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HIGH COURT OF KARNATAKA
Bench: JUSTICE M. NAGAPRASANNA
Date of Decision: 06 OCTOBER, 2023

CRIMINAL PETITION No.6481 OF 2022
C/W
CRIMINAL PETITION No.7203 OF 2022
IN CRIMINAL PETITION No.6481 OF 2022

1 . **SRI RAJIV S/O SANGAPPA KADAPATTI DIRECTOR M/S. JAMKHANDI SUGARS LTD.,**

2 . **SRI LAXMAN OCC: DIRECTOR M/S. JAMKHANDI SUGARS LTD.,**

3 . **SRI RAJENDRA S/O BALASAHEB PATIL OCC: DIRECTOR M/S. JAMKHANDI SUGARS LTD.,**

... PETITIONERS

Versus

STATE BANK OF INDIA ... RESPONDENT

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE ENTIRE PROCEEDINGS AGAINST THE PETITIONERS / ACCUSED NO.3, 4 AND 6 IN C.C.NO.15686/2022 (OLD C.C.NO.3095/2021) PENDING ON THE FILE OF XLII ADDL.C.M.M., BENGALURU (SPECIAL COURT FOR TRIAL FOR CASES FILED AGAINST SITTING AS WELL AS FORMER MPs/MLAs TRIABLE BY MAGISTRATE IN THE STATE OF KARNATAKA) FOR THE OFFENCE P/U/S 138 OF N.I. ACT.

IN CRIMINAL PETITION No.7203 OF 2022

1. M/S. JAMKHANDI SUGARS LIMITED REPRESENTED BY ITS CHAIRMAN SRI ANAND
2. SRI ANAND CHAIRMAN
M/S JAMKANDI SUGARS LIMITED

3. SRI GURULINGAPPA DIRECTOR M/S JAMKHANDI SUGARS LIMITED

... PETITIONERS

AND:

STATE BANK OF INDIA ... RESPONDENT

Sections, Acts, Articles and Rules:

Section 138, 139 of the Negotiable Instruments Act
Section 482 of the Cr.P.C.

Subject: Negotiable Instruments Act - Chairman of the Company issued the cheque, which was signed by him - Chairman passed away after issuance of the cheque - Accused No. 2 succeeded as Chairman - Liability of Drawer – Presumption under Section 139 of the Negotiable Instruments Act – Blank cheque voluntarily signed and handed over by the accused towards payment – Presumption of liability under Section 139 unless rebutted with evidence.

Headnotes:

Quashing of Complaint - Negotiable Instruments Act - Proceedings under Section 138 of the Act - Petitioners challenging proceedings instituted against them - Accused persons include Directors and office bearers of a company - Cheque issued for credit facility - Chairman of the Company issued the cheque, which was signed by him - Chairman passed away after issuance of the cheque - Accused No. 2 succeeded as Chairman - Renewal and execution of loan documents by accused Nos. 2 to 6 - Cheque presented for realization after being declared a non-performing asset - Dishonored cheque leads to legal proceedings - Company denies liability. [Para 1-12]

Cheque Issued as Security – Liability of Drawer – Presumption under Section 139 of the Negotiable Instruments Act – Blank cheque voluntarily signed and handed over by the accused towards payment – Presumption of liability under Section 139 unless rebutted with evidence – Death of the drawer does not absolve liability, especially when the cheque is issued on behalf of a Company – Company and its office bearers must rebut the presumption before the Court. [Para 15-16]

Decision – Criminal petitions dismissed – Observations made in the order are for the consideration of the case under Section 482 of the Cr.P.C. and do not bind or influence any other pending proceeding. [Para 16]

Referred cases:

- Sripati Singh V. State Of Jharkhand 2021 Scc Online Sc 1002
- Dashrathbhai Trikambhai Patel Vs Hitesh Mahendrabhai Patel (2023) 1 Scc 578
- Oriental Bank Of Commerce V. Prabodh Kumar Tewari 2022 Scc Online Sc 1089

Representing Advocates:
For Petitioner: Sri B.O.Chandrashekar, Advocate, V.M.Sheelvant, Advocate
For Respondent: Sri Abhilash R., Advocate,

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THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE ENTIRE PROCEEDINGS AGAINST PETITIONER/ACCUSED NO.1, 2 AND 5 IN CC NO.3095/2021 ON THE FILE THE PRINCIPAL CIVIL JUDGE AND JMFC, JAMKHANDI FOR THE OFFENCE PUNISHABLE U/S 138 AND 142 OF N.I. ACT.

