

(2013) 08 KAR CK 0090
In the Karnataka High Court
Case No : Criminal Appeal No. 1419 of 2006

CREF Finance Limited (Earlier called ITC Classic Real Estate Finance Ltd.) APPELLANT

Vs

Sree Shanthi Homes Private Limited RESPONDENT

Date of Decision : 30-08-2013

Acts Referred:

Companies Act, 1956 — Section 291
Criminal Procedure Code, 1973 (CrPC) — Section 378
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 4 AKR 831 : (2014) ALLMR(Cri) 201 : (2014) ILR (Kar) 2168

Hon'ble Judges : A.S. Pachhapure, J

Bench : Single Bench

Advocate : Udaya Holla, for Sri. G.L. Vishwanath, for the Appellant; C.V. Nagesh, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Pachhapure, J.—The appellant has challenged the Judgment and Order acquitting the respondent for the charge u/s 138 of the Negotiable Instruments Act [hereinafter referred to as "the Act" for short] on a trial held by the XX Addl. Chief Metropolitan Magistrate, Bangalore. The facts relevant for the purpose of this appeal are as under:

The appellant is the complainant before the trial Court, whereas the respondents are accused Nos. 1 and 2 respectively. The appellant is a company incorporated under the Companies Act, 1956. Likewise, the 1st respondent is also a Company and the 2nd respondent is its Managing Director and was at all material times in-charge and responsible for conducting the business of the said Company. The appellant is engaged in the business of finance of real estate and development and it entered into a Memorandum of Understanding dated 29.08.1995, wherein it was to invest a sum of Rs. 6.40 crores in the project of the 1st respondent called as "Green Ville" in Hosur-Sarjapur Road, Bangalore, under the aforesaid

Agreement. It had option either to buy house sites, plots or villas or to obtain refund of the amount paid with interest at 27% p.a. if paid before 07.01.1997 and interest at 36% p.a. for payments subsequent to the aforesaid date. A sum of Rs. 6.40 crores is said to have been paid to the respondent in 2 instalments i.e., Rs. 3.52 crores at the first instance and Rs. 2.88 crores later.

The project "Green Ville" was delayed and the 1st respondent is said to have assured to refund the amount received with interest, aggregating to Rs. 9.20 crores. The 1st respondent is said to have acknowledged its liability to the extent aforesaid. There was a correspondence and acknowledgement of liability between both the companies in this regard. The 1st respondent company having confirmed its outstanding dues of Rs. 9,20,59,032-00 as on 01.03.1997 and having acknowledged its liability subsequently as well, did not refund the aforesaid amount and ultimately towards part payment of the dues, 4 cheques dated 23.09.1999 for Rs. 1.25 crores each for total sum of Rs. 5 crores were given. The said cheques were drawn on Canara Bank, Bangalore and were issued by the 2nd respondent in his personal capacity on behalf of the 1st respondent. When the said cheques were presented for encashment on 15.03.2002 to the banker, they returned dishonoured on account of "payment stopped", by accused No. 2. An intimation of the dishonour was communicated.

On 18.03.2000, the appellant issued a statutory legal notice u/s 138 of the Act to the 2nd respondent and a notice was also issued to the 1st respondent intimating the dishonour. The 2nd respondent having received the notice said to have given a false, frivolous and untenable reply dated 31.03.2000. The 1st respondent did not reply the notice at all. Later, the respondents are said to have issued a false and untenable letter purporting to be dated 14.03.2000, said to have been posted on 16.03.2000 intimating the appellant about instructions given by them to the bankers to stop the payments on the cheques. As the respondents did not pay the amount under the cheques despite the demand having been made, the appellant was constrained to file a complaint before the trial Court to punish the respondents for the offence punishable u/s 138 of the Act. On these grounds, the appellant filed a complaint in the trial Court, which took cognizance and issued the process.

The respondent/accused having appeared before the trial Court did not plead guilty for the charge u/s 138 of the Act. Therefore, the appellant Company examined P.W.1 and in the evidence, got marked the documents Exs.P1 to 17. After recording the statements of the respondents/accused u/s 313 Cr.P.C., no defence evidence was led. Anyhow, the respondents got marked the documents Exs.D1 to 9 in the cross-examination of P.W.1.

The trial Court after hearing the learned counsel for the parties and on appreciation of the material on record, acquitted the respondents for the charge u/s 138 of the Act. Aggrieved by the Judgment and Order of acquittal, the present appeal is filed.

