

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

Judgment reserved on: May 18, 2011
Judgment delivered on: June 20, 2011

+ **CRL.M.C. No.992/2010 & CRL.M.A. No.3579/2010**

M/S. TOPLINE BUILDTECH PVT. LTD. & ANR.

....PETITIONERS

Through: Mr. Vijay Aggarwal, Advocate.

Versus

STATE & ANR.

....RESPONDENTS

Through: Ms. Fizani Husain, APP for R-1.
Mr. Dalip K. Sharma, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. The petitioners through this petition under Section 482 Cr.P.C. read with Article 227 of the Constitution of India is seeking setting aside of the impugned order dated 30.09.2009 passed by the learned Metropolitan Magistrate whereby he took cognizance of the offence under Section 138 N.I. Act and issued summons for appearance under Section 204 Cr.P.C. to the petitioners.

2. Briefly put, facts relevant for the disposal of this petition are that the respondent filed a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act against the petitioners, namely, M/s Topline Buildtech Pvt. Ltd. and its CMD Shri Vikram Bhardwaj alleging that the petitioner company had purchased hardware and mills store material from the respondent company vide invoice No.R 98 dated 12.09.2008 for ₹5,33,935/-. A part payment against the said consideration amount was made and a sum of ₹2,30,000/- was due from the petitioner company. In discharge of the part liability, the petitioner company issued a cheque dated 07.07.2009 for ₹30,000/- drawn on Punjab & Sind Bank, Green Park Extension, New Delhi. The above cheque, when presented for payment, was returned dishonoured with the remark "Payment Stopped" vide a memo dated 14.08.2009. The complainant issued a legal notice of demand dated 19.08.2009 to the petitioners requiring them to pay the amount of dishonoured cheque within 15 days of receipt of the notice along with the remaining dues. Despite of service of notice of demand, the petitioners failed to pay the cheque amount. This resulted in filing of the complaint.

3. Learned Metropolitan Magistrate on consideration of the complaint and preliminary evidence produced in support during inquiry took cognizance of the offence and issued summons for appearance to the petitioners vide impugned order dated 30.09.2009. Feeling aggrieved by the summoning order, the petitioners have preferred this petition seeking quashing of the summoning order.

4. Learned Shri Vijay Aggarwal, Advocate for the petitioners has referred to the judgment of Supreme Court in **Pepsi Foods Ltd. Vs. Special Judicial Magistrate**, 1988 SCC (Crl) 140 and submitted that the impugned summoning order of learned M.M. dated 30.09.2009 is liable to be quashed as it has been passed in a routine manner without application of mind to the allegations in the complaint as also the preliminary evidence adduced in support of the complaint.

5. Firstly, it is contended that the impugned summoning order is liable to be quashed for the reason that learned Metropolitan Magistrate has failed to appreciate that the legal notice dated 19.08.2009 on which the complaint is based is defective as no demand for the cheque amount has been made by the respondent/complainant from the petitioner company.

6. I do not find merit in the above contention. Petitioner himself has placed on record copy of demand notice dated 19.08.2009 served upon him by the respondent complainant. Last paragraph of the demand notice, inter alia, reads thus:

“I hereby through this legal notice of demand call upon you to make the payment of the dishonoured cheque i.e. ₹ 30,000/- and the whole outstanding amount along with interest within 15 days of receipt of this legal notice of demand failing which I have clear instructions from my client to initiate criminal proceedings against you all and for filing civil recovery proceedings against you for recovery of the above amount along with interest and for your winding up under the provisions of Companies Act, needless to say entirely upon your cost, risk and consequences which please note.”

7. From the above, it is apparent that the notice dated 19.08.2009 specifically demanded the amount of dishonoured cheque ₹30,000/- from the petitioners. The respondent indeed has demanded other outstanding dues also. This by itself will not render the demand notice illegal, particularly when the petitioners company is no stranger to the transaction but is the drawer of the cheque in question which was dishonoured. Therefore, on the receipt of demand notice, the petitioners ought to have made payment at least of the cheque amount within a period of 15 days. Similar question about validity of demand notice came up before the Supreme Court in **Suman Sethi Vs. Ajay K. Churiwal and Anr., JT 2000 (1) SC 493**. In the said case also in addition to the cheque amount, the creditor had demanded charges of ₹1500/- spent on the cheque on its presentation and ₹340/- as notice charges. The Supreme Court on consideration of the facts held as under:

“In the notice in question the “said amount”, i.e. the cheque amount has been clearly stated. Respondent No. 1 had claimed in addition to the cheque amount, incidental charges and notice charge. These two amounts are severable. In the notice it was clearly stated that failure to comply with the demand necessary legal steps will be taken up. If respondent no. 1 had paid the cheque amount he would have been absolved from the criminal liability under section 138. Regarding other claims, a civil suit would be necessary.” *United Credit Ltd. Calcutta v. Agro Sales India & Ors. IV (2000) CCR 50 (SC)*, the Supreme Court again considered a notice of demand in which not only the amount covered by the cheque but also some other amount towards interest and cost was demanded by the complainant. The Supreme Court following the law laid down in *Suman Sethi v. Ajay Kr. Churiwal & Anr. (Supra)* held that the notice of demand was valid and in conformity with requirement of Section 138 of the Act.

