

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

Reserved on: 13th February, 2013
Pronounced on: 21st February, 2013

+ **CRL.M.C. 2782/2010**

R N MALHOTRA Petitioner

Through: Mr.Praveen Kumar, Advocate

versus

BHUPESH KUMAR JAIN & ORS. Respondents

Through: Mr. Surender Chauhan, Advocate for R-1
Mr. S.K.Kalia, Advocate for R-3

+ **CRL.M.C. 2783/2010**

R N MALHOTRA Petitioner

Through: Mr.Praveen Kumar, Advocate

versus

SURENDER KUMAR JAIN & ORS. Respondent

Through: Mr.Surender Chauhan, Advocate for R-1
Mr.S.K.Kalia, Advocate for R-3

+ **CRL.M.C. 2785/2010**

R N MALHOTRA Petitioner

Through: Mr.Praveen Kumar, Advocate

versus

SURENDER KUMAR JAIN & ORS. Respondent

Through: Mr.Surender Chauhan, Advocate for R-1
Mr.S.K.Kalia, Advocate for R-3

+ **CRL.M.C. 2786/2010**

R N MALHOTRA Petitioner

Through: Mr.Praveen Kumar, Advocate

versus

BHUPESH KUMAR JAIN & ORS. Respondent
Through: Mr. Surender Chauhan, Advocate for R-1
Mr. S.K.Kalia, Advocate for R-3

+ **CRL.M.C. 2787/2010**

R N MALHOTRA Petitioner
Through: Mr.Praveen Kumar, Advocate

versus

DHANESH KUMAR JAIN & ORS. Respondent
Through: Mr. Surender Chauhan, Advocate for R-1
Mr. S.K.Kalia, Advocate for R-3

+ **CRL.M.C. 2788/2010**

R N MALHOTRA Petitioner
Through: Mr. Praveen Kumar, Advocate

versus

DHANESH KUMAR JAIN & ORS. Respondent
Through: Mr.Surender Chauhan, Advocate for R-1
Mr.S.K.Kalia, Advocate for R-3

+ **CRL.M.C. 2789/2010**

R N MALHOTRA Petitioner
Through: Mr.Praveen Kumar, Advocate

versus

DHANESH KUMAR JAIN & ORS. Respondent
Through: Mr. Surender Chauhan, Advocate for R-1
Mr. S.K.Kalia, Advocate for R-3

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. By virtue of these seven Petitions, Petitioner R.N Malhotra seeks quashing of the seven complaints filed by Respondent No.1 for an offence under Section 138 of the Negotiable Instruments Act, 1881 (the Act).
2. Quashment of the complaints is sought on two grounds. First, the Petitioner was incapacitated to honour the cheques by virtue of a judicial order dated 07.01.2008 passed by the Company Law Board (CLB) whereby Respondent No.2 M/s. Pearl India Publishing House Pvt. Ltd. was restrained from honouring any cheque already issued by the Company; and secondly, during pendency of the Complaints under Section 138 of the Act, the company went into liquidation and winding up proceedings were initiated by the Company Court and thus, the proceedings before the Court of learned Additional Chief Metropolitan Magistrate (ACMM) cannot continue for want of permission from the Company Court.
3. It is not in dispute that around 45 post dated cheques were issued on different dates by M/s. Pearl India Publishing House Pvt. Ltd. for various invoices in respect of seven complaints with the dates between 28.09.2007 to 16.03.2008. According to the Petitioner, there were three Directors in the company (M/s. Pearl India Publishing House Pvt. Ltd.), namely, R.N. Malhotra, (Petitioner herein), S.K. Malhotra and Y.N. Malhotra (Respondent No.3 herein). In the year 2005 S.K. Malhotra, one

