

A M/S. INDUS AIRWAYS PVT. LTD. & ORS.
v.
M/S. MAGNUM AVIATION PVT. LTD. & ANR.
(Criminal Appeal No. 830 of 2014)

B APRIL 7, 2014

[R.M. LODHA AND SHIVA KIRTI SINGH, JJ.]

Negotiable Instruments Act, 1881 - s.138 - Post-dated cheques issued by purchasers as advance payment in respect of purchase orders - If could be considered in discharge of legally enforceable debt or other liability, and, if so, whether dishonour of such cheques amounts to offence u/s. 138 - Held: For a criminal liability to be made out u/s.138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque - Payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability - 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 by the supplier, the cheque cannot be said to have been drawn for an existing debt or liability - View of the High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence u/s.138 cannot be accepted.

The question which arose for consideration in this appeal was whether the post-dated cheques issued by the appellants-purchasers as advance payment in respect of purchase orders could be considered in discharge of legally enforceable debt or other liability, and, if so, whether the dishonour of such cheques

amounts to an offence under Section 138 of the Negotiable Instruments Act, 1881. A

Allowing the appeal, the Court

HELD: 1.1. The interpretation of the expression 'for discharge of any debt or other liability' occurring in Section 138 of the Negotiable Instruments Act, 1881 is significant and decisive of the matter. 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 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 existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability. [Paras 12, 13] [62-C-E, G] B C D E

1.2. There is a fine distinction between civil liability, and criminal liability under Section 138 of the Negotiable Instruments Act, 1881. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of F G H

A the cheque. The view of the High Court that the issuance
 of cheque towards advance payment at the time of
 signing such contract has to be considered as
 subsisting liability and dishonour of such cheque
 amounts to an offence under Section 138 of the N.I. Act
 cannot be accepted. The High Court has traveled beyond
 the scope of Section 138 of the N.I. Act by holding that
 the purpose of enacting Section 138 of the N.I. Act would
 stand defeated if after placing orders and giving advance
 payments, the instructions for stop payments are issued
 and orders are cancelled. 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 by the supplier, the cheque cannot
 be said to have been drawn for an existing debt or
 liability. [Paras 19] [65-G-H; 66-A-E]

*M/s. Swastik Coaters Pvt. Ltd v. M/s. Deepak Brothers
 and others; [1997 Cri. L.J. 1942 (AP)]; Shanku Concretes
 Pvt. Ltd. and others v. State of Gujarat and another 2000 Cri.
 L.J.1988 (Guj.); M/s. Balaji Seafoods Exports (India) Ltd. and
 another v. Mac Industries Ltd. 1999 (1) CTC 6 and Ullas
 Supply House, Represented by Managing Partner v. Ullas,
 Proprietor Bright Agencies and another 2006 Cri. L.J. 4330
 (Kerala) - approved.*

*M/s. Mojj Engineering Systems Limited and others v. M/
 s. A.B. Sugars Ltd. [154 (2008) Delhi Law Times 579] -
 referred to.*

G Case Law Reference:

	154 (2008) DLT 579	referred to	Para 10
	1997 Cri. L.J. 1942 (AP)	approved	Para 14
H	2000 Cri. L.J.1988 (Guj.)	approved	Para 15

1999 (1) CTC 6 approved Para 15 A

2006 Cri. L.J. 4330 (Kerala) approved Para 17

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 830 of 2014.

From the Judgment and Order dated 27.08.2010 of the
High Court of Delhi in CRLMC No. 244 of 2009.

S.N. Bhat, M.L. Mahajan, Gaurav Mahajan for the
Appellants.

Ashim Vachher, Subramonium Prasad for the
Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The only question that arises for consideration in this
appeal by special leave is, whether the post-dated cheques
issued by the appellants (hereinafter referred to as 'purchasers')
as an advance payment in respect of purchase orders could
be considered in discharge of legally enforceable debt or other
liability, and, if so, whether the dishonour of such cheques
amounts to an offence under Section 138 of the Negotiable
Instruments Act, 1881 (for short, 'the N.I. Act'). The Delhi High
Court in the impugned order has held that to be so.

