
(2009) 07 MAD CK 0130

In the Madras High Court

Case No : Criminal A. No"s. 511 and 485 of 2002

G. Murali Bajaj Proprietor, Maya Electronics rep. by its Power
of Attorney S. Saravanan

APPELLANT

Vs

Selvaraj Prop. Southern Electronics

RESPONDENT

Date of Decision : 21-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378(4)

Evidence Act, 1872 — Section 114

Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2009) 07 MAD CK 0130

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : A.K. Kumaraswamy, for the Appellant; V. Raja Mohan, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—These appeals against acquittal have been preferred by the complainant in C.C. No. 230/2000 and C.C. No.

386/2000 instituted on the file of the learned Judicial Magistrate No. II, Erode for offences punishable u/s 138 of the Negotiable Instruments Act,

1881. AS the parties in both cases are one and the same and in fact the cheques in question were allegedly issued by the respondent in these

appeals in connection with and in the course of one and the same business transaction and since the issues involved in both the appeals are

identical, by consent of the parties, both the appeals have been taken up for disposal by a common judgment.

2. The admitted facts leading to the filing of the complaint and initiation of criminal proceedings against the respondent herein are as follows:

i) The respondent herein is the proprietor of M/s.Southern Electronics functioning at C.W.15 & 11, New Bus Stand Buildings, Erode-3. The

appellant herein/complainant (Murali Bajaj) is the proprietor of M/s.Maya Electronics. The respondent herein/accused purchased pre-recorded

cassettes and blank cassettes from the appellant herein/complainant on credit basis on various dates and there was a credit balance of Rs.

4,40,023/- payable by him to the appellant herein/complainant. In partial discharge of the above said liability, the respondent herein/accused issued

three cheques drawn on State Bank of India in favour of the appellant herein/complainant, the details of which are as follows:

1) Cheque No. 086609 dated 28.02.2000 for a sum of Rs. 70,855/-;

2) Cheque No. 086110 dated 29.02.2000 for a sum of Rs. 85,000/-;

and

3) Cheque No. 086620 dated 18.03.2000 for a sum of Rs. 35,800/-

ii) When the above said first cheque, namely cheque dated 28.02.2000 bearing cheque No. 086609 was presented for collection through the

banker of the appellant herein/ complainant, it was dishonoured. Similarly, the second cheque dated 29.02.2000 bearing cheque No. 086110 was

also dishonoured when the same was presented for collection on 29.02.2000. The third cheque dated 18.03.2000, namely cheque for a sum of

Rs. 35,800/- bearing cheque No. 086620 was presented on 18.03.2000 and the said cheque was also dishonoured. All the three cheques were

dishonoured by the bank on the instructions of the respondent herein/accused to stop payment. Thereafter, a statutory notice was issued on

10.03.2000 in respect of the dishonour of the first two cheques. A separate statutory notice in respect of the third cheque was issued on

31.03.2000. As the respondent herein/accused failed to make payment within 15 days after the receipt of said notices, the appellant

herein/complainant preferred two separate complaints, one in respect of the first two cheques and the other in respect of the third cheque on the

file of the learned Judicial Magistrate No. 2, Erode. The same were taken on file by the learned Judicial Magistrate No. 2, Erode as C.C. Nos.

230/2000 and 386/2000 respectively.

3. The learned Judicial Magistrate issued process to the respondent herein/accused following the procedure prescribed for taking cognizance of the

offences on complaint. The respondent herein/accused, on appearance, denied the charge and took a plea of defence that though the cheques

were issued by him for payment of the price of the cassettes supplied by the appellant herein/complainant, he gave instructions to the bank to stop

payment as the cassettes supplied by the appellant herein/complainant were defective.

4. The parties went on for trial, in which three witnesses were examined in C.C. No. 230/2000 as P.Ws.1 to 3 and Ex.P1 to P17 were marked on

the side of the complainant. No witness was examined on the side of the respondent/accused, but Ex.D1 and D2 were marked on his side in C.C.

No. 230/2000. In C.C. No. 386/2000, three witnesses were examined as P.Ws.1 to 3 and 13 documents were marked as Ex.P1 to P13 on the

side of the complainant. No witness was examined, but three documents were marked as Ex.D1 to D3 on the side of the accused in C.C. No.

386/2000.

5. The learned Judicial Magistrate No. II, Erode considered the evidence brought before it and upon such consideration, came to the conclusion

that the offence u/s 138 of the Negotiable Instruments Act was not made out by the appellant herein/complainant in either of the cases and

acquitted the respondent herein/ accused in both the cases.

6. As against the judgments of acquittal pronounced in the said calendar cases, the appellant herein/complainant has come forward with the present

appeals after getting leave u/s 378(4) Cr.P.C in CrI.O.P. Nos. 7545/2002 and 6947/2002 by orders dated 15.04.2002 and 09.04.2002

respectively.

