

Kerala High Court

M.K. Philip vs Gainmore Investment on 22 May, 2006

Equivalent citations: I (2007) BC 3

Author: K A Gafoor

Bench: K A Gafoor

JUDGMENT K.A. Abdul Gafoor, J.

1. The complainant is in appeal, on dismissal of his complaint alleging offence under Section 138 of the Negotiable Instruments Act filed against the respondent/accused.

2. The admitted case by both the parties is as follows: On 25.8.1993, the appellant entrusted 1000 SBI Magnum shares to the respondent/accused, a share broker for being sold through bi-weekly settlement in the Cochin Stock Exchange, where the respondent conducts his trade. Admittedly, the value of 1000 Magnum shares at that time was Rs. 49,500/-. The accused drew Ext. P2 cheque for the said amount and handed it over to the complainant. It is not forthcoming in evidence, on which date it was handed over. Admittedly by the accused, the cheque so handed over was a post-dated cheque. It bears the date 10.12.1993. Therefore, it could have been handed over earlier than dated 10.12.1993 towards a legally recoverable debt on account of the consideration of 1000 SBI Magnum shares entrusted by the complainant to the accused on 28.8.1993. In the meantime, bi-weekly settlement was banned by the Security Exchange Board of India as per circular dated 30.11.1993. The appellant presented Ext. P2 cheque to the Bankers. It bounced for want of sufficient fund in the account of the accused. This resulted in a lawyer notice, Ext. P4 which was duly registered as per Ext. P6 and acknowledged as per Ext. P6. Ext. P7 ledger of the Bank shows that there was no sufficient fund when the cheque was presented. Nor did he meet the demand for payment of the amount covered by Ext. P2 cheque. This resulted in the complaint.

3. The complainant could prove that the accused had drawn Ext. P2 cheque against an account maintained by him and that it could not be encashed in spite of presentation, as is revealed by Ext. P3 cheque return memo and Ext. P7 ledger extract for want of sufficient amount in the account of the accused. There was due demand in terms of Clause (b) of the proviso to Section 138 of the Act for payment of the amount covered by Ext. P2 cheque as is revealed by Ext. P4, copy of the lawyer notice, Ext. P5 registration slip and Ext. P6 postal acknowledgement from the accused. There was no reply. Issuance of Ext. P2 cheque is admitted by the accused. There is no defect in the notice. It is within time. The complaint was also filed within time. Therefore, it is clear that Ext. P2 cheque admittedly issued by the accused bounced for want of sufficient fund in his account and an offence under Section 138 of the Act is made out.

4. But the Court below acquitted the accused on the ground that Ext. P2 cheque was not issued towards a legally recoverable debt. On 30.11.1993 SEB1 had banned bi-weekly settlement and that the amount covered by Ext. P2 was not recoverable after 10.12.1993. As the cheque was not issued against a legally recoverable debt, an offence under Section 138 was not made, the Court below found. This contention is based on the strength of the decision reported in C.B.S. Gramophone Records and Tapes (India) Ltd. v. Noorudeen 1991 (2) KLT 265. It is contended that so far as the post dated cheque is concerned, it could be presented to the Bank and the Banker (4) is liable to pay

the amount only on the date shown in the cheque or on any date later than that, within the period of limitation. As on the date of Ext. P2 cheque, there was a ban by SEBI towards bi-weekly settlement of shares. Therefore, the amount covered by Ext. P2 was not payable by the accused. The cheque, whether post-dated or not, shall be one issued in discharge of a whole or in part of any debt or other liability. Necessarily, the debt or liability shall be existing earlier than the date of the cheque, irrespective whether the cheque is post-dated or not, the accused contents.

5. Admittedly, the accused has received from the hands of the complainant 1000 Magnum shares worth Rs. 49,500/-. The amount covered by Ext. P2 dated 10. 12.1993 is the consideration amount thereof. Necessarily, it is the consideration towards Magnum shares entrusted by the complainant to the accused for sale. Therefore, Ext. P2 is in respect of a legally recoverable debt. Merely because SEBI had banned bi-weekly settlement on 30.11.1993, the liability of the accused to pay the consideration of 1000 Magnum shares entrusted to him does not vanish. The accused being a licensed share trader has to trade it in the legal manner and give the amount to the appellant. He has no case that he had not sold it on 30.11.1993. If he could not sell it, he ought to have returned 1000 Magnum shares to the complainant. He did not do so. He also does not have a case that he could not sell the shares because of the ban imposed by the SEBI. Therefore, the liability towards the price of 1000 Magnum shares subsists with the accused. Whether the SEBI had introduced any ban on bi-weekly settlement is immaterial, because trade in shares was not banned before and after 30.11.1993. The accused has to return the shares, if he did not sell it. But, he has not done it. He was also aware that Ext. P2 cheque was dated 10.12.1993. It was towards the price of 1000 Magnum shares entrusted by the complainant. Necessarily, it cannot be stated that Ext. P2 was not issued in discharge of a debt or liability incurred by him towards the appellant. A case under Section 138 of the Act is, thus, clearly made out and the respondent is liable for conviction. I do so. Taking into account the absence of the appellant in spite of a second notice from this Court, I am of the view that the consequent sentence shall be one day's imprisonment and fine.

6. Accordingly, the accused is convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and sentenced to undergo imprisonment for a day till the rising of Court on 18.9.2006, when he shall appear in the Court below. He shall also pay a fine of Rs. 1,00,000/- which, if recovered, shall be paid to the complainant. In default of payment of fine, he shall have to undergo simple imprisonment for six months.