

(2009) 02 DEL CK 0083

In the Delhi High Court

Case No : Criminal M.C. 1753 of 2008 and Criminal M.A. No's. 6333 and 8984 of 2008 and 479 of 2009

Senbo Engineering Ltd. and Others

APPELLANT

Vs

Ahlcon Ready Mix Concrete Division of Ahluwalia Constract India Ltd.

RESPONDENT

Date of Decision : 10-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Negotiable Instruments Act, 1881 (NI) — Section 138, 138(1), 139, 141, 142

Citation : (2009) 4 ILR Delhi 83

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Viplav Sharma and Anurag Singh, for the Appellant; Rishi Kapoor and Paras, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—This petition u/s 482 of the Code of Criminal Procedure, 1973 (CrPC) seeks the quashing of Complaint Case No. 1372/1 of 2007 titled "Ahlcon Ready Mix Concrete, Division of Ahluwalia Contract (India) Ltd. v. Senbo Engineering Ltd." pending in the Court of the Chief Metropolitan Magistrate (CMM), Delhi u/s 138 read with Section 142 of the Negotiable Instruments Act, 1881 (NI Act).

2. The aforementioned complaint was filed in respect of the dishonour of cheque No. 694108 dated 10th July 2007 in the sum of Rs. 25,50,000/- drawn by Senbo Engineering Ltd., in favour of Ahlcon Ready Mix Concrete. It is stated in the complaint that when the cheque was presented for payment it was returned unpaid with remarks "stopped payment" by the Bank's memo dated 10th July 2007.

3. Mr. Viplav Sharma, the learned Counsel for the petitioner submits that a cheque in respect of which stop payment instruction has been issued is not a

cheque at all. It ceases to remain payable on demand and return of such a document is not a dishonour of cheque. He seeks to place reliance on the decisions in *Cohen v. Hale* (1878) 3 QBD 371 *William Joseph Reade v. The Royal Bank* ILR (1922) 22 Wianholt v. Spitta (1813) 3 Camp 377 and the decision of the Calcutta High Court in *Syed Mahommed Yaqub Vs. Imperial Bank of India*, . He refers to the endorsement in bold across the face of the cheque by the Bank "payment stopped by the drawer" and such a cheque cannot even be re-presented and therefore is not the kind of cheque which is contemplated by Section 138 NI Act.

4. Mr. Sharma submits that u/s 146 of the NI Act, the banker's slip or memo stating the reason for the dishonour has to be presumed to be proof of such dishonour unless disproved. Building on this argument, he submits that in terms of Section 138(1) NI Act, offence in terms of thereof is attracted only in two eventualities. One is the dishonour on account of insufficiency of funds and other is when the amount for which the cheque is drawn exceeds the arrangement with the bank in respect of the account on which the cheque is drawn. According to Mr. Sharma the maxim *expressum facit cessare tacitum* would apply to exclude any other reason for dishonour like a stop payment instruction from the purview of Section 138 NI Act. According to him the Court cannot enlarge the scope of Section 138 NI Act. The decisions in *Union of India and Another Vs. Tulsiram Patel and Others*, , *Padmasundara Rao and Others Vs. State of Tamil Nadu and Others*, and *Mohan and Another Vs. State of Maharashtra and Others*, are referred to in support of this proposition. He refers to the Parliamentary debates that preceded the amendment to the NI Act in 2002 which show that the intention was not to bring the instance of dishonour on account of a stop payment instruction within the mischief of Section 138 NI Act. He seeks to distinguish the decisions of the Supreme Court in *M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi, M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another*, and *Goaplast (P) Ltd. v. Chico Ursula D'Souza* (2003) 3 SCC 235 which hold that the dishonour of a cheque on account of a stop payment instruction cannot be said to be outside the ambit of Section 138 NI act. According to Mr. Sharma these decisions do not consider the true purport of Section 138 read with 146 NI Act as submitted by him and are therefore either *per incuriam* or *sub silentio*. He cites the decision in *Municipal Corporation of Delhi Vs. Gurnam Kaur*, in support of this submission.

5. It is next submitted that Petitioner No. 2 has been arrayed as an accused only because he happens to be the Managing Director of Petitioner No. 1 and this is not sufficient compliance with the requirement of Section 141 NI Act. On facts, Mr.Sharma submits that the transaction in question was based on an invoice which simply talks of "service charges" and therefore, there is no liability towards which the payment was made. In fact the petitioners informed the Respondent of the factum of issuing the stop payment instruction.

