for the whole of the amount of the cheque, he would be guilty of the offence punishable under Section 138 of Negotiable Instruments Act. Obviously this could not have been the intention of the legislature to make a person liable to punishment even if he has made arrangements necessary for payment of the amount which is actually payable by him. If the drawer of the cheque is made to pay more than the amount actually payable by him, the inevitable result would be that he will have to chase the payee of the cheque to recover the excess amount paid by him. Therefore, I find it difficult to take the view that even if the admitted liability of the drawer of the cheque has got reduced, on account of certain payments made after issue of cheque, the payee would nevertheless be entitled to present the cheque

for the whole of the amount, to the banker of the drawer, for encashment and in case such a cheque is dishonoured for wants of funds, he will be guilty of offence punishable under Section 138 of Negotiable Instrument Act.

9. I am conscious of the implication that the drawer of a cheque may make payment of a part of the amount of the cheque only with a view to circumvent and get out of his liability under Section 138 of Negotiable Instrument Act. But, this can easily be avoided, by payee of the cheque, either by taking the cheque of the reduced amount from the drawer or by making an endorsement on the cheque acknowledging the part payment received by him and then presenting the cheque for encashment of only the balance amount due and payable to him. In fact, Section 56 of Negotiable Instrument Act specifically provides for an endorsement on a Negotiable Instrument, in case of part-payment and the instrument can thereafter be negotiated for the balance amount. It would, therefore, be open to the payee of the cheque to present the cheque for payment of only that much amount which is due to him after giving credit for the part-payment made after issuance of cheque. The view being taken by me was also

taken by a Division Bench of Kerala High Court in Joseph Sartho vs. Gopinathan Nair, 2009 (2) Crimes 463 (Kerala). As noted by the Hon'ble Supreme Court in Rahul Builders vs. Arihant Fertilizers & Chemicals And Another, (2008) 2 SCC 321, Negotiable Instruments Act envisages application of the penal provisions which needs to be construed strictly. Therefore, even if two views in the matter are possible, the Court should lean in favour of the view which is beneficial to the accused. This is more so, when such a view will also advance the legislative intent, behind enactment of this criminal liability.

10. The learned counsel for the respondent has referred to the decision of Satya Narain Singh vs. Janardan, AIR 1980 Patna 277, where it was held that the consideration for a Negotiable Instrument need not necessarily be consideration mentioned in the instrument and it is permissible to prove existence of another consideration. This judgment has no application to the matter in controversy and this is not the case of the respondent that the petitioner was liable to pay some other debt to him on account of which its liability towards him was equal to or more than the amount of the

cheques, on the date these cheques were presented for encashment. It is an admitted case that on the date cheques in question were presented by the respondent for encashment the amount due to him was much less than the amount represented by these cheques.

11. The learned counsel for the respondent has referred to the decision of a Single Judge of Kerala High Court in **Kochayippa vs. Suprasidhan**, 2002(2)ALT (Cr1.) 251. In that case, the transaction between the parties took place on 15.1.1995 when a sum of Rs.80,000/- was given to the accused. However, the amount of the cheque was a post-dated cheque dated 15.1.1997 was Rs.1 lakh. The cheque, when presented, was dishonoured for want of funds. The case of the complainant was that the post-dated cheque was issued to cover the liability arising from the transaction inclusive of interest for two years and, therefore, the balance amount of Rs.20,000/- forming part of the cheque represented the interest on the principal amount of Rs.80,000/- for two years. It was observed by the High Court that viewed from this perspective the debt due to the complainant had become Rs.1 lakh on the date of the cheque

and, therefore, the principal debt being different from the cheque amount was not of any consequence and the accused was not entitled to acquittal on account of difference between the amount of the cheque and the actual amount received by him from the creditor. In the present case, this is not the case of the complainant that on account of liability towards interest or some other liability, the petitioner was liable to pay the whole of the amount of the cheques on the date they were presented for encashment. Therefore, this judgment is of no help to the respondent/complainant.

12. In respect of the cheque, subject matter of CrI.M.C.2225/2009, the amount of the cheque was Rs.31,91,650/- and the respondent, after giving credit for the amount of Rs.10,50,000/- paid to him on 20.10.2008 demanded only a sum of Rs.21,41,650/- vide notice dated 23.1.2009. Therefore, as far as the notice of demand issued in this case is concerned, it was legal and valid as the amount demanded was the actual amount payable by the petitioner to the respondent. But, in respect of the cheque, subject matter of CrI.M.C.2224/2009, the amount demanded in the notice of demand dated 19.12.2008 was

Rs.49,47,600/-, though admittedly the amount due to the respondent at that time was only Rs.32,97,600/-, after giving credit of Rs.10,50,000/- received by him by RTGS on 7.10.2008. Thus, the respondent called upon the petitioner to pay much more than the amount actually due and payable by it. In order to comply with the demand made in the notice, the petitioner would have been required to pay the whole of the amount of Rs.49,47,600/- to the complainant/respondent. A perusal of the notice would show that the complainant did not at all refer to the payment of Rs.16,50,000/- received through RTGS, while issuing the notice of demand dated 19.12.2008. This is not as if the complainant/respondent acknowledged the payment of Rs.16,50,000/- and despite that asked the petitioner to make payment of the whole of the amount of the cheque. The complainant/respondent did not even refer to the substantial payment which he had received by way of RTGS. To ask the drawer of the cheque to make payment of Rs.49,47,600/- despite having earlier received a sum of Rs.16,50,000/- against that very cheque is nothing but a dishonest conduct. Had the petitioner complied with the demands made in this

