Case No. 29

(2001) 3 Supreme Court Cases 726

(BEFORE K. T. THOMAS, R.P. SETHI AND B. N. AGRAWAL, JJ.)

ASHOK YESHWANT BADAVE Appellant

Vs

SURENDRA MADHAVRAO NIGHOJAKAR
AND ANOTHER Respondents

Criminal Appeal No. 293 of 2001, decided on March 14, 2001

Section 138 of the Negotiable Instruments Act - Post dated cheques - initially remains bill of exchange - becomes cheque on the date written on the cheque - validity period recokened from the date mentioned on the face of the cheque and not the date of handing over.

Dismissing the appeal the Supreme Court

Held :

For prosecuting a person for an offence under Section 138 of the Negotiable Instruments Act it is inevitable that the cheque is presented to the banker within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. When a post-dated cheque is written or drawn, it is only a bill of exchange and so long the same remains a bill of exchange, the provisions of Section 138 are not applicable to the said instrument. The post-dated cheque becomes a cheque within the meaning of Section 138 of the Act on the date which is written thereon and the 6 months' period has to be reckoned for the purposes of proviso(a) to Section 138 of the Act from the said date.

Anil kumar Sawhney v. Gulshan Rai, (1993) 4 SCC 424 : 1993 SCC(Cri) 1243, affirmed
Da Sillva v. Fuller, Sel Ca 238 MS; Emanuel v. Robarts, (1868) 9 B&S 121: 17 LT 646;Bull v. Sullivan. LR 6 QB 209; Gatty v. Fry, (1877) 2 Ex D 265: 46 LJQB 605 : 36 LT182; Palmer, Re, ex p Richdale, (1882) 19 Ch D 409 : 51 LJCh 462 : 46 LT 116; Hinchcliffe v. Ballarat Banking Co., 1 VR (L) 229; Royal Bank of Scotland v. Tottenham, (1894) 71 LT 168 : 2 QB 715 : 64 LJQB 99; Pollock v. Bank of New Zealand, (1902) 20 NZLR 174; Aylmer M. Keyes v. Royal Bank of Canada, 1947 SCR 377 (Canada SC); Brien v. Dwyer, (1979) 53 Aus LJR 123; Jiwanlal Achariya v. Rameshwarlal Agarwalla, Air 1967 SC 1118 : (1966) 36 Comp Cas 866, relied on
Halsbury's Laws of England, 4th Edn. (Reissue) Vol. 3(1), p. 143; Chalmers & Guest on Bills of

Exchange, Cheques and Promissory Notes, 15th Edn., p. 74; Thomson's Dictionary of Banking, 12th Edn., p. 463; F.E. Perry in The law and practice relating to banking : 1, pp. 137 and 138, relied on

Thus it is held that the six months' period shall be reckoned from the date mentioned on the face of the cheque and not any earlier date on which the cheque was made over by the drawer to the drawee.

Under Section 6 of the Negotiable Instruments Act a "cheque" is also a bill of exchange but it is drawn on a banker and payable on demand. A bill of exchange even though drawn on a banker, if it is not payable in demand, is not a cheque. A "post-dated cheque" is not payable till the date which is shown thereon arrives and will become cheque on the said date and prior to that date the same remains bill of exchange.

In the case on hand, the cheque was prepared and made over by the drawer to the drawee on 10-11-1995 but the date mentioned thereon was 20-1-1996 and it was presented before the Banker for encashment on 7-7-1996 i.e. within a period of six months from 20-1-1996. There is thus no ground to quash prosecution of the appellant as, on the facts alleged, an offence under Section 138 of the Act is clearly made out.

Advocates who appeared in this case:

M.D.Adkar, S.D. Singh and Vishwajit Singh, Advocates, for the Appellant.

