IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CIVIL PROCEDURE 1908

FAO (OS) No.206/2007 IN CS(OS) No.570/2007.

Date of decision : June 15, 2007

RATNA COMMERCIAL ENTERPRISES LTD. & ANR. ..... Appellant
Through Mr. A.S.Chanhiok, Senior Advocate with Mr. Sudhir K.Makkar and Ms. Meenakshi Singh, Advocates.

versus

VASUTECH LTD. .... Respondent
Through Mr. Sandeep Sethi, Senior Advocate with Mr. Bharat Ahuja, Advocate.

Dr. S. Muralidhar, J.
CM No. 8408/2007
Exemption allowed subject to all just exceptions.

FAO (OS) No. 206 of 2007 & CM 8407/2007

1. This appeal by the defendants is against an order dated 28.3.2007 passed by the learned Single Judge of this Court on the Original Side granting an ad interim ex parte injunction in favour of the plaintiff in an application under Order XXXIX Rule 1 Code of Civil Procedure 1908 (CPC) i.e. I.A.No.3582/2007 in CS (OS) No.570/2007. For the sake of convenience, the parties are referred to by their respective status in the suit.

Background Facts

2. The facts leading to the filing of the present appeal are that the plaintiff Company, M/s.Vasutech Ltd. having its registered office at Rewari, Haryana, approached the defendant No.1 Company, registered in Delhi, for loans for funding its capital requirements for development of a chip called Versatile Component Unit (VCU). Defendant No.1, is stated to have advanced amounts from time to time to the tune of Rs. 52.08 crores. A loan agreement dated 15.4.2005 was entered into between the appellant No.1/defendant No.1 company, plaintiff company, Mr. Dhruv Varma, Mr. R.L.Varma and Mr. R.L.Varma & Sons (HUF) whereby the plaintiff company and the other parties acknowledged that a sum of Rs. 19.20 crores stood advanced by the defendant company to the plaintiff company. According to the defendant that agreement stipulated that a further sum of Rs.2 crores would be advanced to the plaintiff company and that the amount advanced would carry interest at 12 % per annum. Further the plaintiff company was liable to repay the entire outstanding dues to the defendant company in four equal quarterly instalments commencing from the date immediately succeeding the date on which the "moratorium period" as defined in the Agreement, expired but not later than the final maturity date. The moratorium period was to be 18 months from the date of the Agreement. The Agreement is stated to have been expired on 31.1.2007.

3. Simultaneous with the aforementioned Loan Agreement, a share Pledge Agreement was signed on 15.4.2005. In this agreement it was stated that in consideration of the loan, which was to be advanced pursuant to the loan agreement, M/s. R.L.Varma & Sons (HUF) were pledging with the defendant company its rights, title and interest in the five lakh equity shares held by M/s.

R.L.Varma & Sons (HUF) in the plaintiff company. By a separate deed executed on the same date, the directors/promoters of the plaintiff company i.e. Mr. Dhruv Varma and Mr.R.L.Varma and M/s. R.L.Varma & Sons (HUF) stood guarantors for the due payment of loan to the defendant company.

4. The above Loan Agreement was preceded by another set of events. The plaintiff claims to have innovated the VCU technology and some time in 1999 the ICICI Venture Funds Management Company Ltd. ('ICICI') agreed to financially support the venture. It is further claimed by the plaintiff that when it sought to commercialise this venture, ICICI withdrew its support. Defendant No.2 Mr.Pradip Burman, the director of the Defendant No.1 Company is stated to have at this stage expressed interest in the new technology and offered to support it financially. Meanwhile, with a view to commercializing the new technology in the United states, Mr.Dhruv Sharma, one of the directors of the plaintiff company is stated to have promoted another company in the U.S. called Vasu Tech Inc (also referred to as Vasucorp Inc) and Mr.Pradip Burman was appointed in that company as a Director. It appears that on 1.7.2004 a 'Founders Agreement' was entered into between Vasucorp, Mr. Dhruv Varma, Wogan Technologies Inc. (a company incorporated in the British Virgin Islands and represented by Mr.Pradip Burman) and Mr. David Dell whereby Vasucorp Inc. agreed to sell to both Wogan Technologies and Mr. David Dell, shares of Vasucorp Inc at the purchase price of $0.0001 per share. It was stated in this agreement that the shares will be acquired for investment purposes only and that the purchasers understood that there was no assurance that a public market would ever exist for the shares. As far as Wogan Technologies represented by Mr. Pradip Burman defendant No.2 is concerned it is shown to have purchased 1,050,000 shares at the purchase price of US$ 105. This was later amended on 10.3.2005 and thereafter some more shares were transferred by Mr. Dhruv Varma to Wogan Technologies.

