

VRJ

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

CRIMINAL WRIT PETITION NO.1049 OF 2022

Dande Jewellers Pvt. Ltd & Anr.

...Petitioners

V/s.

Kanish Jewels & Anr.

...Respondents

Mr. Pawan Mali i/by Mr. Anant vadgaonkar for the
petitioners.

Mr. Niranjana Mundargi i/by Mr. Kunal D. Ambulkar for
the respondent No.1.

Mr. S.S. Pednekar, APP for the State.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 20, 2022

P.C.:

1. The petitioner who is an accused in a proceeding under section 138 of the Negotiable Instruments Act, 1881 is challenging the order of issuance of process which is confirmed by the Revisional Court.

2. The principal contention raised by the petitioner is that the account in relation to which the cheque was issued had been attached by the Income Tax Authorities at the relevant time. The reason for dishonour was "payment stopped by attachment of Court order", therefore, according to the petitioner, the complaint

would not be covered under section 138 of Negotiable Instruments Act, 1881. According to him, the complaint would be maintainable only in the following circumstances:

- (i) The amount of money standing to the credit of account is insufficient to honour the cheque;
- (ii) which exceeds the amount arranged to be paid from that account.

3. According to him, due to the order of attachment made by the Income Tax Authorities, petitioners could not honour the cheque which is the circumstance beyond their control. Section 138 being penal in nature needs to be construed strictly.

4. Per contra, the learned Advocate for the complainant relied on the Division Bench in the case of **Rakesh Nemkumar Porwal Vs. Narayan Dhondu Joglekar, (1993) MhLJ 630: (1993) 78 Company Cases 822**. The relevant portion at page 835 has observed thus:

" A clear reading of section 138 leaves no doubt in our mind that the circumstances under which such dishonour takes place are required to be totally ignored. In this case, the law only takes note of the fact that the payment has not been forthcoming and it matters little that any of the manifold reasons may have caused that situation. If, for instance, the closure of an account or the stoppage of payment or any other of the commonplace reasons for dishonour were to be justifiable, then, the Legislature would have set these out in the section as exceptions not constituting an offence. No such intention can be read into section 138, as none exists. The solitary exception made by the Legislature is with regard to the drawer being offered a final opportunity of paying up the amount within 15 days from the receipt of notice which,

in other words, provides a last opportunity to prove one's bona fides. It is obvious, that having regard to the widespread practice of issuing cheques which are dishonoured and the many ingenious methods of avoiding payment that are practised, the Legislature has opted for a no-nonsense situation. The possibility has not been overlooked whereby an account may inadvertently be overdrawn or a dishonour may be for technical reasons or where a genuine mistake has occurred and the grace period provided for by the Legislature after service of notice on the drawer is in order to afford an opportunity to the drawer to rectify these. Undoubtedly, even when the dishonour has taken place due to the dishonesty of the depositor, the drawer is still given a last chance to act otherwise. Consequently, the reasons for dishonour even if they be very valid as was sought to be pointed out in this case, should not and cannot be taken into account by a Magistrate when such a complaint is presented".

5. He also placed reliance on the judgment of Apex Court in the case of **NEPC Micon Limited Vs. Magma Leasing Limited, (1994) 4 SCC 253**, paragraph No.8 and 9 read thus:

"(8) Secondly, proviso (c) gives an opportunity to the drawer of the cheque to pay the amount within 15 days of the receipt of the notice as contemplated in proviso (b). Further, Section 140 provides that it shall not be a defence in prosecution for an offence under Section 138 that the drawer has no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that Section. Dishonouring the cheque on the ground that account is closed is the consequence of the act of the drawer rendering his account to a cipher. Hence, reading Section 138 and 140 together, it would be clear that dishonour of the cheque by a bank on the ground that account is closed would be covered by the phrase 'the amount of money standing to the credit of that account is insufficient to honour the cheque'.

(9). Learned Counsel for the appellants, however,

submitted that Section 138 being a penal provision, it should be strictly interpreted and if there is any omission by the Legislature, wider meaning should not be given to the words than what is used in the Section. In our view even with regard to penal provision, any interpretation, which withdraws life and blood of the provision and makes it ineffective and a dead letter should be averted. If the interpretation, which is sought for, were given, then it would only encourage dishonest persons to issue cheques and before presentation of the cheque close 'that account' and thereby escape from the penal consequences of Section 138."

(emphasis is mine)

6. In the facts of the case, according to the complainant, the account of the accused was attached due to non-payment of liability of tax of petitioners. If that be so, the petitioners cannot get advantage of their own wrong. It is the petitioners on their failure to pay income-tax dues have invited such order of attachment and now they cannot turn around and say that the circumstances of dishonour of cheque were beyond their control. Even otherwise, this Court in the case of **Rakesh Nemkumar Porwal** (supra) has observed that the reasons for dishonour even if they be very valid as sought to be pointed out in this case, should not and cannot be taken into account by the Magistrate when such a complaint is presented.

7. Therefore, in my opinion, the order of issuance of process cannot be faulted on the grounds as urged by the petitioner. There is no miscarriage of justice nor error of jurisdiction pointed out. The petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)