of the Directors of Respondent No.2 company passed away and Mrs. Nirmal Malhotra his widow became Director in his place. Some disputes arose between the Directors of Respondent No.2 Company as a consequence thereof, a Company Petition No.100/2006 title *Nirmal Malhotra & Ors. v. Suman Prakashan Pvt. Ltd.* filed in the CLB. Respondent No.2 Company was arrayed as Respondent No.2 in the said Company Petition. It is the case of the Petitioner that on 07.01.2008 an order was passed by the CLB whereby all the cheques issued by Respondent No.2 were ordered to be cancelled and Respondent No.2 was directed to issue fresh cheques signed by all the three Directors. On 10.01.2008, the Petitioner wrote a letter to Respondent No.1 requesting him to return the cheques issued by Respondent No.2 as the same stood cancelled. It is alleged that Respondent No.1 instead of complying with the order dated 07.01.2008 presented all the cheques and after service of the demand notice filed seven complaints. The Petitioner also raised a plea of goods being defective and substandard. The same, however, would not be relevant for the purpose of decision of the instant Petitions. The said contention, therefore, has not been raised on behalf of the Petitioner.

4. To appreciate the contention raised on behalf of the Petitioner, it would be apposite to extract the order dated 07.01.2008 purported to be passed by the CLB. It reads as under:-

“Parties have agreed that an(illegible) and it be carried out by an independent(illegible) from 1/4/04 only will be done.

In so far as operations of books of accounts is concerned it has been agreed that they will be jointly operated by P1, R3 and R6 in respect of both the companies. Accordingly so ordered and the Banks was to be abided of the same.

The cheques now with the company/parties shall be returned and the company will issue the fresh cheques and use only the fresh cheques.

All the cheques already issued and which have not yet been encashed will be cancelled and fresh cheques signed by all the directors would be issued after satisfaction.....”

5. In pursuance of the earlier said order, the Petitioner wrote a letter dated 10.01.2008 requesting Respondent No.1 to return the cheques. The letter reads as under:-

*“M/s. Dhanesh Paper Mart
2358/7, Chatta Shahji
Chawri Bazar
Delhi-110 006.*

Dear Mr. Jain,

This is with reference to the Order dated 7-01-2008 issued by the Hon’ble Company Law Board in CP No.100 of 2006 titled Mrs. Nirmal Malhotra Vs. Suman Prakashan Pvt. Ltd. & Others.

As per the orders of the Hon’ble Company Law Board, all the cheques already issued which have not yet been encashed will be cancelled and fresh cheques signed by all the directors shall be issued.

To implement this order, please return all cheques in your possession that have been issued by us to enable us to issue fresh cheques.

Thanking you,

*Yours faithfully,
For Pearl (India) Publishing House Pvt. Ltd.
Sd/-
(R.N. Malhotra)
Director”*

6. Respondent No.1 responded to the letter dated 10.01.2008 stating that Respondent No.1 was not aware of any order passed by the CLB. Respondent No.1 at the same time requested the Petitioner as also Respondent No.2 company along with other directors to transmit him copy of the order dated 07.01.2008 passed by CLB and also to replace the cheques issued to Respondent No.1. The reply to the letter written by the Petitioner is extracted hereunder:-

“.....Our client Shri Surender Kumar Jain s/o Late Sh. Daroga Mal Jain, sole proprietor of M/s. Dhanesh Paper Mart, 2358/7, Chatta Shah Ji, Chawri Bazar, Delhi-110 006, have placed your letter dated 10.01.2008 in our hands with the instructions to reply the same as follows:-

- 1. That in discharge of your liability to clear the pending bills/invoices you had issued post dated cheques in favour of Our client the details of the same is provided to you and is again reproduced herein below for your reference.*

<i>Sl. No</i>	<i>Bill No.</i>	<i>Date</i>	<i>Amount</i>	<i>Cheque No.</i>	<i>Date</i>
<i>1.</i>	<i>1086</i>	<i>16.1.2007</i>	<i>2,15,764=00</i>	<i>035335</i>	<i>15.11.2007</i>
<i>2.</i>	<i>1119</i>	<i>29.01.2007</i>	<i>1,40,120=00</i>	<i>035687</i>	<i>30.11.2007</i>
<i>3.</i>	<i>1140</i>	<i>08.02.2007</i>	<i>2,80,576=00</i>	<i>035688</i>	<i>23.01.2008</i>
<i>4.</i>	<i>1159</i>	<i>15.02.2007</i>	<i>18,244=00</i>	<i>035735</i>	<i>14.12.2007</i>
<i>5.</i>	<i>1175</i>	<i>23.02.2007</i>	<i>2,62,365=00</i>	<i>035901</i>	<i>22.12.2007</i>
<i>6.</i>	<i>1198</i>	<i>07.03.2007</i>	<i>1,48,097=00</i>	<i>035902</i>	<i>15.03.2008</i>
<i>7.</i>	<i>1598</i>	<i>23.10.2007</i>	<i>46,138=00</i>	<i>Cheque not received</i>	

