

(1994) 08 BOM CK 0037

In the Bombay High Court

Case No : Criminal Writ Petitions No's. 91, 93, 75, 68, 94 and 140 of 1994

Mayuri Pulse Mills and others

APPELLANT

Vs

Union of India and others.
 Tarunkumar Bose Vs Union
of India and others.

RESPONDENT

Date of Decision : 10-08-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 140, 141, 142
Penal Code, 1860 (IPC) — Section 26

Citation : (1996) 5 BomCR 348 : (1994) 96 BOMLR 953 : (1996) 86 CompCas 121

Hon'ble Judges : R.M. Lodha, J;M.B. Ghodeswar, J

Bench : Division Bench

Judgement

R.M. Lodha, J.—The constitutional validity of sections 138, 139, 140 and 141 in Chapter XVII of the Negotiable Instruments Act, 1881 (for short "the N.I. Act"), as enacted by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, is under challenge in this bunch of six writ petitions. Since all these writ petitions involve the aforesaid common question of law, these petitions are decided by this common judgment.

2. Before we appreciate the submissions made by learned counsel challenging the provisions of sections 138, 139, 140 and 141 of the Negotiable Instruments Act, 1881, as ultra vires and violative of articles 14 and 21 of the Constitution of India, briefly the facts of Criminal Writ Petition No. 91 of 1994 may be adverted to.

3. It is alleged in Criminal Writ Petition No. 91 of 1994 Mayuri Pulse Mills v. Union of India that respondent No. 4, Parmanand Mohanlal Rathi, proprietor, Rathi Trading Company, filed a complaint against the petitioners u/s 142 of the Negotiable Instruments Act, 1881, alleging that the petitioners have committed offences under sections 138 and 141 of the Negotiable Instruments Act, 1881. According to the complaint, the petitioners issued two cheques drawn on the

State Bank of Hyderabad, Amravati, dated September 13, 1991, and September 18, 1991, respectively, towards payment of the bills amounting to Rs. 1,11,780. The said cheques were deposited for collection in the account of the complainant with the Punjab National Bank, Amravati Branch, but the said cheques were returned unpaid with an endorsement "exceeds arrangement". Thereafter, the complainant served upon the petitioners a notice in writing making a demand for payment of the said amount of money from the petitioners, but the petitioners failed to comply, compelling the complainant to file the complaint u/s 138 read with section 141 of the Negotiable Instruments Act, 1881. On the said complaint, which was registered as Complaint No. 136 of 1992 by the Chief Judicial Magistrate, Amravati, process was issued to the petitioners. The petitioners moved an application before the Chief Judicial Magistrate, Amravati, for dropping the criminal proceedings on the ground that they had not committed any offence within the meaning of section 138 of the Negotiable Instruments Act, 1881. The Chief Judicial Magistrate by his order dated January 25, 1993, dismissed the application holding that no question of dropping the criminal proceedings arises. The petitioners taking exception to the order passed by the Chief Judicial Magistrate, Amravati, on January 25, 1993, rejecting the application to drop the criminal proceedings under sections 138 and 141 of the Negotiable Instruments Act, 1881, preferred the revision petition before the Additional Sessions Judge, Amravati, who by his order dated December 24, 1993, dismissed the revision petition filed by the petitioners holding that the Chief Judicial Magistrate was justified in rejecting the application of the accused.

4. In Criminal Writ Petitions Nos. 91 of 1994, 93 of 1994, 75 of 1994, 68 of 1994 and 94 of 1994, Mr. J. K. Gilda, learned counsel for respondent No. 4, has put in appearance. Rule was Issued by this court in Criminal Writ Petition No. 68 of 1994 and the Assistant Government Pleader took notice on behalf of respondent No. 2, State of Maharashtra. All the matters involving common questions of law have been heard together by us.

5. Mr. J. N. Chandurkar, learned counsel for the petitioners in Criminal Writ Petitions Nos. 91 of 1994, 75 of 1994, 95 of 1994, 68 of 1994 and 94 of 1994, urged before us that the provisions of sections, 138 and 140 of the Negotiable Instruments Act, 1881, are unreasonable and, therefore, violative of article 14 of the Constitution of India. Learned counsel submitted before us that section 140 of the Negotiable Instruments Act, 1881, takes away a very important right of defence of the accused in a prosecution for an offence u/s 138 of the Negotiable Instruments Act, 1881, and that by itself makes the provisions contained in sections 138 and 140 of the Act unconstitutional. A defence of an accused in a prosecution for an offence u/s 138 that the drawer had reason to believe when he issued the cheque that the cheque may not be dishonoured on presentment is a reasonable defence and section 140 of the Negotiable Instruments Act, 1881, which provides that such defence shall not be a defence in a prosecution for an offence u/s 138 of the Negotiable Instruments Act, 1881, is arbitrary and most unreasonable and, therefore, cannot be allowed to stand and the same deserves

to be struck down.