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THESE CRIMINAL PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 07.07.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioners are before this Court calling in question proceedings in C.C.No.3095 of 2021. Criminal Petition No.6481 of 2022 is preferred by accused Nos. 3, 4 and 6 and Criminal Petition No. 7203 of 2022 is preferred by accused Nos. 1, 2 and 5. Therefore, both these petitions cover a challenge by accused Nos. 1 to 6. The challenge is to the proceedings instituted for offences punishable under Section 138 of the Negotiable Instruments Act 1881 ('the Act' for short).

2. Facts adumbrated are as follows:-

The 1st petitioner in Criminal Petition No.7203 of 2022 is M/s Jamkhandi Sugars Limited (hereinafter referred to as 'the Company' for short). The other accused - accused Nos. 2 to 6 are Directors/office bearers of the Company. The Company in the year 2013 approaches the respondent/State Bank of India (hereinafter referred to as 'the Bank' for short) seeking assistance/finance for harvesting and transportation of the products of the Company and seek credit facility. The credit facility so sought was granted to the Company by the Bank. The business goes on. On 06-01-2018 an application is made by the Company to the Bank for approval of renewal of harvesting and transportation of credit facility for a tie up with JSL for an amount of Rs.65/- crores. On 25-01-2018 the application filed by the Company was processed and credit facility was resolved to be granted against security. A cheque was issued by the Chairman on behalf of the Company for an amount of Rs.90/- crores as security amount to the finance/credit facility of Rs.65/- crores. The Chairman then was

Siddappa B.Nyamagouda/Siddu Nyamagouda. The cheque was signed by the Chairman. After issuance of the said cheque, the Chairman dies on 28-03-2018.

3. On the death of the Chairman, accused No.2 becomes the Chairman of the Company pursuant to the resolution of the Board of Directors. After accused No.2 takes over as Chairman renewal and execution of loan related documents then existed between the Bank and the Company were executed. The execution of loan documents is by accused Nos. 2 to 6. Business goes on. Necessary installments towards the loan are not paid. It becomes sticky and the account is declared as non-performing asset. On the account being declared a non-performing asset, the cheque that was in possession of the Bank was presented for its realization on 24-03-2021. The cheque gets dishonoured for want of sufficient funds. The dishonouring of the cheque leads the Bank to cause a legal notice upon the accused including the Company on 27-03-2021.

4. The Company then replies to the notice on 15-04-2021 denying the liability and contending that the cheque is presented after the death of the person who has signed it. The Bank then registers a private complaint invoking Section 200 of the CrPC against all the accused on 10-05-2021. The concerned Court in terms of its order dated 16-10-2021 takes cognizance of the offence and issues summons to the accused. Issuing of summons leads these accused to this Court in these petitions. This Court in terms of an order dated 18-02-2022 grants an interim order of stay of further proceedings in Criminal Case No.3095 of 2021.

5. Heard Sri.B.O.Chandrashekar, learned counsel appearing for petitioners in Crl.P.No.6481 of 2022; Sri.V.M.Sheelavant, learned counsel

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appearing for petitioners in Crl.P.No.7203 of 2022 and Sri.Abhilash.R., learned counsel appearing for respondent-Bank in both the cases.

6. The learned counsel Sri V M Sheelavant appearing for petitioners would vehemently contend that the liability was guaranteed by issuance of a cheque by the then Chairman in his personal capacity. The cheque is signed by the Chairman. The Chairman dies on 28-03-2018 and the cheque is presented on 24-03-2021 for its realization. He would, therefore, contend that the cheque is presented after the death of the person who had issued it and is, therefore, not valid in the eye of law. He would submit that the entire proceedings that are initiated on the strength of the cheque so issued by the then Chairman, after his death, is clearly a nullity in law. The petitioners have nothing to do with the issuance of the cheque by the dead person and no liability can be fastened upon them on the said instrument. He would seek quashment of the entire proceedings *qua* all the accused.

