Salim Vs. Thomas

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Court : Kerala

Decided On : Feb-06-2004

Reported in : I(2005)BC41; 2004(1)KLT816; [2004]52SCL293(Ker)

Judge : R. Basant, J.

Acts : Negotiable Instruments Act, 1881 - Sections 138

Appeal No. : Crl.A. No. 484 of 1995

Appellant : Salim

Respondent : Thomas

Advocate for Def. : Siby Mathew,; Philip J. Vettickattu and; A.A. Mohammed N

Advocate for Pet/Ap. : T.V. Prabhakaran and; S. Rajeev, Advs.

Disposition : Appeal allowed

Judgement :

R. Basant, J.

1. Does a cheque issued after the date of closure of the account fall within the sweep of Section 138 of the N.I. Act? This is the question of law thrown up for consideration in this appeal against an appellate judgment of acquittal.

2. Fundamental facts are not in dispute. The cheque in question is Ext.P1. It is dated 23.12.1991. It was dishonoured on 21.1.1992. The account on which the cheque was drawn was closed by the accused long earlier - on 30.1.1990. The cheque was dishonoured on the ground that the account was closed. Signature in the cheque is admitted. The accused contended that the cheque was not issued for the due discharge of any legally enforceable debt/liability to the complainant. It was issued to another person - one Vijayan by name. The obvious suggestion was that the undated cheque handed over to the said Vijayan as security was being misused by the complainant.

3. P.Ws.1 to 3 were examined and Exts.P1 to P6 were marked. On the side of the accused D.Ws.1 to 3 were examined and Exts.D1 to D4 were marked.

4. The trial court held that all ingredients of the offence punishable under Section 138 of the N.I. Act have been established. The appellate court took the view that Section 138 of the N.I. Act does not apply to a cheque issued after the date of closure of the account. It was further held that the cheque is not proved to be one issued for the due discharge of any legally enforceable debt/liability.

5. Arguments have been heard. It will be apposite to extract Section 138 of the N.I. Act. Proviso is omitted as it is not of relevance here.

'138. Dishonour of cheque for insufficiency, etc., of funds in the account.-

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.'

6. The short argument of the learned counsel for the accused is that to attract Section 138 of the N.I. Act the cheque must be one drawn 'on an account maintained by him'. It is not enough if it is a cheque drawn 'on an account (which was) maintained by him'. Inasmuch as there was no live account on the date of issue of the cheque, Section 138 of the N.I. Act can have no application at all.

7. On the contrary, the learned counsel for the appellant/complainant contends that the expression 'on an account maintained by him' cannot have any artificial or Unrealistic connotation. The cheque must be drawn on an account which the accused maintained with the bank. The status of the account whether it was live or dead on the date of the cheque, is irrelevant. It must be an account which the accused maintains or had maintained with the bank. Present continuous tense is not used by the Legislature. The expression used is not 'is maintained by him'. The cheque must have reference to an account of the accused. Its status as on the date of the cheque is irrelevant. It would be artificial and unrealistic to exclude persons who fraudulently issue cheques on accounts maintained by them merely because prior to the issue of the cheque they had closed the account. The learned counsel for the complainant/ appellant hence contends that the sweep of Section 138 of the N.I. Act would and should take within it, an accused like the one in this case who has chosen to issue a cheque drawn on an account maintained by him with the bank notwithstanding the fact that prior to the issue of the cheque he had closed the account.

8. Any attempted interpretation must take note of the destination that is to be reached. The legislative purpose, goal and dream cannot be lost sight of. In the modern era financial transactions will not depend on cash. The concept of plastic money must rule to facilitate the monetary transactions in the modern world. Cheques drawn on banks must have credibility. Transactions in cheques must be as effective, efficient, credible and sure as transactions in cash. This is the purpose/goal/dream entertained by the Legislature. The mischief rule in interpretation cannot be lost sight of. Interpretation must lead a court to the ultimate goals which the Legislature wants to be reached. In respect of a penal statute also this principle of interpretation cannot be altogether ignored. It will be apposite in this context to refer to the decision reported in NEPC Micon Ltd. v.

Magna Leasing Ltd. (1999 (2) KLT (SC) (SN) 39 = AIR 1999 SC 1952). It would be sufficient if I extract the relevant passage in para 15:

'15. In view of the aforesaid discussions we are of opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above 'burst away the cobweb varnish, and show the transactions in their true light' (Wilmpt, C.J.) or (by Maxwell) 'to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that it has prohibited".

9. If the interpretation canvassed by the accused were accepted, a person before he receives the cheque will have to ensure that the account is live. If he does not, he runs the risk of the benefit under Section 138 of the N.I. Act being denied to him. That evidently would not have been the legislative intent. The Legislature takes care of normal events and does not make the law to meet rare eventualities. The Legislature must have felt that the expression 'an account maintained by him' would normally cover all cases. A mischievous account holder if he retains a cheque leaf even after closure of the account to defraud an honest payee should not be permitted to go out of the net cast by Section 138 of the N.I. Act. Such an interpretation would defeat the purpose of the statute. The same has to be avoided. Unless binding precedents are there which oblige the court to accept the interpretation canvassed by the learned counsel for the respondent/accused, this Court cannot be persuaded to accept that.

