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**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

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**CRM-M-35306-2022 (O&M)
Date of decision: 18.01.2025**

Vikas Walia

...Petitioner

Versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present:- Ms. Gursharan Kaur Mann, Senior Advocate with
Ms. Simrat Kaur, Advocate
for the petitioner.

Mr. Apoorv Garg, Senior Deputy Advocate General, Haryana.

None for respondent No. 2.

MANISHA BATRA, J. (Oral)

1. Prayer in this petition, filed under Section 482 of the Code of Criminal Procedure (*for short 'the Code'*), is for quashing of Complaint bearing number NACT-357-2019, titled as ***Rakesh Khurana vs. Vikas Walia***, filed under Section 138 of the Negotiable Instruments Act, 1881 (*for short 'N. I. Act'*), as pending before the Court of learned Judicial Magistrate First Class, Panchkula and the proceedings having emanated therefrom.

2. Brief facts relevant for the purpose of disposal of this petition are that the aforementioned complaint has been filed by respondent No. 2/complainant against the present petitioner on the allegations that latter had taken friendly loan to the tune of Rs. 55 Lakhs from the complainant through NEFT/RTGS as well as in cash. He had issued a post dated cheque

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bearing No. 971044 dated 01.02.2019 with an assurance to the complainant that the same would be cleared on presentation. Vide memo dated 04.02.2019, the said cheque had been dishonoured on its presentation with remarks “funds insufficient”. The complainant had served a legal notice dated 12.02.2019 upon the petitioner but since he failed to file any reply to the notice or to pay the aforesaid amount, hence, the complainant was constrained to file the aforesaid complaint.

3. On the basis of the preliminary evidence produced before it, the learned trial Court observed that a *prima facie* case for commission of offence punishable under Section 138 of the N. I. Act had been made out against the petitioner for summoning him as an accused and issued process.

4. The present petition has been filed by the petitioner/accused on the grounds and it has been argued by his counsel that the complaint is liable to be quashed, being not maintainable since the cheque in question was for much more amount of debt than the one that was due to be payable by the petitioner. In fact the cheque in question was an undated cheque given as a security for the loan given to the complainant. Out of the amount of Rs. 55 Lakhs, advanced by the complainant to the petitioner, an amount of Rs. 38.35 Lakhs had been paid through different means including cheques and RTGS etc. The cheque in question was given in the year 2014. It was presented by the complainant without informing the petitioner and without disclosing that the aforesaid amount of Rs.38.35 Lakhs had already been received as part payment of loan forwarded by him during the period from 2014 to 2016 itself. It is submitted that in view of this fact, the provisions of Section 138 of the N. I. Act were not attracted and, therefore, neither any complaint could be filed

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against the petitioner nor any process could be issued against him. It is, therefore, urged that the impugned complaint and the proceedings having emanated therefrom, are liable to be quashed. To fortify his argument, learned counsel for the petitioner has relied upon the authority cited as ***Dashrathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel and another : 2023 (1) RCR (Criminal) 408.***

5. Learned Senior Deputy Advocate General, Haryana, appearing on behalf of respondent No. 1-State, has chosen not to contest the present petition as it is a matter of *lis* between the private parties.

6. Respondent No. 2/complainant had been appearing in person earlier but from the last two dates of hearing, there is no representation on his behalf. Even today, he has not appeared.

7. I have heard learned counsel for the petitioner at considerable length and have also gone through the record carefully.

8. The aforementioned complaint has been filed against the petitioner on the allegations that he had issued a cheque for a sum of Rs. 55 Lakhs in favour of respondent No. 2/complainant to discharge his legally enforceable liability that had been incurred by him by securing friendly loan to the tune of aforementioned amount. On presentation, the said cheque was dishonoured. The claim of the petitioner is that the cheque in question was an undated cheque given by way of security and out of the amount of Rs. 55 Lakhs, an amount of Rs. 35.60 Lakhs had already been paid by him to the complainant by way of different transactions through RTGS as detailed out in para No. 7 of the petition.

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9. It is submitted by learned senior counsel for the petitioner that since as per his own admission, the complainant had received an amount of Rs. 35.60 Lakhs from the petitioner out of the amount of Rs. 55 Lakhs, therefore, it was crystal clear that as on the date of presentation of the cheque on 01.02.2019, only an amount of Rs. 19,40,000/- was due to be payable by the petitioner. It is argued that since no endorsement with regard to part payment of the amount of cheque had been made in the cheque, therefore, offence under Section 138 of the N. I. Act was not attracted.

10. In view of the aforesaid submissions made by learned senior counsel for the petitioner, the main question that falls for consideration before this Court is if the debt amount is less than the cheque amount, whether the ingredients for offence under Section 138 of the N. I. Act would be attracted or not?

11. At the outset, it may be mentioned that for the purpose of Section 138 of N. I. Act, the following ingredients are required to be fulfilled:

(i) A cheque drawn for the payment of any amount of money to another person;

(ii) The cheque is drawn for the discharge of the 'whole or part' of any debt or other liability. 'Debt or other liability' means legally enforceable debt or other liability; and

(iii) The cheque is returned by the bank unpaid because of insufficient funds.

12. It is also relevant to refer to the proviso of Section 138 of the N. I. Act that reads as under:

“Provided that nothing contained in this section shall apply unless -

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- (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, 5 [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 of other liability” means a legally enforceable debt or other liability.

