

CASE NO.:
Appeal (crl.) 818 of 2008

PETITIONER:
Lalit Kumar Sharma and Anr

RESPONDENT:
State of U.P. & Anr

DATE OF JUDGMENT: 06/05/2008

BENCH:
S.B. Sinha & Lokeshwar Singh Pantia

JUDGMENT:
J U D G M E N T
REPORTABLE

CRIMINAL APPEAL NO. 818 OF 2008
[Arising out of SLP (Crl.) No. 4167 of 2007]

S.B. SINHA, J :

1. Leave granted.
2. Application of Section 138 of the Negotiable Instruments Act, 1881 (for short "the Act") in the facts and circumstances of the case is involved in this appeal which arises out of a judgment and order dated 19.02.2007 passed by the High Court of Judicature at Allahabad in Criminal Revision No. (5) of 2003.
3. M/s. Mediline India (P) Ltd. is a company registered and incorporated under the Companies Act, 1956. It had two directors, viz., Shri Ashish Narula and Shri Manish Arora. The Company took loan for a sum of Rs. 5,00,000/-. Two cheques bearing Nos. 0989637 dated 30.11.1999 and 0989638 dated 10.12.1999 for Rs. 3,00,000/- and Rs. 2,00,000/- respectively were drawn on Vijaya Bank, Navyug Market, Ghaziabad in favour of the respondent No. 1. On presentation, they were returned unpaid with the remarks "insufficient fund".
4. A complaint petition was thereafter filed by the respondent No. 2 (complainant) against Shri Manish Arora and Shri Ashish Narula under Section 138 of the Act and Section 420 of the Indian Penal Code.
5. Appellants were not signatories to the cheques. Appellant No. 1 became a director of the said Company only on 15.02.2000. Appellant No. 2 became a director on 1.12.1994. Both of them are said to have resigned from the post of directorship on 30.11.2000.
6. During pendency of the said complaint petition, an endeavour was made to resolve the disputes and differences between the parties. An agreement was entered into by and between the parties in terms whereof it was agreed that if a cheque for a sum of Rs. 5,02,050/- is issued, the complaint petition would be withdrawn. Manish Arora issued a cheque for the said sum on 29.07.2000 which was also on presentation returned on 29.01.2001 with the remark "insufficient fund". It is stated that an agreement was also entered into by and between Shri Ashish Narula and the Company that the liability in question was his personal one. He allegedly affirmed an affidavit and executed an indemnity bond on 26.02.2000.
7. Complainant \026 respondent No. 2, however, filed another complaint petition with regard to the return of the said cheque dated 29.07.2000 not

only against Shri Ashish Narula and Shri Manish Arora but also against the appellants herein.

8. Appellants were summoned in the said complaint case. They filed an application before the Chief Judicial Magistrate for setting aside the order summoning them. The same was dismissed. A revision application filed thereagainst has also been dismissed by the High Court by reason of the impugned judgment.

9. Mr. Rajeev Sharma, learned counsel appearing on behalf of the appellants, urged that the second complaint petition is not maintainable.

10. Mr. Brij Bhusan, learned counsel appearing on behalf of the respondents, however, supported the impugned judgment.

11. Section 138 of the Act reads, thus:

"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."

12. It is not disputed that in respect of the first cheques dated 30.11.1999 and 10.12.1999, the appellants herein were not proceeded against. It is furthermore not in dispute that although a purported compromise was entered into by and between Ashish Narula, Manish Arora, on the one hand, and the complainant, on the other, as a result whereof the said cheque for a sum of Rs. 5,02,050/- was issued and bounced; the complaint petition had not been withdrawn. By a judgment and order 16.01.2006, Ashish Narula and Manish Arora had been found guilty for commission of the offence

under Section 138 of the Act. They were sentenced to undergo one year's R.I. with fine of Rs. 20,000/- each and in default thereof to undergo three months' simple imprisonment. They were also directed to make payment of rupees nine lakhs as compensation to the complainant within a period of one month of the orders under Section 357 of the Code of Criminal Procedure.

13. The fact that Manish Arora issued the second cheque in terms of the settlement between the parties is not in dispute. It appears from the complaint petition itself, the requisite averments made therefor were as under:

"5. That after getting their bail from the court the accused No. 2 to 6 approached and requested the complainant to take fresh cheques for full amount and withdraw the complaint and also felt sorry for the said dishonour of the cheque."

14. The learned Judicial Magistrate also in his order dated 1.10.2002 noticed:

"\005It has been stated on behalf of the accused persons that by settlement it was found that the party involved in the dealing would be responsible. Thus, prayer has been made on behalf of the accused persons that the aforementioned all the three accused persons may be discharged from this case.

The aforesaid contentions have been opposed on behalf of the complainant and it has been stated that all these three persons were party in the whole dealing and their liability is just like other accused persons.

It is clear from the perusal of the complaint that total 6 accused persons have been made parties in this matter by the complainant and in her statement U/s 200 of Cr.P.C., complainant has clearly stated that Manish Arora, Ashish Narula and L.K. Sharma and Bela Narula and wife of L.K. Sharma were directors of the company. All the five accused persons demanded loan of Rs. Five Lakh Two Hundred Fifty from the complainant for some time and promised her to return the said money soon. All the five persons have been equally involved in the dealing of giving and receiving the cheque."

15. Evidently, therefore, the second cheque was issued in terms of the compromise. It did not create a new liability. As the compromise did not fructify, the same cannot be said to have been issued towards payment of debt.

16. Ingredients of Section 138 of the Act are as under:

- (i) that there is a legally enforceable debt;
- (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and
- (iii) that the cheque so issued had been returned due to insufficiency of funds.

17. Thus, the second cheque was issued by Manish Arora for the purpose of arriving at a settlement. The said cheque was not issued in discharge of the debt or liability of the Company of which the appellants were said to be

the directors. There was only one transaction between Shri Ashish Narula, Shri Manish Arora, Directors of the Company and the complainant. They have already been punished. Thus, the question of entertaining the second complaint did not arise. It was, in our opinion, wholly misconceived. The appeal, therefore, in our opinion, must be allowed. It is directed accordingly. Respondent shall bear the costs of the appellants. Counsel's fee assessed at Rs. 25,000/-.

JUDIS