3. The brief facts are these: On 19.02.2007 and
26.02.2007, the purchasers placed two purchase orders for
supply of certain aircraft parts with respondent No.1, M/s.
Magnum Aviation Pvt. Ltd. (hereinafter referred to as 'supplier').
In respect of these purchase orders, the purchasers also issued
two post-dated cheques dated 15.03.2007 for a sum of
Rs.34,57,164/- and 20.03.2007 for a sum of Rs.15,91,820/-.
The said cheques were issued by way of advance payment for
the purchase orders. One of the terms and conditions of the
contract was that the entire payment would be given to the

A supplier in advance. The supplier says that the advance payment was made by the purchasers as it had to procure the parts from abroad.

B 4. These cheques got dishonoured when they were presented on the ground that the purchasers had stopped payment.

C 5. It is not in dispute that the supplier received letter dated 22.03.2007 from the purchasers cancelling the purchase orders and requesting the supplier to return both the cheques.

D 6. The supplier sent response to the letter dated 22.03.2007 on 23.03.2007 asking the purchasers as to when the supplier could collect the payment.

D Thereafter, on 12.04.2007, the supplier sent a notice to the purchasers and then filed a complaint against the purchasers under Section 138 of the N.I. Act before the Court of Additional Chief Metropolitan Magistrate, New Delhi.

E 7. On 22.05.2007, the concerned Additional Chief Metropolitan Magistrate took cognizance of the alleged offence and issued summons to the purchasers.

F 8. The purchasers challenged the order issuing summons in a revision petition under Section 397 of the Code of Criminal Procedure, 1973 (for short, 'Code'). The Additional Sessions Judge, after hearing the parties, allowed the revision petition vide order dated 02.09.2008 and quashed the process issued by the Additional Chief Metropolitan Magistrate.

G 9. The supplier challenged the order of the Additional Sessions Judge in a petition under Section 482 of the Code before the High Court. The High Court allowed the petition, set aside the order of the Additional Sessions Judge and restored the order of the Additional Chief Metropolitan Magistrate issuing process to the purchasers.

H 10. The Delhi High Court following its earlier decision in

*Mojj Engineering*¹ held that the issuance of a cheque at the time of signing such contract has to be considered against a liability, as the amount written in the cheque is payable by the person on the date mentioned in the cheque. A

11. Section 138 of the N.I. Act is as follows: B

"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: C D E

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; F

(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 G

1. *M/s. Nojj Engineering Systems Limited and Others v. M/s. A.B. Sugars Ltd.* [154 (2008) Delhi Law Times 579. H

A (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.

B Explanation. - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

C 12. The interpretation of the expression 'for discharge of any debt or other liability' occurring in Section 138 of the N.I. Act is significant and decisive of the matter.

D 13. 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 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 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 exiting 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.

14. In *Swastik Coaters*², the single Judge of the Andhra Pradesh High Court while considering the explanation to

H 2. *M/s. Swastik Coaters Pvt. Ltd. v. M/s. Deepak Brothers and Others*; [1997 Crii. L.J. 1942 (AP)]

Section 138 held:

".....Explanation to Section 138 of the Negotiable Instruments Act clearly makes it clear that the cheque shall be relateable to an enforceable liability or debt and as on the date of the issuing of the cheque there was no existing liability in the sense that the title in the property had not passed on to the accused since the goods were not delivered."

15. The Gujarat High Court in *Shanku Concretes*³ dealing with Section 138 of the N.I. Act held that to attract Section 138 of the N.I. Act, there must be subsisting liability or debt on the date when the cheque was delivered. The very fact that the payment was agreed to some future date and there was no debt or liability on the date of delivery of the cheques would take the case out of the purview of Section 138 of the N.I. Act. While holding so, Gujarat High Court followed a decision of the Madras High Court in *Balaji Seafoods*⁴.

16. In *Balaji Seafoods*⁴, the Madras High Court held:

"Section 138 of the Negotiable Instruments Act makes it clear that where the 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 under Section 138 of the Act. The explanation reads that for the purposes

3. *Shanku Concretes Pvt. Ltd. and Others v. State of Gujarat and another*; (200 Cri. L.J. 1988 (Guj.))