7. The point that arises for consideration in these appeals is as follows:

Whether the judgments of the trial court acquitting the respondent herein/ accused are infirm or defective warranting interference by this Court in

these appeals?

8. It is not in dispute that the cheques in question, 3 in number, were issued by the respondent herein/accused in favour of the appellant

herein/complainant. It is also not in dispute that the cheques had been issued in discharge of a debt/liability and that the cheques were dishonoured

when presented to the drawee bank for encashment. The dishonoured cheques relating to C.C. No. 230/2000 (CrI.A. No. 511/2002) have been

marked as Ex.P2 and P3 respectively in the said calendar case. The dishonour slips issued by the drawee bank in respect of those cheques have

been marked as Ex.P4 and P5 in the said calendar case. The reason for such dishonour has been mentioned as "payment stopped by the drawer".

The dishonoured cheque concerned in C.C. No. 380/2000 (Crl.A. No. 485/2002) has been marked as Ex.P2 and the dishonour slip has been

marked as Ex.P3 in the said calendar case. The said cheque was also dishonoured as payment was stopped by the drawer.

9. It is not in dispute that within the statutory time, statutory notices calling upon the drawer to pay the amount covered by the cheques were issued

in both the cases and that the respondent herein/accused did not make payment within the time allowed by the statute as demanded in the notices.

It is also not in dispute that the complaints in both the cases were preferred within the time allowed by the statute. Therefore there cannot be any

second opinion that the complaints were preferred following the proper procedure. In fact the complaints were preferred by Saravanan, the power

of attorney holder of the payee/appellant. The power of attorneys executed in favour of the power agent have also been produced in both the

cases.

10. Section 138 of the Negotiable Instruments Act, 1881 makes it an offence to issue a cheque without having sufficient funds for honouring the

cheque and failing to make payment of the amount covered by the cheque within a specified time when called upon to do so by a statutory notice.

Section 138 of the Negotiable Instruments Act, 1881 reads as follows:

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 persons 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 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.

11. A bare reading of the Section will make it clear that the cheque should have been issued for the discharge in whole or in part of any debt or

other liability and that the same should have been returned by the bank unpaid either because the amount of money standing to the credit of that

account was insufficient to honour the cheque or that the amount of cheque exceeded the amount arranged to be paid from out of that account by

an agreement made with that bank. From the above said provision, it shall be clear that the cheques should have been returned unpaid for the

above said two reasons to bring it within the deeming provision making such an act a punishable offence. In case the drawee bank returns the

cheque stating insufficiency of funds or the fact that the amount quoted in the cheque exceeded the arrangement, as the reason for non-payment,

there won't be any difficulty in coming to the conclusion that the same would fall within the mischief of Section 138 of the Negotiable Instruments

Act, provided it fulfills the other conditions found in the said provision, including the condition that the cheques should have been issued in

discharge in whole or part of any debt or other liability. In this regard reference to Section 139 of the Negotiable Instruments Act, 1881 may be

made for the proof of compliance with the condition that the cheque should have been issued for the discharge in whole or in part of a debt or

other liability.

12. When the issue of cheque is either admitted or proved, Section 139 of the Negotiable Instruments Act, 1881 gives rise to a presumption that

the cheque was received for the discharge in whole or part of a debt or liability. In this case the question of raising such a presumption u/s 139 of

the Negotiable Instruments Act, 1881 loses its importance as it is admitted by the respondent herein/accused that the cheques were issued for the

discharge of a liability of the respondent herein/accused to the appellant herein/complainant towards the consideration of the cassettes supplied by

the appellant to the respondent. Therefore, it cannot be contended by the respondent herein/accused that the cheques were not issued for the

discharge in whole or in part of a debt or other liability.

13. On the other hand, the defence of the respondent herein/accused seems to be two fold:- 1) the debt/liability in partial discharge of which the

cheques were issued was discharged otherwise by returning the cassettes supplied by the appellant herein/complainant, as they were found

defective and 2) even if it is assumed that the liability remained undischarged, the cheques were not dishonoured for insufficiency of funds or for the

reason that the amount quoted in the cheques exceeded the arrangement, the respondent herein/accused did have with the banker and that on the

other hand while there was sufficient funds to the credit of the account, disputing the liability, the respondent herein/accused himself issued stop

payment instructions to the bank and only based on such instructions, the cheques were dishonoured.

