HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on 20.07.2024
Pronounced on 06 .09.2024

CRMC No. 276/2018

Sheikh Owais Tariq, aged 32 years S/o Sheikh Tariq Ahmad (Prop Ark Digital Solution) R/o. Chota Bazar Karan Nagar Srinagar ….. Appellant(s)/Petitioner(s)

Through: Mr. Zahoor A. Shah, Adv.

Vs

Satvir Singh S/o. Joginder Singh, R/o. House No. 79 Malikpora Merran Sahib Jammu ….. Respondent(s)

Through: Mr. Ishfaq Bashir, Adv.

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. The petitioner had filed a complaint under section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') against the respondent, as the cheque claimed to have been issued by the respondent was dishonoured due to the reason 'Account Frozen'.

2. The learned court of 3rd Additional Munsiff (JMIC), Srinagar (hereinafter to be referred as 'the Trial Court') vide order dated 23.08.2014 issued the process against the respondent for commission of offence under section 138 of the Act. The respondent filed an application before the learned Trial Court stating therein that as the cheque in question has been dishonoured due to the frozen account, the complaint under section 138 of the Act was not maintainable. The learned Trial Court after hearing the

parties, dismissed the said application vide order dated 04.11.2017. The respondent being aggrieved of orders dated 23.08.2014 (order of issuance of process) and 04.11.2017 passed by the learned Trial Court, filed a revision petition thereby impugning both the orders mentioned above before the court of learned Principal Sessions Judge, Srinagar (hereinafter to be referred as 'the Revisional Court'). The learned Revisional Court vide its order dated 09.05.2018 quashed both the abovementioned orders, resulting into dismissal of the complaint.

3. Aggrieved of order dated 09.05.2018 passed by the Revisional Court, the petitioner has sought the quashing of the same on the following grounds:

(i) That the learned Magistrate had rightly dismissed the application for dropping of the proceedings, as no provision for dropping of proceedings was available in the Code of Criminal Procedure.

(ii) That the Revisional Court has not considered this aspect of the matter that even the complaints for dishonour of cheques on account of 'Closed Account' or 'Payment Stopped by the Drawer' are maintainable and likewise a complaint can be filed, even in case of dishonour of cheque due to frozen account.

4. The objections to the petition have been filed by the respondent wherein it has been stated that the petitioner has concealed the material facts before this Court as on the presentation of the cheque by the petitioner, the account of the respondent was frozen by the Investigating Agencies and despite having the funds available in the account, the cheque issued was not honoured as the situation was beyond the control of the respondent.

The stand of the respondent is that the situation was beyond his control as such, the respondent could not have been proceeded against for commission of offence under section 138 of the Act, as the cheque was dishonoured only because of the account was frozen pursuant to the order of the Crime Branch.

5. Learned counsel for the petitioner has vehemently argued that the learned Revisional Court was not right in returning a finding that the application for dropping of proceedings was wrongly decided by the learned Trial Court, as the learned trial court had no power to review its own order, once the cognizance had already been taken and process issued against the accused/respondent. He has further argued that the learned Revisional Court has wrongly returned a finding that it was not the case of the petitioner that besides the frozen account, there were insufficient funds in the account of the respondent to make him liable for prosecution under section 138 of the Act, as the said finding, if at all was to be returned, could have been returned only after the trial and not at the threshold when only the process was issued against the respondent. He has further argued that there was nothing on record to show as to when the account was frozen because the cheque was issued on 01.07.2014 and the same was dishonoured vide memo dated 14.07.2014.

6. Learned counsel for the respondent has submitted that the cheque was dishonoured not because of the insufficient funds but because the bank account of the respondent was frozen by the Crime Branch and it was not because of the fault of the respondent that the cheque was dishonoured. He

has placed reliance upon the judgments of the High Court of Bambay in **Mr. Kishore Shankar Singapurkar vs State of Maharashtra and Mafatlal**, High Court of Delhi in **Vijay Choudhary vs Gyan Chand Jain, 2008 (2) Bankmann 274** and High Court of Delhi in **M/s Ceasefire Industries Ltd v State and others.**

7. Heard and perused the record.

8. A perusal of the record of the trial court reveals that the complainant filed the complaint by alleging that the respondent owed an amount of Rs. 8,69,700/- and to discharge the said liability, he issued the cheque dated 01.07.2014 in favour of the petitioner which was drawn on Axis Bank Limited. The petitioner presented the said cheque for encashment with his bank but the same was dishonoured by the banker of the respondent vide memo dated 14.07.2014 with the endorsement 'Account Frozen'. The notice was issued to the respondent which the petitioner claims, was received by the respondent and as the respondent did not make the payment within the stipulated period, he filed the complaint under section 138 of the Act against the respondent.

