
(1996) 02 MAD CK 0048
In the Madras High Court
Case No : Writ Petition No. 370 of 1996

R. Sankaralingam

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 14-02-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 243

Evidence Act, 1872 — Section 101, 4

Negotiable Instruments Act, 1881 (NI) — Section 119, 138, 139

Citation : (1996) 86 CompCas 709 : (1996) CriLJ 3387 : (1996) 1 LW(Cri) 320 : (1997) 1 RCR(Criminal) 15

Hon'ble Judges : S.M. Abdul Wahab, J;M. Srinivasan, J

Bench : Division Bench

Advocate : S.K. Sundaram, for the Appellant;

Judgement

Srinivasan, J.—The writ petition is for a declaration that section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the

Act"), is unconstitutional, being opposed to the basic structure of the Constitution of India found in the Preamble thereto, guaranteeing social and

economic justice. In the affidavit filed in support of the writ petition, the following averments are found : For the purpose of a civil suit in which the

petitioner's wife is the plaintiff, at her request the petitioner had given seven post-dated blank cheques to the fifth respondent to enable him to lend

a sum of Rs. 20,000 to the petitioner's wife. The cheques were not supported by any consideration. They were meant only to be security for due

repayment. The petitioner also handed over copies of documents of title to the fifth respondent in respect of certain property with reference to

which the petitioner's wife has filed the suit. It was specifically understood that the cheques having been handed over as security, in the event of

default in payment by the petitioner's wife, they should not be used for purposes of any criminal proceedings u/s 138 of the Act. A total sum of Rs.

10,000 had been paid by the petitioner and his wife to the fifth respondent for which he agreed to give credit. The fifth respondent filed C. C. No.

5577 of 1992 before the VIIth Metropolitan Magistrate, George Town, Madras, who is the third respondent herein. He also filed a civil suit O. S.

No. 7972 of 1993 on the file of the IVth Assistant Judge, City Civil Court, Madras, for recovery of Rs. 7,000 covered under one of the seven

cheques given to him, he has also filed two other criminal cases viz., C. C. Nos. 1793 and 1794 of 1993 on the file of the third respondent relating

to two other cheques.

2. As the onus of proof relating to the cheques involved in the criminal cases to show that no consideration ever passed for the cheques is on the

petitioner as per section 139 of the Act in a case instituted u/s 138 of the Act, the petitioner filed a petition before the third respondent u/s 243(2)

of the Criminal Procedure Code, 1973. The third respondent has, without considering the said petition, issued a non-bailable warrant against the

petitioner. Section 138 of the Act gives the holder of a cheque a preferential and unchecked right to institute original proceedings against the

drawer, even without proving actual consideration towards the cheque. On the other hand, the onus of proving passing of no consideration viz.,

proof of a negative is placed on the unfortunate drawer of the cheque. Already in section 119 of the Act, if the drawer of a cheque admits his

signature in the cheque, it is for him to prove that no consideration passed. The fifth respondent having admitted taking a promissory note from the

petitioner for which he has also taken a cheque from him, the petitioner is sought to be made liable for one and the same transaction before two

forums, one the civil court and the other the criminal court. At least if the petitioner filed by the petitioner to send for the Income Tax returns and

assessment orders of the fifth respondent filed before the third respondent had been taken on the file by the third respondent, the petitioner would

have discharged the onus of proof as per section 139 of the Act that no consideration ever passed under the cheques and that the fifth respondent

had no capacity to lend money to the petitioner. Unfortunately, the provisions of section 138 of the Act are designed in such a way that it gives an

upper hand to the holder of a dishonoured cheque and the formality of getting endorsement of dishonour is made so easy to deny the right of the drawer to defend the action. Under the general law of accounting between a creditor and debtor though the onus of proof of discharge is also on the debtor, there is a departure in the procedure regarding discharge of the debt in a proceeding initiated u/s 138 of the Act. There is another feature which has to be considered. In a criminal case u/s 138 of the Act, the only mental satisfaction of the complainant in the event of his case being accepted is that he has successfully put the debtor in jail, which is nothing but a sinister pleasure. This is because he has to again approach the civil court to recover the money from the debtor. The provision in section 138 of the Act is, only a punitive measure and not a preventive one. The question is whether a creditor simply because he is holding an instrument and without proving actual consideration for the said instrument, can be allowed to initiate criminal proceedings against the drawer just for his mental satisfaction. The petitioner is, therefore, praying for a declaration that section 138 of the Act is unconstitutional which is opposed to the basic structure of the Constitution of India found in the Preamble thereto, guaranteeing social and economic justice.

