

(1999) 06 MAD CK 0041

In the Madras High Court

Case No : Criminal R.C.Nos. 1242 and 1248 of 1998 and Criminal O.P.Nos. 387 and 388 of 1999 and Criminal M.P.Nos. 9469 and 9497 of 1998

Gummadi Industries Ltd., Habibulla Road Chennai-17 and
another

APPELLANT

Vs

Khushroo F.Engineer M/s. Zen Global Finance Ltd., Alwarpet
Chennai-18

RESPONDENT

Date of Decision : 11-06-1999

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 140

Citation : (1999) 2 ALD(Cri) 738 : (1999) 98 CompCas 296 : (1999) CriLJ 4246 : (2000) 2 CTC 443 : (1999) 2 LW(Cri) 618

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : Mr. Aravind P. Datar, for the Appellant; Mr. R.Sivaprakasam, for the Respondent

Judgement

1. CrI.O.P.Nos.387 and 388 of 1999 and CrI.R.C. Nos.1242 and 1248 of 1998 are being disposed of in this common order as the issues and the

parties are the same.

2. The petitioners 1 and 2 are the accused in C.C.Nos.7157 and 7158 of 1998 on the file of the XVIII Metropolitan Magistrate, Saidapet,

Madras arising out of the private complaint filed by the respondent for the offence u/s 138 of the Negotiable Instruments Act.

3. The petitioners in M.P. Nos.1003 of 1998 and 1004 of 1998, in both these cases, filed a petition before the trial court, to discharge the

accused. The respondent filed a counter. After hearing the counsel for the parties, the learned XIII Metropolitan Magistrate, Saidapet, Madras

dismissed these petitions. Aggrieved over these orders, these two revisions have

been filed before this Court. This Court admitted both the revisions and ordered notice on 13.11.98.

4. At this stage, the petitioners filed quashing applications in Cri.O.P.Nos.387 and 388 of 1999, i.e. C.C.Nos.7157 and 7158 of 1998 on the file

of the XVIII Metropolitan Magistrate, Saidapet, raising some more grounds, in addition to the grounds raised in the connected Revisions, viz,

Cri.R.C.Nos.1242 and 1248 of 1998.

5. The counsel for the petitioners in these petitions would mainly raise the following contentions:-

(1) The cheques in question were issued only as a collateral security by the second petitioner for the purchase of shares and given to the

respondent on the express instructions that the same would not be deposited without the prior permission as per the agreement dated 15.9.95.

Suppressing the said agreement, these complaints have been filed. Therefore, when the cheques were issued not towards discharge of any liability,

the complaint is not maintainable.

(2) The cheques in question were issued by the second petitioner from his personal account and not from the account of the first petitioner-

Company and the cheques "have been signed by the second petitioner in his individual capacity and not as an authorised signatory on behalf of the

first petitioner and as such, the complaint as against the first petitioner is not valid.

6. The counsel for the respondent would submit that the case of the prosecution is that the accused/the, second petitioner had undertaken to repay

the short term investment amount made by the complainant with the first accused company and towards discharge of their said liability only, he

issued the cheques and as such, both are liable to be proceeded.

7. I have carefully considered the submissions made by the counsel on either side.

8. According to the complainant, the complainant made a short term investment of Rs, 30,00,000 in the first accused company. The second

accused as Promoter of the first accused company issued four cheques in the name of the complainant towards the discharge of the liability of the

first accused with interest.

9. When the cheques were presented, they were returned with an endorsement ""Funds insufficient"". When the statutory notice was sent to the second accused, the same was returned with an endorsement ""refused"". However, the accused sent replies two days later to the complainant denying their liability.

10. According to the petitioners/accused, as per the agreement entered into between the accused company and the complainant dated 15.9.1995, the complainant invested a sum of Rs. 30,00,000 in the first petitioner Company on agreeing with the terms that the first petitioner company would hold the shares for a period of 180 days after which it was agreed that the shares would be purchased by the second petitioner and by way of collateral guarantee, the second petitioner gave post-dated cheques for the said amount. According to Clause 7 of the agreement, the complainant company would sell the shares in the market and if the sale was made at a price lower than the agreed price, then the complainant would invoice the collateral security submitted by the second petitioner.