- 2. That as on date an amount of ₹11,11,304/- is due to be paid by you the above named addressee and you on one pretext or the other delaying the payment of the cheques already issued by you by not allowing Our Client to present the cheques despite of their due dates. As and when Our Client requested you for the presentation of cheques upon their due dates you gave one story or the other and now you have issued the letter under reply with sole intention to delay the payment of the cheques which are already outstanding.*

3. *Take notice that firstly the order referred by you in your letter under reply is not binding on Our Client, as Our Client was neither a party to the said proceedings and nor have participates in the said mater at any point of time. Still you are called upon to provide the certified copies of complete proceedings along with order sheets of the case titled Mrs. Nirmal Malhotra Vs. Suman Prakshan Pvt. Ltd. & Others in CP No.100 of 2006. Our Client reserves his legal rights to challenge the same if any order is passed against Our Client only after reading the complete case file. As such as on date Our Client has not received any such orders as referred by you.*
4. *Without prejudice to the rights and remedies available to Our Client and by not going in to the details of the said case, as desired by you through your letter under reply you are called upon to issue fresh cheques of current dates as against all the cheques for which the due dates are already over within 10 days from the date mentioned herein above or from the date of receipt of this reply whichever is earlier. Our Client after receiving the fresh cheque of current dates as per respective Bills/invoices payable at Delhi will return the cheque in lieu of the fresh cheques. Take further notice that for post dated cheques, the dates of which is yet to fell due, fresh cheques of the same dates may also be issued. In addition t this you are also liable to issue a cheque of ₹46,138/- as per Our Bill/invoice as is mentioned in Para 1 at serial no.7 against which you have already received paper/paper boards.*
5. *Take further notice that if you fail to issue the fresh cheques in lieu of the cheques already issued as per the invoices / bills and would further try to delay the payments, Our Client will be at liberty to present the cheque already received for its onward clearance with their bankers entirely at your risk, consequences and cost thereof.*

We therefore call upon you, which we hereby do, to supply the complete set of certified copies of the proceedings of CP No.100 of 2006 titled Nirmal Malhotra Vs. Suman Prakashan Pvt. Ltd. & Others and also issue fresh cheques of the current dates in lieu of the cheques of which the dates are already over and fresh PDC against the cheuques /debit not in lieu of the cheques / debit note of which the date is yet to fell due, within 10 days time from the date

of this reply or from the date of receipt of this reply whichever is earlier, failing which Our Client will present all the cheques with their bankers for its onwards clearance entirely at your risk, consequences and cost thereof.....”

7. The learned counsel for the Petitioner urges that after passing of the order dated 07.01.2008, the Petitioner or for that matter Respondent no.2 was incapacitated to honour the cheques already issued in favour of Respondent No.1. In view of the judicial order passed by the CLB the cheques stood cancelled and since the cheques lost its validity, the necessary ingredients of Section 138 of the Act were not fulfilled and the Petitioner cannot said to have committed the offence under Section 138 of the Act.
8. The learned counsel for the Petitioner places reliance on the judgment of the Supreme Court in *Jugesh Sehgal v. Shamsher Singh Gogi* (2009) 14 SCC 683; and *Raj Kumar Khurana v. State of (NCT of Delhi) & Anr.* 2009 (7) SCALE 55 to contend that the third ingredient of the offence under Section 138 of the Act is culled out by the Supreme Court in *Jugesh Sehgal* was missing. Para 13 of the report in *Jugesh Sehgal* relied upon by the learned counsel for the Petitioner is extracted hereunder:-

“13. It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that 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;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank;

(v) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act.”

