

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.12.2016

Pronounced on :22.12.2016

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Crl.A.No.94 of 2014

Mohamad Irfan ... Petitioner
V.

Velukannan ... Respondent

Prayer: Appeal filed under Section 378(4) of the Criminal Procedure Code, against the Judgment of the Learned Fast Track Court Magisterial Level, Alandur at Chennai dated 04.12.2013 in C.C.No.76 of 2013.

For Petitioner : Mr.C.D.Johnson
For Respondent : Mr.S.Shankar

JUDGMENT

The Appellant/Complainant has preferred the instant Criminal Appeal as against the Judgment dated 04.12.2013 in C.C.No.76 of 2013 passed by the Learned Judicial Magistrate, Fast Track Court, Alandur.

2.The Learned Judicial Magistrate, Alandur, while passing the impugned Judgment in C.C.No.76 of 2013 on 04.12.2013, at paragraph 16, had, among other things, observed the following:

'... In the present case there is a technical defect in the legal demand notice that defect cannot be cured u/s 138 Negotiable Instrument Act issuance of notice to the drawer is the pre-requisite condition before exercising the right to lodge the complaint for suing the said drawer of the cheque for dishonour. It means this right is based upon the principle of Audi Alterans Partem the payee is not expected to launch a case. It is bounden duty every payee or the holder in due course within the stipulated period. Under Section 138(b) of the Accused to issue the notice to the maker of the Instrument.

There is major technical defects in the complaint. The legal requirements of under section 138 of Negotiable Instrument Act not followed by the complainant in these circumstances the complainant is failed to establish under section 138 of Negotiable Instrument Act case against the Accused.'

and resultantly, found the Respondent/Accused not guilty and acquitted him under Section 255(1) Cr.P.C.

3.The Learned Counsel for the Appellant/Complainant submits that the trial Court should not have acquitted the

Respondent/Accused in spite of the fact that all the necessary ingredients of an offence under Section 138 of the Negotiable Instruments Act are made out.

4.The Learned Counsel for the Appellant contends that the Appellant/Complainant while proceeding with the process of filing complaint under Section 138 of the Negotiable Instruments Act at the time of issuing the notice, mistakenly typed the cheque number. It is further represented that in Ex.P3 - Legal Notice dated 17.04.2013 the number of the cheque was mentioned as '361838' instead of '361868' and the said error is a typographical one, but the trial Court had acquitted the Respondent/Accused based on the reason that the cheque number was mentioned wrongly.

5.The Learned Counsel for the Appellant takes a plea that the Respondent/Accused had received Ex.P3 – Legal Notice, but had not issued any reply. At this stage, it is represented on behalf of the Appellant/Complainant that in case the Respondent/Accused had given a reply to Ex.P3 – Notice, then, the same could have been rectified by the Appellant, since it is a curable defect.

6.The Learned Counsel for the Appellant submits that in the complaint, the Appellant/Complainant had given the cheque number

in a proper manner. However, the trial Court had acquitted the Respondent/Accused based on the reason that in the Legal Notice – Ex.P3, the said cheque number was wrongly mentioned.

7.The Learned Counsel for the Appellant strenuously contends that the Respondent/Accused (in cross examination) had elucidated from the Appellant that a sum of Rs.2,00,000/- was already paid in the year 2013 and sent notice for another Rs.6,00,000/-. If that be the case, it becomes an unassailable piece of evidence that the Respondent/Accused had transaction with the Appellant/Complainant and therefore, non production of bills would have no effect and on this sole ground, the 'Judgment of Acquittal' passed by the trial Court is an invalid and illegal one.

8.Lastly, it is projected on the side of the Appellant/Complainant that an error in noting down the cheque number is of no consequence and therefore, the view taken by the trial Court in acquitting the Respondent/Accused is an unsustainable one.

9.Per contra, it is the submission of the Learned Counsel for the Respondent/Accused that the Appellant/Complainant had not satisfied

the ingredients of Section 138 of the Negotiable Instruments Act, 1881. Furthermore, it is represented on behalf of the Respondent that the Appellant/Complainant had issued Ex.P3 – Legal Notice dated 17.04.2013 in a defective fashion and in view of the technical defect while issuing Ex.P3 – Legal Notice, the trial Court had rightly opined that the Appellant/Accused had failed to establish his case and consequently, found him not guilty resulting in an acquittal under Section 255(1) Cr.P.C.

