
(1995) 12 AP CK 0043

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 2591 of 1994

Sri Bhaskar Fertilizers and Others

APPELLANT

Vs

Dinkal Agro Chemicals (P) Ltd.

RESPONDENT

Date of Decision : 04-12-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (1996) 1 ALD 147 : (1996) 1 ALD(Cri) 398 : (1996) 1 ALT(Cri) 144 :
(1996) CriLJ 1103

Hon'ble Judges : V. Rajagopala Reddy, J

Bench : Single Bench

Advocate : C. Kodanda Ram, for the Appellant; M. Radhakrishna Murthy, for the Respondent

Judgement

1. The petitioners are the accused, the 1st petitioner is a company and the 2nd petitioner is its proprietor and the respondent is the complainant, on whose complaint, the learned IVth Metropolitan Magistrate, Hyderabad, has taken cognizance of the offence u/s 138 of Negotiable Instruments Act, 1881 (for short, "The Act") in C.C. No. 567 of 1993. The petitioners approached this Court to quash the proceedings u/s 482 Cri.P.C. on two grounds; (1) that the allegations in the complaint do not constitute the offence u/s 138 and 142 of the Act, since the cheque was returned unpaid for the reason of "stop payment by the drawer;" and (2) that the cheque was not issued towards a pre-existing debt. It is contended by the counsel for the petitioners that the offence U/s 138 of the Act, can be fastened on the petitioners only if there was prior debt and that the cheque was returned by the bank on the ground of insufficiency of funds or on the ground of exceeding the limits permitted by the bank, and that the cheque having been returned only on the ground of stop payment ordered by the petitioners, no penal liability is attracted u/s 138 of the Act.

2. The learned counsel for the respondent, controverting the above contentions,

contended that the complaint contains the allegations necessary to make out the offence u/s 138 of the Act, that the endorsement of "stop payment" can be for several reasons and the possibility of insufficient funds in the account of the petitioner could not be eliminated and in fact the cheque was returned for insufficiency of funds in the account of the petitioners. Several decisions have been cited in support of the rival contentions, which will be referred to presently.

3. Before proceeding further, it is well to remember the amplitude of the enquiry in the exercise of this Court's jurisdiction u/s 482 Cr.P.C. One of the guidelines in the case *R.P. Kapur Vs. The State of Punjab*, , a classic case on the point, is : (Para 6)

"Where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not."

4. The Division Bench of this Court in *Syed Rasool and Sons and Others Vs. Aildas and Company and Another*, , considering the scope u/s 482 Cr.P.C., in a case arising u/s 138 of the Act, observed that (at P. 4061 of Cri LJ) :

"It is a matter to be investigated into by the competent Magistrate but not by the High Court in a proceeding u/s 482 of the Criminal Procedure Code. Section 482 of the Criminal Procedure Code can be invoked where *ex facie* no case has been made out on the allegations in the complaint. Whether the cheque was returned for either of the two grounds mentioned in Section 138, is a matter that has to be investigated into by the competent Magistrate. On the allegations in the complaint cognizance has been taken by the competent Magistrate. It is not for this Court u/s 482 Cr.P.C. to go into the rival contentions. Following the guidelines given by the Supreme Court in *R.P. Kapur Vs. The State of Punjab*, we hold that it is neither desirable nor permissible to allow the complainant, particularly in the facts and circumstances of the cases on hand, to invoke the jurisdiction u/s 482 Cr.P.C. Inherent powers u/s 482 Cr.P.C. can be used as a shield to prevent the abuse of the process of the Court but not as a sword or weapon to pre-empt or abort the proceedings initiated on a complaint which requires due enquiry and trial."

5. It has, therefore, to be seen whether the allegations made in the complaint *ex facie* do not constitute the offence u/s 138 of the Act.

4. A perusal of the Section 138 of the Act and also the objects and reasons for the introduction of Chapter XVII in the Act, it is clear that the Parliament intended to confine the offence for dishonour of the cheque on the ground of inadequate balance in the account of the drawer. If the cheque was returned unpaid on other grounds the same has not been made an offence. Unless, therefore, the complainant comes forward with the above allegation for the return of the cheque, the Court can refuse to take cognizance of the offence.