Chronological list of cases cited

1. *(1993) 4 SCC 424 : 1993 SCC (Cri) 1243, Anil Kumar Sawhney v. Gulshan Rai* — *729a, 734f*
2. *(1979) 53 Aus LJR 123, Brien v. Dwyer* — *732e*
3. *AIR 1967 SC 1118:(1966) 36 Comp Cas 866, Jiwanlal Achariya v. Rameshwarlal Agarwalla* — *733f*
4. *1947 SCR 377 (Canada Sc), Aylmer M. Keyes v. Royal Bank of Canada* — *732c*
5. *(1902) 20 NZLR 174, Pollock v. Bank of New Zealand* — *731g*
6. *(1894) 71 LT 168 : 2 QB 715 :64 LJQB 99, Royal Bank of Scotland v. Tottenham* — *731c*
7. *(1882) 19 Ch D 409 : 51 LJCH 462: 46 LT 116, Palmer, Re, ex p Richdale* — *731a-b*
8. *(1877) 2 Ex D 265 : 46 LJQB 605:36 LT 182, Gatty v. Fry* — *731a*
9. *(1868) 9 B&S 121 :17 LT 646, Emanuel v. Robarts* — *730g-h*
10. *Sel Ca 238 MS, Da Silva v. Fuller* — *730g*
11. *LR 6 QB 209, Bull v. O'Sullivan* — *731a*

12. 1 VR (L) 229, Hinchcliffe v. Ballarat Banking Co. *731b*

The Judgment of the Court was delivered by

B.N. Agrawal, J.— Leave granted.

2.Challenge in this appeal has been made to the judgment passed by the Bombay High Court dismissing writ application filed by the appellant upholding an order passed by a Sessions Court in revision refusing to interfere with the order passed by a Chief Judicial Magistrate taking cognizance and issuing process against the appellant for the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act").

3. Surendra Madhavrao Nighojkar, Respondent 1 filed a petition of complaint in the Court of Chief Judicial Magistrate, Satara on 2-9-1996 for prosecution of the appellant under Section 138 of the Act besides Section 420 of the Penal Code which was registered as Criminal Case No. 11348 of 1996. Case of the complainant, in short, is that on 4-7-1993 an agreement to sell was executed by the complainant for sale of his 1/3 rd share in CTS No. 189 within Pratapganj Peth in the district of Satara for Rs.2,21,000 and the said sale was required to be executed in the name of the mother and wife of the appellant. At the time of agreement, Rs. 50,000 was paid b;y the accused to the complainant. Thereafter on 10-11-1995 sale deed was scribed and on the date a further sum of Rs.1,25,000 was paid by the accused to the complainant besides a post-dated cheque drawn on State Bank of India, Satara Branch, for Rs.46,000 bearing the date as 20-1-1996 which was made over by the accused to the complainant. Later on, the accused on several occasions made a request to the complainant for not presenting the cheque in the bank as he was not having sufficient funds in his bank account which request was acceded to by the complainant. Ultimately, as the period of six months was going to expire on 19-7-1996, the complainant had no option but to present the said cheque before his banker for encasement, but the same was returned without clearance on 11-7-1996 with the endorsement "account closed". From these facts the complainant deduced that the accused had deceived him which necessitated issuance of notice by the complainant to the accused on 22-7-1996 which was refused by him on 6-8-1996 whereafter the present complaint was filed.

4. Upon the filing of petition of complaint, the complainant was examined on solemn affirmation and by order dated 2-9-1996 the Magistrate took cognizance of the offence under Section 138 of the Act and issued process against the accused. The said order having been unsuccessfully challenged by the accused before the Sessions Court as well as the High Court, the present appeal by special leave is before us.

5. Prosecution of the appellant for the offence under Section 138 of the Act has been assailed on the sole ground that even if the facts disclosed in the complaint are taken at their face value and accepted in entirety, no offence at all much less the offence under Section 138 of the Act is made out as one of the conditions precedent for its applicability is that cheque must be presented to the bank within a period of six months from the date on which it was drawn or within the period of its validity whichever is earlier, but in the case on hand the cheque was presented before the banker for encasement after expiry of six months from the date it was made over by the accused to the complainant, though within a period of six months from the date mentioned on the cheque. As such, the question which arises for our consideration is:

"whether period of six months for presentation of cheque to the banker, as required under proviso (a) to Section 138 of the Act, should be reckoned from the date mentioned on the face of the cheque or a date previous to that when it was made over by the drawer to the drawee."