6. Mr. V. S. Sohoni, learned counsel for the petitioner in Criminal Writ Petition No. 140 of 1994, adopted the arguments of Mr. J. N. Chandurkar, and further challenged the power of the Central Government to enact sections 138, 139, 140 and 141 of the Negotiable Instruments Act, 1881. In exercise of its legislative power under entries 45 and 46 of List I of the, Seventh Schedule to the Constitution of India.

7. It may be observed that sections 138 to 142 of the Negotiable Instruments Act, 1881, were enacted and Chapter XVII was inserted in the Negotiable Instruments Act, 1881, by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988. The Provisions contained in Chapter XVII provide 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 amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangement made by the drawer of the cheque with the banker, for that act the drawer of such cheque shall be deemed to have Committed an offence and in that case the drawer without prejudice to the other provisions of the said Act, shall 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. Before it can be deemed that the drawer has committed an offence, section 138 of the Negotiable Instruments Act, 1881, provides for fulfilment of the conditions mentioned in clauses (a), (b) and (c). It has been also provided that it shall be presumed unless the contrary is proved that the holder of such cheque received the cheque in the discharge of liability. The defences which may or may not be allowed in any prosecution for such offence have also been provided, to make the provision effective. The usual provisions relating to offences by companies have also been included in the said new chapter.

8. It would be beneficial at this stage to refer to sections 138 to 142 here which were inserted in the Negotiable Instruments Act, 1881, under Chapter XVII.

"138. Dishonour of cheques 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 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.

139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that 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 other liability.

140. Defence which may not be allowed in any prosecution u/s 138.- It shall not be a defence in a prosecution for an offence u/s 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

141. Offences by companies. - (1) if the person committing an offence u/s 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purposes of this section,-

(a) "company" means any body corporate and includes a firm or other association of Individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) no court shall take cognizance of any offence punishable u/s 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138;

(c) no court inferior to that of a Metropolitan Magistrate or a judicial Magistrate of the first class shall try any offence punishable u/s 138."

9. We would like to first examine the contention relating to the competence of Parliament to enact the aforesaid provisions under entries 45 and 46 of the List I in the Seventh Schedule to the Constitution. Entries 45 and 46 of the List I in the Seventh Schedule to the Constitution read as under :

"45. Banking.

46. Bills of exchange, cheques, promissory notes and other like instruments."

10. The principle in construing the words conferring legislative power is that the widest scope and amplitude should be given to the words occurring in the entries. Each and every word deserves to be given all comprehensive meaning embracing all matters which can be fairly and reasonably included therein. Entries in the Schedule have to be construed by giving the most liberal interpretation to the words. The entries in the list are not to be construed in a narrow or restricted meaning defeating the very constitutional purpose conferring legislative power on the Union or the State, as the case may be, under the Constitution.

11. In *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, it has been laid down (at page 2295) :

"The principle in construing words conferring legislative power is that the most liberal construction should be put on the words so that they may have effect in their widest amplitude. None of the items in the Lists is to be read in a narrow restricted sense. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

12. A Division Bench of this court examining the constitutionality of the provisions of section 138 of the Negotiable Instruments Act, 1881, in *Narayandas Bhagwandas Partani v. Union of India* [1993] MLJ 1229 also held that entries 45 and 46, respectively, refer to banking, bills of exchange, promissory notes and other instruments. It was further held in the said judgment that the impugned provisions would come well within a larger ambit of the entries and it is

connected with negotiable instruments, which clearly come within the aforesaid entries dealing with legislative power.

13. We respectfully agree with the observations of this court In *Narayandas Bhagwandas Partani v. Union of India*. [1993] MLJ 1229 and hold that entry 45 which speaks of banking and entry 46 which provides for bills of exchange, cheques, promissory notes and other like Instruments, are couched in widest form and are wide enough to include the power and competence of the Central Government to provide for penal action and penalties in case of dishonour of certain cheques for insufficiency, etc., of the funds in the account. The provisions of penalties in case of dishonour of certain cheques for insufficiency of funds in the account, prosecution and punishment relating thereto are ancillary and subsidiary to the provisions relating to cheque. Giving the words "banking, bills of exchange, cheques, promissory notes and other like instruments" occurring in entries 45 and 46 the meaning of widest amplitude, it can be safely said that the matters relating to penalties and prosecution in connection thereto are fairly and reasonably comprehended in such words. We have, therefore, no hesitation in holding that Parliament had power and competence to enact Chapter XVII containing sections 138 to 142 in the Negotiable Instruments Act. 1881, under entries 45 and 46 of List I in the Seventh Schedule to the Constitution.

