

IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE G. S. AHLUWALIA ON THE 28th OF
NOVEMBER, 2024 CRIMINAL APPEAL No. 1008 of 2013
SURESH SINGH SIKARWAR

Versus

RADHESHYAM SHARMA

Appearance:

Shri R.K.Shrivastava, Advocate for the appellant. Ms.Pooja Sisodia, Advocate for the respondent.

JUDGEMENT

1 This criminal appeal, under Section 378 of Cr.P.C, has been filed against the judgment of acquittal dated 28.01.2011 passed by JMFC, Gwalior in Case Number 5103/2009, by which respondent has been acquitted of the charge under Section 138 of the Negotiable Instruments Act.

2. Challenging the judgment of acquittal passed by trial Court, it is submitted by counsel for appellant that the respondent had issued a cheque No. 90299 of ₹1,35,000 in discharge of his legal liability. The said cheque was presented and the same was returned by the Bank with an endorsement.

"Insufficient Funds and drawers signature differ". When an information was given to respondent, he again instructed to re-deposit the cheque which was once again returned back with an endorsement "Insufficient

funds and alteration requires full signature". The applicant issued a statutory notice on 15.05.2009. However, respondent did not pay the cheque amount within the stipulated period, and accordingly, a complaint under Section 138 of the Negotiable Instruments Act was filed. The trial Court, by order dated 28.1.2011 held that respondent had given a cheque of ₹1,35,000/- in discharge of his legal liability, and in spite of notice issued under Section 138 of the Negotiable Instruments Act, he has not repaid the cheque amount. However, the respondent was acquitted on the ground that, as per the endorsement by the bank, the cheque was dishonored on the ground of

"Insufficient Funds and Alteration Requires Full Signatures."

3. It is submitted by counsel for appellant that the cheque was presented twice. On the first occasion, the cheque was returned with an endorsement "Insufficient Funds and Drawer Signature differ" and on re- presentation, the cheque was returned with an endorsement of "Insufficient Funds and Alteration Requires Full Signature". It is submitted that once the bank had returned the cheque on the ground of "Insufficient Funds," then

"Alteration Requires Full Signatures" becomes secondary, and under these circumstances, the trial court committed material illegality by acquitting the respondent. To buttress his contention, counsel for appellant has relied on the judgment passed by the Supreme Court in the case of **Bir Singh versus Mukesh Kumar reported in (2019) 4 SCC 197**.

4 . Per Contra, counsel for respondent has supported the findings recorded by the Court below.

5. Heard, learned counsel for the parties.

6. It is clear from the impugned judgment that the cheque was returned on the ground of "Insufficient Funds and Alteration Requires Full Signature". Thus, it is clear that for the second time the cheque was not returned on the ground of "insufficient funds & difference in signatures" but it was returned on the ground of "insufficiency of funds and alteration requires full signatures". If the account was not having sufficient funds then whether the alteration required full signature or not, becomes immaterial. The Delhi High Court in the case of **Santosh Kumar Gupta Vs. State**, decided on 16.09.2017 in CRMC Number 2271/10, has held as under:

i. In the decision reported as 2010 (2) Kerala Law Times Devan Vs. Krishna Menon, in para 37, it was observed as under:-

"37. We do in these circumstances reiterate the law thus. If the signature in the cheque is proved to be not genuine, the instrument cannot be reckoned as a cheque and the same cannot attract culpability under S.138 of the Negotiable Instruments Act. But the decision as to whether the signature is genuine ad whether the execution is proved will have to be taken by a court, the mere fact that the banker returns the cheque for the reason that the signature differs is no reason for the court to mechanically swallow that reason. The courts are obliged to consider whether the real reason for dishonor is insufficiency of funds or not. We may at the risk of repetition proceed to reiterate that if as a matter of fact the signatures are not genuine and the court finds so, needless to say S.138 of the N.I.Act would not apply. But the endorsement by the banker is not conclusive. The court will have to ascertain the real reason. The challenge on this ground is in these circumstances, rejected."