10. A controversy was raised earlier in law as to whether the dishonour of the cheque on the ground that the account is closed can be reckoned as one of the two reasons enumerated in Section 138 of the N.I. Act. That controversy was laid to rest by the decision in NEPC Micon Ltd. case referred above. Of course, that

decision does not deal specifically with cheques issued on accounts which were closed prior to the date of the issue of the cheque. No observation in NEPC Micon Ltd., indicates that such cases were intended to be taken out of the sweep of Section 138 of the N.I. Act. In these circumstances, I do not find any reason to adopt the narrower interpretation which would not advance and would, in fact, defeat the legislative objects and purpose underlying the enactment of Section 138 of the N.I. Act. According to me, the expression 'an account maintained by him' must necessarily take in account (that was) maintained by him as also an account (that is) maintained by him.

11. There is yet another way of looking at the problem. A person like the accused in this case who closes the account with his bank but retains unused cheque leaves with him without surrendering the same to the bank must certainly be held to continue to maintain the account, at least for the purpose of Section 138 of the N.I. Act, notwithstanding the fact that he had instructed his bank to close the account. It is the duty of every bank and every customer to insist and ensure that all unused cheque leaves are returned to the bank before the account maintained by him is closed. Only when that happens can it be held that he has ceased to maintain the account with the bank. Until the last unused cheque leaf is returned or the non-return explained to the bank, it must be held that such account holder continues to maintain the account with the bank. This must be so, at least for the purpose of Section 138 of the N.I. Act. I get support for this reasoning from the observations made by Mr. Justice T.K. Chandrasekhara Das of the Bombay High Court in para 9 of the decision reported in Shivendra v. Adineo (1996 Crl. LJ. 1816).

12. Thus, going by the observations in NEPC Micon Ltd. (cited supra) as well as the later decision of the Supreme Court in Goaplast (P) Ltd. v. Chico Ursula D'Souza (2003 (2) KLT (SC) 16 = (2003) 3 SCC 232), going by the language and in Section 138 of the N.I. Act and drawing inspiration from observations of the Bombay High Court in the decision referred above, I have no hesitation to agree that a cheque issued by the accused on an account which he had maintained with the bank will continue to fall within the sweep of Section 138 of the N.I. Act notwithstanding the fact that he had closed the account before the date of the

cheque/issue of the cheque.

13. The learned counsel for the accused placed reliance on two decisions of the Kerala High Court. Both were rendered by the learned Single Judges. In Japahari v. Priya (1993 (2) KLT 141) the following observations appear in paras 5 and 8:

'5..... No doubt, if any person manages to issue a cheque without an account with the bank concerned its consequences would not snowball into the offence described under Section 138 of the Act. Such acts may amount to other offences. For the offence under Section 138 of the Act there must have been an account maintained by the drawer at the time the cheque was drawn .....'.

'8. Of course, the complainant has to establish on the facts of this particular case that on the date the cheque was drawn petitioner had a live account with the bank concerned.'

14. In a later decision in Joseph v. Philip Joseph (2000 (2) KLJ 679), following the observations in Japahari's case (cited supra) and after taking note of the decision in NEPC Micon Ltd. (cited supra) a contrary view was taken. The corrections of the dictum in these cases was doubted and the matter was referred to a Division Bench. The Division Bench in the decision reported in Vathsan v. Japahari (2003 (3) KLT 972) has preferred the wider interpretation.

15. It is contended that these decisions have not been overruled by the Division Bench and continue to hold the field. Admittedly, on a reference made to it, the Division Bench had considered the very same question in the said decision. It is contended that both the decisions referred above though referred to in that decision have not been overruled. It is, in these circumstances, contended that the dictum in the said two decisions cannot be said to be overruled by the Division Bench.

16. I find no merit whatsoever in this contention. In para 6 of the decision in Vathsan (cited supra), the learned Judges of the Division Bench had, after thorough discussion, declared the law thus:

'6. So, we are of the view that (in) situations where cheques have been issued against an account, which has been closed prior to the date of drawal of the cheques, (such cheques) shall also come within the fold of Section 138 of the Act to attract criminal liability. The reference is answered accordingly.'

In view of the declaration of the law by the Division Bench, according to me, there can be no trace of doubt on the law applicable. The Division Bench after adverting to all the five decisions referred above had declared the law thus. There can hence be no doubt that the dictum in Japahari and Joseph (cited supra) do not any more hold the field.

