(2008) 03 MAD CK 0080

In the Madras High Court

Case No : Criminal O.P. No''s. 576 and 595 of 2008 and M.P. No''s. 1 and 2 of 2008

Mrs. Guruvinder Kaur, Prop. Guru International — APPELLANT

Vs

Surya Agencies and Sanova International — RESPONDENT

Date of Decision : 14-03-2008

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 357
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2008) 1 LW(Cri) 455 : (2008) 5 MLJ 1445

Hon'ble Judges : M. Jeyapaul, J

Bench : Single Bench

Advocate : V. Sairam, for the Appellant; R. Vasudevan, for the Respondent

Final Decision : Dismissed

Judgement

M. Jeyapaul, J.—These petitions are filed seeking to quash the criminal proceedings in C.C. Nos. 49 and 50 of 2007 on the file of the

learned Judicial Magistrate I. Walajah.

2. The petitioner is the accused in those cases filed by the respondent u/s 138 of the Negotiable Instruments Act.

3. The respondent/complainant has contended in the complaint laid u/s 138 of the Negotiable Instruments Act that the complainant supplied goods

to the accused on the strength of the promise made by them, but, the accused made only a meager payment towards the supply of goods. When

the complainant demanded payment continuously, the accused asked the complainant to deposit the subject cheques. The subject cheques have

been issued by the accused in continuation of the cheques given by the accused on earlier occasions. The subject cheques were deposited by the complainant on 17.11.2005 with the complainant''s bankers for realisation. But, the cheques were returned with an endorsement ""insufficient funds

in the accounts of the accused. The complainant sent a legal notice through their counsel demanding the accused to pay the amount in the subject

cheques within fifteen days from the date of receipt of the notice, but, the accused evaded to receive the notices sent to his addresses at Kolkatta

and also at Delhi. Therefore, the service of notice is deemed to be proper service. The complaint also seeks payment of Rs. 3,00,000/- from the

fine amount that may be imposed u/s 357 of the Code of Criminal Procedure. With the aforesaid pleadings and averments, the complaints were

lodged by the petitioner.

4. Heard the arguments of the learned Counsels appearing on either side.

5. Learned Counsel appearing for the petitioner would submit that there was virtually no pleading in the complaints that the cheques were issued

for the subsisting liability. There is no averment in the complaint that the accused failed to pay the cheque amount. In the last paragraph of the

complaint, the complainant has sought for only a sum of Rs. 3,00,000/- being the cheque amount. Therefore, the ingredients to charge a person u/s

138 of the Negotiable Instruments Act have not been averred to in the complaint. Therefore, the complaints are liable to be dismissed.

6. Learned Counsel appearing for the respondent/complainant would contend that the entire pleadings would prima facie show that there was

some commercial transaction between the parties and the accused issued cheques for the dues payable by the accused to the complainant. The

criminal prosecution was laid as against the petitioner/accused only after making sincere attempts to serve statutory notice on the accused. The

return of the notices addressed to the proper addresses of the accused shall be deemed to be proper service. The claim of lesser compensation

from out of the fine amount that may be levied u/s 357 of the Code of Criminal Procedure does not amount to restricting the liability of the accused

under the subject cheques.

7. The complaint would read that there had been business transaction between the complainant and the accused and the accused who received

supply of materials from the complainant did not make proper payment for the goods supplied. The issuance of the cheque has been adverted to in para 14 of the complaint. The averment as to the subsisting liability is found in paragraphs 2 and 3 of the complaint. Of course, the complainant has

not specifically stated in the complaint that the accused failed to pay the cheque amount on receipt of the statutory notice. Here is a case where the

statutory notices were sent to the addresses of the accused at Kolkatta and also at Delhi, but, quite unfortunately, they returned with the

endorsement ""addressee left for out Station"". Of course, the complainant has stated that the return of the notice with the aforesaid endorsement

shall be deemed as proper service of statutory notice. It is not the case of the complainant that the accused did in fact receive the statutory notice.

They have claimed that the return of the notice shall be deemed as proper service. When the accused has not received the notice and proper

service will have to be presumed, the question of making an averment that the accused did not make payment of the cheque amount inspite of

service of notice does not arise at all.

8. After all, the complainant has sought for a sum of Rs. 3,00,000/- from out of the fine amount that may be levied u/s 357 of the Code of Criminal

Procedure. Invocation of the aforesaid provision of law by the learned Judicial Magistrate while pronouncing the judgment of conviction is left to

his judicial discretion. The claim of the restricted amount therein as compensation does not militate against the prosecution launched by the

complainant for the offence u/s 138 of the Negotiable Instruments Act. Further, it also cannot be construed that the complainant has come out with

two contradictory version as to the cheque amount payable by the accused, inasmuch as the cheque amount is totally different from the amount

claimed by way of compensation u/s 357 of the Code of Criminal Procedure.

9. The Honourable Supreme Court, in Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, , has held as follows:

From the facts of the case alleged by the complainant gist of which has been noted earlier the position is clear that no exception can be taken

against the order of the Magistrate taking cognizance of the offence u/s 138 of the Negotiable Instruments Act against the appellants. Undisputedly

the cheques were drawn by the appellants for payment of certain amount of money due to the complainant, from the account in the bank and the

said cheques were dishonoured by the bank and the amount remained unpaid even after lapse of 15 days from the date of the notice issued by the

complainant after the cheques were dishonoured. Therefore, the ingredients of Section 138 being prima facie established from the complaint and

the documents filed with it, the Magistrate rightly took cognizance of the offence and issued summons to the appellants.