14. Coming now to the next submission of learned counsel for the petitioners that the provisions contained in section 138 of the Negotiable Instruments Act, 1881, are rendered unconstitutional because of section 140 of the said Act, which provides that it shall not be a defence in a prosecution for an offence u/s 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section, it may be observed that section 138 of the Negotiable Instruments Act, 1881, provides for an offence which is not based on mens rea. Normally, in criminal law, existence of guilty intent is an essential ingredient of a crime and the principle is expressed In the maxim *actus non facit reum nisi mens sit rea*. This is a general principle. However, the Legislature can always create an offence of absolute liability or strict liability where mens rea is not at all necessary. Such a measure is resorted to in public interest and such laws of strict liability are justified and cannot be said to be unreasonable.

15. In *Sherras v. De Ruizen* [1895] 1 QB 918, Wright J. found that there three classes of cases where the Legislature normally enacts absolute prohibition. Wright J. thus held (at page 922) :

"One is a class of acts which, in the language of Lush J. in *Davies v. Harvey* 9 QB 433, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on the Revenue Statutes, e.g., *Attorney-General v. Lockwood* 9 MW 378, where the innocent possession of liquor ice by a beer retailer was held an offence. So under the Adulteration Acts, *Reg v. Woodrow* 15 M W 404 as to innocent possession of adulterated tobacco; *Fitzpatrick v. Kelly* LR 8 QB 337 and

Roberts v. Egerton LR 9 QB 494 as to the sale of adulterated food. So under the Game Acts, as to the innocent possession of game by a carrier : Rex v. Marsh 2 B C 717. So as to the liability of a guardian of the poor, whose partner, unknown to him, supplied goods for the poor : Davies v. Harvey LR 9 QB 433. To the same head may be referred Reg v. Bishop 5 QB D 259, where a person was held rightly convicted of receiving lunatics in an unlicensed house, although the jury found that he honestly and on reasonable grounds believed that they were not lunatics. Another class comprehends some, and perhaps all, public nuisances : Reg. v. Stephens LR 1 QB 702 where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and so In Rex v. Medley 6 C P 202 and Barnes v. Ahroyd LR 7 QB 474. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right : see per Williams and Willes JJ. in Morden v. Porter 7 C.B. 641; 29 M.C. 213, as to unintentional trespass in pursuit of game; Lee v. Simpson 3 C.B. 871 as to unconscious dramatic piracy and Hargreaves v. Diddams LR 10 QB 582, as to a bona fide belief in a legally impossible right to fish."

16. Section 138 of the Negotiable Instruments Act, 1881, can be said to be falling either in the class of acts which are not criminal in a real sense but are acts which in the public interest are prohibited under the penalty or those where although the proceedings may be criminal in form, they are really only a summary mode of enforcing a civil right. Enactment of sections 138 to 142 has been made to meet creditors' concern in a growing and developing country with a liberal economic policy and opening of more avenues for trade, commerce and industry. Creation of strict liability is an effective measure by encouraging greater vigilance to prevent the usual callous or otherwise attitude of drawers of cheques in discharge of debts or otherwise. The legislative object and purpose of section 138 is clearly to regulate financial promises in growing business, trade, commerce and Industrial activities of the country and the strict liability u/s 138 promotes greater vigilance in the matters covered by it. The incorporation of the said provision is designed to safeguard the faith of the creditor in the drawer of the cheque, which is essential to the economic life of a developing country like India. Its purpose would be defeated if in the prosecution of an offence u/s 138 of the Negotiable Instruments Act, 1881, the accused is permitted to raise the defence that he had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment. Monetary blood flow in the arteries of trade and business heart cannot be permitted to be calcified by the dishonour of cheques drawn by a debtor. If by the legal fiction, introduced by section 138 the dishonour of the 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 liability either because the amount of money standing to the credit of that account is insufficient or that it exceeds the amount arranged to be paid from the account by an agreement with that bank, is to be deemed as an offence, it is obvious that

for that absolute liability full effect must be given to the legal fiction.