ii. In the decision reported as (2006) 134 **Comp Cas 295 (Karn) Dinesh Harakchand Sankla Vs. Kurlon Ltd. & Ors.** it has been observed as under:-

"To decide the second contention of the petitioner, it is beneficial to refer to certain observations made by the apex court in the case of **NEPC Micon Ltd. Vs. Magma Leasing Ltd. (1999) 96 Comp Cas 822; AIR 1999 SC 1952**, wherein it is observed in paragraph 15 thus:

"In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above 'brush away the cobweb varnish, and shew the transactions in their true light' (Wilmot C.J.,) or (by Maxwell) 'to carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, to an indirect or circuitous manner that which it has prohibited'. Hence, when the cheque is returned by a bank with an endorsement 'account closed', it would amount to returning the cheque unpaid because 'the amount of money standing to the credit of that account is insufficient to honour the cheque' as envisaged in Section 138 of the Act.

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The bank has also returned the cheques on the ground that the drawer's signatures found on the cheques differ. It is, but, natural for the bank to return the cheques if the drawer's signature differs from the original signature found in the bank records. It is known only to the drawer as to why he made such signatures that too on series of cheques, which differ from the signature found in the original records of the bank. The reason is obvious. In this context, the contention of learned counsel for the respondent that intentionally the drawer must have changed his signature with the sole intention that the cheques should not be honoured, cannot be lightly brushed aside.

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As observed by the apex court in the case of **NEPC Micon Ltd. Vs. Magma Leasing Ltd. (1999) 96 Comp Cas 822; AIR 1999 SC 1952**, cited supra, it is the duty of the court to interpret Section 138 of the Negotiable Instruments Act consistent with the legislative intent and purpose, so as to suppress the mischief and advance the remedy. Section 138 of the Negotiable Instruments Act has created "contractual breach" as an offence and the legislative purpose is to promote efficacy of banking and for ensuring that in commercial or contractual transaction, cheques are not dishonoured and credibility in transacting business through cheques is maintained. It is no doubt true that Section 138 of the Negotiable Instruments Act, if read plainly, would disclose that the drawer of the cheque would be responsible to be proceeded with for the offence under Section 138 of the Negotiable Instruments Act if the cheque is returned with an endorsement of "insufficient funds" or the amount involved in the cheque exceeds the amount arranged to be paid from that account by an agreement made with that bank. To overcome the said provision in a circuitous way, the drawer of the cheque may find various ways of getting the cheques bounced or returned with the sole purpose of defeating the encashment of the cheques. In such a situation, the question is as to whether the courts can shut their eyes? The answer would be obviously in the "negative". If the drawer intentionally tempers with the cheque or issues the cheque with difference in signature, etc., the cheques will be definitely returned. Even after service of statutory notice, if the amounts involved in the cheque are not paid by the drawer of the cheque, then his intentions are *prima facie* clear, to the effect that he would be tampering with the cheques only with an oblique motive. If in such case, the person in whose favor the cheques are issued is not allowed to prosecute the matter under Section 138 of the Negotiable Instruments Act, the very purpose of enacting Section 138 of the Negotiable Instruments Act would be frustrated. The drawer of the cheque will have to take abundant precaution while issuing the cheques so that the cheques should be honoured and contractual obligations are fulfilled. In case, the drawer issues cheques as in the case on hand, he will be doing so in a circuitous manner in order to save his skin, only to take advantage of the absence of specific words under Section 138 of the Negotiable Instruments Act.

Even when the cheque is dishonoured by the reason of "alteration in date and drawer's signature differs", the court has to presume by virtue of Section 139 of the Negotiable Instruments Act that the cheques are 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 alone can show to the court that the alteration in signature and date were not made because of insufficiency or paucity of funds.