5. It is stated that Defendant No.1 stepped into the shoes of ICICI by repaying to the latter the Rs.2 crores that had been advanced by ICICI to the Plaintiff. That was the background to the execution of the loan agreement dated 15.4.2005 referred to in para 4. The loan agreement shows that there were positive and negative covenants in the loan agreement and under Clause 7.1 if there was failure to repay the principal or the interest of the amount borrowed within three business days of the due date, it would constitute default. Clause 8 gave an option to the Lender, in the event of default in repayment of the loan, to have the outstanding amount converted into equity shares in the Borrower i.e. Vasu Tech Ltd., the plaintiff.

6. This was followed by a memorandum of understanding dated 31.8.2006 in which the plaintiff company acknowledged its liability to pay a sum of Rs. 49,81,93,273 to the defendant No.1 company. It is stated that there were default in payments of both interest and principal amount. Later, along with covering letters dated 27.9.2006, 11.10.2006, 19.10.2006, 22.11.2006, 29.11.2006 and 6.12.2006 the Plaintiff is stated to have issued post-dated cheques totalling a sum of Rs.54,08,93,273 towards payment of principal amount and all these cheques were dated 1.4.2007. It also issued post dated cheques dated 1.1.2007 and 1.4.2007 for payment of the interest amount. The calculation sheet showing the amounts towards repayment of principal, interest and the TDS figure was enclosed.

7. It is stated that there were defaults in the payments of both interest and principal amount. Therefore, a legal notice was issued on 5.1.2007 by the defendant company to the plaintiff company seeking repayment of the dues. The plaintiff company denied its liability by referring to the correspondence exchanged by e-mail. Its case was that the cheques were only issued as

collateral security and that the parties had agreed that the loan amount would be converted into equity shares to be allotted to Defendant No.2 in Vasucorp Inc. A reference was also made to the e-mail sent by Mr. Pradip Burman to the plaintiff company confirming the number of shares to be allotted in Vasucorp Inc. against the loan amount advanced. It was claimed that the issuance of shares of Vasucorp Inc. USA was not a separate transaction. The case of the defendants, on the other hand, was that these two transactions were not inter-related and that the loans advanced to Vasutech Ltd. had nevertheless to be repaid in terms of the loan agreement.

8. The above exchange of legal notice and reply led the defendant company to file a winding up petition against the plaintiff company in the High Court of Punjab & Haryana at Chandigarh on 20.2.2007. Notice was issued in the said petition on 2.3.2007. The claim in the petition was for a sum of Rs. 61,74,46,745 which included the principal amount of Rs. 54,08,93,273.

Proceedings before the learned Single Judge

9. After notice was received by the plaintiff company it filed the present suit i.e. CS No.570/2007 in this Court for a prohibitory and mandatory injunction against the defendant company and defendant No.2 from presenting the 16 cheques for a sum of Rs.61,63,66,140 on 1.4.2007 or any date thereafter within the validity period of the said cheques and in any manner dealing with the said cheques. Along with the said suit an interlocutory application Under Order XXXIX Rule 1 CPC was filed for an ad interim ex parte injunction.

