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(3317404)

PUNJAB AND HARYANA HIGH COURT

JUSTICE MANOJ BAJAJ

RAJESH MEENA V. STATE OF HARYANA

CRM-M-14537-2018, CRM-M-15771-2018, CRM-M-16489-2018
01.07.2019

NIA S. 138 - “account maintained by him” - If an account holder is deprived off his authority, control and dominion over the bank account, it cannot be said that the account is being maintained by the said account holder - Foremost requirement to maintain a complaint under S. 138 of the NI Act is that the cheque issued by the account holder must be from the account maintained by account holder with the drawer-Bank for discharge in whole or in part of any debt or other liability - Complaint quashed. [Para 20]

Held, expression “account maintained by him” cannot be construed narrowly to mean that if the account belongs to the accused, the necessary ingredient would be complete - This expression must necessarily include that the said account is not only alive and operative, but the account holder is capable of executing command to govern the financial transactions which include the clearance of cheques etc. - The authority and control of the account holder upon the account must exist on the effective date i.e. when the cheque becomes valid for presentation in the bank.

NIA S. 138 - Order of moratorium passed under the IB Code 2016 and Resolution professional appointed - Prior to the effective dates mentioned on the Post dated cheques the said account was blocked - Such blocking cannot at all be attributed to the account holder, as it was a result of the order passed by NCLT - By the said order, the authority and control of the account holder over the account ceased to exist - Complaint quashed - IB Code 2016 - Moratorium. [Para 20, 21, 22]

NIA S. 138 - Mere issuance of a cheque is not an offence, but it becomes punishable when the said cheque is dishonoured - Mere fact that the record of the drawer bank shows a particular name as account holder would not be sufficient to establish that account is being maintained by the account holder, unless the said account holder holds the authority and control over the said account.

NIA S. 138 - Pleadings - Reply - In the pleadings in the complaint relating to the legal notice served by the complainant and the reply sent thereto by the accused - Only mention of reply to legal notice made - Complainant did not disclose the contents of the reply and drew a veil over the fact mention in the reply that the account was closed on account of order passed by the NCLT under the IBC - Pleadings Missed an important aspect of the case - Only stand of complainant in the present petition is that since the cheque is dishonoured, therefore, the prosecution of the petitioner accused is inevitable - Court has no hesitation in holding that on the date when the cheques were presented by the complainant to the drawee-Bank, the account holder was not maintaining the said account - Cannot be said that the offence punishable under [Section 138](#) NI Act would be made out.[Para 24, 25, 26]

Mr. Iqbal Singh Saggu, Advocate for the petitioner(s) in all the petitions. Mr. Deepak Vashisth, Advocate for respondent No.2 in CRM-M-14537 and 16489-2018 Mr. Jagjit Singh, Advocate for Mr. Kunal Dawar, Advocate for respondent No.2 in CRM-

M-16483-2018. Mr. Akash Yadav, Advocate for Mr. Abhinav Gupta, Advocate for respondent No.3 in CRM-M-16483-2018. Mr. Nishchal Mann, DAG, Haryana.

MANOJ BAJAJ, J. - Rajesh Meena-petitioner has brought these four petitions under Section 482 Cr.P.C for quashing of criminal complaint(s) no. NACT 5698- 2017 dated 13.11.2017, NACT 5703-2017 dated 13.11.2017, NACT 5172 of 2017 dated nil and NACT 5173 of 2017, all titled as "Narender Singh Vs. M/S Gallium Industries Ltd. and another" under Sections 138, 141 and 142 Negotiable Instruments Act, 1881 (for short 'NI Act') (Annexure P-1), respectively as well as the respective summoning order(s), (Annexure P-2) passed by Judicial Magistrate First Class, Faridabad.

2. Since all the complaints pertain to different cheques issued by the accused in favour of the complainant and the grounds raised for quashing of the complaints and summoning orders are common, therefore, these petitions are being decided by this common judgment.

