

Mathew, V.J. Vs Sony Cyriac and Others

Court: High Court Of Kerala

Date of Decision: July 3, 1995

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Section 115, 151

Constitution of India, 1950 â€” Article 20(3)

Negotiable Instruments Act, 1881 (NI) â€” Section 138, 138(6), 140

Citation: (1995) 2 CivCC 277 : (1995) 3 RCR(Criminal) 495

Hon'ble Judges: P.K. Balasubramanyan, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P.K. Balasubramanyan, J.

These revisions are by the Defendants in two suits. According to the Plaintiffs, the Defendants had issued them

cheques which were dishonoured on presentment. The Plaintiffs had earlier initiated proceedings u/s 138 of the Negotiable Instruments Act on the

basis that the Defendants have committed offences within the meaning of that Act. Suits were subsequently filed for recovery of the amounts due

under the cheques. On entering appearance in the suits, respective Defendants filed applications u/s 151 of the CPC praying that the suits be

stayed pending the criminal cases filed against them. Their contention was that if they were compelled to disclose their defence in the suits, they will

be prejudiced in defending the prosecutions against them and consequently the civil court ought to stay the suits. They relied on Article 20(3) of the

Constitution of India. The Plaintiffs resisted the prayers for stay. They contended that the fact that prosecutions have been launched against the

Defendants is no ground to stay the civil suits based on the dishonour of the cheques and that there would be no violation of any of the rights of the

Defendants either under general law or under Article 20(3) of Constitution.

2. The court below held that there was no substance in the contention of the Defendants that if they are compelled to disclose their defences to the

actions based on the cheques, they would be prejudiced in their defence of the criminal cases. The trial court therefore declined the prayer of the

Defendants to stay the suits pending the criminal cases and dismissed the applications filed by the Defendants. The Defendants challenge the orders

of the court below in these revisions.

3. Learned Counsel for the Defendants submitted that if the suits were proceeded with and a decision rendered, the same would bind the criminal

court and in such a situation the Defendants ought not to be compelled to file their written statements in the suits. He referred to the decision of the

Supreme Court in *M.S. Sheriff Vs. The State of Madras and Others*, in support of the proposition that in appropriate cases civil court can stay the

suits pending before it until the criminal case launched is disposed of. He also relied on the observations of the Supreme Court that a criminal trial

must have precedence over a civil action. Relying on the decision of the Calcutta High Court in *Apeejay Pvt. Ltd. Vs. Raghavachari Narasingham*

and Others, he contended that the Defendants being accused in the criminal cases have the constitutional right to maintain silence and not to be

compelled to be witnesses against themselves and since there is total identity of the subject matter in the earlier criminal proceedings and the

subsequent civil suits, further proceedings in the civil suits have to be stopped until the disposal of the criminal cases. Learned Counsel for the

Plaintiffs on the other hand submitted that the facts of the case before the Supreme Court are clearly distinguishable and that if the offence alleged is

one u/s 138 of the Negotiable Instruments Act, there is no justification for staying the civil suit since the Plaintiffs would also be free to sue for

recovery of the amounts due to them or dishonour of the cheques. He also contended that there is no merit in the contention that the Defendants

cannot be forced to disclose their defences since for making out an offence u/s 138 of the Negotiable Instruments Act, the existence of the

conditions to attract that section have to be clearly established and for getting a decree on the basis of the dishonoured cheques only the due

issuance of the cheque and any plea by the Defendants regarding absence of consideration or of discharge alone need be considered. He brought

to the notice of this Court the decision in *Vasu Vydier v. State of Kerala* 1974 KLT 24 and in *V.C. Madhavan Nambiar and Ors. v. Bharathan*

and Ors. 1995 (1) K.L.J. 463 where in similar situations criminal cases were sought to be stayed. He also referred to the decision of the Madras

High Court in *Yelchuri Ranganayakalu Chetty and Another Vs. K. Gopala Chetty*, and the decision of the Supreme Court in *M.S. Sheriff Vs. The*

State of Madras and Others, to submit that essentially it is a matter of discretion and the court below has exercised its discretion in the case on

hand properly and that in any event there is no justification for this Court to interfere with the exercise of that discretion in these revisions u/s 115 of

the Code of Civil Procedure.

4. A successful prosecution u/s Section 138 of the Negotiable Instruments Act depends upon establishing the elements specified by that section. It

not only includes the issuance of a cheque for the discharge of a pre-existing debt but it also insists on other conditions referred to in the section.

Section 140 of the Negotiable Instruments Act provides that it shall not be a defence in a prosecution for an offence u/s 138 that the drawer had

no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section. His

Lordship Justice Padmanabhan in *Anto v. Union of India* 1991 (2) KLT 341 has stated below thus:

What is made an offence is not the drawing of cheque alone. It must have been drawn in discharge, in whole or in part, of a legally enforceable

debt or other liability. It must have been duly presented in time and dishonoured for the reasons specified. Then there must be a written demand for

the amount within a specified time, followed by failure to make payment within another specified time. It becomes an offence only on such failure

which is an illegal omission made with requisite mens rea.