6. The question posed is no longer res integra as the same is concluded by a two-Judge Bench decision of this Court in the case of *Anil Kumar Sawhney v. Gulshan Rai,* wherein in similar circumstances it was laid down by this Court that post-dated cheque shall be deemed to have been drawn on the date it bears and not the previous date on which it was made over by the drawer to the drawee, but as the matter has been placed before this three-Judge Bench, we find it expedient to consider the same.

7. In the original Act, Chapter XVII contained two sections: Section 138 was related to power to appoint Notary Public, and Section 139 dealt with the power to make rules for Notary Public. But with the introduction of the Notaries Act, 1952 making elaborate provision for appointment of Notaries and their duties, functions, etc., the aforesaid provision became redundant and consequently by Section 16 of the Notaries Act, 1952, Sections 138 and 139 were repealed and thereby chapter XVII was abolished w.e.f. 14-2-1956. However , Chapter XVII has been reintroduced in the Act by Section 4 of the Banking. Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66of 1988) with effect from 1-4-1989 with a new nomenclature for the Chapter: "Of Penalties in case of Dishonour of certain Cheques for insufficiency of Funds in the Accounts." This new chapter contains five sections, namely, Sections 138 to 142 which are altogether different from old Sections 137 and 139. The object of bringing Section 138 by the aforesaid amending Act on the statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business of negotiable instruments. Despite civil rem-

edy, Section 138 intends to prevent dishonesty on the part of the drawer of negotiable instruments to draw a cheque without sufficient funds in his account maintained by him in a bank and induces the payee or holder in due course to act upon it.

8. Relevant portion of Section 5 and the provisions of Sections 6, 19, 138, 139 and 140 of the Act be quoted hereunder:

"5. 'Bill of exchange'.— A 'bill of exchange' is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to , or to the order of a certain person or to the bearer of the instrument.

* * *

6.'Cheque'.—A 'cheque' is a bill a exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

* * *

19. *Instrument payable on demand.*— A promissory note or bill of exchange, in which no time for payment is specified, and a cheque, are payable on demand.

* * *

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 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 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.

139. *Presumption in favour of holder*.— It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

140. *Defence which may not be allowed in any prosecution under Section 138*.— It shall not be a defence in a prosecution for an offence under Section 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." (emphasis added)

9. The concept of post-dated cheque was well known even in common law and it was in effect a bill of exchange payable on demand with a post-date upon which the demand was to be made. As far back as in 1776 and while the Law of Merchant was then in the process of formation, it was held in Da Silva v. *Fuller* referred to in Chitty on Bills of Exchange, 11th Edn., (188) that a banker was not justified in paying a post-dated cheque before its actual date. In 1868 nearly a hundred years later, the Court of Queen's Bench in Emanuel v. *Robarts* observed that a banker was justified in refusing payment of a post-dated cheque before its due date and that the custom of banker to do so was a part of the contract between the banker and the customer. In Bull v. O'*Sullivan* the Court laid down that a post-dated cheque payable to order was an instrument payable to order on demand on its date. Later, in 1877 in Gatty v. Fry the Court held that a post-dated cheque is not payable on the day it is issued but on the day of its date. All these cases were decided before the law was codified in England by the Bills of Exchange Act, 1882. After passing of the aforesaid Act, in the case of Palmer it has been decided by the Court of Appeal that a post-dated cheque was equivalent to a bill of exchange payable on a future date, namely, the date of the cheque. In the case of Hinchcliffe v. Ballarat Banking Co. the Court determined the exact point in question in the present case against the bank, holding that a post-dated cheque is a bill of exchange payable at a future date and that the banker may be liable to an action by the customer for negligence if he pays such cheque before the day it bears date.

