

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT
SRINAGAR**

Reserved on: 23.12.2021

Pronounced on: 28.12.2021

CRM(M) No.46/2021

PARVAIZ AHMAD BHAT & ANR.

...PETITIONER(S)

Through: Mr. Rizwan, Advocate.

Vs.

FIDA MOHAMAMD AYOUB

....RESPONDENT(S)

Through: K. A. Ganai, Advocate

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) Petitioners have challenged the complaint filed by respondent against them for offence under Section 138 of Negotiable Instruments Act (hereinafter for short "the NI Act") read with Section 420 IPC pending before the Court of Chief Judicial Magistrate, Anantnag. They have also challenged the order dated 27.08.2020, whereby the learned Magistrate has, after taking cognizance of the offences, issued process against the petitioners.

2) It appears from the record of the case that respondent has filed a complaint against the petitioners alleging that cheques bearing No.612444 dated 09.07.2020 for an amount of Rs.15.00 lacs, No.612445 dated 09.07.2020 for an amount of Rs.10.00 lacs and

No.612446 dated 09.07.2020 for an amount of Rs.10.00 lacs drawn on J&K Bank Branch Khanabal in favour of respondent/complainant, when presented to the banker, were returned unpaid with the remarks “drawers signature incomplete”. According to respondent/complainant, the petitioners knowing fully-well that the cheques were to be signed by both the petitioners, who happen to be the partners of the firm that has issued the cheques in question, deliberately and intentionally in order to cheat and defraud the respondent, endorsed signature of only one of the partners on the cheques, as a result of which the same were dishonoured by the banker. The respondent/complainant served a legal notice upon the petitioners through registered post and when the petitioners failed to liquidate the cheque amount, the complaint, which is subject matter of this petition, came to be filed before the trial Magistrate. The learned Magistrate, after recording the preliminary evidence, took cognizance of the offences and issued process against the petitioners. The complaint and the order issuing process against the petitioners are under challenge before this Court.

3) The primary ground that has been urged by the petitioners is that the complaint and the order of issuing process is not legally tenable as the dishonor of cheque due to mismatch of signatures or incomplete signatures does not constitute an offence under Section 138 of the NI Act. Petitioners have relied upon judgment of the Supreme Court in the case of **Vinod Tanna. Vs. Zaheer Siddiqui**, (2002) 7 SCC 541 to support their contention.

4) The only question which falls for determination in the instant petition is as to whether dishonor of a cheque for the reason that there were incomplete signatures appearing on the cheque, constitutes an offence under Section 138 of the NI Act. In order to determine this question, the provisions contained in Section 138 are required to be noticed. It 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 be extended to two years’, 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 thirty 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 purposes of this section, “debt of other liability” means a legally enforceable debt or other liability”.

5) From a perusal of the aforesaid provision, it is clear that an offence under Section 138 of the NI Act is constituted when a 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 of any debt, is returned by the bank unpaid either because 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. At first blush, it appears that it is only in two situations that Section 138 of the NI Act is attracted, firstly when there are insufficient funds available in the bank account of the person who is drawing the cheque and secondly where it exceeds the arrangement. However, the provision has been interpreted by the Supreme Court in a number of judgments in a manner so as to include within its ambit even the cases where the dishonor of cheque has taken place for the reasons other than the aforesaid two reasons.

6) In **NEPC Micon Limited And Others vs. Magma Leasing Limited,(1999) 4 SCC 253**, the Supreme Court rejected the contention that Section 138 of the NI Act has to be interpreted strictly or in disregard of the object sought to be achieved by the Statute. Relying upon its earlier judgment in the case of **Kanwar Singh vs Delhi**

Administration, AIR 1965 SC 871 and **Swantraj and Others Vs. State of Maharashtra 1975(3) SCC322**, the Court held that a narrow interpretation of Section 138 would defeat the legislative object underlying the said provision. The Supreme Court relied upon its own decision in **State of Tamil Nadu Vs. M. K. Kandaswami and Others 1974(4) S.C.C. 745**, and it was observed that while interpreting a penal provision which is also remedial in nature a construction that would defeat its purpose or have the effect of scrapping it from the statute book, should be avoided and that if more than one constructions are possible, the Court should choose to adopt construction that would preserve the workability and efficacy of the Statute and avoid an interpretation that would render the provision sterile. The Court, accordingly, held that when a cheque is returned by the banker of a drawer with the comments “account closed” the same would constitute an offence under Section 138 of NI Act.

