

(2004) 01 MAD CK 0038

In the Madras High Court

Case No : Criminal R.C. No. 966 of 2003

Malladi Projects Management Centre Pvt. Ltd. and Another

APPELLANT

Vs

D.C.M. Financial Services Ltd.

RESPONDENT

Date of Decision : 22-01-2004

Acts Referred:

Evidence Act, 1872 — Section 91, 92

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

Citation : (2006) 2 BC 302 : (2005) 127 CompCas 911 : (2004) 1 CTC 518 :
(2004) 2 LW(Cri) 531

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : A.L. Somayaji, for S.K. Sumathi and Ors, for the Appellant; H. Karthic Seshadri, for the Respondent

Final Decision : Allowed

Judgement

S. Ashok Kumar, J.—This revision has been filed against the order passed by the learned XIV Metropolitan Magistrate, Egmore in

Crl.M.P.No. 1359 of 2002 in C.C.No. 2462 of 2002 dated 28.1.2003.

2. The brief facts of the case are as follows: The respondent M/s.D.C.M. Financial Service Ltd., Chennai filed a complaint against (1) M/s.Malladi

Project Management Centre Pvt. Ltd., (2) M/s.Saka Marketing Services Pvt. Ltd, (3) M/s.Sri Prabha Franchise Pvt. Ltd., and (4) Sri. Prashanth

Malladi for the offences punishable u/s 138 r/w 142 of the Negotiable Instruments Act 1881 r/w Section 200 of the Criminal Procedure Code on

the ground that a cheque dated 31.3.2001 for an amount of Rs. 1,25,78,703 towards repayment of outstanding amounts to the complainant

bounced and therefore, the accused have committed the offence punishable u/s 138 r/w 142 of the Negotiable Instruments Act.

3. The Accused A1 to A4 filed a petition u/s 204, Cr.P.C., to recall the process and to drop the proceedings against the accused on the grounds:

(1) The complainant has not disclosed the entire transactions relating to the issue of cheques and the complainant failed to place all the material

particulars in the complaint.

(2) The agreement Ex.P1 dated 9.7.1999 entered into between the complainant and the accused determined the debt at Rs. 5,23,91,635.

(3) The accused issued post dated cheques in pursuance to the said agreement and discharge of the debts was determined as above and the

accused also paid Rs. 23,12,681 to the Income Tax Department towards Tax Deducted at Source and the complainant owed a sum of Rs.

10,00,000 towards advance paid by an associate company of the accused.

(4) By letter dated 13.8.2001 filed as Ex.P7 the complainant agreed to the deduction of Rs. 10,00,000 and the amount due as per the above said

letter dated 13.8.2001 was Rs. 50,98,547.

(5) The accused sought legal opinion regarding the Income Tax and forwarded the same along with their letter dated 29.9.2001 filed as Ex.P5 and

also handed over a cheque for Rs. 30 lakhs which was encashed by the complainant on 3.10.2001.

(6) Thus, the balance due as per the demand dated 13.8.2001 is Rs. 20,98,547 and as against this Rs. 23,12,681 represented tax deducted at

source and paid by the accused directly to the Income Tax Department and the accused cannot seek return of the said payment from the

department and the accused paid a further sum of Rs. 25 lakhs on 22.01.2001 and another Rs. 25 lakhs on 28.2.2001.

(7) The complainant received all these payments without any protest, and by a letter dated 21.3.2001 Ex.P3 asking the accused to pay Rs. 25

lakhs due on 28.3.2001 directly to SBI Home Finance on account of the complainant which was paid as per the letter Ex.P4.

(8) The complainant requested the accused to pay a sum of Rs. 50 lakhs to Indus Ind Bank Ltd. It was made on 28.6.2001 by the second

accused on account of the complainant and thus the accused have paid 6 out of 7 installments as per the agreement dated 28.9.2000. The

petitioner had to pay Rs. 55 lakhs towards last installment as per the revised schedule. As per the agreement which was re-scheduled, the

petitioner has paid a sum of Rs. 260 lakhs leaving a balance of Rs. 225.97 lakhs as on 20.9.2000. The accused agreed to settle the balance

amount in seven installments and the first installment was to be paid on 30.09.2000 and the last installment was to be paid on 30.9.2001. The

complainant accepted the proposal. The accused sent three D.Ds. for Rs. 20,97,000 dated 29.9.2000 in pursuance of the offer dated 20.9.2000

which the complainant accepted silently. The accused paid a sum Rs. 4,03,000 on 3.10.2000 and a further sum of Rs. 25 lakhs on 16.12.2000

and the statement of accounts is marked as Ex.P6. The accused do not owe a sum of Rs. 1,25,78,703. Therefore the amount mentioned in the

cheque is not the actual liability or debt and the complainant have misused the post dated cheque to file the complaint.

4. The complainant filed :a counter stating that the application is not maintainable, that the complaint would on a prima facie reading disclose an

offence u/s 138 read with Section 141 of the Negotiable Instruments Act has been committed, that a cheque had been issued in partial discharge

of a debt was returned dishonoured and in spite of notice, the accused did not repay the amounts covered by the cheque within the stipulated time

and that therefore the accused are guilty of the offence. They denied all other allegations contained in the petition of the accused and as of date, the

accused owe more than Rs. 3.5 crores and the accused and their group concerns have miserably failed in adhering to the terms of the agreement

dated 9.7.1999 and hence the petition is not maintainable at this stage.

