

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
WEDNESDAY, THE 19TH DAY OF JULY 2023 / 28TH ASHADHA, 1945
CRL.MC NO. 8747 OF 2017
CC 2315/2017 OF JMFC(SPECIAL COURT) FOR TRIAL OF SEC.138, NI
ACT CASES, PALLURUTHY
PETITIONER/ACCUSED:

SENTHILKUMAR
S/O. KALIAPPA CHETTIAR, NEHRU NAGAR, NATTUKAL
POST, KOZHINJAMPARA, PALAKKAD-678554.

BY ADVS.
SRI.P.MARTIN JOSE
SRI.P.PRIJITH
SRI.THOMAS P.KURUVILLA

RESPONDENTS/RESPONDENTS:

- 1 THE STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682031.
- 2 * SRI. CHANDRAMOHAN K.
GOURISHANKARAN, K, MURALI ROAD, OPP. KUMARANASAN
ROAD, KADAVANTHRA, KOCHI-682020.

* THE NAME OF THE 2ND RESPONDENT SRI.CHANDRAMOHAN K,
OCCURRING IN THE CAUSE TITLE OF CRL.M.C 8747/2017 IS
CORRECTED AND SUBSTITUTED AS SRI.CHANDRAMENON K, AS PER
ORDER DATED 7.2.2018 IN CRL.M.A NO.1298/18

BY ADVS.
SRI.SANTHOSH MATHEW
SRI.SANTHOSH MATHEW
SRI.VIJAY V. PAUL

SMT. NEEMA T V, SR. PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
19.07.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

"CR"

ORDER

The petitioner herein is the accused in C.C.No.2315/2017 on the file of the Judicial First Class Magistrate (NI Court), Palluruthy. The aforesaid case has arisen from a complaint lodged under Sections 138 and 142 of the Negotiable Instruments Act, 1881 (the "NI Act" for the sake of brevity) by the party respondent herein. This petition is filed seeking to quash all further proceedings in the above case, for which purpose, the powers of this Court under Section 482 of the Code of Criminal Procedure have been invoked.

2. Short facts to be noticed for deciding the issues involved are as under:

a. The complainant held shares in the Company by the name Elnocs Health Care Private Ltd. ("the Company" for the sake of brevity). An agreement was entered into between the complainant and the accused, as per which the complainant agreed to transfer 833 shares held by the complainant in favor of the accused for a total consideration of Rs.87,43,812/- within 12 months from the date of the share purchase agreement. In furtherance thereto, the accused is alleged to have issued

three post-dated cheques drawn on the HDFC Bank bearing numbers '000069', '000070', and '000071' dated 12.03.2017 towards consideration due under the share purchase agreement. It is stated that when the cheque bearing Nos.000069 and 000070 were presented for collection, the same was dishonored for the reason "payment stopped by drawer". Thereafter, statutory notice was issued to which the accused had issued a reply dated 4.5.2017 stating incorrect facts. Thereafter, the complaint was lodged within the statutory period.

3. Sri. Martin Jose, the learned counsel for the petitioner, submitted that the petitioner herein was also a Director of the Company Elnocs Health Care Private Ltd, and this fact would be evident from the shareholding pattern shown in the agreement. While so, the complainant and other Directors approached the petitioner and offered to sell their shares to the petitioner and one Biju Radhakrishnan. Consequently, Annexure-I agreement was entered into for the transfer of the shares. It was at that juncture that the post-dated cheques in question were handed over to the complainant. However, the understanding as per the agreement was to hand over the management of the company with the power to operate the bank accounts to the petitioner and Sri.Biju Radhakrishnan. However, the said exercise was not carried out. The business of the

Company nosedived due to the inefficient management by the complainant. Under the above circumstances, the petitioner resigned from the post of Director of the Company on 13.6.2016 and issued Annexure-II letter informing of his intention to cancel Annexure-I agreement. The request made by the petitioner was accepted by the complainant, as is evident from the return mail. Thereafter, the petitioner sent Annexure-III notice to the Directors requesting the return of the cheques which were handed over as part of the agreement. It was pointed out in the said notice that the cheques were not supported by any consideration, and the consideration, if any, had failed owing to the breach of agreement committed by the complainant. It was also asserted that the cheques were unenforceable, and there is no obligation on the part of the petitioner to effect any payment as the share transfer did not go through. It was thereafter that statutory notice was issued, and after ignoring the reply filed by the petitioner, the complaint was filed. It is submitted that the facts would reveal that the cheques in question did not represent the discharge of existing enforceable debt or liability, but the cheques were post-dated and issued without there being any subsisting debt or liability. According to the learned counsel, the continuance of criminal proceedings on the cover of the complaint is a clear abuse of process.