9. The record further depicts that after recording the statement of the petitioner and one witness, the learned Trial Court issued the process against the respondent for commission of offence under section 138 of the Act vide order dated 23.08.2014. The respondent thereafter filed an application before the learned trial court for dropping of the proceedings only on the ground that the complaint for dishonour of cheque due to frozen account, does not fall within the ambit of the Act.

10. The petitioner responded to the said application by submitting that the learned Magistrate has no power to drop the proceedings and further that the respondent in order to cheat the petitioner issued the cheque despite the fact that there were no funds lying in the account of the accused either at the time of the issuance of the cheque or on the day the cheque was presented. It was also alleged that the respondent on his own got the account frozen in order to obtain huge gain for himself and cause wrongful loss to the petitioner. The learned trial court dismissed the said application by virtue of order dated 04.11.2017 observing that as the court had already taken a cognizance, the application for dropping of proceedings was not maintainable. The respondent assailed the order dated 04.11.2017 and also order dated 23.08.2014 whereby the process was issued against the respondent before the Revisional Court and the learned Revisional Court vide order dated 09.05.2018 set aside order dated 23.08.2014 and order dated 04.11.2017 resulting into dismissal of the complaint.

11. The following questions arise for consideration of this Court:

(i) Whether the learned revisional court is right in returning a finding that the learned Magistrate has wrongly dismissed the application for dropping of proceedings?

(ii) Whether the complaint for dishonour of cheque due to the reason 'account frozen' is maintainable under section 138 of the Act?

12. **Issue No: (i)**

Whether the learned Revisional Court is right in returning a finding that the learned Magistrate has wrongly dismissed the application for dropping of proceedings?

a. The finding returned by the learned Revisional Court that the learned trial court has wrongly dismissed the application for dropping of proceedings in the complaint filed by the petitioner, is contrary to the settled proposition of law that once the Magistrate takes the cognizance and issues the process against the accused, then the Magistrate cannot put the clock back and drop the proceedings at the behest of the accused because there is no such provision in the Code of Criminal Procedure, permitting the Magistrate to recall his order, whereby he has taken the cognizance and issued process against the accused. Reliance is placed upon the judgment of the Apex Court in ***Adalat Prasad v. Rooplal Jindal*, (2004) 7 SCC 338** and the relevant para is extracted as under:

> **15.** It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code.

b. Accordingly, the observation of the learned Revisional Court is contrary to law and, as such, it is held that the Revisional Court was not right in returning the finding that the trial court had wrongly dismissed the application for dropping of the proceedings filed by the respondent herein.

13. Issue No: (ii)

Whether the complaint for dishonour of cheque due to the reason 'account frozen' is maintainable under section 138 of the Act?

a. It is true that in terms of section 138 of the Act, the complaint for dishonour of cheque can be filed against the accused when the amount

lying in the account of the accused is insufficient to honour the cheque or it exceeds the amount arranged to be paid from the account by an agreement made with that bank. Though these are the only two contingences provided by the statute for initiating the proceedings against the accused for dishonour of cheque, but there are numerous judicial pronouncements wherein it has been held that the accused can be prosecuted under section 138 of the Act for dishonour of cheques on account of account closed, payment stopped by the drawer, signature mismatch and image not found, as it would fall within the first contingency as provided under the Act. In this context it would be appropriate to take note of the judgment of the Hon'ble Apex court in ***Laxmi Dyechem v. State of Gujarat,*** **(2012) 13 SCC 375,** wherein it has been held and observed as under:

