



IN THE HIGH COURT OF JUDICATURE AT MADRAS

[ORDERS RESERVED ON : 15.02.2022]

[ORDERS PRONOUNCED ON : 23.02.2022]

CORAM

THE HON'BLE MR.JUSTICE G.CHANDRASEKHARAN

CRL.O.P.NO.17294 OF 2016

AND

CRL.M.P.NOS.8273 AND 8274 OF 2016

D.V.Vanitha

...Petitioner/Accused

Vs.

M.Samiyappan

...Respondent/Complainant

Prayer :- Criminal Original Petition is filed under Section 482 of Code of Criminal Procedure, to quash the private complaint in S.T.C.No.421 of 2016 on the file of the Judicial Magistrate No.2, Salem for the alleged offence under Section 138 of Negotiable Instruments Act.

For Petitioner : Mr.S.Doraisamy

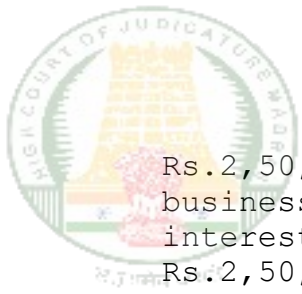
For Respondent : Mr.D.Shivakumaran

O R D E R

This Criminal Original Petition is filed to call for the records in S.T.C.No.421 of 2016 on the file of Judicial Magistrate No.II, Salem and to quash the same.

2. The case in S.T.C.No.421 of 2016 was filed under Section 200 of Criminal Procedure Code read with Section 138 of the Negotiable Act, 1881.

3. The petitioner is an accused in the case. The allegations against the petitioner is that the respondent/complainant, on the request of the petitioner/accused lent him a sum of



Rs.2,50,000/- on 01.08.2015 to meet the urgent family and business expenses. The petitioner agreed to pay the amount with interest at 18% per annum. Petitioner borrowed another amount Rs.2,50,000/- from the respondent on 01.09.2015 for her urgent family and business necessity and agreed to repay the same with interest at 18% per annum to the respondent/complainant. After repeated demands, petitioner issued a cheque in favour of the respondent on 01.02.2016 for Rs.5 lakhs drawn on Karur Vysya Bank Limited, Salem. The cheque Number is 284360. As per the request of the petitioner, the respondent presented the cheque for collection on 28.03.2016 in Indian Overseas Bank, V.S.A.Complex, Near New Bus stand, Leigh Bazaar branch, Salem. But the cheque was dishonoured on 29.03.2016 on the ground that "account closed". The respondent/complainant caused a legal notice dated 26.04.2016 to the petitioner/accused calling upon her to pay the amount within 15 days from the date of receipt of this notice. The notice was received by the petitioner on 27.04.2016. Instead of paying the cheque amount, petitioner sent a reply notice containing false allegations. Therefore, this case is filed.

4. Petitioner filed this quash petition on the ground that the cheque bearing No.284360 dated 01.02.2016 was presented by the respondent on 02.02.2016 and the same was returned for the reason "account closed". Without issuing the statutory notice, respondent again presented the cheque on 28.03.2016. This time also the cheque was returned with the same endorsement "account closed" on 29.03.2016. Only thereafter, respondent issued the Statutory notice on 26.04.2016. Petitioner gave a suitable reply on 10.05.2016 and this complaint came to be filed on 13.05.2016.

5. It is further submitted that when a cheque was returned on 03.02.2016 for the reason "account closed", the respondent ought to have issued legal notice within 30 days from the date of receipt of memo from the Bank. That was not done in this case. Having failed to give statutory notice within the stipulated period, the respondent again presented the cheque on 28.03.2016 for the purpose of savings the limitation. The second presentation after the return of the cheque on the ground "account closed" is illegal and it was made only for the purpose of saving limitation and therefore this case has to be quashed.

