

(2000) 07 BOM CK 0052
In the Bombay High Court
Case No : Writ Petition No. 744 of 2000

Shirish Suresh Welling

APPELLANT

Vs

Smt. Sangeeta Avinash Marathe and Others

RESPONDENT

Date of Decision : 05-07-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 233, 234, 235
Criminal Procedure Code, 1973 (CrPC) — Section 395
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2001) 2 BOMLR 99 : (2001) 2 MhLj 94

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : Mr. P. Janardah, Addl. A.G. and Ms. Usha Kejariwal, app, Mr. Sakhardande and Mr. Prabhavalkar, for the Appellant; Mr. H.V. Mehta, Mr. V.M. Kanade, for the Respondent

Judgement

T. K. Chandrashekhara Das, J.—This writ petition is filed challenging the order passed by the learned Magistrate, First Class, Link Court, Pune, which was confirmed by the judgment of the 7th Additional Sessions Judge, Pune in Criminal Revisional Application No. 581/99.

2. The complaint was filed against the petitioner by Smt. Sangeeta Avinash Marathe u/s 138 of the Negotiable Instruments Act, for having dishonoured the cheque issued by the petitioner in the name of Mrs. Sangeeta Avinash Marathe. While that complaint was pending, an application was made by the petitioner u/s 395 of the Cr. P. C. requesting the Magistrate to refer the matter to the High Court as section 138 of the N. I. Act is violative of Article 14 of the Constitution of India. The learned Magistrate after hearing the parties, has come to the conclusion that the section cannot be said to be invalid or unconstitutional as offending Article 14 of the Constitution of India, and therefore it need not be referred to the High Court u/s 395 of the Cr. P. C. and the application was rejected by the Magistrate. Against the said order a Revision Application was filed. In Revision also the learned Sessions Judge has gone into the aspect of the

constitutional validity of section 138 and found that no interference is called for in the order passed by the Magistrate. It is in this circumstance that the petitioner approached this Court by way of this writ petition.

3. The learned counsel for the Petitioner Mr. Sakhardande has contended that the Magistrate was wrong in holding that no case has been made out by the petitioner before the Court that section 138 is violative of Article 14 of the Constitution of India and he submits that the refusal to refer the matter to the High Court by the Magistrate u/s 395 of the Cr. P. C. is illegal because when a question of constitutional validity of section is raised before the Magistrate, he was under the obligation to refer the matter to the High Court.

4. To substantiate his contention he also referred to the decision of Allahabad High Court in the case of Smt. Ramawati v. Union of India, and in the case of L. Chandrakumar v. Union of India and Ors., I find that these two decisions will not help to bring home the contentions raised by the counsel for the petitioner. In Allahabad High Court decision case does not stem from the proceedings u/s 395 of the Cr. P. C. but it was a matter where the High Court was approached under Article 226 of the Constitution to declare that section 138 is unconstitutional. The nature of the discrimination to attract Article 14 have been stated by that Court in paragraph 4 of that judgment.

The grounds on which the prayer for declaring the provisions ultra vires were that the N. I. Act thought of at least three types of negotiable instruments, namely, promissory note, bill of exchange and cheque, and the law had made punishable a failure of encashment upon cheque only and not upon the other two types of negotiable instruments. It was further stated that the liability to repay a loan is out and out a civil one and for that no criminal liability could have been attached, even by making a legislation.

5. The aforesaid contention has been met by the Allahabad High Court in its observation as contended in paragraph 12 which reads as follows.

A cheque and a promissory note may not be equated as a promissory note simply creates a liability and by issuing a cheque, the drawer desires that certain payment is to be made in favour of the holder. Section 138 does not punish every dishonour of a cheque, it must be a cheque for discharge in whole or any part any debt or other liability and the cheque is to be drawn upon a bank. This provision had to be introduced as in business transactions issuance of cheque to discharge a debt of other liability is a common transaction and it has also been found that to avoid immediate liability, people to take recourse to issuance of cheque which bounces on presentation at the bank. The law may not therefore be deemed discriminatory as a promissory note basically differ from a cheque and only a cheque out of possible bills of exchange have been chosen to come under the purview of section 138. This law has been necessitated because of the malpractices prevalent in our society.

6. As I indicated earlier, since the entire gamut of the case was to examine the

validity of the action of the Magistrate, who refused to refer the matter u/s 395 the Cr. P. C. the case cited by the learned counsel for the Petitioner of Allahabad High Court will not be of any help. As rightly pointed out by the Addl. Advocate General Mr. Janardhan, even in that case the Allahabad High Court has not held that section is unconstitutional.

7. The learned counsel for the petitioner have strenuously relied upon the observation of the Supreme Court in decision cited above. In fact in Chandrakumar's case the Supreme Court has examined the scope of the power and duty of the Central Administrative Tribunal which is an authority constituted under Article 323(A) and 323(B) of the Constitution of India which comprised in Part XIV-A which deals with Tribunals. The main question arose in that case is that what are the powers of a Tribunal under the aforesaid articles to declare a statute invalid on the basis of the statute as a whole or in part is violate the fundamental rights. The learned counsel has also relied upon the observation of the Supreme Court in paragraph 93 which reads thus :

Before moving on to other aspects, we may summarise our conclusions of the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules.

