IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
29.04.2024 & 30.04.2024	**03.06.2024**

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

CRL. A. NOS.473, 481, 482, 485 OF 2024 & 305 OF 2021
AND
CRL. O.P. NOS. 9792, 10557, 10628 OF 2024, 25233 OF 2023
CRL M.P. NO. 2904 OF 2024 IN CRL A. SR NO. 7517 OF 2024

CRL. A. NO. 473 OF 2024

M/s. Sree Gokulam Chit & Finance
Co. (P) Ltd., rep. By its Vice
Chairman, Mr. V.C.Praveen
Regional Office at :
Sree Gokulam Towers
100 Feet Road, 7th Street
Gandhipuram, Coimbatore – 12

Corporate Office at :
No.66, Arcot Road, Kodambakkam
Chennai 600 024. .. Appellant

- Vs -

M. Rajkumar .. Respondent

Crl. A. No.473 of 2024 filed under Section 378 of the Code of Criminal Procedure against the judgment in C.C. No.32 of 2017 dated 5.2.2024 passed by the Judicial Magistrate No.I, Fast Track Court, Magisterial Level, Coimbatore.

For Appellant / Petitioner	:	Mr. L.Rajasekar in all appeals & Original Petitions
For Respondents	:	Mr. C.Prabakaran in CA 305/2021

COMMON JUDGMENT

Assailing the orders in and by which the complaint initiated by the appellant u/s 138 of the Negotiable Instruments Act (for short 'the Act') had come to be dismissed, the present appeals are directed against the said judgment.

2. There are two sets of petitions. In the first set, the appeals have been filed after grant of leave by this Court assailing the said orders, while in the second set, criminal original petitions have been filed seeking leave of this Court to file the appeal. Since the issue involved in the appeals as well as the petitions

seeking grant of leave for filing the appeals are one and the same, they are taken up together and disposed of by this common judgment.

3. For the sake of clarity/convenience, the appellant in the appeals, who is the petitioner in the grant leave petitions will be referred to as 'appellant' and the respondent in the appeals and petitions will be referred to as 'respondents'.

4. In the appeals, notice had been ordered and in some of the appeals, the respondents have appeared through counsel. However, insofar as the criminal original petitions are concerned, where, leave is sought for, for filing the appeal, as no adverse order is being passed against the respondents therein, notice to the respective respondent in the criminal original petitions are dispensed with.

5. The facts in all the appeals/petitions are one and the same and, therefore, barring the specifics, the brief facts, which are required for appreciation of the issue are stated hereunder.

6. Chits run by the appellant are governed by the Tamil Nadu Chit Funds Act. The respondents in all the appeals/petitions are persons, who had entered into chit transaction with the appellant. The period of chit covered in all the cases is for a tenure of 20 months. It is the case of the appellant that the respondents, who were paying the monthly chit amounts, at various points of time in the chit, had become the successful bidder and they were disbursed the prize money by the appellant. However, after receiving the chit amount, even before the term, on the basis of their successful bid, the respondents failed to honour the commitment to pay the subscription amount every month till the end of the chit term and, thereby, committed default and the respondents are liable to pay various sums of money, as detailed in the respective affidavit filed in support of the appeals/petitions.

7. It is the further case of the appellant that due to the said default committed by the respondents, which were called upon to be paid by the respective respondents, the respective respondents gave cheque for the said amount towards discharge of the defaulted amount, which cheque, on being deposited were returned by the appellant's bankers for insufficient funds. Upon

return of the cheques as dishonoured, the appellant issued legal notice u/s 138 (b) of the Act calling upon the respondents to pay the amount of the cheque, failing which legal action would be taken to realise the said amount. The notice issued by the appellant was acknowledged and reply notice was given by the respondents for which a rejoinder was sent by the appellant. Inspite of the same, as the respondents fail to pay the amount, the appellant filed complaints before the court competent to take cognizance of the case u/s 138 of the Act. Upon cognizance being taken, summons were issued to the accused and on their appearance, copy of the complaint was provided to the accused, who pleaded not guilty and contended that a false case has been foisted upon them.

8. Trial proceeded thereafter during which, in each of the case, the appellant and the respondents examined witnesses and marked documents. The court below, upon perusing the oral and documentary evidence and appreciating all the other materials available on record, as also the provision of Section 138 and 139 of the Act held that the appellant has not proved that the cheque was issued towards the discharge of a legally enforceable debt and, accordingly, dismissed the complaint by holding the accused/respondents not guilty of the

offence. Aggrieved by the same, the present appeals and petitions seeking leave to file appeal have been filed.

