

REPORTABLE
*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+CRIMINAL MISCELLANEOUS CASE NO. 3308 OF 2008

Reserved on: 18 August, 2010
Date of Decision: 30th August, 2010

SANDEEP KHANNA & ANR. Petitioners
Through: Mr. Vijay Aggarwal
and Mr. Gurpreet
Singh, Advs.

Versus

STATE & OTHERS Respondents
Through: Mr. T.K. Ganju, Sr.
Adv. with Mr. A.K.
Thakur, Mr. R.K.
Mishra and Mr.
Anesh Paul, Advs.
for R-2.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

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

SANJIV KHANNA, J.:

1. Mr. Sandeep Khanna, sole proprietor of M/s. Kripa Overseas, has filed the present petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code, for short) for quashing of the order dated 26th April, 2006 taking cognizance and summoning him in the complaint case No.1965/2005 titled “NAFED Vs. Kripa Overseas” filed under Section 138 of the Negotiable Instrument Act, 1882 (hereinafter referred to as the Act, for short).

2. NAFED has filed the said complaint on account of dishonour of cheque No.411372 drawn on Canara Bank, Chandni Chowk, Delhi, of Rs.10 crores. The cheque was presented for encashment on 19th October, 2005. The allegation made in the

complaint is that the petitioner had approached the NAFED in the month of February, 2004 with the proposal to import asafetida (Heeng) and rolling scrap in the name of NAFED from Tazikistan/Kyrgystan and was advanced a sum of Rs.10 Crores for this purpose. A Memo of Understanding dated 20th September, 2004 was executed.

3. Learned counsel for the petitioner has not referred or controverted the allegations made in the complaint on merits. However, four contentions are raised. These contentions have been dealt with below.

4. It was submitted that the summoning order dated 26th April, 2006 was a non-speaking and mechanical order which was passed without application of mind by the learned Metropolitan Magistrate (Magistrate, for short). The summoning order placed on record is not cyclostyled. It is a computer print-out which is also partly hand written. The first line of the order states that the Magistrate had heard the learned counsel for the complainant and had perused the affidavit of the complainant filed on record. It records that the complaint was well within the period of limitation. It states that the learned Magistrate was of the opinion that prima facie there was sufficient evidence and grounds to summon the accused. Learned counsel for the petitioner submitted that the date of hearing, the date for which notice was issued and the name of counsel were filled up by hand and this proves and establishes that a pre-written or composed computer print-out was filled up and notice has been issued. The said contention is merely a presumption. Petitioner has not placed on record any other order passed by the same Magistrate in a different case wherein the same alleged pre-written/pre-composed computer printout was used. I have already quoted above the language of the order. Merely because the dates and presence of the counsel are hand-written, it does not show that the order dated 26th April, 2006

was pre-dictated/composed order which was filled-up and the summoning/cognizance order was passed mechanically without examining the allegations in the complaint and the pre-summoning evidence.

5. Learned counsel for the petitioner submitted that Mr. Sandeep Khanna is a Proprietor of M/s. Kripa Overseas and the learned Magistrate has overlooked the fact that Mr. Sandeep Khanna and M/s. Kripa Overseas had been made two separate accused. Thus it was submitted that the Magistrate did not apply his mind and read the complaint.

6. In the cause title of the complaint, the accused have been described as under:-

- “1 M/s. Kripa Overseas
(Importers & Exporters)
469 – Ishwar Bhawan
Khari Baoli
Delhi-110006.
- 2 Mr. Sandeep Khanna
Prop.
M/s. Kripa Overseas
469 – Ishwar Bhawan
Khari Baoli
Delhi- 110006.
Also at :
E-18, East of Kailash, New Delhi.”

7. If a sole proprietor or an individual carries on business in a different or a trading name, the individual is the person responsible and liable. It is apparent that the complaint in question is drafted by an advocate. The individual and the business name in which the individual carries on business have been made separate accused. This may have happened because of abundant caution. This error or mistake does not merit or justify interference with the summoning order dated 26th April, 2006. The net effect of the order and the complaint is that Mr. Sandeep Khanna, who is a sole proprietor of M/s. Kripa

Overseas, has been summoned to enter appearance in the complaint.