8. Relying on these observations the learned counsel for the petitioner has argued that the Magistrate by his own should have taken the task of examining the constitutional validity of section 138 of the N. I. Act in exercise of his power u/s 395 of the Cr. P. C. The attempt on the part of counsel to compare the lower judiciary like the Magistrate's Court and District Court as that of a Tribunal, which is constituted under Article 323(A) and 323(B) of the Constitution of India is totally irrelevant and out of place. The subordinate judiciary and the Tribunal are in the nature of its function and conduct are totally different. Even in the setting of the constitution subordinate Courts and Tribunals are treated separately and distinctly. Chapter IV of the Constitution deals with subordinate Courts and Articles 233 to 237 deals with regard to the organisation, function and control of Subordinate judiciary. Therefore constitutionally, subordinate Courts and Tribunals are treated differently, the observations by the Supreme Court in L. Chandrakumar's case cannot be applied to the subordinate Courts.

9 Even if, we assume that the Magistrate's Court and the Tribunals are on the same footing the observations made by the Supreme Court cannot be applicable in the Magistrate's Court, particularly when the power of the Magistrate has been circumscribed u/s 395 of the Cr. P. C. which reads as follows :

Where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or Provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court the Court shall state a case setting out its opinion and the reasons, therefore and refer the same for the decision of the High Court.

10. When the function of the Magistrate has been limited and circumscribed, we need not go into the general observations made by the Supreme Court in Chandrakumar's case. The main purpose of section 395 is to obviate any difficulties which has arisen at the time of trial or hearing of a case before the Magistrate or District Court with regard to the constitutional validity of a provision and entire disposal of the case is depended upon the determination of such constitutional validity then only the Magistrate can refer the matter to the High Court. Moreover in such cases the Magistrate himself must arrive at a subjective satisfaction that a particular case involve the testing of the virus of any act or regulation, then only he can refer the matter. When he is satisfied that it is invalid, he must refer the matter to the High Court. This power of the Magistrate cannot be invoked by an application by the accused. The section itself indicates that a case pending before him involves the question and the determination of the question is necessary for disposal of the case, if it is of the opinion that such act is invalid or inoperative. First of all the Magistrate must satisfy himself that such a question has arisen in the case. Therefore it is a matter not by merely raising that question by party to the proceeding. If the learned counsel's argument is accepted we are driven to a ridiculous position that any accused can make an application before the Magistrate alleging that particular act under which he is prosecuted is invalid and scuttle the trial. That is not the intent and purport of the section. The intention of the legislature is to obviate the difficulty of the Magistrate or District Court in deciding the case before them. If the Magistrate feels or satisfied himself that the Act is invalid, he can invoke section 395 but it cannot be so readily invoked by merely demonstrating that the particular section is invalid.

11. Secondly, the entire allegation of the petitioner is that two negotiable instruments vis-a-vis promissory note and cheque are treated differently. According to the petitioner for the non-payment of a promissory note, it does not entail a criminal prosecution whereas a dishonouring of a cheque entail the prosecution. In other words, if a default of payment under these two instruments results in prosecution the petitioner will not have any grievance. His only grievance is that, being both are Negotiable Instrument Act the failure to pay one case is entail to criminal prosecution and the other is not. I am afraid whether such an approach is correct approach by a person who assail the particular section is violative of Article 14 of the Constitution of India. Article 14 of the Constitution of India speaks about discrimination. The State shall not deny to any

person the equality before the law, which means every citizen is entitled to equal treatment under the law and equal protection of law. Then the Article 14 does speak about the fundamental right of a citizen and it does not speak about the fundamental right of the accused. The accused cannot assail the provision of the Act which he is prosecuted, pointing out that unless the promissory note is also brought in similar line of that of cheque, his prosecution is wrong and that is not how a statute has to be assailed on the ground of discrimination.

12. The manner in which the petitioner try to classify both instruments is only imaginary. Even though N. I. Act deals with different Negotiable Instrument that are relevant in the day-to-day commercial transaction of the people, infact those Negotiable Instruments are not alike. The only commonality that does exist among these instruments, namely, promissory note, bill of exchange, cheque or hundies is in their negotiability. But in their operation and function they act differently and these instruments are created under different commercial context. Therefore except the negotiability a cheque cannot be treated as par with promissory note. Therefore the classifications sought to be made by the petitioner before the Magistrate or before this Court, are quite unscientific, unreal, to say the least artificial. As rightly pointed out by Allahabad High Court, a promissory note cannot be treated as equally as that a cheque and in other words a promissory note cannot be said to be as same as a cheque. Promissory note in fact creates a liability; but in the case of a cheque particularly u/s 138 it discharges a liability. So one is creating a liability and another is discharging a liability and these two instruments therefore cannot be equated with each other. This difference is not only in form but in substance as well.

13. Moreover the preamble of the amended Act by which section 138 was introduced is to bring in credibility in the commercial activities in India which largely depend upon the transactions through cheques. Therefore the classifying the cheque, to treat differently, is made to bring out the object to be achieved. Legislature has thought in its wisdom to bring out above objects namely, dishonouring of cheque should be met with more onerous consequences to the defaulters apart from the civil remedy available against the defaulters. The petitioner has therefore failed in his endeavour to show that section 138 of the N. I. Act is violative of Article 14 of the Constitution of India. The learned Magistrate therefore has correctly found that he has no power to refer the matter to the High Court as he is not satisfied that section 138 is violative of Article 14 of the Constitution of India. Therefore not only that the discrimination is made out but also it has not been demonstrated so before the Magistrate's Court in order to invoke the Magistrate his power to refer the matter to the High Court u/s 395 of the Cr. P. C. In view of this, the Magistrate as well as the Sessions court has rightly rejected the application of the petitioner to refer the matter to the High Court u/s 395 of the Cr. P. C. In the light of the foregoing discussion. I find no ground to interfere in the matter.

In the result the petition fails and it is dismissed. There is no order as to costs.

P. A. to issue ordinary copy of this order authenticated by the Sheristedar of this Court.