

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2243 OF 2009**

Joseph Vilangadan

...Petitioner.

v.

Phenomenal Health Care Services Ltd. & Anr. ...Respondents.

Mr.B.K.Ashok i/by Bekay Legal, **adv.**, for the petitioner.

Mr.Shivajirao Satpute i/by M/s.Satpute and Co., **adv.** for the respondent no.1

Shri Y.S.Shinde, APP for the Respondent No.2/State.

CORAM : J.H.Bhatia, J.

DATE : 20th July, 2010

P.C.:

1 Rule. Rule made returnable forthwith. Heard the learned counsel for the parties.

2 There is no dispute that the respondent no.1/complainant and M/s. Encon Engineering and Contractors (Hereinafter referred to as 'Contractors') had entered into an agreement on 28th January, 2005 whereby Contractors had undertaken to carry out certain works for the respondent. As per the said contract, Contractors deposited the sum of Rs.10 lacs by undated cheque no.027840 drawn against South Indian Bank Ltd., Palarivattom Branch, Cochin branch with the respondent no.1 as refundable security deposit for the due performance of the agreement. The said undated cheque was in custody of the respondent

no.1 and it appears that the respondent no.1 filled in the date on undated cheque as "4.6.2008". The cheque was presented to the drawee bank through the banker of the respondent no.1. Cheque was returned unpaid on the ground that the drawer had stopped the payment. Therefore, notice was issued by the respondent to the contractor as well as it's managing partner for the payment of the cheque amount . In spite of notice, payment was not made. Therefore, the respondent no.1 filed complaint under Section 138 of the Negotiable Instruments Act, in the Court of Metropolitan Magistrate 44th Court, Andheri. Process was issued against the accused, who is the petitioner before this Court . Petitioner/accused challenged the issuance of process by filing revision application no.789/2009 before the Sessions Court, Gr. Bombay. By the impugned order dated 8th June, 2009, the learned Additional Sessions Judge rejected the revision application. Hence, this petition.

3 At the outset it may be stated that before the revisional Court, petitioner had taken several grounds challenging the issuance of process. However, during the arguments before this Court, the learned counsel for the petitioner restricted the challenge only to one point. According to him, cheque was not issued in discharge of any debt or

liability and as the cheque was issued as security deposit, provisions of Section 138 are not applicable. The learned counsel placed reliance upon several authorities in support of his contention. The learned counsel for the respondent/complainant contended that the said cheque was deposited in lieu of the amount of Rs.10 lacs which would be otherwise required to be deposited as security by the contractor with the respondent for due performance of the contract and, therefore, it must be held that the cheque was issued in discharge of “other liability.”

4 Section 138 of the Negotiable Instruments Act provides that where any cheque was drawn by a person on account maintained by him with the banker for the payment of any amount of money to another person **for discharge in whole or in part of any debt or other liability** and it was returned by the drawee bank unpaid either because the amount of money in the account is insufficient or it exceeds the amount arranged to be paid, such person shall be deemed to have been committed offence and shall be liable to punishment with imprisonment or with fine or with both. Of course, before the offence is committed, several other conditions are required to be fulfilled. We are not concerned with the same for the decision of the present matter.

Important ingredient for the offence punishable under Section 138 is that cheque must have been issued for the discharge in whole or in part of any debt or other liability. If the cheque is not issued for the discharge of any debt or other liability, Section 138 can not be invoked. It is now well settled legal position that if the cheque is issued only as security for performance of certain contract or an agreement and not towards the discharge of any debt or other liability, offence punishable under section 138 is not made out. In **Travel Force v. Mohan N. Bhave and Another** 2007 Mh.L.J.- 3- 339 , the cheque in question was issued by the accused for investment in fixed deposit and it was accepted by the complainant as fixed deposit in the scheme. As the cheque was dishonoured, the complaint under Section 138 of the Negotiable Instruments Act was filed. Process was issued by the Magistrate. However, the Sessions Court set aside the order issuing the process holding that the cheque was not issued for discharge in whole or in part of any debt or other liability and, therefore, presumption under Section 139 could not arise in favour of the complainant. Revision application filed by the complainant was rejected by this High Court holding that when the cheque was issued only as a deposit and not in discharge of any debt or liability, offence under Section 138

is not made out.