11. In the reply notices sent by the accused dated 9.11.1996 it has been specifically stated by the accused that the said cheques were issued by the second accused only towards the collateral security.

12. On the basis of these materials, the learned counsel for the petitioners would submit by relying upon the decision in M/s. Balaji Seafoods Exports (India) Ltd. and another Vs. Mac Industries Ltd., that Section 138 would not get attracted, since the cheques were not issued towards the discharge of the liability but only as a collateral security and as such, the proceedings as against the petitioners are liable to be quashed and consequently, they are entitled to be discharged.

13. Both the counsel for the parties would rely upon the agreement dated 15.9.1995. Though in the complaint there is no reference about the agreement dated 15.9.1995 the reply notices dated 9.11.1996. as referred to in the complaint, would mention about the said agreement. That apart, the complainant while filing a counter to the discharge petition, also would rely upon the said agreement dated 15.9.1995.

14. Under these circumstances, it cannot be contended that this Court, while dealing with the petition for quashing and the revision against the order of dismissing the discharge petition, cannot go into the contents of the

agreement dated 15.9.1995. In other words, since both the parties would now rely upon the agreement dated 15.9.1995, this Court would certainly go into the recitals of the said agreement along with the other materials found in the complaint and other documents, in order to find out whether the ingredients of Section 138 of the Negotiable Instruments Act are made out or not.

15. The main contention urged by the counsel for the petitioners is that the post-dated cheques were issued only as a collateral security and not towards the discharge of the liability. As per the complaint, the second accused as a promoter of the first accused issued four cheques in the name of the complainant towards the discharge of the liability of the first accused with interest.

16. Since the agreement dated 15.9.1995 is relied upon by both the counsel, it is quite appropriate to refer to the relevant recitals contained in the agreement, dated 15.9.1995. The perusal of the agreement would show that the complainant shall invest Rs.30,00,000 and the accused agreed to allot 3,00,000 equity shares of the company to the complainant.

17. It is further mentioned that the said shares shall be held by the complainant for a period of 180 days from the date of the agreement and at the end of the said period the accused agreed to buy the entire lot of the said shares at a price of Rs.13.50 per share, irrespective of the ruling market price on that date. The second accused agreed to give post-dated cheques, personal guarantee and 3,00,000 shares in the company for the sale value of the said shares as collateral security for the said offer. It was further agreed that on the expiry of 180 days, if the promoter/accused fails to buy back the said shares, the complainant is free to make good the loss by selling the entire investment in the market and by depositing the post-dated cheques with any of the banks, to the extent of shortfall.

18. The submission made by the counsel for the petitioners is that on the date of handing over of the post-dated cheques, that is, on 15.9.1995 those cheques were given only as collateral security. If this recital contained in the agreement is acted upon, then there is no case made out for the offence u/s 138 of the Negotiable Instruments Act.

19. In this context, it is appropriate to refer Section 139 of the Negotiable Instruments Act. Section 139 of the Act incorporates a rule of

presumption, to the effect that until the contrary is proved, the holder of a cheque received the cheque of the nature referred to in Section 138 for

the discharge in whole or in part of any debt or liability.

20. It is also laid down in Section 140 of the Act that when a person is prosecuted for an offence u/s 138, he is not entitled to plead in his defence

that he had no reason to believe that when he issued the cheque it may be dishonoured on presentment for the reasons stated in Section 138.

21. Through the rebuttable presumption u/s 139, it is made clear that unless the contrary is proved, it shall be presumed by the Court that the holder

of the cheque received the cheque of the nature referred to in Section 138, for the discharge in whole or in part of any debt or other liability.

22. In the light of these provisions, it is argued by the counsel for the respondent/complainant, the presumption has to be rebutted by the accused

only during the course of trial by proving that the cheques were not issued towards the discharge of the liability.

23. However, if the materials referred to and relied upon by the complainant in the complaint and other documents accompanied to the said

complaint would show that the cheques were not issued towards the discharge of the liability, then there is no difficulty in holding that the complaint

is not sustainable under law.