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Even otherwise, the drawer of the cheque may also come within the purview of Section 420 of the IPC in these cases as he would be committing the offence of cheating, if he intentionally issued the cheques in question. As the criminal cases are still in the preliminary stage and charges are yet to be framed, it is always open for the court below to frame charges for the offence under Section 420 of the IPC, if the material on record at that stage of the proceedings disclose such offence. It is to be noted that the first information or complaint is not an encyclopedia to contain all the particulars and the sections under which the offences are committed. Mere omission to mention any or more penal sections in the FIR would not ipso facto deter the concerned court to proceed further for the concerned offences. It is always open to the court to frame charges for different offences, other than and in addition to the offences which are mentioned in the FIR, if ultimately the material on investigation discloses such offences. Thus the criminal proceedings cannot be scuttled, on that technical score, at this initial stage. If the process is stopped at this stage, it may lead to travesty of justice. The substance of the allegations found in the first information or complaint is relevant and not the mere format or the sections, for the purposes of proceeding further. In view of the same, there is no bar for the court below to proceed further as the complaint also discloses the offence punishable under Section 420 of the Indian Penal Code along with the offence under Section 138 of the Negotiable Instruments Act."

7. The ratio of the two decisions squarely applies to the instant case where we have proof that there were insufficient funds in the account and it hardly mattered whether drawer's signatures were different. In any case, it would be a matter of evidence whether the petitioner acted dishonestly by camouflaging his signatures to cover the real reason i.e. insufficiency of funds in his account i.e. the real reason for the cheques being dishonoured was the insufficiency of funds in the account on which the cheques were drawn. Further, fully concurring with the last quoted paragraph above

from the preceding decision it would also surface that *prima facie* an offence of cheating would also be made out and the learned Metropolitan Magistrate can even take cognizance of the same."

8. The Supreme Court, in the case of *R. Vijayan vs Baby & Anr* reported in (2012)1 SCC 260), observed that the object of Chapter 17 of the Negotiable Instruments Act is punitive, as also compensatory, and restitutive. It provides a single forum and single process for enforcement of criminal liability for dishonoring of cheques and enforcement of civil liability for realization of cheque amounts. Anguish was also expressed that some Magistrates went by traditional view that criminal proceedings are for imposition of punishment and did not exercise discretion to award compensation causing considerable difficulty to the complainant, as invariably the limitation for filing civil cases would expire by the time the criminal case was decided.

9. The Supreme Court in the case of *M/S Laxmi Dyechem vs State Of Gujarat & Ors* reported in (2012)13 SCC 375 has held as under:-

"16. 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 *Magma* case [(1999) 4 SCC 253 : 1999 SCC (Cri) 524] that the expression "amount of money ... is insufficient" appearing in Section 138 of the Act is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour 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

16.1. 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 authorised 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 authorised 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 authorised 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.

16.2. 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 authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier 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 whereof 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."

10. Furthermore, in the present case, the cheque was re-presented for the second time. The Supreme Court, in the case of **Msr Leathers vs S. Palaniappan And Anr reported in 2013 (2) MPLJ 542**, has held that holder of a cheque can present the cheque any number of times and can launch prosecution on the second or any successive defaults.

11. In the present case, the cheque was dishonored for two reasons i.e. (i) insufficient funds (ii) alteration requires full signature. If the intention of the respondent was not dishonest in not putting his full signatures after making alterations, then he could have repaid the cheque amount after receiving the statutory notice, but that was not done. Furthermore, when there were insufficient funds, then "alteration requires full signature" becomes secondary. Therefore, in either way, the trial Court could not have acquitted the respondent. Therefore, it is held that acquittal of respondent was on account of perverse finding and, therefore, it is set aside.

12. Ex consequenti, the judgement dated 28/1/2011 passed by JMFC, Gwalior in Case No. 5103/109 is partially set aside to the extent of findings recorded in Issue No. 2 and by affirming the findings recorded by trial court in respect of Issue Nos. 1 and 3, the respondent is held guilty of committing (G. S. AHLUWALIA)

JUDGE

offence under Section 138 of Negotiable Instruments Act.

13. Heard on the question of sentence.

14. Considering the allegations made against the respondent, it is directed that respondent shall undergo rigorous imprisonment of one year and fine of Rs.2,70,000/- with default RI of 2 months. The respondent is directed to surrender before the trial Court on or before 7th January, 2025, failing which the trial Court shall be free to issue warrant of arrest to undergo the jail sentence.

The appeal succeeds and is allowed.