7. On the other hand, the learned counsel representing the respondent/Bank would vehemently refute the submissions contending that the petitioners are not alien to the transaction. The 2nd accused is in fact the son of the person who had issued the cheque, the then Chairman. He is appointed as Chairman by a resolution of the Board of Directors. All the accused come together and executed renewal of loan documents being fully aware of the cheque being issued by the then Chairman against security for the credit facility that was availed. He would submit that mere death of the Chairman of the Company will not absolve the other office bearers who are in-charge of the affairs of the Company to escape the liability of the offence punishable under Section 138 of the Act, as they have every role to play in

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clearance of the debt of the Company and the Company is still in existence. He would seek dismissal of the petition.

8. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

9. The afore-narrated facts, dates and link in the chain of events are not in dispute. The business of the Bank with the Company began way back in 2013 when the Company began to seek credit facility from the Bank for harvesting and transportation of sugarcane. Though the credit facility is granted to its contractors, the Company had stood guarantee to the said credit facility for harvesting and transportation by execution of necessary agreement and undertaking by the Company. On 06-01-2018 an application is made to the Bank seeking approval of renewal of the earlier tie up. This time a tie up with JSL with an aggregate limit of Rs.65/- crores. The Bank made the grant subject to the condition of furnishing security by the Company. It is then a cheque was issued by the Chairman of the Company, signed by him for an amount of Rs.90/- crores. About two months after issuance of the cheque, the signatory to the cheque, the Chairman dies. The Board of the Company resolves that accused No.2 son of the then Chairman to be anointed as Chairman of the Company. Thus, accused No.2 becomes the Chairman of the Company. The other accused are office bearers of the Company. All of them cannot feign ignorance of the finance taken and as a measure of security cheque was issued by the then Chairman of the Company.

10. Copy of the cheque is appended to the petition. The cheque is drawn on Union Bank for an amount of Rs.90/- crores by the then Chairman not in

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his personal capacity but for Jamkhandi Sugars Limited – the Company. Therefore, the cheque is issued on behalf of the Company. It is, therefore, in the considered view of the Court, the other accused cannot project themselves to be ignorant of this fact.

11. Yet another circumstance is, the renewal and execution of loan documents by accused Nos. 2 to 6 with the Bank on 27-08-2019. The renewal is for the earlier loan taken. The Chairman and the Directors who seek such renewal are accused Nos. 2 to 6. The finance is renewed.

12. After renewal comes the saga of the account being declared to be a non-performing asset. The Company defaults in repayment and the account is declared to be a non-performing asset. After declaration of the account as non-performing asset and after few of the efforts to recover the amount failed, the cheque that was furnished as security was presented on 24-03-2021. The cheque gets dishonoured for want of sufficient funds, the very next day. Proceedings under the Act are taken up by the Bank. The Bank caused a legal notice against the accused on 27-03-2021. This is replied to by the Company on 15-04-2021 denying its liability. It is then the Bank initiates proceedings before the learned Magistrate invoking Section 200 of the CrPC. The learned Magistrate takes cognizance of the offence and issues summons to the accused. Further proceedings are interdicted by this Court.

13. The submission of the learned counsel for the petitioners that they have nothing to do with the cheque so issued or the Company has nothing to do is noted only to be rejected, as it is fundamentally flawed. The renewal of the loan that has taken place on 29-08-2019 is a document that assumes significance in this regard. The document is appended to the petition. This

is with regard to renewal of credit facility of Rs.65/- crores. Clause 15 of the said document reads as follows:

"(15) Personal guarantee of 4 Directors (Shri Anand S Nyamgouda, Guruling Sangappa Nyamgouda, Rajiv Sangappa Kadapatti and Rajendra B Patil)".