7) In Modi Cements Ltd vs. Kuchil Kumar Nandi, (1998) 3 CC 249, the Supreme Court, while considering the question whether dishonor of a cheque on account of stoppage of payment by the drawer would constitute an offence under Section 138 of the NI Act, observed as under:

“18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 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 limit extent as indicated above."

8) The question whether stop payment instructions, which result in dishonor of a cheque, would amount to an offence under Section 138 of the NIA Act, was considered by the Supreme Court in **M. M. T. C. Ltd. Vs. M/S Medchl Chemicals, (2001) 1 SCC 234**, and it was held that same would come within the ambit of definition of offence under Section 138 of the NIA Act. Similar view was taken by the Supreme Court in the case of **Goaplast (P) Ltd vs. Chico Ursula D'Souza, (2003) 3 SCC 232**.

9) In the face of foregoing discussion, it is clear that the Supreme Court has interpreted the provisions contained in Section 138 of the NI Act in a liberal manner so as to achieve the object for which the said

provision has been enacted. Not only the cases of dishonour of cheques on account of insufficiency of funds or on account of exceeding of arrangement but the cases involving dishonour of cheques on accounts of “stop payment” and “account closed” have also been brought within the ambit of offence under the aforesaid provision.

10) In **Vinod Tanna’s** case (supra), the Supreme Court, while dealing with a case where the cheque drawn by the accused was not been honoured by the bank on account of drawer’s signatures being incomplete, held that dishonour of cheque for the aforesaid reason would not constitute an offence under Section 138 of the NI Act and, accordingly, the criminal proceedings against the accused were quashed.

11) The aforesaid decision of the Supreme Court came up for consideration before the same Court in the case of **Laxmi Dyechem vs. State of Gujarat and others, (2012) 13 SCC 375**. The Court, after noticing its earlier decisions on interpretation of the provisions of Section 138 of the NI Act, made the following observations:

“15. A three-Judge Bench of this Court in Rangappa v. Sri Mohan [(2010) 11 SCC 441: (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] 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.”

12) The Supreme Court in the aforesaid decision did not follow the ratio laid down in **Vinod Tanna's** case and observed that the ratio laid down in the said case is based upon the ratio laid down by the Supreme Court in *Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists and Engineers (Electronics) (P) Ltd.* (1996) 2 SCC 739, which has been overruled by the Supreme Court in **Modi Cements Ltd** (supra). Para 16 of the judgment is relevant to the context and the same is reproduced as under:

“16. In the case at hand, the High Court relied upon a decision of this Court in Vinod Tanna's case (supra) in support of its view. We have carefully gone through the said decision which relies upon the decision of this Court in Electronics Trade & Technology Development Corporation Ltd. (supra). The view expressed by this Court in Electronics Trade & Technology Development Corporation Ltd. (supra) that a dishonour of the cheque by the drawer after issue of a notice to the holder asking him not to present a cheque would not attract Section 138 has been specifically overruled in Modi Cements Ltd. case (supra). The net effect is that dishonour on the ground that the payment has been stopped, regardless whether such stoppage is with or without notice to the drawer, and regardless whether the stoppage of payment is on the ground that the amount lying in the account was not sufficient to meet the requirement of the cheque, would attract the provisions of Section 138.”

13) The Supreme Court on the basis of the aforesaid observations and the ratio, while dealing with a case in which the cheques were dishonoured by the bank on the ground that drawer's signatures were incomplete and that no image was found or that the signatures did not match, came to the conclusion that criminal prosecution against the

accused in such cases should be allowed to proceed and the judgment and orders passed by the High Court quashing the criminal proceedings were set aside.

14) Both the judgments of the Supreme Court in **Vinod Tanna's** case as well as in **Laxmi Dyechem's** case (supra) have been rendered by the Benches of co-equivalent strength. The judgment rendered in **Laxmi Dyechem's** case is latest in point of time, wherein the ratio laid down in **Vinod Tanna's** case has been termed as *per incuriam*. Therefore, as per law of precedents, the ratio laid down in **Laxmi Dyechem's** case has to be followed. Accordingly, as per the ratio laid down in **Laxmi Dyechem's** case, the contention of the petitioners that in the instant case offence under Section 138 of the NI Act is not constituted because the cheques were dishonoured on account of incomplete signatures and not for the reason of insufficiency of funds or exceeding the arrangement, deserves to be rejected.

15) For the foregoing reasons, the petition is found to be devoid of merit and the same is dismissed. Interim order dated 19.02.2021 is vacated. The trial court is directed to proceed further in the matter in accordance with law.

(Sanjay Dhar)
Judge

Srinagar,
28.12.2021
"Bhat Altaf, PS"

Whether the order is speaking:
Whether the order is reportable:

Yes/No
Yes/No