

IN THE HIGH COURT OF MADHYA PRADESH, JABALPUR

SINGLE BENCH : HON'BLE MR. JUSTICE N.K.GUPTA, J.

M.Cr.C.No.3547/2010

Mahinder Singh Bhasin

VERSUS

M/s Ssangyong Engineering & Construction Co. Ltd.

Shri Bramhadatt Singh, counsel for the applicant.

Shri Anoop Nair, counsel for the respondent.

O R D E R

(Passed on the 14th day of August, 2015)

This order shall govern the disposal of present matter as well as M.Cr.Cs.No.2234/2010, 2235/2010, 3827/2010, 3828/2010, 3830/2010, 3842/2010, 3845/2010, 3853/2010, 3866/2010, 3870/2010, 3874/2010, 3876/2010, 3886/2010, 3995/2010, 6887/2010, 6888/2010, 6919/2010, 6920/2010, 6921/2010, 6922/2010, 12346/2010, 11785/2012, 11788/2012, 11789/2012, 11792/2012 and 11794/2012 because facts of such cases are same. However, in the present order facts of the present matter are mentioned.

2. The applicant has preferred the present petition under Section 482 of the Cr.P.C. to quash the proceedings of complaint case No.2382/2009 pending before JMFC,

Narsinghpur for offence under Section 138 of Negotiable Instruments Act (in short "*NI Act*").

3. The facts of the case, in short, are that, the applicant gave a cheque of Rs.5 Lacs to the respondent company. Cheque was presented before the concerned bank on 15.6.2009 but, it was dishonoured because the applicant had given instructions to the concerned bank to stop the payment. A demand notice was given on 3.7.2009 and payment could not be received, thereafter, a criminal complaint was lodged before CJM, Narsinghpur, which was transferred to JMFC, Narsinghpur.

4. I have heard the learned counsel for the parties at length.

5. Learned counsel for the applicant submits that the amount of cheque was not recoverable because it was given for the purpose of security and therefore, no complaint under Section 138 of NI Act lies even if the applicant instructed the bank to stop the payment of the cheque. On the other hand, learned counsel for the respondent submits that the amount of cheque was due according to the terms of contract that took place between the parties.

6. If a work contract agreement executed by the parties is considered then, on its internal page No.3, in para 9, terms and conditions for issuance of the cheque is mentioned, which is reproduced herebelow for ready reference:-

*“9. SSANGYONG will give Rupees 2 (Two) Crores as interest bearing Mobilisation Advance to the Sub Contractor for the costs of mobilization. The rate of interest being 10% per annum. Half of the amount shall be paid in advance and remaining half shall be paid directly to the suppliers on the behalf of the Sub Contractor, when sub Contractor has achieved 5% of financial progress. Sub Contractor have to submit post dated cheque/cheques of equivalent amount **as a security** against Mobilization Advance.”*

According to such condition, the respondent has given a mobilisation advance to the applicant. However, 50% of that amount was directly to be given to various suppliers from whom the applicant took the material and 50% of that amount was to be retained by the applicant to meet out other expenses of contract. However, the applicant was directed to submit post dated cheques equivalent to the amount as security against the mobilisation advance and consequently, he gave 25-26 cheques of various denominations to the respondent.

7. Also, according to the Para 12 of the aforesaid document, recoveries were to be made from monthly running bills of the applicant. It was also quoted in para 12 (C) that mobilisation advance recovery @ 12% from second R.A. bill onwards. Similarly, there was a termination clause of the contract also. In para 8 of that agreement, it was specifically mentioned that the post dated cheques given by the applicant were taken for equivalent amount against mobilisation advance as a security. Hence, such cheques could be encashed by the

respondent if the contract is terminated and payment of various bills submitted by the applicant relating to work done by him should have been cleared. It is apparent that various proceedings for recovery of amount relating to work done in compliance to the aforesaid agreement are pending at various forums like Civil Court and Arbitration Tribunal. When various cheques were taken for security of the amount given as mobilisation advance then, the entire mobilisation advance cannot be recovered by lodging the entire cheques before the concerned bank. If the sub contractor had arranged for machinery, material and started work then, his expenditure was to be assessed and such amount was to be adjusted while recovering the mobilisation advance and therefore, by such cheques obtained as security amount for mobilisation advance could not be lodged for their payment without considering the account of the applicant and without clearing his running bills.

