**(2009) 10 MAD CK 0331**

**In the Madras High Court**

**Case No :** Criminal Original Petition (MD) No. 5893 of 2004 and Criminal M.P. (MD) No. 1089 of 2005

N. Rajangan APPELLANT

Vs

Centurian Bank Ltd. RESPONDENT

**Date of Decision :** 13-10-2009

**Acts Referred:**
Criminal Procedure Code, 1973 (CrPC) — Section 204
Negotiable Instruments Act, 1881 (NI) — Section 138

**Citation :** (2010) 1 LW(Cri) 831 : (2011) 1 RCR(Criminal) 5

**Hon'ble Judges :** Raja Elango, J

**Bench :** Single Bench

**Advocate :** S. Natesh Raja, for B.S. Gnanadesikan, for the Appellant; P. Subramanian, for the Respondent

**Final Decision :** Allowed

# Judgement

Raja Elango, J.—The Petitioner approaches this Court with a prayer to quash the case in S.T.C. No. 486 of 2004 on the file of the Judicial Magistrate No. III, Madurai.

2. The brief facts of the case are as follows:

The Petitioner herein is an accused and the defacto complainant is the Respondent herein. The Petitioner has availed a loan for a sum of Rs. 6,00,000/- (Rupees six lakhs) to purchase lorry bearing Registration No. TN 69 E 4657 as per hypothecation agreement No. 625053 from the Respondent bank. As per the schedule of payment given by the Respondent herein, the Petitioner has to pay a sum of Rs. 21,514/- for 35 equally monthly instalments. With a view to discharge his liability, the Petitioner had given 35 post dated cheques bearing Nos. 448001 to 448035 drawn on City Union Bank Ltd., Tuticorin to the Respondent Bank.

3. Since the Respondent bank has withheld an amount of Rs. 95,000/- out of Rs. 6,00,000/-, the Petitioner stop the payment of cheques and thereafter the

Respondent disbursed the balance amount of Rs. 95,000/-. The Respondent contrary to the schedule of payment has tendered the cheque bearing No. 448009 dated 23.04.2001 and cheque No. 448010 dated 14.05.2001 instead of 29.05.2001. Since the Petitioner was availing over draft facility in bank, the cheques were honoured even though it was tendered on prior to the actual schedule date. But, the Respondent bank has forcibly taken custody of the lorry bearing No. No. TN 69 E 4657. The Petitioner was not able to repay the loan amount as per the schedule.

4. Further, it is the case of the Petitioner that the Respondent bank has sold the vehicles belong to the Petitioner and adjusted the sale proceeds in the loan amount and informed the same to the Petitioner. Hence, the Petitioner is not liable to pay any amount and there is no liability exists at the time of presenting the impugned cheques.

5. The Respondent had filed a private complaint u/s 138 of Negotiable Instruments Act before the Judicial Magistrate No. 1, Madurai, where the same was taken cognizance in C.c. No. 294 of 2003. Thereafter, the Petitioner filed a petition u/s 204 Code of Criminal Procedure to rescind the process as there is no legal liability exists, which was dismissed by the learned Judicial Magistrate concerned. Hence, the Petitioner approaches this Court to quash the complaint filed in S.T.C. No. 486 of 2004.

6. The main contentions raised by the learned Counsel appearing for the Petitioner is that as per the hypothecation agreement between the Petitioner and Respondent in oder to settle the liability, the Petitioner issued cheques for equal monthly instalments and he could not able to honour the same for some time. In view of the failure to comply with the payment for each and every month, the Respondent herein seized the vehicle and also repossessed the same. Whereas, the cheques were given as per the earlier agreement in order to settle the liability, post dated cheques were given by the Petitioner herein.

7. The learned Counsel appearing for the Petitioner further submitted that due to the failure on the part of the Petitioner, the Respondent repossessed the vehicle and also sold the same in auction and the sale proceeds were also received by the Respondent herein.

8. Further, the learned Counsel appearing for the Petitioner submitted that the said earlier post dated cheques, on the basis of the amount liable to be paid at the time of agreement, cannot be utilised by the Respondent herein after the recovery of the vehicle and the same is disposed of and the Respondent received the entire sale proceeds.