10.It is to be noted that a cursory perusal of the complaint filed [under Section 200 Cr.P.C. in respect of an offence punishable under Section 138 of the Negotiable Instruments Act] by the Appellant/Complainant clearly points out that the Respondent/Accused had approached the Complainant and requested to supply chickens to his Hotel at Navalur on 'Credit'. Furthermore, the Appellant/ Complainant had accepted the request and supplied chickens to the Respondent/Accused Hotel on 'Credit'. Moreover, the Appellant/Complainant had stated in his complaint that for running the balance amount payable by the Respondent/Accused to him, the Respondent/Accused had issued a cheque bearing No.361868 dated 22.03.2013 drawn on Indian Bank, Tambaram Branch for a sum of Rs.6,00,000/-. When the said cheque was deposited dated 22.03.2013 with the State

Bank of India, Uthandi Branch, Chennai – 600 119 for a sum of Rs.6,00,000/-, the cheque got returned unpaid, with an endorsement 'Exceeds Arrangement' and the same was informed by the Appellant/Complainant's banker on 23.03.2013.

11.The stand of the Appellant/Complainant (as seen from the complaint) is that within 30 days from the date of receipt of intimation from the Bank he issued a statutory registered notice dated 17.04.2013 – Ex.P3 calling upon the Respondent/Accused to pay the cheque amount of Rs.6,00,000/- within 15 days from the date of receipt of notice etc. The said notice was received by the Respondent on 19.04.2013.

12.The plea taken on behalf of the Appellant/Complainant is that even after the lapse of 15 days i.e. from 19.04.2013 till 10.05.2013 the Accused had neither paid the said sum of Rs.6,00,000/- towards dishonoured cheque bearing No.361868 nor replied, hence, the Respondent/Accused had committed an offence punishable under Section 138 of the Negotiable Instruments Act.

13.It is quite evident from Ex.P2 – Return Memo dated 23.03.2013 that the Bank had stated that the cheque was returned because of the reason that it 'Exceeds Arrangement'. In Ex.P3 – Legal Notice issued on behalf of the Appellant/Complainant dated

17.04.2013, it was among other things mentioned that for the chickens supplied to the Respondent/Accused on credit basis, the amount was payable and that the cheque issued by the Respondent/Accused bearing No.361868 dated 22.03.2013 drawn on Indian Bank, Tambaram East Branch for a sum of Rs.6,00,000/- to discharge liability, was deposited on 22.03.2013 at the Appellant/Complainant's Banker State Bank of India, Uthandi Branch, Chennai – 600 019 to encash the same, but the same was returned with an endorsement 'Exceeds Arrangement' which was informed by the Banker to the Appellant/Complainant on 23.03.2013 and in such circumstance, the Respondent/Accused was called upon to pay the cheque amount of Rs.6,00,000/- within 15 days from the date of receipt of notice etc.

14.Before the trial Court, it appears that the Appellant/Complainant had filed an Additional Proof Affidavit on 29.10.2013 among other things mentioning that on 10.02.2013 the Respondent/Accused had issued acknowledgement for the outstanding amount payable to him [from the year 2011-2013] for a sum of Rs.7,98,385/- and the said acknowledgement was marked as Ex.P6.

15.The categorical stand of the Appellant is that for the outstanding running balance amount payable by the Respondent/

Accused to the Appellant/Complainant, the Respondent/Accused had issued a cheque bearing No.361868 dated 22.03.2013 drawn on Indian Bank, Tambaram Branch for a sum of Rs.6,00,000/-.

16.To appreciate the facts of the present case, this Court pertinently makes a meaningful and useful reference to the evidence of P.W.1 (Appellant/ Complainant).

17.It is the evidence of P.W.1 (Appellant/Complainant) that he does not possess a licence to run the chicken stall and for the supply of chickens, he used to issue receipt and that daily an order was placed for supply of 20 kilos of chickens and if the order was for a small amount, then, money would be paid for that and if the order was for higher amount, then, a cheque would be given and for the supply of chickens to his customers, he used to write account for the amount paid by them.