14. The learned Counsel for the appellant drawing the attention of the court to Section 114 of the Evidence Act submitted that the very fact that

the cheque was dishonoured when presented for encashment would give rise to a presumption that the cheque was dishonoured for insufficiency of

fund or for the reason that the amount covered by the cheque/cheques exceeded the arrangement made by the drawer with the bank. The learned

Counsel for the appellant relying on a judgment of a three judge bench of the Hon"ble Supreme Court in Modi Cements Limited v. Shri Kuchil

Kumar Nandi reported in 1998 2 L.W.(Crl.) 417 contended that a conjoint reading of Section 138 and 139 of the Negotiable Instruments Act,

1881 and Section 114 of the Evidence Act would give rise to a presumption that when the cheque issued had been dishonoured by the drawee

bank even on the instructions of the drawer, there shall be a presumption that the cheque was dishonoured for the reason that the funds in the

account were insufficient or that the amount covered by the cheque exceeded the arrangement the drawer had with the bank by agreement and that

hence the respondent herein/accused should be held guilty of the offence punishable u/s 138 of the Negotiable Instruments Act, 1881. Of course it

is true that the Hon''ble Supreme Court in the above said case held that the order of the High Court quashing the complaint itself on the ground that

the drawer had issued instructions to the banker to stop payment and hence the fact of dishonour of the cheque would not come within the mischief

of the penal provision u/s 138 of the Negotiable Instruments Act, 1881 was not legally correct. In the said judgment of the Hon''ble Supreme

Court, reference was made to a previous judgment of the same court in .Electronics Trade & Technology Development Corporation Limited,

Secunderabad v. Indian Technologies & Engineers (Electronics) Private Limited and Anr. reported in 1996 1 L.W.(Cri.) 325 wherein it was

observed as follows:

It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of

money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the

endorsement like (1) in this case, ""refer to the drawer"" (2) ""instructions for stoppage of payment"" and stamped (3) ""exceeds arrangement"", it

amounts to dishonour within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in the due course after

dishonour, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the

statutory presumption of dishonest intention, subject to any other liability, stands satisfied.

However, it was also observed therein as follows:

Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not

to present the same for encashment and yet the payee or holder in due course presents the cheque to bank for payment and when it is returned on

instructions Section 138 does not get attracted.

15. But in K.K. Sidharthan Vs. T.P. Praveena Chandran and Another, , it had been observed as follows:

5. The above apart, though in the aforesaid case this Court held that even ""stop payment"" instruction would attract the mischief of Section 138, it

has been observed in para 6, that if ""after the cheque is issued to the payee or to the holder in due course and before it is presented for

encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the

bank for payment and when it is returned on instruction, Section 138 does not get attracted"".

6. From the facts mentioned above, we are satisfied that in the present case cheques were presented after the appellant had directed its bank to

stop payment"". We have said so because though it has been averred in the complaint that the cheque dated 10.10.1994 was presented for

collection on that date itself through the bank of the respondent which is Catholic Syrian Bank Ltd., from the aforesaid letter of the Indian

Overseas Bank, we find that the cheque was presented on 15.10.1994 (in clearing). The lawyer's notice to the respondent being of 4th October,

which had been replied on 12th from Cochi, which is the place of the respondent, whereas the advocate who issued notice on behalf of the

appellant was at Thrissur, it would seem to us that the first cheque had even been presented after the instruction of ""stop payment"" issued by the

appellant had become known to the respondent.

16. The larger bench of the Hon''ble Supreme Court in Modi Cements Limited v. Shri Kuchil Kumar Nandi reported in 1998 2 L.W.(Crl.) 417

held that the above said observations made in those cases did not lay down the law correctly. The larger bench of the Hon''ble Supreme Court has

expressed a view that the deeming provision found in Section 138 coupled with the presumption contemplated in Section 139 of the Negotiable

Instruments Act, 1881 will give rise to a presumption that a cheque has been dishonoured for insufficiency of funds or for the reason that the

amount covered by the cheque/cheques exceeded the arrangement made by the drawer with the bank, even if it is returned unpaid based on the

stop payment instructions given by the drawer. A careful analysis of the judgment of the Hon''ble Supreme Court in Modi Cements Limited (supra)

will show that the view expressed by the Supreme Court is that even in a case wherein the cheque has been returned unpaid on the instructions of

the drawer to stop payment, Section 138 of the Negotiable Instruments Act, 1881 would be attracted as there shall be a presumption and that

such a presumption could be rebutted by the drawer at the trial and that it will be improper to reject the complaint at the threshold itself. The

relevant observation in this regard is found in paragraph 21 of the judgment, which reads as follows:

21. It is needless to emphasize that the court taking cognizance of the complaint u/s 138 of the Act is required to be satisfied as to whether a

prima-facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity u/s 139 of the Act to rebut the

presumption at the trial. It is for this reason we are of the considered opinion that that complaints of the appellant could not have been dismissed by

the High Court at the threshold.