17. Why then did the Division Bench not overrule the said decisions? Specific overruling was perhaps found to be not necessary in view of the clear declaration of the law. May be, the Division Bench must have felt that in cases where the account is not one maintained at all by the accused, graver offences of deceit and cheating would be involved and they do not fall within the purview of Section 138 of the N.I. Act. If 'A' who does not maintain any account with the bank gets hold of a cheque leaf issued to 'B' by his bank to operate his account and misleads 'C to believe that the account is his and persuades him to accept such a cheque signed and issued by him, probably the offence committed is graver and Section 138 of the N.I. Act will not at all apply in that situation. This is so inspite of the dictum laid down by decision of the Division Bench. Probably, Their Lordships must have felt that the observations in para 5 of Japahari (cited supra) that 'if a person manages to issue a cheque without an account with the bank concerned, its consequences would not snowball into the offence described under Section 138 of the Act' are to be preserved to that extent. I am unable to draw any other inference from the mere omission to specifically overrule Japahari and Joseph (cited supra) by the Division Bench.

18. In view of the clear declaration of law by the Division Bench, the acquittal of the accused in this case on the ground that the account was closed on 30.1.90 long prior to the date/issue of the cheque on 23.12.91 cannot be upheld. The challenge on that ground must succeed.

19. The learned Sessions Judge appears to have accepted the case of the accused that the cheque was not issued for the due discharge of any legally enforceable debt/liability. That the accused did maintain an account with the bank is admitted. That the cheque - Ext.P1 bears his signature is not disputed. That he had financial transactions earlier with the complainant is admitted clearly in the evidence tendered by the accused as D.W.3. The burden, in these circumstances, was undoubtedly heavy on the shoulders of the accused to rebut the presumption under Section 139 of the N.I. Act. Has he done it? This is the next question to be considered.

20. The burden on an accused to rebut the presumption under Section 139 of the N.I. Act must certainly be discharged by him. This burden, it is trite, and it has often been repeated, is not certainly as heavy and onerous as the initial paramount burden on the prosecution to prove its case beyond reasonable doubt. The lesser/inferior yardstick/ touchstone of proof by preponderance of possibilities and probabilities as in a civil case will alone be adopted while considering the case of the accused. But it is not sufficient if fanciful doubts are raised. His evidence will be tested/measured on the touchstone/ yardstick of proof by preponderance of possibilities and probabilities as in a civil case.

21. According to the accused, he had issued the cheque to one Vijayan. That Vijayan has not been examined. To Vijayan the cheque was issued as security. That liability had been discharged. Still Vijayan did not return the cheque. Fanciful suggestions would not be sufficient. There must be tangible evidence to inspire the confidence of the court. That this defence was promptly raised in the reply to the notice of demand is by itself insufficient to till the scales. That a later cheque bearing No. 157386 (Ext.Pl cheque bears the No. 157380) was presented for encashment on 13.9.1988 cannot also be reckoned as final, conclusive or clinching. These are not sufficient to discharge the burden to rebut the presumption under Section 139 of the N.I. Act.

22. The course of conduct adopted by the accused after receipt of the notice of demand is indeed relevant while considering whether his burden has been discharged. The said Vijayan has not been examined. No notice has been issued

to the said Vijayan even after the accused came to know that the cheque handed over to Vijayan and which he pleaded was lost, was misused. Inaction/silence is eloquent and goes a long way to influence the court while considering the acceptability of the defence version advanced.

23. The conclusion appears to be inevitable that the accused has not discharged his burden under Section 139 of the N.I. Act. The appellate court had gone wrong in accepting the plea of the accused and exonerating him of the allegations. Though conscious of the limited scope of the jurisdiction of this Court in an appeal against acquittal, I am satisfied that this is a fit case where the misdirection of the appellate court in law and on facts deserves appellate correction. The challenge succeeds.

24. Coming to the question of sentence, I have already adverted to the principles which should govern the imposition of sentence in a prosecution under Section 138 of the N.I. Act in the decision reported in Anilkumar v. Shammy (2002 (3) KLT 852). The cheque for Rs. 11,000/- is dated 23.12.1991. Section 138 of the N.I. Act was brought into the Statute Book only in 1988. I am satisfied that imposition of a deterrent substantive sentence of imprisonment has no penological object to be achieved in a case like the instant one. An appropriate and lenient substantive sentence of imprisonment coupled with an appropriate restoratory direction under Section 357(3) of the Cr.P.C. shall serve the interests of justice, I am convinced.

25. In the result:

(a) This appeal is allowed.

(b) The impugned judgment of acquittal is set aside.

(c) The verdict of guilty and conviction by the trial court are restored.

(d) The accused is sentenced under Section 138 of the N.I. Act to undergo imprisonment till the rising of the court.

(e) He is further directed to pay an amount of Rs. 17,500/- (Rupees Seventeen thousand and five hundred only) as compensation under Section 357(3) of the Cr.

P.C. and in default, to undergo simple imprisonment for a period of three months. If realised, the entire amount shall be released to the complainant/appellant.

26. The learned Magistrate shall take necessary steps to execute the sentence hereby imposed. The accused/respondent shall appear and his sureties shall produce him before the learned Magistrate at 11 a.m. on 1.4.2004 for execution of the sentence. Needless to say, the learned Magistrate shall be at liberty to invoke his powers under Section 446 of the Cr. P.C. against the accused and his sureties if the accused does not appear before the learned Magistrate, as directed.