5. The allegations in the complaint, in substance and relevance for the purpose, are that the petitioners issued a cheque dated 18-3-1993 for Rs. 27,065.70 in favour of the complainant, towards discharge of his liability on account of his taking chemicals on credit. The cheque was presented on 26-4-1993 and it was returned unpaid by the Banker on 30-4-1993, with an endorsement "payment stopped by the drawer." It was specifically alleged that the banker returned the cheque as there was no amount to the credit in the petitioner's bank account to honour the cheque. The notice was issued on 3-5-1993, by the complainant, but the petitioners neither responded nor paid the amount. Again it was said that the cheque was issued without funds in the bank, only to cheat the complainant.

6. These allegations, *ex facie*, constitute the offence u/s 138 of the Act, as it is clearly stated that the cheque was issued in discharge of a debt and the cheque was returned unpaid though with an endorsement stop payment, but actually for the reason that there was no amount to the credit of the petitioner's account in the bank. The requirements of Section 138 of the Act are *prima facie* satisfied to give jurisdiction to the Magistrate to take cognizance of the offence.

7. However, the learned counsel for the petitioners, with some justification, stressed the point, supported by authorities, that the cheque having been returned with the endorsement "stopped payment by the drawer." and not for want of funds, the primary requirement, the *sine qua non*, for fastening liability u/s 138 of the Act, namely the return of the cheque unpaid for either insufficiency of funds or exceeding the limits granted by the bank, was not satisfied and the Court could not assume jurisdiction to try case. The decisions of Kerala High Court in *Dr. P.K. Mohammed Rasheed Vs. State of Kerala and Another*,), *S. Ashok and Another Vs. Vasudevan Moosad*, , *Balakrishna Pillai v. V. Abdullakutty* (1994) 2 A LT (Cri) 326, the decision of Punjab and Haryana High Court in *Raj Kumar Gupta v. Manmohan Singh* (1994) 79 Comp Cas 335 and the decision of Sikkim High Court in *Safiq Ahmed Vs. Ahsan Halim and Others*, were cited in support of his contention. But on a close scrutiny, the decisions of Kerala and Sikkim High Courts do not advance the contention of the petitioner's counsel. In all those cases it was found that the complaints were filed without making any allegation that the cheques were returned unpaid because of insufficiency of funds in the account of the petitioner. It was merely stated that the cheque was returned with the endorsement "stop payment." In those circumstances, the Courts held that the complaints do not make out the offence. It was held by the Kerala High Court in *Dr. P.K. Mohammed Rasheed Vs. State of Kerala and Another*, , that

"The facts or events must be pleaded in the action for endorsement of legal right since the jurisdiction of the Court to try the case depends on it and in absence of allegation to that effect Court cannot assume jurisdiction to try the case."

The Decision in *S. Ashok and Another Vs. Vasudevan Moosad*, was followed. In *Balakrishna Pillai v. V. Abdullakutty* (1994) 2 ALT (Cri) 326 the Kerala High Court observed :

"Nowhere did the complainant say that the cheque was dishonoured due to want of sufficient amount in the account. Learned Counsel made a bid to show that the ingredients can be discerned from implications in the complaint. I find it extremely difficult to deduce from the complaint a case of dishonour of the cheque due to want of amount in the account. Averments in the complaint are totally bereft of such a case."

The decision of Sikkim High Court in *Safiq Ahmed Vs. Ahsan Halim and Others*, is also to the same effect. In the absence of the allegation that the cheque was dishonoured for inadequate funds, the Court refused to quash the proceedings. In the instant case, there are clear allegations that there were no adequate funds in the drawer's account and the cheque was issued only to cheat the complainant. The above decisions are therefore distinguishable on facts.

