(2012) 09 MAD CK 0079

In the Madras High Court

Case No : Crl RC (MD) No. 332 of 2006

Kavikumar Spinning Mills Pvt. Ltd., A. Thangavelu and Kalimuthu	APPELLANT
Vs	
M/s. Saravana Traders Railway Feeder Road	RESPONDENT

Date of Decision : 18-09-2012

Acts Referred:
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 5, 6

Citation : (2013) 1 BC 479 : (2013) 1 Crimes 585 : (2012) 5 CTC 503 : (2013) 1 RCR(Criminal) 482

Hon'ble Judges : A. Selvam, J

Bench : Single Bench

Advocate : N. Anantha Padmanabhan, for the Appellant; C. Muthu Saravanan, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice A. Selvam

1. Challenge in this Criminal Revision Case is against the conviction and sentence passed in C.C. No. 145 of 2001 by the Judicial Magistrate No.

2, Sattur, modified in Criminal Appeal No. 128 of 2004 by the Principal District and Sessions Court, Virudhunagar District at Srivilliputhur. The

respondent herein as complainant has filed the complaint in question u/s 138 r/w 141 of the Negotiable Instruments Act, 1881 wherein the present

revision petitioners and others have been shown as accused.

2. The averments made in the complaint may be stated like thus:

The complainant is a sole proprietorship through its proprietor viz. P. Arumugasamy. The complainant is a dealer in cotton and carrying on

business in Sattur. The first accused is a corporate body, registered under the

Companies Act and having registered office at Coimbatore. The

second accused has been serving as its Managing Director. The third accused is serving as its Joint Managing Director. The fourth accused is the

wife of second accused and fifth accused is the wife of third accused. The 6th and 7th accused are younger brothers of third accused and they are

the other Directors of the first accused. The accused 2 to 7 as members of the Board of Directors, are responsible for day-to-day business of the

first accused. The accused 2 to 7 have constituted a Board of Directors. The accused have purchased cotton from the complainant on credit basis

and they are bound to give Rs. 52,69,124/-. The proprietor of the complainant during August 2000 has suffered a severe heart attack and

admitted in a hospital. During first week of September 2000 the complainant has sent an ultimatum to all the accused to settle the entire amount

within a period of 10 days. The first accused is maintaining a bank account in State Bank of Travancore, Pappanayakanpalayam Branch,

Coimbatore. As per constitution of the company, the second accused alone is authorised to operate bank accounts. The accused 2 and 3 have met

the complainant at Sattur on 18.09.2000 and tendered a cheque for a sum of Rs. 20,00,000/-. Since the complainant has expressed its displeasure

through its proprietor, another cheque has been given to the complainant for a sum of Rs. 23,00,000/-. The complainant is maintaining a bank

account in Tamilnadu Mercantile Bank Limited, Sattur Branch. The complainant has deposited both the cheques in Tamilnadu Mercantile Bank

Limited, Sattur Branch, for collection of the amounts mentioned therein. It appears that there is no sufficient funds in the bank account of the first

accused to meet the cheques in question. The accused with a view to prevent the complainant from filing a complaint, have made a false complaint

and the same has been registered in FIR No. 437 of 2000. On 23.09.2000, some of the accused have met the Bank Manager, Tamilnadu

Mercantile Bank, Sattur Branch and demanded the cheque in question to be handed over to them. The complainant has given a legal notice to the

said bank. Since police complaint has been registered, the complainant has not been able to obtain originals of dishonoured cheques. Under the

said circumstances, xerox copies of dishonoured cheques have been filed. The accused have committed offences punishable under sections 138 r/w 141 of the Negotiable Instruments Act, 1881. The complainant has given a proper legal notice and after receipt of the same, the accused have

given a false reply notice. Under the said circumstances, the present complaint has been filed so as to dealt with the accused in accordance with

law.

3. The trial Court after considering the available evidence on record has found the accused 2 to 7 guilty u/s 138 of the Negotiable Instruments Act

and sentenced each of them to undergo one year simple imprisonment and also slapped a fine of Rs. 5,000/- upon each of them. The trial Court

has also found the first accused guilty under the said section and imposed a fine of Rs. 5,000/- and directed the second respondent to pay the

same. The trial Court has further directed that all the fine amounts should be paid as compensation to the complainant.

4. The conviction and sentence passed by the trial Court have been challenged by the accused as appellant in Criminal Appeal No. 128 of 2004

on the file of the first appellate Court.