10. The learned Single Judge by the impugned order dated 28.3.2007, while directing summons to issue in the suit, granted an ad interim ex parte injunction as prayed for by the plaintiff. In the impugned order the learned Single Judge noted the submission of the plaintiff that the cheques issued by the plaintiff "were liable to be returned to the plaintiff and the defendants had no right to encash the same." The impugned order also noted the submission of the learned Senior counsel appearing for the plaintiff that "the plaintiff shall extend the validity of the cheques if so directed by the Court." The learned Single Judge was also informed that the plaintiff had received notice of the winding up petition filed in the Punjab & Haryana High Court. Thereafter the learned Single Judge passed the following Order:

"Having heard learned senior counsel for the plaintiff and having perused the plaint, application and documents on record, I am satisfied that the plaintiff has made out a prima facie case for grant of an ad interim injunction. Grave and irreparable loss would undoubtedly ensure to the plaintiff if the interim injunction as prayed for is not granted at this stage. Balance of convenience and interest of justice also lies in favour of the plaintiff and against the defendants.

Accordingly, till the next date of hearing, the defendants are restrained from presenting the cheques detailed in para 42 of the plaint for encashment."

11. It appears that on receipt of the summons the defendant No.1 company filed an application being I.A. No.3979 of 2007 under Order XXXIX Rule 4 CPC on 3.4.2007, seeking the vacation of the ad interim ex parte injunction. It is stated that the said application was listed on 4.4.2007 and notice was issued for 17.4.2007. The plaintiff filed its reply to the application on 16.4.2007. On 17.4.2007 the case was adjourned to 3.5.2007. Thereafter the case was listed on May 3,14,16,22,25 and 29. It is stated that the case was heard at some length on 22.5.2007 but on the subsequent dates it could not be heard on account of the heavy board. The case has now been listed for further hearing on 2.7.2007.

Submissions of the Appellants/Defendants

12. Appearing for the defendants Mr. A.S.Chandhiok learned senior counsel submits that the non-disposal of the application under Order 39 Rule 4 filed by the defendant on 3.4.2007 within 30 days contravened the mandate of Order 39 Rule 3 A CPC. Consequently, the defendants were entitled to file the present appeal against the impugned order. He places reliance upon the judgment of the Hon'ble Supreme Court in A.Venkatasubbiah Naidu v. S.Chellappan AIR 2000 SCC 3032. He next submits that the ad interim ex parte injunction granted ought to be vacated for several reasons. First, it has been obtained by suppressing material facts and documents. The plaint gives incomplete and inaccurate facts replete with false assertions. In particular he points out that the plaintiff has not referred to the Founders' Agreement dated 15.7.2004 modified on 10.3.2005. It also does not disclose that cheques earlier issued by the plaintiff on 1.1.2007 in favour of the defendant No.1 had been dishonoured; that on 23.1.2007 and 10.2.2007 the plaintiff had by pay orders replaced the dishonoured cheques and that this would belie the stand taken that the amount borrowed by the plaintiff was not to be treated as a loan. None of the covering letters with which each of the 16 cheques had been issued had been placed on record by the plaintiff. A bare reading of the covering letters would have exposed the falsity of the plaintiff's stand that the amounts were not to be treated as loans and therefore the cheques were not to be encashed.

13. Lastly, Mr.Chandhiok submits that the suit itself was not maintainable as the prayer made therein was in effect to restrain the defendants from instituting the proceedings against the plaintiff under Section 138 of the Negotiable Instruments Act, 1888 (NI Act). Such a suit was barred under Sections 41(b) and 41(d) of the Specific Relief Act, 1963. The plaintiff was fully aware that the cheques if presented would be dishonoured. He submits that in light of the above facts and circumstances, an unconditional ad interim ex parte injunction restraining the defendant from presenting cheques for recovering the amount of Rs. 61.63 crores could not have been passed by the learned Single Judge.

