

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL MISC. PETITION NO. 965 OF 2016

Shiv Kumar alias Jawahar Saraf S/o Motilal Saraf, Aged about 53 years,
R/o Behind Motilal Petrol Pump, Link Road, PS Tarbahar, Bilaspur (CG).

... **Petitioner**

Versus

Ramavtar Agrawal S/o Shri Jagmohan Das Agrawal, aged about 52
years, R/o Agrawal Bhawan, Vidyanagar, PS Tarbahar, Bilaspur (CG).

... **Respondent**

For Petitioner.	:	Shri Sudhir Agrawal, Advocate.
For Respondent	:	Shri Prafull N Bharat and Shri Ankit Singhal, Advocates.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

06/09/2016

1. The present petition under Section 482 Cr.P.C. has been preferred seeking for quashment of order dated 18.07.2016 passed by the Sessions Judge, Bilaspur, in Criminal Revision No.92/2016. Vide the said impugned order, the Sessions Judge has rejected the revision petition preferred by the petitioner herein affirming the order dated 18.08.2015 passed by the Judicial Magistrate First Class, Bilaspur, taking cognizance and registering the complaint case against the petitioner for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 (for short, NI Act).
2. The relevant facts for adjudication of the present dispute is that, the petitioner had issued a postdated cheque (No.251759) of Central Bank of India, Main Branch, Bilaspur, amounting to Rs.7.8 Crores in

favour of the respondent towards discharge of the liability in respect of a property dealing between the two. That, there was also an agreement dated 21.10.2014 entered into between them in this regard which is enclosed in this petition as Ex. P/4. Subsequently, the petitioner did not discharge the liabilities towards the respondent. The cheque which was issued by the petitioner was therefore put for encashment and the said cheque got dishonored by the Bank vide intimation dated 02.04.2015 with an endorsement of insufficient fund. A legal notice was sent on the same day i.e. 02.04.2015 by the respondent to the petitioner which was received by the petitioner somewhere on 9-10.04.2015. Service of legal notice stand proved as the petitioner has also replied to the legal notice on 15.04.2015 denying the claim put forth by the respondent. Since the petitioner did not make any payment to the respondent even after issuance of legal notice, the respondent had filed a complaint case before the JMFC, Bilaspur for initiating proceedings against the petitioner for the offence punishable under Section 138 of NI Act.

3. The JMFC after taking into consideration the statement and material which have come on record, vide order dated 18.08.2015 took cognizance of the offence and registered a complaint case as criminal complaint case No.4664 of 2015.
4. This taking cognizance and registration of complaint case by the JMFC, Bilaspur was subjected to challenge before the Sessions Court wherein the matter was registered as Criminal Revision

No.92 of 2016. The revisional court also accepted the reasons and reasoning given by the trial court and rejected the revision vide order dated 18.07.2016, leading to filing of this petition.

5. The petitioner has assailed the order of the JMFC as also of the revisional court on the ground that the court below has failed to appreciate the fact that the provisions of Section 138 of NI Act would not be applicable in the instant case for the simple reason that there was no legally enforceable debt over the petitioner towards the respondent on account of which the said provision could have been made applicable.
6. Learned counsel appearing for the petitioner submits that if the entire complaint is taken into consideration as it is, even then the respondent has not been able to disclose as to the transaction for which the petitioner had issued the said cheque to the respondent towards discharge of his liability. In the entire complaint there is no allegation whatsoever against the petitioner. Alleged agreement on the basis of which the discharge of liability is being claimed is a non enforceable contract, which on the face of it, is null and void as the conditions incorporated in the said agreement were non enforceable conditions. It is further argued that it was a voidable contract as per Section 2(j) of the Indian Contract Act.
7. It was next submitted that the agreement itself was obtained by playing fraud by the respondent with the petitioner with certain conditions which are impossible to be complied with at least at the hands of the petitioner. That, since the conditions are non

enforceable, the agreement itself becomes a voidable agreement. The petitioner has already filed a Civil Suit for declaration in this regard before the court below which is pending consideration. It was also submitted that since the conditions incorporated in the agreement were impossible to be complied with or honored and the petitioner had already sent an affidavit to the respondent intimating him that he is not interested to purchase the said property which by itself resiles the transaction between the petitioner and the respondent, and as such, the contract between the two also stood cancelled and for this reason also the proceedings under Section 138 of NI Act could not have been initiated. Thus, for all these reasons the orders passed by the JMFC and the Revisional court be set aside and taking cognizance of offence and registration of complaint case against the petitioner be quashed.