9. Learned counsel appearing for the appellant submitted that there is a clear admission that the respondents had partaken in the chit and had become the successful bidder and had been paid the bid amount. However, they committed default in paying the chit amount regularly after receiving the bid amount. It is the further submission of the learned counsel that upon constant follow up, the respondents agreed to pay the defaulted amount and had given the cheque, which had since been dishonoured, leading to the filing of the complaint.

10. It is the further submission of the learned counsel that the once the cheque given by the respondents is dishonoured, which is towards the discharge of whole or part of the debt, then the presumption falls on the respondents to prove that the cheque was not given for the purpose of discharge of the debt. Since the respondents have failed to prove the same, necessarily the benefit should fall on the appellant and the court below ought to have appreciated the

said fact in proper perspective, which it has miserably failed to do and, therefore, the respective orders require interference at the hands of this Court.

11. In support of the aforesaid submissions, learned counsel for the appellant placed reliance on the following decisions :-

- *i)* *M/s. Oriental Kuries Ltd. – Vs – Lisa & Ors. (AIR 2020 SC 115);*
- *ii)* *K.Selvam & Anr. – Vs – M/s. Gokulam Chit Fund Pvt. Ltd. (Crl. O.P. (MD) 8115 & 8202 of 2018 – Dated 12.11.2019);*
- *iii)* *M/s. Sri Krishna Agencies – Vs – State of A.P. & Anr. (2AIR 2009 SC 1011);*
- *iv)* *Dashrathbai Trikambahi Patel – Vs – Hitesh Mahendrabhai Patel & anr. (2022 Live Law (SC) 830); and*
- *v)* *Sripathi Singh – Vs – State of Jharkhand (2021 Live Law (SC) 606)*

12. Per contra, learned counsel appearing for the respondent in Crl. A. No.305/2021 submitted that Section 138 of the Act clearly mandates that the cheque which has been drawn by the person should be for the purpose of

discharge, in whole or in part, of any debt or other liability which clearly puts the onus on the appellant to show that the said cheque was given for the purpose of discharging the debt or liability. However, the courts below have categorically held that the cheque, which was given as security along with blank papers had been misused by the appellant and, therefore, the said cheque cannot be brought within the ambit of a dishonoured cheque as provided for u/s 138 of the Act.

13. It is the further submission of the learned counsel that the dishonour of the cheque should be for a legally enforceable debt and in this regard, it is for the appellant to provide the details and prove that the amounts, towards which statements are given, are legally enforceable debts, which have to be paid by the respondents, however, there is a specific finding by the courts below that no details with regard to the enforceability of the debts have been provided such as statement of accounts, the demands raised towards the default committed, etc., and there is no calculation of the amount which has been claimed against the respective respondents.

14. It is the further submission of the learned counsel that even, without admitting, that the claim of the appellant is towards default in payment of chit amount, the appellant ought to proceed against the respondents under the provisions of the Chit Funds Act and it is not open to the appellant to invoke Section 138 of the Act, when the cheques have not been given for the purpose of satisfying a legally enforceable debt, but was given only as a security. Rightly appreciating all the aforesaid facts, the courts below have rightly dismissed the complaint filed by the appellant by giving cogent and convincing reasons and the same does not require any interference at the hands of this Court.

15. This Court gave its careful consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record as also the relevant provision of law with regard to dishonour of cheques.

16. The short question that falls for consideration of this court is –

Whether a complaint could be maintained u/s 138 of the Act with regard to a dishonoured cheque without *establishing that it is for enforcing a legally enforceable debt, which is on account of a default alleged to have been committed in the payment of chit.*

17. Before appreciating the facts in issue, Sections 138 and 139 of the Act, which are relevant for the consideration of the present issue, requires to be adverted to and the same is quoted hereunder :-

*"**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 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.

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 other liability."

18. The appellant is drawing inspiration from the presumption provided for u/s 139 of the Act to impress upon this Court that it is for the respondents to prove that the respective cheques, which are the subject matter of the present petitions/appeals were not issued towards the discharge of any debt or liability and in the absence of such proof, necessarily, the rigours of Section 138 of the Act would stand attracted.

19. In this regard, a careful perusal of the order passed by the courts below in the cases, which are the subject matter of the present appeals/petitions reveal that the court below had embarked upon a careful analysis of the materials placed before it and had come to the conclusion that though the cheques were dishonoured, however, there is no material placed by the appellant to show that it was towards the discharge of an legally enforceable debt and also taking into consideration the fact that no details such as calculation statement, account statement, demand notice calling upon the respondent to pay the amounts towards the monthly contribution, etc., have been produced by the appellant, the courts below have rejected the complaint.

