

V.

Criminal Appeal No. 913 of 2009

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Negotiable Instruments Act, 1881:

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D The question which arose for consideration in the present appeal was whether the return of a cheque by the bank on the ground that it was reported lost by the drawer would attract the penal provisions contained in section 138 of the Negotiable Instruments Act, 1881.

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Allowing the appeal, the Court

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HELD:1.1. A bare perusal of section 138 of Negotiable Instruments Act, 1881 would clearly show that by reason thereof a legal fiction has been created. A legal fiction, although is required to be given full effect, has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute itself. [Para 10] [440-B-C]

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State of A.P. and Anr. v. A.P. Pensioners Association and Ors. 2005 13 SCC 161; *R Kalyani v. Janak C Mehta and Ors.* 2009(1) SCC 516; *DCM Financial Services Ltd. v. J.N. Sareen and Anr.* 2008 8 SCC 1 - relied on.

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1.2. Section 138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction. Such a penal

provision, enacted in terms of the legal fiction drawn would be attracted when a cheque is returned by the bank unpaid. Such non-payment may either be: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank. Before a proceeding thereunder is initiated, all the legal requirements therefor must be complied with. The court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with. The parameters for invoking the provisions of Section 138 of the Act, thus, being limited, refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of Section 138 of the Act. [Para 11] [440-E-H; 441-A-B]

2. The court while exercising its jurisdiction for taking cognizance of an offence under Section 138 of the Act was required to consider only the allegations made in the complaint petition and the evidence of the complainant and his witnesses, if any. It could not have taken into consideration the result of the complaint petition filed by the respondent No. 2 or the closure report filed by the Superintendent of Police in the First Information Report lodged by the appellant against him. Keeping in view the facts and circumstances of the case, the complaint petition does not disclose an offence punishable under Section 138 of the Act. [Para 12 & 14] [441-B-F]

Case Law Reference

2005 (13) SCC 161	relied on	Para 10
2009 (1) SCC 516	relied on	Para 11
2008 (8) SCC 1	relied on	Para 11

A From the Judgement and Order dated 18.09.2007 of the Hon'ble High Court of Delhi at New Delhi in Criminal M.C. No. 2890 of 2007.

B M.N. Krishamani, GP. Capt. Karan Singh Bhati, Aishwarya Bhati, Himanshu Singh, with him for the Appellant.

Gulshan Rai Nagpal, Jai Prakash, for the Respondent.

The Judgement of the Court was delivered by

S.B. SINHA, J.

C 1. Leave granted.

D 2. Whether return of a cheque by the bank on the ground that it was reported lost by the drawer would attract the penal provisions contained in Section 138 of the Negotiable Instruments Act, 1881 (for short "the Act") is the question involved in this appeal. It arises out of a judgment and order dated 18.09.2007 passed by the High Court of Delhi in Criminal M.C. No. 2890 of 2007.

3. The said question arises in the following factual matrix.

E Appellant kept two blank cheques in his office along with some stamp papers. They were said to have been stolen from his office. Information as regards missing of the said cheques was also given to the bank. He lodged a First Information Report with regard thereto, stating:

F "...On my return to Digras, I found that the cheques and the stamp worth Rs. 50 bearing only my signatures had been stolen, therefore, to prevent any misuse of my cheques, I sent a written information to State Bank, Branch Digras and subsequently on 21-04-01 I filed a complaint in Police Station Digras...."

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H The blank cheques were allegedly filled up on 24.06.2001. They were presented before the bank but the same were returned dishonoured with the remarks "said cheque reported lost by the drawer".

Respondent No. 2 thereafter upon issuance of notices in terms of the proviso appended to Section 138 of the Act filed a complaint petition in the Court of Chief Metropolitan Magistrate, Delhi, inter alia, alleging :

"5. That the above said cheque in question was presented by the complainant for encashment through its bearers, namely State Bank of India, Azadpur Branch, Delhi – 33, but the same was returned as dishonoured with the remarks "SAID CHEQUE REPORTED LOST BY THE DRAWER". This intimation was received by the complainant from the bankers on 27.7.2001 and accordingly a notice dt. 3.8.2001 was sent to the accused requesting the accused to make payment of the above said cheque amount and on 17.8.2001 the accused sent reply through his Advocate denying his liability falsely taking the plea that the cheque in question was lost as stolen by the complainant...

6. That the accused has taken the above said false pleas knowing it fully well that he does not intend to make payment of the said cheque amount, and the complainant is thus compelled to file this complaint.

7. That the issuance of the cheque by the accused and informing wrongly his own bankers about the loss/ theft of the cheque, with no intention to make payment thereof, rather showing that right from the time he issued the cheque, he had intention to cheat and defraud the complainant by making false representations and thus the accused has willfully committed an offence punishable under Sections 138 and 142 of the Negotiable Instruments Act read with Section 420 IPC and is liable to be punished accordingly."