4. The learned counsel appearing for the party respondent submitted that it was owing to the lapses of the petitioner that the agreement fell through. As the petitioner failed to comply with the terms of the agreement, the cheques which were handed over by way of security for compliance were presented, and the same was dishonored. According to the learned counsel, the cheques are supported by consideration, and as the same was issued in the discharge of a legally enforceable debt, the complaint is maintainable under the law. It is further submitted that the defense of the accused that the consideration was paid and that there is no legally enforceable debt cannot be sustained under the law.

5. I have considered the submissions advanced and have gone through the entire records.

6. Before delving into the contentions advanced by both sides, it would be profitable to refer to the law laid down by the Hon'ble Supreme Court in **Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd.**¹, wherein the following observations were made explaining the parameters of the jurisdiction of the High Court in exercising its jurisdiction under Section 482 of the Code of Criminal Procedure

'17. The parameters of jurisdiction of the High Court in exercising its jurisdiction under Section 482 of the Code of Criminal

¹ (2008) 13 SCC 678

Procedure is now well settled. Although it is of wide amplitude, a great deal of caution is also required in its exercise. What is required is application of the well-known legal principles involved in the matter.

22. Ordinarily, a defence of an accused although appears to be plausible, should not be taken into consideration for exercise of the said jurisdiction. Yet again, the High Court at that stage would not ordinarily enter into a disputed question of fact. It, however, does not mean that documents of unimpeachable character should not be taken into consideration at any cost for the purpose of finding out as to whether continuance of the criminal proceedings would amount to an abuse of process of court or that the complaint petition is filed for causing mere harassment to the accused. While we are not oblivious of the fact that although a large number of disputes should ordinarily be determined only by the civil courts, but criminal cases are filed only for achieving the ultimate goal, namely, to force the accused to pay the amount due to the complainant immediately. The courts on the one hand should not encourage such a practice; but, on the other, cannot also travel beyond its jurisdiction to interfere with the proceeding which is otherwise genuine. The courts cannot also lose sight of the fact that in certain matters, both civil proceedings and criminal proceedings would be maintainable.'

7. The Apex Court has held that the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure is well-established and broad, but the same has to be exercised with caution and by adhering to well-known legal principles. Generally, the defense of an accused should not be considered while exercising the jurisdiction under Section 482 of the

Code, and this Court should avoid getting involved in disputed questions of fact. Nevertheless, it can take into account the documents of unquestionable authenticity to determine if the criminal proceedings are an abuse of the court process or filed solely to harass the accused. While many disputes should be resolved by civil courts, criminal cases are often filed to pressure the accused into immediately paying the complainant. The court should discourage such practices. However, it must not exceed its jurisdiction and interfere with genuine proceedings, even if both civil and criminal proceedings may be applicable in certain matters.

8. It needs to be stated at this juncture that the party respondent is not disputing Annexure-I agreement or its contents. On the other hand, the details of the cheques in question have been specifically mentioned as Annexure-II to the agreement, and it is the admitted case of the parties that the cheques were issued towards consideration due under the share purchase agreement. As per the terms of the agreement, the 2nd respondent, who is named as the seller, undertook to transfer 833 shares of M/s. Elnocs Health Care Pvt. Ltd. on an agreed consideration subject to various terms and conditions. It is also stated in the agreement that the consideration mentioned in the agreement shall be paid by the buyer within 12 months from 11.3.2016, strictly in terms of Annexure-II which details the

manner in which the payment of consideration was to be effected. It is also stated that the payment of consideration shall be secured by post-dated cheques issued by the buyer in the name of the seller. It is mentioned in the agreement that the company has received certain loans from the seller and that the buyer agrees that the repayment of the loan is an essential part of the agreement. The buyer had agreed to arrange funds to close the unsecured loans and gave a personal guarantee to the seller for the closure of the loans to the extent as mentioned in Annexure II of the agreement. It is also stated that the payment would be secured by post-dated cheques. As per clause 6(e) of the agreement, the Company, its authorized persons, and the buyer had agreed to indemnify the damages caused to the sellers due to the non-fulfillment of the conditions in the agreement, and the commitment was secured by the very same post-dated cheques. The buyer, on the other hand, had agreed to indemnify the seller if the terms of the agreement were not honored.

9. The materials produced before this Court reveals that within three months of the execution of the agreement, the petitioner resigned from the company, and his resignation was also accepted. This aspect is not denied by the party respondent. On 13.6.2016 itself, the petitioner issued a letter to the company requesting to cancel the agreement, which was signed

for take over of the company, and a further request was made to return back the cheques handed over by way of guarantee. Annexure-III would disclose that on 20.2.2017, the petitioner had issued a notice through the lawyer disclosing the events that had transpired and informing that the agreement dated 11.3.2016 had fallen through due to the breach committed by the party respondent. A request was also made to return the cheques and to formally cancel the agreement dated 11.3.2016. It is thereafter that the complaint under Section 138 of the Negotiable Instruments Act was filed before the Jurisdictional magistrate on 30.5.2017. There is no case for the party respondent that he had transferred the shares to the petitioner in terms of the agreement.