9. At this juncture, I would again refer to the order dated 07.01.2008 purported to have been passed by the CLB. Admittedly, Respondent No.1 was not a party to the proceedings before the CLB wherein order dated 07.01.2008 was passed. Moreover, the order of cancellation of all the cheques was passed on the consent of the parties to the proceedings before the CLB. All the parties agreed that fresh cheques signed by all the Directors would be issued after satisfaction. In reply to the letter dated 10.01.2008 written by the Petitioner, Respondent No.1 (the Complainant) required the Petitioner as also Respondent No.2 Company and another Director to issue fresh cheques in lieu of the cheques already issued apart from sending him a copy of the order passed by the CLB. The Petitioner or for that matter the other Directors chose not to respond

to the reply dated 21.02.2008. The CLB never prohibited the Petitioner or Respondent No.2 Company from issuing fresh cheques. If the Petitioner, Respondent No.2 company and other Directors wanted to avoid their liability under Section 138 of the Act they could have discharged their liability either by issuing fresh cheques or even by transmitting pay orders for the cheque amount. The Petitioner or for that matter the other Directors were not entitled to withhold the payment simply on the pretext of the order dated 07.01.2008 passed by the CLB.

10. Moreover, on receipt of the demand notice under Section 138 again the Petitioner as well as Respondent No.2 Company could have come forward to make the payment to avoid their liability under the Act that was also not done.
11. Learned counsel for the Petitioner relies on *Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd. (2000) 2 SCC 745* to urge that in view of the order passed by the CLB for cancellation of the cheques already issued it became impossible for the Petitioner and Respondent No.2 to issue the cheques. Learned counsel for the Petitioner presses into service Para 19 of the report which is extracted hereunder:-

“19. In a case in which BIFR has submitted its report declaring a company as “sick” and has also issued a direction under Section 22-A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence under Section 138 NI Act cannot be instituted during the period in which the restraint order passed by BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of BIFR under

Section 22-A was passed against the Company then it cannot be said that the offence under Section 138 NI Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the Company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the Company in view of the ban order passed by BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case.”

12. *Kusum Ingots & Alloys Ltd.* is not attracted to the facts of the present case and is clearly distinguishable. The proceedings before the Board of Industrial & Financial Reconstruction (BIFR) constituted under Sick Industrial Companies (Special Provisions) Act, 1985 (Act of 1985) are taken at the behest of the creditors and in view of Section 22A of the Act of 1985 the Company and its Directors were directed not to dispose of the Companies assets, except with the consent of the Board.
13. In the instant case, the Directors of the Company themselves suffered a consent order of cancellation of the cheques. The company and its Directors were under obligation to honour their commitment to the third party or else to face consequences flowing from non compliance. The order passed by the CLB did not incapacitate the Petitioner from honouring the commitment to make the payment either by replacing the cheques or by issuing demand draft or even making the payment after receipt of the demand notice.
14. I have perused *Jugesh Sehgal v. Shamsher Singh Gogi* (2009) 14 SCC 683 and *Raj Kumar Khurana v. State of (NCT of Delhi) & Anr.* 2009 (7) SCALE 55. It is true that the cheques have to be presented to the Bank within a period of six months or from the date on which it is drawn or

within the period of its validity, whichever is earlier. This ingredient does not envisage a contingency as is sought to be propounded on behalf of the Petitioner. Otherwise also, it would be very easy to obtain such a consent order by the Directors of a Company or by the Partners of a Partnership firm and to plead their inability to honour the cheque because of such a consent order. Thus, the first contention raised on behalf of the Petitioner has to be rejected being devoid of any merit.

15. Coming to the second contention it may be mentioned that the dishonor of the various cheques took place in or about March, 2008 and the legal notice dated 04.04.2008 was issued by the Respondent No.1 in April, 2008. The proceedings before the Company Court were started thereafter and the Provisional Liquidator was appointed only on 18.01.2010. It is urged by the learned counsel for the Petitioner that even if the offence was completed before initiation of the proceedings before the Company Court or before appointment of the provisional liquidator, yet the appointment of the official liquidator will be a bar to continue of any proceedings including the criminal proceedings against the Company. Since primarily it was the liability of the Company to make the payment in respect of the cheques the proceedings against the Petitioner also cannot continue. Learned counsel for the Petitioner vehemently argues that the proceedings envisaged under Section 446 of the Companies Act will include the criminal proceedings. The learned counsel for the Petitioner places reliance on a judgment of coordinate Bench of this Court in *The Official Liquidator of M/s. R.C. Abrol & Company (P) Ltd. (in Liquidation) v. Shri R.C. Abrol & Ors.*, 1976 (2) ILR 283 wherein it was held that even criminal proceedings pending before a Magistrate

could be transferred to the Company Court under Section 446 (3) of the Companies Act, 1956 (as it was in force at that time and since deleted).

