

# **M/S Cpec Engineering Ltd vs The Bombay Mercantile Co-Operative on 17 December, 2013**

**Author: A.R. Joshi**

**Bench: A.R. Joshi**

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judgment in criminal writ petition no. 3542-12.doc

LADDA

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION No. 3542 of 2012.

1) M/s CPEC Engineering Ltd  
(a Public Ltd Company)  
Registered under the Companies Act,

and having its office at :-  
Plot No.D/207,  
TTC Industrial Area, H.P. Road,  
Turbhe, MIDC,  
Navi Mumbai - 400 705,

Through its Director  
Ramchandrappa Shankar Koli

..Petitioner No.1.

2) Mr Ramchandra Shankar Koli

Adult, Hindu, Indian Inhabitant,  
Age 32 years,

Neel Siddhi Tower B-102,  
Sector 12, Vashi,  
Navi Mumbai 400 703.

..Petitioner No.2.

3) Mrs Sangeeta R. Koli,  
Adult, Hindu, Indian Inhabitant,  
Age 30 years,  
Neel Siddhi Tower B-102,  
Sector 12, Vashi,  
Navi Mumbai 400 703.

..Petitioner No.3.

4) Mr Shyam S. Koli,  
Adult Hindu, Indian Inhabitant,  
Aged 31 years,  
2/C/B, Tolaram Nagar,  
Chembur Camp,  
Mumbai 400 074.

..Petitioner No.4.

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5) Mrs Mahadevi S. Koli

Adult Hindu, Indian Inhabitant,  
Aged 65 years  
Neel Siddhi Tower B-102,

Sector 12, Vashi,  
Navi Mumbai 400 703.

..Petitioner No.5.

6) Mr Deepak D. Deshpande,

Adult Hindu, Indian Inhabitant,  
Aged 55 years  
Flat No.1604, 16th Floor,  
A-wing, Hawa Mahal Rajvilas Chitalsar,  
Manpada, Thane (West) 400 610.

..Petitioner No.6.

Versus

1. The Bombay Mercantile Co-operative

Bank Ltd.  
(a Scheduled Bank) having its  
Registered office at Zain G. Rangoonwala  
Building, 78, Mohammad Ali Road,

Mumbai 400 003 and having its  
Branch office, at Vardhman Chambers

Premises, Co-operative Society Ltd.  
Shop No.5 to 7 and 11, Plot No.84  
Sector 17, Vashi,  
Navi Mumbai 400 705.

Through its branch Manager Mr C.M. Patekar  
..Respondent No.1.

2. The State of Maharashtra ..Respondent No.2.

Mr Dharmendra Rohra a/with Ashok Shahani and Hardik B.  
Vyas for the petitioners.

Mr Subhash Jha i/by Prakash Mahadik for Respondent No.1.  
Ms G.P. Mulekar, APP for the Respondent No.2.

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CORAM :- A.R. JOSHI, J

Reserved on : 4.12.2013.  
Pronounced on : 17 th December,2013

JUDGMENT :

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(1) Rule. Rule returnable forthwith.

With the consent of learned counsel for the parties, the petition is heard finally at the stage of admission.

The learned counsel for respondent Nos. 1 and 2 waive service.

(3) The present writ petition is filed by the petitioners- the original accused persons in the matter of complaint lodged against them by the present respondent No.1, the Bombay Mercantile Co-operative Bank Ltd. for taking action under section 138 of Negotiable Instruments Act, 1881 (26 of 1881) read with section 141 of the said Act. The present petition is filed for quashing the said criminal proceedings being Court Case No. 1452 of 2012 pending before the JMFC judgment in criminal writ petition no. 3542-12.doc Vashi at CBD Belapur, Navi Mumbai, District Thane. The present petition is filed under Article 227 of the Constitution of India and as per the provisions of section 482 of the Code of Criminal Procedure.