10. In **Indus Airways Pvt. Ltd. and ors. v. Magnum Aviation Pvt. Ltd. and Another**², the facts were that Indus Airways placed two purchase orders with the supplier by issuing two separate cheques towards advance payment. After some time, the deal between the parties got canceled as goods were not supplied. Though Magnum tried to supply goods, the same was refused by Indus Airways. A complaint under Section 138 of the NI Act was instituted by the supplier on the strength of the post-dated cheques. While explaining that the expression 'for discharge of

² (2014) 12 SCC 539

any debt or other liability” occurring in Section 138 of the NI Act as ‘significant’ and ‘decisive,’ it was observed as follows in Paragraphs 7 to 9 of the Judgement.

7. Section 138 of the NI Act is as follows:

“138. *Dishonour of cheque for insufficiency, etc., of funds in the account.*— 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 be extended to two years, 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 in due 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, within thirty days of the receipt of information by him from the bank regarding the return of the cheque 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 purposes of this section, ‘debt or other liability’ means a legally enforceable debt or other liability.”

8. The interpretation of the expression “for discharge of any debt or other liability” occurring in Section 138 of the NI Act is significant and decisive of the matter.

9. The Explanation appended to Section 138 explains the meaning of the expression “debt or other liability” for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The Explanation leaves no manner of doubt that to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of an existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque

cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability.

In terms of the Explanation annexed to Section 138, the phrase "debt or other liability" is defined as a legally enforceable obligation. Under this section, the dishonor of a cheque is an offense contingent upon the issuance of the cheque in satisfaction of a debt or other obligation. The Explanation stipulates that for the application of Section 138, a legally enforceable obligation must be in existence on the date of the cheque's issuance. Hence, the issuance of a cheque in satisfaction of an existent or past judicially determined obligation is a prerequisite for constituting an offense under Section 138. However, in a scenario where a cheque is issued as an advance payment for a purchase, and the transaction does not reach fruition due to cancellation or other factors, and the intended goods are not delivered, such a cheque cannot be deemed to have been issued against an extant obligation. Advance payment via cheque, in a way, signifies the absence of a pre-existing liability at the time of the cheque's issuance.

11. While reiterating and explaining the principles in **Indus** (supra), the Apex Court in **Sampelly Satyanarayana Rao v. IRED Agency Ltd** [(2016) 10 SCC 458] held as under in paragraphs 9 and 12 of the judgment.

9. 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 [Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd.]*, (2014) 12 SCC 539 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.

12. 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.

12. In other words, the crucial question is whether the cheque represents the discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. In other words, 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.

13. In **Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel**³, the Apex Court, after considering the law laid down

³ (2023) 1 SCC 578

in **Indus** (supra), **Sampelly** (supra) and **Sunil Todi v. State of Gujarat**⁴ had occasion to observe as follows in paragraph No. 20 of the judgment.

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.

14. In the case on hand, undisputedly, the shares have not been transferred in terms of the agreement. The agreement fell through, and admittedly both sides did not seek enforceability of its terms. It cannot be said that the post-dated cheques represented the discharge of any existing debt or liability. In that view of the matter, I hold that the cheques not having been issued for any debt or liability, this Court will be well justified in quashing the proceedings. Instead of getting the terms of the agreement implemented through the process of law, the party respondent has presented the cheques and has initiated criminal proceedings, which

⁴ (2022) 16 SCC 762

according to this Court, would amount to clear abuse of process.

In that view of the matter, I am satisfied that the petitioner is entitled to the relief sought for. This petition is allowed. All further proceedings against the petitioner in C.C No.2315 of 2017 on the files of the Judicial First Class Magistrate (NI) Court, Palluruthy, will stand quashed.

Sd/-
RAJA VIJAYARAGHAVAN V,
JUDGE

IAP/PS

APPENDIX OF CRL.MC 8747/2017

PETITIONER'S ANNEXURES:

ANNEXURE I	TRUE COPY OF AGREEMENT BETWEEN THE PETITIONER AND 2ND RESPONDENT ON 11.03.2016.
ANNEXURE II	TRUE COPY OF E-MAIL DATED 13.06.2016 SENT BY THE PETITIONER TO THE COMPANY.
ANNEXURE III	TRUE COPY OF LAWYER NOTICE DATED 20.02.2017 TO THE 2ND RESPONDENT.
ANNEXURE IV	TRUE COPY OF REPLY DATED 14.03.2017 ISSUED ON BEHALF OF THE 2ND RESPONDENT.
ANNEXURE V	TRUE COPY OF NOTICE DATED 10.04.2017 ISSUED UNDER SECTION 138(b) OF THE NEGOTIABLE INSTRUMENTS ACT.
ANNEXURE VI	TRUE COPY OF REPLY ISSUED BY THE PETITIONER TO THE 2ND RESPONDENT.
ANNEXURE VII	TRUE COPY OF COMPLAINT AS C.C NO.2315 OF 2017 BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE (N.I.) COURT, PALLURUTHY, NOW AT ERNAKULAM.