

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved On: 9th September, 2011
Judgment Delivered On: 16th September, 2011

+ CRL.M.C.2271/2010

SANTOSH KUMAR GUPTA Petitioner
Through: Mr.Ashok Gurnani, Advocate

versus

STATE & ANR. Respondents
Through: Mr.Pawan Sharma, Standing Counsel
(CrI.) with Mr.Harsh Prabhakar,
Advocate for State/R-1
Mr.Vijay Aggarwal and Mr.Gurpreet
Singh, Advocate for R-2

CRL.M.C.862/2011

SANTOSH KUMAR GUPTA Petitioner
Through: Mr.Ashok Gurnani, Advocate

versus

STATE & ANR. Respondents
Through: Mr.Pawan Sharma, Standing Counsel
(CrI.) with Mr.Harsh Prabhakar,
Advocate for State/R-1
Mr.Vijay Aggarwal and Mr.Gurpreet
Singh, Advocate for R-2

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

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

PRADEEP NANDRAJOG, J.

1. Since litigating parties are the same i.e. Santosh Kumar Gupta, the petitioner and Religare Securities Ltd., the respondent; both captioned petitions are being disposed of by a common order.

2. The subject matter of Crl.M.C.No.2271/2010 is a cheque bearing No.258810 in sum of ₹5,00,000/- drawn on Etah Urban Co-operative Bank Ltd. which when presented for encashment was returned by the said bank with the remark '*Drawer's signature different*' and '*Funds insufficient*'. The subject matter of Crl.M.C.No.862/2010 is a cheque bearing No.258815 in sum of ₹5,00,000/- drawn on Etah Urban Co-operative Bank Ltd. which when presented for encashment was returned by the said bank with the remark '*Drawer's signature different*' and '*Funds insufficient*'.

3. Being the holder of the two cheques, Religare Securities Ltd. filed two complaints against the petitioner alleging that the cheques were issued by the petitioner in discharge of debts accrued to the company. It was pleaded that the petitioner is the beneficiary of facility of trading in shares in NSE and other stock exchanges through the complainant and his account number is SG-511. It was pleaded in the complaint that in spite of notices served after the cheques were returned with the remarks aforesaid, the payment has not been made good.

4. The petitioner had replied to the notices issued and served and with respect to Crl.M.C.No.2271/2010, where the reply is on record pertaining to when cheque No.258810 was

dishonoured. In para 4 and 6 of the reply, the petitioner stated as under:-

“4. That you have deliberately and with mala fide intention presented the said cheque for clearance second time after such a long period notwithstanding that after your telephonic information, my client send a fresh new cheque of the said amount but you had not returned the said cheque in question.

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6. That my aforesaid client has never gave you the said cheque to discharge his debt or any other liability. Section 139 of the Act says that, “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.”

5. I may highlight that the petitioner has in para 4 of the reply admitted having issued the cheque inasmuch as he has pleaded in para 4 of the reply that the company ought not to have presented the cheque as he had wanted the same to be returned to him to enable him to issue a fresh cheque. The reply as per para 6 is obviously a patent lie inasmuch as para 6 conflicts with para 4 of the reply.

6. After the company led pre-summoning evidence, taking cognizance of the complaint, the learned Metropolitan Magistrate summoned the petitioner to face a trial for having violated Section 138 of the NI Act and the petitioner has immediately rushed to this Court pleading that of the various defaults which may result in a cheque being dishonoured, what is made penal by the legislature is only the default of a cheque being dishonoured due to insufficiency of funds. The petitioner

alleges in both complaints that the two cheques were dishonoured due to drawer's signatures being different and thus urges that the learned Magistrate could not take cognizance of the complaints.