This clause indicates that four Directors including accused No.2 stood as personal guarantors for Rs.65/- crores. It is only then the loan/credit facility is renewed. Now, with the account becoming sticky, the accused are wanting to show their hands off to the Bank with the specious plea that it is issued by the then Chairman in his personal capacity and since he is no more, they have nothing to do. This is again noted to be rejected as a very look at the cheque indicates that it is issued on behalf of the Company by the then Chairman. Therefore, the office bearers of the Company who had stepped into the shoes of the Chairman or Directors of the Company cannot wash off their hands of their liability of repayment, as it is neither the money belonging to the Directors or the officers of the Bank, it is public money. In the considered view of the Court, the death of the signatory to the cheque, issued in favour of the Bank, would not absolve or diminish the value of the cheque, even if it is a blank cheque issued as a security. The Bank was always at liberty to present the said cheque for its realization as it was a security at its hands and security is sought to be redeemed by such presentation.

14. In the aforesaid circumstance reference being made to the judgment of the Apex Court in the case of ***SRIPATI SINGH v. STATE OF JHARKHAND***[1] becomes apposite. In the said judgment the Apex Court holds as follows:

> ***"14.*** *In fact, it would be apposite to take note of the decision of this Court in the case of Sampelly Satyanarayana Rao (supra) wherein this Court while answering the issue as to what constitutes a legally enforceable debt or other liability as contained in the Explanation 2 to Section 138 of N.I. Act has held as hereunder:—*

[1] 2021 SCC OnLine SC 1002

"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 (supra) 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.I (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 28th February, 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. 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 at 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 presenti in terms of the loan agreement, as against the case of 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. ***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 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."***

(emphasis supplied)

15. *The said conclusion was reached by this Court while distinguishing the decision of this Court in the case of Indus Airways Pvt. Ltd. v. Magnum Aviation Pvt. Ltd. (2014) 12 SCC 539 which was a case wherein the issue was of dishonour of post-dated cheque issued by way of advance payment against a purchase order that had arisen for consideration. In that circumstance, it was held that the same cannot be considered as a cheque issued towards discharge of legally enforceable debt.*

16. *Further, this Court in the case of Womb Laboratories Pvt. Ltd. (supra) has held as follows:—*

"5. In our opinion, the High Court has muddled the entire issue. The averment in the complaint does indicate that the signed cheques were handed over by the accused to the complainant. The cheques were given by way of security, is a matter of defence. Further, it was not for the discharge of any debt or any liability is also a matter of defence. The relevant facts to countenance the defence will have to be proved-that such security could not be treated as debt or other liability of the accused. That would be a triable issue. We say so because, handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques.

6. Suffice it to observe, the impugned judgment of the High Court cannot stand the test of judicial scrutiny. The same is, therefore, set aside."

17. *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.*

18. *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.

19. *If the above principle is kept in view, as already noted, under the loan agreement in question the respondent No. 2 though had issued the cheques as security, he had also agreed to repay the amount during June/July 2015, the cheque which was held as security was presented for realization on 20.10.2015 which is after the period agreed for repayment of the loan amount and the loan advanced had already fallen due for payment. Therefore, prima facie the cheque which was taken as security had matured for payment and the appellant was entitled to present the same. On dishonour of such cheque the consequences contemplated under the Negotiable Instruments Act had befallen on respondent No. 2. As indicated above, the respondent No. 2 may have the defence in the proceedings which will be a matter for trial. In any event, the respondent No. 2 in the fact situation cannot make a grievance with regard to the cognizance being taken by the learned Magistrate or the rejection of the petition seeking discharge at this stage.*

20. *In the background of the factual and legal position taken note supra, in the instant facts, the appellant cannot be non-suited for proceeding with the complaint filed under Section 138 of N.I. Act merely due to the fact that the cheques presented and dishonoured are shown to have been issued as security, as indicated in the loan agreement. In our opinion, such contention would arise only in a circumstance where the debt has not become recoverable and the cheque issued as security has not matured to be presented for recovery of the amount, if the due date agreed for payment of debt has not arrived. In the instant facts, as noted, the repayment as agreed by the respondent No. 2 is during June/July 2015. The cheque has been presented by the appellant for realisation on 20.10.2015. As on the date of presentation of the cheque for realisation the repayment of the amount as agreed under the loan agreement had matured and the amount had become due and payable. Therefore, to contend that the cheque should be held as security even after the amount had become due and payable is not sustainable. Further, on the cheques*

being dishonoured the appellant had got issued a legal notice dated 21.11.2015 wherein inter-alia it has been stated as follows:—