8. The third contention raised by the learned counsel for the petitioner is that as per the complaint itself the cheque of Rs.10 Crores was given as a security and, therefore, no offence under Section 138 of the Act is made out on dishonour of a cheque given as a security. He relies upon ***M.S. Narayana Menon @ Mani versus State of Kerala & Anr.***, (2006) 6 SCC 39 and a judgment of this Court in ***K.S. Bakshi & Anr. versus State & Anr.***, 146 (2008) DLT 125.

9. The complaint has to be read as a whole and one or two sentences are not to be read out of context. Allegations made in the complaint in brief have been stated above. It is stated in the complaint that pursuant to the Memorandum of Understanding dated 16th September, 2004, the respondent/NAFED had paid a sum of Rs.10 Crores to the petitioner by way of a cheque. It is further alleged that the petitioner did not comply with its commitment and supply the goods for which advance of Rs.10 Crores was paid. Several meetings and phone calls were made and letters were written and thereafter cheque of Rs.10 Crores was presented for encashment but was dishonoured for insufficient funds. In the case of ***K.S. Bakshi*** (Supra), there was an agreement between the builder and the owners for construction on a property as per the terms and conditions mentioned in the Memorandum of Understanding, creating mutual rights and obligations. As per the Memorandum of Understanding the owners had received Rs.11.5 lakhs from a confirming party but no payment was made by the owners to the builder or any third party. Clause V (a) of the Memorandum of Understanding stipulated that the builder would deposit with the owners a total sum of Rs.138 lakhs towards security including Rs.11.5 lakhs which was paid to the owners by the confirming party. This security deposit was to be paid by the

builder to the owners in 30 equal and monthly installments and was in the form of a deposit which was to be refunded to the owners without interest upon the builders handing over to the owners' possession of their portion in the to be constructed building. There was stipulation for refund/adjustment of the security deposit. Some cheques towards payment of the security deposit in 30 equal monthly installments were dishonoured. A question arose whether these dishonoured cheques were issued in discharge of a debt or other liability. It was observed that the words "other liability" cannot be interpreted in the light of the preceding word "debt" and the rule of *ejusdem generis* is not applicable as the word "debt" is a single word and it is not a case where a particular category, class or genus is followed by a general word. Accordingly, the expression "other liability" should be given ordinary grammatical meaning and within its broad sweep it would include "any liability to pay". Learned Single Judge thereafter referred to the doctrine of fundamental terms of a contract and observed that an obligation which is a condition, if breached, hits at the root of the contract. Further, by a contract it is open for the parties to make a term, a condition which otherwise under ordinary circumstances may not be. Thereafter reference was made to Clause V (b) of the agreement, which for the sake of the convenience is reproduced below:-

“(b) Payment of the said cheques on the due dates is the essence of the contract. In the event any cheque is dishonoured for any reason, the Builder shall replace the cheque with a demand draft within 7 days of the receipt of an intimation from the Owners failing which the Owners shall be entitled to take recourse to any right or remedy available to or accruing to the Owners by such dishonour.”

10. It is accordingly observed as under:-

“29. Under the agreement, the accused company had a liability to pay Rs.138 lakh to the complainant and other owner of the said property and discharge of this liability was treated fundamental to the agreement, non-performance thereof would entitle the complainant and the other owner to rescind the contract.

30. In the instant case, money in sum of Rs.126.5 lakh was to be paid by the accused company to the complainant and other owner. It is irrelevant whether such money was to be retained and returned in future on due performance of the agreement. What is relevant for purposes of Section 138 of the NI Act is the fact that at the time of issuance of cheques the accused company had a liability to pay money to the complainant and other owner of the said property.

31. A distinction has to be drawn between a cheque issued as security and a cheque issued towards discharge of a liability to pay notwithstanding that the money is by way of security for due performance of the contract. A cheque given as security is not to be encashed in *presenti*. It becomes enforceable if an obligation is future is not enforced. It is not tendered in discharge of a liability which has accrued.

