

Madras High Court

M/S. Balaji Seafoods Exports ... vs Mac Industries Ltd, S. Pichalah, ... on 13 October, 1998

Equivalent citations: 1999 (1) CTC 6

Bench: A Raman

ORDER

1. This application is filed to quash the proceedings initiated under Section 138 of the Negotiable Instruments Act, pending before the IX Metropolitan Magistrate, Saidapet, Chennai, in C.O. No. 6629 of 1997.

2. The case of the complainant is that the complainant paid an advance of Rs. 35,00,000 to the accused. The accused had agreed that he will clear the advance amount of Rs. 35 lakhs within thirty days from the date of receipt of advance and also handed over a post dated cheque for a sum of Rs. 35 lakhs signed by the 2nd accused for and on behalf of the 1st accused. The transactions between the complainant and the accused came to an end in September 1996 and as on 15.7.1997 towards the outstanding balance, the accused owe to the complainant along with interest is a sum of Rs. 39,43,405. When the cheque was presented for collection, it was returned on the ground that 'funds not arranged for'. A notice issued also did not evoke any response except a payment of a sum of Rs.2,00,000. Hence, the complaint.

3. Learned counsel for the petitioner submitted that the cheque in this case was not issued in discharge of any liability but was handed over only as a security and therefore, the provisions of section 138 of the Negotiable Instruments Act is not attracted. Learned counsel for the petitioner referred to the xerox copy of the agreements entered into between the parties. The xerox copy of the agreements produced along with the petition were also served on the counsel for the respondent. He also referred to the same. Therefore, it can be taken that the xerox copy of the agreement can be relied upon for the purpose of the disposal of this petition. There are two agreements. The first agreement was entered into on 27.12.1995. The second agreement was entered into on 1.4.1996. learned counsel for the petitioner would rely upon Clause (5) of the agreement, which reads as follows:

"MI i.e., the complainant, will be releasing at the request of the Processor need based advances and the outstanding advance at any time shall not exceed Rs. 35 Lakhs. The processor agreed to give a cheque for Rs. 35 lakhs to MI as security for the advance received from MI. No advance shall remain unadjusted for a period of more than 30 days from the date of payment by MI and any overdue on this account shall be deemed to be a breach of this Agreement by the processor. It is further agreed by the processor that in the event of breach as above, MI shall be at "liberty to encash such cheques in settlement of the amounts due from the processor and initiate appropriate further proceedings including action under section 138 of the Negotiable Instruments Act, 1881."

4. In pursuance of the agreement, the petitioner herein gave a post dated cheque for Rs. 35 lakhs. According to the petitioner's counsel, it was an undated cheque. The second agreement also refers to a similar clause under Clause 5. It is not the case that any fresh cheque was issued towards security as mentioned in clause 5. Therefore, the fact remains that only one cheque was issued on 27.12.1995

as security for the advance of Rs. 35 Lakhs received by the processor from the complainant. The 1st agreement does not contain the period during which the agreement will be in force. The 2nd agreement also does not contain any reference to the period of agreement. From the admitted case of the parties, it is clear that the cheque that was issued by the petitioner was as security for the advance received. According to the terms of the agreement, the said advance of Rs. 35 lakhs will be adjusted against the profits made by the accused in the transaction. Even according to the complaint, the supply should be completed on or before 31.3.1997. Therefore, it cannot be accepted that the petitioner handed over a cheque for Rs. 35 lakhs dated 17.7.1997. Since the cheque was issued at the time when the 1st agreement was entered into, the cheque must be post dated so as to coincide with the expiry of the period of the 1st agreement or coincide with the expiry of the 2nd agreement. The agreements and the complaint would show that the supply shall be completed by the accused on or before 31.3.1997. If that is the allegation, on its face value, one would expect the petitioner to give a post dated cheque dating it as 31.3.1997 or 1.4.1997, as the case may be. Therefore, to say that the accused handed over a cheque dated 17.7.97 even on the date when he entered into the 1st agreement on 27.12.1995, is rather odd. For the contention of the accused is that the complainant hurriedly filled up the date of his choice and what was handed over was an undated cheque.

5. Considering the above background of these facts, this submission appears to have force. Thus, what we find is that the cheque has been given as a security. It was not a post dated cheque, but it was a blank cheque. It was handed on the date when the 1st agreement was entered into in the month of December, 1995. Now, the point to be considered is as to whether such a cheque issued in 1995 as security can be brought under Section 138 of the Act.

6. Section 46 of the Negotiable Instruments Act speaks of delivery. It reads as follows"-

"The making, acceptance or endorsement of a promissory note, bill of exchange or cheque is completed by delivery, actual or constructive.

As between parties standing in immediate relation, delivery to be effectual must be made by the party making, accepting or endorsing the instrument, or by a person authorised by him in that behalf. As between such parties and any holder of the instrument other than a holder in due course, it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

It is to be pointed out that on the date when the contract was entered into between the parties there was no subsisting liability or debt. That is why the contract itself makes it clear that the cheque has to be handed over as a security.

7. Section 138 of the Negotiable Instruments Act makes it clear that where the 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 under Section 138 of the Act. The explanation reads that for the purposes of this section, 'debt or other liability' means a legally enforceable debt or liability.

8. Therefore, on the date when the cheque was handed over, there was no legally enforceable debt or other liability. An undated cheque for Rs.35 lakhs was handed over as a security for the purpose of the contract. It was not handed over with the intention of making it as an instrument of immediate negotiation to discharge a subsisting liability or debt. Thus, this is a case where one of the parties to the contract had obtained a signed undated cheque for Rs. 35 lakhs as a security. As dispute arose between the parties, the cheque is now utilised by the complainant to resort to Sections 138 of the Act by filing in a date convenient to him.

9. There is yet another flaw in this matter. The agreement refers to the fact that a cheque for Rs. 35 lakhs shall be given as security for the advance received. Therefore, the cheque was issued for Rs. 35 lakhs. But the claim made in the notice was for Rs.39,43,508. Therefore, I am of the view that this is a case where the provisions under Section 138 of the act will not apply. A reading of the agreements between the parties does not lend support to such a view. Of course, the learned counsel for the respondent referred to the later part of Clause 5. The later part shows that MI shall be at liberty to encash such cheques in settlement of the amounts due from the processor. That cheque was given in pursuance of an earlier agreement and not the latter agreement. Therefore, obviously, it does not refer to the cheque received for Rs. 35 lakhs. It refer to cheques and not the cheque. The clause provides the parties or the 1st party to initiate further proceedings including action under section 138 of the Act in respect of cheques handed over and that too with not to later agreement.

10. Therefore, I am of the considered view that as an undated cheque having been given only as security, the provision of Section 138 of the Negotiable Instruments Act are not at all attracted and hence, the complaint against the accused under section 138 of the Negotiable Instruments Act cannot be maintained at all.

11. In the result, this petition is allowed, quashing the proceedings against the petitioners herein C.C.No. 6029 of 1997, pending on the file of the IX Metropolitan Magistrate, Saidapet, Chennai. In view of the order passed in the main petition, Crl.M.P.No. 6854 of 1997 shall stand closed.