"You request to my client for loan and after accepting your word my client give you loan and advanced loan and against that you issue different cheque all together valued Rs. One crore and my client was also assured by you will clear the loan within June/July 2015 and after that on 26.10.2015 my client produce the cheque for encashment in H.D.F.C. Bank all cheque bearing No. 402771 valued Rs. 25 Lakh, 402770 valued Rs. 25 lakh, 402769 valued Rs. 50 lakh, (total rupees one crore) and above numbered cheques was returned with endorsement "In sufficient fund". Then my client feel that you have not fulfil the assurance."

21. *The notice as issued indicates that the appellant has at the very outset after the cheque was dishonoured, intimated the respondent no. 2 that he had agreed to clear the loan by June/July 2015 after which the appellant had presented the cheque for encashment on 26.10.2015 and the assurance to repay has not been kept up.*

22. *In the above circumstance, the cheque though issued as security at the point when the loan was advanced, it was issued as an assurance to repay the amount after the debt becomes due for repayment. The loan was in subsistence when the cheque was issued and had become repayable during June/July 2015 and the cheque issued towards repayment was agreed to be presented thereafter. If the amount was not paid in any other mode before June/July 2015, it was incumbent on the respondent No. 2 to arrange sufficient balance in the account to honour the cheque which was to be presented subsequent to June/July 2015.*

23. *These aspects would prima-facie indicate that there was a transaction between the parties towards which a legally recoverable debt was claimed by the appellant and the cheque issued by the respondent No. 2 was presented. On such cheque being dishonoured, cause of action had arisen for issuing a notice and presenting the criminal complaint under Section 138 of N.I. Act on the payment not being made. The further defence as to whether the loan had been discharged as agreed by respondent No. 2 and in that circumstance the cheque which had been issued as security had not remained live for payment subsequent thereto etc. at best can be a defence for the respondent No. 2 to be put forth and to be established in the trial. In any event, it was not a case for the Court to either refuse to take cognizance or to discharge the respondent No. 2 in the manner it has been done by the High Court. Therefore, though a criminal complaint under Section 420 IPC was not sustainable in the facts and circumstances of the instant case, the complaint under section 138 of the N.I Act was maintainable and all contentions and the defence were to be considered during the course of the trial."*

The said judgment is followed by the Apex Court subsequently in ***DASHRATHBHAI TRIKAMBHAI PATEL v.HITESH MAHENDRABHAI PATEL***[2] wherein it is held as follows:

*"**16.** Based on the above analysis of precedent, the following principles emerge:*

***16.1.** Where the borrower agrees to repay the loan within a specified timeline and issues a cheque for security but defaults in repaying the loan within the timeline, the cheque matures for presentation. When the cheque is sought to be encashed by the debtor and is dishonoured, Section 138 of the Act will be attracted.*

***16.2.** However, the cardinal rule when a cheque is issued for security is that between the date on which the cheque is drawn to the date on which the cheque matures, the loan could be repaid through any other mode. It is only where the loan is not repaid through any other mode within the due date that the cheque would mature for presentation.*

***16.3.** If the loan has been discharged before the due date or if there is an "altered situation", then the cheque shall not be presented for encashment."*

17. In Sunil Todi v. State of Gujarat [Sunil Todi v. State of Gujarat, (2022) 16 SCC 762 : 2021 SCC OnLine SC 1174] , a two-Judge Bench of this Court expounded the meaning of the phrase "debt or other liability". It was observed that the phrase takes within its meaning a "sum of money promised to be paid on a future day by reason of a present obligation". The Court observed that a post-dated cheque issued after the debt was incurred would be covered within the meaning of "debt". The Court held that Section 138 would also include cases where the debt is incurred after the cheque is drawn but before it is presented for encashment. In this context, it was observed : (SCC para 30)

"30. 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 [Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd., (2014) 12 SCC 539 : (2014) 5 SCC (Civ) 138 : (2014) 6 SCC (Cri) 845] , 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

[2] (2023) 1 SCC 578

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."

