

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 279 of 2020

With

CRAN 1 of 2020

(Old No.: CRAN 1023 of 2020)

Subir Sarkar

Vs.

Sk. Anisur Rahaman.

For the Petitioner

: Mr. Uday Sankar Chattopadhyay,
Ms. Trisha Rakshit,
Ms. Rajashree Tah.

For the State

: Mr. Arijit Ganguly,
Mr. Sanjib Kumar Dan.

Heard on

: 25.04.2023

Judgment on

: 17.05.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding in C.R. Case No. 990 of 2018 under Section 138 of the Negotiable Instrument Act pending before the learned Judicial Magistrate, 4th Court, Purba Bardhaman.
2. The petitioner's case is that the opposite party herein lodged a written complaint under Section 200 of the Code of Criminal Procedure before the Chief Judicial Magistrate, Burdwan alleging, inter alia, the following facts :-
 - i) That the opposite party is a businessman. He has a business of garments, travel and electrical goods under the name and style of 'Pragati'.
 - ii) That the accused person is a LIC Agent and few years ago, he came to the house of the complainant for making a LIC policy and the complainant deposited the money with LIC.
 - iii) The accused person wanted to take a personal loan in the year 2018 for his business.
 - iv) The complainant gave Rs.27 lakhs in cash to the complainant.
 - v) In order to repay the said amount the accused issued one cheque bearing No. 847014 dated 10.10.2018, for Rs.27,00,000/- (Rupees twenty seven lakhs) drawn on South Indian Bank, Burdwan Branch, and the complainant deposited

the said cheque in his account on October 11, 2018 in Punjab National Bank, G. T. Road, Burdwan Branch, for encashment. But on October 12, 2018, the said cheque was dishonored due to **“Drawer's signature differ”**. Thereafter the complainant sent a legal notice on October 22, 2018, as per provisions of Section 138 of Negotiable Instruments Act requesting the accused to repay the said amount within fifteen days after receiving of the notice.

vi) That the said acknowledgment card was returned in time. Thereafter, the complainant filed the instant case against the petitioner.

3. The petition of complaint was filed under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'said Act') before the Learned Chief Judicial Magistrate, Burdwan. The said case was transferred to the learned Judicial Magistrate, 4th Court, Burdwan.
4. The petitioner filed a petition before the trial court stating, inter alia, that the impugned cheque has been dishonored due to “Drawer's signature differ” and as such the instant case was not maintainable.
5. The aforesaid application filed by the petitioner herein was taken up for hearing on September 26, 2019 and after hearing the learned advocates of the parties, the learned Judicial Magistrate, 4th Court, Purba Bardhaman was pleased to reject the said application filed by the petitioner on the ground that Section 138 of the Negotiable

Instruments Act will attract when the cheque has bounced due to “drawer's signature differs”.

6. The petitioner states that the learned trial court failed to consider that the complainant did not produce any document regarding the payment of Rupees Twenty Seven Lakhs to the petitioner.
7. The petitioner states that on 6th October, 2018, i.e., prior to the issuance of the legal notice by the learned advocate of the opposite party herein, the petitioner lodged a complaint before the learned Chief Judicial Magistrate, Burdwan against the opposite party and one Mou Roy Chowdhury. On the basis of the said written complaint Burdwan Police Station Case No.696 of 2018 was started against the opposite party and another, under Sections 341/308/384/406/420 of the IPC.
8. **Mr. Uday Sankar Chattopadhyay, learned counsel for the petitioner** has submitted that from a plain reading of Section 138 of the Negotiable Instruments Act, it is crystal clear that unless the conditions precedent mentioned therein are satisfied, the said penal, provision cannot be attracted.
9. The petitioner has relied upon a judgment of the Hon'ble Supreme Court, reported in **(2002) 7 SCC 541 (Vinod Tanna and Another vs. Zaher Siddiqui and others)** wherein the Hon'ble Supreme Court quashed the proceeding under Section 138 of the Negotiable Instruments Act on the ground that the cheque was dishonoured because the drawer's signature was incomplete.

10. It is further submitted that the learned Magistrate relied upon the judgment of Hon'ble Supreme Court reported in **(2012) 13 SCC 375, M/s Laxmi Dychem vs. State of Gujarat & Ors.** The petitioner submits that the facts of the given case are totally different from the instant case. The petitioner further submits that in paragraph 17 of the referred case the Hon'ble Supreme Court referred the earlier judgment reported in **(2002) 7 SCC 541, Vinod Tanna (Supra)**. In the referred case the cheque was dishonored due to stoppage of payment by the drawer. In the instant case the cheque in question was dishonored due to mismatch of signature of the drawer which is not the condition precedent for attracting Section 138 of the Negotiable Instruments Act.
11. The petitioner humbly submits that the judgment reported in **(2012) 13 SCC 375, M/s Laxmi Dychem vs. State of Gujarat & Ors.**, is not applicable in the instant case.
12. That the learned court below erred in point of law as well as in facts.
13. That the instant criminal proceeding is bad, perverse and liable to be quashed. Such a proceeding is an abuse of process of law and as such is liable to be quashed.
14. **In spite of due service there is no representation on behalf of the opposite party.**
15. **The Supreme Court in M/s Laxmi Dychem vs. State of Gujarat & Ors., Criminal Appeal Nos. 1870-1909 of 2012, with Criminal Appeal Nos. 1910-1949 of 2012, on 27 November, 2012, held:-**

