**AFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Reserved on 23-9-2019**

**Delivered on 26-9-2019**

**CRMP No. 1180 of 2019**

- Laxmi Prasad Vishwakarma S/o Manu Ram Vishwakarma Aged About 60 Years R/o Aman Nagar, Behind Ashoka Heights, Mowa, Police Station Mowa, Raipur, Tehsil And District Raipur Chhattisgarh. (Accused), District : Raipur, Chhattisgarh

**---- Petitioner**

**Versus**

- Smt. Shakuntala Singh Vishwakarma W/o Laxmi Prasad Vishwakarma Aged About 47 Years R/o Sonkar Badi, Near Yogesh Jwellers, Kushalpur, Tehsil And District Raipur Chhattisgarh. (Complainant), District : Raipur, Chhattisgarh

**---- Respondent**

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| For petitioner | : | Mr. Rajesh Kumar Kesharwani, Adv. |
| For Respondent | : | Mr. Vipin Punjabi, Adv. |

**Hon'ble Shri Sharad Kumar Gupta, Judge**

**CAV ORDER**

1. Petitioner has preferred this CRMP under Section 482 of the Code of Criminal Procedure (in brevity Cr.P.C.) for quashing the impugned order dated 1/2/2019 as well as entire proceeding of Complaint Case No. 929/2019 pending before JMFC, Raipur.

2. In brief the respondent's case is that she and petitioner are wife and husband. On 27/6/2017 he had executed an agreement to leave her and in lieu thereof he will pay her Rs. 23 Lacs. On 20/12/2018 he gave him a cheque bearing No.839148 of amount Rs. 5 Lacs. She presented said cheque on 28/12/2018 at Punjab National Bank, Main Branch, Raipur. Said cheque was returned back to her as dishonored with the endorsement that 'payment was stopped by drawer' on 31/12/2018. She sent a registered notice to him through her Lawyer on 7/1/2019 which was returned back unserved with the endorsement that he is usually not present there. Thereafter she filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereafter called as 'NI Act').

3. Trial Court on 1/2/2019 registered a complaint case No. 929/2019 against the petitioner under Section 138 of NI Act.

4. In brief the petitioner's case is that he is already married with Smt. Jagan Bai. There was the physical relationship between him and her. She extorted him and taking undue advantage obtained said cheque from him. She had never given him money in any transaction. So called agreement was executed by him without free consent. No responsibility lies upon him regarding her. In absence of any liability and valid transaction impugned order of registration of the offence is illegal. He had written a letter to the Branch Manager of Branch Shanti Nagar of State Bank of India not to make payment to her.

5. It would be relevant in the case in hand to extract the provisions of Section 138 and 139 of NI Act to resolve the controversy which reads as under :-

> **138. Dishonour of cheque for insufficiency, etc., of funds in the account**.—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 provision 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:
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> Provided that nothing contained in this section shall apply unless —
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> (*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;
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> (*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 cheque as unpaid; and
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> (*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.
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> *Explanation*.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

> **139. Presumption in favour 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.

6. Counsel for the petitioner placed reliance on the judgment of co-ordinate Bench of this Court in the matter of **R.L. Sahu vs. Mohd. Tahir Sheikh** 2012 Lawsuit (Chh) 249 wherein it was observed that :-

"Where the first part of the agreement was not legal but when the accused with a view to correct himself has agreed to return the money which he/she has received from the complainant for illegal purpose and issued cheques in favour of the complainant then it cannot be said that second part of agreement is illegal and the complainant is not entitled to take recourse available under the law for the wrong committed by the accused. Therefore complainant cannot be denied to access the justice. His position was not of *paridelicto*."

7. Counsel for the respondent placed reliance on the judgments of Hon'ble Supreme Court in the matter of **Rajendra Kumar Sitaram Pande and others vs. Uttam and another**, [AIR 1999 SC 1028], **M.M. T.C. Limited and another vs. Medchl Chemicals and Pharma (P) Ltd. and another** [(2002) 1 SCC 234], **Goa Plast (P) Ltd. vs. Chicoursula D'souza and another** [(2003) 3 SCC 232] and **Rangappa vs. Sri Mohan** (2010) 11 SCC 441 wherein following judicial precedents have been laid down :-

"There is no requirement that the complainant must specifically allege in the complaint that there was any debt or a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondent this the accused had to discharge in the trial. At this stage merely on the basis of averments in the petition filed by petitioner High Court could not have concluded that there was no existing debt or liability. Prior to trial complaint cannot be quashed by the High Court under Section 482 of CrPC.

Even when the cheque is dishonoured by reason of stop of payment instructions by virtue of Section 139 of the NI Act, the Court has to presume that the cheque was received by the holder for the discharge in whole or in part, of any debt or liability. Of course, this is a rebuttable presumption. If the accused shows that in his account there was sufficient fund to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of the cheque for encashment then offence under section 138 would not be made out. Thus, High Court cannot quash a complaint on this ground before the trial.