… … …

20. *The judgments of this Court on post-dated cheques when read with the purpose of Section 138 indicate that an offence under the provision arises if the cheque represents a legally enforceable debt on the date of maturity. The offence under Section 138 is tipped by the dishonour of the cheque when it is sought to be encashed. Though a post-dated cheque might be drawn to represent a legally enforceable debt at the time of its drawing, for the offence to be attracted, the cheque must represent a legally enforceable debt at the time of encashment. If there has been a material change in the circumstance such that the sum in the cheque does not represent a legally enforceable debt at the time of maturity or encashment, then the offence under Section 138 is not made out.*

… … …

24. *It was the contention of the first respondent that the cheque was not dated. On the other hand, it was the contention of the appellant that the cheque was dated 17-3-2014. The courts below did not record a finding on whether the cheque was un-dated or was dated 17-3-2014. However, it was conclusively held that the cheque was issued by the first respondent for security on the date when the loan was borrowed. It was also categorically recorded by the courts below that a sum of Rs 4,09,315 that was paid by the first respondent was paid to partly fulfil the debt of rupees twenty lakhs. The appellant in his cross-examination has stated that a "cheque against a cheque" was given when he loaned the sum of rupees twenty lakhs. Thus, it can be concluded that the cheque was given as a security to discharge the loan, either undated or dated as 17-3-2014. Merely because the sum of Rs 4,09,315 was paid between 8-4-2012 and 30-12-2013, which was after 17-3-2014, it cannot be concluded that the sum was not paid in discharge of the loan of rupees twenty lakhs. The sum of Rs 4,09,315 was paid after the loan was lent to the first respondent. The appellant in his cross-examination has not denied the receipt of the payments. He has also stated it was not received as a "gift or reward". In view of the above discussion, at the time of the encashment of the cheque, the first respondent did not owe a sum of rupees twenty lakhs as represented in the cheque at the time of encashment of the cheque that was issued for security.*

25. *The High Court while dismissing the appeal against acquittal held that the notice issued by the appellant is an omnibus notice since it does not represent a legally enforceable debt. Relying on the judgment of this Court in Rahul Builders v. Arihant Fertilizers & Chemicals [Rahul Builders v. Arihant Fertilizers & Chemicals, (2008) 2 SCC 321 : (2008) 1 SCC (Civ) 553 : (2008) 1 SCC (Cri) 703] , it was held that the legal notice was not issued in accordance with proviso (b) to Section 138 since it did not represent the "correct amount". The appellant has contended that the requirement under Section 138 is to send a notice*

demanding the "cheque amount". It was contended that the offence under Section 138 was made out since the appellant in the statutory notice demanded the payment of rupees twenty lakhs which was the "cheque amount".

26. *Section 138 of the Act stipulates that if the cheque is returned unpaid by the bank for the lack of funds, then the drawee shall be deemed to have committed an offence under Section 138 of the Act. However, the offence under Section 138 of the Act is attracted only when the conditions in the provisos have been fulfilled. Proviso (b) to Section 138 states that a notice demanding the payment of the "said amount of money" shall be made by the drawee of the cheque.*