> 9. **The question that falls for our determination is whether dishonour of a cheque would constitute an offence only in one of the two contingencies envisaged under Section 138 of the Act**, which to the extent the same is relevant for our purposes reads as under:
> "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 provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:"
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> From the above, it is manifest that a dishonour would constitute an offence only if the cheque is retuned by the bank "unpaid" either because the amount of money standing to the credit of the drawer's account is insufficient to honour the cheque or that the amount

exceeds the amount arranged to be paid from that account by an agreement with that bank. **The High Court was of the view and so was the submission made on behalf of the respondent before us that the dishonour would constitute an offence only in the two contingencies referred to in Section 138 and none else. The contention was that Section 138 being a penal provision has to be construed strictly. When so construed, the dishonour must necessarily be for one of the two reasons stipulated under Section 138 and none else. The argument no doubt sounds attractive on the first blush but does not survive closer scrutiny.** At any rate, there is nothing new or ingenious about the submission, for the same has been noticed in several cases and repelled in numerous decisions delivered by this Court over the past more than a decade. We need not burden this judgment by referring to all those pronouncements. Reference to only some of the said decisions should, in our opinion, suffice.

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16. **The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in *Magma case*** that the expression "amount of money … is insufficient" appearing in Section 138 of the Act **is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act**:

16.1. This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonour of the cheque issued by them. **For instance, this Court has held that if after issue of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories.** There is in our view no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with

> a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied.
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> 16.2. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself **because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable.** Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.
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> **(emphasis added)**

c. So far as the present case is concerned, the respondent had nowhere pleaded in his application for dropping of proceedings that he was having sufficient amount in the bank account and that he was not having the knowledge of freezing of account at the time of issuance of cheque, and in absence of any such material before the learned Revisional Court, the Revisional Court could not have put the onus upon the complainant by observing that there was no argument on the part of the respondent therein i.e. the petitioner herein that besides being the account frozen, there were insufficient funds in the account of the respondent/accused to meet his liability. The said observation is contrary to the specific pleadings made by the petitioner before the

learned trial court wherein he had categorically pleaded that the respondent had fraudulently, with the aim of cheating the petitioner, issued the cheque despite the fact there were no funds lying in his account either at the time of issuance of cheque or on the day the cheque was presented. The cheque was issued on 01.07.2014 and the same was dishonoured on 14.07.2014 and in absence of any finding as to when the account was frozen i.e. whether the account was frozen prior to the issuance of the cheque or after the issuance of the cheque and further as to whether the accounts of the respondent was having sufficient amount to honour the cheque at the time of issuance of cheque or not and rightly so because there was no material before the Revisional Court to return any such finding, the petitioner herein could not have been knocked out of the court at the threshold. The learned Revisional Court has put the cart before the horse and has returned a finding which could have been returned only after the full-fledged trial. Rather, the onus would be on the respondent to prove that he was not aware about the freezing of the account when the cheque was drawn, the account was frozen due to reasons beyond his control and the account was having sufficient balance when the cheque was dishonoured.

d. In "**Vikram Singh vs. Shyoji Ram**, 2022 Legal Eagle(SC) 792, the High Court had quashed the proceedings of the complaint under section 138 of the Act, as the witnesses had stated that the accused had not opened the account with the Bank but in the memo it was mentioned

that the cheque was dishonoured due to the reason 'Account Frozen'. The Hon'ble Supreme Court of India set aside the order passed by the High Court by observing that the "Account Frozen" would presuppose the existence of the account and it was premature to quash the compliant. The Hon'ble Supreme Court of India remanded the matter back for full-fledged trial.

14. In view of above, this court is of the considered view that the complaint under section 138 of the Act is maintainable even if the cheque is dishonoured due to reason 'Account frozen'. The judgments mentioned above, cited by the learned counsel for the respondent are not applicable in the present case.

15. Viewed thus, the present petition is allowed. Order of Revisional Court dated 09.05.2018 is set aside and the order of the trial court dated 14.11.2017 is restored. The matter is remanded back to the trial court and the trial court shall proceed in accordance with law. The parties shall appear before the trial court on 19.09.2024.

16. Record of court(s) below, if received in original, be returned back.

(RAJNESH OSWAL)
JUDGE

Srinagar:
06.09.2024
Rakesh PS

Whether the order is speaking: Yes/No.
Whether the order is reportable: Yes/No.