5 In **M.S.Narayana Menon @ Mani v. State of Kerala and Another (2006) 6 SCC 39**, accused and the complainant were brokers working in the stock exchange and the complainant was to enter into certain transactions on behalf of the accused. The cheque was issued for an amount of Rs.2,95,033/- by the accused in favour of the complainant. On presentation, the cheque was dishonoured. After notice also the payment was not made. In the case under Section 138 plea of the accused was that the complainant was in dire need of financial assistance and the said cheque was issued so as to enable him to tide over his financial difficulties and not in discharge of any debt or liability payable to the complainant. During the trial, it was revealed that there was discrepancy of more than Rs.14 lacs in the account maintained by the complainant. Accused was convicted by the trial Court but was acquitted by the appellate Court . High Court set aside the acquittal and convicted the accused. Accused went to the Supreme Court. After going to the facts and circumstances, the Supreme Court observed thus in paragraph 52:

“52. We, in the facts and circumstances of this case, need not go into the question as to whether even if the prosecution fails to prove

that a large portion of the amount claimed to be a part of the debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The appellants clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefore cannot be held to have been issued in discharge of the debt as, for example, *if a cheque is issued for security or for any other purpose* the same would not come within the purview of Section 138 of the Act.”

From these observations, it appears that if the cheque was not issued for discharge of any debt or liability but as a security only, offence is not made out under Section 138.

6 Coming to the facts of the present case from the complaint as well as particulars of the agreement executed on 28.1.2005, it is clear that cheque was issued as a security deposit at the time of entering into contract for due performance of the terms of the contract. Agreement shows that the contractor had deposited the undated cheque no.027840 with the respondent as refundable security deposit for due performance of the agreement. Even the allegations in the complaint are not different. Admittedly, when this agreement was

entered into, no debt or liability was in existence and under that agreement, parties had entered into a contract whereby contractor was to perform certain works for the respondent. Naturally, as per the terms of the contract and the allegations made in the complaint if the contractor would fail to perform the agreement, respondent could encash the cheque and recover an amount of security deposit.

7 The learned counsel for the respondents vehemently contended that the contractor was to perform so many works and in respect of some works, his rates were higher and in respect of some other, rates were lower than the other bidders. He was also advanced certain amount for carrying out certain works from time to time. Contractor had completed works in which higher rates were given to him but he ignored to carry out those works where the rates were less and thereafter he ignored to complete those particular works resulting into the disputes between the parties. Admittedly, the disputes had occurred in the year 2006 and the contractor filed a suit against the respondent in the year 2006. Not only this, admittedly, matter was also referred to arbitrator in respect of said disputes. The learned counsel for the respondents pointed out that undated cheque was lying with the respondent since 28.1.2005. However, for the first time

a date “4.6.2008” was put on him and then cheque was presented for encashment, which was returned unpaid with endorsement “payment was stopped”. It shows that date was put on the cheque by the respondents long after disputes had arisen between the parties. Proviso (a) to Section 138 requires that the cheque should be 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. In the present case though the cheque was drawn and handed over on 28.1.2005, date was not put on it. If the date would have been put, cheque would have been valid for six months from 28.1.2005. However, the respondent put the date 4.6.2008, i.e., almost three years after the period of cheque was over. Thus, the cheque was not presented to the drawee bank within six months from the date when it was actually drawn. Anyhow, it is not necessary to enter into that controversy for the purpose of deciding the present petition. Fact remains that the cheque was issued towards the security deposit and not towards the discharge of any debt or liability.

