

(2022) 04 J&K CK 0068

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous Cases (M) No. 75 Of 2019

Mohammad Rafiq Wani

APPELLANT

Vs

Ghulam Nabi Khan

RESPONDENT

Date of Decision : 28-04-2022

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138
Code Of Criminal Procedure, 1973 — Section 242, 342
Indian Contract Act, 1872 — Section 29
Code Of Criminal Procedure, 1989 — Section 435, 561A

Citation : (2022) 04 J&K CK 0068

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : F. A. Wani, T. M. Shamsi

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) The petitioner has challenged the judgment dated 21.06.2017 passed by learned Judicial Magistrate 1st Class (Forest Magistrate), Srinagar, as also the judgment dated 20.03.2019 passed by the Appellate Court i.e., Court of 2nd Additional Sessions Judge, Srinagar, whereby judgment of the learned Magistrate has been upheld.

2) Vide the impugned judgment passed by the learned Magistrate in a complaint filed by respondent against the petitioner under Section 138 of Negotiable Instruments Act, the petitioner has been convicted of the aforesaid offence and sentenced to undergo a simple imprisonment of one year and to pay fine of Rs.13.00 lacs, in default whereof the petitioner has been directed to undergo further simple imprisonment of five months. The Appellate Court, while upholding the finding of conviction passed by the learned Magistrate, has reduced the sentence of imprisonment awarded against the petitioner from one year to six months. The sentence of fine has been kept in-tact.

3) Before coming to the grounds of challenge, it would be apt to briefly state the allegations contained in the complaint filed by the respondent.

4) In the complaint it was alleged by the respondent that he had entered into a business transaction with the petitioner and an amount of Rs.9.50 lacs was outstanding against him. It was further alleged that in discharge of aforesaid liability, the petitioner issued a cheque dated 05.03.2013 drawn on J&K Bank, Rawalpura, Srinagar, which, when presented by respondent/complainant before his banker J&K Bank Aircargo, Srinagar, on 03.04.2013, was dishonoured. It was further alleged that respondent demanded cash from the petitioner when the cheque was dishonoured but the petitioner assured him that the cheque would be honoured if he presents it again before the bank. Accordingly, respondent presented the cheque again before his bank on 25.04.2013 but it was returned unpaid on account of insufficiency of funds vide memo dated 25.04.2013. The respondent is stated to have served a legal notice of demand upon the petitioner but he failed to pay the amount. It was also alleged by respondent in the complaint that prior to issuance of the cheque in question, an agreement was executed between the parties on 5th March, 2013, whereby the petitioner had acknowledged the issuance of the aforesaid cheque under his signatures and he also acknowledged that he had to pay an amount of Rs.9.50 lacs to the respondent.

5) On the basis of aforesaid allegations, the complaint was lodged before the learned trial Magistrate. Pursuant to issuance of the process, the petitioner appeared before the learned trial Magistrate. His statement under Section 242 of Cr. P. C was recorded in which he admitted issuance of the cheque under his signatures but denied the receipt of legal notice of demand and claimed that he had no liability to discharge against the respondent. Thus, the petitioner claimed to be tried. The respondent/complainant besides examining himself as a witness also examined Senior Executive Manager, J&K Bank Aircargo Branch and two more witnesses, namely, Saleem Mohi-ud-din and Ab. Rashid. After completion of complainant's evidence, the statement of the petitioner/accused under Section 342 of Cr. P. C was recorded. In his statement under Section 342 of Cr. P. C, the petitioner/accused claimed that as per the agreement dated 5th March, 2013, it was clearly provided that the cheque in question will not be presented for encashment. He further claimed that he did not owe any amount to the respondent and that he did not receive the legal notice of demand. The petitioner further claimed that the cheque in question was issued by him in favour of respondent as a measure of security and the same was not meant to be encashed. The petitioner also examined one witness in defence who in his statement claimed that respondent was to supply iron to the petitioner and for this purpose only the cheque in question was issued but when respondent failed to do so, there was no question of payment of any amount to him.

6) The learned trial court after discussing the evidence on record passed a very detailed judgment on 21.06.2016 thereby convicting the petitioner under Section

138 of Negotiable Instruments Act. The learned Magistrate while passing the aforesaid judgment observed that as on date of issuance of the cheque, petitioner, admittedly, owed an amount of Rs.9.50 lacs and, as such, it can safely be stated that the cheque in question was issued in discharge of legally enforceable debt and it was not a security cheque.