20. This Court, with a view to find out the bona fides of the claim made by the appellant with regard to the cheques being issued to discharge a legally enforceable debt, perused the various documentary evidence produced by the appellants.

21. A careful perusal of the various documents produced by the appellant in the respective complaints against the respondents show that, but for the account statement for the said period, there is no other material to show that there is a default committed by the respondents. Further, there is also no material to show that the appellant had called upon the respondents to pay the said sum towards the chit default by giving the requisite details with regard to the non-payment of monthly chits by the respondents.

22. In fact, it is the specific case of the respondents before the trial court that they had called upon the appellant to provide them the break up of the details with regard to the sums that are alleged to be due by the respondents, but no such material or information were provided by the appellant. It is the further case of the respondents that notwithstanding the said fact, the cheque,

which is alleged to have been dishonoured, was not given to discharge a legally enforceable debt, but it was given as a security along with other connected papers, including blank papers and pronote and the appellant had nowhere proved that the cheques, which were dishonoured, forming part of the present action, was given to discharge a legally enforceable debt.

23. In this regard, a careful perusal of Section 138 of the Act clearly prescribes that any cheque, which has been given towards payment of any amount of money to another person towards the discharge in whole or 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, then it would mean that such person shall be deemed to have committed an offence. Explanation therefore with regard to 'debt or other liability' appearing in Section 138, it has been explained that it means a legally enforceable debt or other liability.

24. From a careful reading of Section 138, it transpires that the cheque, which had been given, which stood dishonoured, should be in pursuance of a legally enforceable debt or liability and only in such cases, Section 138 of the Act would stand attracted.

25. However, in the case on hand, it is the case of the respondents that the cheques, which are the subject matter of the present appeals/petitions, were not given for the discharge of a legally enforceable debt, which has been accepted by the courts below on the ground that neither the appellant has proved that the cheques were given for the purpose of discharging a legally enforceable debt nor any materials have been placed by the appellant to show that there existed a legally enforceable debt towards which the cheques in issue were given. Without the appellant discharging his share u/s 138, the appellant cannot fall back on Section 139 to show that the presumption would have to be given to the appellant and the ball would have to be placed in the court of the respondents to prove that the cheques were not given towards the discharge of a legally enforceable debt or other liability. Therefore, the courts below, rightly appreciating Section 138 of the Act has held that the appellant having not

established that there existed a legally enforceable debt and the cheques which were given by the respondents, which stood dishonoured were given towards its discharge, had rightly negatived the contention of the appellant, with which this Court has no qualms or grievance.

26. Further, one other aspect has to be placed on record. The debt, which is alleged by the appellant is towards the discharge of monthly chit amounts by the various respondents. The Chit Funds Act provides for necessary avenues in which the amount in default can be claimed by the appellant. Therefore, the chits being approved by the authority, necessarily, the default towards the same, the appellant has to take recourse under the Chit Funds Act.

27. Turning the attention of this Court to the various decisions relied on by the learned counsel for the appellant, even at first blush, the decision in *Selvam and Krishna Agencies case*, would not in any way be of assistance to the appellant. Insofar as the decision in *Oriental Kuries case* is concerned, it is a case initiated under the Chit Funds Act, in which the Apex Court had held that the foreman in the chit transaction could proceed against the defaulted members of

a chit under the Chit Funds Act. However, in the present case, the case is under the Negotiable Instruments Act and that the security has not been enforced against the respondents by the foreman and, therefore, the said decision cannot be pressed into service.

28. The decision in *Dashrathbhai case* is more in favour of the respondents. In the said case, the Apex Court has held that in case of part-payment before the presentation of the cheque must be endorsed whereinafter alone the cheque dishonour would attract Section 138 of the Act against the issuer of the cheque. In this regard, the Apex Court had made the following observation :-

> *"16. The judgments of this Court on post-dated cheques when read with the purpose of Section 138 indicate that an offence under the provision arises if the cheque represents a legally enforceable debt on the date of maturity. The offence under Section 138 is tipped by the dishonour of the cheque when it is sought to be encashed. Though a post-dated cheque might be drawn to represent a legally enforceable debt at the time of its drawing, for the offence to be attracted, the cheque must represent a legally enforceable debt at the time of encashment. If there has been a material change in the circumstance such that the*

sum in the cheque does not represent a legally enforceable debt at the time of maturity or encashment, then the offence under Section 138 is not made out.