8. Provision of Section 138 of NI Act clearly indicates that a complaint could be filed against a person, who issues the cheque and same is dishonoured unless amount of cheque is not payable. For ready reference provision of Section 138 of NI Act is reproduced herebelow:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the accounts - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is

returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for [“a term which may extend to two year”], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) The cheque has been 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.

(b) The payee or the holder induce course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer, of the cheque, ³[“within thirty days”] of the receipt of information by him from the bank regarding the return of the cheques as unpaid, and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purpose of this section, “debt or other liability” means a legally enforceable debt or other liability].”

9. According to the explanation given in that provision, the word “Debt or other liability” means a legally enforceable debt or other liability. When the dispute between the parties was not settled and the respondent had to pay the expenditure done by the applicant to fulfil the terms and conditions of the agreement as a sub contractor then, the cheques which were

kept for the security purpose could not be encashed. Those cheques were given against the mobilisation advance and therefore, the mobilisation advance was not legally enforceable liability at that time when the dispute between the parties was not settled.

10. In this connection, learned counsel for the applicant has placed his reliance upon the judgment passed by the Apex Court in case of “M.S.Narayana Menon @ Mani Vs. State of Kerala and another”, [2006 (4) M.P.L.J. 97], in which it is held that if a cheque is issued for security or for any other purpose, the same would not come within the purview of Section 138 of NI Act. Learned counsel for the applicant has also placed his reliance upon the order passed by the single Bench of this Court in case of “Jitendra Singh Flora Vs. Ravikant Talwar”, [2001 (1) M.P.H.T. 130], in which various judgments of Hon'ble the Apex Court were considered and it is held that if there was no “Debt or other Liability” under Section 138 of the NI Act in view of the agreement then, the concerned accused cannot be held liable under Section 138 of NI Act. In that case order of framing of charge against the accused was set aside. Learned counsel for the applicant has also placed his reliance upon the judgment passed by the Apex Court in case of “Indus Airways Private Limited Vs. Magnum Aviation Private Limited and another”, [(2014) 12 SCC 539], in which it is held that “Debt or

other Liability” means legally enforceable debt or liability. Advance payment for supply of goods not supplied are not covered within the debt or other liability.

11. On the basis of the aforesaid discussion, in the light of judgments passed by the Apex Court and order of the single Bench of this Court, in the present matter cheques were given for security against the mobilisation advance and those cheques could not be encashed unless the total account between the parties would have settled and therefore, the amount of such cheques cannot be considered as Debt or other Liability as defined under Section 138 of NI Act. In case of “State of Haryana Vs. Ch. Bhajanlal”, [AIR 1992 SC 604], the Apex Court has laid 7 conditions in para 106 of its judgment. Conditions No.3 and 5 as mentioned in that judgment may be reproduced as under:-

“3. where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

5. where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.”

12. When cheques issued by the applicant were issued for security purpose against mobilisation advance and those were submitted to the bank for withdrawal of the amount in a

premature stage then, the entire pleadings of the complaint made by the respondent does not disclose the commission of any offence and therefore, in the light judgment passed in case of *Ch.Bhajanlal* (supra) these complaints are not legally maintainable. When complaint cannot be prosecuted under Section 138 of NI Act, it is a good case in which inherent powers of this Court under Section 482 of the Cr.P.C. may be invoked and complaint filed by the respondent against the applicant may be quashed.

10. On the basis of the aforesaid discussion, the petition under Section 482 of the Cr.P.C. filed by the applicant Mahinder Singh Bhasin is hereby allowed. Proceedings of criminal complaint case No.2382/2009 pending before JMFC, Narsinghpur is hereby quashed. JMFC, Narsinghpur is directed to drop the case against the applicant.

11. Copy of the order be sent to the trial Court alongwith its record for information and compliance.

(N.K.GUPTA)
JUDGE
14/8/2015

Pushpendra