4. It is not in dispute that the Superintendent of Police, Digras has issued a certificate showing that FIR No. 57 of 2003 arising out of the First Information Report filed by the appellant before the Station House Officer, Digras had been closed.

A It is furthermore not in dispute that the appellant in the meanwhile filed a complaint petition under Section 380 read with Sections 34, 467, 468 and 471 as also Sections 420 and 120B of the Indian Penal Code in the Court of Judicial Magistrate First Class and the same is pending adjudication.

B Admittedly, the appellant had lodged a First Information Report under Sections 369, 495, 498, 420 and 34 of the Indian Penal Code with the Police Station Digras against the respondent No. 2 and his brother, wherein also a closer report has been submitted.

C Appellant has filed another criminal complaint against the respondent No. 2 under Section 409 of the Indian Penal Code which has also been dismissed on the ground that the dispute is of civil nature.

D 5. Appellant has moreover filed a suit for recovery of a sum of Rs.31,40,131.43 in the Court of Civil Judge, Sr. Division, Darwha, Madhya Pradesh against the respondent No. 2 and his brother. Several other applications were filed by the appellant before the said court to which we need not advert to.

E 6. Appellant filed an application under Section 482 of the Code in the High Court of Delhi praying for quashing of the proceedings under Section 138 of the Act on or about 6.09.2007 on the premise that the same was not maintainable. By reason of the impugned judgment, the said application has been dismissed.

F 7. Mr. M.N. Krishnamani, learned senior counsel appearing on behalf of the appellant, would submit that the High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration that the complaint petition even if given face value and taken to be correct in its entirety does not disclose an offence under Section 138 of the Act.

G 8. Mr. Gulshan Rai Nagpal, learned counsel appearing on behalf of the respondent No. 2, on the other hand, would contend

that the appellant had lodged a false First Information Report with regard to the purported theft of the cheques which having been found to be not true and, thus, it is evident that he had resorted to various proceedings to pre-empt the drawee of the cheques to obtain lawful payments due from him. A

9. Section 138 of the Act reads as under: B

"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 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: Provided that nothing contained in this section shall apply unless— C D E

(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; F

(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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and G

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case H

A 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.”

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10. A bare perusal of the aforementioned provision would clearly go to show that by reason thereof a legal fiction has been created. A legal fiction, as is well known, although is required to be given full effect, has its own limitations. It cannot be taken
C recourse to for any purpose other than the one mentioned in the statute itself.

In *State of A.P. and Anr. v. A.P. Pensioners Association and Ors.* [(2005) 13 SCC 161], this Court held :

D “...In other words, all the consequences ordinarily flowing from a rule would be given effect to if the rule otherwise does not limit the operation thereof. If the rule itself provides a limitation on its operation, the consequences flowing from the legal fiction have to be understood in the light of the limitations prescribed. Thus, it is not possible to
E construe the legal fiction as simply as suggested by Mr. Lalit.”

11. Section 138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction
F must receive strict construction. [See *R. Kalyani v. Janak C. Mehta and Ors.* (2009) 1 SCC 516 and *DCM Financial Services Ltd. v. J.N. Sareen and Anr.* (2008) 8 SCC 1]. Such a penal provision, enacted in terms of the legal fiction drawn would be attracted when a cheque is returned by the bank unpaid.
G Such non-payment may either be: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

Before a proceeding thereunder is initiated, all the legal
H requirements therefor must be complied with. The court must

be satisfied that all the ingredients of commission of an offence under the said provision have been complied with. A

The parameters for invoking the provisions of Section 138 of the Act, thus, being limited, we are of the opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of Section 138 of the Act. B

12. The court while exercising its jurisdiction for taking cognizance of an offence under Section 138 of the Act was required to consider only the allegations made in the complaint petition and the evidence of the complainant and his witnesses, if any. It could not have taken into consideration the result of the complaint petition filed by the respondent No. 2 or the closer report filed by the Superintendent of Police in the First Information Report lodged by the appellant against him. C D

13. Before us a contention has been raised that the appellant did not have sufficient funds in his bank account. Such an allegation has not been made in the complaint petition. In any event, it was for the bank only to say so, as the complainant is not supposed to have knowledge in regard to the amount available in the account of the appellant. E

14. Keeping in view the facts and circumstances of the case, we are of the opinion that the complaint petition does not disclose an offence punishable under Section 138 of the Act. F

15. For the reasons aforementioned, the impugned judgment being unsustainable is set aside. The appeal is allowed.

D.G.

Appeal allowed.