

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. No. 145/2009**

Reserved on: 13th January 2010

Pronounced on: 21st January 2010

PREM CHAND GUPTA Petitioner
! Through: Mr. Sudhir Makkar,
Ms. Meenakshi Singh and Mr. Ankit
Malhotra, Advs.

versus

\$ STATE & ANR. Respondents
^ Through: Mr. Jaideep Malik, APP.

And

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PREM CHAND GUPTA Petitioner
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* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

: V.K. JAIN, J.

1. Vide this common judgment I shall dispose of both the petitions referred above. The petitioner is Managing Director of Elite Appliances Ltd. (hereinafter referred as 'the Company'), a company incorporated under the provisions of Companies Act, 1956. A reference was made to Board of Industrial and Financial Reconstruction (hereinafter referred as 'BIFR') under Section 15 of Sick Industrial Companies (Special Provision) Act, 1985 (hereinafter referred as 'SICA'), on the ground that in the opinion of the Board of Directors, the company had become a Sick Industrial Company. Vide order dated 1st December 1998, BIFR nominated UPFC as the Operating Agency to work out the rehabilitation scheme for the company and also directed that neither the company nor any of the involved party should dispose of/alienate any of the assets of the company. On 4th October 2002 BIFR recommended that the company be wound up. Vide order dated 13th December 2002, passed in Company Petition 89 of 1997, this Court directed the company to be wound up and appointed Official Liquidator as Provisional Liquidator for the company and instructed him to take over the

attached property of the company as well as its accounts books and records.

2. Complaints under Section 138 of Negotiable Instruments Act was filed by respondent No.2 Delhi Safe Deposit Company Ltd. against the petitioner in his capacity as Managing Director of the company. It was alleged in the complaints that two cheques, both dated 3rd February 1999, which are subject matter of Crl.M.C. 145/2009 and two cheques dated 3rd November 1998, which are subject matter of Crl.M.C. 146/1999, when presented by the banker of the petitioner, were dishonoured and payment was not made to the complainant despite issue of Demand Notice dated 15th February 1999.

3. The petitioner having been summoned under Section 138 of Negotiable Instruments Act, he has filed these petitions seeking quashing of the complaints primarily on the ground that the alleged offence was completed after the commencement of the proceedings under the provisions of SICA and on account of freezing of the assets of the company, it was not permissible for the bank to honour the cheque nor could he have made payment to the complainant from the funds of the company on that date.

4. Admittedly, the cheques in question were issued by the company and were signed by the petitioner in his capacity as its Managing Director and not in his personal capacity. The following are the essential ingredients of the offence punishable under Section 138 of Negotiable Instruments Act:

“(1) drawing of the cheque by a person on an account maintained by him with a banker, for payment to another person from out of that account for discharge in whole/part any debt or liability, (2) presentation of the cheque by the payee or the holder in due course to the bank, (3) returning the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque, (4) giving notice in writing to the drawer of the cheque within 15 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount, (5) failure of the drawer to make payment to the payee or the holder in due course of the cheque, of the amount covered by the cheque within 15 days of the receipt of the notice.”

5. No offence under Section 138 of Negotiable Instruments Act is made out in case the drawer of the cheque makes payment of the amount of the cheque to its holder, within 15 days of the receipt of the notice, envisaged in Section 138(b) of Negotiable

Instruments Act. Issuing of cheque, towards discharge, in whole or in part of any debt or other liability, and its being returned unpaid by the bank on account of want of funds, are necessary ingredients of the offence under Section 138 of Negotiable Instruments Act and must necessarily be proved before a person can be convicted under the aforesaid provision. No criminal liability is however incurred in case payment is made within 15 days of receipt of notice. This proposition of law has been accepted in a number of cases including the decision of the Hon'ble Supreme Court in '**K. Bhaskaran v. Sankaran Vaidhyan Balan & Anr.**' (1999) 7 SCC 510, where the Hon'ble Supreme Court inter alia observed as under:

"The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But a concatenation of

all the above five is a sin qua non for the completion of the offence under Section 138 of the Code.....” (emphasis supplied)

6. In ***‘Harman Electronics (P) Ltd. Vs. National Panasonic India (P) Ltd.’*** 2009 (1) SCC 720, the Hon’ble Supreme Court observed as under:

“A distinction must also be borne in mind between the ingredient of an offence and commission of a part of the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, commission of an offence is completed.” (emphasis supplied)