(4) Prior to discussing the rival arguments, certain factual position leading to the filing of the complaint under section 138 of the Negotiable Instruments Act, is narrated hereunder;

(5) The petitioner No.1 is M/s CPEC Engineering Ltd, a Public Limited Company, hereinafter referred to as the petitioner company. Petitioner Nos.2 to 6 are the Directors of the said petitioner no.1 company. Petitioner company was granted a loan to the tune of Rs.3 crores by the present respondent the Bombay Mercantile Bank Ltd some time on 25 th June, 2010. The said loan account was not performed in the satisfactory manner and it became non performing asset ( for short NPA). As such respondent no.1 bank issued recall notice to the petitioner company sometime on 13 th December,2011.

On 4th January,2012 the petitioner company deposited judgment in criminal writ petition no. 3542-12.doc self drawn cheque for Rs. 3 crores for transfer of funds from the petitioner company's another bank account with ICICI Bank Ltd. According to the petitioner company, said amount of Rs. 3 crores was to be deposited in the current account of the petitioner company maintained at the respondent No.1 bank. Said cheque was dishonoured and as such respondent No.1 bank sent a statutory notice contemplated by section 138 of the NI Act mentioning dishonour of the cheque and calling upon the petitioner company to repay the amount mentioned in the cheque. On receipt of said demand notice petitioner company replied repudiating the demand raised by respondent no.1 company.

Consequently, on non-payment of the amount under the dishonoured cheque respondent No.1 company filed a complaint under section 138 of the N.I.Act read with section 141 of the same Act. It was filed on 2.3.2012 being case No.1452/2012.

6) Process was issued on the same day of lodging of the complaint by JMFC Vashi at CBD Belapur mentioning judgment in criminal writ petition no. 3542-12.doc that complainant had made out a prima face case against all the accused. Being aggrieved by the said order present writ petition came to be filed.

7) The contention of the petitioner company is that the respondent No.1 bank is neither payee nor holder of the cheque in due course which is dishonoured and as such there is no cause of action arisen for respondent No.1 bank to file a criminal complaint under the provisions of Section 138 of NI Act. Secondly, according to the petitioner company, the said cheque for Rs.3 crores was given as a simplicitor transfer of funds from the account of the petitioner company maintained with the ICICI Bank to the current account of the Company maintained with respondent No.1 bank and that the cheque was not given to respondent No.1 bank towards the satisfaction of the loan amount outstanding in the loan account of the petitioner company.

8) In order to appreciate the above arguments the provisions of Section 138 of NI Act are required to be judgment in criminal writ petition no. 3542-12.doc narrated thus;

Section 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 be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

judgment in criminal writ petition no. 3542-12.doc 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.

judgment in criminal writ petition no. 3542-12.doc

9) By above provisions in order to lodge a complaint under Section 138 of NI Act, the complainant must prove that he is payee or holder in due course of the cheque. At this juncture, definitions of 'payee' and 'holder in due course' so also the definition of the 'holder' as appearing in the Negotiable Instruments Act are reproduced hereunder;

"Payee":- The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee".

"Holder" :- The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

"Holder in due course":- "Holder in due course"

judgment in criminal writ petition no. 3542-12.doc means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if [payable to order,] before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

10) Definitely the cheque of Rs.3 crores was drawn on CPEC Engineering Ltd and it was account payee cheque and not bearer cheque. This aspect is significant enough as to the cheque not the bearer cheque as it is submitted on behalf of the respondent No.1 bank that it was meant for the respondent No.1- bank towards the satisfaction of the out-standings in the loan account of the petitioner company maintained by the said bank. Moreover, by considering the definition of holder and holder in due course again it cannot be said that the respondent no.1-Bank was entitled in its own name to the possession of said judgment in criminal writ petition no. 3542-12.doc cheque and to receive or recover the amount due thereon. Moreover, respondent no.1 bank also cannot be termed as holder in due course, inasmuch as respondent no.1 bank was not the party who for consideration became the possessor of the cheque if payable to the bearer. Moreover, the respondent No.1 bank was also not the payee as mentioned above or endorsee thereof when the said cheque was payable to the order.

