

## **I.C.D.S. Ltd vs Beena Shabeer & Anr on 12 August, 2002**

**Author: Umesh C. Banerjee**

**Bench: Umesh C. Banerjee**

CASE NO. :  
Appeal (crl.) 797 of 2002

PETITIONER:  
I.C.D.S. LTD.

Vs.

RESPONDENT:  
BEENA SHABEER & ANR.

DATE OF JUDGMENT: 12/08/2002

BENCH:  
Umesh C. Banerjee & Y.K. Sabharwal.

JUDGMENT:

BANERJEE,J.

Leave granted.

A short but an interesting question falls for consideration in this appeal to the effect as to the maintainability of a proceeding under Section 138 of the Negotiable Instruments Act, 1881, vis-a- vis a guarantor. The High Court negated it and hence the matter before this Court under Article 136 of the Constitution. In order, however, to appreciate the contentions raised in the matter, it would be worthwhile at this juncture to notice Section 138 for its true terms, scope and effect as also to assess the situation ourselves. Section 138 of the Negotiable Instruments Act, 1881 reads as below :

"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 provision of this Act, be punished with imprisonment for a term which may extend to one year, 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 fifteen 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 purpose of this section, "debt or other liability" means a legally enforceable debt or other liability."

It is on the basis of the provision as above, the High Court came to a conclusion when a cheque was issued as security, no complaint will lie under Section 138 of the Act since the cheque issued cannot be said to be for the purpose of discharging any debt or liability : In justification of the said conclusion the High Court records the following reasons :

"Reading of the above Section would make it clear that issuance of a cheque must be for payment of amount of money from out of the account. In the case of a guarantor or surety, even if a cheque is issued, that cannot be said to be for immediate payment of money :

Section 138 of the Act further says that issuance of cheque to another person is towards discharge, in whole or in part of any debt or other liability."

The High Court has also placed reliance on a decision of the Kerala High Court in the case of Sreenivasan v. State of Kerala (1999 (3) K.L.T. 849). Incidentally, a learned Single Judge of the High Court in the decision last noted (supra) also placed reliance on a decision of Andhra Pradesh High Court in Taher N. Khambati v. Vinayak Enterprises (1995 (1) KLT SN 5), wherein it has been held as follows :-

"In the instant case, the appellant advanced some money to the respondents and obtained a pronote. It was stipulated that the respondent should pay interest every month. At the same time appellant-creditor took a blank signed cheque from the

respondents with the understanding that the complainant could fill the other columns in the cheque and present it if the respondents committed default in payment of interest. So, the appellant has obtained this blank signed cheque with a view to make use of it, as a threat to the respondents for realisation of the amount. So it cannot be construed that the respondent had issued the cheque voluntarily for discharge of any debt or legal liability as envisaged under Section 138."

Having, however, the support of Andhra Pradesh High Court judgment, the Kerala High Court in Sreenivasan (supra) observed :

"A comparative reading of the principle laid down by the Andhra Pradesh High Court and the mandatory provisions laid down in Section 138 of the Negotiable Instruments Act is crystal clear that when a cheque has been issued as a security, no complaint will lie under Section 138 of the Negotiable Instruments Act."

After having noted the interpretation of the High Court as regards Section 138 of the Act, time has thus now come for us to assess the acceptability of such a wisdom. Before however doing so, a brief factual reference would be convenient. The facts reveal : The appellant herein is a Company incorporated under the provisions of the Companies Act, 1956, having its registered and administrative office at Syndicate House, P.B. No.46, Upendra Nagar, Manipal-576119 and branches among other places at Palayam, Trivandrum. The husband of respondent No.1 entered into a hire purchase agreement with the appellant for the purposes of the purchase of a Maruti car on hire purchase basis. The respondent No.1, his wife stood as a guarantor in respect of the hire purchase facilities being made available to her husband. The facts further reveal that the respondent No.1, on account of the aforesaid transaction and towards part payment issued a cheque bearing No.672501 dated 29.8.1998 for Rs.80,490/- drawn on Catholic Syrian Bank Limited, St. Mary's School, Pattom, Trivandrum to the Appellant. Admittedly, the said cheque was dishonoured and returned to the appellant with a remark "insufficient funds".

The factual matrix depict that the appellant issued a statutory notice on 2.9.1998 as contemplated under Section 138 of the Negotiable Instruments Act, calling upon the respondent No.1 to pay the amount covered under the cheque within a period of 15 days and since the respondent No.1 did not think it fit and proper to reply to the said notice in spite of receipt thereof, the appellant thereafter filed a complaint under Section 138 of the Act before the Chief Judicial Magistrate's Court, Thiruvananthapuram. The complaint has been registered as S.T. No.141/1999 in the Court of the Additional Chief Judicial Magistrate, Thiruvananthapuram and subsequently the case was taken on file for the purposes of the complaint and immediately thereafter, the respondents herein moved a Petition under Section 482 of the Code of Criminal Procedure for quashing of the complaint and the proceedings noticed above pending before the Additional Chief Judicial Magistrate's Court, Thiruvananthapuram.

The High Court, as noticed above, did allow the Petition upon a categorical finding that being a cheque from the guarantor it could not be said to have been issued for the purpose of discharging any debt or liability and the complaint under Section 138 of the Negotiable Instruments Act, 1881,

thus cannot be maintained.

As noticed hereinbefore, the principal reason for quashing of the proceeding as also the complaint by the High Court was by reason of the fact that Section 138 of the Act provides for issuance of a cheque to another person towards the discharge in whole or in part of any debt or liability and on the factual context, the High Court came to a conclusion that issuance of the cheque cannot be co-related for the purpose of discharging any debt or liability and as such complaint under Section 138 cannot be maintainable.

The language, however, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque". The above noted three words are of extreme significance, in particular, by reason of the use of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.

The issue as regards the co-extensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act: 'Any cheque' and 'other liability' are the two key expressions which stands as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus does not lend any assistance to the contentions raised by the respondents.

It is to be noted, however, that both the parties during the course of arguments have made elaborate submissions on Sections 126 and 128 of the Contract Act, but in our view, by reason of the specific language used by the legislature, question of consideration of the matter from the point of view of another Statute would not arise, neither we would like to express any view since that may have some effect as regards the merits.

In our view, the High Court fell into a manifest error and as such the judgment impugned cannot obtain our concurrence. The appeal succeeds and is thus allowed. The order of the learned Single Judge stands quashed and the proceeding in ST No.141/1999 on the file of the Additional Chief Judicial Magistrate's Court, Thiruvananthapuram stands restored and so is the complaint under

Section 138 of the Act. No costs.