

Mainuddin Abdul Sattar Shaikh vs Vijay D Savli on 6 July, 2015

Equivalent citations: AIR 2015 SUPREME COURT 2579

Author: Pinaki Chandra Ghose

Bench: Pinaki Chandra Ghose, Uday Umesh Lalit

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1472 OF 2009

MAINUDDIN ABDUL SATTAR SHAIKH

...APPELLANT

:Versus:

VIJAY D. SALVI

...RESPONDENT

J U D G M E N T

Pinaki Chandra Ghose, J.

This appeal, by special leave, has been filed against the judgment and order dated 9.10.2007 passed by the High Court of Judicature at Bombay in Criminal Application No.646 of 2006, whereby the High Court has refused leave to appeal against the judgment of the Trial Court, to the appellant herein.

The brief facts necessary to dispose of this appeal are that in the year 1999, the appellant had booked a flat at Khargar Project proposed to be developed by M/s. Salvi Infrastructure Pvt. Ltd. through the accused- respondent by paying him Rs.74,200/-. In acknowledgment of the said amount, the accused respondent issued two receipts to the appellant, for a sum of Rs.59,000/- and Rs.14,200/-, respectively. By the year 2003, as alleged by the appellant, the aforesaid project of the

respondent did not materialize. After much persuasion, the accused respondent drew cheque No.075073 for Rs.74,200/- in favour of the appellant, of an account maintained by him with his banker towards refund of the aforesaid booking amount. The cheque was drawn by the respondent in his individual capacity and not in the capacity as a Director of M/s. Salvi Infrastructure Pvt. Ltd. or as Proprietor of Salvi Builders and Developers. When the appellant presented the said cheque on 1.08.2003 to his Bank for realization, the same was returned unpaid. Hence, the appellant sent notice of demand dated 25.8.2003 through his advocate under Section 138(b) of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the NI Act"), to the respondent. As the accused respondent failed to pay the amount within 15 days of the notice of demand, the appellant filed a complaint under Section 138 of the N.I. Act.

The aforesaid complaint filed by the appellant was taken up by the Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai, and vide his order dated 15.12.2005 passed in C.C. No.5194/2003, the Metropolitan Magistrate acquitted the respondent. The reasons given for the acquittal of the respondent were that the Company M/s. Salvi Infrastructure Pvt. Ltd. was not made the accused and instead the respondent was made accused in his personal capacity. The cheque could not be said to have been issued for the discharge of whole or part of the liability because it exceeded the liability. Further, it had not been proved that the respondent was a person liable to make the payment for M/s. Salvi Infrastructure Pvt. Ltd.

Being aggrieved by the order passed by the Metropolitan Magistrate, the appellant filed an application for leave to appeal under Section 378 of Cr.P.C. along with a Criminal Application No.646 of 2006 under Section 378(4) of Cr.P.C., before the Bombay High Court. The High Court by the impugned order dismissed the said application on the ground that the reasoning set out by the Trial Court in its order did not call for reconsideration.

The appellant is thus before us. Learned counsel for the appellant has raised the following grounds in this appeal. Learned counsel submits that the Courts below have failed to appreciate that under Section 138 of the NI Act, it is the drawer of the cheque who is made punishable for offence under Section 138 of the NI Act. Further, the Courts below have failed to appreciate that in the present matter the cheque in question was drawn by the respondent and not by the Company of which the respondent is the Managing Director. The cheque was drawn by him in his personal capacity on an account maintained by him with his Banker. The Courts below have wrongly concluded that notices under Section 138(b) of the N.I. Act were sent to all the Directors of the Company. Learned counsel for the appellant contended that such a conclusion was not supported by any evidence inasmuch as there was only one acknowledgment card on record, showing receipt of notice under Section 138(b) of the Act, by the respondent. The Courts below did not appreciate that the accused respondent in his statement under Section 313 Cr.P.C. had admitted that he was paid Rs.74,200/- as earnest money and that he had issued receipt for the same and thus there is no substance in the argument of the respondent that the cheque for Rs.74,200/- cannot be said to have been issued for discharge of whole or part of liability, because it exceeded the liability.

The plea taken by the learned counsel for the respondent in the Court of Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai, was that the Company had not been made an accused in the case.