9. According to the learned Counsel appearing for the Petitioner, after the repossess and sale of the vehicle, the amount payable to the Respondent is automatically varied and the cheques issued in connection with the earlier liability cannot be used by the Respondent herein. The learned Counsel appearing for the Respondent submitted that even though the vehicle is re-

possessed and sole in auction, the remaining amount can be realised by way of depositing the post dated cheques issued by the Petitioner herein.

10. The learned Counsel appearing for the Petitioner relied on the decision of the Kerala High Court reported in Sudha Beevi Vs. State of Kerala, , wherein of the ratio laid down by the High Court as follows:

Para 20. A perusal of various clauses in Annexure A8 agreement, in particular Clauses 8 and 9, would clearly show that the owner is not entitled to present, any of the post-dated cheques for encashment after determination of the agreement, especially after the vehicle was re-possessed by him. Even though the post-dated cheques issued by the hirer were supported by consideration at the time when they were issued, they had ceased to be so when the vehicle was re-possessed. The consideration had failed subsequently. Therefore, I have no hesitation to hold that, the cheque dated September 3, 1999 which was the subject matter of Annexure A1 complaint was not supported by any consideration, since the agreement had stood "determined ipso facto" and also since the owner had admittedly re-possessed the vehicle even before the cheque was presented for encashment. Thus, there is no doubt, that by effecting seizure of the vehicle, the owner had exercised the option available to him under the agreement. The post-dated cheques in the hands of the owner had become instruments for which consideration had failed. In that view of the matter, no offence punishable u/s 138 of the Act would be attracted, since it is trite that in order to attract the above penal provision, the "debt or other liability" must be a "legally enforceable debt or liability". If the negotiable instrument is not supported by consideration, there is no question of the provisions of Section 138 of the Act being attracted.

21. There is yet another reason to take the above view in this case. It is admitted by the complainant that the seized vehicle was sold later and the sale price was adjusted towards the liability payable by the hirer. It is on record that Respondent No. 2/complainant has already filed a suit before the High Court of Madras (Annexure A9) for recovery of a total sum of Rs. 12,84,503/- with interest and costs. The plaint claim includes the alleged balance amount payable under the agreement after adjusting the sale proceeds of the vehicle and all other expenses in connection with the transaction between the parties. Thus it is clear that the complainant/owner has already initiated steps to recover the liabilities from the hirer as provided under Clause 9 of the agreement. In that view of the matter, the criminal proceedings initiated against the Petitioner cannot be sustained.

11. In contra, the learned Counsel appearing for the Respondent submitted that the said decision is applicable while there is a hire purchase agreement. But, whereas, here, the agreement is in the nature of hypothecation.

12. Heard the submission made by the learned Counsel appearing for the Petitioner as well as the learned Counsel appearing for the Respondent.

 

13. Considering the facts and circumstances of the case, this Court is of the view that where it is a hire purchase agreement or purchase on the basis of hypothecation, the same is laid down by the Kerala High Court based on the following principles:

(i) The post-dated cheques issued by the hirer were supported by consideration at the time when they were issued, they had ceased to be so when the vehicle was re-possessed. The consideration had failed subsequently.

(ii) The post-dated cheques in the hands of the owner had become instruments for which consideration had failed.

(iii) As per Section 138 of Negotiable Instrument Act, in order to attract the penal provision, the "debt or other liability" must be a "legally enforceable debt or liability". If the negotiable instrument is not supported by consideration, there is no question of the provisions of Section 138 of the Act being attracted.

14. In view of the same, this Court is also of the view that once the financier had exercised the option of seizure of the vehicle, the postdated cheques obtained from the purchaser cannot be presented for encashment after the seizure. The owner has to take recourse to other legal remethes for recovery of the balance amount. If and when the vehicle is soled subsequently, the owner can recover the balance amount for adjusting the sale proceeds of the vehicle. Of course, in the post-seizure scenario, it may be open to the parties to agree upon a new schedule of payment or restructuring of the agreement concerned. So, the present case filed on the basis of the postdated cheques issued by the Petitioner is not attracted the offence u/s 138 of Negotiable Instruments Act, and hence, the same is liable to be quashed.

15. Accordingly, this criminal original petition is allowed and the case in S.T.C. No. 486 of 2004 on the file of the Judicial Magistrate No. III, Madurai. Consequently, connected miscellaneous petition is closed.