3. The details of the cheques involved in these petitions are as under:-

S.No	Complaint Nos.	Cheque No.	Date	Amount
1.	NACT/5698- 2017	005108	27.06.2017/	Rs.59,227/-
		005109	27.07.2017	Rs.65,507/-
2.	NACT/5703- 2017	005110	25.08.2017	Rs.90,447/-
3.	NACT/5172- 2017	005106	25.05.2017	Rs.7,4024/-
4.	NACT/5173-17	005097	26.08.2017	Rs.3,88964/-

4. The facts in brief are being extracted from CRM-M-14537-

The complainant (respondent No.2) namely, Narender Singh filed a criminal complaint on the ground that he was employed as an Engineer (Design) by M/s Gallium Industries Ltd.(accused No.1) through an appointment letter dated 05.08.2010 and worked with the said company till 31.03.2017, when he resigned. At that time, the account of the employee was settled and a sum of Rs.2,89,205.54/- was outstanding towards salary etc. In order to discharge the said liability, four post dated cheques drawn at HDFC Bank, Faridabad were issued in favour of the complainant by the said company which were signed by authorized signatory i.e. petitioner (accused No.2). According to the complaint, only Rs.2,15,181/- was due and recoverable, as a sum of Rs.74,024/- was paid in cash after return of the cheque bearing No.005106. The cheques bearing Nos.005108 and 005109 upon presentation were returned by drawee-Bank through return memo dated 14.09.2017 with remarks "Account Blocked". The complainant proceeded to serve the statutory notice dated 04.10.2017 which was served upon the accused persons on 09.10.2017. The complaint further revealed that the accused had sent the reply dated 16.10.2017 to the said legal notice, wherein a false and frivolous defence had been set up to evade the payment of the dues to the complainant. Finally, as the demand raised by the complainant was not adhered to, therefore, it compelled the complainant to institute a complaint dated 13.11.2017 seeking prosecution of the accused under Sections 138, 141 and 142 NI Act.

5. In support of the complaint, complainant-Narender Singh examined himself as CW-1 in the pre-summoning evidence and the documents Exhibit C-1 to Exhibit C-15 were also tendered. The trial Court after examining the pre-summoning evidence and the fact that the alleged cheques were dishonoured with the remarks "account blocked" proceeded to summon the accused persons for the offence punishable under Section 138 NI Act alone vide impugned order dated 14.11.2017 (Annexure P-2). In the other connected petitions summoning order in each complaint was passed on 14.11.2017, 18.12.2017, respectively.

6. Pursuant to the notice of motion, the respondent had appeared through their counsel, however, no reply was filed by the contesting respondent (complainant).

7. Learned counsel for the petitioner contends that as per the complainant himself, the cheques given were post-dated and on the given date when the cheques were presented, the account of the company already stood blocked. The provisions of Section 138 NI Act clearly contemplate that the dishonour of the cheque is punishable only if it is dishonoured either on the ground of "insufficient funds" or that the "amount exceeds the arrangement with the Bank". Learned counsel has contended that since none of these two conditions are fulfilled, therefore, no offence is made out and Court below committed serious error in

law in proceeding to summon the petitioner as an accused.

8. Attention of the Court is invited to the order dated 21.07.2017 (Annexure P-5) passed by National Company Law Tribunal, New Delhi (in short "NCLT") to contend that at the instance of Indusind Bank, the proceedings for initiation of Corporate Insolvency Resolution Process (CIRP) commenced under the provisions of Insolvency and Bankruptcy Code, 2016 (for short 'IBC 2016') whereby the prohibitory order was passed in respect of the assets of the corporate debtor (accused No.1). It is also pointed out that Sh.Vijender Sharma stood appointed as Interim Resolution

9. Professional. According to him, in these circumstances, the complaint brought by respondent/complainant is not maintainable. It is also argued by the learned counsel that the statutory notice dated 04.10.2017 (Annexure P-3) was promptly responded to by the petitioner through reply dated 16.10.2017 and the complaint itself acknowledged this fact, however, neither the same was produced before the Court nor the trial Court desired to examine it by directing the complainant to produce the same. The trial Court has proceeded to pass the summoning order in a mechanical manner. It is prayed that the complaints and the proceedings deserve to be quashed.

