

Thomas Varghese Vs. P. Jerome

Thomas Varghese Vs. P. Jerome

SooperKanoon Citation : sooperkanoon.com/721512

Court : Kerala

Decided On : Jun-05-1992

Reported in : [1993]76CompCas380(Ker); 1992CriLJ3080

Judge : K.T. Thomas and; K. Sreedharan, JJ.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138

Appeal No. : Crl. M.C. No. 1371 of 1991

Appellant : Thomas Varghese

Respondent : P. Jerome

Advocate for Def. : P.B. Suresh Kumar, Adv.

Advocate for Pet/Ap. : Mathews J. Nedumpara, Adv.

Disposition : Petition dismissed

Judgement :

Sreedharan, J.

1. This is a petition filed under Section 482 of the Code of Criminal Procedure, 1973, for quashing the complaint in C. C. No. 468 of 1990 on the file of the Judicial First Class Magistrate's Court, Punalur. Learned counsel representing the petitioner canvassed the correctness of the decision in Calcutta Sanitary Wares v.

Jacob [1991] 1 KLT 269 ; [1993] 76 Comp Cas 347 . Consequently, a learned single judge referred the petition to a Division Bench for disposal.

2. Before dealing with the question of law raised, we consider it advantageous to refer to the averments made by the complainant before the court below. They are in the following terms : The accused entered into an agreement for sale of his property with the complainant on March 21, 1989. In pursuance of that agreement, the accused received Rs. 21,001 in three instalments. Since the contract fell through, he issued a cheque dated December 8, 1989, bearing No. 787656 drawn on the Cheppad branch of the Lord Krishna Bank for repayment of the amount. Thereafter, with the intention of cheating the complainant and to make unlawful enrichment to himself, the accused caused the issuance of a lawyer's notice on September 25, 1989, alleging incorrect acts. By the intervention of mediators, the accused agreed to remit a sufficient amounts in the bank so as to honour the cheque. The complainant agreed to forgo interest on the amount. Contrary to this agreement, without remitting the amount in the bank for honouring the cheque, the accused informed the bank to stop payment of the amount covered by the cheque. The complainant presented the cheque through the Punalur Branch of the Canara Bank for encashment. That cheque was dishonoured by memo dated April 4, 1990, stating ' payment stopped by the drawer'. The complainant proceeded to state that the accused had no funds with his bank either on December 8, 1989, or on any subsequent date and so he issued stop memo to the bank. When the cheque was dishonoured, a lawyer's notice was sent to the accused on April 18, 1990, requiring him to pay the amount covered by the cheque. The notice was received by the accused on April 20, 1990. The accused did not pay the amount. Hence, the accused liable for offences under Section 138 of the [Negotiable Instruments Act, 1881](#) (hereinafter referred to as ' the Act'), and Section 420 of the Indian Penal Code.

3. For a proper understanding of the provisions contained in Section 138 of the Act, we read the same :

' 138. Dishonour of cheques 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 :'

Provided that nothing contained in this section shall apply unless --

(a) the 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 ;

(b) the payee or the holder in due course of the cheque, as the case may be, 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid ; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. -- For the purposes of this section 'debt or other liability' means a legally enforceable debt or other liability. '

4. This shows that the drawer of the cheque should have drawn the same on an account maintained by him with the banker. That cheque must have been drawn for payment of any amount of money to another from out of that account. The money so drawn must have been for the discharge of the whole or part of any debt or other liability. The said cheque must be returned by the bank unpaid. The return of the cheque must be either because the amount of money standing to the credit

of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with the bank. On satisfying these conditions, the drawer of the cheque will be deemed to have committed an offence under the section if the other requisites in the proviso are satisfied. As per the proviso, the cheque should have been presented to the bank within a period of six months from the date on which it was drawn or within the period of its validity, whichever is earlier. The payee should make a demand for the payment of the amount covered by the cheque by giving notice in writing to the drawer within 15 days of the information regarding the return of the cheque. Within 15 days of the receipt of the said notice, the drawer of the cheque must fail to pay the amount covered by the cheque to the payee or the holder in due course of the cheque.

5. In the instant case, the complainant specifically avers that the accused drew a cheque on an account maintained by him with the Cheppad branch of the Lord Krishna Bank. It was for payment of an amount of Rs. 21,001 to the complainant. It was dated December 8, 1989. The complainant presented the cheque for encashment. It was returned unpaid as evidenced by the banker's memo dated April 4, 1990. The memo is to the effect that the return of the cheque was due to 'payment stopped by drawer'. On April 18, 1990, the complainant issued a lawyer's notice calling upon the accused to make the payment covered by the cheque. That notice was received by the accused on April 20, 1990. He did not pay the amount and hence the complaint dated June 4, 1990.

6. The main argument advanced by learned counsel representing the petitioner is that an offence under Section 138 of the Negotiable Instruments Act can be maintained only if the cheque happens to be returned by the bank either because of the amount of money standing to the credit of the account of the drawer 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. Hence for a complaint to be entertained by the court, the banker's endorsement while returning the cheque must be on the ground that the amount of money standing to the credit of the account of the drawer 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. In other words, it is contended that if the endorsement given by the bank while returning the cheque is anything other than the above, the complaint must be thrown out at the threshold. According to counsel, the penal provision contained in Section 138 of the Act should be construed liberally in favour of the person who would be liable to the penalty.

7. From the argument advanced by learned counsel representing the petitioner, it would appear that an offence under Section 138 of the Act should depend on the endorsement made by the banker while returning the cheque unpaid, i.e., only when the banker makes an endorsement that the amount of money standing to the credit of the account of the drawer 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, can an offence under Section 138 of the Act be made out. According to us, such an approach will defeat the very purpose of the enactment.