16. The view taken in *The Official Liquidator of M/s. R.C. Abrol & Company (P) Ltd.* was not approved in *D.K.Kapur v. Reserve Bank of India & Ors.* 2001 (58) DRJ 424 (DB) where a Division Bench of this Court observed that “other legal proceedings” envisaged under Section 446 (1) of the Companies Act cannot include criminal proceedings. The Division Bench held that “other legal proceedings” must be read in *Ejusdem Generis* to the expression suit in Section 446 of the Act. Thus, the Division Bench took the view that no permission of the Company Court was required for filing a criminal complaint either against the Company or against its Directors which is binding.
17. In *Pankaj Mehra & Anr. v. State of Maharashtra & Ors.* (2000) 2 SCC 756 relied upon by the learned counsel for the Respondent, the Supreme Court interpreted the provision of Section 536 (2) of the Companies Act and held that dispositions of the property made by the Company during the interregnum between presentation of Petition for winding up and the passing of the order of winding up would not be void. It was held that even if any disposition of the property made by a Company after commencing of winding up proceedings is held to be null and void, it would not be a ground to escape the offence under Section 138 of the Act. Paras 20 & 26 to 29 of the report in *Pankaj Mehra & Anr* are extracted hereunder:-

“20. It is difficult to lay down that all dispositions of property made by a company during the interregnum between the presentation of a petition for winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be paralysed, for the

company may have to deal with very many day-to-day transactions, make payments of salary to the staff and other employees and meet urgent contingencies. An interpretation which could lead to such a catastrophic situation should be averted. That apart, if any such view is adopted, a fraudulent company can deceive any bona fide person transacting business with the company by stage-managing a petition to be presented for winding up in order to defeat such bona fide customers. This consequence has been correctly voiced by the Division Bench in the impugned judgment.

x x x x x x x x x x

26. There is no provision in the Companies Act which prohibits enforcement of the debt due from a company. When a company goes into liquidation, enforcement of debt due from the company is only made subject to the conditions prescribed therein. But that does not mean that the debt has become unenforceable altogether. Perhaps due to want of sufficient assets of the company the realisation of a debt would be difficult. But that is no premise to hold that the debt is legally unenforceable. Enforceability of a debt is not to be tested on the touchstone of the modality or the procedure provided for its realisation or recovery. Hence the contention that the special provision incorporated in the Companies Act regarding the debts and liabilities due from the company will render the debt unenforceable, cannot be accepted.

27. The alternative approach is this: even assuming that any disposition of the property made by a company after commencement of the winding-up proceedings is null and void, how is that an escape ground from the offence under Section 138 of the NI Act? That section created a statutory offence which on the confluence of the various factors enumerated therein, commencing with the drawing of the cheque and ending with the failure of the drawer of the cheque to pay the amount covered by it within the time stipulated, ripens into a penal liability.

28. The last factor for constituting the offence under Section 138 of the NI Act is formulated in clause (c) of the proviso to the section which reads thus:

“(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.”

29. The words “the drawer of such cheque fails to made the payment” are ostensibly different from saying “the drawer refuses to make payment”. Failure to make payment can be due to the reasons beyond the control of the drawer. An illustrative case is, if the drawer is not a company but an individual who has become so pauperised or so sick as he cannot raise the money to pay the demanded sum, can he contend that since failure to make payment was on account of such conditions he is entitled to be acquitted? The answer cannot be in the affirmative though the aforesaid conditions can be put forth while considering the question of sentence.”

18. In the instant case, the dishonor of the cheques and subsequent failure to make the payment within 15 days of the notice of demand took place much before filing of the winding up proceedings and appointment of the provisional liquidator.
19. The Petitions, therefore, have to fail; the same are accordingly dismissed.
20. Pending applications also stand disposed of.

(G.P. MITTAL)
JUDGE

FEBRUARY 21, 2013

vk