4. *M/s. Balaji Seafoods Exports (India) Ltd. and another v. Mac Industries Ltd.*; [1999 (1) CTC 6].

A of this section, 'debt or other liability' means a legally enforceable debt or liability."

B 17. The Kerala High Court in *Ullas*⁵ had an occasion to consider Section 138 of the N.I. Act. In that case, the post-dated cheque was issued by the accused along with the order for supply of goods. The supply of goods was not made by the complainant. The accused first instructed the bank to stop payment against the cheque and then requested the complainant not to present the cheque as he had not supplied the goods. The cheque was dishonoured. The single Judge of the Kerala High Court held, ".....Ext.P1 cheque cannot be stated to be one issued in discharge of the liability to the tune of the amount covered by it, which was really issued, as is revealed by Ext. D1, as the price amount for 28 numbers of mixies, which the complainant had not supplied."

D 18. The reasoning of the Delhi High Court in the impugned order is as follows:

E "8. If at the time of entering into a contract it is one of the conditions of the contract that the purchaser has to pay the amount in advance then advance payment is a liability of the purchaser. The seller of the items would not have entered into contract unless the advance payment was made to him. A condition of advance payment is normally put by the seller for the reason that the purchaser may not later on retract and refuse to take the goods either manufactured for him or procured for him. Payment of cost of the goods in advance being one of the conditions of the contract becomes liability of the purchaser. The purchaser who had issued the cheque could have been asked to make payment either by draft or in cash. Since giving cheque is a mode of payment like any other mode of payment, it is normally accepted as a payment. The issuance of a cheque at the time of signing such contract

H 5. *Supply House, Represented by Managing Partner v. Ullas, Proprietor Bright Agencies and another*; [2006 Cri. L.J. 4330 (Kerala)].

has to be considered against a liability as the amount written in the cheque is payable by the person on the date mentioned in the cheque. Where the seller or manufacturer, on the basis of cheques issued, manufactures the goods or procures the goods from outside, and has acted upon the contract, the liability of the purchaser gets fastened, the moment the seller or manufacturer acts upon the contract and procures the goods. If for any reason, the seller fails to manufacture the goods or procure the goods it is only under those circumstances that no liability is created. However, where the goods or raw material has been procured for the purchaser by seller or goods have been manufactured by the seller, it cannot be said that the cheques were not issued against the liability. I consider that if the liability is not construed in this manner, the sole purpose of making dishonour of the cheque as an offence stands defeated. The purpose of making or enacting Section 138 of the N.I. Act was to enhance the acceptability of cheque in settlement of commercial transactions, to infuse trust into commercial transactions and to make a cheque as a reliable negotiable instrument and to see that the cheques of business transactions are not dishonoured. The purpose of Negotiable Instrument Act is to make an orderly statement of rules of law relating to negotiable instruments and to ensure that mercantile instruments should be equated with goods passing from one hand to other. The sole purpose of the Act would stand defeated if after placing orders and giving advance payments, the stop payments are issued and orders are cancelled on the ground of pricing of the goods as was done in this case."

19. The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the N.I. Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the

A amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt
B or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence
C under Section 138 of the N.I. Act. The Delhi High Court has traveled beyond the scope of Section 138 of the N.I. Act by holding that the purpose of enacting Section 138 of the N.I. Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a
D 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 by the supplier, in our considered view, the cheque
E cannot be said to have been drawn for an existing debt or liability.

20. In our opinion, the view taken by Andhra Pradesh High Court in *Swastik Coaters*², Madras High Court in *Balaji Seafoods*⁴, Gujarat High Court in *Shanku Concretes*³ and Kerala High Court in *Ullas*⁵ is the correct view and accords with the scheme of Section 138 of the N.I. Act.

21. The view taken by Delhi High Court is plainly wrong and does not deserve acceptance.

22. Criminal Appeal is, accordingly, allowed; the impugned judgment of Delhi High Court is set aside; and the order of the Sessions Judge is restored.