

PETITIONER:
M/S. MODI CEMENTS LTD.

Vs.

RESPONDENT:
SHRI KUCHIL KUMAR NANDI

DATE OF JUDGMENT: 02/03/1998

BENCH:
M.K. MUKHERJEE, S.P. KURDUKAR, K.T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:
THE 2ND DAY OF MARCH, 1998

Present :

Hon'ble Mr. Justice M.K. Mukherjee
Hon'ble Mr. Justice S.P. Kurdukar
Hon'ble Mr. Justice K.T. Thomas

Ranjit Kumar, and Ms. Bina Tamta, Advs. for the appellant
Ranjan Mukherjee, Adv. for the Respondent.

J U D G M E N T

The following Judgment of the Court was delivered :
S.P. KURDUKAR. J.
Leave granted.

(2) These three appeals are filed by the appellants/complainants challenging the legality and correctness of the judgment and order dated 21.11.1996 passed by the High Court in Crl. Revision Petition Nos. 2303-04 of 1995.

(3) The present proceedings arise out of a complaint filed by the appellant in the Court of Chief Judicial Magistrate, Calcutta under Section 138 of the Negotiable Instruments Act, 1981 (for short the 'Act') against the respondent. The appellant company is a public limited company manufacturing and selling cement under the brand name "Modi Cement" throughout India.

(4) The respondent/accused carries on business in the name and style of "Dubey Construction, M/s Nandi Traders, M/s Nandi Concerns, M/s Nandi and Co., M/s Nandi Enterprises, M/s S.K. Enterprises, M/s S.K. Trading and M/s Jupiter Art. The respondent/accused is sole proprietor of all these business concerns.

(5) It is alleged by the appellant in the complaint that the respondent purchased from them non-levy Modi Cement on credit against the orders placed on behalf of his concerns. These orders were placed by the respondent with the Calcutta office of the appellant and it was agreed that the price of the consignments was to be paid by the respondent at the said office. After taking accounts it was found that on 23.2.1994 the respondent incurred a liability/debt of Rs. 1,10,53,520.30 payable to the appellant towards the purchased price of the cement supplied by them to the respondent. In partial discharge of the said liability/debt

the respondent drew three cheques in favour of the appellant on 23.2.94, 26.2.94 and 28.2.94 bearing cheque Nos. 1308340-42 for a sum of Rs.2,00,000/- each.

(6) The appellant presented these three cheques on 9.8.1994 for encashment through their bankers. Bank of India, J.L. Nehru Road Branch, Calcutta. On 6.9.94 the Indian Bank Bankura, the Banker of the respondent returned the said cheques as unpaid with an endorsement "payment stopped by the drawer". Later on it transpired that vide his letter dated 8.8.94 the respondent had given such instruction. The appellant on 13.9.94 sent a legal notice in terms of Section 138 of the Act to the respondent demanding payment of the aforesaid amounts under the cheques. The said notice was duly served on the respondent on 17.9.94. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days which expired on 2.10.94, the appellant filed three criminal complaints against the respondent under Section 138 of the Act. After entering appearance in obedience to the processes issued in connection with the above three cases the respondent filed applications for staying the proceedings which were rejected.

(7) The respondent then filed three petitions under Section 482 Cr.P.C. in the High Court of Calcutta for quashing the complaints. The Learned Single Judge vide his common Judgment and order dated 21.11.96 allowed the petitions of the respondent and quashed the complaints.

It is against this order passed by the High Court the appellant has filed these appeals.

Section 130 of the Act reads thus:-

Dishonor 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 honor 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 the 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 purpose of this Section, "debt or other liability" means a legally enforceable debt or other liability.

(8) Briefly stated the reasons given by the High Court are as under:-

(i) The appellant has not pleaded in his complaint that the cheques were 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 mad 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.

(ii) Mere endorsement of the Bank "payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act.

(9) The High Court has laid much stress in its judgment to emphasize that a petition under Section 482 Cr. P.C. is tenable when no offence even prima facie was made out in the complaint. There can be no dispute regarding that legal proposition but the application thereof will depend upon the averment made in the complaint. But the second reasoning of the High Court is contrary to the decision of this Court (rendered by a Bench of two Judges) in *Electronics Trade & Technology Development Corporation Ltd., Secunderabad vs. Indian Technologists & Engineers (Electronics) (P) Ltd., & Anr.* 1996 (2) SCC 739. While interpreting Section 138 of the Act, it firstly observed as under:

"It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case, "refer to the drawer" (2) "instructions for stoppage of payment" and stamped (3) "exceeds arrangement", it amounts to dishonor within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonor, to the drawer demanding payment within 15 days from the date of the receipt of such a notice. if he does to pay the same, the statutory presumption of

dishonest intention, subject to any other liability, stands satisfied".

