SMT. JUSTICE T. RAJANI

Criminal Appeal No.1833 of 2007

JUDGMENT:

This appeal is preferred against the judgment dated 27.09.2007 passed in C.C. No.106 of 2006 on the file of the Judicial Magistrate of First Class, Parchur by virtue of which the Court below dismissed the complaint, which was filed for the offence under Section 138 of N.I.Act.

The facts of the case, in brief, are that the accused borrowed an amount of Rs.85,000/- from the complainant on 17.04.2006, for the purpose of his Cinema business, he being the Proprietor of Bhaskar Picture Palace, Parchur and executed a pro-note in his own handwriting, agreeing to repay the same with interest at 24% per annum, to the complainant or to his order on demand. In spite of several demands, the accused did not pay the amount but issued a cheque bearing No.016262 dated 17.09.2006 for Rs.85,000/- drawn on the Vysya Bank Limited, Guntur, which is presently called as Ing Visya Bank. When the said cheque was presented, the same was returned with a memo dated 25.09.2006, with an endorsement "no account in the bank". Thereafter, the complainant got issued a legal notice dated 04.10.2006 and on receiving the same, the accused neither made payment nor gave reply, hence, the complainant lodged the complaint.

The Court below, on appearance of the accused before it, after complying with all the legal formalities, framed accusation against the accused for the offence under Section 138 of the Act, which was denied by the accused and he claimed for trial. During trial, on behalf of the prosecution P.Ws.1 and 2 were examined and Exs.P.1 to P.8 were marked. On behalf of the defence no evidence was adduced. The Court below, after considering the evidence on record, passed the impugned judgment, against which the present appeal has been preferred on the grounds, that the Court below misread the evidence and went wrong in holding that the existence of live account at the time of drawing the cheque is a condition precedent, for attracting penal liability under Section 138 of the Act; the Court below ought to have found that the complainant was under *bona fide* impression that the second respondent was having bank account and to discharge the legally enforceable debt due to him, the second respondent/accused issued the cheque; it ought to have found that in mercantile transaction, it is not possible to verify whether the cheques are issued from the live account. On the basis of the above grounds, the appellant/complainant seeks to set aside the impugned judgment.

Heard the learned counsel for the appellant and the learned Public Prosecutor, appearing for the first respondent. None appears for the second respondent in spite of service of notice.

The learned counsel for the appellant contends that even if the account is closed, the accused would be liable for prosecution under Section 138 of the Act. Based on the above argument, the following point is framed for consideration:

1) Whether the prosecution is maintainable against the accused when the cheque is returned with an endorsement that there is no account.

The cheque, which was issued by the accused, was marked as Ex.P.2, drawn on the Vysya Bank Limited. No account number is found on the said cheque and the column of account number is kept blank. The cheque return memo shows that the cheque was returned on the ground that there is no account number. Hence, from the cheque return memo it can be understood that there is no account number pertaining to the accused in the said bank. Section 138 of the Act can be extracted for better appreciation of the facts.

> 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 provisions of this Act, be punished with imprisonment for [19] [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Hence, the question of prosecuting a person under Section 138 of the Act would arise only when a person draws a cheque on an account maintained by him with a banker, for payment of any amount to another person, from out of that account, for the discharge. Hence, the words used in the above provision are very specific that the cheque should be drawn on the account of the drawer. It is one thing to say that the accused has closed the account either before or after the issuance of the cheque. But when there is no account at all in the name of the accused, in the bank on which the cheque was drawn, the question of prosecuting a person for the offence under Section 138 of the Act does not arise. It may be a case for Section 420 IPC. The Court below relied on a judgment of the High Court of Karnataka in **DEEPA FINANCE CORPORATION Vs. MOHAMMED, A.K.,[1],** which is to the effect that when a cheque is drawn on overdraft account, without mentioning account number and overdraft account is not in existence on the date of which cheques were drawn provision of Section 138 are not attracted and

[1] 2001 Crl.Law Journal 3582 (Karnataka)

cheque cannot be said to be drawn on the account maintained by drawer. The judgment of the Bombay High Court can also be looked into, which is reported in **SHIVENDRA SANSGUIRI Vs. ADINEO AND ANOTHER**[2]. The observations made at para 9 would be relevant, which reads as under:

> 9. The problem unfolded in this case can be looked into another angle. Cheque facility is afforded by a Bank to its customer only when a customer opens an account in a Bank with funds. This is part of its Banking activity. This prerogative is available for a Bank under the provisions of the Banking Regulation Act. "Banking" has been defined under the said Act. Section 5(a) of the Banking Regulation Act reads hereunder :-
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> "Banking" means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft order or otherwise."
>
> This section clearly mandates that a cheque can be used by its customer for withdrawing the money from the Bank. When a customer of the Bank draws a cheque in discharge of his debt, the Banker steps into the shoes of the customer of drawer to pay the money shown in the cheque to the payee of the cheque. Law, therefore, does not take cognizance of a situation to issuance of a cheque without an account in the Bank. If any customer closes an account with the Bank, it is the legal responsibility of the Banker to see that all unused cheque leaves are surrendered to the Bank and see that the cheque issued by the customer before closure of account is honoured. If any Banker does not observe this obligation it is liable not only under the Banking Regulation Act but also liable for damages to the person in whose favour the cheque was issued. However, this obligation of the Banker does not absolve the drawer from the

[2] 1998 (2) ALD (Crl.) 177 (Bom.)

> liability in the event of the cheque being dishonoured, under Section 138 of Negotiable Instrument Act. If he closes the account before or after the issuance of the cheque because when cheque is drawn in discharge of a pecuniary liability, it can be always presumed that there exists an account in the Bank in the name of a drawer. This presumption, however, cannot be displaced by misusing cheque facility after closing the account. In such circumstances the drawer of the cheque is not only liable under Section 138 of the Negotiable Instruments Act, but also under Banking Regulation Act. At any stretch of reasoning, it cannot be said that such misuser of cheque is not liable under Section 138 of the Negotiable Instruments Act. To hold otherwise will render the whole object of the legislation infructuous.

The facts of this case do not reflect that the accused had any account in the bank at all. Hence, the facts of this case become distinguishable from the facts of the case dealt with by the Bombay High Court (2nd supra).

The learned counsel for the appellant relies on the ruling reported in **GORANTLA VENKATESWARA RAO Vs. KOLLA VEERA RAGHAVA RAO AND ANOTHER**[3] which also is rendered on similar facts, as dealt with by the Bombay High Court (2nd supra). It was after issuing the cheque, that the account therein was closed. But, in this case, as already noted, there was no account of the accused at all, which can be understood from the cheque return memo and the notice issued by the complainant, which mentions the same. The cheque return memo contains the endorsement as no account number, which may also mean that there was no account number on the cheque. But the understanding of the said endorsement by the complainant is reflected in the notice, as no account. No evidence, to explain the same, is adduced.

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[3] 2005 (2) ALD (Crl.) 840 (AP)

Even if it is taken as the absence of account number on the cheque, it would be bereft of the ingredients of Section 138 of the Act, as the cheque has to be drawn on the account of the drawer. In view of the above, this Court is of the view that the judgment of the Court below does not require any interference.

In the result, the appeal is dismissed. Consequently, miscellaneous applications, if any pending, shall stand closed.

JUSTICE T. RAJANI

Date: 26.09.2018
LSK