

KERALA HIGH COURT

Manoj K. Seth

Vs

R.J. Fernandez

(M P Pillay, C.J. L Manoharan, J.)

20.06.1991

JUDGMENT

Manoharan, J.

1. The petitioner seeks to quash the proceedings in C. C. No. 479 of 1990 pending before the Chief Judicial Magistrate's Court, Ernakulam, by invoking Section 482 of the Criminal Procedure Code. The respondent filed a complaint against the petitioner alleging that a cheque issued by the petitioner on March 6, 1990, for an amount of Rs. 15, 192.65 drawn on the Syndicate Bank, Ernakulam, was presented for encashment on August 2, 1990, was dishonoured on August 3, 1990, and that though the notice required under Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act"), was issued, the petitioner failed to make the payment within 15 days of the receipt of the notice and, therefore, the petitioner has committed an offence under Section 138 of the Act.

2. According to the petitioner, the cheque post-dated March 6, 1990, was drawn on March 1, 1986 ; and since the cheque was not presented within six months from the said date as required under Clause (a) of the proviso to Section 138 of the Act, no offence under the said section is disclosed and, therefore, it is necessary that the proceeding is quashed.

3. The learned single judge before whom the matter came up for consideration felt that the matter has to be considered by a Division Bench since the view taken in *Paramjith Singh v. N. C. Jobl* was not endorsed by another single judge and the same was referred to a Division Bench for consideration.

4. The Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988), amended the Act also and inserted Chapter XVII containing Sections 138 to 142 in the Act. Section 138 makes the drawer of a cheque liable for penalties in case the cheque is dishonoured and payment is not made after notice. As has been noted, whereas the respondent alleged that the petitioner has committed an offence punishable under Section 138 of the Act, the petitioner maintains that though the cheque was dishonoured, since the conditions required under Section 138 of the Act are not satisfied, no offence under the said section is made out. For properly appreciating the argument, it would be necessary to read Section 138 of the Act. Section 138 reads :

"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 the amount of money standing to the credit of that account is insufficient to honour the cheque or 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."

5. According to the petitioner, the cheque dated March 6, is a post-dated cheque and the same was drawn and delivered on March 1, 1986. As, admittedly, the cheque was not presented within six months from March 1, 1986, the condition under Clause (a) of the proviso to Section 138 of the Act not having been satisfied, no offence under the said section is committed. According to him, though the cheque bears the date March 6, 1990, since the same was drawn and delivered on March 1, 1986, the cheque ought to have been presented within six months from the said date to satisfy the condition in Clause (a) of the proviso to Section 138 ; that not having been done the offence under the said section cannot be said to have been committed. But, according to the respondent, apart from the fact that the question whether the cheque is a post-dated cheque is a matter to be proved, even assuming that the cheque was delivered on March 1, 1986, the cheque can be considered to have been drawn only on the date it bears, that is March 6, 1990. According to him, since the cheque was presented within six months from the date, the condition in Clause (a) of the proviso is also satisfied. The two questions that would arise are whether the cheque in question is a post-dated cheque delivered on March 1, 1986 ; and the other, which is the date on which a post-dated cheque can be considered to have been drawn for the purposes of Section 138 of the Act.

6. The first is a question of fact. Reliance was placed by the petitioner on annexures II and V in support of his argument that the cheque was drawn on March 1, 1986. Annexures II and V are copies of the notices by the respondent. Annexure V dated April 2, 1986, states that the cheque issued was postdated March 6, 1990. From that, it may be possible to infer that the cheque mentioned therein was delivered before April 2, 1986, and that the date of the same was March

6, 1990. But the cheque number mentioned in annexure II is not the same as in annexure V. Thus, it becomes a matter for evidence. In such circumstances, normally, it will not be appropriate to invoke the jurisdiction under Section 482, Criminal Procedure Code.

7. We now proceed to examine the other question. The contention of the petitioner, as noted earlier, is that though the cheque bears the date March 6, 1990, it was really drawn on March 1, 1986, and inasmuch as the cheque was presented for encashment only on August 2, 1990, no offence under Section 158 of the Act is made out. The cheque was presented within six months after the date of the cheque but beyond six months of its delivery on March 1, 1986. According to learned counsel for the petitioner, with respect to post-dated cheques as the present one, if the cheque bears a date beyond six months from the date on which it was drawn, the same would be outside the purview of Section 138 of the Act. Learned counsel relied on the decision of a single judge of the Madras High Court in *Babu Xavier v. Lalchand Munnath*². This question as such did not arise for consideration in Paramjith Singh's case [1_989] 2 KLT 740 ; [1990] 67 Comp Cas 570(Supra) or in Prithviraj's case [1991] 71 Comp Cas 131 ; [1991] 1 KLT 595(Supra) which confirmed the former. What was considered in Paramjith's case [1989] 2 KLT 740 ; [1990] 67 Comp Cas 570(Supra) and Prithviraj's case [1991] 71 Comp Cas 131(Supra) was whether prosecution is maintainable under Section 138 of the Act in the case of a cheque issued before the commencement of the Amending Act 5G of 1988 but dishonoured after the said commencement. The contention was that since the Amending Act came into force only on April 1, 1989, and the cheque therein was drawn before such commencement, prosecution under Section 138 of the Act is not maintainable in view of Article 20(1) of the Constitution. It was held, as per Section 138 of the Act, that an offence is committed not on the drawing of the cheque but only on failure to pay the amount within 15 days of the receipt of the notice of dishonour. Though the cheque was drawn prior to the commencement of Act 66 of 1988, as the offence was committed after the commencement, it cannot be said that the law was not in force at the time of commission of offence under Section 138 of the Act. The consequence of dishonour of a post-dated cheque in the context of Section 138 of the Act did not arise for consideration in those decisions.