7) The learned Appellate Court upheld the judgment of the learned trial court and negatived the contention of the petitioner that cheque in question was only a security cheque which was not meant to be presented for encashment in terms of agreement dated 5th of March, 2013.

8) The petitioner has challenged both the aforesaid judgments on the grounds that the learned courts below have failed to appreciate the fact that there was an agreement between the petitioner and the respondent whereby it was agreed by the parties that the cheque which petitioner had issued in favour of the respondent, was not to be presented for encashment and that it was only a cheque for security. It is contended that when it was specifically agreed by the petitioner that the cheque in question would not be presented for encashment, the respondent could not have initiated criminal proceedings against the petitioner on its basis. It is further contended that the agreement dated 5th March, 2013 contains contradictory covenants and, as such, the same is hit by Section 29 of the Contract Act thereby rendering it void.

9) I have heard learned counsel for the parties and perused the material on record including the record of the trial court.

10) The petitioner has filed the instant petition under Section 561-A of Cr. P. C read with Section 435 of J&K Cr. P. C invoking inherent and revisional jurisdiction of this Court. So, while approaching this case, it has to be borne in mind that it is only if there is any illegality or impropriety writ large in the impugned orders passed by the courts below or there has been any failure of justice resulting from the aforesaid orders that this Court would step in and invoke its inherent or revisional jurisdiction. The concurrent findings of fact recorded by the learned courts below cannot be gone into by re-appreciating the evidence on record unless the findings of the learned courts below are patently illegal and perverse.

11) In the backdrop of aforesaid legal position and the limited scope of interference by this Court, let us now proceed to test the merits of contentions raised by learned counsel for the petitioner.

12) The first ground which has been urged by learned counsel for the petitioner is that cheque in question was issued as a measure of security, as is clear from the agreement dated 5th of March, 2013, which is part of the complaint and an admitted document. According to the petitioner, the respondent could not have initiated the criminal proceedings against him, particularly when the agreement itself provided that cheque in question was not to be encashed

13) The legal position as regards the question as to whether proceedings under

Section 138 of the NI Act can be initiated in case a cheque issued by way of security is dishonoured for insufficiency of funds, has been a topic of discussion in a number of cases. In *Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd.* (2016) 10 SCC 458, the Supreme Court has, while answering the issue as to what constitutes a legally enforceable debt and other liability as contained in section 138 of N.I. Act, observed as under:

“10. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in *Indus Airways* with reference to the explanation to Section 138 of the Act and the expression “for discharge of any debt or other liability” occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for “discharge of debt or liability” depends on the nature of the transaction. If on the date of the cheque, liability or debt exists or the amount has become legally recoverable, the section is attracted and not otherwise.

11. Reference to the facts of the present case clearly shows that though the word “security” is used in Clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of instalments. The repayment becomes due under the agreement, the moment the loan is advanced and the instalment falls due. It is undisputed that the loan was duly disbursed on 28-2-2002 which was prior to the date of the cheques. Once the loan was disbursed and instalments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.

12. The judgment in *Indus Airways* (supra) is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself on a par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in praesenti in terms of the loan agreement, as against *Indus Airways* (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan instalment which had fallen due though such deposit of cheques towards repayment of instalments was also described as “security” in the loan agreement. In applying the judgment in *Indus Airways* (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

13. The crucial question to determine applicability of Section 138 of the Act is

whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of the different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court.”

14) Relying upon its aforesaid observations, the Supreme Court in the case of *Sripati Singh vs. State of Jharkhand and Ors.* AIR 2021 SC 5732, has, while discussing the status of a cheque issued as a security, observed as under:

“16. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. ‘Security’ in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.

17. When a cheque is issued and is treated as ‘security’ towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as ‘security’ cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a *sine qua non* to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in a proceedings initiated under Section 138 of the N.I. Act. Therefore, there cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an ‘on demand promissory note’ and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as ‘security’ the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal

proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation.”