Considering the argument that once a civil suit has been instituted, the prosecution for an offence u/s 138 of the Negotiable Instruments Act

becomes an abuse of process of court, His Lordship in *Padmanabha Panicker v. Tomy* 1991 (2) KLT S.N 1 Case No.1 stated thus:

Enforcement of the liability through a civil court will not disentitle the aggrieved person from prosecuting the offender for the offence punishable u/s

138 of the Act. Both remedies may be simultaneously possible. A civil suit cannot debar the criminal prosecution. At the best, realisation of the

amount may be taken as circumstance by the criminal court, in considering the sentencing discretion. Simply because of the successful termination

of the civil litigation, criminal prosecution cannot become an abuse of the process of court justifying interference by this Court, in exercise of the

inherent powers.

According to me there is no substance in the contention raised on behalf of the Defendants that they cannot be compelled to file a written statement

in the suits based allegedly on the dishonoured cheques. To make out an offence u/s 138 of the Negotiable Instruments Act a notice has to be

issued on behalf of the drawee or such other person entitled to encash the instrument calling upon the drawer to pay the amount covered by the

dishonoured cheque within the time stipulated in the section. At that stage the drawer of the cheque is bound to adopt a specific stand either by

paying off the pre-existing debt or putting forward his contention in respect of the cheque and in respect of the liability. In other words the drawee

is bound to disclose his defence, if he has any, when he receives the notice contemplated by proviso (b) to Section 138 of the Negotiable

Instruments Act. I therefore find no substance in the argument that by being compelled to file written statement in the suits, the Defendants would

be forced to disclose their defence and that would amount to violation of their fundamental rights under Article 20(3) of the Constitution of India. A

negotiable instrument is the life blood of Commerce and Section 138 of the Negotiable Instruments Act was enacted to ensure the preservation of

that concept. As observed by Eyre, C.B. in Gibson v. Minet (1791) 1 H.B.1.-569, ""The wit of man cannot devise a thing better calculated for

circulation. The value of the writing, the assignable quality of it and the particular mode of assigning it, are created and determined in the original

frame and constitution of the instrument itself; and the party to whom such a Bill of Exchange is intended, has only to read it, need look no further

and has nothing to do with any private history that may belong to it"". It is in that context that Section 138 of the Negotiable Instruments Act insists

only on the establishment of the conditions specified therein and Section 140 of the Negotiable Instruments Act precludes a defence to a

prosecution u/s 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment. An

accused in an offence u/s 138 of the Negotiable Instruments Act has necessarily either to deny the issuance of the instrument or to confirm it and if

he is confirming the issuance of the instrument at best his defence can only be the absence of the other elements referred to in Section 138 of the

Negotiable Instruments Act. The filing of a written statement in the suit either confirming the issuance of the cheque or denying the issuance of the

cheque and pleading the absence or failure of consideration cannot therefore affect the defence that may be open to him in a prosecution u/s 138 of

the Negotiable Instruments Act. As observed by Padmanabhan, J. in Padmanabha Pillai's case even if the civil litigation goes against the

Defendant, that can only have relevance in considering the sentencing discretion of the criminal court. In my view the observations in Apeejay Pvt.

Ltd. Vs. Raghavachari Narasingham and Others, are somewhat wide and in any view may not cover cases arising u/s 138 of the Negotiable

Instruments Act in view of the fact that even when he receives notice under the proviso (6) to Section 138 of the Negotiable Instruments Act, the

drawer is obliged either to honour the instrument or to put forward his defence. Of course, mere failure to reply to a notice issued to him under

proviso (b) to Section 138 of the Negotiable Instruments Act cannot put the drawer in a better position than the one who takes up his definite

stand in reply to the notice issued to him. In such a situation I am satisfied that there is no need to stay the suits based on the cheques merely

because prosecutions have been initiated u/s 138 of the Negotiable Instruments Act against the Defendants.

5. Moreover as has been observed by the Supreme Court in *M.S. Sheriff Vs. The State of Madras and Others*, it is essentially a matter of

discretion for the court to either stay the civil suit or to proceed with it in the circumstances of a given case. In the case on hand, the court below

after referring to the aspects brought to its notice has exercised its discretion not to stay the suits. I am not in a position to say that the discretion

vested in the court has been exercised by that court so unreasonably or perversely as to call for interference u/s 115 of the Code of Civil

Procedure. In that view also I find no merit in the contention raised on behalf of the Defendants.

I thus confirm the orders of the court below and dismiss these Civil Revision Petitions. I make no order as to costs.

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