6. Appearing for the respondent Mr. Rishi Kapoor, learned Advocate refers to the

judgment in *Modi Cements Ltd. v. Kuchil Kumar Nandi* (supra) which overruled the earlier judgment in *K.K. Sidharthan Vs. T.P. Praveena Chandran and Another*, and categorically held that even if a cheque is dishonoured because of a stop payment instruction Section 138 NI Act would get attracted. It is submitted that the judgment of the Calcutta High Court in *Syed Mahommed Yaqub* was rendered at a time when the law had not been settled by the Supreme Court. It is further submitted that the liability of a Managing Director would automatically follow in terms of the judgments of the Supreme Court in *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, and *Everest Advertising Pvt. Ltd. Vs. State, Govt. of NCT of Delhi and Others*, . As regards the merits of the complaint, it is submitted that the points urged by the petitioners raise triable issues which cannot be gone into in a petition u/s 482 CrPC.

7. Having considered the submissions of the learned Counsel for the parties, it appears to this Court that the point regarding dishonour on account of stop payment instruction to the Bank by the drawer stands covered by the decision of the Supreme Court in *Modi Cements Ltd.* The Supreme Court accepted the submission made on behalf of the drawee of the dishonoured cheque that the dishonour of a cheque on account of a stop payment instruction did not preclude an action u/s 138 NI Act and that a cheque that was validly drawn would attract presumption of liability u/s 139 NI act. The Supreme Court also accepted the submission that its earlier decision in *M/s. Electronics Trade and Technology Development Corpn. Ltd., Secunderabad Vs. M/s. Indian Technologists and Engineers (Electronics) Pvt. Ltd. and another*, was not correctly decided. Also, the decision in *K.K. Sidharthan v. T.P. Praveena Chandran* was expressly overruled. In para 16 of *Modi Cements Ltd* it was explained by the Supreme Court as under:

16. We see great force in the above submission because once the cheque is issued by the drawer a presumption u/s 139 must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action u/s 138 of the Act by the drawee or the holder of a cheque in due course. The object of Chapter XVII, which is instituted as "Of Penalties in case of Dishonour of certain Cheques for Insufficiency of Funds in the Accounts" and contains Sections 138 - 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this Court in *Electronics Trade & Technology Development Corporation Ltd.* in para 6 to the effect "Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted", does not fit in with the object and purpose for which the above chapter has been brought on the statute book.

8. The aforementioned judgment was followed in the later decision in *MMTC Ltd.* where it was held that (SCC, p.240):

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 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.... The important thing is that the burden of so proving would be on the accused. The court cannot quash a complaint on this ground.

9. In *Goaplast Pvt. Ltd. Vs. Shri Chico Ursula D'Souza and Another*, the judgment in *Modi Cements Ltd.* was followed. It was observed (SCC, p.237-38): "If stoppage of payment before the due date of the cheque is taken out of the purview of Section 138 of the Act, it will shake the confidence which the cheque is otherwise intended to inspire regarding payment being available on the due date." The entire set of decisions was again discussed and the law reiterated in *Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza*,

10. With the law having been so unambiguously stated in several decisions of the Supreme Court, this Court is unable to accept the submission that a cheque which is dishonoured for the reason of a stop payment instruction is not a cheque within the meaning of Section 138 NI Act or that the offence thereunder is not attracted in such instance. The decision of the Calcutta High Court in *Syed Mahommed Yaqub v. Imperial Bank of India* and the earlier decisions in *Cohen v. Hale*, *William Joseph Reade v. The Royal Bank*, *Wianholt v. Spitta* are therefore to no avail in this regard. The submission that any or all of the above judgments of the Supreme Court are per incuriam or sub silentio does not impress this Court. They in fact provide a complete answer to the contentions of the learned Counsel for the petitioner on this issue.

11. There is no merit in the contention concerning the minimum averment in the complaint as regards Petitioner No. 2 who is the Managing Director of Petitioner No. 1. The decisions in *S.M.S Pharmaceuticals v. Neeta Bhalla* and *Everest Advertising Pvt. Ltd. v. State (NCT of Delhi)* answer the point against the petitioners. The other contention on merits, that no liability existed, cannot obviously be gone into at this stage and will have to await the conclusion of the trial. The question that is required to be answered is whether when the complaint in the instant case is read as a whole a prima facie case can be said to be made out for proceeding against the petitioners for the offence u/s 138 NI Act. The answer is unambiguously in the affirmative. There is, therefore, no ground for this Court to interfere in exercise of its powers u/s 482 CrPC to quash the criminal complaint against the petitioners.

12. Any request made by the petitioner No. 2 for exemption from personal appearance will have to be made to the court concerned by an appropriate application which will be considered on its merits by that court.

13. With the above observations, the petition is dismissed. The interim orders stand vacated. The applications are dismissed. A certified copy of this order be

sent to the learned MM concerned forthwith.