10. On the other hand, learned counsel appearing on behalf of the State contends that though the State has been arrayed as one of the respondents, but the main contest lies between the respondent No.2 (complainant) and the petitioner, whereas respondent No.3 is accused No.1/company and therefore is proforma party.

11. The other respondent (complainant) has neither filed any reply to controvert the pleadings contained in the petition(s) nor has disputed the fact that the alleged notice dated 04.10.2017 was duly replied by the petitioner through his response dated 16.10.2017. On behalf of the respondent No.2, it is argued that of course the provisions of Section 138 NI Act do contemplate that the penal provisions would be attracted in case the cheque in question is dishonoured on account of "insufficient funds" or "the amount exceeds the arrangement", but these provisions have been interpreted on number of occasions by this Court as well as by the Hon'ble Supreme Court, wherein it was held that in cases where the account is "closed" or "payment was stopped" by drawer even then complaint under Section 138 NI Act would be maintainable.

12. It is vehemently argued that on the same analogy, the complaint is maintainable as it is not disputed by the accused that the blocked account belongs to it which resulted in dishonour of the cheques. According to the respondent, the trial Court has passed the summoning order carefully after examining the material on record and therefore, the petition deserves to be dismissed.

13. At this stage, before advertiring to the merits of this case, it would be appropriate to have a glance at Section 138 NI Act which is extracted below:-

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 19 [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, 20[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.

14. The above provision has been dealt with in detail by the Hon'ble Supreme Court on number of occasions. In **M/s Kusum Ingots & Alloys Ltd. v. M/s Pennar Peterson Securities Ltd.** and others etc, 2000(2) SCC 745), the necessary ingredients required to constitute the offence punishable under the above provision were highlighted which read as under:-

- (i) *a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;*
- (ii) *that 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;*
- (iii) *that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank;*
- (iv) *the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;*
- (v) *the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.*

15. Here it would be appropriate to deal with the argument of the learned counsel for the petitioner that the offence would be made out only in case if the cheque is dishonoured on account of "insufficient funds" or when "the amount exceeds the arrangement with the Bank".

16. In NEPC Micon Ltd. Vs. Magma Leasing Ltd. 1999 (2) R.C.R.(Criminal) 648, the Hon'ble Supreme Court had examined the applicability of Section 138 NI Act in respect of the cheque, which was dishonoured as the account was closed. The relevant observations are reproduced:-

"Further, the offence will be complete only when the conditions in the proviso (a), (b) and (c) are complied with. Hence, the question is, in a case where cheque is returned by the bank unpaid on the ground that the account is closed, would it mean that cheque is returned as unpaid on the ground that the amount of money standing to the credit of that account is insufficient to honour the cheque. In our view, the answer would obviously be in the affirmative because cheque is dishonoured as the amount of money standing to the credit of that account was nil at the relevant time apart from it being closed. Closure of the account would be an eventuality after the entire amount in the account is withdrawn. It means that there was no amount in the credit of that account on the relevant date when the cheque was presented for honouring the same. The expression the amount of money standing to the credit of that account is insufficient to honour the cheque is a genus of which the expression that account being closed is specie. After issuing the cheque drawn on an account maintained, a person, if he closes that account apart from the fact that it may amount to another offence, it would certainly be an offence under Section 138 as there was insufficient or no fund to honour the cheque in that account; Further, cheque is to be drawn by a person for payment of any amount of money due to him on an account maintained by him with a banker and only on that account cheque should be drawn. This would be clear by reading the Section along with provisos (a), (b) & (c)."