* * * * * *

28. A Division Bench of the Kerala High Court has held in Joseph Sartho v. Gopinathan that since the representation in the cheque was for a sum higher than the amount that was due on the date that it was presented for encashment, the drawer of the cheque cannot be convicted for the offence under Section 138 of the Act. The High Court of Delhi addressed the same issue in Alliance Infrastructure Project Ltd. v. Vinay Mittal. The High Court observed that when part payment is made after the cheque is drawn, the payee has the option of either taking a new cheque for the reduced amount or by making an endorsement on the cheque acknowledging that a part payment was made according to the provisions of Section 56 of the Act. It was also held that the notice of demand which requires the drawer of the cheque to make payment of the whole amount represented in the cheque despite receiving part repayment against the sum, before the issue of notice, cannot be valid under Section 138(b) of the Act. A similar view was taken by the High Court of Gujarat in Shree Corporation v. Anilbhai Puranbhai Bansal.

29. Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note 12 (2008) 3 KLJ 784 13 ILR (2010) III

Delhi 459 14 [2018 (2) GLH 105] appended to the cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of Section 138. Thus, when a part- payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment."

29. From the aforesaid decision, it is implicitly evident that the payments which have been made should be reflected so as to come to the conclusion that the cheque, which is the subject matter of dishonour was with regard to the discharge of a legally enforceable debt. Further, the Apex Court has held that the dishonour of the cheque alone cannot be the criteria to invoke Section 138 of the Act, but the cheque, which stood dishonoured should be against a legally enforceable debt. However, as stated above, there are no materials to show that the amount, which is shown in the cheque is a legally enforceable debt, as

no statement of account, the dues paid and the dues in default, etc., have not been established by the appellant.

30. Therefore, applying the said ratio to the present case, as aforesaid, the appellant ought to discharge their burden by giving the requisite details with regard to the statement of account and all the other details, which have been noted above and without giving the aforesaid details, placing a cheque, which is alleged to have been dishonoured, which is alleged to have been given by the respondents cannot be the basis to hold that a case u/s 138 of the Act is made out.

31. Insofar as the decision in *Sripathi Singh case,* though the cheque received by means of security, on its dishonour, the Apex Court had held that the drawer of the cheque would be responsible and would be held entitled under a criminal prosecution, yet, in the said case, the facts of the case disclose that it was based on a loan agreement in which there is clear receipt of money by one party from the other and cheque has been issued as security. However, in the case on hand, as aforesaid, though the respondents had received the prize

money by being successful in the bid and receiving the amount, the whole claim of the appellant is based on the alleged default said to have been committed by the respondents in non-payment of the monthly chit amount. However, as aforesaid, no material with regard to the payments made, the details of the account statement, the receipts and payments and payment made towards the prize amount to the respondents have not been established.

32. In fact, the whole case of the respondents is on the ground that they dispute the amount shown by the appellant and that the cheque, which was given for security purpose was misused by the appellant and, therefore, the amount having not been established to be a legally enforceable debt, the dishonour of the cheque would not attract the wrath of Section 138 of the Act. Therefore, the aforesaid decision also does not in any way aid the appellant.

33. However, this Court is not barring the avenue of the appellant with regard to dishonour of cheque and seeking relief under Section 138 of the Act. For the appellant to seek recourse u/s 138 of the Act, necessarily, the appellant has to place the requisite details like the statement of account, the details of the

payments made, the default amount and establish that there is a debt, which requires to be honoured by the respective respondents, which alone could be enforced and also further prove that the cheques, which have since been dishonoured were, indeed, issued by the respective respondents towards the discharge of the said legally enforceable debt. If the appellant is able to provide all the details and place materials to establish the same, then there would be no impediment for the court below to look into the issue u/s 138 of the Act. Without placing the aforesaid materials, it would not be justified for this Court to interfere with the well considered orders passed by the courts below in the respective petitions.

34. For the reasons aforesaid, the impugned orders passed by the respective courts in the petitions does not deserve interference and the same stands affirmed. However, liberty is granted to the appellant to provide all the details, such as statement of account, the payment and receipt details with regard to the chit amounts, the defaulted amounts and also materials to establish that the cheques, which were dishonoured were given for the purpose

of discharging the said debt, which is legally enforceable, then there would be no impediment for the courts below to look into the issue u/s 138 of the Act.

35. Accordingly, all the appeals fail and the same are dismissed. In view of the aforesaid findings, there arise no necessity for this Court to grant leave to the petitioners in the respective criminal original petitions to file appeal and, therefore, the petitions seeking grant of leave is dismissed and, consequently, the criminal appeals are rejected in the SR stage itself.

03.06.2024

Index : Yes / No
GLN

M.DHANDAPANI, J.

GLN

PRE-DELIVERY JUDGMENT IN
CRL. A. NOS.473 OF 2016, ETC. BATCH

Pronounced on
03.06.2024