6. In support of the case, the learned counsel for the petitioner has relied on the following judgments:-

(i) (1999) 4 Supreme Court Cases 253 [NEPC MICON LTD and others Vs.MAGMA LEASING LTD] it has been held that:

"The return of a cheque by the bank unpaid on the ground that the "account is closed" would mean that the cheque is returned as unpaid on the ground that



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"the amount of money standing to the credit of that account is insufficient to honour the cheque". The reason is that the cheque was dishonoured as the amount of money standing to the credit of "that account" was "nil" at the relevant time apart from it being closed. The closure of the account would be an eventuality after the entire amount in the account is withdrawn. It means that there was no amount in the credit of "that account" on the relevant date when the cheque was presented for honouring the same. The expression "the amount of money is insufficient to honour the cheque" is a genus of which the expression "that account being closed" is a specie. After issuing the cheque drawn on an account maintained, if the drawer closes "that account" apart from the fact that it may amount to another offence, it would certainly be an offence under Section 138."

(ii) (2012) 13 Supreme Court Cases 475 [Laxmi Dyechem Vs.State of Gujarat and others] it has been held that:

"16. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in Magma Case that the expression "amount of money....is insufficient" appearing in Section 138 of the Act is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act."

7. Per contra, the learned counsel for the respondent submitted that the second presentation of the cheque is not altogether barred. "Account closed" implies that there is no sufficient fund in the account at the time of closure of the account. Therefore, the accused can be prosecuted for insufficiency of funds. The complainant is entitled to make successive presentation of the cheque within the period permitted that is what had been done in this case. Petitioner had no sufficient funds in his account at the time of closing the account. Therefore, the complaint is maintainable and the case should go for trial.



8. In support of his submission, the learned counsel for the respondent has relied on the following judgments.

(i) 2010 4 Crime (HC) 143 [R.Basant and M.C.Hari Rani.JJ Devan Vs.Krishna Menon] it has been held that:

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"39. It is contended with the help of the decision of the Karnataka High Court in Nanjundappa V.Hanumantharayappa, that when the dishonour is on the ground of "account closed" and "the signature differs", the period of limitation must start running from the date of initial presentation. Subsequent presentation cannot give a renewed lease of life for the cause of action, contends the learned counsel."

"40. We have gone through the decision in Sadanandan Bhadrar V.Madhavan Sunil Kumar⁸, which has clearly held that successive presentation within the permissible period of time is justified and can be resorted to. The cause of action for prosecution can arise only when a notice of demand is issued. Till then within the period permitted by Section 138 of the Negotiable Instruments Act, any number of representations can be done. We are unable to accept the general statement made in Nanjundappa (supra) that in such a case the prosecution must be held to be failed by limitation, if notice of demand is not given within the stipulated period from the date of the original dishonour of the cheque. In the instant case, we find that it is the specific case of the complainant that initial dishonour on the twin grounds was conveyed to the accused and the accused wanted the complainant to represent such cheques for encashment. In any view of the matter, we are unable to agree that the mere fact that signature differs"was one of the reasons for dishonour of the cheque is sufficient to conclude that the period of limitation will start even before the cause of action has arisen as per the decision in Sadanandan (supra). We respectfully disagree with the dictum in Nanjundappa (supra). The challenge on the sixth ground also therefore fails.

ii) 2007 4 AIR (Kar) (R) 523 [H.Nanjundappa (deceased) by his L.R V.H.Hanumantharayappa] it has been held that:

"4. The dishonour of a cheque on the ground of "account closed" may be technically within the meaning of legal phrase of "insufficiency of funds". But in a fact situation both are not always identical. In the case of literal situation of insufficiency of funds in the account successive presentation may serve purpose.



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The drawer could be given opportunity to make good the funds in the account for honouring the cheque on the second presentation. But in the case of "account closed", the question of successive presentation makes no sense because the account itself is not in existence, there is no possibility of having a fruitful result by successive presentation unlike in the case of "insufficiency of funds". Therefore, whenever the cheque is dishonoured on the ground of account closed, the payee cannot resort to successive presentation to save the limitation. So also in the case of dishonour of cheque on the ground that "the signature does not tally with the specimen".

iii) (2013) 10 Supreme Court Cases 568 [MSR Leathers Vs.S.Palaniappan and another] it has been held that:

"8. After analysing Sections 138 and 142 of the Act, Their Lordships held that : (SCC p. 192, para 23)

"23.....we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138".