5. The first appellate Court after hearing both sides and upon reappraising the evidence available on record has allowed Criminal Appeal in part

and thereby modified the conviction and sentence passed by the trial Court to the extent that the conviction and sentence passed against the

accused 1 to 3 by the trial Court are confirmed. The Accused 4 to 7 are entitled to get acquittal. Against the conviction and sentence passed by

the trial Court, modified by the first appellate Court, the present Criminal Revision Case has been preferred at the instance of the accused 1 to 3 as

criminal revision petitioners.

6. Before contemplating the rival submissions made on either side, it would be more useful to narrate the following admitted facts. It is an admitted

fact that the complainant is a proprietorship and its proprietor is one P. Arumugasamy. The complainant has been doing cotton business in and

around Sattur. The first accused is a corporate body. The second accused has been acting as its Managing Director and third accused has been

acting as its Joint Managing Director. The remaining accused are also directors and they have constituted a Board of Directors. The accused have

used to purchase cotton from the complainant on credit basis.

7. The contention of the complainant is that the accused are bound to pay Rs.

52,69,124/- to the complainant and in order to discharge a partial

due, the cheques in question have been given on behalf of the first accused. The cheques in question have been marked as Exs. P1 and P2.

8. Ex.P1 is dated 16.09.2000, whereas Ex.P2 is dated 18.09.2000.

9. The consistent stand taken on the side of the complainant is that Exs. P1 and P2 have been given for the purpose of discharging due from the

first accused and the same have been presented in Tamilnadu Mercantile Bank Limited, Sattur Branch and the first accused is having a bank

account in State Bank of Travancore Pappanayakkanpalayam Branch, Coimbatore and subsequently the complainant has come to know that the

cheques in question have been dishonoured and some of the accused have preferred a false police complaint and the same has been registered in

FIR No. 437 of 2000. Under the said circumstances, the complainant has not been able to obtain originals of cheques in question and

subsequently issued a legal notice and after receipt of the same, the accused have given a false reply notice.

10. The trial Court has found all the accused guilty u/s 138 of the Negotiable Instruments Act, whereas, the first appellate Court has found that the

accused 1 to 3 alone have committed offence under the said section.

11. The only legal point that involves in the present Criminal Revision Case is as to whether Exs. P1 ad P2 are valid cheques.

12. Section 5 of the Negotiable Instruments Act, 1881 deals with ""Bill of Exchange"", and the same reads as follows:

A ""bill of exchange"" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain

sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

13. Section 6 of the said Act deals with ""Cheque"" and the same reads as follows:

A ""cheque"" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise that on demand and it includes the

electronic image of a truncated cheque and a cheque in the electronic form.

14. From conjoint reading of the said sections, it is clear that cheque is nothing but a bill of exchange and the same should be in writing containing

an unconditional order and the same should be signed by the maker. One of the essential ingredients of bill of exchange is that the same should be

signed by the maker. Otherwise, a particular instrument cannot be construed as bill of exchange.

15. In the instant case, the cheques in question have been marked as Exs. P1 and P2. Exs. P1 and P2 have been signed by Managing Director of

the first accused. In Exs. P1 and P2, the Director of the first accused has not put his signature even though his seal has been affixed on Exs. P1 and

P2. The entire argument put forth on the side of the criminal revision petitioners is based upon signature of Director not found in Exs. P1 and P2.

16. The learned counsel appearing for the revision petitioners/accused 1 to 3 has laconically contended that as per constitution of the first accused,

entire money dealings should be dealt with by the Director and Managing Director and in fact, the account of the first accused in State Bank of

India, Travancore, Pappanayakanpalayam Branch stands jointly in the names of Director and Managing Director. But in Exs. P1 and P2, signature

of Director is not found place and the cheques in question have not been given by any of the accused in favour of the complainant and the same

have been stealthily removed from the custody of the accountant of first accused and subsequently the complaint in question has been filed and

since Exs. P1 and P2 are having structural defect, the same cannot be treated as bills of exchange. The Courts below without considering the

contentions put forth on the side of the accused, have erroneously found that the accused have committed offence punishable u/s 138 of the

Negotiable Instruments Act and therefore, the findings given by the Courts below are liable to be interfered with.

17. In order to repudiate the argument advanced by the learned counsel appearing for the revision petitioners, the learned counsel appearing for

the respondent/complainant has contended that the respondent/complainant is a sole proprietorship represented by its proprietor, P.