… … …

28. *In K.R. Indira v. G. Adinarayana [K.R. Indira v. G. Adinarayana, (2003) 8 SCC 300 : 2003 SCC (Cri) 2002] , it was held that the notice did not demand the payment of the cheque amount but the loan amount. It was observed that for the purposes of proviso (b), the amount covered in the dishonoured cheque must be demanded. In Rahul Builders [Rahul*
Builders v. Arihant Fertilizers & Chemicals, (2008) 2 SCC 321 : (2008) 1 SCC (Civ) 553 : (2008) 1 SCC (Cri) 703] , the drawee demanded the payment of Rs 8,72,409 which was higher than the sum of Rs 1,00,000 represented in the cheque. It was reiterated that the phrase "payment of the said amount" in proviso (b) would mean the cheque amount. Since the demand in the notice was not severable as the cheque amount could not be severed from the demand for the additional amount, it was held that it was an omnibus notice. S.B. Sinha, J. writing for a two-Judge Bench of this Court observed [Rahul Builders v. Arihant Fertilizers & Chemicals, (2008) 2 SCC 321 : (2008) 1 SCC (Civ) 553 : (2008) 1 SCC (Cri) 703] : (Rahul Builders case [Rahul Builders v. Arihant Fertilizers & Chemicals, (2008) 2 SCC 321 : (2008) 1 SCC (Civ) 553 : (2008) 1 SCC (Cri) 703] , SCC pp. 324-25, para 10)

"10. … One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money". … It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. Respondent 1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts of bills i.e. Rs 8,72,409. The noticee was to respond to the said demand. Pursuant thereto, it was to offer the entire sum of Rs 8,72,409. No demand was made upon it to pay the said sum of Rs 1,00,000 which was tendered to the complainant by cheque dated 30-4-2000. What was, therefore, demanded was the entire sum and not a part of it."

29. *Section 138 creates a deeming offence. The provisos prescribe stipulations to safeguard the drawer of the cheque by providing them the opportunity of responding to the notice and an opportunity to repay the cheque amount. The conditions stipulated in the provisos need*

to be fulfilled in addition to the ingredients in the main provision of Section 138. It has already been concluded above that the offence under Section 138 arises only when a cheque that represents a part or whole of the legally enforceable debt at the time of encashment is returned by the bank unpaid. Since the cheque did not represent the legally enforceable debt at the time of encashment, the offence under Section 138 is not made out."

(Emphasis supplied)

The Apex Court, in the afore-quoted judgments, would steer clear the issue whether the cheques that are issued as security could become the subject matter of proceedings under Section 138 of the Act. The Apex Court holds that it can and it is a matter of evidence for the accused to prove before the concerned Court with regard to issuance of the cheque or otherwise. These are matters which have to be thrashed out before the concerned Court in a full-blown trial.

15. Yet another factum that would lead to rejection of the petitions is elucidation of the Apex Court *qua* an instrument/cheque in a transaction. The Apex Court in the case of ***ORIENTAL BANK OF COMMERCE v. PRABODH KUMAR TEWARI***[3] has held as follows:

"12. *The submission which has been urged on behalf of the appellant is that even assuming, as the first respondent submits, that the details in the cheque were not filled in by the drawer, this would not make any difference to the liability of the drawer.*

13. *Section 139 of the NI Act states:*

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.*

14. *In Bir Singh v. Mukesh Kumar,*[3] *after discussing the settled line of precedent of this Court on this issue, a two-Judge Bench held:*

33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the

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payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. ***It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer.*** *If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.*

34. ***If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.***

[…]

36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

(emphasis supplied)

15. *The above view was recently reiterated by a three-Judge Bench of this Court in Kalamani Tex v. P. Balasubramanian.*

16. *A drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in discharge of a liability. The presumption arises under Section 139."*

The Apex Court holds that a drawer who signs the cheque and hands it over to the payee is presumed to be liable, unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt, in discharge of a liability or otherwise. The presumption is in tune with Section 139 of the Act. The death of the drawer of the cheque cannot and will not efface such presumption, as the cheque is issued on behalf of the Company. The Company is in existence, so are the Chairman and Directors. Therefore, it is for the Company or its Chairman or Directors to rebut such presumption before the Court, as it is trite that, bearers of the office of a Company may come and go, the company remains.

16. For the aforesaid reasons, I pass the following:

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ORDER

(i) Criminal Petitions stand dismissed.

(ii) It is made clear that the observation made in the course of the order are only for the purpose of consideration of the case of the petitioners under Section 482 of the Cr.P.C. and the same would not bind or influence any other proceeding pending between the parties.

Interim order, granted earlier, if subsisting, shall stand dissolved.

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