

(1990) 03 CAL CK 0051

In the Calcutta High Court

Case No : Criminal Revision No. 2276 of 1989

Madras Forgings and Allied Industries (C.B.C.) Ltd.

APPELLANT

Vs

Suresh Chandra and Another

RESPONDENT

Date of Decision : 28-03-1990

Acts Referred:

Banking, Public Financial Institutions and the Negotiable Instruments Laws
(Amendment) Act, 1988 — Section 4
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 140, 141

Citation : (1992) 73 CompCas 385

Hon'ble Judges : J.N. Hore, J;Ajit Kumar Sengupta, J

Bench : Division Bench

Advocate : Balai Roy and Y. Dastoor, for the Appellant; Dipak Bose and Dipti Bose and M. Vidyadharan, for the Respondent

Final Decision : Allowed

Judgement

Sengupta, J.—Upon the petition of complaint filed by the opposite party, the learned Metropolitan Magistrate, Eight Court, Calcutta, directed issuance of summons against the petitioners, one of whom is a public limited company and the other its managing director to answer charges u/s 141, read with Section 138, of the Negotiable Instruments Act, 1881.

2. In the petition of complaint, it has been, inter alia, alleged :

(a) Against supply of steel rounds to the petitioner company, two cheques bearing No. 1277900, dated January 28, 1989, for Rs. 2,00,000 and No. 1277903, dated February 10, 1989, for Rs. 1,50,000 were issued in favour of the complainant's firm, namely, M/s. Standard Engineering Company, 40, Strand Road, Calcutta-1, by the petitioner-company acting through its managing director, i.e., the second petitioner, drawn on Indian Bank, Main Branch; Coimbatore.

(b) In due course, the said cheques were presented with the complainant's

bank, viz., Oriental Bank of Commerce, Strand Road, Calcutta, and the same were returned with the remarks "exceeds arrangement".

(c) On March 13, 1989, the complainant intimated the petitioner-company regarding the dishonour of the cheques and requested issue of a demand draft for the value of the cheques failing which it was told that the cheques would be presented again before the bank.

(d) Accordingly, the said cheques were again presented with the complainant's bank on March 29, 1989, and the same were returned with the remark "refer to the drawer" on April 13, 1989.

(e) On April 27, 1989, the complainant's firm thereupon issued a notice under-registered post with acknowledgment due to the petitioner-company intimating the dishonouring of the cheques and demanding payment within fifteen days of receipt of the said notice.

(f) The petitioner-company, it was alleged, received the notice on May 4, 1989, but did not make payment of the sum of Rs. 2,00,000 (rupees two lakhs only) and Rs. 1,50,000 (rupees one lakh fifty thousand only) being: the value of the cheques within the said fifteen days of receipt of the notice.

3. On the above facts, it was alleged that the petitioners have committed the offence u/s 138, read with Section 141, of the Negotiable Instruments Act, 1881, as amended.

4. The said complaint was filed on June 27, 1989, find the learned Metropolitan Magistrate, Eighth Court, Calcutta, issued process against the petitioners to appear on August 11, 1989, to answer the charges u/s 141, read with Section 138, of the Negotiable Instruments Act, 1881, as amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988. On that day, the learned Metropolitan Magistrate examined the accused-petitioner No. 2 to which the accused-petitioner No. 2 pleaded not guilty on behalf of both the accused petitioners.

5. The said proceeding has been challenged in this application.

6. Mr. Roy, learned counsel appearing for the petitioners, has submitted that the proceeding initiated under the aforesaid provisions of the Act is without jurisdiction inasmuch as the Amendment Act of 1988 came into force on April 1, 1989, and the alleged offence having been committed long before the said amendment came into force, prosecution in respect of such offence is not maintainable. He has also submitted that, admittedly, two cheques were issued on January 28, 1989, and February 10, 1989, and the said cheques had been dishonoured by non payment on March 13, 1989. The complainant intimated the petitioner-company that the said cheques had been dishonoured. The said cheques were again presented with the complainant's bank on March 29, 1989, and the same were returned with the remark "refer to the drawer" on April 13, 1989. On April 27, 1989, the complainant's firm issued a notice under registered

post to the petitioner-company intimating the dishonour of the cheques and demanding payment. It is, therefore, contended that the offence, if any, was committed when the cheques were issued, one of the ingredients of the offence being the issuance of the cheques which in fact was made before the Amendment Act came into force. Even the cheques have been dishonoured before the commencement of the amended provisions of the Act came into force. Accordingly, it is contended that the entire proceedings are without jurisdiction.