As per Section 141 of the NI Act, if the person committing an offence under Section 138 is a Company, every person who, at the time the offence was committed, was incharge of, and was responsible to the Company for the conduct of business of the Company as well the Company, shall be liable. In the complaint and the affidavit, M/s. Salvi Infrastructure Pvt. Ltd. was not made the accused. Further, it was argued that there was no averment that the accused was the person incharge of, and responsible for the affairs of the Company. In that case the accused was mentioned as the said person incharge. In the present case, the accused Vijay Salvi was made accused in his personal capacity.

We have heard the learned counsel appearing for the parties and have perused the order passed by the Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai.

In our opinion, the issue involved in the present case is whether the respondent can be made liable in his personal capacity when the Company has not been made a party to the complaint.

From a bare reading of Section 138 of the NI Act, the following essentials have to be met for attracting a liability under the Section. The first and foremost being that the person who is to be made liable should be the drawer of the cheque and should have drawn the cheque 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 discharge in whole or part, of any debt or other liability. We see that from the bare text of the Section it has been stated clearly that the person, who draws a cheque on an account maintained by him, for paying the payee, alone attracts liability.

In the present case, it is an admitted fact that the drawer of the cheque was the respondent, who had drawn the cheque, bearing No.075073 for Rs.74,200/- on a bank account maintained by him towards the refund of the booking amount. Therefore, he was the drawer of the cheque. The case of the appellant, apart from being supported by the provision of Section 138 of the NI Act, also gets buttressed by the judgment in P.J. Agro Tech Limited and Ors. Vs. Water Base Limited,[1] where this Court has dealt with the scope of Section 138 and held that it is very clear that in order to attract the provisions thereof a cheque which is dishonoured will have to be drawn by a person on an account maintained by him with the 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. It is only such a cheque which is dishonoured which would attract the provisions of Section 138 of the above Act against the drawer of the cheque.

About the liability under Section 138 of the NI Act, where the cheque drawn by the employee of the appellant company on his personal account, even if it be for discharging dues of the appellant-company and its Directors, the appellant-company and its Directors cannot be made liable under Section

138. Thus, we observe that in the abovementioned case, the personal liability was upheld and the Company and its Directors were absolved of the liability. The logic applied was that the Section itself makes the drawer liable and no other person. This Court in P.J. Agro Tech Limited (supra) noted as under:

“An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence.” (Emphasis Supplied) Going by the strict interpretation of the provision the drawer which in the present case is the respondent is liable under Section 138 of the N.I. Act.

The Respondent has adduced the argument that in the complaint the appellant has not taken the averment that the accused was the person incharge of and responsible for the affairs of the Company. However, as the respondent was the Managing Director of M/s. Salvi Infrastructure Pvt. Ltd. and sole proprietor of M/s. Salvi Builders and Developers, there is no need of specific averment on the point. This Court has held in National Small Industries Corporation Ltd. Vs. Harmeet Singh Paintal and Anr.,[2] as follows:

Para 39 (v) “If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.” Thus, in the light of the position which the respondent in the present case held, we are of the view that the respondent be made liable under Section 138 of the NI Act, even though the Company had not been named in the notice or the complaint. There was no necessity for the appellant to prove that the said respondent was incharge of the affairs of the company, by virtue of the position he held. Thus, we hold that the respondent Vijay D Salvi is liable for the offence under Section 138 of the NI Act.

The law laid down by this Court in R. Vijayan Vs. Baby and Anr.,[3] was to the following effect:

“As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine up to twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonor of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of courts of justice.” We, therefore, award compensation to the extent of twice the cheque amount and simple interest thereon at 9% per annum to the complainant. Accordingly, the respondent Vijay D Salvi is sentenced to undergo simple imprisonment for a period of five months for the offence under Section 138 of the NI Act. Considering the fact that the cheque amount is Rs.74,200/-, we direct the respondent Vijay D Salvi to pay a compensation of

Rs.1,48,400/- (Rupees one lakh forty-eight thousand four hundred only) with simple interest thereon at 9% per annum, to the complainant-appellant. In default of payment of the said compensation, the respondent will have to undergo simple imprisonment for a period of six months.

Accordingly, this appeal is allowed and the impugned order passed by the High Court as also the order passed by the Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai, are set aside. We direct that the respondent shall be taken into custody forthwith to undergo the sentence.

.....J (Pinaki Chandra Ghose)J (Uday Umesh Lalit) New Delhi;

July 06, 2015.

[2] (2010) 12 SCC 146 [4] (2010) 3 SCC 330 [6] (2012) 1 SCC 260