32. Thus where a cheque forms part of a consideration under a contract it is paid towards a liability.”

(emphasis supplied)

11. The ratio of the said judgment, rather than supporting the case of the petitioner, supports the case of the respondent NAFED. In any case, at this stage (without trial) *prima facie* it cannot be said that no case is made out. In the present case as per the allegations in the complaint Rs.10 Crores was paid to the petitioner and the petitioner has issued a cheque of Rs.10 Crores to the respondent. Mere use of the word “security” in the

complaint is irrelevant. What is relevant is in the context and purpose for which the cheque was issued and whether the cheque which was dishonoured can be regarded as paid towards payment of debt or other liability. As observed in the aforesaid judgment, when a cheque forms part of the consideration under the contract it is paid towards a liability. Learned Single Judge after the aforesaid quote (paras 29 to 32) has referred to the definition of the term “consideration” in Section 2 (d) of the Indian Contract Act, 1872 and observed that the term “consideration” is very wide and paragraph 57 in the case of **M/s. Narayana Menon** (Supra) was quoted by the learned Judge and it was emphasized that the said observations are clarificatory in nature. Paragraph 57 of the judgment in **M/s. Narayana Menon** case (supra) reads as under:-

“57. We in the facts and circumstances of this case need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The appellant clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefore cannot be held to have been issued on discharge of the debt as, for example, if a cheque is issued for security or any other purpose the same would not come within the purview of Section 138 of the Act,”

12. Learned counsel for the respondent had submitted that in the complaint itself it is mentioned that the petitioner had given another cheque of Rs.1 Crore which was dishonoured but subsequently payments in lieu thereof were made. It is stated in

the complaint that this cheque of Rs.1 Crore was towards earnest money. Payment of this cheque towards earnest money cannot be set off and reduced from the cheque of Rs.10 Crores which was advanced and given pursuant to the advance payment of Rs.10 Crores made by the respondent to the petitioner. In view of the said submission, I do not think at this stage, the petitioner is entitled to any relief. It may be appropriate here to refer to the observations of the Supreme Court in ***I.C. D.S. Ltd. versus Beena Shabeer & Another***, (2002) 6 SCC 426, which are 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 abovenoted three words are of extreme significance, in particular, by reason of the use 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.

11. The issue as regards the coextensive 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 stand 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 do not lend any assistance to the contentions raised by the respondents.”

13. It may be also appropriate to reproduce observations made in the ***Constellation Enterprises Pvt. Ltd. & Anr. versus P.E.C. Limited***, 127 (2006) DLT 733:

“14. As regards the second point even if a post dated cheque is given as security and the payment is not made as promised, then the said post dated cheque itself becomes payable because that is the agreement and understanding between the parties otherwise the security would have no meaning. Learned counsel for the petitioner has cited a judgment titled **M/S. Nijjer Agro Foods Limited and Ors. v. Shri Nasib Chand and Another**, reported in 2003 (3) JCC 304 , in support of his contentions. The facts in that case were that post dated cheques were given as security subject to the terms and conditions that the said cheques were to be replaced by demand drafts for the equivalent amount. The accused in that case had made the payment by way of demand drafts but the the complainant instead of returning the cheques presented them. The court opined "once the payment against those cheques was made by way of Demand Drafts the liability qua these cheques ceased to exist and therefore the complainant was not entitled to present those cheques even if some amount or balance was outstanding".

14. In ***Mojj Engineering Systems Ltd. & Others versus A.B. Sugars Ltd.***, 154 (2008) DLT 579, it has been observed

as under:-

“7. Even otherwise, prima facie, it was the petitioners who had handed over the undated cheque for a certain amount to the respondent in terms of a contract between the parties. Since an undated cheque cannot be encashed, it can only mean that the petitioners had authorized the complainant to enter an appropriate date on it. In *Young v. Grote*, (1827) 4 Bing. 253 it was held that when a blank cheque is signed and handed over, it means the person signing it has given an implied authority to any subsequent holder to fill it up. Similarly, in *Scholfield v. Lord Londesborough*, (1895-1899) All ER Rep 282, it was held that whoever signs a cheque or accepts a bill in blank, and then puts it into circulation, must necessarily intend that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. This common law doctrine was also affirmed by Justice Macnaghten in *Griffiths v. Dalton*, (1940) 2 KB 264, where it was held that the drawer of an undated cheque gives a prima facie authority to fill in the date. This aspect has also been incorporated in Section 20 of the Negotiable Instruments Act, which deals with Inchoate Stamped Instruments. The Supreme Court in *T. Nagappa v. Y.R. Murlidhar*, IV(2008)SLT694=II(2008)CCR398(SC)=II(2008)DLT(Crl.)19(SC)=(2008)5SCC633 while discussing the scope of Section 20 held that by reason of this provision, a right has been created in the holder of the cheque. *Prima facie*, the holder thereof is authorized to complete the incomplete negotiable instrument. In that view of the matter, all further issues that may be raised by the petitioners regarding the nature and scope of the authority of the respondent to put any particular date on the cheque in question, are all matters for trial.”