“9. In NEPC Micon Ltd. Vs. Magma Leasing Ltd. (1999) 4 SCC 253, the cheques issued by the appellant-company in discharge of its liability were returned by the company with the comments ‘account closed’. The question was whether a dishonor on that ground for that reason was culpable under Section 138 of the Negotiable Instruments Act. The contention of the company that issued the cheque was that Section 138 being a penal provision ought to be strictly construed and when so interpreted, dishonor of a cheque on ground that the account was closed was not punishable as the same did not fall in any of the two contingencies referred to in Section 138. This Court noticed the prevalent cleavage in the judicial opinion, expressed by different High Courts in the country and rejected the contention that Section 138 must be interpreted strictly or in disregard of the object sought to be achieved by the statute. Relying upon the decision of this Court in Kanwar Singh v. Delhi Administration (AIR 1965 SC 871), and Swantraj v. State of Maharashtra (1975) 3 SCC 322 this Court held that a narrow interpretation of Section 138 as suggested by the drawer of the cheque would defeat the legislature intent underlying the provision. Relying upon the decision in State of Tamil Nadu v. M.K. Kandaswami (1975) 4 SCC 745, this Court declared that while interpreting a penal provision which is also remedial in nature a construction that would defeat its purpose or have the effect of obliterating it from the statute book should be eschewed and that if more than one constructions are possible the Court ought to choose a construction that would preserve the workability and efficacy of the statute rather than an interpretation that would render the law otiose or sterile. The Court relied upon the much quoted passage from the Seaford Court Estates Ltd. v. Asher (1949 2 ALL E.R. 155) wherein Lord Denning, L.J. observed:

“The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and

blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.....A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

10. *Relying upon a three-Judge Bench decision of this Court in Modi Cements Ltd. v. Kuchil Kumar Nandi (1998) 3 SCC 249, this Court held that the expression 'the amount of money.....is insufficient to honour the cheque' is a genus of which the expression 'account being closed' is a specie.*

11. *In Modi Cements Ltd. (supra) a similar question had arisen for the consideration of this Court. The question was whether dishonor of a cheque on the ground that the drawer had stopped payment was a dishonor punishable under Section 138 of the Act. Relying upon two earlier decisions of this Court in Electronics Trade & Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) (P) Ltd. (1996) 2 SCC 739 and K.K. Sidharthan v. T.P. Praveena Chandran (1996) 6 SCC 369, it was contended by the drawer of the cheque that if the payment was stopped by the drawer, the dishonor of the cheque could not constitute an offence under Section 138 of the Act. That contention was specifically rejected by this Court. Not only that, the decision in Electronics Trade & Technology Development Corporation Ltd. (supra) to the extent the same held that dishonor of the cheque by the bank after the drawer had issued a notice to the holder not to present the same would not constitute an offence, was overruled. This Court observed:*

"18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Section 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the

drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in Electronics Trade & Technology Development Corpn. Ltd. “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 maintained 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” (emphasis supplied) in our opinion, do not also lay down the law correctly.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and, therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above.”

12. *We may also at this stage refer to the decisions of this Court in M.M.T.C. Ltd. and Anr. v. Medchl Chemicals and Pharma (P) Ltd. and Anr. (2002) 1 SCC 234, where too this Court considering an analogous question held that even in cases where the dishonor was on account of “stop payment” instructions of the drawer, a presumption regarding the cheque being for consideration would arise under Section 139 of the Act. The Court observed:*

“19. Just such a contention has been negated by this Court in the case of Modi Cements Ltd. vs. Kuchil Kumar Nandi. It has been held that even though the cheque is dishonoured by reason of “stop-payment” instruction an offence under Section 138 could still be made out. It is held that the presumption under Section 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 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. The accused can thus show that the “stop-payment” instructions were not issued because of insufficiency or

paucity of funds. If the accused shows that in his account there were sufficient funds 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 cheque for encashment, then offence under Section 138 would not made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground.”

13. *To the same effect is the decision of this Court in Goaplast (P) Ltd. v. Chico Ursula D’souza and Anr. (2003) 3 SCC 232, where this Court held that ‘stop payment instructions’ and consequent dishonor of the cheque of a post-dated cheque attracts provision of Section 138. This Court observed:*

“Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. The said provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque.

In view of Section 139, 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 leads to the conclusion 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 would 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."

(emphasis supplied)

14. A three-Judge Bench of this Court in *Rangappa v. Sri Mohan* (2010) 11 SCC 441 has approved the above decision and held that failure of the drawer of the cheque to put up a probable defence for rebutting the presumption that arises under Section 139 would justify conviction even when the appellant drawer may have alleged that the cheque in question had been lost and was being misused by the complainant.

15. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in *NEPC Micon Ltd.* (supra) that the expression "amount of money.....is insufficient" appearing in Section 138 of the Act is a genus and dishonor for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonor of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", **which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act.** This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonour of the cheque issued by them. For instance this Court has held that if after issue of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorized to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authosed signatories. There is in our view no qualitative difference

*between a situation where the dishonour takes place on account of the substitution by a new set of authorized signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorized signatory may in the ordinary course of business be replaced by a new signatory ending the early mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. **Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge thereof the cheque was issued would be a matter that the trial Court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.***

16. Thus, in view of the observations of the Supreme Court in ***M/S Laxmi Dychem (supra)***, the order under revision is in accordance with law and needs no interference by this court.

17. The revisional application being **CRR 279 of 2020 along with CRAN 1 of 2020 (Old CRAN 1023 of 2020) are dismissed.**
18. The order dated 26th September, 2019 passed in CR Case No.990 of 2018 under Sections 138 of the Negotiable Instruments Act passed by the learned Judicial Magistrate, 4th Court, Purba Bardhaman is affirmed. **The learned Magistrate shall proceed with the trial expeditiously.**
19. No order as to costs.
20. All connected Applications stand disposed of.
21. Interim order if any stands vacated.
22. Let a copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.
23. Urgent Photostat Certified copy of this Judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)