18.P.W.1 in his evidence proceeds to depose that it was correct to state that in the complaint filed by him, he had not mentioned which year and to what extent the order was placed and even in his sworn statement, he had not mentioned it and for the amount of Rs.6,00,000/- to be paid by the Respondent/Accused, he had not filed any document other than the cheque, he would give receipt in the

name of his shop to his customers.

19.P.W.1 (in his cross examination) had stated that for the chickens supplied to the Respondent/Accused every month based on the order, he had not issued the receipt. Also, P.W.1 had added in his evidence that around 2013, the Respondent/Accused had paid him a sum of Rs.2,00,000/- and in the Legal Notice sent by him to the Respondent/Accused, he had mentioned the Respondent/Accused is to pay a sum of Rs.9,25,000/-. Moreover, he had stated that for each and every transaction, he has receipts.

20.Apart from the above, it is the evidence of P.W.1 that he does not know to read and write English and he had studied upto 7th standard and it was correct to state that the number mentioned in the cheque and the cheque number mentioned in the Lawyer Notice dated 17.04.2013 were different.

21.It is to be borne in mind that an issuance of notice and making a claim for the amount covered by the dishonoured cheque is one of the essential ingredients of an offence under Section 138 of the Negotiable Instruments Act. Ordinarily, while demanding a claim, the number of the cheque is only incidental. Even a cursory reading

of Section 138(b) of the Negotiable Instruments Act, 1881 does not indicate that the number of cheque is a must in Notice.

22.It is to be remembered that in 'Civil Law', 'Cause of Action' means every fact which a Plaintiff will have to prove if traversed in order to get his right but not every piece of evidence. No wonder, Section 80 of the Civil Procedure Code specifies that the 'Notice' should disclose correctly the 'Cause of Action' containing necessary particulars /circumstances giving rise to the claim. In fact, the principle of 'Cause of Action' (Bundle of Facts) is to be established in a suit for the place of 'suing', is not relevant in a Criminal Case for deciding a territorial Jurisdiction of the concerned Court. However, Section 178 Cr.P.C. enjoins that every offence shall ordinarily be inquired into and tried by a Court within whose local Jurisdiction it was committed. Likewise, Section 179 Cr.P.C. runs on similar lines.

23.In this connection, this Court relevantly points out that the 'Cause of Action' when it arises therefore assumes great significance for taking cognizance of an offence under Section 138 of the Negotiable Instruments Act by a Judicial Magistrate. Furthermore, just because ingredients of an offence under Section 138 of the Negotiable Instruments Act are attracted, it will not preclude a

Complainant from lodging 'First Information Report' with the Police, in respect of an offence under Section 420 I.P.C. as Bar under Section 142(a) of the Negotiable Instruments Act is applicable only for an offence under Section 138 of the Negotiable Instruments Act and not for a cheating offence.

24. Moreover, an offence within Section 138 of the Negotiable Instruments Act is complete with the dishonour of cheque, but taking cognizance of the same by any Court is prohibited so long as the Complainant does not have any 'Cause of Action' to file a complaint as per clause (c) of the proviso read with Section 142 of the Negotiable Instruments Act.

25. It cannot be brushed aside that if there is a structural defect in Cheque, an offence under Section 138 of the Negotiable Instruments Act is not made out. After all, the 'Cause of Action' is therefore, the non-payment of money to the Payee within 15 days of receipt of Notice by which demand for payment of the said money was made. That demand has to be made under Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, in the considered opinion of this Court.

26. In fact, the aim of issuance of notice is to provide a prior intimation about action to be taken against an individual on whom the notice is served. However, if the purport of notice suffers from mist, shroud/cloud and if one is not able to reasonably decipher, then, it will not enure to the benefit of a Complainant. Further, Section 138 of the Negotiable Instruments Act being a technical offence all the requisite technical formalities ought to be complied with as per Section 138 of the Negotiable Instruments Act. A mere perusal of Section 142(b) of the Negotiable Instruments Act shows that the words 'Cause of Action' are employed and for taking cognizance of an offence, the elements mentioned in Section 138 are might essential, though they are not part of action constituting an offence/crime, as opined by this Court.

27. It is to be pointed out that Section 138 of the Negotiable Instruments Act, 1881 is a penal provision. However, the presumption under Section 118 of the Negotiable Instruments Act is a rebuttable one. Further, the existence of legally recoverable debt is not a matter of presumption under Section 139 of the Negotiable Instruments Act.