7. I may highlight that in both petitions, lists of dates and events have been pleaded by the petitioner. I reproduce the same by extracting the same as pleaded in the two petitions. In Crl.M.C.No.2271/2010 the petitioner, against the date 16.06.2009 has stated: 'The banker of the respondent-ICICI Bank Ltd. returned the aforesaid cheque 258810 vide return memo dated 16.06.2009 with remarks 'drawer's signatures differs' and 'funds insufficient'.' I may highlight that the return memo is not of ICICI Bank but is that of Etha Urban Co-operative Bank Ltd. ICICI Bank Ltd. has simply attached the forwarding note to the return memo inasmuch as it appears that the respondent company had an account with ICICI Bank Ltd. with whom the cheque was deposited for collection. Pertaining to the date 25.5.2009, in the list of dates and events, the petitioner has pleaded: 'The banker of the respondent-HDFC Bank Ltd. returned the aforesaid cheque 258815 vide return memo dated 25.05.2009 with remarks 'drawer's signatures differs' and 'funds insufficient'.' The error even in this plea is the same as that of the preceding cheque.

8. Be that as it may it needs to be highlighted that the petitioner admits that the two cheques were returned as dishonoured cheques on the twin reason of drawer's signatures differing and also funds insufficient.

9. In the decision reported as 2010 (2) Kerala Law Times Devan Vs. Krishna Menon, in para 37, it was observed as under:-

“37. We do in these circumstances reiterate the law thus. If the signature in the cheque is proved to be not genuine, the instrument cannot be reckoned as a cheque and the same cannot attract culpability under S.138 of the Negotiable Instruments Act. But the decision as to whether the signature is genuine and whether the execution is proved will have to be taken by a court, the mere fact that the banker returns the cheque for the reason that the signature differs is no reason for the court to mechanically swallow that reason. The courts are obliged to consider whether the real reason for dishonor is insufficiency of funds or not. We may at the risk of repetition proceed to reiterate that if as a matter of fact the signatures are not genuine and the court finds so, needless to say S.138 of the N.I.Act would not apply. But the endorsement by the banker is not conclusive. The court will have to ascertain the real reason. The challenge on this ground is in these circumstances, rejected.”

10. In the decision reported as (2006) 134 Comp Cas 295 (Karn) Dinesh Harakchand Sankla Vs. Kurlon Ltd. & Ors. it has been observed as under:-

“To decide the second contention of the petitioner, it is beneficial to refer to certain observations made by the apex court in the case of NEPC Micon Ltd. Vs. Magma Leasing Ltd. (1999) 96 Comp Cas 822; AIR 1999 SC 1952, wherein it is observed in paragraph 15 thus:

“In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section

138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above 'brush away the cobweb varnish, and shew the transactions in their true light' (Wilmot C.J.,) or (by Maxwell) 'to carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, to an indirect or circuitous manner that which it has prohibited'. Hence, when the cheque is returned by a bank with an endorsement 'account closed', it would amount to returning the cheque unpaid because 'the amount of money standing to the credit of that account is insufficient to honour the cheque' as envisaged in Section 138 of the Act.

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The bank has also returned the cheques on the ground that the drawer's signatures found on the cheques differ. It is, but, natural for the bank to return the cheques if the drawer's signature differs from the original signature found in the bank records. It is known only to the drawer as to why he made such signatures that too on series of cheques, which differ from the signature found in the original records of the bank. The reason is obvious. In this context, the contention of learned counsel for the respondent that intentionally the drawer must have changed his signature with the sole intention that the cheques should not be honoured, cannot be lightly brushed aside.