8. In **Parbatbhai Aahir v. State of Gujarat,** [(2017) 9 SCC 641], the Hon'ble Supreme Court has had an occasion to consider whether the High Court can quash the FIR/complaint/criminal proceedings, in exercise of the inherent jurisdiction under Section 482 CrPC. Considering a catena of decisions on the point, the Hon'ble Supreme Court summarised the following propositions:

> "(1) Section 482 Cr.P.C. preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.
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> (2) xxx xxx xxx
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> (3) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.
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> (4) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised (i) to secure the ends of justice, or (ii) to prevent an abuse of the process of any court.
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> (6) xxx xxx xxx
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> (7) xxx xxx xxx
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> (8) xxx xxx xxx
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> (9) xxx xxx xxx
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> (10) xxx xxx xxx

9. In the matter of **Narinder Singh v. State of Punjab** [(2014) 6 SCC 466], after considering the decision in **Gian Singh v. State of Punjab**, [(2012) 10 SCC 303], in para 29.1, Their Lordships summed up as under:

> "29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised

**sparingly and with caution**."

10. Looking to the aforesaid provisions of Section 138, and 139 of NI Act, aforesaid observation made by Hon'ble Supreme Court in the matter of **Rajendra Kumar Sitaram Pande** (supra), **M.M. T.C. Limited** (supra), **Goa Plast (P) Ltd.** (supra) and **Rangappa** (supra), **Parbatbhai Aahir** (supra) and **Narinder Singh** (supra), following legal prepositions emerge :-

i. Where any person draws any cheque on his bank account for payment of any amount of money to another person for discharge in whole or in part of any debt or other liability and same is returned back by the bank unpaid either because of insufficient money in account or it exceeds the amount which is to be paid from that account under an agreement with the bank, then Section 138 of NI Act attracts provided -

a. The cheque was presented to the bank within a period of six months from the date on which it was drawn or within the period of its validity, whichever is earlier,

b. The payee or cheque holder makes a demand for payment of said amount of money by giving a notice in writing to the drawer of cheque within 30 days of the receipt of information of unpaid from the bank,

c. The drawer of such cheque fails to make payment of said amount of money to the payee or the holder as the case may be within 15 days of the receipt of said notice.

ii. There is no requirement that the complainant must specifically allege in the complaint that there was existing of debt or a subsisting liability. The burden of proving that there was no existing debt or liability was on the drawer this he has to discharge in the trial. At the stage of Section 452, Cr.P.C., merely on the basis of averments in the petition filed by petitioner High Court could not have concluded that there was no existing debt or liability. Prior to trial complaint cannot be quashed by the High Court under Section 482 of CrPC.

iii. Even when the cheque is dishonoured by reason of stop payment instructions by virtue of Section 139 of the NI Act, the Court has to presume that the cheque was received by the holder for the discharge in whole or in part, of any debt or liability. Of course, this is a rebuttable presumption. If the accused shows that in his account there was sufficient fund to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of the cheque for encashment then offence under section 138 would not be made out. Thus, High Court cannot quash a complaint on this ground before the trial under Section 482, Cr.P.C.

iv. Inherent powers enumerated in section 482, CrPC can be exercised by the High Court to give effect to an order under Cr.P.C. to prevent abuse of process of Court and to otherwise secure the ends of justice;

v. Inherent power under Section 482, Cr.P.C. is to be exercised sparingly and with caution.

11. Looking to the aforesaid provisions of Section 138, 139 of NI Act and aforesaid observation made by Hon'ble Supreme Court in the matter of **Rajendra Kumar Sitaram Pande** (supra), **M.M. T.C. Limited** (supra), **Goa Plast (P) Ltd.** (supra) and **Rangappa** (supra), this Court finds that in the case in hand, it is not necessary for the complainant/respondent to specifically plead that cheques were issued for any debt or existing liability. Onus to prove the non-existence of a debt or liability lay on the drawer/ petitioner and had to be discharged at the trial. Prior to trial, complaint cannot be quashed by exercising the power under Section 482, Cr.P.C. This Court presumes that said cheque was received by the respondent for the discharge in whole or any part of any debt or liability. This is a rebuttable presumption. If petitioner shows that in his account there was sufficient fund to clear the amount of the cheque at the time of presentation of said cheque for encashment at the drawer bank and non-stop payment notice had been issued because of other valid causes including that there was not existing debt or liability at the time of presentation of cheque for encashment then offence under Section 138, NI Act would not be made out. Therefore, this Court cannot quash the complaint on this ground prior to trial under Section 482, Cr.P.C. Thus this Court is not impressed from the written argument of counsel for the petitioner in this regard.

12. Looking to the above mentioned facts and circumstances of the case, this Court finds that petitioner does not get any help from the

aforesaid judgment of coordinate bench of this court in the matter of **R.L. Sahu** (Supra).

13. Consequently, instant CRMP is dismissed at motion stage without entertaining it for final hearing.

14. In view of above, I.A. No. 1 stands disposed of.

**Sd/-**
**Sharad Kumar Gupta**
**Judge**

Pathak/-