7. Mr. Dipak Basu, learned counsel appearing for the complainant/opposite party, has contended that only upon dishonour of the cheques, cause of action would arise. Although the cheques might have been issued prior to the commencement of the amended provisions, but the subsequent dishonour of the cheques was made in April, 1989, after the amended provisions have come into force. He has contended that once the cheques bounced because of nonpayment, the payee is at liberty to deposit the said cheques once again in his bank account. In this case, after dishonour, the cheques were again presented in the bank and those were dishonoured after April 1, 1989. Accordingly, the proceedings are not without jurisdiction as contended by learned counsel appearing for the petitioners.

8. To appreciate the contentions, it is necessary to set out the relevant provision of Section 138 which has been inserted in the Negotiable Instruments Act, 1881, by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, [1989] 65 Comp Cas (st.) 308. Section 138 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 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 provision of this Act, be punished with imprisonment for a term which may extend to one year, 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 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.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

9. Section 141 relates to offences by companies and Section 142 provides for taking cognizance of such offences.

10. Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, inserted Chapter XVII in the Negotiable Instruments Act, 1881. We may usefully refer to the Notes on Clauses appended to the Bill [1989] 65 Comp Cas (St.) 140, 156 explaining the provisions of the new chapter for ascertaining the intention of Parliament, which reads as follows :

"This Clause (clause 4 of the Bill) inserts a new Chapter providing that where any cheque drawn by a person for the discharge of any liability is returned by the bank unpaid for the reason of insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangements made by the drawer of the cheque with the bank for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the said Act, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both.

The provisions have also -been made so that to constitute the said offence--

(a) Such a cheque should have been presented the bank within a period of six months of the date of its drawal or within the period of its validity, whichever is earlier.

(b) The payee or holder in due course of such cheque should have made a demand for the payment of, the said amount by giving notice in writing to the drawer of the cheque within fifteen days of the receipt of information by him from the bank regarding return of the cheque unpaid.

(c) The drawer of such cheque should have failed to make payment of the said amount to the drawee or holder in due course of the cheque within fifteen days of receipt of the said notice.

It has also been provided that it shall be presumed, unless the contrary is proved, that the holder of such cheque received the cheque in the discharge of a liability. Defences which may not be allowed in any prosecution for such offence have also been provided to make the provisions effective. The usual provision relating to offences by companies has also been included in the said new chapter.

In Order to ensure that genuine and honest bank customers are not harassed or put to inconvenience, sufficient, safeguards have also been provided in the proposed new chapter."

11. Although the Amendment Act of 1988 was enacted by Parliament in 1988, the provisions of Sections 138 to 142 came into effect from April 1, 1989, by Notification No. S. O. 240(E), dated March 29, 1989, [1989] 66 Comp Cas (St.) 12.

12. It will be evident from the Statement of Objects and Reasons that the said provisions have been enacted with a view to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangement made by the drawer, with adequate safeguards to prevent harassment of honest drawers. The following conditions are required to be satisfied to constitute the offence within the meaning of Section 138 :

(a) The cheque in question should have been issued in discharge of the whole or a part of a debt or liability.

(b) The cheque in question "should be presented within six months or its specific validity period, whichever is earlier.

(c) The payee or holder should give notice demanding payment within fifteen days of his receiving information of dishonour, which should be for no other reason than for insufficiency of funds.

(d) The drawer of such cheque can make payment of the said amount of the money to the payee or the holder in due course of the said cheque within fifteen days of receipt of the notice and only if he fails to do so, he is liable to be prosecuted.