3. Learned counsel for the petitioner contended that the basic principle of criminal law is that any person accused of an offence is presumed to be innocent and until he is proved to be guilty of the offence, he cannot be punished. It is contended that the burden of proof has been shifted by sections 138 and 139 of the Act on to the accused which is against the fundamental principle of criminal law. It is, therefore, argued that such a provision is against the basic principles of the Constitution which are guaranteed in the Preamble thereto. According to learned counsel, the shifting of the burden on to the drawer of the cheque would amount to denial of justice, social, economic and political. It is also contended that in such proceedings, the criminal court refuses to grant petitions u/s 243 of the Code of Criminal Procedure, 1973, under which the accused seeks to summon certain documents from third parties to discharge his burden. According to learned counsel, the same will invalidate section 138 of the Act itself.

4. We are unable to accept any of the above contentions. Sections 138 and 139

of the Act are in the following terms :

138. 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. 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.

5. For an action u/s 138 of the Act, there are certain conditions precedent : (1) a cheque issued by a person must have been presented to the bank

within the period of validity and it must have been dishonoured; (2) after such dishonour, the payee or the holder shall make a demand for the

payment of the amount 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; (3) after receipt of such notice, the drawer of such cheque fails to make payment of the amount of money to the payee or the holder. Only if the above conditions are satisfied an action can be taken u/s 138 of the Act by which the drawer of the cheque shall be deemed to have committed an offence. If such an action is taken, there is a presumption u/s 139 of the Act in favour of the holder. The presumption is to the effect that the holder of the cheque received the cheque of the nature referred to in section 138 of the Act for the discharge, in whole or in part, of any debt or other liability.

6. We do not find any invalidity in the section as such. The section does not run counter to the basic principles of criminal law that an accused must be presumed to be innocent. u/s 138 of the Act, when an action is taken against a particular person, there are certain admitted facts and circumstances which have been referred to above. On such admitted facts and circumstances, the law raises a presumption that the accused is guilty. Then the burden shifts on to the accused to prove that he is not guilty by establishing that the cheque was not supported by any consideration and it was not in discharge of any debt. Thus, section 138 and section 139 of the Act will come into play only on the existence of certain basic facts and circumstances. In such a case, it cannot be contended that the general fundamental rule that a person is presumed to be innocent unless and until he is proved to be guilty, cannot apply.

7. Presumptions are not unknown to law. In the Evidence Act, there are several provisions for enabling the court to raise presumption. In fact, section 4 of the Evidence Act defines the terms ""may presume"", ""shall presume"" and ""conclusive proof"". In certain cases, a statute can declare that a particular fact is conclusive proof of another fact and in those cases, the court can regard the fact as proved when the other fact is established. In such case, the court shall not allow the evidence to be given for the purpose of disproving it. Sections 138 and 139 of the Act are only in consonance with the definition contained in section 4 of the Evidence Act.

8. Our attention is drawn to section 101 of the Evidence Act. Under that section, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that

those facts exist. Illustration (a) to the section refers to a person who wants the court to give judgment that another person shall be punished for a crime which has been committed. In such cases, it is for the person who makes a complaint to prove that the other person has committed the crime. Neither the illustration nor the section will help the petitioner in this case. As pointed out already, the law can impose presumptions when certain basic facts and circumstances exist. Sections 138 and 139 of the Act are based on such presumptions which arise on the existence of certain basic facts and circumstances.

9. The second contention is without any merit. According to learned counsel, an application was filed u/s 243(2) of the Code of Criminal

Procedure, 1973, for summoning the Income Tax returns of the fifth respondent. The Magistrate has refused to entertain the same. Just because in

the particular case the Magistrate has not chosen to grant the prayer made by the petitioner, it will not invalidate either section 138 of the Act or

section 243 of the Code of Criminal Procedure, 1973. If in the particular case, the Magistrate has committed an error in not granting the prayer of

the petitioner, several remedies are available to the petitioner to challenge such an action on the part of the Magistrate. That will not be a ground to

declare section 138 of the Act as unconstitutional. In fact, section 243 of the Code of Criminal Procedure, 1973, does not exclude proceedings u/s

138 of the Act. Nor does section 138 of the Act exclude the applicability of section 243 of the Code of Criminal Procedure, 1973. It is open to

the petitioner to take appropriate proceedings in order to set right the action of the Magistrate, if according to the petitioner, the Magistrate has

acted erroneously.

10. We do not find any justification whatever to entertain this writ petition. In our opinion, there is no substance in any of the contentions urged by

the petitioner.

11. The writ petition is dismissed.