

* **THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.M.C. 1136/2011**

Reserved on: 14.12.2011
Pronounced on: 11.01.2012

DEEPAK VIG Petitioner
Through: Mr. Harish Malhotra, Senior Advocate
with Mr. V.L. Madan and Mr. K.K.
Madan, Advocates
versus

AVDESH MITTAL Respondent
Through: Mr. Ashish Middha and Mr.Y.R. Yadav,
Advocates.

CORAM:
HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. This petition under section 482 Cr. P.C. read with section 227 of the Constitution of India is preferred against the impugned order dated 23.12.2009 of learned Metropolitan Magistrate whereby in a complaint case under section 138 of Negotiable Instrument Act (for short 'the Act'), filed by the respondent herein, he ordered for issuance of summons to the petitioner.

2. Though the facts of the case are plain and simple, but, there is an interesting legal issue. By virtue of lease agreement dated 14.08.2008 arrived at between the petitioner/lessee and respondent/lessor the property of respondent situated at E-582 Greater Kailash – II, New Delhi was taken by the petitioner for the purpose of running a guest house for a period of five years on an agreed monthly rent of ₹ 19.00 lakh subject to increase in the rent as per said agreement. The lease was to

come into force from 01.09.2008. The lease stipulated a lock-in period of one year before the contract could be terminated. One month's rent was to be payable in advance by the lessee/petitioner in case of termination of the lease deed. The relevant portions of the lease deed dated 14th August, 2008 read as follows:

- i. Clause 4 – “That the lessee shall pay a total sum of ₹ 1,50,00,000/- (Rupees One Crore Fifty lacs Only) by way of Interest free Security Deposit against the demised premises”
- ii. “The amount shall be retained by the lessor as interest free deposit and will be refundable at the time of termination of the said lease against handing over the vacant possession of the demised premises to the lessor”
- iii. Clause v sub clause (b) of clause 4 – “The lessor shall refund the security deposit immediately after taking over the possession of the property, in the case of default or delay in refund of the amount an interest of 36 % per annum on the amount will be charged till the whole of the security deposit is refunded”
- iv. Clause 2 sub clause (iv)- “The lessee shall keep the demised premises in a clean and hygienic condition at their own cost. The maintenance contract for all the items provided by the Lessor shall be borne by the Lessee. Full comprehensive annual maintenance contract for general air conditioner will be taken with ETA General by the Lessee”
- v. Clause 2 Sub Clause (vii)- “The lessee shall repair....”
- vi. Clause 2 Sub Clause (ix)- “The Lessee shall keep the interior of the demised premises...damage or breakage caused by the lessee shall be made good by the lessee”
- vii. Clause 2 Sub clause (x)- “Maintainence responsibility....arising from negligence or misuse on the part of the Lessee.
- viii. Clause 3 Sub clause (iii)- “That the Lessor provided the electricity connection... If there is a requirement of the extra load to run the business smoothly it will be done at the cost of the lessee.....

3. In pursuance of the said agreement, the petitioner gave five cheques of the amounts of ₹5.00 lakh, ₹57.00 lakh, ₹16.00 lakh, ₹20.00 lakh and ₹52.00 lakh to the respondent. [Out of these five cheques, three cheques of ₹57.00 lakh, ₹16.00 lakh and ₹20.00 lakh were dishonoured on presentation by the bankers of the petitioner with the remarks “insufficient funds”]. Fresh cheques of these amounts were issued by the petitioner. Out of these three fresh cheques, two cheques of ₹16.00 & ₹ 20.00 lakh respectively dated 04.08.2009 and 11.08.2009 again got dishonoured on account of “payment stopped”. The respondent/complainant issued two separate legal notices to the petitioner in respect of these two dishonoured cheques. These

notices were replied by the petitioner on 24.08.2009. Thereafter, the respondent filed the complaint case against the petitioner under section 138 of the Act, the cognizance of which was taken by the MM and the impugned order was passed summoning the petitioner.