24. In the light of the said settled principles as enunciated by this Court as well as the Apex Court, the agreement dated 15.9.1995 which is relied

upon by both the parties, has to be looked into to solve the riddle posed before this Court.

25. There is no dispute with regard to the fact that the complainant invested Rs.30,00,000. It cannot also be debated, in view of the agreement,

that 3,00,000 equity shares were allotted to the complainant. As per the agreement, four post-dated cheques were issued on 15.9.1995 putting

different dates. One of the conditions in the agreement is that on the expiry of 180 days, the complainant is free to make good the loss by selling

the entire investment in the market and by depositing the post-dated cheques with any of the banks to the extent of shortfall, if any. This would

make it clear that the post-dated cheques which were handed over by the accused to the complainant on 15.9.1995 can be deposited after expiry

of 180 days, if there is any shortfall in the amount after sale of the entire shares.

26. It is also seen from the records that though the agreement was dated 15.9.1995, the cheques in question were dated only from 10.9.1996 to

15.9.1996. Therefore, since the cheques were dated 10th to 15th September 1996, it cannot be contended that those cheques were issued on the

date of the agreement, namely, 15.9.1995, inasmuch as those cheques would become valid only from the date which is mentioned in the cheques.

Hence, on the expiry of 180 days, as agreed by the parties in the agreement, the complainant is well within his rights to use the cheques by

depositing them in the Bank for the purpose of encashment.

27. Under these circumstances, it cannot be concluded, at this stage, that there is no liability at all. Whether the shares allotted to the complainant

were sold in the meantime and whether any shortfall occurred for the purpose of exercising the right of using those cheques for encashing the

balance amount, are all the questions to be canvassed only during the course of trial. Under the said situation, I am not inclined to accept the

contention of the counsel for the petitioners that the cheques were issued only as a collateral security on the date of the agreement.

28. The citation reported in M/s. Balaji Seafoods Exports (India) Ltd. and another Vs. Mac Industries Ltd., would not be applicable to the present

case. In the said case, though the agreement referred to by both the parties was relied upon by this Court for the disposal of the application for

quashing it was, held in the facts and circumstances of that case that the cheque was given as a security and it was not a post dated cheque, but it

was a blank cheque. It was further held that the said undated cheque was not handed over with the intention of making it as an instrument of

immediate negotiation to discharge a subsisting liability or debt.

29. In the instant case, the cheques in question are post-dated cheques and it was agreed that the cheques can be deposited for realisation of the

amount after the expiry of 180 days. Therefore, the proceedings as against the second petitioner, who has signed the cheques, are maintainable

and consequently, the Crl.O.Ps. and the revisions filed by the second petitioner are liable to be dismissed.

30. However, it is noticed on perusal of the records that the second petitioner alone is the drawer, as he has signed the cheques in his individual

capacity and not as a promoter of the first accused company. Though the

cheques were issued by the second petitioner towards the discharge of the liability of the first petitioner, the first petitioner Company cannot be prosecuted as it is not the drawer.

31. Section 138 of the Act would indicate that the debt or liability towards which the cheque is issued, should be a legally enforceable debt or

liability. This would have reference to the nature of the debt or liability and not to the person against whom the debt or liability would be enforced.

This is clear by the use of the words ""any debt or liability"" which would include a cheque drawn by one person towards a legally enforceable debt

or liability of another person. The significant omission of the words ""of that person"" after the words ""any debt or liability"" would indicate the

intention of the Parliament.

32. In the instant case, the liability or debt was though legally enforceable against the first accused company but the cheques had been issued by

the second accused in his individual capacity and as such, he alone is the drawer. This position of law is already settled in K. Krishna Bai v. M/s.

Arti Presss, 1991 (2) MWN (Cr.) 110.

33. Therefore, the proceedings as against the first petitioner who is not the drawer, are liable to be quashed and accordingly, the same are quashed.

34. In the result, the Crl.O.Ps. and the revisions filed by the first petitioner are allowed and by the second petitioner are dismissed. Consequently,

the connected Crl.M.Ps. stand closed.

35. The Registry is directed to send the order copy to the trial Court forthwith. The trial Court is directed to dispose of the matter as expeditiously

as possible.