Submissions of the respondent plaintiff

14. Appearing for the plaintiff on advance notice Mr. Sandeep Sethi, learned senior counsel raises a preliminary objection to the maintainability of this appeal. He submits that the impugned order passed under Order XXXIX Rule 1 is not appealable per se under Order 43 when the application under Order XXXIX Rule 4 is yet to be disposed of. Secondly, even if it were to be taken that an appeal was maintainable in terms of the judgment of the Hon'ble Supreme Court in A.Venkatasubbiah Naidu the appeal should have been filed within 30 days from the date of the impugned order i.e on or before 28.4.2007. Therefore the appeal is clearly barred by the limitation. With no application having been filed for condoning the delay in filing the appeal, it should be dismissed on this short ground. Thirdly, he submits that the appeal should be dismissed on account of propriety since the application under Order XXXIX Rule 4 CPC was still part-heard before learned Single Judge. On one date i.e 22.5.2007 the application was heard at some length. Given the fact that the application was listed on the opening day after the summer recess, i.e. 2.7.2007, there was absolutely no need for the defendants to have filed this appeal before the Vacation Bench.

15. On merits, Mr.Sethi then refers to the e-mail correspondence exchanged between defendant No.2 Mr. Pradip Burman and the plaintiff company to show that the outstanding amount of Rs. 61.63 crores had been agreed to be converted into shares of equivalent value in Vasucorp Inc. Although he does not deny that the

covering letters with which the cheques were sent do not advert to this agreement between the parties, he states that the correspondence between the parties through e-mail reflected this position. In response to a query from the Court whether the plaintiff company would be prepared to secure the interest of the defendant No.1 company, without prejudice to the plaintiff's rights and contentions, as a condition for continuing the ad interim injunction, Mr. Sethi states that it will not be possible for the plaintiff company to provide any such security.

Maintainability of the appeal

16. This Court will first deal with the preliminary objection of the plaintiff to the maintainability of this appeal. Rules 3A and 4 of Order XXXIX CPC read as under:

"3A. Court to dispose of application for injunction within thirty days.

Where an injunction has been granted without giving notice to the opposite party, the Court shall make an endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted; and where it is unable so to do, it shall record its reasons for such inability.

4. Order for injunction may be discharged, varied or set aside

Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit support such application a part has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused under hardship to that party."

17. The rationale of Rule 3A, which was inserted by an amendment to the CPC with effect from 1.2.1977, was explained by the Hon'ble Supreme Court in A.Venkatasubbiah Naidu in the following manner (AIR, p.3036, para 17):

"The aforesaid rule casts a three pronged protection to the parties against whom the ex parte injunction order was passed. First is the legal obligation that the court shall make an endeavour to finally dispose of the application of injunction within the period of 30 days. Second is, the legal obligation that if for any valid reasons the court could not finally dispose of the application within the aforesaid time the court has to record the reasons thereof in writing."

18. The consequence of a Court not proceeding in accordance with Rule 3A was also explained by the Hon'ble Supreme Court in the next following paragraphs as under (AIR, pp. 3036-37, paras 18 and 19):

"18. What would happen if a Court does not do either of the courses? We have to bear in mind that in such a case the Court would have by-passed the three protective humps which the legislature has provided for the safety of the person against whom the order was passed without affording him an opportunity to have a say in the matter. First is that the Court is obliged to give him notice before passing the order. It is only by way of a very exceptional contingency that the Court is empowered to by-pass the said protective measure. Second is the statutory obligation cast on the Court to pass final orders on the application

within the period of thirty days. Here also it is only in very exceptional cases that the Court can by-pass such a rule in which cases the legislature mandates on the Court to have adequate reasons for such bypassing and to record those reasons in writing. If that hump is also bypassed by the Court it is difficult to hold that the party affected by the order should necessarily be the sole sufferer.