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As observed by the apex court in the case of NEPC Micon Ltd. Vs. Magma Leasing Ltd. (1999) 96 Comp Cas 822; AIR 1999 SC 1952, cited supra, it is the duty of the court to interpret Section 138 of the Negotiable Instruments Act consistent with the legislative intent and purpose, so as to suppress the mischief and advance the remedy. Section 138 of the Negotiable Instruments Act has created "contractual breach" as an offence and the legislative purpose is to promote efficacy of banking and for ensuring that in commercial or contractual transaction, cheques are not dishonoured and credibility in transacting business through cheques is maintained. It is no doubt true that Section 138 of the Negotiable Instruments Act, if read plainly, would disclose that the drawer of the cheque would be responsible to be proceeded with for the offence under Section 138 of the Negotiable Instruments Act if the cheque is returned with an endorsement of "insufficient funds" or the amount involved in the cheque exceeds the amount arranged to be paid from that account by an agreement made with that bank. To overcome the said provision in a circuitous way, the drawer of the cheque may find various ways of getting the cheques bounced or returned with the sole purpose of defeating the encashment of the cheques. In such a situation, the question is as to whether the courts can shut their eyes? The answer would be obviously in the "negative". If the drawer intentionally tempers with the cheque or issues the cheque with difference in signature, etc., the cheques will be definitely returned. Even after service of statutory notice, if the amounts involved in the cheque are not paid by the drawer of the cheque, then his intentions are prima facie clear, to the effect that he would be tampering with the cheques only with an oblique motive. If in such case, the person in whose favor the cheques are issued is not

allowed to prosecute the matter under Section 138 of the Negotiable Instruments Act, the very purpose of enacting Section 138 of the Negotiable Instruments Act would be frustrated. The drawer of the cheque will have to take abundant precaution while issuing the cheques so that the cheques should be honoured and contractual obligations are fulfilled. In case, the drawer issues cheques as in the case on hand, he will be doing so in a circuitous manner in order to save his skin, only to take advantage of the absence of specific words under Section 138 of the Negotiable Instruments Act.

Even when the cheque is dishonoured by the reason of “alteration in date and drawer’s signature differs”, the court has to presume by virtue of Section 139 of the Negotiable Instruments Act that the cheques are received by the holder for the discharge, in whole or in part, of any debt or liability. Of course, this is a rebuttable presumption. The accused alone can show to the court that the alteration in signature and date were not made because of insufficiency or paucity of funds.

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Even otherwise, the drawer of the cheque may also come within the purview of Section 420 of the IPC in these cases as he would be committing the offence of cheating, if he intentionally issued the cheques in question. As the criminal cases are still in the preliminary stage and charges are yet to be framed, it is always open for the court below to frame charges for the offence under Section 420 of the IPC, if the material on record at that stage of the proceedings disclose such offence. It is to be noted that the first information or complaint is not an encyclopedia to contain all the particulars and the sections under which the offences are committed. Mere omission to

mention any or more penal sections in the FIR would not ipso facto deter the concerned court to proceed further for the concerned offences. It is always open to the court to frame charges for different offences, other than and in addition to the offences which are mentioned in the FIR, if ultimately the material on investigation discloses such offences. Thus the criminal proceedings cannot be scuttled, on that technical score, at this initial stage. If the process is stopped at this stage, it may lead to travesty of justice. The substance of the allegations found in the first information or complaint is relevant and not the mere format or the sections, for the purposes of proceeding further. In view of the same, there is no bar for the court below to proceed further as the complaint also discloses the offence punishable under Section 420 of the Indian Penal Code along with the offence under Section 138 of the Negotiable Instruments Act.”

11. The ratio of the two decisions squarely applies to the instant case where we have proof that there were insufficient funds in the account and it hardly mattered whether drawer’s signatures were different. In any case, it would be a matter of evidence whether the petitioner acted dishonestly by camouflaging his signatures to cover the real reason i.e. insufficiency of funds in his account i.e. the real reason for the cheques being dishonoured was the insufficiency of funds in the account on which the cheques were drawn. Further, fully concurring with the last quoted paragraph above from the preceding decision it would also surface that prima facie an offence of cheating would also be made out and the learned Metropolitan Magistrate can even take cognizance of the same.

12. The two captioned petitions are dismissed and since the transaction was commercial and noting the prima facie dishonesty in the stand of the petitioner I impose cost (one set) in sum of ₹25,000/- to be paid by the petitioner to respondent No.2.

(PRADEEP NANDRAJOG)
JUDGE

SEPTEMBER 16, 2011
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