15. The aforesaid decision also negates the contention of the petitioner with regard to the fact that the cheque was undated.

Reference in this regard can be also made to Section 20 of the Act, which for the sake of the convenience is reproduced below:-

“20. Inchoate stamped instruments.—

Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in ¹[India] and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount:

Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.”

16. The last contention raised by the learned counsel for the petitioner was based upon the compromise/Memorandum of Understanding dated 3rd May, 2007. It was submitted that by this Memorandum of Understanding the parties had compromised the matter which amounted to and resulted in compounding of the offence. Reference was made to a judgment of learned Single Judge of this Court in ***Venkatesh Dutt versus M.S. Shares East Ltd.***, 2004 (109) DLT 610. The said contention has to be rejected in view of the reasons given in ***Thakur Arora versus State***, 2009 (157) DLT 737. In this case it was observed:

“7. Learned Counsel for the Petitioner submits that the judgment of this Court in Venkatesh Dutt is no longer good law in view of the judgment of the Supreme Court in Lalit Kumar Sharma and Anr. v. State of UP., V(2008)SLT1=III(2008)DLT(Crl.)114(SC)

=III(2008)BC204=II(2008)CCR430(SC).

He submits that when the compromise did not materialize, the cheques issued thereunder could not be said to have been issued in discharging the liability of the original debts and therefore no subsequent complaint would be maintainable.

8. In the present case the MOU contained a clear stipulation that if the cheques issued pursuant to the MOU were dishonoured, the MOU would come to an end and the original complaint would revive. The complaint was not disposed of on the basis of the said MOU and was kept pending, at which stage the Petitioner filed an application seeking discharge.

9. In the judgment in Venkatesh Dutt the facts were that during the pendency of the criminal complaint in relation to dishonour of a cheque in the sum of Rs. 1 crore a compromise was arrived at between the parties. Pursuant to the compromise several cheques were issued and accepted by the complainant. These subsequent cheques on presentation for payment were dishonoured. Clause 8 of the terms of compromise, similar to Clause 5 of the MOU in the present case, stipulated that in the event the cheques were dishonoured, the complainant shall have the "right to continue the above referred cases" and "to further initiate both civil and criminal actions including under Section 138 of the Negotiable Instruments Act with reference to the cheques issued under this Agreement." In those circumstances this Court held that-

“8. The very fact that a party enters into a compromise during the pendency of a complaint filed under Section 138 of the Act shows the cause of action pertaining to the initial cheque ceases to be available to the complainant as fresh cause of action becomes available in respect of the cheques issued pursuant to the agreement between the parties in case those cheques are dishonored.”

10. It was further held as under:

“9. By no stretch of imagination complaints under Section 138 relating to several cheques given by a party to the complainant on account of the agreement between the parties towards liability against initial cheque leading to the filing of original complaint can be allowed to go simultaneously. Reason is simple. Section 138 of the Negotiable Instruments Act specifically refers to only that cheque which is issued towards the liability drawn by a person on an account with a banker for payment of money and no other cheque. Once the parties enter into an agreement during the pendency of such complaint or proceedings and complainant accepts the cheques given by the accused in lieu of the subject matter of original complaint every cheque gives rise to a fresh cause of action if it, on presentation is dishonored as in that case original complaint becomes extinct. Aggrieved person has a right to file as many complaints as many cheques were given to him as every cheque under the Act provides an independent and fresh cause of action to the aggrieved person.”

11. It was therefore concluded that-

“12. In view of the foregoing reasons, the petition is allowed, the complaint filed by the respondent under Section 138 of the Act for cheque of Rs. One crore and the proceedings arising therefrom stand quashed whereas the subsequent complaints filed by the respondent arising out of as many as seven cheques shall continue being independently maintainable.”

