HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR
SB: Justice Sujoy Paul

M. Cr.C. No. 247/2011
Ramswaroop Tyagi
Vs.
Omkarnath Pandey

Shri A.V. Bhardwaj, Advocate for the applicant.
Shri Ashish Saraswat, Advocate for the non-applicant / complainant.

O R D E R
(21 / 08 / 2015)

The applicant / drawer has invoked the jurisdiction of this Court under Section 482 Cr.P.C. to assail the order dated 18.12.2010 whereby the court below has rejected the application of the applicant preferred under Section 245 of Cr.P.C and decided to proceed with the matter on merits. The question needs consideration is whether court below is justified in rejecting the said application and proceeding with the matter on merits and whether any interference at this stage is warranted by this Court?

2. The said question emerges on the following factual backdrop. The non-applicant / complainant filed a complaint under Section 138 of N.I. Act. contending that the present applicant took a loan of Rs. 3,00,000/- in April, 2008 from the non-applicant with the promise that same would be refunded within a year. A receipt to that effect was also executed. When the said loan amount was not repaid up to one year, request was made by the non-applicant to the applicant and ultimately a cheque No. 82978 dated 13.05.2009 of Rs. 3,00,000/- was given by the applicant to the non-applicant / complainant. The said cheque was deposited by the

complainant at State Bank of India , Morena on 25.05.2009. However, the said cheque was returned back with an endorsement that applicant has asked for “stop payment”. The complainant then sent a legal notice and ultimately filed a complaint under the NI Act on 17.08.2009. The complaint was registered on 22.09.2009 and summons were issued to the present applicant by the court below. Subsequently, charges were framed vide Annexure P/2. The applicant preferred an application under Section 245 of Cr.P.C. stating that since there is no charge against the present applicant, the case against him be dropped. Certain other grounds were also taken. The complainant, in turn, filed his reply to the said application. The trial court dismissed the said application and decided to proceed with the matter on merits.

3. Shri A.V. Bhardwaj, learned counsel for the applicant submits that as applicant's cheque book was not traceable, he immediately informed this fact to the Police and Bank authorities. He requested that if any such cheque from the said cheque book is deposited, no payment be made. Accordingly, the said bank vide Annexure P/8 stopped the payment on the instructions of applicant. To elaborate, Shri Bhardwaj contended that Section 138 of NI Act is a penal provision. Being a penal provision, it must receive strict construction. Section 138 can be invoked when (i) amount of money standing to the credit of that account is insufficient to honour the cheque or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank. By placing reliance on *2009 CRI.L.J. 3454 (SC) (Rajkumar Khurana Vs. State of (NCT of Delhi and Anr.),* it is contended that parameters for invoking the provisions of Section 138 of NI Act being limited, the refusal on the part of the Bank to honour the cheque would not bring the matter within the

mischief of provisions of Section 138 of the Act.

4. Shri Ashish Saraswat, Advocate for the non-applicant / complainant, supported the order. He submits that court below has rightly held that at this stage, the applicant cannot be exonerated.

5. No other point is pressed by the learned counsel for the parties.

6. I have heard the parties at length and perused the record.

7. Section 138 of NI Act finds place in Chapter XVII of the NI Act. The object behind introducing this chapter is to instill faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were introduced in order to discourage people from not honouring their commitments by way of payment through cheques. This is trite law that Court should lean in favour of an interpretation which serves the object of the statute. [See: *(2003) 3 SCC 232 (Goaplast (P) Ltd. Vs. Chico Ursula D' Souza)*].

8. However, before dealing with the rival contentions, I deem it apposite to quote certain relevant sections from the NI Act. Section 118 reads as under :-

> "118. *Presumptions as to negotiable instruments*.—Until the contrary is proved, the following presumptions shall be made:
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> (*a*)*of consideration*: that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

Section 139 of NI Act reads as under :-

> "139. *Presumption in favour of holder*.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability." (**Emphasis Supplied**)

9. The Apex Court considered Section 139 in *2001 (6) SCC 16 (Hiten P. Dalal Vs. Bratindranath Banerjee)*. It was held that because both Sections 138 and 139 require that the court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn. It is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on the accused. Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court 'may presume' a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

10. In *2008 (7) SCC 655 (Mallavarapu Kasiviswesara Rao Vs. Thadikonda Ramulu Firm)* the Apex court opined that under Section 118(*a*) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal.