19. It is the acknowledged position of the law that no party can be forced to suffer for the inaction of the Court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1, 2, 2A, 4 or 10 of Order 39 of the Code in terms of Order 43 Rule 1 of the Code. He cannot approach the appellate or revisional Court during the pendency of the application for grant or vacation of temporary injunction. In such circumstances the party who does not get justice due to the inaction of the Court in following the mandate of law must have a remedy. So we are of the view that in a case where the mandate of Order 39 Rule 3A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the appellate Court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate Court in complying with the provisions of Rule 3A. In appropriate cases, the appellate Court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex-parte temporary injunction shall, for the purposes of the appeal, be deemed to be the final order passed on the application for temporary injunction, on the date of expiry of thirty days mentioned in the Rule."

19. The upshot of the above delineation of the law by the Hon'ble Supreme Court is as under:

(i) In the exceptional circumstances where a Court is unable to dispose of the application Under Order 39 Rule 4 within 30 days "It shall record its reasons for such inability";

(ii) If the court does not dispose of the application then notwithstanding the fact that the order is not appealable in terms of Order 43 Rule 1, the aggrieved party shall be entitled to the right of appeal; and

(iii) When such an appeal is filed "the appellate court shall be obliged to entertain the appeal and further to take note of the omission of the court in complying with the provisions of Rule 3A."

20. Turning to the facts of the present case this Court finds that the application filed by the defendant under Order 39 Rule 4 was first taken up on 4.4.2007 when notice was directed to be issued. Thereafter on 3.5.2007 the parties were asked to get the court file paginated and the case was adjourned to 14.5.2007. On 14.5.2007 the order reads: "List on 16.5.2007". On 22.5.2007 the order, after an admittedly extended, was: "List for further hearing on 25.5.2007." On 25.5.2007 the Order was: "List for continuation of arguments on 29.5.2007."

21. Although, after the 30-day period was crossed on 4.5.2007 the learned Single Judge did not indicate the reasons for the inability to dispose of the application in terms of the requirements of Rules 3A, this Court is not prepared to find fault with the learned Single Judge on that score. This Court is conscious that each of the Judges on the Original Side has a heavy board of pending and fresh cases. In fact this Court sitting in appeal cannot be unmindful of the fact that each of the learned Single Judges is overburdened

with a huge load of pending cases. The Rules of the CPC, salutary as they are, will nevertheless have to be interpreted and applied in the context of the reality of the excessive workload of the learned Judges not only of this Court but of the subordinate courts as well. If, as has been pointed out fairly both by the defendant and the plaintiff, the learned Single Judge expressed her inability on account of the heavy board to hear the matter on the last few dates prior to the closure of the Court for the summer recess, that would, in terms of Rule 3 A, constitute sufficient reasons for the non-disposal of the application of the defendant under Order XXXIX Rule 4 CPC.

22. We now turn to the consequences of the non-compliance with the main requirement of Rule 3 A, i.e. disposal of the application under Order 39 Rule 4 CPC by the learned Single Judge within 30 days of its being filed. This Court is bound by the mandate of the Hon'ble Supreme Court in A.Venkatasubbiah Naidu. The said judgment makes it abundantly clear that the affected party which is unable to get its application under Order 39 Rule 4 disposed of in terms of Rule 3A, can file an appeal and in such event the appellate court is "obliged to entertain the appeal and further to take note of the omissions of the subordinate court...." In that view of the matter the defendant is justified in preferring this appeal and this Court is obliged to entertain the appeal.

23. We are unable to accept the submissions of Mr. Sethi that the appeal is barred by limitation. The defendants were expecting till 29.5.2007 that their application would be disposed of by the learned Single Judge. The expectation was a reasonable one and the defendants cannot be faulted on that score. The period of limitation for filing the appeal should be taken to have commenced on 29.5.2007 when it was clear that the application would not be disposed of at least till 2.7.20007. The appeal is therefore within time.

24. We also do not agree with the submission that the filing of the present appeal was an act of impropriety. The defendants exercising their right of appeal, declared as such by the binding judgment of the Hon'ble Supreme Court, which is the law of the land in terms of Article 141 of the Constitution of India, can hardly be considered to be an act of impropriety.