5. Learned Magistrate has dismissed the application, filed by the accused on the ground that whether the parties viz., the complainant and the

accused entered into agreement dated, 9.7.1999 have performed their part as per the terms of the agreement can be decided only by letting in oral

evidence on both sides and at this stage it cannot be done on mere production and perusal of the documents. Aggrieved over the said order, this

revision has been filed by the accused.

6. Mr.A.L. Somayaji, learned senior counsel appearing for the revision petitioners would contend that the ""Debt or Liability"" occurring in Section

138 refers to only a legally enforceable debt or liability and Section 139 creates a rebuttable presumption in favour of holder to the effect that the

holder received cheque for discharge in whole or in part of any debt or liability

and such presumption will hold good till the contrary is proved.

7. Mr. Karthik Seshadri, learned counsel appearing for the respondent would contend that even though the cheque concerned in this case was a

post dated cheque, it was issued in pursuance of an acknowledged liability of the accused and when the cheque is dishonoured, the accused are

liable to be punished u/s 138 of the Negotiable Instruments Act.

8. The main question to be decided in this case is,

Whether the cheque dated 31.3.2001 for a sum of Rs. 1,25,78,703 was issued for a ""debt or liability"" which is legally enforceable; and Whether

the accused were liable to pay the amount referred to in the cheque as claimed by the complainant.

9. The fact that on 9.7.1999, an agreement was reached between the complainant and the accused, is not in dispute. According to the said

agreement a sum of Rs. 3.08 crores was advanced by the complainant to the accused as inter-corporate deposits and the said amount has

accumulated to an amount of Rs. 6,48,55,568.00 and a settlement was arrived at by revising the terms of repayment at reduced rate of interest

with retrospective effect from the date when the corporate deposits were advanced and the accused have also offered a schedule of payment for

which consent was given by the complainant The accused agreed to pay a sum of Rs. 5,23,91,635 out of which the accused have already paid Rs.

30,88,875 and TDS certificates for Rs. 7,04,213 acknowledged by the complainant and the balance amount payable on future dates as set out in

Annexure-II and the accused have issued Post Dated cheques and represented that the cheques will be honoured on presentation and the schedule

of payment was also annexed as Annexure-II to the agreement and the schedule of Post Dated cheques was Annexure-III to the agreement in

which the cheque for Rs. 1,25,78,703 dated 31.3.2001 (subject matter of the case) was the last Post Dated cheque. On 31.3.2000, the accused

have paid Rs. 2,60,00,000 as found in Annexure-II and the balance amount of Rs. 2,25,98,547 was payable by them between 30th Sep. 2000

and 31.3.2001 could not be paid within the time specified. The last installment of this amount ought to have been paid on 30.9.2000. On

20.9.2000 the accused sent Ex.P2 letter to the complainant giving a revised schedule of repayment requesting the complainant to extend the time

for six months from 30.9.2000.

10. Whether the complainant accepted the above offer by the accused for re-schedule of payment has to be decided by the following facts:

(1) The complainant never sent a reply stating that the re-schedule of payment by extension of six months time is not agreed upon or objected to.

(2) On the other hand, the complainant had sent a letter dated 21.3.2001 wherein they have requested the accused to pay Rs. 25 lakhs before

28.3.2001 to SBI Home Finance, Chennai on the complainant's account.

(3) The complainant requested the accused to pay a sum of Rs. 50/-lakhs by 28.6.2001 to Chennai branch of IndusInd Bank and the same was

also paid by the accused.

(4) The complainant has sent another letter dated 13.8.2001 under Ex.P4 wherein the complainant has agreed to adjust Rs. 10 lakhs paid as

advance by one of the group companies of the accused and the net amount payable is Rs. 50,98,547 which was promised to be paid on

30.9.2001. It has also reminded the accused have committed default and demanded last payment of Rs. 50,98,547 due on 30.9.2001.

The above letters would clearly indicate the implied consent of the complainant for extension of time for six more months as per the revised

schedule proposed by the accused. It is pertinent to note that in the letter dated 13.8.2001, the complainant has mentioned as follows:

The claim for the overdue interest will be sent to you after clearance of your last payment of Rs. 50,98,547 due on 30.9.2001.

As per the said letter referred to above, the complainant has accepted that the final balance was Rs. 50,98,547. But, the subject matter cheque is

for a sum far in excess of the admitted balance. The admitted balance was also paid by a cheque for Rs. 30 lakhs and the balance sum of Rs.

20,98,540 was paid in the form of TDS (Tax Deducted at Source). The tax actually paid by the accused on account of the complainant is Rs.

23,12,681 and the statement of account was also enclosed therewith. Thus, it could be seen that the entire liability agreed upon as per the memo of

understanding dated 9.7.1999 has been cleared by the accused.