Accordingly, Their Lordships held as follows: (SCC p.193, para 25)

"25. Coming then to the question whether there is anything in section 142(b) to suggest that prosecution based on subsequent or successive dishonour is impermissible, we need only mention that the limitation which Sadanandan Bhadrans case reads into that provision does not appear to us to arise. We say so because while a complaint based on a default and notice to pay must be filed within a period of one month from the date the cause of action accrues, which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires, there is nothing in Section 142 to suggest that expiry of any such limitation would absolve him of his criminal liability should the cheque continue to get dishonoured by the bank on subsequent presentations. So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holder's right to prosecute the drawer for the default committed by him remains valid and exercisable. The argument that the holder takes advantage by not filing a prosecution against the drawer has not impressed us. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of Section 138 proviso clause (b), the drawer gets an extended period to make the payment and thereby benefits in terms of further opportunity to pay



to avoid prosecution. Such fresh opportunity cannot held the defaulter on any juristic principle, to get a complete absolution from prosecution".

iv) (1999) 4 Supreme Court Cases 253 [NEPC MICON Ltd and others V.MAGMA LEASING LTD] it has been held that:

"14.....The Court observed that the object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transaction in business on negotiable instruments and to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Thereafter, the Court disagreed with other views expressed in the aforesaid two cases and held that 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 drawee or to the bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The Court further held that it will make Section 138 a dead letter if the contention that by giving instruction to the bank to stop payment immediately after issuing a cheque against the debt or liability, the drawer can easily get rid of the penal consequences notwithstanding the fact that deemed offence was committed. Finally, the Court held that Section 138 of the Act gets attracted only when the cheque is dishonoured".

v) (2012) 13 Supreme Court Cases 375 [Laxmi Dyechem Vs.State of Gujarat and others] it has been held that:

"28. What is wished to be emphasised is that matters arising out of "stop-payment" instruction to the bank although would constitute an offence under Section 138 of the NI Act since this is no longer res integra, the same is an offence subject to the provision of Section 139 of the Act and hence, where the accused fails to discharge his burden of rebuttal by proving that the cheque could be held to be a cheque only for discharge of a lawful debt, the offence would be made out. Therefore, the cases arising out of stop-payment situation where the drawer of cheques has sufficient funds in his account and yet stops payment for bona fide reasons, the same cannot be put on a par with other variety of cases where the cheque has bounced on account of insufficiency of funds or where it exceeds the amount arranged to be paid from that account, since Section 138 cannot be



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applied in isolation ignoring Section 139 which envisages a right of rebuttal before an offence could be made out under Section 138 of the Act as the legislature already incorporates the expression "unless the contrary is proved" which means that the presumption of law shall stand and unless it is rebutted or disproved, the holder of a cheque shall be presumed to have received the cheque of the nature referred to in Section 138 of the NI Act, for the discharge of a debt or other liability. Hence, unless the contrary is proved, the presumption shall be made that the holder of a negotiable instrument is holder in due course".

9. In reply, the learned counsel for the petitioner submitted that apart from the return of the cheque for the reason "account closed", the specific case of the petitioner is that she had lost the cheque along with other records. A paper publication was given in this regard on 25.01.2016 followed by a police complaint on 28.09.2016. On receiving, the notice dated 26.04.2016, petitioner sent a detailed reply dated 10.05.2016 denying the allegations made in the notice and also explaining her case. Suppressing the earlier presentation and return of the cheque, this complaint had been filed. Therefore, it deserves to be quashed.

10. Considered the rival submissions and perused the records.

11. It is seen from the complaint allegations that petitioner issued a cheque on 01.02.2015 for a sum of Rs.5 lakhs and it was presented for collection on 28.03.2016. Cheque was dishonoured on 29.03.2016 for the reason that "account closed". From the typed set of papers filed by the petitioner it is clear that the cheque was earlier presented on 02.02.2016 and returned with the reason "account closed". In the reply dated 10.05.2016, petitioner clearly stated that the cheque presented for collection on 02.02.2016 was returned on 03.02.2016 for the reason that "account closed".