2. I have heard Sri. Udaya Holla, learned Senior Counsel for the appellant and Sri. C.V. Nagesh, learned Senior Counsel for the respondents.

3. The point that arises for my consideration is;

Whether the appellant has made out any grounds for interference in the Judgment and Order of acquittal for the charge u/s 138 of the Act?

4. It is the contention of learned counsel for the appellant that the complaint is signed by a person authorized and P.W.1 had the authority to depose before the Court under resolution-Ex.P1 and when the resolution clearly reveal an authority to P.W.1, to give evidence, the trial Court committed an error in not accepting Ex.P1 as an authorisation both to sign the complaint and depose before the Court. So also, he contends that notice to the 2nd respondent having been duly served and as the law does not contemplate a notice to the 1st respondent, the trial Court committed an error in rejecting the request of the appellant. He also submits that even if Exs.P4 to 7 are either the cheques given as security or the post-dated cheques, there is no bar under the provisions of Section 138 of the Act to file a complaint for the aforesaid offence and seek conviction.

He further submits that the signature of the 2nd respondent on the cheques Exs.4 to 7 are admitted and therefore, he would contend that under the provisions of Section 139 of the Act, a presumption arises in favour of the appellant and in the absence of rebuttable evidence, the trial Court erroneously granted an Order of acquittal. He submits that the documents produced by the respondents in the cross-examination of P.W.1 at Exs.D1 to 9 indicate the loan liability and when this liability was proved both from the evidence of P.W.1 and the documents produced, he submits that the trial Court ought to have convicted the respondents for the charge u/s 138 of the Act. It is also the contention of learned counsel for the appellant that there is no bar to proceed against the respondents for the offence punishable u/s 138 of the Act irrespective of the suit instituted by the appellant for recovery of the dues. On these grounds, he has sought for setting aside the Judgment and Order of acquittal.

On the other hand, learned counsel for the respondents submits that Ex.P1 does not indicate any authority either to the signatory or to the complainant to sign the complaint or to P.W.1 to depose before the Court and in the absence of an authority, the complaint itself is not maintainable in law. He would submit that from the evidence of P.W.1, a sum of Rs. 3.52 crores alone was due and P.W.1 has admitted the receipt of Rs. 1 crore from the respondent and in such circumstances, there is no question of issuing the cheques for Rs. 5 crores when according to P.W.1, only a sum of Rs. 2.52 crores was due. So also he contends that the notices of demand issued are not in accordance with law and as there is no notice to the 1st respondent for the cheque amount and the complaint is not maintainable. So also, he would contend that P.W.1 does not know anything about the affairs of the complainant-Company and his evidence is not at all sufficient to award the conviction. He would submit that Ex.P3 is concocted and

Exs.P4 to 7, the cheques were blank cheques which were given at the time of the memorandum of understanding dated 29.09.1995 and the appellant has misused the blank cheques by filling the blanks and has made a false claim for a total sum of Rs. 5 crores. He would also contend that there are no dues to the appellant-company and the material placed on record in the cross-examination of P.W.1 and the documents produced are sufficient to rebut the presumption and that the trial Court rightly granted an order in favour of the respondents on the basis of the rebuttable evidence. He further contends that this is an appeal against acquittal and even if a second view is possible, the one accepted by the trial Court cannot be disturbed. On these grounds, he has sought for dismissal of the appeal.

5. I have considered the submissions made on either side and also perused the records.

6. The Board of Directors of the Company collectively entitled to exercise the powers and to do the acts on behalf of the Company. Section 291 of the Companies Act confers the authority to the Board of Directors collectively. Therefore, if a complaint is to be filed, it is necessary for the Board of Directors to authorize any person to file a complaint or depose to the facts in a case and such an authority could be granted by the Board of Directors only under a resolution. The complainant has produced Ex.P1, which is a certified copy of the Resolution dated 27.06.2000, which authorizes one Sri. Ravi Puri and Sri. Pramod Kumar, to sign any document in connection with the legal proceedings pertaining to recovery of the amount due and dishonour of cheques and to do all acts and deeds necessary in this behalf. It is in pursuance of this Resolution-Ex. P1 that P.W.1-Pramod Kumar has deposed on behalf of the Company. This Resolution authorizes the aforesaid two persons to do all necessary acts in the legal proceedings.