13. The question is whether the Amendment Act of 1988 has retrospective operation. The general principle is that unless a contrary intention appears, an enactment is presumed not to be intended to have retrospective operation. The essential idea of legal system is that current law should govern current activities. An act or omission is not criminal unless forbidden by law. If it is done today, the law applying to it should be the law in force today. Article 20(1) of the Constitution provides as follows ;

"20(1). No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

14. Article 7 of the European Convention of Human Rights states that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at

the time when it was committed. Where the act or omission did constitute an offence when committed, no penalty is to be imposed which is heavier than the one applicable at that time. Willes J. in *Phillips v. Eyre* [1870] LR 6 QB 1, observed as follows :

". . . . contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

15. Mr. Justice Blackstone, 1 Bla. Com 46 observed that ex post facto laws are of a substantially different character. They did not confirm irregular acts, but voided and punished what had been lawful when done. He described laws ex post facto of this class as those by which "after an action indifferent in itself is committed, the Legislature then for the first time declared it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should afterwards be converted to guilt by a subsequent law ; he had, therefore, no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust".

16. The same distinction was elaborately pointed out in the judgment of the Supreme Court of the United States in *Calder v. Bull* (3 Dallas 386). It was held that an Act of the State of Connecticut passed to set aside a decree of a court of probate and grant a new hearing was valid, though the effect was ultimately to deprive the party in whose favour the first decision was made of the benefit of the decree. The opinion of the Supreme Court is summarised in the following passage of the judgment of Chase J. :

"I will state what laws I consider ex post facto laws, within the words and intent of the prohibition. First, every law that makes an action done before the passing of the law ; and which was innocent when done, criminal ; and punishes such action. Second, every law that aggravates a crime, or makes it greater than it was when committed. Third, every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed. Fourth, every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence in order to convict the offender. All these and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between ex post facto laws and retrospective laws. Every ex post facto law must necessarily be retrospective ; but every retrospective law is not an ex post facto law : The former, only, are prohibited. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust and may be oppressive ; and it is a good general rule that a law should have no retrospect ; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement ; as statutes of oblivion or of pardon. They are certainly

retrospective, and literally both concerning and after the facts committed. But I do not consider any law ex post facto within the prohibition that mollifies the rigour of the criminal law ; but only those that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, or to commence at an antecedent time, as to save time from the Statute of Limitations, or to excuse acts which were unlawful and before committed, and the like, is retrospective. But, such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime."

17. It cannot be gainsaid that a new offence has been created by the Amending Act of 1988 from April 1, 1989. There was no law in force at the time when the accused issued the cheques that if any cheque is issued in discharge of a debt or liability and is dishonoured by non-payment and the drawer does not pay within 15 days of receipt of the notice of such dishonour, he will be deemed to have committed an offence. The accused is, therefore, entitled to the protection of Article 20(1) of the Constitution. When no such provisions as contained in Sections 138 and 141 were in existence at the relevant time, the accused cannot, therefore, be said to have committed an offence under the aforesaid provisions. In other words, the said provisions are not retrospective in operation.

18. Admittedly, two several cheques drawn by the petitioner-company in discharge of a debt or liability in favour of the complainant's firm were dishonoured by non-payment prior to the said provisions coming into force. Those cheques were once again presented by the payee in its bank before April 1, 1989, within the period of validity of such cheques. These cheques were again dishonoured by non-payment, but after April 1, 1989. Accordingly, it is contended that dishonour of cheques being one of the ingredients of the offence having taken place after the Amendment Act came into force, the provisions of the Amendment Act have rightly been pressed into service. We are, however, unable to accept the contention.

19. In our view, when several ingredients of the offence have been specified, all the ingredients must have taken place after the Amendment Act creating the offence has become operative. One of the essential ingredients of the offence as introduced by the Amendment Act is the drawing of a cheque in discharge of a debt or liability. All other consequences will necessarily flow from such drawing. If, for the cheque drawn prior to the coming into force of the substantive law creating the offence, a person is sought to be charged, then the said provisions have to be construed as having retrospective effect. In that event, the accused would be deprived of a defence open to him at the time the acts complained of were committed. A defence which was open to the accused at the time he did the acts complained of cannot be taken away by retrospective operation of a subsequent statute (see *Queen v. Griffith* [1891] 2 QB 145). The ingredients of

the offence on which the prosecution has been launched had taken place before the amendment came into operation. In our view, therefore, the provisions of Sections 138 and 141 of the Act cannot be pressed into service in this case. The statute will operate on the event which occurs on April 1, 1989, or thereafter.

20. For the reasons aforesaid, this application is allowed. The impugned proceedings are quashed.

21. This judgment will govern the other application being Criminal Revision No. 2277 of 1989.

Hore, J.

I agree.