15) In *Sunil Todi and Ors. v. State of Gujarat and Ors.* AIR 2022 SC 147, the issue whether dishonour of a cheque furnished as a security is covered under the provisions of Section 138 of N. I. Act, again came up for discussion before the Supreme Court and the Court observed as under:

“26. The object of the NI Act is to enhance the acceptability of cheques and inculcate faith in the efficiency of negotiable instruments for transaction of business. The purpose of the provision would become otiose if the provision is interpreted to exclude cases where debt is incurred after the drawing of the cheque but before its encashment. In *Indus Airways*, advance payments were made but since the purchase agreement was cancelled, there was no occasion of incurring any debt. The true purpose of Section 138 would not be fulfilled, if ‘debt or other liability’ is interpreted to include only a debt that exists as on the date of drawing of the cheque. Moreover, Parliament has used the expression ‘debt or other liability’. The expression “or other liability’ must have a meaning of its own, the legislature having used two distinct phrases. The expression ‘or other liability’ has a content which is broader than ‘a debt’ and cannot be equated with the latter. In the present case, the cheque was issued in close proximity with the commencement of power supply. The issuance of the cheque in the context of a commercial transaction must be understood in the context of the business dealings. The issuance of the cheque was followed close on its heels by the supply of power. To hold that the cheque was not issued in the context of a liability which was being assumed by the company to pay for the dues towards power supplied would be to produce an outcome at odds with the business dealings. If the company were to fail to provide a satisfactory LC and yet consume power, the cheques were capable of being presented for the purpose of meeting the outstanding dues.

27. According to the complainant, the LCs’ were not in a format agreed to by their bankers. The cheques which were initially towards security could not have been presented before the payments under the PSA fell due. Moreover, if the company were to discharge its liability to pay the outstanding dues under the power supply agreement through the agreed modality of an LC to the satisfaction of the second respondent’s bankers, there would be no occasion to present the cheque thereafter. In other words, once payments for electricity supply became due in terms of the PSA, and the company failed to discharge its dues, the second respondent was entitled in law to present the cheque for payment. Merely labelling the cheque as a security would not obviate its character as an instrument designed to meet a legally enforceable debt or liability, once the supply of power had been provided for which there were monies due and payable. There is no inflexible rule which precludes the drawee of a cheque issued as security from presenting it for payment in terms of the contract. It all depends on whether a legally enforceable debt or liability has arisen.

30. The submission which has been urged on behalf of the appellants, however, is that the fact that the cheques in the present case have been issued as a security is not in dispute since it stands admitted from the pleading of the second respondent in the suit instituted before the High Court of Madras. The legal requirement which Section 138 embodies is that a cheque must be drawn by a person for the payment of money to another "for the discharge, in whole or in part, of any debt or other liability". A cheque may be issued to facilitate a commercial transaction between the parties. Where, acting upon the underlying purpose, a commercial arrangement between the parties has fructified, as in the present case by the supply of electricity under a PSA, the presentation of the cheque upon the failure of the buyer to pay is a consequence which would be within the contemplation of the drawer. The cheque, in other words, would in such an instance mature for presentation and, in substance and in effect, is towards a legally enforceable debt or liability. This precisely is the situation in the present case which would negate the submissions of the appellants.

16) From the foregoing enunciation of law on the subject, it is clear that crucial thing which a Court has to consider is whether at the time of presentation of the cheque for encashment, there was a legally enforceable debt or liability due to the complainant from the accused. The nomenclature of the cheque, security etc. would pale into insignificance once the debt had become due to the complainant and even if the cheque was issued as a security, the provisions of Section 138 of the N. I. Act would get attracted.

17) Now coming to the facts of the instant case. As per the agreement dated 5th March, 2013, it was clearly indicated therein that the petitioner owed a sum of Rs.9.50 lacs to respondent. It was further agreed by the parties that the petitioner would liquidate the aforesaid amount and that he had issued the cheque in question as security to the respondent. The agreement also provides that the petitioner would be bound to deposit the sum in the savings bank account of the respondent maintained with J&K Bank Aircargo Branch to liquidate the aforesaid liability. The agreement also provides that the petitioner would pay the amount of Rs.9.50 lacs to respondent positively.

18) From the foregoing covenants of the agreement, there is no manner of doubt about the fact that the petitioner owed a sum of Rs.9.50 lacs to respondent at the time when he issued the cheque in question in favour of the respondent. Learned counsel for the petitioner has harped on the expression 'security' used in the agreement and he has laid much emphasis on the covenant which provides that the cheque in question would not be presented for encashment. The cheque in question might have been issued by the petitioner in favour of respondent as a security for repayment of the debt due but when petitioner failed to liquidate the said amount within a reasonable time, the respondent was well within his rights to present the same for encashment.