8. However, the decision of Punjab and Haryana High Court appears to support the case of the petitioner. The ratio in this decision is that it is an abuse of the process of the Court to proceed with an enquiry, in cases where the cheque was returned with the endorsement "stop payment by the drawer". *Raj Kumar Gupta's* (1994 (79) Com Cas 335(p&h)) a case of the bank returning the cheque with the endorsement "stop payment". But from the facts of the case, as disclosed in the judgment, I find that there is no averment that there was no money to the credit of the accused in his account. This aspect was not considered. The complaint was however quashed following another decision of Punjab & Haryana High Court in *Abdul Samad v. Satyanarayan Mahawar* (1993) 76 Com. Cas. 241, where the complaint was quashed when the cheque was returned by the bank with an endorsement "account closed".

9. On the other hand the Rajasthan High Court in *M/s. Pearey Lal Rajendra Kumar Pvt. Ltd. v. State of Rajasthan* (1994) 3 Crimes 308 in considering the case where the cheque was bounced with the endorsement "payment stopped", held that

"It is for the complainant to make out the ingredient of Section 138 of the Act and it is open to him to raise a plea that the real reasons for the return of unpaid cheque was insufficiency of funds. When in the complaint such a plea has been raised, then at the time of taking cognizance of the offence, the Magistrate cannot be expected to go into the niceties of case which would be set up by the accused without their appearance before the Court. What is to be seen is whether the allegation made in the complaint prima facie disclosed an offence and if so who was the person who can be said to be liable for the same. When the facts are such, in the present cases, it can be said that it is only after evidence of both the parties that it can be determined as to what was the real reason for dishonouring the cheque, this Court cannot quash the proceeding before the Magistrate as it is only the availability of all material on record which would make the Court to take a decision in the matter.

Hence in the facts and circumstances the complaint and the order taking

cognizance cannot be quashed merely because the cheque was dishonoured with the remark that the payment has been stopped."

The decision of Kerala High Court in *Thomas Vargese v. P. Jerome* (1992) 2 Crimes 919 : (1992 Cri LJ 3090), was considered, where the cheque was returned unpaid with endorsement "payment stopped by the drawer". A specific allegation was made in the complaint that the accused had no amounts in the account and as such he issued a direction to the bank to "stop payment". On that ground the Court refused to quash the complaint. *Prithviraj v. Bhupendra* (1994) 3 Crimes 579 (Bombay) is also a case where the cheque was returned unpaid with endorsement "stopped by the drawer". The Bombay High Court after considering several decisions in this regard held that

"the wording and the endorsement from the bank or the circumstances under which the cheque was returned, were not guiding criteria, but the fact that on presentation of the cheque the payment was not made is the material fact. There would be host of reasons for return of the cheques, but the bottomline of the situation was that the payment could not be made by the banker, leading to the dishonour of the cheque implying insufficient funds."

A passage in the Division Bench decision of the Kerala High Court in *Thomas Varghese Vs. P. Jerome*, was relied upon, where it was observed that there would be a possibility for the drawer to do mischief by issuing a direction to the banker for "stop payment," finding that there were no sufficient funds in the account. It was also observed that the offence u/Section 138 of the Act is made out if the cheque was returned unpaid irrespective of the nature of the endorsement made by the banker. The Bombay High Court, thus rejected the application to quash the complaint.

10. A Division Bench of this Court in *Syed Rasool and Sons and Others Vs. Aildas and Company and Another*, had an occasion to deal with the return of the cheque with an endorsement "referred to drawer." It was contended that the endorsement "referred to drawer" would not necessarily indicate insufficiency of funds and hence the offence u/Section 138 of the Act was not made out, drawing support from the decision in *M/s. Union Road Ways (P) Ltd v. M/s. Shah Ramamlal Stesh Kumar* (1992) 1 AWR 372, rendered by a learned single Judge of this Court. G. Radha Krishna Rao, J., as he then was, speaking for the Bench, had exhaustively considered the decisions of several High Courts on this aspect and observed;

"The endorsements "refer to drawer" or "insufficiency of funds" or "not arranged" or "Account closed" or some other technical words used by the bank, ultimately resulted in dishonouring the cheque, on account of the fault of the person who has issued the cheque in not providing sufficient funds or not arranging funds. Having issued the cheque without having sufficient funds or not arranging the funds or after closing the account, it is definitely an act on the part of the drawer of the cheque which ultimately resulted in dishonouring the cheque. This again is

a matter of evidence which has to be adduced in support of the endorsement. Under these circumstances, it cannot be said at this stage that taking of cognizance on a private complaint by the Court itself is bad."