7. It is an admitted case that BIFR, vide its order dated 1st December 1998, had directed that neither the company nor any other involved party should dispose of/alienate any of the assets of the company. Consequently, it was not possible for the company to make any payment to anyone including the complainant after 1st December 1998. Admittedly, Legal Notice in respect of cheques dated 3rd November 1998 was issued on 18th November 1998. The payment of the amount of the cheques dated 3rd November 1998 could have been made by the company

at any time upto 3rd December 1998 presuming that the notices were received by the company on the very same day on which they were issued. Since BIFR had, vide its order dated 1st December 1998 put a complete embargo on disposal or alienation of any of the assets of the company, which would include amount lying in the bank of the company, it was not possible either for the company or for any of its Directors to thereafter comply with the notice. The offence under Section 138 of Negotiable Instruments Act was complete only on 3rd December 1998, when the stipulated period of 15 days for making payments in terms of the notice expired and on that day, it was not possible for the company or its Directors, to comply with the notice. It is true that nothing prevented the company and its Directors from honouring the cheques when they were presented for encashment prior to 1st December 1998 and/or from complying with the notice prior to order dated 1st December 1998 being passed by BIFR. But, the offence itself came to be complete only on 3rd December 1998. No offence under Section 138 of Negotiable Instruments Act was committed by the company or any of its Directors prior to 3rd December 1998.

8. Since the company was not in a position to dispose of or alienate any of its assets and it was not possible for them to make payment of amount of the cheques on 3rd December 1998, no offence under Section 138 of Negotiable Instruments Act was committed by the company on account of non-payment of these cheques. As regards the cheques, subject matter of Crl.M.C 145/2009, they being dated 3rd February 1999 and the notice pursuant to dishonor of these cheques being dated 15th February 1999, this proposition of law would be equally applicable in respect of those cheques.

9. In fact, the issue involved in this case is no mere res integra, in view of the decision of the Hon'ble Supreme Court in '***Kusum Ingots vs. Pennar Piterson Securities Ltd.***' AIR 2000 SC 1954 where the Hon'ble Supreme Court inter alia held as under:

"The question that remains to be considered is whether S.22A of SICA affects a criminal case for an offence under S.138 NI Act. In the said section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its' assets (a) during the period of preparation or consideration of the scheme under S.18; and (b) during the period beginning with the recording of opinion by the Board for

winding up of the company under sub-sec.(1) of S.20 and up to winding up before the concerned High Court. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which the BIFR has submitted its report declaring a company as 'sick' and has also issued a direction under S.22A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case or the alleged offence under S.138 NI Act cannot be instituted during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR under S.22A was passed against the company then it cannot be said that the offence under S.138 NI Act was completed. In such a case it may be reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to

face trial in a criminal case." (emphasis supplied)

10. In view of the above referred authoritative pronouncements of the Hon'ble Supreme Court, it cannot be disputes that the offence under Section 138 of Negotiable Instruments Act is not complete before expiry of the statutory period of 15 days, after receipt of notice and, therefore, it cannot be said that an offence under Section 138 of Negotiable Instruments Act was committed by the company on account of dishonor of these cheques and its non-payment within 15 days of the receipt of the notice envisaged in Section 138(b) of Negotiable Instruments Act. Since the company could not have disobeyed the order passed by BIFR, it was not possible for it to make payment of the amounts of the cheques at any time after 1st December 1998. The purpose of issuing of notice under Section 138(b) of Negotiable Instruments Act is to inform an honest drawer of the cheque, who, for one reason or the other, could not arrange funds at the time of presentation of the cheque to his bank, to show his bona fide, by making payment within 15 days of the receipt of the notice. If a person is prohibited on account of an order passed by BIFR from making payment on the date the statutory period of 15 days expires,

non-payment being beyond his control, no offence under Section 138 of Negotiable Instruments Act would be made out against him.

11. The decision of the Hon'ble Supreme Court in the case of Kusum Ingot (supra) was applied by this Court in some subsequent cases involving this very company. In Crl.M.C. 52/2003, decided on 22nd January 2004, this Court quashed the complaint that had been instituted against this company under Section 138 of Negotiable Instruments Act. Similar order was passed by this Court in Crl.M.C. 634, 648, 1084-86 and 5631 of 2005, filed by the petitioner Prem Chand Gupta and company Elite Appliances Ltd. in respect of the complaint filed by Delhi Safe Deposit Company Ltd, which is also the respondent/complainant in these petitions.

12. The learned counsel for the complainant/respondent has relied upon the decision of this Court in '**Ramaswamy vs. Bharti Infotel Ltd**'. 148 (2008) DLT 79 where a learned Single Judge of this Court observed in para 21 of the judgment that the date of commission of the offence cannot be said to be the date of its dishonor of the cheque, but the date on which it was drawn. In view of the authoritative pronouncements of the

Hon'ble Supreme Court in Kusum Ingot (supra) and K. Bhaskaran (supra), it is not possible for me to go by the view taken in this case. More importantly, this judgment does not take into consideration, the decision of the Hon'ble Supreme Court in the case of Kusum Ingot as well the subsequent decisions of this Court relying upon and following the decision of the Hon'ble Supreme Court in the case of Kusum Ingot and, therefore, does not bind this Court.

13. For the reasons given in the preceding paragraphs, both the petitions are allowed and the criminal complaints, subject matter of these petitions are here quashed.

**V.K. JAIN
(JUDGE)**

JANUARY 21, 2010

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