11) Counter to the arguments advanced on behalf of the petitioner company, learned counsel for respondent No.1 bank took shelter of the sanction letter vide which working capital term loan of Rs. 3 corres was sanctioned against hypothecation of the machineries, stock and book debts. It is further submitted that the said credit facility was secured by mortgaging residential flat, Deed of further charge on the industrial plot, mortgage of the property etc. Various clauses in the said sanction letter were brought to the notice of this Court. However, nowhere it is specifically averred judgment in criminal writ petition no. 3542-12.doc that the standing authority has been given by the petitioner company to respondent no.1 bank to transfer the amounts lying in the credit of the current account of the Company to the loan account towards satisfaction of the outstanding dues in the loan account. Moreover, nothing is brought before the court by any document or any understanding between the parties that a specific mandate has been given to the respondent no.1 bank to use each and every cheque deposited in the current account of the petitioner bank for satisfaction of the outstanding dues in the loan account.

12) Apart from the above, attention of this Court is also drawn towards the correspondence between the parties by way of letters dated 26.9.2011 and 29.11.2011 addressed by the petitioner company to respondent no.1 bank. By the first letter apparently it was informed by the petitioner company to the respondent bank that company wishes to close both the loan accounts with the respondent no.1 bank i.e. the account of the CPEC Engineering Ltd and account of judgment in criminal writ petition no. 3542-12.doc new Marine Transport. In the said letters, it was also intimated that the petitioner

company had received certain loan facility from other institution to the extent of Rs.5.25 crores as on 15.10.2011. By the second letter it is apparently mentioned by the petitioner that both the loan accounts as mentioned in the first letter would be closed by 10th December,2011. By pointing out these contents of the letters, it is strongly submitted on behalf of the respondent-bank that it was the desire of the petitioner company to close the loan accounts including the loan account in the name of petitioner company by end of December, 2011 and as such towards the repayment of the outstanding dues in the loan account the concerned cheque for Rs. 3 crores was handed over to the bank. As such this conduct on the part of the petitioner company goes to show that the amount under the said cheque was meant for satisfaction of the outstandings in the loan account and as the said cheque was dishonoured, a cause of action arose for the respondent no.1 bank being 'holder in due course' judgment in criminal writ petition no. 3542-12.doc of the said cheque, though not 'payee'. At this juncture, on asking by the court as to how much amount was due and payable as on the date of the cheque of Rs. 3 crores, it was specifically mentioned that it was definitely more than Rs.3 crores and not exactly 3 crores. As such without there being any specific mandate given in favour of the respondent no.1 bank to utilize the said cheque towards satisfaction of the entire outstandings of the loan account so as to close that account, it cannot be accepted that the said cheque was given for clearing the outstanding amount in the loan account. On plain viewing of the transaction it was apparently the cheque simplicitor given, being account payee cheque by the petitioner company drawn on the ICICI Bank payable to the same company in its current account.

13) During the arguments much is argued on behalf of the respondent No.1 bank that the said cheque for Rs. 3 crores was handed over to respondent no.1 bank and as such it was towards satisfaction of the judgment in criminal writ petition no. 3542-12.doc loan account. This submission was strongly repudiated by learned counsel on behalf of the petitioner company by pointing towards the letter dated 13 th September,2011 addressed by respondent no.1 bank to the petitioner company. This is the notice titled "Advances Recall Notice" for working capital term loan (WCTL) of Rs.3 crores. In the said notice, instances of not satisfactorily conducting the said loan account are mentioned and it is ultimately mentioned as follows;

14) Due to non payment of loan instalments and interest over the dues accumulated and/or WCTL Account 3001/08 has already been classified as 'Non performing Asset' (NPA). In another paragraph it is mentioned as ;

Recently you had deposited self drawn false cheque of huge amount of Rs. 300.00 lacs in their current account without balance and wrong signature for the reasons which the same was returned unpaid by the drawee bank.

