
(2002) 08 MAD CK 0238
In the Madras High Court
Case No : S.A. No. 1755 of 1991

Radha Rukmini Ammal

APPELLANT

Vs

Swaminatha Mudaliar Sons Co. and Sri.Sarada Tex.

RESPONDENT

Date of Decision : 08-08-2002

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 35, 36

Citation : (2004) 2 BC 478 : (2002) 112 CompCas 383 : (2002) 4 LW 541 :
(2002) 3 MLJ 436

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : R. Subramanian, for Hema Sampath, for the Appellant; T. Srinivasa Raghavan, for the Respondent

Final Decision : Allowed

Judgement

Prabha Sridevan, J.—The plaintiff, whose decree for recovery of Rs.17,590/- was reversed by the appellate Court on the ground that the 2nd defendant / 1st respondent is not liable to satisfy the suit claim, has filed the present second appeal.

2. The two respondents had business transactions with each other. The 1st respondent was due to pay some amount to the 2nd respondent. Therefore, the 1st respondent issued on 15.1.1987, a post-dated cheque bearing the date 28.2.1987, Ex.A2 for a sum of Rs.15,000/- drawn on Madurai Central Bank. The 2nd respondent endorsed it in favour of the appellant herein and received a cheque for Rs.14,520/-. This cheque was encashed by the 2nd respondent. When the appellant presented the cheque, Ex.A2, it was dis-honoured because the 1st respondent had issued instructions to stop payment. Notice of dis-honour was given and the suit was filed. The 2nd respondent remained ex parte. The 1st respondent claimed that on account of non-delivery of the goods, which is subject matter of the transaction between the respondents 1 and 2, instructions to stop payment was issued. These transactions are between the respondents

and the appellant is a third party to this contract. There is no privity of contract between the appellant and the 1st respondent and any amount must be claimed only from the 2nd respondent and not from the 1st respondent. The trial Court decreed that suit as prayed for. The appellate Court held that under the provisions of the Negotiable Instruments Act (hereinafter referred to as "the Act"), the 1st respondent will be liable only in the absence of a contract to the contrary, but since there was a contract to the contrary between the 1st and the 2nd respondents, the 1st respondent is not liable to pay any amount.

3. The learned counsel for the appellant raised as questions of law, the applicability of Sections 35 and 36 of the Negotiable Instruments Act. The learned counsel submitted that u/s 35 of the Negotiable Instruments Act, the endorser was liable to pay, subject to due notice of dishonour. u/s 36, every prior party to a negotiable instrument is liable to a holder in due course until the instrument is duly satisfied. Learned counsel for the appellant also submitted that the appellant is a holder in due course and therefore, reliance by the appellate Court on Section 37 to absolve the liability of the 1st respondent is not in accordance with law. According to the learned counsel, the provisions "contract to the contrary" will not refer to the contract or failure of contract between the 1st and the 2nd respondent. The learned counsel also submitted that Ex.A6 which is the reply of D2 does not refer to any contract to the contrary and therefore, it was not open to the appellate Court to cite that as a reason for rejecting the suit claim since it was not pleaded. Learned counsel relied on the case of M/s. U. Ponnappa Moothan Sons, Palghat Vs. Catholic Syrian Bank Ltd. and others, to show that unless there is patent gross negligence on the part of the holder in due course, his claim cannot be negated.

4. Learned counsel for the 1st respondent on the other hand submitted that the business transaction between the 1st and the 2nd respondent was a time bound contract and the failure on the part of the 2nd respondent to supply the goods would be a contract to the contrary for denying the relief prayed for by the appellant. The learned counsel would also submit that a post-dated cheque is not "a cheque" since a cheque by definition, is an instrument that is payable on demand. The definition of "a cheque" and "a bill of exchange" makes it clear that this is an intrinsic distinction. Therefore, according to the learned counsel, the word "cheque" in Section 9 which deals with the "Holder in due course" cannot be applied to a post-dated cheque. The learned counsel referred to the case of ANIL KUMAR SAWHNEY vs. GULSHAN RAI reported in Vol.79 Company cases 150, where it was held that a post-dated cheque becomes a cheque only from the date shown on the face of the said cheque. For these reasons, the learned counsel would submit that the substantial question of law will not apply to this case and further, the appellant herself cannot be granted any relief since she is not a holder in due course.

5. The appellate Court had dismissed the suit as against the 2nd defendant only on the ground that the appellant did not know the nature of the contract inter se

the respondents herein. With regard to the supply of goods between the 1st and 2nd defendants, there had been a dispute and on account of non-supply within a particular date, the 2nd defendant had issued "stop-payment" instructions. Therefore, according to the lower appellate Court, this contract was not known to the appellant and therefore, this was a contract that would absolve the 2nd defendant of his liability under the instrument and as per Section 37, he would be liable only in the absence of a contract to the contrary. The existence of this contract was not known to the appellant and therefore, he filed the suit against both the defendants though he was not entitled to proceed against the 2nd defendant.