10. In the high authority of *Royal Bank of Scotland V Tottenham* similar question was the subject-matter of consideration before the Court of Appeal in which

Lord Esher, M.R., after due consideration observed thus:

"A cheque is a contract between the parties, and it is for a Judge at the trial to construe that contract by reading what is written upon it Reading his cheque, upon its face it is dated the 10th of August, and is payable to order. What is the true construction of that contract upon reading it? It is simply an order to pay £250 upon demand. It is said that this is not the proper construction under the circumstances, because the cheque was signed on the 3rd of August, and handed over to the payee on the 8th of August, being dated the 10th of August. It is said that the cheque was, therefore, a post-dated cheque. Upon those facts being proved before the judge, what ought he to do? Must he say that, in consturing this written document, because it was handed over before the day of the date written upon it, he must put a different construction upon it and say that it is not a bill payable upon demand, but a bill payable two days after the day of its issue or negotiation? I have never heard of a cheque being so construed, and the argument of the appellant is entirely fallacious.... It is not denied that, by the Bills of exchange Act, 1882, a post-dated cheque is not made invalid;... The objection as to post-dating a cheque is therefore now an obsolete and useless objection. If a cheque is dealt with as a bill of exchange before the date which it bears, then it becomes a bill of defences and objections are futile and must fail."

11. In the case of *Pollock v. Bank of New Zealand* the Court of Appeal was considering a case where the Bank had paid a post-dated cheque before expiry of its date and thereafter dishonoured another cheque of its customer presented before the date of the post-dated cheque on the ground that after payment of the post-dated cheque, there were no funds to honour another cheque and consequently the same was dishonoured which necessitated filing of a suit by the customer for damages. The suit was decreed and when the matter was taken in appeal, the Court of Appeal while upholding the same observed thus:

"The Bank, by paying the post-dated cheque before its actual date, wrongfully debited its amount against the plaintiff's account. But for that debit there would have been sufficient funds to meet the cheque for Pound 38 11s., a cheque which the Bank ought to have paid, but which in breach of its duty to the plaintiff, dishonoured. The plaintiff is therefore entitled to damages for the wrongful dishonour of this cheque."

12. In the case of *Aylmer M. Keyes v. Royal Bank of Canada* the Supreme Court of Canada was considering a case where payment of a post-dated cheque was

made before the date of issue due to oversight. Thereafter the drawer countermanded payment of the cheque at the opening of business on the day of the date of cheque. This necessitated filing of a suit by the drawer against the Bank for realisation of the payments erroneously made by the Bank under post-dated cheque. The suit was decreed by the trial court but on appeal being preferred the Supreme Court of Alberta in its appellate division dimissed the suit by allowing the appeal, whereafter on special leave to appeal being granted, the matter was taken in appeal to the Supreme Court of Canada which set aside the appellate judgment and restored that of the trial court decreeing the suit and held that before the date of issue of the cheque the Bank was not justified in honouring the same.

13. In the case of *Brien v. Dwyer* the matter was considered by the High Court of Australia and it was laid down that a post-dated cheque was a bill of exchange payable at a future date.

14. In Halsbury's Laws of England, 4th Edn., (Reissue) Vol. 3(1), at p. 143, procedure to be adopted by the bank in relation to post-dated cheque has been enumerated which reads thus:

"Post-dated cheques are not invalid, but the banker should not pay such a cheque if presented before the date it bears. If, therefore, a cheque dated on a Sunday is presented on the previous business day, it should be returned with the answer 'post-dated'. A post-dated cheque, however, if presented at or after its ostensible date, should be paid though the banker knows it to be post-dated, and even if it has been presented before the date and refused payment."

15. In Chalmers & Guest on Bills of Exchange, Cheques and Promissory Notes, 15th Edn., at p.74, the concept of "post-dated cheques" has been explained as under:

"Post-dated cheques.— Cheques are often issued post-dated, that is to say, bearing a date later than that on which they are in fact issued. The purpose of issuing a post-dated cheque is to prevent the drawee banker from paying the cheque to the payee or a holder before the date written on the cheque. It is clear that the instrument is a cheque once the date written on it arrives. But its status is unclear prior to that date. It is arguable that, between the date of its issue and the date written on the cheque, it is not payable on demand and so cannot be a cheque but an insturment of a different kind. The view has been expressed that: 'so far as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days' date as intervene between the day of delivering the cheque and the date

marked upon the cheque'. It has also been stated that the effect of issuing a post-dated cheque is equivalent to giving a promissory note not payable until the date written on the cheque".

