

(2009) 09 BOM CK 0064

In the Bombay High Court

Case No : Criminal Writ Petition No. 1131 of 2009

Smt. Rukmini Vishwanath Shendge

APPELLANT

Vs

Shri Shriniwas Tuljaram Burudkar and Another

RESPONDENT

Date of Decision : 09-09-2009

Acts Referred:

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

Citation : (2010) 2 BC 60 : (2010) CriLJ 748

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : D.V. Gangal and Ram Singh, for the Appellant; Niranjana P. Shimpi and P.P. Bhosale, Assistant Public Prosecutor for State, for the Respondent

Final Decision : Dismissed

Judgement

S.A. Bobde, J.—The petitioner has challenged the process u/s 138 of the Negotiable Instruments Act on a complaint filed by the respondent No. 1.

2. The main contention of Mr. Gangal, the learned Counsel for the petitioner, is that two of the five vital ingredients of the offence u/s 138 as laid down by the Supreme Court in *Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd.* (2002) 2 SCC 745 have not been followed, viz., ingredients Nos. (iii) and (v). The five ingredients laid down by the apex Court in paragraph 10 in *Kusum Ingots & Alloys Ltd.*'s case read as follows:

(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.

3. According to Mr. Gangal, the respondent No. 1 did not allege ingredient No. (iii) above by stating that the amount of money standing to the credit of the account is sufficient to honour the cheque. On the contrary, the respondent No. 1 averred in the complaint that the petitioner- accused ordered the Bank to stop payment of the cheque and that is why the respondent-complainant did not receive the money. According to Mr. Gangal, the averments that the accused directed the Bank to stop payment of the cheque does not constitute an offence since what constitutes an offence u/s 138 of the Act, it is the return of a cheque by the Bank, unpaid, because the funds of the accused are insufficient to honour the cheque. The second contention of Mr. Gangal is that the respondent No. 1 has not averred in the complaint that the petitioner-accused has failed to make payment of the amount of money demanded within 15 days of receipt of the notice.

4. There is no merit in the contention that if a complainant avers in the complaint that he did not receive payment because the accused directed the Bank to stop payment of the cheque, no offence u/s 138 of the Act can be said to have been made out. In *M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi*, the Supreme Court was considering an appeal from a judgment of the High Court which had held that a complaint u/s 138 is not tenable since:

(i) The appellant has not pleaded in his complaint that the cheques were returned by the bank unpaid either because 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. The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(i) Mere endorsement of the bank payment stopped was not sufficient to entertain the complaint as that was not an ingredient of the offence u/s 138 of the Act.

The Supreme Court relied on its earlier Judgement in *M/s. Electronics Trade and Technology Development Corpn. Ltd., Secunderabad Vs. M/s. Indian Technologists and Engineers (Electronics) Pvt. Ltd. and another*, and the

judgement in *K.K. Sidharthan v. T.P. Praveena Chandran* (1996) 6 SCC 369 in which the Supreme Court held that Section 138 gets attracted even if a cheque is dishonoured because of stop payment instructions to the Bank. Their Lordships concluded as follows:

11. Another two-Judge Bench while dealing with the same question in *K.K. Sidharthan v. T.P. Praveena Chandran* (SCC p. 370, para 2) observed: This shows that Section 138 gets attracted in terms if cheque is dishonoured because of insufficient funds or where the amount exceeds the arrangement made with the bank. It has, however, been held by a Bench of this Court in *Electronics Trade and Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) (P) Ltd.* that even if a cheque is dishonoured because of 'stop payment instruction to the bank, Section 138 would get attracted.: We are in complete agreement with the above legal proposition.

5. Subsequently, the Supreme Court in *Goaplast (P.) Ltd. v. Chico Ursula DSouza and Anr.* 2003 Bom.C.R.(Cri.) 931 re-affirmed this view in the following words:

A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences u/s 138. Once a cheque is issued by a drawer, a presumption u/s 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action u/s 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in *M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi*, : 1999 Bank.J. 83 (S.C.) : 1998 (3) S.C.C. 249. On same facts is the decision of this Court in *Ashok Yeshwant Badave Vs. Surendra Madhavrao Nighojakar and Another*, . The decision in *Modi* case overruled an earlier decision of this Court in *M/s. Electronics Trade and Technology Development Corpn. Ltd., Secunderabad Vs. M/s. Indian Technologists and Engineers (Electronics) Pvt. Ltd. and another*, which had taken a contrary view. We are in respectful agreement with the view taken in *Modi* case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date. In this view of the matter, there is no merit in this contention raised on behalf of the petitioners.

6. As regards the contention that the complaint does not mention another essential ingredient, viz., the petitioner-accused failed to make payment within a period of 15 days on receipt of the notice, Mr. Gangal referred to the pleadings in the case, a true translation of which reads as follows:

For the information and payment of amount of the dishonoured cheque, the Complainant sent a notice on the above noted address on 3.2.2006, through Advocate Shri P.D. Kulkarni by Registered post Ack/Due and copy of that was sent by Under Postal Certificate on the address mentioned in the notice. The Accused has received the aforesaid notice. After receiving the above notice, the Accused did not pay the amount mentioned in the notice to the Complainant. The Complainant due to non-receipt of the amount and offence committed by the Accused this case is filed for enquiry.

According to Mr. Gangal, because the notice does not mention that payment was not made within 15 days from the receipt, the complaint is not tenable u/s 138 of the Act as it does not disclose a vital ingredient of the offence. It is true that non-payment of the amount demanded within 15 days of the receipt of the notice is a vital ingredient of the offence u/s 138 of the Act i.e. an ingredient, the existence of which must be proved to the satisfaction of the Court upon evidence at the time of the judgement. The mere non-mention of 15 days in the complaint would not render the complaint liable to be dismissed if the complaint otherwise discloses that payment was not made within 15 days. In the complaint in question, the respondent-complainant has averred that he sent a notice on 3.2.2006 which was received by the petitioner. It is further stated that the petitioner did not pay the amount mentioned in the notice to the complainant. This statement obviously must be understood in the context of the date of filing of the complaint i.e. to say that the petitioner did not make the payment till the date the complaint was filed i.e. on 28.3.2006. The complaint ex facie discloses that upon service of notice, a period longer than 15 days has passed without any payment. Such averments, in the context, are sufficient compliance of the requirements of Section 138 of the Act. There is no merit in this contention also. It must, however, be made clear that dismissal of this petition u/s 482 shall not foreclose any other defence of the petitioner.

7. Mr. Shimpi for the respondent No. 1 points out that there is already an order for time bound decision of the complaint passed by the Sessions Court. However, the trial could not be concluded because of the pendency of this petition. In the circumstances, it is directed that the trial Court shall decide the complaint within three months from the date the parties appear before the trial Court. The parties are directed to appear before the trial Court on 22.9.2009.

8. This Criminal Writ Petition stands dismissed.