6. Section 35 of the Act deals with the liability of an endorser and his liability to compensate every subsequent holder exists in the case of dis-honour by the drawee, acceptor or the maker in the absence of a contract to the contrary. In this case, we are not concerned with Section 35 because it is the 1st defendant who is the endorser and not the 2nd defendant. The 2nd defendant is the maker of the cheque.

7. Section 36 of the Act makes every prior party to an instrument liable to a holder in due course until the instrument is duly satisfied. The comparison of Sections 35 and 36 would show that while Section 35 subjects the liability to any contract to the contrary, Section 36 has no such qualifying phrase and a holder in due course of a bill or note may recover the amount due on the instrument notwithstanding the existence of facts and circumstances attacking the validity of the transaction between the prior parties even including want of consideration.

8. In Bhashyam & Adiga's "The Negotiable Instruments Act", 16th Edition at page 343, it is observed thus:

" So great is the protection extended to a bona fide holder for value of a negotiable paper that it is said that the tendency of Courts even in doubtful cases seems to be in favour of sustaining its validity and enforceability in the hands of such a holder, for it would seriously embarrass mercantile transactions and expose traders and merchants to great risks, and the convenience and necessities of commerce require that the negotiable instrument should be protected by such a rule."

9. Section 37 deals with the liability of the maker, drawer and acceptor of a negotiable instrument as principle debtors and sureties vis-a-vis each other in the absence of a contract to the contrary. This section also does not apply to this case.

10. The question was raised as to whether the appellant can even be held to be a holder in due course when the cheque is a post-dated cheque.

11. In ANIL KUMAR SAWHNEY vs. GULSHAN RAI 1994 Com Cas 150, the Supreme Court held while dealing with a question u/s 138 of the Negotiable Instruments Act, that an offence u/s 138 of the Act would be committed only

when a cheque drawn for payment of any debt or liability is returned by the Bank unpaid and the drawer fails to make payment of the said amount within 15 days of the notice of dis-honour and that for conviction of this offence. The main criterion is that the cheque should have been returned unpaid and so it was held that a post-dated cheque which is not payable on demand till a particular date is not a cheque in the eyes of law till the date on which it becomes payable on demand and that the net result is, a post-dated cheque remains a bill of exchange till the date written on it.

12. In this case, the appellant had presented the cheque, Ex.A2 only after the date which it bore and therefore, it cannot be denied that when it was presented for encashment, it was a cheque. The definition of a cheque under the Act is "a bill that is drawn on a specified Banker and not expressed to be payable otherwise on demand". Therefore, the hallmark of a cheque is that it must be payable instantly on demand. A post-dated cheque is not prohibited by the Act. While a post-dated cheque may be deemed to be a bill until the date which it bears, it cannot be denied that it becomes due on the date it bears and also payable on demand and therefore is a cheque. The Act does not say that a cheque should be payable on demand on the date which it is made or drawn regardless of the date it bears. It makes no difference whether a cheque is ante-dated or post-dated. It is payable on demand on the date which it bears and at any time thereafter until it becomes stale. It is found in Bhashyam & Adiga's "The Negotiable Instruments Act", 16th Edition at page 122 that "the mere fact that the date of payment of a cheque is postponed to a future date does not make the cheque payable otherwise than on demand". Therefore, merely because on the date on which it was issued it was post-dated, it cannot be contended that even after the date which the instrument bears, it is still a non-cheque.

13. In *S. Hajee Mohamed Haneef Saheb and Co. Vs. S.S. Abu Bucker and Others*, , it was held thus:

"A post-dated cheque is as much negotiable as a cheque for which payment is due immediately on presentation, and there is no authority for holding that a person in whose favour such a cheque is endorsed before the date of payment is not a holder in due course or that such an assignment or endorsement is not enforceable at the instance of the assignee or endorsee."

14. In *FULCHAND vs. LAXMINARAYAN* AIR 1952 Nag 308, a Division Bench of Nagpur High Court held that there is no prohibition in the Indian Act against post-dating and a promissory note which is post-dated is an effective negotiable instrument though it cannot be sued upon till after that date passes. Therefore, the contention of the respondent relying on *ANIL KUMAR SAWHNEY vs. GULSHAN RAI* (1994) Comp Cas 150 that a post-dated cheque is not a cheque and therefore a person in possession of a post-dated cheque cannot be a holder in due course must be rejected outright.