28. Before filing a complaint under Section 142 of the Negotiable Instruments Act for having committed an offence under Section 138

of the Negotiable Instruments Act, compliance of certain provisions of the Act are necessary; (1) a Notice as per Section 138(b) of the Act is to be issued by the 'Payee' or the 'Holder in Due Course' of the cheque making a demand for payment of the amount mentioned in the cheque; (2) 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 sum by giving a notice in writing to the Drawer of cheque within 15 days of receipt of information by him from the Bank in regard to the return of the cheque as 'unpaid' etc. It is to be pointed out that if a statutory notice is issued, a Cause of Action arises which cannot be resurrected/ revived by issuing another notice. However, if a complaint is filed after service of another/second notice, the same will be hit by Limitation, in the considered opinion of this Court.

29. There is no second opinion of an essential fact that a penal liability incurred as a result of 'Dishonour of Cheque', amounts to an offence is certainly a different and independent liability. Further, as per Section 140 of the N.I. Act, when a person is prosecuted for an offence under Section 138 of the Act is precluded from taking a plea that he had no reason to believe that when he issued the cheque, it may be dishonoured on presentment for the reasons assigned in Section 138 of the Act.

30.It cannot be gainsaid that an offence will be deemed to have been committed only if a 'Drawer of the Cheque' failed to make the payment within 15 days of receipt of notice. As per definition Section 2(n) Cr.P.C. the term 'offence' includes not only performing a possible act, but by omitting to do something as well. The pivotal fact one has to bear in mind is that the 'Cheque' was drawn for discharge in full or part of liability, if this is not traversed in the complaint, then, it is a fatal one. The strict liability under Section 138 of the Negotiable Instruments Act can be enforced only when the cheque was issued in discharge of any 'Legally Enforceable Debt' or other liability partly or in entirety. No wonder, the cheque ought to be issued in respect of either past or an existing debt or other liability as the case may be.

31.It is not necessary for an Accused to let in evidence separately or to enter into the witness box and it is just enough if he can successfully gather requisite materials from the Complainant side which would amply disprove the presumptive facts, especially in relation to a pre-existing of legal liability or the debt for discharge of which the cheque in question was issued.

32.It may not be out of place for this Court to make a pertinent mention that Section 138 of the Negotiable Instruments Act refers to the demand to be made in regard to the payment of the cheque

amount by the Payee or Holder in Due Course after the cheque was dishonoured. Also that, Section 138(b) of the Act further mentions that the demand for payment must be for the 'said amount of money'.

33. At this juncture, this Court worth recalls and recollects the decision of the Hon'ble Supreme Court in ***Suman Sethi V. Ajay K. Churiwal reported in 2000 Cri.L.J. 1391 (SC) at special page 1392***, wherein at paragraph 6, it is observed as under:

"We have to ascertain the meaning of the words 'said amount of money' occurring in clause (b) and (c) to the proviso to Section 138. Reading the Section as a whole we have no hesitation to hold that the above expression refers to the words 'payment of any amount of money' occurring in main Section 138 i.e., the cheque amount. So in notice, under clause (b) to the proviso, demand has to be made for the cheque amount".

Added further, in the aforesaid decision at paragraph 8, it is observed as follows:

"It is well settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the 'said amount' i.e., cheque amount. If no

such demand is made the notice no doubt would fall short of its legal requirement."

34.As far as the present case is concerned, in the complaint, the Appellant/Complainant, at paragraph 8 and 12 had mentioned the number of the cheque as '361868' dated 22.03.2013, but at paragraph 9 of the complaint, the cheque number was mentioned as '361838'. In fact, in Ex.R1 – Legal Notice dated 17.04.2013 (issued to the Respondent/Accused), the cheque number was mentioned as '361868' but at paragraph 5 of the said notice, the cheque that was deposited on 22.03.2013, described as '361838'. Even though incorrect mentioning of the Cheque number in Ex.R1 - Legal Notice dated 17.04.2013 is a mistake or ancillary or incidental one, since the transaction between the Appellant/Accused viz., supply of chickens, the evidence of P.W.1 indicates that the Respondent/Accused had issued the cheque in favour of the Appellant/Complainant towards security for the outstanding amount. At this stage, this Court aptly points out that if the cheques were issued not for discharge of any debt or liability, but they were issued by way of security, the Applicant could not be held liable under Section 138 of the Negotiable Instruments Act, as per decision ***Jitendra Singh Flora v. Ravikant Talwar, [2001] 2 Crimes 534.***