25. For all of the above reasons the preliminary objections to the maintainability of the appeal are hereby rejected.

Suppression of facts

26. Turning to the other submissions of Mr. Chandihok regarding suppression of the material facts, this Court finds some substance in the submission. An examination of the plaint shows that there is indeed no reference to the Founders' Agreement dated 15.7.2004 and the amendment thereto. There is no reference to the fact that by its letter dated 21.2.2007 and 10.2.2007 the plaintiff had sent pay orders to the defendant in lieu of certain dishonoured cheques. What is more serious is that, as rightly pointed out by Mr. Chandihok, there is no reference whatsoever to any of the covering letters with which the 16 cheques, in respect of which the suit has been filed, were sent. Each of these covering letters is almost identically worded. A sampling of one such letter dated 29.11.2006 reads as under:

"29.11.2006
The Chairman
M/s. Ratna Commercial Enterprises Pvt. Ltd.
New Delhi

Reg: SHORT TERM LOAN

Dear Sir,
Please find enclosed herewith the following cheques towards repayment of short term loan of Rs.50,00,000/-(Rupees Fifty lacs only) along with interest @ 12% p.a for the period

1.	381120	01.01.2007	42074	Interest @ 12% per annum for the period 29/11/2006 to 31/12/2006 on Rs. 50,00,000/- less TDS @ 22.44% i.e. Rs. 12173/-
2.	381121	01.04.2007	114746	Interest @ 12% per annum for the period 01/01/2007 to 31/03/2007 on Rs. 50,00,000/- less TDS @ 22.44% i.e. Rs. 33,199/-
3.	381122	01.04.2007	50,00,000	Repayment of loan.

We hope you will find the above in order. We shall be grateful if you can provide us with your income tax PAN number for our records and for issue of TDS certificates.

Thanking you,
for VASU TECH-LIMITED

(ARUNA VARMA)
DIRECTOR" (emphasis supplied)

Each of the covering letters, copies of which have been placed on record by the defendants, is identically worded. There is no explanation at all why these letters were not produced by the plaintiff along with the plaint. On the other hand, it can be seen that the plaintiff does not deny these covering letters. Para 41 of the plaint states that "purely with a view to give comfort to the defendants as collateral security, till the shares were transferred, post-dated cheques were given from time to time…" In para 42 it simply lists out the details of the 16 cheques. These letters unequivocally reflect that the cheques were being issued for repayment of a loan and there is no whisper that they are being offered as a collateral as claimed in the plaint. There is a high probability that had the learned Single Judge been shown these letters, the unconditional ex parte injunction may not have been granted. The very basis of the plaintiff's claim that these cheques were not intended for repayment of the loan would have been in doubt. Therefore, the withholding of these letters should result in drawing an adverse inference against the plaintiff. This is definitely one ground why the ad interim injunction should be vacated.

Prima Facie case not made out
27. Mr. Sethi was at pains to point out that there were e-mails of 9.5.2006, 10.10.2006 and 6.12.2006 exchanged between which indicated that the loan amount was to be made good by issuance of shares in Vasucorp Inc. However, Mr. Sethi is unable to explain how the series of covering letters issued as referred to above, i.e. 27.9.2006, 11.10.2006, 19.10.2006, 31.10.2006, 22.11.2006, 29.11.2006 and 6.12.2006, was either parallel to the dates of some of the e-

mails or even subsequent thereto. None of these letters even remotely suggest that the cheques were not expected to be encashed or that they were being issued as collateral only in lieu of the shares which were to be allotted to the defendants in Vasu Corp. Likewise even the emails do not say that the cheques issued with the covering letters should not be encashed. The agreement pleaded by the plaintiff whereby the cheques were to be treated as collateral and not encashed do not prima facie seem to be reflected in these covering letters with which the cheques were issued. Further till such time the defendants sent it a legal notice the plaintiff does not appear to have written to it asking that the cheques not be presented for payment.

28. This Court finds therefore that the plaintiff has not been able to establish a prima facie case for the grant of an ad interim injunction.

