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

Judgment delivered on: 07th October, 2015

\+ **CRL.M.C. 951/2015 and Crl. M.A. No. 3554/2015**

M/S MOHAN ENERGY CORPORATION LTD & ORS. ..... Petitioners

Represented by: Mr. Harsh Jodika, Advocate.

versus

STATE & ANR ..... Respondents

Represented by: Mr. Mukesh Kumar, APP for the State.
Mr. Ajay Singh, Advocate for Chetak International.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. Vide the present petition, petitioner seeks directions thereby quashing of complaint case titled as M/s Chetak International Private Limited v. M/s Mohan Energy Corporation Limited and Others, bearing CC No. 4270/2014 under Section 138 of the Negotiable Instruments Act, 1881 pending before the Metropolitan Magistrate, (NI Act-2) Saket Courts, New Delhi along with the proceedings emanating there from.

2. The present petition has been filed on the ground that cheque bearing No. 205775 dated 31st May, 2014 was a post dated cheque, which was handed over by the petitioner to respondent No. 2, to be presented for encashment only after respondent No. 2 delivers all the five containers withheld by him in terms of minutes of meeting dated 2nd May, 2014. In the relevant portion of the minutes dated 2nd May, 2014 it was agreed between the parties as under:

" ... the above schedule is agreed by both the parties to effect release of 5 containers held and to release of POE and other shipping documents as abovementioned.

By way of this document, MECPL assures that it will not stop the payment of cheques given that CIPL ensures the smooth deliveries of 5 containers and all documents on the given dates".

3. Learned counsel for the petitioner submitted that despite the fact that respondent No.2 withheld three containers with him, still in violation of the aforesaid minutes, he presented the cheque for encashment. Respondent No. 2 even till date has not delivered the three withheld containers, but on the other hand had presented the cheque despite specific intimation given on 29th May, 2014 for not presenting the cheque without delivery of the containers.

4. Learned counsel for the petitioner further submits that minutes of meeting dated 2nd May, 2014 were specific in this regard that respondent No. 2 will get the payment of Rs.34,00,000/- subject to the delivery of all the five consignments. Thus, by presenting the cheque respondent No. 2 has violated terms of agreement. Moreover, before presenting the cheque petitioner intimated respondent No. 2 on 29th May, 2014 not to present the cheque without delivery of the containers, however, on 31st May, 2014 the cheque was presented and the same got dishonoured and, consequently, respondent No. 2 had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 against the petitioner herein.

5. To strengthen his arguments, learned counsel appearing on behalf of the petitioner relies on the decision titled as ***Electronics Trade and Technology Development Corporation Limited, Secunderabad v. Indian Technologists and Engineers (Electronics) (P) Ltd.*** (1996) 2 SCC 739,

wherein it was held as under:-

> *"6. Shri Nageswara Rao, learned Counsel appearing for the respondents, contended that stoppage of payment due to instructions does not amount to an offence Under Section 138 and that, therefore, the ingredients in Section138 have not been satisfied. We find no force in the contention. The object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account mainly attained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the Bank for non-payment and the cheque is returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138. 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. Under these circumstances, since the accused has not made the payment within 15 days from the date of the receipt of the notice issued by the payee or the holder in due course, the dishonest intention is inferable from those facts. Accordingly, the ingredients as contained in Section 138 have been prima facie made out in the complaint. The High Court, therefore, was wholly incorrect in its conclusion that the ingredients have not been made out in the complaint. The orders of the High Court quashing the complaints are illegal. They are accordingly set aside and the trial Court is directed to dispose of the matters as expeditiously as possible. It is made clear that we do not*

intend to express any opinion on merits."