16. In *Thomson's Dictionary of Banking*, 12th Edn., at p. 463 "post-dated" has been defined as follows:

> "*Post-dated.*— A cheque which is dated subsequent to the actual date on which it is drawn, and which is issued before the date it bears, is called a post-dated cheque.
>
> A post-dated cheque should not be paid before the date appearing thereon...
>
> A cheque presented for payment before the date has arrived should be returned marked 'post-dated' "

17. *F.E.Perry in The law and practice relating to banking : 1, at pp*. 137 and 138 has dealt with "post-dated cheque" as under:

> "A cheque must not be post-dated, that is, dated after the day on which it is presented for payment to the drawee branch. Post-dated cheques present far more difficulties to the banker than antedated cheques: There are practical difficulties rather than legal ones... . But a cheque is generally post-dated because the drawer does not expect to have the funds to meet it until that date arrives. It is a mandate to the banker to the effect that it should not be paid before that date arrives."

18. In the case of *Jiwanlal Achariya v. Rameshwarlal Agarwalla*, a cheque dated 25-2-1954 was delivered on 4-2-1954 and encashed soon after 25-2-1954. This court was considering the question of payment envisaged within the meaning of Section 20 of the Indian Limitation Act, 1908 and delivering the majority judgment, Wanchoo, J., speaking for himself and J.C. Shah, J., observed thus:

"Where, therefore, the payment is by cheque and is conditional, the mere delivery of the cheque on a particular date does not mean that the payment was made on that date unless the cheque was accepted as unconditional payment. Where the cheque is not accepted as an unconditional payment, it can only be treated as a conditional payment. In such a case the payment for purposes of Section 20 would be the date on which the cheque would be actually payable at the earliest, assuming that it will be honoured... . As the payment was conditional it would only be good when the

cheque is presented on the date it bears, namely, 25-2-1954 and is honoured. The earliest date, therefore, on which the respondent could have realised the cheque which he had reveived as conditional payment on 4-2-1954 was 25-2-1954 if he had presented it on that date and it had been honoured."

19. From a bare perual of Sections 5 and 6 of the Act it would appear that a bill of exchange is a negotiable instrument in writing containing an instruction to a third party to pay a stated sum of money at a designated future date or on demand. On the other hand, a "cheque" is a bill of exchange drawn on a bank by the holder of an account payable on demand. Under Section 6 of the Act a "cheque" is also a bill of exchange even though drawn on a banker, if it is not payable till the date which is shown thereon arrives and will become cheque on the said date and prior to that date the same remains bill of exchange.

20. For prosecuting a person for an offence under Section 138 of the Act, it is inevitable that the cheque is presented to the banker within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. When a post-dated cheque is written or drawn, it is only a bill of exchange and so long the same remains a bill of exchange, the provisions of Section 138 are not applicable to the said instrument. The post-dated cheque becomes a cheque within the meaning of Section 138 of the Act on the date which is written thereon and the 6 months' period has to be reckoned for the purposes of proviso(a) to Section 138 of the Act from the said date. Thus while respectfully agreeing with the law laid down by this Court in th case of Anil Kumar Sawhney, we hold that six months' period shall be reckoned from the date mentioned on the face of the cheque and not any earlier date on which the cheque was made over by the drawer to the drawee.

21. In the case on hand, the cheque was prepared and made over by the drawer to the drawee on 10-11-1995 but the date mentioned thereon was 20-1-1996 and it was presented before the banker for encashment on 7-7-1996 i.e. Within a period of six months from 20-1-1996. Thus we find no ground to quash prosecution of the appellant as, on the facts alleged, an offence under Section 138 of the Act is clearly made out.

22. The appeal is accordingly dismissed.