Maintainability of the Suit

29. The other issue concerns the maintainability of the suit itself in terms of the Section 41(d) of the Specific Relief Act, 1963 ('SRA') which reads as under:

"41. An injunction cannot be granted……

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter."

The law concerning the interpretation of Section 41(d) of the SRA is fairly well settled. It has been held In Re N.P. Essappa Chettiar AIR 1942 Mad. 756 and in Gauri Shanker v. District Board AIR 1947 All. 81 that a suit to restrain criminal proceedings being initiated is not maintainable. In Aristo Printers Pvt. Ltd. v Purbanchal Trade Centre AIR 1992 Gau. 81 a Division Bench of the Gauhati High Court was dealing with a case where cheques issued by the plaintiff to the defendant had been dishonoured and notice had been issued to the defendant under Section 138 NI Act. The plaintiff then filed a suit to restrain the defendant from instituting proceedings under the NI Act. The Court referred to a judgment of the Hon'ble Supreme Court in State of Orissa v. Madan Gopal Rungta AIR 1952 SC 12 and Cotton Corporation of India Ltd. v. United Industrial Bank Ltd. AIR 1983 SC 1272 and held that "an order of injunction of the nature issued in this case cannot be granted and the hands of the criminal court cannot be fettered by the civil court."

30. The decision of this Court in Atul Kumar Singh v. Jalveen Rosha AIR 2000 Del 38 was in a case where the plaintiff had issued four cheques issued in favour for the defendant for a value of Rs. 7 lakhs. The cheques when presented were dishonoured. After service of notice under Section 138 NI Act, the plaintiff filed a suit for a declaration that "the defendant is not entitled to any benefit on account of holding the cheques" and to injunct the defendant "from using or claiming any benefit by virtue of possessing the instruments." This Court, while allowing the defendant's application for rejecting the plaint, held that (AIR, p.40):

> "The reliefs claimed in this suit are in substance for an injunction restraining the defendant from prosecuting the criminal case instituted against the plaintiff. Section 41(b) of the SRA denies to the Court the jurisdiction to grant an injunction restraining any person from prosecuting any proceedings in a Court. Consequently, the injunction sought by the plaintiff cannot be granted since it would have the effect of preventing the defendant from prosecuting the criminal case against the plaintiff."

Turning to the present case, the plaintiff does not deny that the cheques issued by it to the defendant No.1 if presented are likely to be dishonoured. In effect the prayer in the suit is to forestall the defendants executing proceedings against the plaintiff under the NI Act. The suit would therefore be

prima facie barred in terms of Section 41(d) NI Act. Where the maintainability of the main suit is itself in doubt, the Court cannot grant a temporary injunction of the same nature. This is one more reason why the ad interim injunction should be vacated.

Plaintiff not willing to a conditional order of injunction

31. This Court did consider the question of grant of a conditional Order of interim injunction. However, as already noted, Mr. Sethi appearing for the plaintiff was candid enough to state that it would not be possible for the plaintiff to secure the interest of the defendant by depositing a reasonable sum in this Court, without prejudice to the plaintiff's rights, as a condition for the grant of an interim injunction. Therefore this Court is not inclined to pass such a conditional order.

32. For all of the above reasons this Court finds that the plaintiff has failed to make a prima facie case for grant of ad interim injunction. In these circumstances, if the defendant is prevented from presenting of the cheques it would be put to hardship. The balance of convenience in declining interim injunction to the plaintiff is in favour of the defendants.

33. Accordingly the impugned order dated 28.3.2007 is set aside and the appeal is allowed with costs of Rs.10,000/- which shall be paid by the respondent plaintiff to the appellant defendant within a period of 10 days. In view of this decision, the I.A. No. 3979/2007 in C.S. No. 570/2007 is required to be allowed. The learned Single Judge will pass consequential orders when the suit is listed before that Court on 2.7.2007.

34. Order dasti to the parties.

Sd/-
S. Muralidhar,J
(Vacation Judge)

Sd/-
(J.P.Singh,J.)
(Vacation Judge)