But, the perusal of the complaint reveals that it is signed by "Ravi Seth", who is said to be the authorized signatory and Vice-President of the Company. The name of Sri. Ravi Seth is not seen in the Resolution at Ex.P1. So also, the complainant has not produced any other Resolution or document conferring authority to Sri. Ravi Seth to file or sign a complaint on behalf of the Company. The appellant has not explained as to who authorized Sri. Ravi Seth to file or sign the complaint and no Resolution of the Board or any document has been produced in the evidence. Learned counsel for the appellant has not explained any authority having been granted to Sri. Ravi Seth to file a complaint on behalf of the Company. Therefore, the complaint of the appellant cannot be maintained in the absence of any authority to Sri. Ravi Seth to file the complaint on behalf of the Company. Mere fact that P.W.1-Pramod Kumar was authorized on behalf of the Company either to file the complaint or depose to the facts, he having not signed the complaint, his authority in the absence of his signature on the complaint is of no help to the appellant. On this aspect of the matter, a reliance is placed on the decision of this Court reported in Director Maruti Feeds and

Farms Pvt. Ltd. Vs. Basanna Pattekar, ; wherein it is held that the Company is a juristic person and any person on behalf of the Company has to be authorized by the Company under Articles of Association or by a separate resolution to depose on behalf of the Company. Therefore, this Court held that dismissal of the complaint is sound and proper. Though the decision refers to an authority to depose to the facts, the principle of law as such is applicable even to an authority to sign the complaint.

7. Reliance is placed by learned counsel for the appellant on the decision of the Apex Court reported in National Small Industries Corporation Ltd. Vs. State (NCT of Delhi) and Others, . The principle laid-down in the aforesaid case is not applicable to the facts on hand for the sole reason that it pertains to the complaint filed on behalf of a Government Company or Statutory Corporation, and its representative was a public servant. The principle laid-down therein has no link with the facts on hand. Learned counsel for the respondents has also placed reliance on the decision of this Court reported in Om Shakthi SC/ST and Minority Credit Co-Operative Society Ltd. Vs. M. Venkatesh, . The facts therein reveal that the President of the Society filed a complaint on behalf of the Society, no bye-law or resolution has been produced and it is held that presentation of the complaint by the Society through its President without authorization is bad in law. The complaint is not maintainable. Though in the aforesaid case, the Co-operative Society is the complainant, the principle laid therein equally applies to a Company also. The decision reported in Al-Amin Seatrans Ltd. Vs. Owners and Party interested in Vessel M.V. "Loyal Bird", relied by the appellant speaks to the powers of the Company through the Board of Directors to authorize a person to institute the suit. The principle laid herein supports the version of the respondents.

8. P.W.1 is Sri. Pramod Kumar, who deposed on behalf of the Company and Resolution-Ex.PI authorizes him to do all necessary acts, any complaint of dishonour of cheque, he has an authority to depose on behalf of the Company. But, mere fact that he has such an authority to do all other necessary acts, in the complaint filed, in the absence of his signature on the complaint, and in the absence of an authority to Sri. Ravi Seth, the signatory of the complaint, the complaint itself is not maintainable in law.

9. Secondly, so far as the validity of the notice issued on behalf of the complainant, under Clause (b) of Section 138 of the Act, Ex.P14, the notice was issued to accused No. 2 and Ex.P16 is the notice to accused No. 1. In Ex.P16, there is demand for the loan amount, but not the cheque amount. Therefore, it is contended that Ex.P16 is invalid as it is not in accordance with Section 138(b) of the Act and so far as the complaint, against accused No. 1 has to be dismissed solely on this ground. They would contend that when the complaint has to be dismissed against accused No. 1 on this ground, the complaint filed as against accused No. 2 is not maintainable in the absence of the liability on accused No. 1.