12. As rightly pointed out by the learned counsel for the petitioner that the earlier presentation of cheque on 02.02.2016, return of cheque on 03.03.2016 for the reason "account closed" is not mentioned either in the statutory notice dated 26.04.2016 or in the complaint. Thus it is clear that a material information was suppressed by the petitioner. It is claimed in the reply that the account was closed even in the year 2010. Petitioner claims that she does not aware of the respondent and she never had any dealings with the respondent, especially money dealings.



13. From the facts narrated above, it is evident that respondent had earlier presented cheque on 02.02.2016 and that was returned on 03.02.2016 for the reason "account closed". This fact was not mentioned in the statutory notice or in the complaint. Again, the same cheque was presented on 28.03.2016 and returned on 29.03.2016 with the same reason "account closed". Whether the second presentation of the cheque, when the cheque was earlier returned for the reason "account closed" is legally permissible is the moot question? Next question is whether the claim of the petitioner that the second presentation was made only for the purpose of saving the limitation?

14. While dealing with the cheque returned on the ground that the "account closed", it was observed in 1999 4 SCC 253 [NEPC MICON LTD and others V.MAGMA LEASING LTD] that "account is closed" would mean that the cheque is returned as unpaid on the ground that "the amount of money standing to the credit of that account is insufficient to honour the cheque". It is observed in "2012 (13) SCC 375 [Laxmi Dyechem V.State of Gujarat and others] that the reasons for dishonour of cheque " as account closed", "payment stopped", "referred to drawer" are only species of the genus that the amount of money available in the account is insufficient. Therefore, these grounds for return would constitute a dishonour within the meaning of Section 138 of the Act.

15. The judgment reported in 2013 10 SCC 568 [MSR Leathers V.S.Palaniappan and another] is relied upon for the proposition that a cheque may be presented again, after its dishonour. It is no doubt, a cheque may be presented second time. Validity of second presentation depends on facts and circumstances of the case. The aforesaid judgment deals with the case where the cheque was returned for the reason "not arranged funds for". We have the case where the cheque was returned for the reason "account closed". The aforesaid judgments relied by the counsel appearing for the respondent do not deal with the situation where a cheque was presented again, when the earlier presentation was dishonoured on the ground "account closed".

16. There is an observation in the judgment reported in 2010 (4) Crime HC 143 that the Court has not accepted the general statement made in Nanjundappa (deceased) by his L.R V.H.Hanumantharayappa that when the cheque is dishonoured for the reason "account closed" and "signature differs" the limitation starts running from the date of initial presentation. In the said case, there was a specific case of the complainant that initial dishonour on the twin grounds was conveyed to the accused and the accused wanted the complaint to represent the cheques for encashment. That is not the situation here.



17. In the case before hand, the first presentation of cheque and return on the ground of "account closed" was not even mentioned in the statutory notice and the complaint and it was not informed to the petitioner and petitioner had never asked the respondent to represent the cheque again. Therefore, the judgment reported in 2010 (4) Crime HC 143 is not applicable to the facts and circumstances of this case.

18. In the case before hand the cheque was returned for the reason that "account closed" on 03.02.2016 when it was presented for the first time on 02.02.2016. Suppressing this return, cheque was presented again on 28.03.2016 and it was again returned for the same reason "account closed". It is palpably clear that second presentation was made only to bring the case within a period of limitation. There is no logic or reason for representing the cheque again, when the cheque was returned for the reason "account closed". Once account is closed, there is no question of re-opening the account to facilitate payment in the same account. It is quite obvious that the respondent having failed to issue a statutory notice within stipulated period after the first return, again presented the cheque to save the limitation. This Court finds that this case is barred by limitation and cannot be maintained.

19. In this view of the matter, this Criminal Original Petition is allowed and the case in S.T.C.No.421 of 2016 o the file of the Judicial Magistrate No.II, Salem is quashed. Consequently, connected Crl.M.Ps are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate No.2, Salem.
2. The Public Prosecutor
High Court of Madras.

+lcc to M/s.S.Doraisamy, Advocate, S.R.No.11866
+lcc to M/s.D.Shivakumaran, Advocate, S.R.No.11882

CRL.O.P.No.17294 of 2016 and
Crl.M.P.Nos.8273 and 8274 of 2016

BS (CO)
RLP(10/03/2022)