8. As noted, the question for consideration in this case is when can a postdated cheque be considered to have been drawn for the purpose of Clause (a) of the proviso to Section 138 of the Act. The Act as such does not contain any specific provision as to when a cheque could be considered to have been drawn. As per the presumption under Section 118(b) of the Act, the cheque must be presumed to have been drawn on the date it bears. The contention now is, that even if the cheque was presented and was dishonoured within six months of the date of the cheque, since the cheque is a post-dated one, it must be considered to have been drawn on the date when it was delivered, viz., on March 1, 1986, and since the cheque was not presented within six months from that date, the condition in Clause (a) of the proviso to Section 138 of the Act is not satisfied.

9. In considering the said aspect, it will be necessary to know the character of a post-dated cheque. A post-dated cheque is one containing a date later than the date of delivery. Therefore, it has an implied notice that there is no present deposit to the credit of the drawer and an implied guarantee that the funds would exist when it become due. Though the cheque is payable only on a future date, it may be negotiable. There is no prohibition in the Act against post-dating a cheque. If a banker pays the amount before the due date of a cheque, he will lose the statutory

protection arising from such payment. In the decision in *Jiwanlal v. Rameshwarlal*³, in considering the question as to when a payment would be deemed -to have been made under a post-dated cheque for the purpose of Section 20 of the Limitation Act, it is held that the material date is the date on which the payment could have been made. In that case, a post-dated cheque was given on February 4, 1954, it was dated February 25, 1954. The Supreme Court held in para 8 (at pages 872-73 of 36 Comp Cas) :

"We are, therefore, of opinion that, as a post-dated cheque was given on February 4, 1954, and it was dated February 25, 1954, and as this was not a case of unconditional acceptance, the payment for the purpose of Section 20 of the Limitation Act could only be on February 25, 1954, when the cheque could have been presented at the earliest for payment."

10. In the case of a post-dated cheque, payment need be on the date it bears. Thus, a post-dated cheque is intended to be operative only from the date it bears though, in between the date of delivery and the date it bears, the same is negotiable. But the drawee is not bound to honour it on any date prior to the date it bears.

11. Interpretation of Section 138 of the Act to discover the liability arising from dishonouring of a post-dated cheque has to be with due regard to the said character of a post-dated cheque and the scope of Clause (a) of the proviso to Section 138 cannot be considered in isolation. The statute has to be construed with reference to the context and other clauses of the Act to make it consistent. The very object of the provision is to enhance the acceptability of cheques by making the drawer liable for penalty in case the cheque bounces for the reason mentioned in the said section. If a post-dated cheque is considered to be drawn on the date of its delivery, the drawer of such a cheque can defeat Section 138 of the Act, by showing a date beyond six months of its delivery. In the circumstances, an interpretation which will bring about such a result cannot be adopted. The object of the section is to make the drawer of the cheque subject to penalty when the cheque bounces on the ground mentioned in the section. The rigour of the section itself reveals the intention of the Legislature. Enough safeguards are provided in the section itself to protect honest drawers.

12. An offence under Section 138 of the Act would be committed only when a cheque drawn for payment of any debt or liability is returned by the bank unpaid and the drawer fails to make payment of the said amount within 15 days of the notice of dishonour. One of the elements to be satisfied is that the cheque should have been returned unpaid. It goes without saying that such return of the cheque by the drawee could only be on presentation ; that is when he is capable of presenting the same for encashment. In the case of a post-dated cheque, as noted earlier, the same can be presented only on or after the date of the cheque.

13. The question as to when a post-dated cheque can be considered to have been drawn for the purpose of Section 138 of the Act cannot be dealt with independently of the right to present the same. In relation to the drawer and drawee, a post-dated cheque becomes operative only from the date of the cheque when alone the same is intended to be honoured. A post dated cheque for the purpose of Clause (a) of the proviso to Section 138 of the Act has to be considered to have been drawn on the date it bears and, in this case, since the cheque was presented within six months of the date of the cheque, it cannot be said that the condition in the said proviso is not satisfied.

14. In view of the above, with respect, we are unable to agree with the view taken in Babu Xavier's case [1990] TLNJ (CrI) 121 referred to earlier.

15. The Criminal M; C. is without merit and the same is liable to be dismissed which, accordingly, is hereby dismissed.

Cases Referred.

1[1989] 2 KLT 740 ; [1990] 67 Comp Cas 570

2[1990] TLNJ (CrI) 121

3[1966] 36 Comp Cas 866 ; AIR 1967 SC 1118