In view of the law laid down by the Supreme Court, I find no legal infirmity in the demand notice dated 19.08.2009.

8. Learned counsel further submitted that the trial court failed to appreciate that the cheque of the petitioner company was dishonoured not because of paucity of funds in the account of the petitioner, but due to “stop payment instructions” issued by the petitioner as the material supplied by the respondent company was sub-standard. Learned counsel submitted that dishonour of cheque due to stop payment does not meet the ingredients of offence under Section 138 N.I. Act. Therefore, the cognizance taken by the Magistrate vide order dated 30.09.2009 is bad in law. In support of this contention, petitioner has relied upon the judgment of the Supreme Court in the matter of **Raj Kumar Khurana Vs. State (NCT of Delhi), 2009 (3) JCC 181 (NI)**.

9. Learned Shri Dalip K. Sharma, Advocate for respondent No.2 has repelled the contention on the ground that the judgment of Supreme Court in **Raj Kumar Khurana**(supra) is of no avail to the petitioners firstly because it is based upon its own peculiar facts, secondly it is contrary to the view of larger Bench of the Supreme Court in the matter of **Modi Cements Ltd. Vs. Kuchil Kumar Nandi, (1998) 3 SCC 249**.

10. In my considered view, the judgment of Supreme Court in **Raj Kumar Khurana**(supra) does not help the petitioners because it is

based upon its own peculiar facts. In that case, the drawer of the cheque had lodged an FIR with the police claiming that two blank cheques along with some stamp papers were stolen from his office and an information as regards missing cheques was also given to the bank. The cheques when presented for encashment were returned dishonoured by the bank with the remarks "Said Cheque Reported Lost By The Drawer." In the background of aforesaid facts, Hon'ble Supreme Court after analysing Section 138 N.I. Act, inter alia, observed thus:

"10. A bare perusal of the aforementioned provision would clearly go to show that by reason thereof a legal fiction has been created. A legal fiction, as is well known, although is required to be given full effect, has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute itself.

In **State of A.P. and Anr. v. A.P. Pensioners Association and Ors. [(2005) 13 SCC 161]**, this Court held:

"...In other words, all the consequences ordinarily flowing from a rule would be given effect to if the rule otherwise does not limit the operation thereof. If the rule itself provides a limitation on its operation, the consequences flowing from the legal fiction have to be understood in the light of the limitations prescribed. Thus, it is not possible to construe the legal fiction as simply as suggested by Mr. Lalit."

11. Section 138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction. [See **R. Kalyani v. Janak C. Mehta and Ors. (2009) 1 SCC 516** and **DCM Financial Services Ltd. v. J.N. Sareen and Anr. (2008) 8 SCC 1**]. Such a penal provision, enacted in terms of the legal fiction drawn would be attracted when a cheque is returned by the bank unpaid. Such non-payment may either be: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

Before a proceeding thereunder is initiated, all the legal requirements therefor must be complied with. The court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with.

The parameters for invoking the provisions of Section 138 of the Act, thus, being limited, we are of the opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of Section 138 of the Act.”

11. On the other hand, the issue regarding stop payment came up before three Judge Bench of Supreme Court in the matter of **Modi Cements Ltd.** (supra), wherein the Supreme Court has, inter alia, held thus:

“16. We see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawer or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The object of Chapter XVII, which is intitled as "OF PENALTIES IN CASE OF DISHONOR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS" and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this Court in Electronics Trade & Technology Development Corporation Ltd., in paragraph 6 to the effect "Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted", does not fit in with the object and purpose for which the above chapter has been brought on the statute-book.

17. The above view had been referred to in K.K. Sidharthan (supra) as is clear from Paras 5 and 6 of the Judgment. Paras 5 and 6 read as under:-

"5. The above apart, through in the aforesaid case this Court held that even "stop payment" instruction would attract the mischief of Section 138, it has

been observed in para 6, that if "after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course present the cheque to the bank for payment and when it is returned on instruction, Section 138 does not get attracted".

"6. From the facts mentioned above, we are satisfied that in the present case cheques were presented after the appellant had directed its bank to "stop payment". We have said `so because though it has been averred in the complaint that the cheque dated 10-10-1994 was presented for collection on that date itself through the bank of the respondent which is Catholic Syrian Bank Ltd., from the aforesaid letter of the Indian Overseas Branch, we find that the cheque was presented on 15.10.1994 (in clearing). The lawyer's notice to the respondent being of 4th October, which had been replied on 12th from Cochi, which is the place of the respondent, whereas the Advocate who issued notice on behalf of the appellant was at Thrissur, it would seem to us that the first cheque had even been presented after the instruction of `stop payment' issued by the appellant had become known to the respondent".