(10) It been took up for consideration a similar contention advanced before them by the Learned Counsel for the drawer of the cheques that stoppage of payment due to instructions does not amount to an offence under Section 138 of the Act and repelling the same observed, "We find no force in the contention. The object of bringing Section 138 on the Statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments.....". The Court further observed, "..... it is seen that once the cheque had been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque is returned to the payee with such an endorsement, it amounts to dishonor of cheque and it comes within the meaning of Section 138".

(11) Another two Judge Bench while dealing with the same question in K.K. Sidharthan vs. T.P. Praveena Chandran & Anr.. (1996) 6 SCC 369 observed. "This shows that Section 138 gets attracted in terms if cheque is dishonored 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 Corpn. Ltd., vs. Indian Technologists and Engineers (Electronics) (P) Ltd.. that even if a cheque is dishonored because of 'stop payment' instruction to the bank, Section 138 would get attracted". We are in complete agreement with the above legal proposition.

(12) The Learned Counsel for the appellant vehemently urged that both these decisions of this Court clearly support the case of the appellant and the trial court had rightly issued the process and the High Court was totally wrong in taking a contrary view.

(13) It was, however contended on behalf of the respondent that the decision in Electronics Trade & Technology Development Corporation Ltd., Secunderabad (supra) does not support the appellant as far as the facts that emerged in the present cases inasmuch as the drawer had intimated to the Bank on 8.8.1984 to stop the payment whereas the cheques were presented for encashment on 9.8.94 although the same were drawn on 23.2.1994, 26.2.1994 and 28.2.1994. The Learned counsel for the respondent strongly relied upon the following observations in Electronics Trade and Technology Development Corporation Ltd., (supra):

"Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions Section 138 does not get attracted".

emphasis supplied

(14) The Learned Counsel for the appellant submitted that if the attention of the Court was drawn to the provisions of Section 139 of the Act which according to him. had an important bearing on the point in issue, the Court would certainly not have made the above observations. The said Section reads as under:

Section 139 - Presumption in favour

of holder :- it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or to her liability".

(15) According to the learned counsel if the observations of this Court in Electronics Trade & Technology Development Corporation Ltd. Secunderabad (supra) to the effect, "Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the Bank for payment and when it is returned on instruction. Section 138 does not get attracted" is accepted as good law, the very object of introducing Section 138 in the Act would be defeated.

(16) We see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawer or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawer or the holder of a cheque in due course. The object of Chapter XVII, which is intitled as "OF PENALTIES IN CASE OF DISHONOR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS" and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this Court in Electronics Trade & Technology Development Corporation Ltd., Secunderabad (supra) in paragraph 6 to the effect "Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions. Section 138 does not get attracted", does not fit in with the object and purpose for which the above chapter has been brought on the Statute Book.

(17) The above view had been referred to in K.K. Sidharthan (supra) as is clear from Paras 5 and 6 of the Judgment.

Paras 5 and 6 read as under:-

"5. The above apart, through in the aforesaid case this Court held that even "stop payment" instruction would attract the mischief of Section 138, it has been observed in para 6, that if "after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course present the cheque to the bank for payment and when it is returned on instruction, Section 138 does not get attracted".

"6. From the facts mentioned above. We are satisfied that in the present case cheques were presented after the appellant had directed its bank to "stop payment". We have

said 'so because though it has been averred in the complaint that the cheque dated 10-10-1994 was presented for collection on that date itself through the bank of the respondent which is Catholic Syrian Bank Ltd., from the aforesaid letter of the Indian overseas Branch, we find that the cheque was presented on 15.10.1994 (in clearing). The lawyer's notice to the respondent being of 4th October, which had been replied on 12th from Cochi, which is the place of the respondent, whereas the Advocate who issued notice on behalf of the appellant was at Thrissur, it would seem to us that the first cheque had even been presented after the instruction of "stop payment" issued by the appellant had become known to the respondent".

With the above observations, the complaint under Section 138 of the Act was quashed.

(18) The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the Bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in Electronics Trade & Technology Development Corporation Ltd., Secunderabad (supra). "..... Section 138 of the Act intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 dress presumption that one commits the offence if he issues the cheque dishonestly" in our opinion, do not also lay down the law correctly.

(19) Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground either because of the amount of money standing to the credit of that account is insufficient to honor 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person, draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposited the amount thereafter before the cheque is out in the bank by the drawer, and the cheque is honored, in such a situation drawing of presumption of dishonesty on the part of the drawer under Section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonored.

(20) On careful reading of Section 138 of the Act, we are

unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honor the cheque issues the same and, therefore, amounts to an offence under Section 138 of the Act. For the persons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act of the limited extent as indicated above.

(21) It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold.

(22) In the result the appeals succeed and the common order dated 21.11.96 passed by the High Court in Criminal Revision Petition Nos. 2303-2304 of 1995 is quashed and set aside and the order passed by the Metropolitan Magistrate 11th Court, Calcutta on 6.4.95 is restored. It is made clear that all contentions are kept open.