8 The learned counsel for the respondent contends that it is not necessary that the cheque should be issued for discharge of a debt. According to him, it may be issued towards the discharge of other

liability also and in support of this, he placed reliance on **ICDS Limited v. Beena Shabeer and Another (2002) 6 SCC 426**. In that case, husband of the accused/respondent no.1 had obtained a car under hire purchase agreement from the complainant. The accused was a guarantor for payment of the amount by her husband and towards the part payment of the said transaction, she had issued a cheque in favour of the complainant. Cheque was dishonoured and the payment was not made in spite of the notice. High Court quashed the complaint on the ground that cheque from the guarantor could not be said to have been issued for the purpose of discharge of any debt or liability. However, the Supreme Court set aside the order of the High Court. The Supreme Court observed thus in paragraphs 10 and 11

“10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the section stands with the words “Where any cheque”. The above noted three words are of extreme significance, in particular, by reason of the user of the word “any”- the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement

of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.

11. The issue as regards the coextensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. “Any cheque” and “other liability” are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. Any contra-interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor’s liability and thus has overlooked the true intent and purport of Section 138 of

the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus do not lend any assistance to the contentions raised by the respondents.”

Supreme Court in **ICDS Ltd. v. Beena Shabeer and Another (2002) 6**

Supreme Court Cases 426 considered provisions of the law and held that when the cheque is issued by the guarantor in discharge of such other liability, provisions of section 138 are applicable. Infact, section 138 itself specifically provides that the cheque should have been issued by a person for the discharge of any debt or other liability. The guarantor may not be himself a debtor but he guarantees the repayment of the loan taken by the principal debtor. By giving such a guarantee, the guarantor incurs a liability towards the creditor and for the discharge of that liability, if he issues cheque, he will be covered by the provisions of Section 138. As the cheque was issued for the discharge of “other liability” case would be covered by Section 138.

9 In the present case, there was no liability or debt towards the complainant/respondent when the cheque was issued by the contractor. From the language of the agreement as well as allegations made in the complaint, it is clear that said cheque was issued as

security deposit and not towards the discharge of any debt or lone. The learned counsel for the respondent contended that in **M.S.Narayana Menon @ Mani (Supra)**, evidence was led by the parties and on the basis of evidence, the Supreme Court came to conclusion that the cheque was issued as a security and, therefore, Section 138 would not be applicable. According to the learned counsel, in this case only process has been issued and the parties are yet to go to the trial and, therefore, said authority in **M.S.Narayana Menon @ Mani (Supra)** would not be applicable. It would be difficult to accept this contention. Ratio in **M.S.Narayana Menon @ Mani (Supra)**, is applicable to the facts of the present case. When on the face of the complaint itself, it is clear that the cheque was issued as a security deposit and not towards the discharge of any debt or other liability, case under Section 138 is not made out. When the complaint itself does not make out criminal case to issue the process, to force the accused to undergo trial would be clear misuse of the process of the Court and this should not be allowed. The Additional Sessions Judge while rejecting the revision application dealt with the liability of the contractor on the basis of terms of the contract and the cheque. The learned counsel for the respondent also contended that the matter was referred to arbitrator

and arbitrator also held that the contractor is liable to pay on the basis of that cheque. As far as civil liability of the contractor/petitioner is concerned, it is not necessary to look into the same in present matter. Suit was filed in the year 2006 and the arbitrator was also appointed in 2008, therefore, civil liability of the parties against each other can be looked into the said litigation or arbitration proceedings. In the present matter, we have only to see whether the offence under Section 138 of the Negotiable Instruments Act is made out or not. The learned Revisional Court did not address to this question properly before rejecting revision application.

10 In view of the facts and circumstances, I find that no case to issue process under Section 138 was made out and, therefore, process issued by the trial Court is liable to be quashed

11 For the aforesaid reasons, petition is allowed. The order passed by the learned Metropolitan Magistrate to issue process under Section 138 is hereby quashed. Rule made absolute accordingly.

(J.H.BHATIA, J.)