13. Reference can then be made to Section 56 of the N. I. Act, which stipulates that if there is an indorsement on a negotiable instrument that a part of the sum mentioned in the cheque has been paid, then the instrument may be negotiated for the balance. The phrase ‘indorsement’ is defined under Section 15 of the N. I. Act, as per which, when a maker or holder of a negotiable instrument signs the same, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is stated to have indorsed the same. Section 138 of the N. I. Act creates a deeming offence. The conditions stipulated in the proviso of this section are required to be fulfilled in addition to ingredients of main offence. Meaning thereby that an offence under Section 138 of the N. I. Act is deemed to have been committed only when a cheque represents a part or whole of the legally

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enforceable debt at the time of encashment and the same is returned by the bank as unpaid. In *Dashrathbhai*'s case (supra), Hon'ble Supreme Court had observed that for the commission of offence under Section 138 of the N. I. Act, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation. If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the same represented on the cheque. When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed under Section 56 of the N. I. Act. The cheque endorsed with the payment made may be used to encash the balance, if any. It was also observed that offence under Section 138 of the N. I. Act will stand attracted if the cheque i.e. endorsed is dishonoured when it is sought to be encashed upon maturity.

14. In the instant case, there is no dispute on the part of the petitioner of the fact that the cheque in question was issued by him and it was bearing his signature as well as the fact that the same had been dishonoured. The contention of the petitioner is that on 01.02.2019, when this cheque had been presented for encashment, the amount that was actually payable to the respondent/complainant, was much lesser than the amount as shown in the cheque and, therefore, the provisions of Section 138 of the N. I. Act were not attracted. On a perusal of the record, in my considered opinion, this contention is not without any basis. The petitioner has placed on record Annexure P-11 and Annexure P-12. **Annexure P-12** is certified copy of the statement shown to have been recorded by the complainant on 09.09.2020 before the Inspector

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of Police, CBI, ACB, Mumbai in connection with some other case and while placing reliance upon this document, it has been contended that the factum of receiving an amount of Rs. 33.50 Lakhs from the petitioner had been admitted by the complainant and **Annexure P-11** is a copy of sworn deposition of the complainant recorded before the learned trial Court, and a perusal of the same reveals that during cross examination, the complainant admitted that the petitioner had returned an amount of Rs. 35.60 Lakhs by different transactions, though at the same time, he is also shown to be stating that the petitioner had taken a loan of Rs. 10 Lakhs, Rs. 9.5 Lakhs and Rs. 5 Lakhs, respectively during the period from 17.04.2014 till 02.03.2015. He is also shown to have admitted that the statement Annexure P-12 (Ex. D-1) was recorded by him before the CBI authorities. On the basis of the statements (Annexures P-11 and P-12), which have admittedly been recorded by the complainant, it is apparent that much before presentation of the cheque in question, an amount of Rs. 35.60 had been paid by the petitioner to the complainant. Even if the plea as taken in the statement (Annexure P-12) to the effect that an amount of Rs. 74.50 Lakhs had been borrowed by the petitioner, still after deducting an amount of Rs. 35.60 Lakhs, the remaining amount which became payable to the complainant comes to Rs. 38.90 Lakhs, which is shown to be claimed in the statement Annexure P-12.

15. As discussed above, since it is explicit that the amount due to be payable by the petitioner to the respondent/complainant on the date of presentation of cheque in question was lesser than the amount of Rs. 55 Lakhs, therefore, the question that requires consideration is whether the cheque for the aforesaid amount could be presented for realization? In view of the

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observations made in *Dashrathbhai*'s case (supra), which have already been discussed above, the answer is to be given in negative since the provisions of Section 138 of the N. I. Act are applicable only when there is a legally enforceable debt subsisting on the date when the cheque is drawn but if there is some change in the circumstances, such as the sum in the cheque does not represent a legally enforceable debt at the time of encashment, the offence under Section 138 of the N. I. Act is not made out. Reliance in this regard is also drawn to the observations made by the High Court of Kerala at Ernakulam in the judgment dated 26.11.2015, passed in *Shiju K vs. Nalini and another*, wherein sum amount of the cheque in question was repaid and payment was admitted by the complainant. No indorsement was made on the back of the cheque or face thereof. It was held that no offence under Section 138 of the N. I. Act was made out in the absence of such indorsement. Similar proposition of law was laid down by the High Court of Kerala in Joseph *Sartho v. Gopinathan : (2008) KLJ 784*, wherein the representation of the cheque was for a sum higher than the amount that was due when it was presented for encashment and it was held that the drawer of the cheque could not be convicted for offence under Section 138 of the N. I. Act and by the High Court of Gujarat in *Shree Corporation v. Anilbhai Puranbhai Bansal : 2018 (2) GLH 105* and by the Delhi High Court in *Alliance Infrastructure Project Ltd. v. Vinay Mittal : ILR (2010) III Delhi 459*.

16. In view of the above discussed proposition of law, it is apparent that since in this case as on the date of presentation of the cheque in question for presentation, only a sum of Rs. 38.90 Lakhs was due, even as per admission made by the respondent/complainant, whereas the cheque was for

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much higher amount and since no writing or indorsement had been made on the cheque regarding receipt of part payment against the sum of Rs. 55 Lakhs, therefore, the provisions of Section 138 of the N. I. Act were not attracted and as a consequence, the impugned complaint filed against the petitioner and subsequent proceedings having emanated therefrom are not sustainable as the amount of Rs. 55 Lakhs, which was represented on the cheque, was not a legally enforceable debt on that particular date. Accordingly, for the reasons indicated above, the present petition is allowed. As a consequence, the impugned complaint along with all the subsequent proceedings having emanated therefrom is quashed.

18.01.2025*Wasim Anwar***(MANISHA BATRA)
JUDGE***Whether speaking/reasoned**Yes/No**Whether reportable**Yes/No*