The learned Judge, held that the endorsement "refer to drawer" necessarily means that the cheque has been returned for want of funds. The Court therefore declined to quash the complaint. Though in this case the cheque was returned unpaid with endorsement "refer to drawer", the learned Judge has made it clear that "other technical words used by the bank, ultimately resulted in dishonouring the cheque" would come within the purview of either of the eventualities contemplated in Section 138 of the Act. The decision therefore, takes into its sweep the endorsement of the banker "stop payment" in returning the cheque. This decision is therefore an authority for the proposition that even in the absence of any allegation to the effect that the cheque had been returned unpaid, for want of funds, the Court should take cognizance of the offence; the endorsements like "stop payment", "account closed" etc., resulting in dishonouring the cheque cannot be conclusive proof of inadequate funds in the account. The decision is also an authority to the proposition that the complaint cannot be thrown out at the threshold without trial and the enquiry has to go on to find out, whether, irrespective of the expressions used in the banking parlance, the cheque was returned for want of funds. I am in agreement with the ratio of this case and being a Division Bench decision I am bound by it. The reasoning adopted by the Punjab & Haryana High Court, apparently to advance the object of the Amendment Act, in reality defeats the same. Only evidence in the trial could disclose the real reason for the dishonouring the cheque. I, therefore, do not agree with the decisions of the High Court of Punjab & Haryana in Raj Kumar Gupta's case (1994 (79) Com Cas 335) (supra) and in Abdul Samad's case (1993 (76) Com Cas 241) (supra).

11. In the light of the above decisions it has to be held that a complaint cannot be quashed as not maintainable on the ground that the cheque was returned with endorsement "stop payment".

12. In the instant case there is a categorical allegation that the cheque was issued towards the discharge of a liability and it was returned unpaid on the ground that there were no funds in the account of the petitioner in the bank. The endorsement stop payment does not exclude the possibility of there being no funds in the account of the petitioner. The drawer might play mischief and ask the banker to stop payment finding no funds in his account, to evade punishment under the Section 138 of the Act. That is exactly the case of the complainant in the instant case. The decision of Kerala High Court in Thomas Varghese Vs. P. Jerome, is squarely applicable to the facts of this case. Hence, it cannot be said that, prima facie, the cheque was not dishonoured for want of funds. The above decisions overwhelmingly support this view. The complaint is, therefore, maintainable and the learned Magistrate has rightly taken cognizance of the offence. The contentions raised by the learned counsel for the petitioners are,

therefore, rejected.

13. It is contended that the decision of the Division Bench of this Court in B. Mohan Krishna v. Union of India 1995 (1) ALD 393 , has taken a cotrary view to that of the Division Bench decision of this Court in Syed Rasool and Sons and Others Vs. Aildas and Company and Another, and therefore the matter has to be referred to a Full Bench. The contention is without substance. In Mohan Krishna's case (supra), the vires of the provisions of Chapter XVII of the Act comprising of Sections 138 - 142, was in question. The point raised before me in the present case was neither canvassed nor decided, nor was any reference made, in that case. It is contended by Sri Kodanda Ram, learned counsel for the petitioners, that in that case, the learned Judge has observed that a drawer of cheque could be held liable for the offence u/s 138 of the Act, only in two eventualities, viz, if the cheque was returned unpaid either for want of funds in the account of the dawner in the bank or if the limits arranged by the Bank have been exceeded. But I do not find any conflict of opinion on this aspect. In fact, this position having been underlined, the Bench in Syed Rasool and Sons and Others Vs. Aildas and Company and Another, further held that the complaints filed on the allegation of dishonour of the cheque with the endorsement "refer to drawer" "account closed" etc., cannot be thrown out without trial to determine whether such dishonour of the cheques was due to either of the two eventualities.

14. For the aforesaid reasons, the Criminal Petition is dismissed.

15. Petition dismissed.