17. The said position has been clarified in *M.M.T.C. Ltd and Anr. v. Medchl Chemicals & Pharma (P) Ltd. and Anr.* reported in 2001 (4) CTC

749. After referring to the above said judgment in *Modi Cements Limited v. Shri Kuchil Kumar Nandi*, the following observations have been made

by the Hon"ble Supreme Court:

It has been held that even though the cheque is dishonoured by reason of "stop payment" instruction an offence u/s 138 could still be made out. It

is held that the presumption u/s 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of

stop payment instructions by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge, in whole

or in part, of any debt of liability. Of course this is a rebuttable presumption. The accused can thus show that the ""stop payment"" instructions were

not issued because of insufficiency or paucity of funds. If the accused shows that in his account there was sufficient funds to clear the amount of the

cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of

other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence u/s 138

would not be made out. The important thing is that the burden of so proving

would be on the accused. Thus a Court cannot quash a complaint on this ground.

18. The above said observation will make it abundantly clear that though there shall be a presumption that a cheque was dishonoured for insufficiency of funds or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such a presumption is only a rebuttable presumption and that the same can be rebutted by adducing evidence showing that there were funds sufficient to honour a cheque on the date of its presentation and dishonour.

19. The very same view has been expressed by another bench of the Hon''ble Supreme Court in two recent judgments in John K. John v. Tom

Varghese and Anr. reported in 2007(4) Crimes 155 SC and Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, . In both the cases, it has been

held that the concerned provision prescribing a reverse burden on the accused is intended to regulate the growing business, trade, commerce and

industrial activities of the country and the direct liability to promote greater vigilance, the court should not forget a stronger general presumption in

favour of the innocence of the accused while dealing with the statutory presumption causing a reverse burden on the accused and that such

statutory presumptions casting a reverse burden on the accused can be rebutted by preponderance of probabilities and that the important

principles of legal jurisprudence, namely the presumption of innocence as a human right and the doctrine of reverse burden introduced by the

statute should be delicately balanced.

20. It is quite obvious from the said judgments of the Hon''ble Supreme Court that it cannot be said that no prosecution can be lodged for an

offence u/s 138 of the Negotiable Instruments Act, 1881 for the simple reason that the cheque was returned unpaid pursuant to the instruction of

the drawer given to the bank to stop payment. The presumption that the cheque was dishonoured for the reasons contemplated in Section 138 of

the Negotiable Instruments Act, 1881 is a rebuttable presumption and the accused shall have a right to lead evidence to show that the

cheque/cheques was/were dishonoured not for the reasons contemplated in Section 138 and that he had sufficient funds in his account on which

the cheque was drawn. By proving that he had sufficient funds on the relevant

date, the accused can rebut the presumption. The proof required for such rebuttal is not proof beyond reasonable doubt and such proof shall be on preponderance of probabilities.

21. In this case, there is sufficient evidence to show that the respondent herein/accused did have a grievance against the appellant

herein/complainant that the goods (cassettes) supplied by him were defective. On that basis alone, the respondent herein/accused seems to have

issued a letter to the drawee bank, even before the presentation of the cheques for encashment specifying the dates, cheque numbers and the name

of the payee to stop payment as he believed the goods supplied by the appellant herein/complainant were defective. Whether the goods supplied

by the appellant herein/complainant were in fact defective or not, is outside the scope of consideration in this criminal case. We are concerned with

the question whether the cheques were dishonoured for the reason of insufficiency of fund or for the reason that the amount exceeded the

arrangement made with the bank and not with the question whether the reasons assigned by the respondent herein/accused for countermanding the

cheque even though there was sufficient funds in the account, are justifiable. It has been clearly stated in the dishonour slips that the cheques were

returned unpaid for the reason that the drawer had instructed to stop payment and not for any other reason. The witnesses examined on the side of

the appellant herein/complainant have not asserted that there was insufficiency of funds in the account on which the cheques were drawn. On the

other hand, the bank official examined as P.W.2 on the side of the appellant herein/ complainant himself admitted that there was sufficient

arrangement on the date of presentation of cheques for encashment to make payment upto Rs. 25,00,000/- from the account maintained by the

respondent herein/accused on which the cheques had been drawn.

22. In view of the said evidence of P.W.2 examined on the side of the appellant herein/complainant, there was no necessity for the respondent

herein/accused to lead further evidence to prove that he had sufficient funds in his account and that only because of the stop payment instructions

given by him, the cheques were dishonoured. The court below has rightly come to the conclusion that the reverse burden cast on the respondent

herein/accused has been discharged and that hence the offence u/s 138 of the

Negotiable Instruments Act, 1881 has not been made out. There is no defect or infirmity in the above said finding of the court below. This Court finds no ground or reason to interfere with the judgments of acquittal pronounced by the court below. There is no merit in these appeals and they deserve to be dismissed.

23. Accordingly, both the appeals are dismissed.