

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. A. No. 294/2011

% Judgment decided on: 26th May, 2011

M/s THE JAMMU & KASHMIR BANK Appellant

Through: Mr. N.S. Ahluwalia and
Mr. Brijesh Choudhary,
Adv.

Versus

ABHISHEK MITTAL ...Respondent

Through: Mr. A.K. Tiwari, Adv.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | Yes |

A.K. PATHAK, J. (Oral)

1. This appeal is directed against the judgment dated 16th August, 2010 passed by the Trial Court whereby respondent has been acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short hereinafter referred to as 'the Act').

2. It is the case of the appellant that M/s Akansha Machine Tools, a sole proprietorship firm of respondent's father, was enjoying temporary overdraft facility from the appellant. Shri Jitender Sharma was the then Branch Manager of the appellant. Respondent, in discharge of liability

of M/s Akansha Machine Tools, issued three cheques bearing numbers 224600 dated 06.03.2006 for ₹2,25,000/-, 224598 dated 10.03.2006 for ₹1,00,000/- and 224599 dated 06.03.2006 for ₹1,00,000/- all drawn on Bank of Punjab Ltd. Noida, U.P., in favour of appellant. On presentation, cheques were returned dishonored for the reason “insufficient funds”. The amount involved in the cheques was not paid by the respondent within the statutory period despite service of demand notice. Thus, respondent had committed offence under Section 138 of the Act.

3. At the pre-summoning evidence appellant examined Mr. Jitender Sharma as CW1. He tendered his evidence by way of affidavit. Trial Court took cognizance of offence and summoned the respondent. Notice under Section 251 Cr.P.C. was framed against him. He pleaded not guilty and claimed trial. During the trial, Shri Devender Kumar Magotra, Authorized Representative of appellant, was examined as PW1. He filed his affidavit in his examination-in-chief, reiterating the averments made in the complaint. He has fully supported the appellant’s version. He proved the cheques in question as Ex. PW1/2 to PW1/4. Cheque returning memos have been proved as Ex. PW1/5 to PW1/7. Demand notice was proved as PW1/8. Postal receipts were proved as PW1/9 and PW1/10. This witness was cross-examined by the respondent’s counsel at length.

4. After appellant concluded its evidence, statement of respondent under Section 313 Cr.P.C. was recorded by the Trial Court on 31st July, 2010. So far as issuance of cheques in question are concerned, respondent stated that he was having personal relations with Shri Jitender Sharma and, therefore, had given the cheques in question to him in good faith. He admitted his signatures on these cheques. However, he took a plea that particulars in the said cheques were not filled up by him. He also admitted that the cheques had been returned dishonored due to the reason “insufficient funds”. In answer to a question that whether he wanted to lead any evidence in his defence, he replied in negative.

5. Trial Court has taken note of the fact that neither the issuance of cheques nor its dishonourment for the reason “insufficient funds” was in dispute, inasmuch as, the cheque amount had not been paid despite service of notice. At the same time, it has returned a finding that ingredients of offence under Section 138 of the Act were not attracted since the cheques had not been issued by the respondent towards discharge of his personal liability. This view has been taken by the Trial Court in para nos. 8 and 9 of the judgment which reads as under:-

“8. One of the ingredients of offence u/s 138 NI Act is the legal liability of the accused to pay the cheque amount. CW/1/AR of complainant in his cross

examination has admitted that the accused was not having any legal liability towards the complainant. Therefore, in view of provisions of Section 138 NI Act, the complainant has not fulfilled the requirement of Section 138 NI Act.

9. In view of my above mentioned observations, this Court is of the opinion that the accused did not any have legally enforceable liability to pay any amount to the complainant, therefore, no offence u/s 138 NI Act has been committed by the accused. In view of my above mentioned findings, accused stands acquitted.”

6. In this case, issuance of cheque, its presentation and dishonourment are not in dispute, inasmuch as, the same has been duly proved on the basis of cogent evidence. In his statement under Section 313 Cr.P.C., respondent has admitted having handed over the cheques to Shri Jitender Sharma with whom he has alleged that he was having friendly relations. It may be noted here that Shri Jitender Sharma was Branch Manager of the appellant. The plea taken by the respondent that the blank cheques had been given by him is of no consequence. Respondent has admitted his signatures on the cheques. There is no law that a person drawing the cheque has to necessarily fill it up in his own handwriting. Respondent has not denied his signatures on the cheques. Once he has admitted his signatures on the cheques he cannot escape his liability on the ground that the same has not been filled in by him. When a blank cheque is signed and handed over, it means that the person signing it has given

implied authority to the holder of the cheque, to fill up the blank which he has left. A person issuing a blank cheque is supposed to understand the consequences of doing so. He cannot escape his liability only on the ground that blank cheque had been issued by him. As regards handing over of the cheques to the appellant is concerned, same is not in dispute since respondent has admitted that he had handed over the cheques to Shri Jitender Sharma, who happens to be Branch Manager of the appellant at the relevant time. Cheques had been drawn in favour of "J & K Bank Ltd. A/c Akansha Machine Tools". This shows that cheques had been issued to discharge liability of the said firm.