Arumugasamy. The first accused is a Corporate Body and registered under Companies Act. The second accused is its Manager, third accused is

its joint manager and other accused are also its Directors. The accused have used to purchase cotton from the respondent/complainant on credit

basis and in that way they are bound to pay Rs. 52,69,124/-. Under the said circumstances, Exs. P1 and P2 have been given in favour of the respondent/complainant and since the same have been returned, all the accused have committed offence punishable u/s 138 of the Negotiable

Instruments Act, 1881 and further the respondent/complainant has not known about the internal arrangement of the accused with regard to

maintenance of account, issuance of cheque etc. The trial Court after considering all the contentions raised on either side has rightly found that all

the accused have committed offence punishable u/s 138 of the Negotiable Instruments Act and the first appellate Court has come to a definite

conclusion to the effect that the accused 1 to 3 have committed the said offence. Further it is false to contend that Exs. P1 and P2 have been

stealthily removed from the custody of the accountant of the first accused and therefore, the entire contentions put forth on the side of the revision

petitioners/accused 1 to 3 are liable to be eschewed.

18. As pointed out earlier, the only legal point that has winched to the fore in the present Criminal Revision Case is as to whether Exs. P1 and P2

are valid cheques.

19. As per section 5 of the Negotiable Instruments Act, 1881, every bill of exchange should be signed by the maker.

20. The legal contention put forth on the side of the revision petitioners/accused 1 to 3 is that the first accused is having joint account in the names

of Director and Managing Director in State Bank of Travancore Pappanayakkanpalayam Branch, Coimbatore and in each cheque, both the

Director and Managing Director should put their signatures and since in Exs. P1 and P2, the Director has not put his signature, Exs. P1 and P2 are

not valid cheques and since the same have been returned, it cannot be stated that the accused have committed offence punishable u/s 138 of the

Negotiable Instruments Act, 1881.

21. It is an admitted fact that in Exs. P1 and P2, signature of Managing Director alone is found place. In Exs. P1 and P2 seal of Director is found

place. But the Director has not put his signature. Only on that aspect, it is represented on the side of the revision petitioners/accused 1 to 3 to the

effect that Exs. P1 and P2 are not at all valid cheques.

22. The complainant has been examined as PW1 for the purpose of proving the contents of the complaint and he narrated the entire business

transaction and amount due from the accused and also issuance of Exs. P1 and

P2. One Kandimuthu, Manager of State Bank of Travancore has

been examined as PW2 and his evidence during the course of chief examination is that Exs. P1 and P2 have been issued in the name of first

accused. The first accused is having his account in Account No. 703. On 21.09.2000, the first accused is not having any credit balance and only

debit balance to the tune of Rs. 62,30,233/-

23. During the course of cross examination he has stated that Ex.P5 is a memorandum issued by the said Bank. In serial numbers 24 to 26,

reasons have been stated with regard to return of cheques. In Serial No. 24 it has been specifically stated to the effect that the cheques in question

have been missing. In Serial No. 25, it has been specifically mentioned about FIR No. 437 of 2000. The account of the first accused is joint

account. Both Director and Managing Director should issue cheque for the purpose of disbursing amount. In the cheques in question, signature of

Director is not found in the place of Director. In Exs. P4 and P5 it has been stated that property not marked. Further he deposed to the effect that

all previous cheques have been issued only by Director and Managing Director.

24. From the evidence of PW2 it is easily discernible that the first accused is having joint account in the names of Director and Joint Director and

both of them have jointly issued cheque, otherwise the amount mentioned in the concerned cheque will not be disbursed.

25. In the instant case as pointed out in many places in Exs. P1 and P2, signature of Director is not found place. Only on that basis, the said legal

contention has been put forth on the side of the revision petitioners/accused 1 to 3. It has already been pointed out that every bill of exchange

should be signed by its maker. If a bill of exchange is not signed by maker, the same cannot be construed as a valid bill of exchange. To put it in

short, a bill of exchange enables a person in whose favour it is drawn to encash the amount mentioned therein. Otherwise, the same cannot be

treated as a bill of exchange. As per 6 of the Negotiable Instruments Act, 1881, cheque is also a bill of exchange. Therefore, every cheque must

be signed by its drawer so as to enable the concerned drawee to get the amount mentioned therein. If the drawer of cheque has not signed, the

concerned cheque cannot be construed as valid one.

26. In support of the contention put forth on the side of the revision petitioners/

accused 1 to 3, the following decisions have been relied upon:

(a) In Shri Babulal Nainmal Jain Vs. Shri Khimji Ratansha Dedhia and others, it is held that ""if a cheque is returned on account of any structural

defect in its form, want of signature, date has not been properly written, figure of the amount has been over written or erased in the drawer''s name,

the same will not amount to an offence punishable u/s 138 of the Negotiable Instruments Act.

(b) In Vinod Tanna and Another Vs. Zaheer Siddiqui and Others, the Honourable Apex Court has held that ""dishonour of cheque because of

incomplete signature of drawer, did not attract Section 138 of the Negotiable Instruments Act.