notice, it would have been compelled to later on chase the complainant for recovery of the excess amount paid by it and had the complainant not paid the excess amount received by him, the petitioner would also have been compelled to initiate legal proceedings against him. Therefore, a notice of demand which requires the drawer of the cheque to make payment of the whole of the cheque amount, despite receiving a substantial amount against that very cheque, much before issue of notice, cannot be said to be a legal and valid notice envisaged in Section 138(b) of Negotiable Instrument Act. The expression 'amount of money' used in Section 138(b) of Negotiable Instrument Act, to my mind, in a case of this nature would mean the amount actually payable by the drawer of the cheque to the payee of the cheque. Of course, if the payee of the cheque makes some demands on account of interest, compensation, incidental expenses etc, that would not invalidate the notice so long as the principal amount demanded by the payee of the cheque is correct and is clearly identified in the notice. When the principal amount claimed in the notice of demand is more than the principal amount actually payable to the payee of the cheque and the notice

also does not indicate the basis for demanding the excess amount, such a notice cannot be said to be a legal and valid notice envisaged in Section 138(b) of Negotiable Instrument Act. In such a case, it is not open to the complainant to take the plea that the drawer of the cheque could have escaped liability by paying the actual amount due from him to the payee of the cheque. In order to make the notice legal and valid, it must necessarily specify the principal amount payable to the payee of the cheque and the principal amount demanded from the drawer of the cheque should not be more than the actual amount payable by him though addition of some other demands in the notice by itself would not render such a notice illegal or invalid.

13. In **Central Bank of India & Another vs. Saxons Farms & Others** 1999(8) SCC 221, the Hon'ble Supreme Court observed that the object of the notice under Section 138(b) of Negotiable Instrument Act is to give a chance to the drawer of the cheque to rectify his omission and also to protect the honest drawer. If the drawer of the cheque is asked to pay more than the principal amount due from him and that amount is demanded as the principal sum payable by him, it

is not possible for an honest drawer of the cheque to meet such a requirement.

14. In **Suman Sethi vs. Ajay K. Churiwala**, 2000 (2) SCC 380, the Hon'ble Supreme Court held that where the notice also contains a claim by way of cost, interest etc. and gives breakup of the claim of the cheque amount, interest, damages etc., which are separately specified, the claim for interest, cost etc. would be superfluous and these additional claims being severable would not invalidate the notice. It was further held that if an ominous demand is made in a notice as to what was due against a dishonoured cheque, the notice might fail to meet the legal requirement and may be regarded as bad. The same consequence, in my view, would follow where the principal sum demanded in the notice is more than the actual amount payable to the payee of the cheque as principal sum. In the present case, while demanding Rs.49,47,600/- vide notice dated 19.12.2008, the complainant did not even indicate that the actual amount due to him was only Rs.32,97,600/- and he called upon the complainant to pay the whole of the amount of the cheque without even trying to justify the demand made by him.

15. In **K.R.Indira vs. Dr.G.Adinarayana**, 2003 (3) JCC(NI) 273, a consolidated notice was sent in respect of four cheques. Two of which were issued to him in the name of the husband and the two were in the name of the wife. It was noted by the Hon'ble Supreme Court that the cheque amounts were different from the alleged loan and the demand made was not of the cheque amount but was of the loan amount. It was held that the complainant was required to make demand for the amount recovered by the cheque which was conspicuously absent in the notice and, therefore, the notice was imperfect. The same would be the legal effect when a part-payment against a cheque is made, after its issue. The amount covered by the cheque would necessarily mean the principal amount due to the payee after giving credit for the par-payment received by him and, therefore, if the notice does not specifically demand that particular amount, it would not be a valid notice and would not fasten criminal liability on account of its non-compliance.

16. In **Rahul Builders** (supra), the outstanding amount due to the appellant from respondent No.1 was Rs.8,72,409/. Respondent No.1 issued a cheque of Rs.1 lakh in favour of

the appellant, which, on presentation was dishonoured. A notice was thereafter sent by the appellant to respondent No.1 informing him about dishonour of the cheque and asking him to remit the amount of Rs.8,72,409/-. It was noted that the amount which respondent No.1 was called upon to pay was the outstanding amount of the bills, i.e. Rs.8,72,409/- and the noticee was to respond that demand by offering the entire sum of Rs.8,72,409/-. It was further noted that there was no demand to pay the sum of Rs.1 lakh which was the amount of the cheque and what was demanded was the entire sum of Rs.8,72,409/- and not a part of it. In these circumstances, it was held that there was no demand for payment of the cheque amount. The decision of the High Court holding that the notice was invalid, was upheld by the Hon'ble Supreme Court.

17. For the reasons given in the preceding paragraphs, I hold that the complaint, subject matter of CrI.M.C.No.2225/2009 is liable to be quashed because the complainant presented the cheque for encashment of the whole amount of Rs.49,47,600/- though the amount due to him on the date of the presentation of the cheque was

Rs.32,9600/- and he also demanded the whole of the amount of Rs.49,47,600/- as principal sum without even indicating the principal amount due to him under the cheque was Rs.32,97,600/- and without even referring to the part-payment of Rs.16,50,000/- which he had received by RTGS on 7.10.2008. The criminal complaint, subject matter of CrI.M.C.2224/2009 is liable to be quashed as the complainant presented the cheque for encashment of whole of its amount of Rs.31,91,650/- though he had already received a sum of Rs.10,50,000/- before presentation of the cheque and the principal amount due to him on the date of presentation of the cheque was only Rs.21,41,650/-.

Ordered accordingly.

(V.K.JAIN)
JUDGE

JANUARY 18, 2010
bg/sn