7. Once issuance of the cheque has been admitted or stands proved, a presumption arises in favour of the holder of the cheque that he had received the cheque of the nature referred to under Section 138 of the Act for the discharge, in whole or in part of any debt or any other liability. This presumption arises in favour of the holder under Section 139 of the Act which envisages that it shall be presumed unless the contrary is proved that the holder of a cheque received the cheque of the nature referred to under Section 138 of the Act for discharge, in whole or in part of any debt or any other liability. Of course, this presumption is a rebuttable presumption and same can be rebutted only by the person who had drawn the cheque. Accordingly, a presumption

arises in favour of the appellant and against respondent that the cheque had been issued in discharge of any debt or other liability. It was for the respondent to rebut this presumption which he has miserably failed to do so.

8. Trial Court has acquitted the respondent solely on the ground that the cheques had not been issued by him in discharge of his any legally enforceable liability. Trial Court was carried away from the answers given by the PW1, in his cross-examination, that the respondent had no relations with M/s Akansha Machine Tools nor was he the actual recipient of the loan; that he did not have any personal liability to pay any amount to the appellant. Thus, sole question which needs to be redressed is whether the ingredients of Section 138 of the Act would get attracted even in such cases where drawer has issued a cheque not in discharge of his own liability but in order to discharge any debt or other liability of someone else.

9. Section 138 of the Act reads as under:-

“138. 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 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 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.

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

10. The language employed in Section 138 of the Act makes it ample clear that this Section does not confine its operation to the cases where cheque had been issued by a person in favour of other in discharge of his own personal debt or other liability. Section 138 of the Act is attracted in relation to cheque issued by a person to another for discharge of any debt or other liability. The explanation further specifies that such debt or other liability shall be legally enforceable. This Section provides for discharge of debt or other liability by a person even if it is a debt or other liability of another.

11. In ***ICDS Ltd. Vs. Beena Shabeer & Another (2002) 6 SCC 426***, cheque issued by the guarantor to discharge the debt of principal borrower was in question. High Court held that being a cheque from the guarantor it could not be said to have been issued for the purpose of discharging any debt or liability. Supreme Court while reversing this finding held 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 above noted 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.”

12. In ***Komalam Gopi vs. T.K. Mohankumar and Anr.***

MANU/KE/0504/2008, wife had issued a cheque in favour of payee in discharge of liability of her husband. Plea taken by her that ingredients of offence under Section 138 of the Act were not attracted, since she had not issued the cheque in discharge of her liability, was rejected. It was held as under:-

“3.....It needs to be noticed that Section 138 of the N.I. Act comes into play in relation to cheques issued by a person to another person for the discharge, in whole or in part, of any debt or other liability. The explanation at the foot of that section provides that “debt or other liability” means a legally enforceable debt or other liability. Neither does that explanation, nor the charging provision in Section 138 confines its operation to be only in relation to cases where cheques are issued in discharge of debt or liability of the person issuing the cheque. The law provides for discharge of debt by a person, even if it is a debt of another. Such transactions, where one

discharges debt of another, is an instance of discharge of debt or other liability. If 'A' discharges a legally enforceable debt or other liability of 'B', by making a payment to 'C', then, if that is done by 'A' issuing a cheque to 'C', it becomes a cheque issued in discharge of the legally enforceable debt or other liability of 'B' and is therefore, debt or other liability for the purpose of Section 138 of the N.I. Act. So much so, the arguments on behalf of the accused that she issued the cheque for discharge of liability of her husband DW4 would not save her from the penal provision of Section 138 of the N.I. Act."

13. It is, thus, clear that for whatever reason if a cheque is drawn on an account maintained by a drawer with its bank in favour of any person for the discharge of "any debt or other liability" the ingredients of offence under Section 138 of the Act gets attracted in case the cheque is returned dishonored for insufficiency of funds and the cheque amount remains unpaid within the statutory period, despite service of notice. Legislature has been careful enough to record not only discharge in whole or in part of any debt but the same also includes other liability as well. The words 'any' and 'other liability' used in the Section assumes importance in the sense that if a cheque is issued by a person to discharge any debt or other liability of another person it would attract the penal consequences under Section 138 of the Act. Accordingly, the view taken by the Trial Court is perverse being contrary to the settled legal position and has resulted in 'miscarriage of justice'.

14. For the foregoing reasons, acquittal of the respondent is set aside and he is convicted under Section 138 of the Act.

15. Section 138 provides that a person guilty for the offence be punished with imprisonment for a term which may be extended to two years or with fine which may extend to twice the amount of cheque or with both. Having regard to the facts and circumstances of this case, respondent is sentenced to simple imprisonment for six months with fine of ₹5,00,000/-; in default of payment of fine to further undergo simple imprisonment for 3 months. Out of the fine so deposited, a sum of ₹4,75,000/- be paid to the appellant/complainant. Respondent to surrender before the Trial Court forthwith. In case he fails to do so Trial Court shall take him in custody and remit him to Superintendent, Tihar Jail, Delhi. Copy of this order be sent to Trial Court for compliance.

16. Appeal is allowed in the above terms.

A.K. PATHAK, J.

May 26, 2011
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