8. In support of his contention, reliance has been placed upon the judgments of Supreme Court in cases of Rojasa Ramjibhai Dahyabhai Vs. Jain Narottamdas Lallubhai (dead by LR's) and another¹, S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another², Silvey & Ors. Vs. Arun Varghese & Another³, Indus Airways Private Limited & Others Vs. Magnum Aviation Private Limited & Another⁴, judgments of this High Court in cases of Rajkumar Sharma Vs. Shriram Finance Co. Ltd.(Cr.M.P. No.128 of 2014, decided on 07.08.2014), Smt. Chhaya Roy and Others Vs.

1 AIR 1986 SC 1912
2 2005 AIR SCW 4740
3 2008 AIR SCW 1732
4 2014 (12) SCC 539

Keshav Das R. Jadwani & Others⁵ and also the judgment of Delhi High Court in case of S.C. Rastogi Vs. Smt. Renu Kalra⁶.

9. Per contra, learned counsel appearing for the respondent submitted that this petition is totally misconceived and is liable to be rejected. According to him, the petition is nothing but a strategy adopted by the petitioner to somehow drag on the litigation as far as possible and it is with that intention that the petitioner have been moving before the trial court as well as before the revisional court. A plain reading of the complaint itself clearly reflects the transaction between the two disputing parties and also establishes the legally enforceable debt which was to be discharged by the petitioner in favour of the respondent, but on presentation of the cheque issued by the petitioner for encashment, it got dishonored for insufficient fund.
10. It was next submitted that the very fact that as per the agreement (Ex. P/4), the petitioner having issued a postdated cheque in favour of the respondent, itself is proof of an enforceable debt which was entered between the two. The question of enforceable debt also stands established from perusal of agreement dated 21.10.2014 entered into between the parties in which the petitioner is shown as the first party whereas, the respondent as second party. Thus, the respondent-complainant has been able to show the primary requirement under the provisions of NI Act while the complaint was being registered. He further referred to Section 118 of the NI Act to

5 2015 (3) CGLJ 21

6 2003 CLDC 204

show that the cheque which has been issued by the petitioner in favour of the respondent is a negotiable instrument. Likewise, counsel for the respondent also referred to Section 139 of the NI Act to show that once when the cheque has been issued, there has to be a presumption which has to be drawn against the person who has issued the cheque, unless it has to be presumed that the holder of the cheque has received the same towards discharge of whole or in part of any debt or other liability.

11. It is also contended that no prejudice whatsoever has been caused to the petitioner at this juncture except for the court below on the admitted factual position taking cognizance of the offence and registering the complaint. According to respondent, the question whether the alleged agreement dated 21.10.2014 (Ex.P/4) between the two parties was voidable agreement or whether there was a legally enforceable debt, are all matter of evidence and which cannot be taking into consideration at this stage. Moreover, it is a petition under Section 482 CrPC which is being heard by this court and powers under Section 482 CrPC are to be exercised sparingly. In the instant case a cheque has been issued by the petitioner in favour of the respondent. The agreement between the parties show that there was a transaction between the two wherein the petitioner has agreed to pay an amount of Rs. 7.8 Crores to the respondent. This alone is a prima facie strong material against the petitioner to take cognizance and register the complaint case and it is these grounds which have also been considered and given weightage by

the revisional court while rejecting the revision petition. The counsel for the respondent therefore, prayed for rejection of the revision.

12. In support of his contention, reliance has been placed upon the judgment of Supreme Court in case of Rangappa Vs. Sri Mohan⁷.

13. Having heard the rival contentions of the parties and having perused the record, certain admitted facts that erupt are as under :

- i. There was an agreement between the petitioner and the respondent which is enclosed in this petition as Ex. P/4,
- ii. As per agreement, the petitioner agrees payment of Rs.7.8 Crores to the respondent,
- iii. Indisputably cheque No. 251759, dated 31.03.2015 of Central Bank of India, Main Branch, Bilaspur, amounting to Rs.7.8 Crores has been issued by the petitioner in favour of the respondent,
- iv. The cheque was put for encashment by the respondent which got dishonored for insufficient fund on 02.04.2015,
- v. On the same date i.e. 02.04.2015, a legal notice was issued by the respondent to the petitioner,
- vi. Legal notice was admittedly served upon the petitioner on 9/10.04.2015, and
- vii. The petitioner sent a reply to the legal notice denying the entire claim and thereafter, a complaint case was instituted.