6. Learned counsel for the petitioner further relies on the decision rendered in ***M/s Indus Airways Private Limited and Others v. M/s Magnum Aviation Private Limited and Another*** in Criminal Appeal No. 830/2014 dated 7th April, 2014, wherein it was held as under:-

> *"19. The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the N.I. Act. 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 and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the N.I. Act. The Delhi High Court has traveled beyond the scope of Section 138 of the N.I. Act by holding that the purpose of enacting Section 138 of the N.I. Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability."*

7. It is pertinent to mention herein that the case of ***Electronics Trade and Technology Development Corporation Limited*** (supra) has been overruled by the decision of the Supreme Court in the case titled as ***Goaplast Private Limited v. Shri Chico Ursula D' Souza and Another*** **(2003) 3 SCC** 232. The relevant portion therein reads as under:-

> *"6. In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. Four purpose of considering the issue, it is relevant to see Section 139 of the Act which creates a presumption in favour of the holder of a cheque. The said Section provides that "it shall be presumed that, 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, or any debt or other liability". Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view should render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an*

action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi Cements Ltd. v. Kuchil Kumar Nandi 1998CriLJ1397. On same facts is the decision of this Court in Ashok Yeshwant Badave v. Surendra Madhavrao Nighojakar and Anr. 2001CriLJ1674. The decision in Modi's case overruled an earlier decision of this Court in Electronics Trade & Technology Development Corporation Ltd. v. Indian Technologists & Engineers 1996CriLJ1692 which had taken a contrary view. We are in respectful agreement with the view taken in Modi's case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act it will shake the confidence which is cheque is otherwise intended to inspire regarding payment being available on the due date."

8. The fact remains in the complaint that the petitioner on finding that five containers stood released by the custom authorities at Abidjan Port after necessary payments made by M/s Necotrans, agent of complainant on behalf of the petitioner and/or their foreign buyer, vide e-mail dated 29th May, 2014, insisted that the five containers ought to have reached their destination by 20th May, 2014 as per minutes of meeting dated 2nd May, 2014 while ignoring their own breach of conditions thereof including initial dishonour of cheque for Rs. 1 crores and their failure and neglect to pay the customs duty, detention charges and demurrages etc., since their expectation of discount for Rs.35 lakhs from the customs authorities did not materialise in spite of best efforts of complainant and their agent M/s Necotrans on account of rampant breaches on

the part of the petitioner, including, wrong declaration in the documents, non declaration of correct values, not taking value of AV certificates, taking out containers illegally by paying illegal gratification to customs authorities, etc. as admitted by them in their internal e-mail dated 28th May, 2014. The petitioner further on 29th May, 2014 instructed Indian Bank to stop payment of Rs.34 lakhs and informed the complainant accordingly vide e-mail dated 29th May, 2014. This conduct of the petitioner was wholly unjustified, considering the fact that complainant had cleared the five containers at Abidjan Port from the customs authorities after making necessary payments on the faith of post dated cheque dated 31st May, 2014 for an amount of Rs.35 lakhs and the undertaking and assurance given by the petitioner in the minutes of meeting dated 2nd May, 2014 to pay all outstanding amounts, irrespective of whether the customs authorities gave a discount of Rs.35 lakhs as expected by them, on or before 31st May, 2014. The petitioner had also sent a letter dated 29th May, 2014 to the complainant enquiring about the status of the containers. M/s Necotrans, agent of the complainant, thereafter vide e-mail dated 3rd June, 2014 informed the complainant that CFAF 5,000,000 were to be paid to the customs department by evening of the same day to avoid penalties of more than CAF 35,000,000 that would be payable by the petitioner. The complainant vide e-mail dated 3rd June, 2014 requested M/s Necotrans to make the payment and offered to refund the same to them. However, complainant vide e-mail dated 3rd June, 2014 also informed the petitioner regarding non-payment of the outstanding amounts towards customs duty, penalty etc., by the foreign buyer and requested the petitioner to pay the same, but the petitioner failed and neglected to do so.

9. Apart from the aforesaid allegations there are other allegations against the petitioner, and the petitioner rebuts the same in the present petition. This Court is not to conduct the mini-trial. Moreover, as per allegations there were outstanding dues against the petitioner. Therefore, the cases cited by petitioner have no bearing upon the merits of this case.

10. All these issues can be urged before the trial Court and the trial Court can then decide the same as per law. At this stage, this Court is not inclined to interfere with the complaint pending before the trial Court.

11. The present petition along with the pending application stand dismissed.

12. Pursuant to the directions passed by this Court dated 10.03.2015, petitioner had deposited an amount of Rs.34 lakhs with the Registrar General of this Court. The said amount shall be subject to the outcome of the complaint case pending before the trial Court.

13. Trial Court record be sent back forthwith.

SURESH KAIT
(JUDGE)

OCTOBER 07, 2015
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