10. The perusal of the averments in the complaint would reveal that under the

Memorandum of Understanding dated 29.10.1995 a sum of Rs. 6.40 crores has been paid to accused No. 1 Company in 2 instalments and it is repayable with interest at 27% p.a. if repaid before 7th of January 1997 and with interest at 36% p.a. if the payment is made subsequent to the aforesaid date. Thereby, the complainant has alleged that a sum of Rs. 9.20 crores is due, from the accused and towards part payment of the aforesaid dues the four cheques at Exs. P4 to 7 have been issued. In the notice at Ex.P14, the complainant having mentioned the total dues at Rs. 9,20,59,032-00 a specific demand is made for Rs. 5 crores, the cheque amount, covered under the dishonoured cheques. But, so far as the notice to accused No. 1 produced at Ex.P16, though the contents reveal issuance of 4 cheques for a total sum of Rs. 5 crores, the complainant has made a demand for payment of Rs. 9,20,59,032-00 together with interest, but nowhere in the said notice Ex.P16, there is any demand for the total sum of Rs. 5 crores, the amount of cheques. On this aspect of the matter, learned counsel for the respondent has placed reliance on the decision of the Apex Court reported in K.R. Indira Vs. Dr. G. Adinarayana, . The Apex Court considering the provisions of Section 138(b) of the Act has held that where the demand is made for the loan amount due and the cheque amount is different from the loan due in the absence of a specific demands for the cheque amounts, the notice is invalid. The perusal of the principles laid-down by the Apex Court in the aforesaid decision and Clause (b) of Section 138 the Act would reveal that the words "said amount" mentioned in Clause (b) of the Act confines only to the cheque amount and not for the loan amount. In the aforesaid circumstances, when the complainant has not made a demand for the cheques amount in the notice [Ex.P16] issued to accused No. 1, the said notice appears to be invalid for the aforesaid reason.

But, this contention of learned counsel for the respondents cannot be accepted for the sole reason that it is not necessary for the complainant to issue notice to accused No. 1, u/s 138(b) of the Act for the sole reason that the said provision requires a notice only to the drawer of the cheque. To elaborate this aspect, Clause (b) of Section 138 of the Act indicates that the payee or a holder in due course of the cheque has to make a demand for 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. So, under the aforesaid provision, it is the drawer of the cheque to whom a notice has to be issued u/s 138(b) of the Act and not others. It is accused No. 2 who is the drawer of the cheques and not accused No. 1. So, when accused No. 1 is not the drawer, there is no necessity for the complainant to issue a notice to accused No. 1. Therefore, issuance of invalid notice-Ex.P16 cannot be a ground to reject the complaint filed.

11. Now, to consider on the merits, the signature of accused No. 2/respondent No. 2 on cheques-Ex.P4 to 7 is not in dispute. As admitted by P.W.1 in the cross-examination, these cheques were given by accused No. 2 at the time when the Memorandum of Understanding dated 29.09.1995 was entered into between the parties. According to P.W.1, the cheques Exs.P4 to 7 were post-dated cheques.

But, the appellant contends that these cheques were issued by accused No. 2 with covering letter-Ex.P3 dated 23.09.1999. The perusal of Ex.P3 would reveal that cheques-Exs.P4 to 7 were enclosed with letter-Ex.P3. This version is contrary to what has been stated by P.W.1 in his evidence. When he admits that the cheques were given at the time of Memorandum of Understanding, in the year 1995, issuance of these cheques in the year 1999 under letter-Ex. P3 does not arise at all. Therefore, Ex.P3 appears to be a concocted letter and therefore, no reliance can be placed on Ex.P3 for any reason.

12. Accepting the admission of P.W.1 that the cheques-Exs.P4 to 7 signed by him were given as a Security at the time of the Memorandum of Understanding dated 29.09.1995 and that these cheques were post-dated cheques, that itself does not absolve the liability of the accused for the reason that the complainant is at liberty to use the post-dated cheques as well, in case if he establishes the liability of the accused to the extent of the sum mentioned in the cheques. Reliance could be placed on the decision of this Court reported in *Umaswamy Vs. K.N. Ramanath*, ; wherein this Court held;

The cheque whether issued for payment of debt or as security makes no difference in law. The cheque issued even if as a security for payment, it is negotiable instrument and encashable security is at the hands of payee. Therefore, solely because the drawer averred that it was issued as security cannot be held as ground to pardon the penal liability u/s 138 of the Negotiable Instruments Act.

So, even accepting the admission of P.W.1 and the contention of the respondents that Ex.P3, the covering letter is a created document, the complainant has an authority to encash the cheques given by way of security and there appears to be no wrong committed by the complainant by presenting the cheques-Exs.P4 to 7.