14. After completing the formalities before registration of complaint, the court below vide its order dated 18.05.2015 has taken cognizance of the offence and ordered for issuance of summons to the petitioner seeking for his appearance before the court.

⁷ 2010 (11) SCC 441

15. The petitioner infact was primarily aggrieved by the said order of the trial court taking cognizance of the offence and registration of the complaint. This order, when subjected to revision by the petitioner, the same was also rejected wherein the revisional court also found that there was no illegality or infirmity to have been committed by the court below in taking cognizance and registration of the complaint.
16. Now, for better understanding of the case, it would be relevant to refer Section 138 of NI Act, which for ready reference reads as under :

“138. Dishonor of cheque for insufficiency, etc., of funds in the accounts -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 honor 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 one year, 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque 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."

17. Now, if we peruse the said provision referred to above, what clearly reflects is that, the court below at the time of taking cognizance and registration of complaint has to ensure the compliance required to be undertaken prior to filing of the complaint case. In other words, to prima facie bring home the case under Section 138 of the NI Act, the main ingredients required are as follows:

- A debt or a liability between the person who has issued the cheque and the person in whose favour the cheque has been issued be it part or whole towards discharge of the said debt or liability,
- Cheque is subsequently presented for clearance,
- Cheque gets dishonored for insufficient funds,
- The issuance of service of statutory notice on the person sought to be made liable,
- Non compliance or non payment in pursuance of notice within the period prescribed under the said provision.

18. Now, if we peruse the facts of the present case to ensure whether the above referred necessary ingredients are reflected in the complaint instituted by the respondent-complainant. On perusal, we find that Ex. P/4, dated 21.10.2014, in this petition is an agreement entered into between the parties in which the petitioner is shown as the first party and the respondent as the second party. Clause-3 of the said agreement dated 21.10.2014 refers to transaction of Rs.7.8 Crores to be paid by the first party to the second party i.e. by the

petitioner to the respondent, which for ready reference is being reproduced as under :

“यह कि उक्त भूमि का समस्त विवाद प्रथम पक्ष द्वारा 31 मार्च 2015 तक निराकृत निर्विवाद कराया जाना तय हुआ तथा विवाद का निराकरण द्वितीय पक्ष के पक्ष में नहीं होने पर प्रथम पक्ष 3,00,00,000/-रु० (तीन करोड़ रुपये) प्रति एकड़ की दर से कुल राशि 7.8 करोड़ द्वितीय पक्ष को अदा करेगा एवं अदा करने पर भूमि का कब्जा प्रथम पक्ष प्राप्त करने का हकदार होगा एवं प्रथम पक्ष के द्वारा विक्रय संबंधी समस्त दस्तावेज प्राप्त कर उप पंजीयक कार्यालय में अपने पक्ष में विक्रय विलेख निष्पादित कराया जायेगा।”

19. In discharge of the said liability, a cheque bearing No.251759, dated 31.03.2015 of Central Bank of India, Main Branch, Bilaspur, amounting to Rs.7.8 Crores duly signed by the petitioner was executed. It is also not in dispute that the said cheque was presented and which got dishonored on account of insufficient funds. There is no dispute so far as issuance of a legal notice is concerned as the petitioner himself has replied to the said legal notice and only after non payment and non compliance of the demand as per the legal notice, a complaint case was lodged. Thus, prima faice the respondent-complainant has infact been able to make all the ingredients required as per para-17 of this order for registration of the complaint and for taking cognizance of the offence under Section 138 of NI Act.

20. It is also all the more necessary at this juncture to refer Section 139 of the NI Act, which reads as under:

“139. Presumption in favor of holder- 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.”

21. A perusal of said provision clearly reflects that once when there is cheque issued with no denial of the same being duly signed by the account holder, there shall be a presumption that it is towards the discharge of a debt or liability in part or in whole.
22. This presumption is a rebuttal presumption and it would be on the part of the petitioner-accused to prove to be contrary. In *Mandvi Cooperative Bank Ltd. Vs. Nimesh B. Thakor*⁸, the Supreme Court has held that a rebuttal presumption is created under Section 139 of NI Act that of the cheque being issued, by the drawer, in discharge of a debt or liability owned by him to its holder.
23. The presumption available under Section 139 of NI Act has to be rebutted and that rebuttal can only be done after adducing evidence. This, by itself clearly reflects that the rebuttal presumption cannot be looked into at the stage of the court taking cognizance of the offence and registering the case. All that court would have to see is whether there is a prima facie case made out meeting the conditions precedent as envisaged under Section 138 of NI Act, which in the instant case, in the opinion of this court, the respondent has infact been able to establish and fulfill all such ingredients.
24. So far as the contention of the counsel for the petitioner as regards the agreement (Ex. P/4) is concerned, whether that agreement is a valid or void agreement would be beyond the ambit and scope of provisions under Section 138 of NI Act. Likewise, contention of the