In the above case, before the Hon'ble Supreme Court where the proceedings were challenged on the same ground, i.e. maintainability of complaint as the cheque was dishonoured because account stood closed. Relying upon various other judgments on the issue, the Hon'ble Supreme Court held that the provisions of Section 138 NI Act cannot be interpreted narrowly because if argument of the drawer is accepted, it would defeat the legislative intent.

17. Similarly, where the drawer had stopped the payment and the cheque in question was dishonoured, whether it would be punishable under Section 138 NI Act was another

question posed before the Hon'ble Supreme Court, in **M.M.T.C Ltd. and Anr Vs. Medchi Chemicals and Pharma (P)Ltd. and Anr, 2001 (1) SCC 234**, wherein following observations were made:-

"It has been held that even though the cheque is dishonoured by reason of 'stop payment' instruction an offence under Section 138 could still be made out. It is held that the presumption under Section 139 is attracted in such a case also. The authority shows 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 was 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 an offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a Court cannot quash a complaint on this ground."

18. This Court does not find any merit in the argument of learned counsel for the petitioner that only either of the two grounds i.e. "insufficient funds" or "the amount exceeds the arrangement" must exist as a reason for dishonour of cheque in order to launch prosecution against the accused. Resultantly, the said argument is rejected.

19. A careful analysis of Section 138 NI Act reveals that the first and foremost requirement to maintain the complaint under Section 138 NI Act is that the cheque issued by the account holder must be from the account maintained by account holder with the drawer-Bank for discharge in whole or in part of any debt or other liability.

20. The expression "account maintained by him" as appearing in Section 138 of NI Act carries great significance and meaning. The dictionary meaning of "Maintain" (as contained in Oxford Dictionary) is defined as:- *the act of making the state or situation continue*. Therefore, the said expression "account maintained by him" cannot be construed narrowly to mean that if the account belongs to the accused, the necessary ingredient would be complete. This expression "account maintained by him" must necessarily include that the said account is not only alive and operative, but the account holder is capable of executing command to govern the financial transactions which include the clearance of cheques etc. The authority and control of the account holder upon the account must exist on the effective date i.e. when the cheque becomes valid for presentation in the bank. It is settled law that mere issuance of a cheque is not an offence, but it becomes punishable when the said cheque is dishonoured. Mere fact that the record of the drawer bank shows a particular name as account holder would not be sufficient to establish that account is being maintained by the account holder, unless the said account holder holds the authority and control over the said account. In other words, if an account holder is deprived off his authority, control and dominion over the bank account, it cannot be said that the account is being maintained by the said account holder.

21. Now while advertizing to the facts of this case, it is evident that the proceedings against the company were initiated under the provisions of IB Code 2016 and the order in terms of Section 14 of IB Code was passed on 21.07.2017. The provisions of IB Code 2016 makes it absolutely clear that whenever a corporate debtor is facing the proceedings before the adjudicating authority (NCLT), then the control and management of the said corporate debtor can be vested with the Interim Resolution Professional.

22. It is also not disputed by learned counsel for the parties that Sh. Virender Singh already stands appointed as Interim Resolution Professional who is seized of the management and operation of the corporate debtor (accused No.1). Admittedly, the post dated cheques were given containing the dates as 27.06.2017 and 27.07.2017, but prior to the effective dates the said account was blocked, which cannot at all be attributed to the account holder, as it was a result of the order passed by NCLT, New Delhi and therefore, by virtue of the said order, the authority and control of the account holder over the account ceased to exist.