12. It appears that the aforementioned enunciation would no longer good law in

view of the subsequent judgment of the Supreme Court in Lalit Kumar Sharma. The facts in this case were that M/s. Mediline India (P) Limited borrowed a loan of Rs. 5 lakhs from the complainant and in repayment thereof issued two cheques dated 30th November 1999 and 10th December 1999 for Rs. 3 lakhs and Rs. 2 lakhs respectively. The Company had two directors, namely, Ashish Narula and Manish Arora. The cheques on presentation were dishonoured with the remarks "insufficient funds". The complainant then filed a criminal complaint against Manish Arora and Ashish Narula under Section 138 NI Act.

13. An agreement was entered into between the parties during the pendency of the criminal complaint. Pursuant thereto Manish Arora on 29th July 2000 issued a cheque in favour of the complainant in the sum of Rs. 5,02,050/- . This cheque when presented for payment was also returned dishonoured with the remarks "insufficient funds". In regard to the dishonour of subsequent cheques the complainant filed another criminal not only against Manish Arora and Ashish Narula. Lalit Kumar Sharma, who became a director of the said company on 15th February 2000 and another person who became a Director on 1st December 1994, were also arrayed as accused. Both of them had resigned from the post of directorship on 30th November 2000. The learned MM summoned all the accused. Their challenge in the revision petition was negatived by the High Court and thereafter they approached the Supreme Court.

14. The Supreme Court categorically held that in the above circumstances a separate complaint could not be maintained since the cheque issued in terms of the compromise was not towards any liability for which the earlier complaint had been filed and further when the accused there had been convicted and sentenced. The Supreme Court held as follows:

“15. Evidently, therefore, the second cheque was issued in terms of the compromise. It did not create a new liability. As the compromise did not fructify, the same cannot be said to have been issued towards payment of debt.”

17. Paragraph 13 of the Memorandum of Understanding relied upon by the petitioner reads as under:-

“13. NAFED shall withdraw all legal cases in the courts all over India/Police/EOW/CBI or any other agency that may be involved by NAFED or otherwise, after entire payment is made in terms of the offer for settlement.”

18. Thus, as per the terms of the Memorandum, the cases including criminal cases were not to be withdrawn by the respondent till payments were made as per the offer of settlement. The payments were not made. In view of the said clause, it is not possible to accept that the offence in question was compounded by entering the Memorandum of Understanding. It may be appropriate here to reproduce the observations of the Supreme Court in ***Lata Construction versus Rameshchandra Ramniklal Shah (Dr)***, (2000) 1 SCC 586, with reference to Section 62 of the Contract Act, 1872. It has been observed as under:

“10. One of the essential requirements of “novation”, as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract.

11. In the instant case, the rights under the original contract were not given up as it was specifically provided in the subsequent contract that the rights under the old contract shall stand extinguished only on payment of the entire amount of Rs 9,51,000. Since the amount was not paid by the appellants as stipulated by the subsequent contract, the rights under the original contract were still available to the respondents and they could legally claim enforcement of those rights. Obviously, under the original contract, the appellants were under an obligation to provide a flat to the respondents. This right would come to an end only when the appellants had, in pursuance of the subsequent contract, paid the entire amount of Rs 9,51,000 to the respondents. Since they had not done so, the respondents could legally invoke the provisions of the earlier contract and claim before the Commission that there was “deficiency in service” on the part of the appellants.”

19. The said observations are opposite as compounding it is alleged is pursuant to a contract between the parties. In this connection it may be also noted that another associate of the petitioner-Mr. Rajesh Khanna had filed a similar petition before this Court being Criminal Miscellaneous Case No.507/2008. In this petition, one of the contentions raised was that there was a settlement or a Memorandum of Understanding and, therefore, the offence was compounded. This contention was rejected after observing that since the compromise has not adhered to by the petitioner therein, there was no question of the petition for quashing being entertained.

20. In view of the aforesaid, I do not find any merit in the present petition and the same is dismissed. Observations made above are for the disposal of the present petition and will not be construed as observations on merits, which are binding on the trial court.

(SANJIV KHANNA)
JUDGE

AUGUST 30, 2010
J/VKR