8 AIR 2010 SC 1402

petitioner of the contract also being void contract and with unenforceable conditions in the agreement and the debt or liability is not established, are again matters of fact which are beyond the scope of a proceeding under Section 138 of NI Act. The petitioner in this regard is stated to have already invoked the civil jurisdiction seeking for a declaration.

25. So far as the case referred to by the petitioner in cases of Rojasa Ramjibhai Dahyabhai (Supra) as also in Silvey & Ors. (Supra) are concerned, the principle laid down by the Supreme Court in those judgments would not be applicable in the present case for the simple reason that those were cases which had originated under the provisions of Specific Relief Act where the provisions are distinct and different from the provisions of NI Act.
26. Similarly, so far as judgments referred to by the petitioner which has been passed by this court in cases of Rajkumar Sharma (Supra) and Smt. Chhaya Roy (Surpa), the ground of challenge again in those cases were under entirely different factual background and both the judgments are not in any way related to the issue raised by the petitioner in the instant case and would thus not be of any assistance to the petitioner.
27. So far as judgment of Supreme Court in case of Indus Airways Pvt. Ltd. (Supra) is concerned, the facts in the said case was, before the cheque itself could have been presented for encashment, there was an order of stop payment issued by the drawer of the cheque and also the drawer had prior to the cheque getting dishonored had

issued a letter to the holder of the cheque intimating him about the cancellation of the purchase order. This by itself would show contract between the two parties in the said agreement stood terminated, and therefore, the debt and the liability did not any further survive which again is not the factual matrix of the present case.

28. As regards case of SMS Pharmaceuticals Ltd. (Supra) in which heavy reliance has been placed by the petitioner is concerned, it would be relevant to quote the relevant portion of the said judgment which reads as under :

“6. Even Section 204 of the Code starts with the words “if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding.....”It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the chargesheet do not constitute an offence against a person, the complaint is liable to be dismissed.

7.....The fact that a Magistrate has to consider the complaint before issuing process and he has power to reject it at the threshold, suggests that a complaint should make out a case for issue of process.

8. As to what should be the averment in the complaint, assumes importance in view of the fact that at the stage of issuance of process, the Magistrate will have before him only the complaint and the accompanying documents.....”

29. Accepting the said principle laid down by the Supreme Court in SMS Pharmaceuticals (Supra), what clearly culls out is that at the time of taking cognizance and registration of complaint the Magistrate concerned has to consider only the averment and pleadings in the complaint.

30. A perusal of complaint clearly depicts that there was a property dealing between the petitioner and the respondent pursuant to which an agreement was also entered into on 21.10.2014. In furtherance to the agreement, a cheque amounting to Rs.7.8 Crores was issued by the petitioner to the respondent. The said cheque on presentation, got dishonored on account of insufficient funds. A legal notice as required under the provisions of Section 138 of NI Act was sent to the petitioner who having received the same, replied to the same and at the same time did not make any payment as demanded through the legal notice. All these are the facts which have been clearly mentioned in the complaint.
31. Thus, it met all the pre-conditions required under the provisions of Section 138 of NI Act and it also met the principle and the guidelines laid down by the Supreme Court in case of SMS Pharmaceuticals (Supra).
32. As has been stated in the preceding paragraphs since there is a presumption to be drawn of there being a debt or liability in part or in whole of the drawer to the holder of the instrument, the court below cannot be said to have faulted upon in taking cognizance and in registering the offence. Since it is a rebuttal presumption and all the contentions and averments made by the counsel for the petitioner being his defence, it would be open for him to raise all these grounds at the stage of leading evidence including the defence of existence of legally enforceable debt or liability. However, there can

be no doubt that at the time of filing of complaint there was always initial presumption which would be in favour of the complainant.

33. Thus, in the facts and circumstances of the case, this court is of the opinion that no strong case has been made out by the petitioner to interfere with the orders passed by the JMFC as also the revisional court while registering the complaint and taking cognizance of the same.

34. Accordingly, the petition being devoid of merit is liable to be and is hereby dismissed.

Sd/-
(P. Sam Koshy)
Judge

inder