19) It has been contended by learned counsel for the petitioner that the agreement in question is hit by Section 29 of the Contract Act, inasmuch as the

covenants of the said agreement are uncertain which make it void. He has submitted that on the one hand the covenants provide that the petitioner would liquidate the amount of Rs.9.50 lacs to the respondent but on the other it provides that the cheque in question would not be presented for encashment. According to the learned counsel these covenants are mutually contradictory making the agreement itself void.

20) At the first blush, the argument of learned counsel for the petitioner appears to be attractive but when closely examined, the same is destined to fail because the covenants of the agreement are to be interpreted and inferred in a manner to give effect to the same and not to render them useless. As already noted, in the agreement in question, the petitioner has in no uncertain terms admitted his liability towards the respondent and he has in no uncertain terms undertaken to pay this amount to the respondent positively, which means that he has undertaken to do so with certainty. So, there is no ambiguity in the covenants of the agreement so far as the same relate to the liability of the petitioner and his obligation to discharge his liability towards the respondent. The cheque in question has been, admittedly, issued by the petitioner in favour of the respondent as security to discharge his liability. Once the petitioner failed to discharge his liability, the respondent had no option but to present the cheque for encashment.

The covenant that the cheque in question is not to be presented for encashment is to be ignored and its enforcement has to be avoided in order to give effect to the intention and purport of the covenants of the agreement.

21) In support of his argument that the agreement in question is void, the learned counsel for the petitioner has relied on the judgment of the Delhi High Court in the case of Virender Singh v. Laxmi Narain and another, (2007) CriLJ 2262. The ratio laid down in the said judgment is not applicable to the facts of the instant case, inasmuch as in the said case, the consideration for which the cheque was issued was unlawful. It is in those circumstances that it was held that the agreement between complainant and the accused therein was void as the consideration was in the nature of an illegal gratification, which is unlawful. In the instant case, the consideration for which the cheque in question was issued is not unlawful nor the agreement between the petitioner and respondent is unlawful as the transaction between the petitioner and respondent, admittedly, was a commercial transaction of lawful nature.

22) A feeble attempt has been made by learned counsel for the petitioner to canvass that the cheque in question was issued by the petitioner in favour of the respondent in consideration of iron supplies to be made by the respondent to him, which he failed to do. According to the petitioner, the respondent could not have presented the cheque for encashment.

23) If we have a look at the evidence led before the trial Magistrate, it becomes clear that the petitioner during cross-examination of respondent or his witnesses

has not taken this defence and he has not even made a suggestion to this effect to the respondent during his cross-examination. It is only at the time of leading evidence in defence that the petitioner has tried to advance this defence by examining one defence witness who has not been able to prove or establish this defence. This aspect of the case has been dealt with by both learned trial Magistrate as well as by learned Appellate Court. The findings arrived at by the learned courts below in this regard do not call for any interference by this Court in the present proceedings.

24) Lastly, it has been argued by learned counsel for the petitioner that the Manager of the Bank where the cheque in question was presented has clearly stated that he has not seen the account of the petitioner, which shows that the endorsement in the memo, wherein it is recorded that the cheque has been dishonoured due to insufficiency of funds, is not based upon his personal knowledge. Thus, according to learned counsel, respondent has failed to establish that the cheque was dishonoured for reasons of insufficiency of funds.

25) The argument of learned counsel for the petitioner is without any merit for the reason that the witness from the Bank has clearly stated that he verified the matter online and he has not seen the account of the petitioner. In the present times of internet banking, balance of a particular customer of a bank can be easily accessed by an official of a bank sitting in another branch of the bank online without actually going to the said branch and verifying the account of the customer. Therefore, it cannot be stated that the respondent has failed to prove that the cheque in question was not dishonoured for insufficiency of funds. In any case, if petitioner had sufficient funds in his account at the relevant time, it was always open to him to produce statement of account while leading his evidence in defence. Having failed to do so, it has to be presumed that whatever is stated in the memo of dishonour of cheque in question is correct. The argument of learned counsel for the petitioner is, therefore, rejected.

26) For the foregoing reasons, I do not find any merit in this petition. The same is, accordingly, dismissed. The learned trial court is directed to proceed against the petitioner in accordance with law so that the sentence awarded against him by the learned trial court as modified by learned Appellate Court is executed.

27) A copy of this order be sent to learned trial court for information and compliance.