17. Mere dishonour of a cheque for the reasons stated in section 138 of the Negotiable Instruments Act, 1881, is sufficient for commission of crime u/s 138 of the Negotiable Instruments Act, 1881, and it is not material whether he had reason to believe when he issued the cheque that the cheque may not be dishonoured on presentment. For an offence u/s 138 of the Negotiable Instruments Act, 1881, mens rea is not essential, which is clearly spelt out from a reading of section 138. The said provision clearly rules out mens rea as a constituent part of the crime. The position of law is that section 138 brings into operation the rule of strict liability and, therefore, there is nothing unreasonable, if it is provided in section 140 that certain defences may not be allowed in any prosecution u/s 138. The rigour of section 138 which creates dishonour of cheque for insufficiency, etc., of funds in the account as an absolute offence by legal fiction, is further maintained by making the provision in section 140 that it shall not be a defence in a prosecution for an offence u/s 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section and, therefore, cannot be said to be unreasonable or arbitrary.

18. The state of mind of the accused person, his knowledge or reasonable belief are not the necessary Ingredients of an offence u/s 138 of the Negotiable Instruments Act, 1881, and, therefore, the provision contained in section 140 of the Act that it shall not be a defence in a prosecution for an offence u/s 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment, cannot be said to be unreasonable and violative of article 14 of the Constitution of India.

19. According to section 26 of the Indian Penal Code, a person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing but not otherwise. This definition of "reason to believe" is to be read wherever in the Indian Penal Code, 1860, the phrase "reason to believe" occurs. Thus, wherever knowledge of or reason to believe a particular thing makes an offence under the Indian Penal Code, 1860, it has to be read for sufficient cause to believe that thing, but not otherwise. As stated above, the offence u/s 138 of the Negotiable Instruments Act, 1881, is committed by legal fiction on dishonour of cheque for insufficiency, etc., of the funds in the account when the cheque had been drawn for the discharge, in whole or in part, of any debt or liability. The provision contained in section 140 fortifies the intention of the Legislature that reasonable belief or state of mind of an accused person is not relevant for an offence u/s 138 of the Negotiable Instruments Act, 1881.

20. The argument of Mr. Chandurkar, learned counsel for the petitioners, in the petitions as aforesaid, that the circumstances which are beyond the control of the accused having taken place subsequent to the issuance of the cheque should be taken as a valid defence, whenever criminal liability is sought to be fastened, and section 140 of the Negotiable Instruments Act, 1881, that takes away that

right shows that the said provision is grossly arbitrary and unreasonable. Force majeure or vis major or other circumstances which are beyond the control of the accused do not affect the constitutionality or validity of section 138 or 140 of the Negotiable Instruments Act, 1881, because sufficient safeguards are provided in Chapter XVII and particularly in sections 138 and 142 of the Negotiable Instruments Act, 1881, and which are :

"Nothing contained in section 138 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."

21. Again, in section 142, it is provided that, -

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

(a) no court shall take cognizance of any offence punishable u/s 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable u/s 138."

Moreover, the Legislature has enacted this new offence u/s 138 in larger public interest for the laudable purpose that the drawer maintains faith of a creditor when he draws any cheque on an account maintained by him with the banker for payment of any amount of money for the discharge, in whole or in part, of any debt or liability, and the said provision creates strict liability. In *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, the Supreme Court has laid down that when examining the legislation from the angle of its vires the court has to be forward looking. The apex court thus observed that "a law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs."

22. Thus, we find that in enacting section 140 of the Negotiable Instruments Act,

1881, there is nothing legally or morally wrong or constitutional anathema in such an embargo as provided in section 140 and, therefore, we hold that sections 138 and 140 of the Negotiable Instruments Act, 1881, are constitutionally valid.

23. No argument was advanced before us as to how the provisions contained in sections 139 and 141 of the Negotiable Instruments Act, 1881, are unconstitutional or ultra vires the Constitution. Even otherwise we are satisfied that section 139, which raises a presumption that unless 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 other liability, shows that the said presumption is rebuttable and, therefore, constitutionally valid. Similarly, section 141 which provides for criminal vicarious liability is also a valid piece of legislation and does not suffer from any vice because it is provided in the said section that nothing contained in sub-section (1) of section 141 shall render any person liable to punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. This provision is enough safeguard protecting the right of a person, who is sought to be made vicariously liable, if he proves before the court that he had no knowledge of the offence or that he had taken all care, caution and due diligence to prevent the commission of such an offence.

24. Consequently, all the criminal writ petitions have no merit and are liable to be dismissed and the same are hereby dismissed. Rule in Criminal Writ Petition No. 68 of 1994 is discharged. No costs.