

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 571 OF 2019

Manisha Salekar alias Manisha Mane	]	
Age- 33 Years, C/. B/206, Omkar	]	
Building, Ghanshyam-Gupte Road,	]	
Dombivili West.	]	...Petitioner

Versus

- | | | |
|-----------------------------------|---|----------------|
| 1. Orian Multi Specialty Hospital |] | |
| Through Dr. Prasanna Mahajan |] | |
| Nirmal Chhaya Apartment Opposite |] | |
| Agarwal Hall, Manpada Road, |] | |
| Dombivili (East). |] | |
| |] | |
| 2. State of Maharashtra |] | ...Respondents |

Mr. N.R. Bafna for petitioner.
Mrs. Kalyani Pathak for Respondent No. 1.

CORAM	:	S. S. SHINDE, J
DATE	:	22 nd July 2019

Judgment

1. This petition takes an exception to the order dated 17.12.2018 passed by learned Additional Sessions Judge, Kalyan in Criminal Revision No. 115 of 2018 arising out of order dated 25/5/2018 passed by 9th J.M.F.C. Kalyan in Cr. Case No. 561/2018.

2. Learned counsel appearing for the petitioner invites attention of this Court to the averments in the complaint and submits that, there is no averment in the complaint that the cheque was dishonoured for insufficient

funds in the account. It is submitted that by mistake cheque was issued on 20th February 2018. On 21st February 2018 by E-mail sent at 9.13 AM, petitioner requested not to present the cheque. Said E-mail was received by the Respondent on 22nd February 2018. The cheque was returned despite sufficient funds in bank account as payment was stopped by the petitioner. The Trial Court did not appreciate that the cheque was presented in clearing by respondent bankers on 21st February 2018, after receipt of notice by respondent the cheque was presented to petitioner's banker on 22nd February 2018. It is submitted that it is not in dispute that stop payment instructions were given to bankers after requesting the Respondent not to present the cheque. Since the cheque was not dishonoured for want of sufficient funds no process ought to have been issued by the Trial Court. It is submitted that, entire medical bill of Respondent No. 1 was cleared by the petitioner by depositing Rs. 1,55,000/- and therefore, there was no necessity of issuing cheque in favour of Respondent No. 1. Therefore, learned counsel appearing for the petitioner relying upon the pleadings and grounds taken in the petition submits that, petition may be allowed.

3. On the other hand learned counsel appearing for Respondent No. 1 invites attention of this Court to the averments in the complaint and submits that, the Trial Court after considering the averments in the complaint and also statement of Respondent No. 1, and the other material on record, has rightly

issued the process. It is not in dispute that the cheque was issued in favour of Respondent no. 1 signed by the petitioner. There is compliance of mandate of Section 138 of Negotiable Instruments Act (for short "the said Act"). It is submitted that on 5th February 2018, lady namely Usha Shankar Salekar was admitted in the complainant hospital as an indoor patient. She was admitted as indoor patient on 5th February 2018 till 20th February 2018. The complainant raised total bill of Rs. 2,99,218/- to Usha Salekar towards treatment and other charges. Out of total due amount from Smt. Usha Salekar to the complainant, the accused showed willingness to pay the amount of Rs. 1,30,000/- by way of cheque as Smt. Salekar is the mother of accused. Accordingly, the accused had issued cheque of Rs. 1,30,000/- drawn on Central Bank of India, Dombivli Branch, bearing Cheque No. 327981 dated 20th February 2018 in favour of "Orien Multispeciality Hospital". The said cheque was deposited by Respondent No. 1 with banker of the complainant 'The Saraswat Co-op. Bank Ltd'- Dombivli East Branch, on 20th February 2018. The said cheque was returned unpaid on 22nd February 2018 by the banker of the complainant. Therefore, notice was sent to the accused and after compliance of mandate of Section 138 of the said Act the complaint was filed before the concerned Court wherein the Trial Court has rightly issued the process. It is submitted that, merely because it was communicated by the petitioner not to present the said cheque by sending e-mail on 21st February 2018 however, the cheque was deposited in the Bank on 20th February 2018 itself. It is submitted that once there is no

dispute that the cheque was issued and same was signed by the petitioner, the question of stoppage of payment won't arise. Out of total amount of Rs. 2,99,218/-, petitioner deposited Rs. 1,55,000/- and balance amount was due and payable and against the said liability aforesaid cheque was issued by the petitioner. It is submitted that, the Hon'ble Supreme Court in the case of (M/s) Modi Cements Ltd. Versus (Shri) Kuchil Kumar Nandi, 1998 (20 G.L.H. 577 held that, once the cheque is issued by the drawer a presumption under Section 139 of the said Act, must follow and merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the said Act, by the drawer or the holder of a cheque in due course.

Therefore, learned counsel appearing for Respondent submits that, petition may be rejected.

4. I have given due consideration to the submissions of the learned counsel appearing for the petitioner, and also learned counsel appearing for Respondent No. 1. With their able assistance perused the pleadings and grounds taken in the petition, annexures thereto and affidavit in reply on record. It appears that the daughter of the petitioner namely Ushal Salekar was admitted in the Respondent No. 1 hospital as indoor patient. It is not in dispute that, she was treated as indoor patient from 5th February 2018 till 20th February

2018. The Respondent No. 1 alongwith reply has placed on record hospital bill wherein name of Usha Salekar is written in patient column. It appears that total medical bill is of Rs. 2,99,218/-. Out of that Rs. 1,55,000/- have been deposited by the petitioner and balance amount of Rs. 1,30,000/- was remained to be paid. It appears that, the daughter of the petitioner namely Ushal Salekar had also given in writing to the hospital that the subject cheque is issued towards the balance payment of treatment. It is also further stated by her that in case said cheque is not honoured in that case the balance amount will be given in cash or by card. Therefore, prima facie it appears that the balance amount was to be deposited by the daughter of the petitioner for treatment in the hospital, and to pay the said balance amount aforesaid cheque was issued.

5. The contention of the petitioner that on 21st March 2018 by E-mail sent by at 9.13 AM, petitioner requested to Respondent No. 1, not to present the cheque and said E-mail was received by Respondent No. 1, however, in spite of said instructions Respondent No. 1 deposited the said cheque in the bank. In this respect it appears that, the cheque was issued on 20th February 2018 and same appears to have been deposited on very same day in the Bank. The fact that the cheque was issued by the petitioner is not in dispute. The petitioner also does not dispute the signature on the said cheque. Whether such request can be made by the petitioner for not to present the cheque in the

bank or stoppage of payment, will not preclude the action under Section 138 of the said Act, as held by the Hon'ble Supreme Court in the case of **M/s. Modi Cements Ltd.** (supra). The Hon'ble Supreme Court in Para 16 observed that-

“We see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The object of Chapter XVII, which is instituted as “Of penalties in case of dishonour of certain cheques of insufficiency of funds in the accounts” and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques.”

6. The other contentions raised by the petitioner in his defence can be considered by the Trial Court. The Hon'ble Supreme Court in the aforesaid case in Para 21 held as under:-

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold.

7. In the light of discussions made in foregoing paragraphs, no case is made out to cause an interference in the impugned order, hence writ petition stands rejected.

8. At this stage, learned counsel appearing for petitioner prays for continuation of ad-interim relief. The prayer is vehemently opposed by the learned counsel appearing for Respondent No. 1. Since the present proceedings are arisen out of Section 138 of Negotiable Instruments Act, further continuation of ad-interim relief will delay the proceedings before the Trial Court. Hence, prayer for continuation of ad-interim relief stands rejected.

[S. S. SHINDE , J]