23. At this stage, it will be necessary to note the pleadings in the impugned complaint relating to the legal notice served by the complainant and the reply sent by the accused. The relevant pleadings of the complaint reads as under:-

"10. That upon receipt of written intimation of dishonour of cheques of the

aforesaid cheques from the banker of accused, the complainant got served legal notice dated 04.10.2017 u/s 138, 141 and 142 of N.I.Act. Vide this notice, the accused persons were called upon to make payment of above said dishonoured cheques to the complainant within a period of 15 days from the date of receipt of this notice. The said legal notice was dispatched vide Registered A.D. Post dated 06.10.17 on last known and correct addresses of the accused persons. The said legal notice was duly served upon the accused persons on 09.10.17 in the ordinary course of postal delivery. The accused persons instead making payment got issued false and frivolous reply dated 16.10.2017 through their counsel. The alleged provision of law as cited in false and frivolous reply dated 16.10.2017 is not applicable and false defence has been put forth to evade legitimate payment of the complainant."

24. A perusal of the above makes it clear that the complainant did not disclose the contents of the reply dated 16.10.2017 and drew a veil over this important aspect of the case.

25. The said reply dated 16.10.2017 (Annexure P-4) clearly revealed that because of prohibitory orders by NCLT New Delhi, the account in question stood blocked and therefore, the request was made to the complainant to withdraw the legal notice. It was further requested that as and when the accused would get the permission to operate the account of the company, the payment in respect of the cheques in question would be made to the complainant. It is also relevant to note that the said reply also contains a specific averment that intervention by the Company-NCLT was conveyed to the complainant even before the presentation of the cheque and request was made to the complainant to not to present the cheque. The reply dated 16.10.2017 (Anenxure P-4) is reproduced below:-

1. *That para No.1 of your legal notice is admitted hence needs no reply.*
2. *That para No.2 of your legal notice is correct and admitted.*
3. *That para No.3 of your legal notice is correct and admitted.*
4. *That para No.4 of your legal notice is correct and admitted.*
5. *That para No.5 of your legal notice it is submitted that my client intimated you not to present the above said cheques because Hon'ble National Company Law Tribunal, New Delhi vide order dated 21.07.2017 have blocked the account as well as moveable and immovable properties of my client under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (application to adjudicating Authority) Rule 2016. The copy of the order dated 21.7.2017 is attached herewith.*
6. *That in reply to para No.6 of your legal notice it is submitted that my client has replied above in detail in para No.5 of the reply.*
7. *That para No.7 of your legal notice is wrong and denied. My client had not guilty intention from the inception and my client dishonestly with a view to cause wrongful loss to your client.*
8. *That para No.8 of your legal notice is matter of record.*
I through this legal notice all upon you to advise your client to withdraw the above said legal notice because my client will pay the amount of cheques as and when my client do the work and the Hon'ble National Company Law Tribunal, New Delhi give permission to operate the account of the company."

26. The above averment in the present petition is not refuted either by way of filing the reply or by way of oral arguments. The only stand adopted by the respondent is that since the cheque is dishonoured, therefore, the prosecution of the petitioner accused is inevitable. In the given facts, this Court has no hesitation in holding that on the date when the cheques were presented by the complainant to the drawee-Bank, the account holder was not maintaining the said account. Resultantly, in the absence of this material condition it cannot be said that the offence punishable under Section 138 NI Act would be made out.

27. It is true that in one of the cases i.e. CRM-M-15771-2018, the impugned complaint does not contain the pleading regarding reply to the legal notice but at the same time, it is established that the cheque in the said complaint was for a date which was subsequent to

the other cheques, and therefore, the response of the accused was well within the knowledge of the complainant. Even otherwise, there is no conflict between the parties regarding the material facts including the proceedings before the NCLT and its consequences.

28. In view of the above discussion, petitions are allowed and the criminal complaint(s) nos. NACT 5698-2017 dated 13.11.2017, NACT 5703-2017 dated 13.11.2017, NACT 5172 of 2017 dated nil and NACT 5173 of 2017, titled as "Narender Singh Vs. M/S Gallium Industries Ltd. and another" under Sections 138, 141 and 142 of NI Act, the respective summoning orders (Annexure P-2) as well as proceedings arising out of it are quashed.