11. In view of aforesaid judgments, it is clear that a

presumption is created by statute itself. In view of this presumption, the initial burden is on the defendant to show that existence of consideration was either doubtful or illegal, then only onus would shift on the plaintiff. The Supreme Court in *(1999) 3 SCC 35 (Bharat Barrel & Drum Mft. Co. V. Amin Chand Payrelal)* held that if the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist.

12. In *(2002) 1 SCC 234 (M.M.T.C. Ltd. Vs. Medchl Chemicals & Pharma (P) Ltd.)* the Apex Court directly considered a question where cheque was dishonoured by reason of stop payment instructions. This aspect was considered in the light of Section 139 of NI Act. The Apex court opined that 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 the 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. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out.

13. The judgment in *M.M.T.C.* (supra) was considered by three judge Bench of Supreme Court in *(2010) 11 SCC 441 (Rangappa Vs. Sri Mohan)*. In this case the Apex court followed the *ratio decidendi* of judgment of M.M.T.C. (supra) and opined that Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation.

14. In view of aforesaid judgments, it is clear that it is for the accused to show by leading adequate evidence that in his account there were sufficient fund to clear the amount of cheque and that stop payment notice had been issued because of other valid reasons. Thus, this aspect can be gone into only after recording evidence.

15. The Apex Court in its recent judgment reported in *AIR 2015 SC 910 (Pulsive Technologies P. Ltd. Vs. State of Gujrat and Ors.)* followed the earlier judgment of *M.M.T.C.* (supra). It was held that the High Court has relied on M.M.T.C. Ltd. (AIR 2002 SC

182) and Modi Cements (AIR 1998 SC 1057) and yet drawn a wrong conclusion that inasmuch as cheque was dishonoured because of “stop payment” instructions, offence punishable under 138 of NI Act is not made out. The High Court observed that “stop payment” instructions were given because the complainant had failed to discharge its obligations as per agreement by not repairing/replacing the damaged UPS system. Whether complainant had failed to discharge its obligations or not could not have been decided by the High Court conclusively at this stage. The High Court was dealing with a petition filed under Section 482 of the Code for quashing the complaint. On factual issue, as to whether the complainant had discharged its obligations or not, the High Court could not have given its final verdict at this stage. It is matter of evidence. This is exactly what Supreme Court said in M.M.T.C. Ltd. (AIR 2002 SC 182). It is held that although High Court referred to M.M.T.C. Ltd., it failed to note the most vital caution sounded therein. It is pertinent to mention that the case of Pulsive Technologies (supra) was also arising out of the same reason i.e. “ stop payment” by drawer.

16. Thereafter the Apex Court in *2015 SCC Online 233 (H.M.T. Watches Ltd. Vs. M.A. Abida & Anr; decided on March 19, 2015)* again considered Section 138 and 139 of NI Act and opined that the accused (respondent no.1) challenged the proceedings of criminal complaint cases before the High Court, taking factual defences. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial Court after recording evidence of the parties. Supreme Court held that the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure,

to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties.

17. It is clear that the defence of present applicant is based on factual matrix. In that situation, initial burden is on him to lead evidence and putforth his case. At the threshold, it would not be proper for this Court to interfere with the cognizance of the complainant having been taken by the trial court. In view of three judge Bench judgment in *Rangappa* (supra) in which earlier judgments of Supreme Court were taken into account and impact of Section 118 and 139 of NI Act were also considered, the Division Bench judgment in *Rajkumar Khurana* (supra) is of no assistance to the applicant. Moreso when the view taken in *M.M.T.C. Ltd* and *Rangappa* (supra) is consistently followed by the Supreme Court in subsequent judgments viz. *Pulsive Techonologies* and *H.M.T. Watches Ltd*. (supra).

18. This is trite law that parameters of jurisdiction of High Court in exercising its jurisdiction under Section 482 of Cr.P.C. is although of wide amplitude, a great deal of caution is also required in its exercise. Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of such jurisdiction. High Court at that stage would not ordinarily enter into a disputed question of fact [See :- *(2008) 13 SCC 678 (Suryalakshmi Cotton Mills Limited Vs. Rajvir Industries Limited)*].

19. In view of aforesaid analysis, no fault can be found in the order of trial Court. The order of trial Court is in accordance with law wherein it is held that defence of the applicant will be considered after recording of the evidence of the parties. At this stage, no interference is warranted by this Court.

20. Application fails and is hereby dismissed. No costs.

(Sujoy Paul)
Judge

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