10. The process is issued taking cognizance of the offence u/s 138 of the Negotiable Instruments Act only after considering not only the complaint

but also the sworn statements and the documents produced by the complainant. Therefore, the Trial Court is called upon to weigh the entire

materials made available at the time of taking cognizance to find whether the ingredients have been made out prima facie to make out an offence u/s

138 of the Negotiable Instruments Act. The complaint u/s 138 of the Negotiable Instruments Act cannot be simply truncated and separately

scanned and assessed to come to a finding whether the ingredients are made out prima facie to constitute the offence u/s 138 of the Negotiable

Instruments Act. Even if a part of the ingredients is found lacking in the private complaint launched against the accused for offence u/s 138 of the

Negotiable Instruments Act, the Trial Court is empowered to peruse the sworn statement of the complainant and other witnesses and the

documents produced to support his allegation to come to a decision whether prima face case is made out u/s 138 of the Negotiable Instruments

Act.

11. It has been further held in the decision cited supra as follows:

On a reading of the provisions of Section 138 of the Negotiable Instruments Act it is clear that the ingredients which are to be satisfied for making

out a case under the provision are:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person

from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15

days of the receipt of the said notice.

12. In yet another case, viz., Saroj Kumar Poddar v. State NCT of Delhi (2007) 2 SCC (Cri) 135, the Honourable Supreme Court has observed

as follows:

For creating a criminal liability in terms of the said section, the complainant must show:

(i) that a cheque was issued;

(ii) the same was presented;

(iii) but, it was dishonoured;

(iv) a notice in terms of the said provision was served on the person sought to be made liable; and

(v) despite service of notice, neither any payment was made nor other obligations, if any, were complied within fifteen days from the date of receipt

of the notice.

13. Of course, the complainant will have to show prima facie that the cheques were issued and the same were presented, but, they were

dishonoured and a notice in terms of Section 138 of the Negotiable Instruments Act was served on the drawer of the cheques demanding payment

of the cheque amount within fifteen days from the date of receipt of statutory notice. As already held by this Court, the entire materials produced

by the complainant beforeever the complaint was taken on file will have to be thoroughly scanned to find whether all the aforesaid ingredients are

made out to prosecute the accused u/s 138 of the Negotiable Instruments Act. Firstly, it is found that there are averments in the complaint to show

that there was subsisting liability and the disputed cheques were issued by the accused. The statutory notice also was issued on the accused, but, quite unfortunately, the said notices were returned unserved with the endorsement ""the drawer had left for outstation"". Therefore, the complainant

had no occasion to aver in the complaint that the accused did not make payment of the cheque amount within fifteen days from the date of receipt

of the statutory notice. Even otherwise, the complaint, the sworn statement of the complainant and the supportive documents produced by the

complainant would go to show prima facie that all the ingredients u/s 138 of the Negotiable Instruments Act have been prima facie made out.

14. It is true that this Court in K. Devaraj Vs. T.K. Koya, has held that when there was no averment in the complaint about the factum of non

payment of the cheque amount within fifteen days from the date of receipt of the notice by the complainant, the complaint sans the aforesaid

essential ingredients u/s 138 of the Negotiable Instruments Act is liable to be quashed.

15. As observed by this Court, there was no occasion for the complainant to speak about the non payment of the amount under the cheque within

fifteen days from the date of receipt of notice by the accused, as the notices sent to both the addresses of the accused were returned with the

endorsement ""the addressee left for outstation"". Further, the complaint cannot be separately perused to come to a decision whether the ingredients

u/s 138 of the Negotiable Instruments Act were made out. The Honourable Supreme Court has held that not only the complaint but also the sworn

statement and the supportive materials produced by the complainant will have to be perused carefully to come to a decision whether all the

ingredients are made out to rope in the accused for offence u/s 138 of the Negotiable Instruments Act.

16. It has also been held in the authority reported in M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, that

even in a case where there was no averment as to the subsisting liability and an enforceable debt for the issuance of the subject cheques in the

complaint filed by the de facto complaint, inasmuch as there is a legal presumption u/s 138 of the Negotiable Instruments Act, the complaint cannot

be quashed on that score.

17. It is obligatory on the part of the court to presume the liability of the drawer for the amount of the cheque in every case where the factual basis

is established. See Hiten P. Dalal Vs. Bratindranath Banerjee, .

18. To sum up, it is found that by and large, the ingredients to launch the prosecution u/s 138 of the Negotiable Instruments Act have been made

out in the complaint. The cumulative reading of the complaint, sworn statement of the complainant and the supportive materials produced by the

complainant would go to show prima facie that a case u/s 138 of the Negotiable Instruments Act has been made out. Lack of pleadings as to the

subsisting liability for the issuance of the cheque cannot be a ground to quash the criminal proceedings. No necessity has arisen for the complainant

to aver in the complaint that the accused failed to pay the cheque amount as the statutory notice was returned with the endorsement ""the addressee

left for outstation"". The claim of lesser compensation amount in the last portion of the complaint or the factual mistake as to the cheque amount in

the last paragraph of the complaint cannot be a valid ground for seeking quashment of the criminal proceedings.

19. The petitioner has come out with these petitions seeking quashment without any legal basis. Therefore, the petitions fail and the same stand

dismissed. The connected Miscellaneous Petitions also stand dismissed.