4. There does not appear to be any dispute with regard to the facts as briefly noted above. The only contention that was raised by the petitioner in assailing the impugned order was that the cheques were not issued in discharge of any 'debt' or 'liability' but were issued as interest free security deposits and so the provisions of section 138 of the Act were not applicable. The learned counsel for the petitioner sought to rely upon the judgments of **(1) Joseph Vilangadan Vs. Phenomenal Health Care Services Ltd**, Cri (Writ) No. 2243 of 2009; **(2) M.S. Narayana Menon Vs. State of Kerala**, (2006) 6 SCC 39 and **(3) K.S. Bakshi Vs. State**, 146 (2008) DLT.

5. Per contra, the contention of learned counsel for the respondent/ complainant was that the cheques were forming part of the security amount of ₹1.5 crore which was the fundamental term of the lease agreement and that these formed part of the consideration of the contract and were given by the petitioner in discharge of his liability of payment of security and so the provisions of section 138 of the Act were applicable. The reliance was sought to be placed on the cases of **K.S. Bakshi & Anr. Vs. State and Anr.** 146 (2008) DLT 125; **S. Thangamani Vs. R.S.T. Steels**, 2001 107 Comp. Cas. 205.

6. I have heard learned counsel for the parties and perused the record.

7. Section 138 of the Act provides that wherein any cheque was drawn by a person for the payment of any amount of money to another person for the discharge, in whole or in part, of any debt or other liability, and it was returned by the drawer's

bank because the amount in the drawer's account was insufficient to honour the cheque or it exceeded the amount arranged to be paid to such persons, shall be deemed to have committed offence. Of course, before the offence is deemed to be committed, various other conditions are also required to be fulfilled with which this court is not concerned for the decision in the instant case. The important ingredient under section 138 of the Act with which we are concerned in this case is that the cheque must have been issued in discharge of in whole or in part of any debt or other liability. A plain reading of this provision would mean that if the cheque is not issued for the discharge of any debt or other liability, this section could not be invoked. It is trite that if the cheque is issued only as security for the performance of certain contract or agreement and not towards discharge of any debt or any other liability, the offence under section 138 of the Act is not attracted. In the case of **M.S Narayana Menon** (Supra) the accused as also the complainant were stock brokers. The complainant entered into certain transactions on behalf of the accused. Cheque issued by the accused in favour of the complainant was dishonoured. The plea that was taken by the accused was that the complainant was in dire need of financial assistance and the said cheque was issued to enable him to tide over his financial necessities and it was not in discharge of any debt or liability payable to the complainant. The Supreme Court held that the defence is acceptable as probable and the cheque could not be said to have been issued in discharge of a debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the preview of section 138 of the Act. In the case of **Joseph Vilangadan** (Supra) the facts were that the Directors had given certain cheques as refundable security deposits to ensure due performance of their work. In the given facts and circumstances it was held that there did not exist any debt or liability and the cheques were given solely for the purpose of security and hence no action under section 138 of the Act was maintainable. In the case of **K.S. Bakshi & Anr.**

(Supra) there was an agreement between the parties to construct a multi-storey residential building and certain sum was payable by the accused/appellant as security to ensure performance of the contract. A few cheques given as security for that purpose got dishonoured. Having regard to the terms of the agreement, it was held that the accused had a liability to pay the security amount to the complainant who was the owner of the said property and the discharge of this liability was stated as fundamental to the agreement. It was held that it was irrelevant whether such money was retained or returned in future. What was relevant for the purpose of section 138 of the Act was the fact that at the time of issuance of the cheque the accused company had liability to pay money to the complainant as the owner of the property. The promise/act of the complainant and the other owner of the said property of blocking their assets for a considerable period was held to be consideration as per section 2(d) of the Indian Contract Act and consequently the reciprocal obligation of the builder regarding security cheques to ensure performance of the contract would also be consideration for the contract. With these observations it was held that cheques formed part of the consideration of the contract and was payable towards liability. A distinction was 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.

