

**IN THE COURT OF MS. SHIPRA DHANKAR, METROPOLITAN
MAGISTRATE (N.I. ACT), DIGITAL COURT-04, SOUTH-WEST DISTRICT,
DWARKA COURT, NEW DELHI**

CC No.11747/2021

VIRENDER DAHIYA

VS.

KESHAV KUMAR

ORDER

1. Vide this order, I shall decide the issue of maintainability of the present complaint case.

2. The matter is at the stage of consideration on the point of cognizance. The brief facts giving rise to the present complaint are that the complainant was approached by the accused with the proposal that, in return for a commission/liaison fees, the accused can obtain in the complainant's favour -a tender issued by the NTPC where the accused enjoys "good links" with the higher authorities. Thereafter, the complainant, after having applied for the said tender and paid the amount demanded from him, received from the accused a tender award letter, however, the said letter was later found to be forged. This discovery led the complainant to demand his money back from the accused, pursuant to which certain cheques were drawn in his favour out of which one got dishonoured on presentation. It is with respect to this cheque that the present complaint has been filed.

3. A bare reading of the above facts, as gleaned from the complaint, manifests that the transaction in pursuance of which the cheque was drawn is manifestly illegal and unenforceable.

4. On the LDOH, oral arguments on the question of maintainability were heard. After concluding oral arguments, Ld. Counsel for the complainant had submitted that he wishes

to file written submissions as well. He was given liberty to file the same by today. However, the same have not been filed.

4. In the course of oral arguments, the Ld. Counsel for the complainant, with a view to persuade the court as to the maintainability of this complaint, placed reliance on ***Bapuraom Mankar Vs. Shri Vyankatesh Housing Agency and The State of Maharashtra (2010) ALLMR (Crl)1453*** and ***Devender Kumar Vs. Khem Chand, (2015) 10AD(Delhi) 555***. **The point sought to be argued being**, that at the stage of taking cognizance, the Court is not required to look into the factum of legal enforceability of the debt in repayment of which the cheque in question was drawn. He submits that section 139 of N. I. Act is a mandate on the Court to compulsorily raise a presumption in favour of the complainant as to not only the existence of debt or liability but also as to the legal enforceability of the same.

5. Before, I express my opinion on the correctness of the submissions made by the Ld. Counsel for the complainant, let us first look at the language of section 138 of N.I. Act which reads as under:

[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 provisions 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: 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.]

6. The explanation to section 138 of N. I. Act clarifies that “debt or other liability” means a *legally enforceable* debt or other liability. In other words, for an offence u/s 138 of the NI Act to be made out, the drawal of the cheque has to be for a legally enforceable debt/liability. This legal position is further fortified by the decision of Hon’ble High Court of Delhi in **Virender Singh Vs. Laxmi Narain And Anr, 2006 SCC OmLine Del 1328 2007 CriLJ 2262** wherein it was held that if the consideration or object of an agreement is unlawful, illegal or against the public policy, the agreement itself is void and legally unenforceable; as a result of this, any cheque issued in discharge of a liability under such a void agreement, cannot be said to be issued in discharge of a legally enforceable debt or liability. As a result of this, no case u/s 138 of the NI Act would lie in case such a cheque gets dishonored.

7. Reliance in this regard may also be placed on Section 23 of Indian Contract Act to see whether the agreement entered into by both the parties was for a lawful consideration/object or not. Section 23 of Indian Contract Act reads as under:-

*“23. What consideration and objects are lawful, and what not.—
The consideration or object of an agreement is lawful, unless—
The consideration or object of an agreement is lawful, unless—” it
is forbidden by law; or is of such a nature that, if permitted, it would
defeat the provisions of any law; or is fraudulent; or involves or*

implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

8. Reference may also be made to illustration (j) to the above section, which provides for a similar, if not exact, fact situation. It reads as under:

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral."

9. From a bare perusal of the complaint, the illegality of the consideration/object for which the agreement was entered-into by the parties to the present complaint is quite clear. The sole purpose of the agreement was to obtain a tender in favour of the complainant, not on the basis of its intrinsic merit, but on the basis of "good links" of the accused with the NTPC higher authorities. Such agreements are expressly rendered void and of no legal consequence by virtue of S.23 of the Indian Contract Act.

10. Having expressed my views on the legality of the agreement between the parties, I will now deal with the submissions of the Ld. Counsel for the complainant with respect to section 139 of N. I. Act. As mentioned above, Ld. Counsel for the complainant has suggested that, as per the cases on which he has relied, the Court has no option but to draw a presumption in favour of the complainant with regard to legality of the debt or liability.

11. While it is true that section 139 of N. I. Act envisages a presumption both as to the existence of a debt/liability as well as legal enforceability thereof, it is important, however, to carefully look into the factual matrices of the above cited cases to see if an analogy can be drawn to this case.

11. In ***Bapuraomankar Vs. Shri Vyankatesh Housing Agency and The State of Maharashtra (2010) ALLMR (Crl)1453***, the cheque was drawn by the accused on

account of his failure to execute a sale deed despite having taken part payment from the complainant with whom he had entered into an agreement to sell a piece of land. A transaction like this, on the face of it, appears perfectly legal and any question as to its legal enforceability would be a matter of trial, in case the same is disputed by the accused. Hence, presumption U/s 139 of N. I. Act would, and rightly so, be attracted in such case. Similarly, in case of ***Devender Kumar Vs. Khem Chand, (2015) 10AD(Delhi) 555***, the facts involved dishonour of a cheque given in a repayment of a friendly loan. This transaction again, *prima facie*, appears to be one that gives rise to a legally enforceable debt.

12. Hence, in both the cases, the Court at the time of taking cognizance, was *prima facie* satisfied that the cheque was drawn for a legally enforceable debt as envisaged and required U/s 138 of N. I. Act.

13. Since in neither of the above two cases, agreements in question were *prima facie* for an unlawful consideration/object, they are distinguishable and reliance on them is misplaced. In the present case, the agreement itself is illegal and void.

14. Further, the statutory presumption does not come to the aid of the Complainant as a presumption, by its very nature, holds the field only so long as the real facts are hidden or unknown. As soon as presumptions are rebutted with the truth and facts, they vanish.

15. In the present case, the presumption stands rebutted by the Complainant's own version. The Complainant's own depiction of the transaction discloses that the same is legally unenforceable and void

16. Reference may also be made to the well established legal maxim "*in pari delicto potior est conditio defendantis*", which embodies the principle : "*the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to a illegality or fraud*". Enforcing contracts which are patently illegal would

further set a bad precedent and result in the Court becoming a tool for enforcement of illegal debts. My opinion further finds support in the decision in the case of **Virender Singh vs Laxmi Narain And Anr** (Supra). Reliance is also placed on **R. Parimala Bai v Bhaskar Narasimhaiah** CrI. P. No 1387 of 2011 (decided on 6th July, 2018) wherein it was held that a presumption u/s 139 of the NI Act, cannot be raised at the initial stages if the complainant is himself relying on an illegal consideration.

14. In light of the above discussions, cognizance in the present complaint is declined and the complaint stands dismissed.

15. File be consigned to Record Room after due compliance.

16. Copy of this order be given dasti to the Ld. Counsel for the complainant.

**Announced in Open Court
on 10.01.2022.**

**(Shipra Dhankar)
MM (N.I. Act) Digital Court-04
South-West District/Dwarka Court
New Delhi**