15. In fact, Section 9 which deals with holder in due course reads that it means "any person who for consideration became the possessor of a promissory-note, bill of exchange or cheque, if payable to the bearer". Even if one had to accept the proposition placed by the learned counsel for the respondent, still, the conclusion is that the appellant was holding the instrument as a bill until 28.2.1987 and on the date when it was presented for payment, it was as good as a cheque as any, satisfying the conditions of Section 6 of the Act. So she was any way a holder in due course.

16. As regards the question relating to defect in title or contract to the contrary, these points cannot be raised to deny the appellant, his claim against the respondent.

17. In *M/s. U. Ponnappa Moothan Sons, Palghat Vs. Catholic Syrian Bank Ltd. and others*, relied on by the appellant, the Supreme Court considered in detail as to what is the degree of negligence which would negative the claim of a holder to be a holder in due course. It was observed that a holder in due course should have acquired the cheque without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. It was also observed therein:

"It is left to the Court to decide whether the negligence on the part of the holder is so gross and extraordinary as to presume that he had sufficient cause to believe that such title was defective."

18. In *Raghavji Vizpal Vs. Narandas Parmanandas*, , it was observed thus:

"The test of good faith in such cases is thus: Regard to the facts of which the taker of such instruments had notice is most material whether he took in good faith. If there be anything which excites suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicion aside without further inquiry."

and in *Durga Shah Mohan Lal Bankers Vs. Governor General in Council and Others*, , it was held thus:

"The provision that the person must have become possessor of a cheque "without having sufficient cause to believe" is more favourable to the person who claims to have become holder in due course than the words "acting bona fide". His claim would be defeated only if it is found that there was sufficient cause for him to believe that a defect existed. If he fails to prove bona fides or absence of negligence, it would not negative his claim. There must be evidence of positive circumstances on account of which he ought to have believed that some defect existed."

19. There is nothing to show that the appellant had sufficient cause to believe that the 1st respondent's title was defective. The legal position in *Chitty's Law of Contracts* was extracted in the above case.

"While the doctrine of constructive notice does not apply in the law of negotiable instruments the holder is not entitled to disregard a "red flag" which has raised a suspicions."

20. The failure of the contract which was dealt with in great detail by the appellate Court was not something that the appellant could have known even with due diligence. In fact S. Hajee Mohamed Haneef Saheb and Co. Vs. S.S. Abu Bucker and Others, , dealt with a similar situation. Two cheques were issued by the 2nd defendant in favour of the 1st defendant just like this case and the 1st defendant endorsed them to the plaintiffs. They were also post-dated cheques dated 11.6.1951, drawn on 24.4.1951 and endorsed on 27.4.1951. When they were presented for payment on the due date, they were dishonoured. The trial Court held that the plaintiffs were holders in due course and decreed the two suits. The 2nd defendant preferred the appeals and it was contended that the very fact that the cheques were post-dated should have put the plaintiffs on notice of the circumstances under which they came into existence. It was contended that the cheques should have been presented only after all the goods ordered were delivered to the 2nd defendant, but the defendant himself gave evidence that the plaintiffs were not aware of any such arrangement. In this case, there is not even the pleading that the plaintiff knew that the goods were rejected. It merely says that since the 1st defendant did not supply the goods in time, the 2nd defendant rightly asked the Bank to stop payment and the 1st defendant was intimated in advance and that it is perfectly legal and the plaintiff has no right to question the same. From the evidence of D.W.1, who works for the respondent herein, the cheque, Ex.A2 was given on 15.1.1987, post-dating it on 28.2.1987 with the understanding that the goods must be supplied by 15.2.1987. The cheque was endorsed in favour of the appellant on 21.1.1987, who issued his cheque to the 1st defendant and which had been duly encashed. Therefore, even assuming that the so-called understanding between the defendants is true, even before the alleged supply or non-supply on 15.2.1987, the appellant had become a holder in due course and could not have had any notice of defect in the title. As stated earlier, there is neither pleading, nor proof that the appellant was aware of this alleged understanding. No "red flag" was flying before the appellant's eyes to stop him in his track. In fact, both in respect of the legal position regarding post-dated cheques holders in due course, the decision in S. Hajee Mohamed Haneef Saheb and Co. Vs. S.S. Abu Bucker and Others, is almost identical to the case on hand. There is no dispute regarding issue of due notice of dis-honour. Therefore, the question of law relating to Section 36 of the Negotiable Instruments Act must be answered in favour of the appellant.

21. The judgment and decree of the appellate Court is set aside. The judgment and decree of the trial Court stands confirmed. The appeal is allowed. No costs.