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15) A reference to the cheque in the above paragraph is with respect of the same cheque for which the complaint under section 138 was lodged. As such it was the contention of the respondent No.1 bank that the petitioner company had deposited the self drawn cheque in the current account and as such now it cannot be accepted that it was the cheque handed over to the respondent igno.1 bank for clearing the outstandings in the loan account. Even in the said letter dated 13th September, 2011, it



is specifically mentioned as under:

16) In view of the above, bank has no option left but to call back the entire advances and follow the legal course for its recovery of dues. Accordingly we call upon you to pay total advances as shown below with further interest and penal interest till full payment is made.

Principal outstandings Rs.3,00,00,000.00 Interest up to Rs.29,84,674.00 11.12.2011  
Rs.3,29,84,674.--

As such, from the above it is certain that when the judgment in criminal writ petition no. 3542-12.doc concerned cheque for Rs 3 crores was issued by the petitioner company, the total outstanding dues in their loan account were to the tune of Rs.3,29,84,674/-.

17) During the arguments, learned counsel for respondent No.1 bank placed reliance on the following authority.

CDJ 1012 BHC 2575 Sada Vijaykumar Vs. State of Maharashtra and Anr

18) In that matter before the Single Judge of this Court the cheque was given in the name of 'HDFC Bank A/c M/s K. Sada Vijay Kumar Beedi Leaves Merchant against Account No. 3752790000051'. As such the name of the HDFC bank was mentioned as payee or "holder in due course" and as such the criminal complaint lodged by HDFC Bank against the drawer of the cheque was held as maintainable. However, in the present matter, admittedly, the concerned cheque for Rs. 3 crores was account payee cheque in the name of petitioner company itself without there being any name judgment in criminal writ petition no. 3542-12.doc of respondent No.1 bank in the column "PAY". As such the ratio of the said authority cannot be taken in favour of the present respondent No.1 bank, original complainant. Another Authority is cited on behalf of respondent No.1, reported in 2001 7 SCC 721, Punjab and Sind Bank, Vinkar Sahakari Bank Ltd and others.

19) Again, in that matter the pay order was drawn with inscription "Payees account only" to pay the Punjab and Sin Bank - M/s Poise Leasing and Finance Co. Ltd or order". Again this is not a case in the present matter at hand. By referring to this decision in Punjab and Sind Bank Vs. Vinkar Sahakari Ltd (Supra), It is argued that provisions of Section 118 of N.I.Act are required to be construed and a presumption is required to be accepted so far as holder of the negotiable instrument being a holder in due course. In this context, if the definition of holder as reproduced above in the earlier paragraphs and mentioned in Section 8 of the Negotiable Instruments Act is considered, then the judgment in criminal writ petition no. 3542-12.doc holder must be a person entitled in his own name to the possession of the said negotiable instrument. However, for the absence of name of respondent No.1 bank in the cheque and in the absence of any mandate in favour of respondent No.1 bank to credit the amount of said cheque, for clearing the outstandings in the loan account of the petitioner company, the presumption envisaged under section 118 (9) of the N.I. Act cannot be taken in favour of the respondent bank.

20) Considering the rival submissions and considering the definitions of "payee", "holder" and "holder in due course" and considering the provisions of Sections 138 and 142 of NI Act, it must be said that the respondent No.1 was not holder in due course in the strict sense of the meaning so far as the dishonoured cheque is concerned. In the result, the present writ petition must succeed and accordingly it is disposed of with the following order:-

judgment in criminal writ petition no. 3542-12.doc ORDER.

(a) The writ petition is allowed.

(b) Process issued against the petitioners in Court

Case No. 1452 of 2012 pending on the board of JMFC, Vashi, CBD Belapur is quashed and set aside and consequently said case is also quashed and set aside.

(c) Rule is made absolute in above terms. No order as to costs.

(A.R. JOSHI, J) Ladda R.S.