(c) In CDJ 2009 SC 910 (Raj kumar Khurana Vs. State of (NCT of Delhi) & another), it observed that ""the parameters for invoking the provision

of section 138 of the Act, thus, being limited, refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of

the provision of Section 138 of the Negotiable Instruments Act.

27. It has already been pointed out in many places that Exs. P1 and P2 do not bear signature of Director. In fact PW2 has given a picturesque

evidence with regard to maintenance of account of the first accused in the names of Director and Managing Director. Further he deposed to the

effect that a cheque which has been given by Director, Managing Director is alone fit to be honoured and if any one of them has not put his

signature, the same will be returned. Further he deposed that since the Director has not put his signature in Exs. P1 and P2 in the memorandum, it

is stated as ""property not found.

28. As per the decisions referred to supra, it is made clear that if any cheque is structurally defect, the same would not attract penal provision of

section 138 of the Negotiable Instruments Act, even though the same has been returned by the concerned Bank. Further mere return by the

concerned bank would not attract the penal provision of the said section. The Court must independently decide each and every case on the basis

of its factual situation.

29. Even at the risk of repetition the Court would like to point out that in Exs. P1 and P2 the Director of the first accused has not put his signature.

As per section 5 of the Negotiable Instruments Act, 1881, cheque is a bill of exchange and every bill of exchange should be signed by its maker.

So far as Exs. P1 and P2 are concerned, the Managing Director as well as Director are joint makers and both of them should sign. If any one of

them has not signed, the concerned cheque is having structural defect.

30. Even though Exs. P1 and P2 have been returned on the basis of registration of the First Information Report alleged to have been given by

some of the accused, evidence of PW2 would reveal that in each and every cheque, issued in the name of first accused must be signed by Director

and Managing Director, since both of them are having joint accounts for the first accused. In Exs. P1 and P2 signature of the Director is not found

place. Therefore, Exs. P1 and P2 are having structural defect and the same cannot be construed as valid cheques and at the most, the same can be

treated as inchoate instruments, since Exs. P1 and P2 are nothing but inchoate instruments, even though the same have been returned by the State

Bank of Travancore Pappanayakkanpalayam Branch, Coimbatore, the same would not attract penal provision of section 138 of the Negotiable

Instruments Act. Further it has already been pointed out that a cheque must be issued by its maker so as to enable drawee to encash the amount

mentioned therein. In the instant case, in Exs. P1 and P2 since signature of Director is not found place, the complainant cannot encash the amount

mentioned therein. Therefore, it is very clear that Exs. P1 and P2 are not valid cheques since, the same are having structural defect and at the most

Exs. P1 and P2 can be construed as inchoate instruments. Since Exs. P1 and P2 are having structural defect and the same cannot be treated as

valid cheques, mere returning of the same by the said State Bank of Travancore Pappanayakkanpalayam Branch, Coimbatore would not attract

penal provision of Section 138 of the Negotiable Instruments Act. The Courts below have failed to look into the same.

31. The first appellate Court has confirmed the conviction and sentence passed against the revision petitioners/accused 1 to 3 by the trial Court on

the basis of the following decisions:

(a) In 2003 (1) CTC 127 (Katta Sujatha V. Fertilizers & Chemicals Travancore Ltd. and another), the Honourable Apex Court has held that ""if

any cheque issued on behalf of a firm, the persons concerned with the firm can be shown as accused.

(b) In S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , the Honourable Apex Court has held that ""for the purpose of fixing liability of

Managing Director, Director and persons incharge of and responsible for conduct of business of company, when such persons are sought to be

made criminally liable u/s 141 for offence committed by companies, such person should be in-charge of and responsible to company for the

conduct of business of company at the time when offence is committed.

32. In the instant case, the position is otherwise. The only legal point as mentioned supra involves in the present case is as to whether Exs. P1 and

P2 are valid cheques, since Exs. P1 and P2 are having structural defect. The first appellate Court has not at all considered the same. Therefore,

viewing from any angle, the conviction and sentence passed by the trial Court, modified by the first appellate Court are liable to be interfered with.

In fine, this Criminal Revision Case is allowed. The conviction and sentence passed in C.C. No. 145 of 2001 by the Judicial Magistrate No. 2,

Sattur, modified in Criminal Appeal No. 128 of 2004 by the Principal District and Sessions Court, Virudhunagar District at Srivilliputhur are set

aside. The complaint filed in C.C. No. 145 of 2001 is dismissed and the revision petitioners/accused 1 to 3 are acquitted. Bail bonds if any

executed by them shall stand cancelled and fine amounts paid by them, are ordered to be refunded forthwith.