With the above observations, the complaint under Section 138 of the Act was quashed.

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 Corporation Ltd.*,

"Section 138 of the Act 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 dress presumption that one commits the offence if he issues the cheque dishonestly*"

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

12. From the judgment of the Larger Bench of Supreme Court, it is obvious that the stop payment instructions by the drawer of the

cheque would not absolve the drawer of liability to be prosecuted under Section 138 N.I. Act if the ingredients of the offences are satisfied. It would be seen that in the judgment relied upon by the petitioner, Larger Bench judgment is not discussed nor distinguished. Therefore, going by the law laid down by the Supreme Court in the matter of **Modi Cements Ltd.** (supra), I find no merit in the contention of counsel for the petitioners.

13. Third contention of the petitioner is that the complaint under Section 138 N.I. Act against him is not maintainable for the reason that he had paid the cheque amount to the petitioner vide demand draft dated 08.09.2009 for ₹30,000/- within the requisite period of 15 days from the date of service of demand notice.

14. Above plea of the petitioners is not substantiated by the record. The petitioners have placed on record copy of his letter dated 08.09.2009 addressed to the respondent company vide which he forwarded the pay order dated 08.09.2009 for ₹30,000/- drawn on Punjab & Sind Bank, Green Park, New Delhi in lieu of the amount of dishonoured cheque. On perusal of this letter, it transpires that admittedly, the petitioners received the demand notice dated 19.08.2009 on 21.08.2009. As per the requirement of section 138 N.I. Act, in order to escape the criminal prosecution, the petitioner was required to make payment of demanded amount within 15 days of the date of service of notice. That period expired on 05.09.2009 if

21.08.2009 is excluded while computing the period of 15 days. Admittedly, the pay order for ₹30,000/- vide which payment was made to the respondent is dated 08.09.2009. Therefore, it is apparent that the petitioners have failed to make the payment of cheque amount within 15 days of the receipt of notice of demand. Thus, prima facie, commission of offence under Section 138 N.I. Act is disclosed.

15. It is further submitted by learned counsel for the petitioner that as per Section 147 of N.I. Act, every offence punishable under the Act is compoundable. Learned counsel submitted that in the instant case, admittedly before the filing of the complaint, the petitioners had sent a pay order dated 08.09.2009 for ₹30,000/- drawn on Punjab & Sind Bank to the respondent along with a forwarding letter dated 08.09.2009 against the payment of the dishonoured cheque. The respondent by encashing that pay order, according to the petitioner, has impliedly compounded the offence. Therefore, there was no occasion for learned M.M. to issue process for appearance against the petitioners vide order dated 30.09.2009.

16. I do not find any merit in this contention. On perusal of the record, it transpires that allegations in the complaint constitute all the requisite ingredients of offence under Section 138 N.I. Act. Admittedly, the amount of the dishonoured cheque has not been paid within 15 days of the date of receipt of notice of demand by the petitioners. It is true that after the expiry of requisite period, the petitioner did send a

pay order dated 08.09.2009 to the respondent against the amount of dishonoured cheque and said pay order was encashed by the respondent. But, this by itself does not mean that respondent has compounded the offence. Compounding of an offence amounts to entering into a compromise wherein the complainant agrees to drop the prosecution against the accused. There is no evidence of any such agreement between the parties. In the matter of **Rajneesh Aggarwal Vs. Amit J. Bhalla**, 2001 DCR 1, similar question came up before the Supreme Court, inter alia, observing thus:

“7. So far as the question of deposit of the money during the pendency of these appeals is concerned, we may state that in course of hearing the parties wanted to settle the matter in Court and it is in that connection, to prove the bonafide, the respondent deposited the amount covered under all the three cheques in the Court, but the complainant's counsel insisted that if there is going to be a settlement, then all the pending cases between the parties should be settled, which was, however, not agreed to by the respondent and, therefore, the matter could not be settled. So far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereto will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the Courts trying the offence. But by no stretch of imagination, a criminal proceeding could be quashed on account of deposit of money in the Court or that an order of quashing of criminal proceeding, which is otherwise unsustainable in law, could be sustained because of the deposit of money in this Court. In this view of the matter, the so-called deposit of money by the respondent in this Court is of no consequence.”

17. In view of the above, it is clear that offence under Section 138 N.I. Act was complete when the petitioners failed to pay the demanded cheque amount within 15 days of receipt of demand notice. His subsequent payment was before the filing of the complaint will not

absolve the petitioners of liability of commission of offence, though it may be a mitigating factor in the matter of awarding sentence.

18. In view of the discussion above, I do not find any merit in the petition seeking setting aside of the impugned order dated 30.09.2009 and quashing of complaint.

19. Petition is dismissed.

(AJIT BHARIHOKE)
JUDGE

JUNE 20, 2011
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