13. So far as the liability is concerned, P.W.1 in the cross-examination to a suggestion made that a sum of Rs. 3,52,00,000-00 is due from the accused, he admits the said suggestion. He also admits that the accused have paid Rs. 1 crore and deducting this amount admitted by P.W.1. It is contended by learned counsel for the respondents that as deposed by P.W.1 in his evidence only a sum of Rs. 2.52 crores is due and as the cheques are for Rs. 5 crores, he would submit that the liability being less than cheque amount, the complaint cannot be maintained. At this juncture, it is necessary to refer to Ex.D4, which is written by accused No. 2 to the complainant. In the letter-Ex.D4, accused No. 2 states "we have handed the draft sale agreements and the draft sale deeds for the sale of land of Kundalahalli and Sarjapur for the payment made by you to us viz., Rs. 3,52,00,000-00 [Rs. Three Crore Fifty Two Lakhs] only, dated 05.10.1995, drawn on Grindlays Bank and Rs. 2,88,00,000-00 [Rs. Two Crore Eighty Eight Lakhs] only dated 05.10.1995 drawn on Grindlays Bank. Hence, we have told our Bankers to stop payment for the following cheques viz.,". The aforesaid contents of the letter-Ex.D4 clearly indicate an admission of the 2nd respondent for a total

sum of Rs. 6.40 crores [Rs. 3.52 crores + Rs. 2.88 crores]. In addition to the sum of Rs. 6.40 crores aforesaid, the appellant is entitled to the interest on the said sum as well. Even deducting Rs. 1 crore said to have been paid by the respondents, the amount due was not less than Rs. 5 crores as on the day when the cheques were issued. So, from this evidence made available on record, in addition to the admission in Ex.D4, the appellant was entitled to the amount under the cheques as the appellant has proved the liability which was not less than Rs. 5 crores as on that day. The respondents cannot take the non-reference of Rs. 2.88 crores in the evidence of P.W.1 as there was no suggestion to P.W.1 about the dues of Rs. 2.88 crores. The scrutiny of the material placed on record would reveal that the respondents were not able to place on record sufficient material to rebut the presumption that arises in favour of the appellant. From the evidence of P.W.1 and the documents produced, it could be said definitely that the appellant has proved the liability. There is no rebuttal evidence to negate the presumption that arise in favour of the appellant. Many decisions have been referred to by learned Counsel for the appellant on this aspect, but in view of the admission in Ex.D4, I do not think that it is necessary to consider the principles laid down in the following decisions relied on by the respondents:

- 1) Hiten P. Dalal Vs. Bratindranath Banerjee, .
- 2) Munna Kumar Upadhyaya @ Munna Upadhyaya Vs. The State of Andhra Pradesh Through Public Prosecutor, Hyderabad, Andhra Pradesh, .
- 3) Ravi Kapur Vs. State of Rajasthan, .
- 4) 1995 (105) Cri.L.J. 4663(A11) [Subedar Yadav Vs. State of U.P.].
- 5) R. Mohan Vs. A.K. Vijaya Kumar, .
- 6) K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, .
- 7) NEPC Micon Limited and Others Vs. Magma Leasing Limited, .

14. A feeble attempt is made by the respondents and it is contended by learned counsel that both the civil and criminal cases for recovery of dues and dishonour of cheques cannot be maintained. On this aspect of the matter, learned counsel for the appellant has placed reliance on the decision of the Apex Courts reported in D. Purushotama Reddy and Another Vs. K. Sateesh, . The appellant has filed O.S. No. 15045/01; wherein he has sought for a decree against the respondents for a sum of Rs. 9,20,59,032-00. Simultaneously, he filed the complaint before the trial Court to initiate action for the offence punishable u/s 138 of the Act. There is no dispute so far as this position is concerned. The Apex Court in the aforesaid decision has held "simultaneous civil suit and complaint case u/s 138 of the N.I. Act for the same cause of action are maintainable". Therefore, the respondents cannot take any advantage of filing the suit by the appellant for recovery of dues. Despite the findings, the accused are due for the sum mentioned in the cheques-Exs.P4 to 7 and that P.W.1-Sri. Pramod Kumar has the authority to depose before the Court in the present case, the complaint instituted

by the appellant in the trial Court is not maintainable for the sole reason that Sri. Ravi Seth, who has signed the complaint has no authority in law to represent the Company as there is no resolution by the Company authorizing Sri. Ravi Seth to file the complaint. The trial Court in addition to other grounds has dismissed the complaint of the appellant on this ground as well. In this appeal though the appellant is able to establish all other grounds, as the complaint itself is incompetent for the reasons aforesaid, the dismissal order passed by the trial Court cannot be interfered with.

In the result, the appeal fails and it is accordingly dismissed.