11. In the complaint, the complainant has not referred to the basis on which a sum of Rs. 1,25,78,703 has been arrived at. It is pertinent to note

that this cheque which is the subject matter in the case was issued in the year

1999 when the memorandum of understanding was entered into between the parties.

12. Learned counsel for the complainant would contend that in pursuance of the breach of the agreement caused by the accused, the complainant has invoked Clause-xiv of the agreement dated 9.7.99 by which the complainant was entitled to enforce and recover from the accused all that amounts which stand due and payable without the concessions and final amount agreed upon on the date of agreement. That is to enforce Rs. 6,48,55,568 which was subsequently revised to Rs. 4,85,98,547 and therefore the complainant is entitled to utilise the cheque for the amount of Rs. 1,25,78,703. According to the learned counsel for the complainant since the accused have committed breach of agreement and delayed payment by six months, the complainant is entitled to revert back to the original claim of Rs. 6,48,55,568 and therefore, the cheque issued in the year 1999 is for an amount which is enforceable for the legal debt or liability.

13. As already elaborately dealt with, the accused has paid the entire amount agreed as per the memo of understanding dated 9.7.1999. A period of six months extension was requested by the accused in making the last installment payment due on 30.3.2001 by Ex.P2, the letter dated 20.9.2000. The accused has sought for 6 months further time and they sent a revised schedule of payment upto 30.9.2001 i.e., six months extra time. For the said proposal, the complainant has not sent any objection. On the other hand by its letter dated 21.3.2001 and 20.6.2001 he has asked the accused to pay Rs. 25 lakhs and Rs. 50 lakhs to SBI Home Finance and IndusInd Bank Ltd. In the letter dated 13.8.2001, the complainant has admitted that the balance amount is Rs. 50,98,547 as on 30.9.2001. All the above letters would clearly indicate the implied acceptance of extension of time sought for by the accused.

14. A reference can be made to the lawyer's notice sent on behalf of the complainant when the said cheque was dishonoured. In the lawyer's notice sent on behalf of the complainant nothing is mentioned about how the figure of Rs. 1,25,78,703 the amount mentioned in the said cheque was arrived at. The lawyer's notice is particularly silent about the present contention of the complainant how he has invoked Clause-14 of the agreement by virtue of which the concession already accepted is revoked. The

notice is also silent about the extension of six month's time

requested by the accused for clearing the entire balance. On the other hand, in the lawyer's notice sent by the accused all the aspects now

contended have been clearly mentioned.

15. There is no dispute that an agreement was entered into between the parties on 9.7.99. There is also no dispute with regard to the payment

made by the accused in pursuance of the said agreement. As regards the delay of six months, even if the complainant wants to claim over due

interest as found in the letter 13.8.2001, he can only calculate the interest payable by the accused and intimate the accused about the same. But,

the complainant cannot make use of a post dated cheque issued on 9.7.99 with the date as on 31.3.2001 as a weapon to compel and coerce the

accused to pay that amount which is not supported by necessary consideration. In the decision reported in *Hithen P. Dalal v. Bratindranath*

Banerjee, 2001 (3) CTC 243 this Court has held as follows:

In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the

statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A

fact is to be proved when, "after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a

prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". Therefore, the rebuttal does not have

to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the

defence to exist OP consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man.

The presumption created u/s 139 of the Act in favour of the holder to the effect that the holder received cheque for discharge in whole or in part of

any debt or liability is a rebuttable presumption and the presumption will hold good till the contrary is proved. By letter dated 2.8.2001, the

accused have categorically mentioned that the total debts payable to the complainant have been settled and the balance to be paid in their

account is Rs. 1,69,249 and has demanded the return of the cheques dated 31.3.2000, 30.9.2000, 31.12.2000 and 31.3.2001. But, the

complainant has made use of the last cheque and had not mentioned anything about the three other cheques demanded by the accused either in the

reply dated 13.8.2001 or in the lawyer's notice. The conduct of the complainant is not only highly suspicious, but also will make anyone to think

that he has used a post dated cheque as a weapon to coerce the accused to part with huge amount of money. If really, the complainant wanted to

enforce clause-14 of the agreement, he should have given notice to the accused and also explained how the figure of Rs. 1,25,78,703 is arrived at.

The petitioner/accused have proved that they have discharged the liability as per the agreement dated 9.7.1999. The subject matter of the case is

only a post dated cheque which was issued for the liability under an agreement to make payment to the complainant. Once the liability is

discharged, there is no relationship of creditor and debtor between the complainant and the accused. The petitioner/accused have proved that they

have discharged the liability by documentary evidence. All the letters between the parties are admitted. Payments are admitted in all the letters

produced by the parties. No oral evidence contrary to the letters is admissible under Sections 91 and 92 of the Evidence Act. When the admitted

evidence proves that there is no liability on the accused towards the complainant, the requirement of the complainant before the Magistrate to

record evidence and giving a finding after appreciating the evidence and then accept the same is beyond the scope of Section 138 of the

Negotiable Installments Act and the request to the Magistrate to do so is only a waste of the precious time of Court.

16. For all the above reasons, the revision is allowed and the order of the learned Magistrate is set aside and the accused are discharged from the

charge framed against them.