8. This Court in the case of **Magnum Aviation Vs. State**, 2010 (172) DLT 91 in para 8 observed as under:

“8. If at the time of entering into a contract it is one of the conditions of the contract that the purchaser has to pay the amount in advance then advance payment is a liability of the purchaser. The seller of the items would not have entered into contract unless the advance payment was made to him. A condition of advance payment is normally put by the seller for the reason that the purchaser may not later on retract and refuse to take the goods either manufactured for him or procured for

him. Payment of cost of the goods in advance being one of the conditions of the contract becomes liability of the purchaser. The purchaser who had issued the cheque could have been asked to make payment either by draft or in cash. Since giving cheque is a mode of payment like any other mode of payment, it is normally accepted as a payment. The issuance of a cheque at the time of signing such contract has to be considered against a liability as the amount written in the cheque is payable by the person on the date mentioned in the cheque. Where the seller or manufacturer, on the basis of cheques issued, manufactures the goods or procures the goods from outside, and has acted upon the contract, the liability of the purchaser gets fastened, the moment the seller or manufacturer acts upon the contract and procures the goods. If for any reason, the seller fails to manufacture the goods or procure the goods it is only under those circumstances that no liability is created. However, where the goods or raw material has been procured for the purchaser by seller or goods have been manufactured by the seller, it cannot be said that the cheques were not issued against the liability. I consider that if the liability is not construed in this manner, the sole purpose of making dishonour of the cheque as an offence stands defeated. The purpose of making or enacting Section 138 of the N.I. Act was to enhance the acceptability of cheque in settlement of commercial transactions, to infuse trust into commercial transactions and to make a cheque as a reliable negotiable instrument and to see that the cheques of business transactions are not dishonoured. The purpose of Negotiable Instrument Act is to make an orderly statement of rules of law relating to negotiable instruments and to ensure that mercantile instruments should be equated with goods passing from one hand to other. The sole purpose of the Act would stand defeated if after placing orders and giving advance payments, the stop payments are issued and orders are cancelled on the ground of pricing of the goods as was done in this case.”

9. Having discussed the law on the point as above, the answer to the controversy to my mind is very simple. Section 139 of the Act states that it shall be presumed unless contrary is proved that the holder of a cheque received the cheque of a nature referred to in section 138 of the Act against discharge in whole or in part of any debt or other liability. Thus, section 139 raises presumption that the cheque was given for consideration. This issue has already been settled by several judicial pronouncements of the Supreme Court. Reference is made to the case of **Maruti Udyog Ltd. Vs. Narender and Ors.** JT 1998 (9) SC 411 and **MMTC Ltd. Vs. Medchl Chemicals & Pharma (P) Ltd.** In the later case it was held as under:

“15. A similar view has been taken by this Court in the case of **M.N. Beena Vs. Muniyappan** reported in 2001(7) Scale 331, wherein again it has been held that under Section 139 of the Negotiable Instruments Act the Court has to presume, in complaint under Section 138, that the cheque had been issued for a debit or liability.

16. There is therefore no requirement that the Complainant must specifically allege in the complaint that there was a subsisting liability. The burden of providing that there was no existing debit or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability.”

10. Keeping in mind that there was a distinction between cheque issued merely as security and the cheque issued towards discharge of a liability to pay notwithstanding that the money is by way of security for due performance of the contract, it is seen that the payment of security amount of ₹1.5 crore by the petitioner was a fundamental term of the lease agreement between the parties. This is irrespective of the fact that the said security was refundable at the time of vacation of the premises by the petitioner. What was relevant was that the aforesaid cheque formed part of the security deposit which was payable by the petitioner as a liability to the complainant. The cheques were not given as security per se, but were issued towards discharge of liability of payment of security. In consideration of this security, the respondent agreed to remain deprived of the possession of the lease property for a certain period. The lease deed entered into between the parties constituted a valid contract between them. The interest free security deposit amount of ₹1.5 crore to be paid by the petitioner to the respondent constituted his liability as against the lessor as it formed a part of the consideration of the contract for the use of the property by the petitioner as lessee.

11. In the case of **S. Thangamani** (surpa) it was held that:

“With regard to the point in relation to security, I am of the view that whether the cheque was given as security or towards discharge of liability is a question to be decided by the Trial Court during the course

of trial. Therefore, the point regarding issuance of cheque as security cannot be urged at this stage before this Court.”

12. From all these prima facie it is established that the dishonoured cheques were issued towards the discharge of a liability notwithstanding the fact that the money was by way of security deposit for the due performance of the terms of the agreement and was refundable at the time of vacation of the premises.

13. In view of my above discussion, I am of the considered view that the impugned order does not suffer from any infirmity or illegality and that being so, the petition is hereby dismissed.

M.L. MEHTA, J.

JANUARY 11, 2012

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