8. The offence under the section cannot depend on the endorsement made by the banker while returning the cheque. Irrespective of the endorsement made by the banker, if it is established that in fact the cheque was returned unpaid either because the amount of the money standing to the credit of the account of the drawer 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 offence will be established. The endorsement made by the banker while returning the cheque cannot be the decisive factor.

9. Learned counsel representing the petitioner brought to our notice the following decisions in support of his contention that the offence under Section 138 of the Act will depend on the wording of the endorsement made by the banker while returning the cheque. The first decision referred to by him is of a learned single judge of the Punjab and Haryana High Court in *Abdul Samad v. Satya Narayan Mahawar* [1993] 76 Comp Cas 241. In that case, the Banker returned the cheque unpaid with the remarks ' payment stopped by the drawer '. The learned single judge held that the ingredient of Section 138 of the Act, namely, that the cheque was returned unpaid because the amount available in that account was insufficient for making the payment of the cheque was missing and consequently the

complaint was quashed under Section 482 of the Code. No discussion is seen in the judgment to support that conclusion. The second decision cited by him is G.F. Hunasikattimath v. State of Karnataka [1990] ILR 3881 ; [1993] 76 Comp Cas 278. In that case, a complaint under Section 138 of the Act was dismissed by the Magistrate holding that no sufficient material is made out by the complainant to proceed against the accused for the offence punishable under Section 138 of the Act. There the cheque was dishonoured on the ground of 'closure of his account'. The order of the Magistrate was challenged before the High Court in a petition under Section 482. The petitioner's counsel at first wanted two weeks' time on the ground that the matter is likely to be settled. After the expiry of the two weeks when the case came up for hearing, he did not appear in court. The learned judge, after hearing counsel for the respondent, took the view that in the light of the endorsement made by the banker at the time of the return of the cheque, the court will not be justified in proceeding with the complaint for an offence under Section 138 of the Act.

10. Section 138 was enacted by the Legislature to enhance the acceptability of cheques. The drawer of the cheque was sought to be made liable in case of bouncing of cheques due to insufficiency of funds in the account or for the reason that it exceeds the arrangement made by the drawer with the bank. If the cheque has bounced on account of insufficiency of funds in the account of the drawer or for the reason that it exceeds the arrangement made by the drawer, then the drawer must be liable. It cannot solely depend on the endorsement made by the banker. An endorsement by the banker that a cheque is returned due to insufficiency of funds standing in the name of the drawer will tell upon the financial soundness of the drawer. Such an endorsement may adversely affect the reputation of the drawer. Sometimes a banker may be slow to use the words such as 'no sufficient funds in the account', etc., because it may have adverse implications on the financial soundness of the drawer of the cheque and consequently affect his reputation also. So if the banker refrains from making such a derogatory endorsement, should the object of the legislation be defeated ?

11. The rule of strict interpretation of penal statutes in favour of an accused is not of rigid or universal application. It must be considered along with other well

established rules of interpretation. When it is seen that the scheme and object of the statute are likely to be defeated by the strict interpretation, courts must endeavour to resort to that interpretation which furthers the object of the legislation. It is well recognised that a statutory provision must be construed, if possible, to avoid absurdity and mischief. In *K.P. Varghese v. ITO* : [1981]131ITR597(SC) ; : [1981]131ITR597(SC) , their Lordships observed (at pages 605 and 606) :

' It is now a well-settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the Legislature, the court may modify the language used by the Legislature or even 'do some violence' to it, so as to achieve the obvious intention of the Legislature and produce a rational construction : vide *Luke v. IRC* [1963] AC 557 ; [1964] 54 ITR 692. The court may also in such a case read into the statutory provision a condition which, though not expressed, is implicit as constituting the basic assumption underlying the statutory provision.'

12. In this circumstance, we are not in a position to hold that a complaint under Section 138 of the Act should be thrown out at the threshold if the banker's endorsement while returning the cheque is anything other than that the amount of money standing to the credit of the account of the drawer 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. If the circumstances contemplated by Section 138 of the Act are made out, the court has to examine whether the return of the cheque was on account of insufficiency of funds in the account of the drawer. This can be done even without reference to the endorsement , made by the banker. Endorsements like ' refer to drawer', ' account closed ', ' payment has been stopped ', etc., made by the banker at the time of the return of the cheque have effect of proving that the cheque has bounced. If the bouncing of the cheque was on account of insufficiency of funds in the account of the drawer, then the drawer will be subjecting himself to proceedings under Section 138 of the Act. In *Calcutta Sanitary Wares v, Jacob* [1993] 76 Comp Cas 347 , a learned judge of this court observed (at page 348) :

' The issuance of cheques and their dishonour followed by notices of demand and failure to pay, are not matters which had been challenged. That payment was countermanded by a stop memo is of no consequence. That hardly affects the right of the respondent to initiate proceedings under the Act. It has the same effect as closure of the account as far as he is concerned. The object of the provision cannot be allowed to be defeated by such ingenuous action.'

13. According to us, the above observations were made with reference to the facts before him. However, we are of the view that the learned judge was right in observing that countermanding of a cheque by a stop memo hardly affects the rights of the complainant to initiate proceedings under the Act. It is not necessary for us to consider the effect of the other observations made by the learned single judge in the above-quoted passage on the facts before us.

14. In the complaint filed before the court below the complainant had specifically stated that the accused had no amount in his account with the bank for honouring the cheque and that he mischievously and maliciously issued a direction to the banker to stop payment. The complaint makes out all the ingredients of the offence under Section 138 of the Act. In such a situation, this court is not to quash the complaint in exercise of the powers under Section 482 of the Code of Criminal Procedure.

15. The petition fails. It is accordingly dismissed.