35. In so far as the 'Writing of Accounts' by P.W.1 (Appellant/Complainant), it is to be pointed out that as per Section 34 of the Indian Evidence Act, 1872 entries in 'Books of Accounts' regularly kept in the course of business are relevant, although it may not be adequate enough to charge any one with liability, in the considered opinion of this Court. Also that, there cannot be any certain form of 'Books of Accounts'. An entry in an account is a self serving one as it is an admission by the maker thereof, in his favour. The crucial test would be whether the entries in a particular account are honest or otherwise. An account book is to be established by a person who had written it and if he is alive or by some other person who is competent to speak about its veracity/genuineness. It cannot be gainsaid that before an extract from 'Account Book' is admitted in evidence, it must be legally proved.

36. Furthermore, in the instant case, even though the Appellant/Complainant had deposed (in his cross examination) to the effect that for every transaction concerning the Respondent/Accused, he had receipt with him and further stated that it was correct to state per month with the Respondent/Accused he had a business of Rs.70,000/-, but the said receipt to show a running transaction

between the Appellant/Complainant and the Respondent/Accused was not produced before the trial Court and marked as an Exhibit. Moreover, for the supply of chickens to his customers, P.W.1 (Appellant/Complainant) had stated in his cross examination that he used to write account for the amount paid by the customers, yet, he had not filed the same before the Court and also not marked the same as a document on his side. More importantly, the Appellant/Complainant although he had admitted in his evidence (in cross examination) that around 2013 the Respondent/Accused had paid a sum of Rs.2,00,000/- to him, but he had stated that in Ex.P3 – Notice he had mentioned that the Respondent/Accused should pay a sum of Rs.9,25,000/- towards an outstanding amount. In this aspect, there is a variance as seen from Ex.P3 – Notice wherein the outstanding sum was mentioned as Rs.6,00,000/- for which only the cheque in question was issued.

37.Be that as it may, in the instant case, even though the Appellant/Complainant, at paragraphs 8 & 12, in the complaint, had mentioned the cheque number as '361868' and mentioned the cheque number incorrectly as '361838' in Ex.P3 – Notice, this Court is of the considered view that there is no mist or cloud or shroud or any manner of simmering doubt in regard to the language employed in

Section 138 of the Negotiable Instruments Act. Admittedly, notice will have to be read in entirety. In the present case, there was no correction notice communicated/issued on behalf of the Appellant/Complainant to the Respondent/Accused. Also, considering the fact that the supply of chickens by the Appellant/Complainant to the Respondent/Accused is a running transaction, the mistake that had occurred in Ex.P3 – Notice pertaining to the cheque number cannot be said to be an ancillary/ incidental or irrelevant/immaterial one, because of the fact that the issuance of Cheque – Ex.P1 was not the only one transaction between the parties. Certainly, the incorrect mentioning of the cheque in Ex.P3 – Notice is not fulfilling the requirement under Section 138(b) of the Negotiable Instruments Act. In as much as Ex.P3 – Notice is not in conformity with Ex.P1 – Cheque, as a logical corollary, the complaint filed by the Appellant/Complainant is *per se* not maintainable in Law.

38.In view of the aforesaid qualitative and quantitative discussions, this Court comes to a consequent conclusion that the Appellant/Complainant had not established his case beyond all reasonable doubt. Therefore, the resultant view taken by the trial Court in finding the Respondent/Accused not guilty and acquitting him under Section 255(1) Cr.P.C. is free from any flaw.

Consequently, the Criminal Appeal fails.

39.In fine, the Criminal Appeal is dismissed. The Judgment passed by the trial Court in C.C.No.76 of 2013 dated 04.12.2013 is affirmed by this Court for the reasons assigned in this Appeal.

22.12.2016

Index : Yes
Internet : Yes
Sgl

To

- 1.The Fast Track Court
Magisterial Level,
Alandur at Chennai.
- 2.The Section officer
Record Section,
High Court, Madras.

M.VENUGOPAL,J.

Sgl

JUDGMENT IN
Crl.A.No.94 of 2014

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