

Case No. 36

1999 (1) CTV 687
IN THE HIGH COURT OF MADRAS
M.Karpagavinayagam, J
Crl. O.P.Nos. 704 and 796 of 1999
18.2.1999

Bharath N.Mehtha and another...

Petitioners

Vs

Mansi Finance (Chennai) Ltd by its Authorised
Signatory Mr. Kantilal B. Dave and another

Respondent

Section 138 of the Negotiable Instruments Act - drawer of the cheque adjudicated insolvent - cheque issued by him dishonoured - Action under Section 138 of the N I Act - provisions of Insolvency Act not a bar for criminal prosecution.

CASES REFERRED

1998 CrI L.J. 903 (22) *I.L.R Vol.35 Bom 63* (24)
I.L.R 1994 (II) Mad 1060 (21)
Mr. Ramachandran Advocate for Petitioner
CRL O.P. DISMISSED

ORDER

1. Since the question involved in these two petitions for quashing is common it is desirable to dispose of these petitioners by a common order.

2. The question posed before this Court is this:

“ Whether the complaint for the offence under Section 138 of the Negotiable Instruments Act is maintainable as against the accused, when the said accused was already declared as an insolvent in the insolvency proceedings.? ”

3. The facts in Crl O.P.No. 704 of 99 is Bharat N.Metha, the petitioner is an accused in a case for the offence under Section 138 of the Negotiable Instruments Act initiated by the respondent. According to the complainant, a cheque for Rs. 10,000 was issued by the petitioner to the complainant towards discharge of a loan and it was dishonored on 25.4.1998. On 30.4.1998, the statutory notice was sent and the same was received by the accused. However, no payment was made. Therefore, on 27.5.1998, the respondent complainant filed a complaint in C.C.No. 4161 of 1998 before the VII Metropolitan Magistrate, George Town, Chennai. According to the

petitioner, since he incurred heavy loss in his business, on 16.4.1998 he filed insolvency petition in I.P.No. 48 of 1998 he filed insolvency petition in I.P.No 48 of 1998 under the Presidency Towns Insolvency Act III of 1909 and on 17.4.1998, he was declared as an insolvent by the High Court in insolvency jurisdiction. On 23.4.1998, the petitioner sent a notice to the complainant informing about the said order and asking him not to present the cheque for clearance. The adjudication notice was also received by the counsel for the respondent on 2.7.1998. Despite the above fact for the offence the complaint under section 138 of the Negotiable Instruments Act was filed on 27.5.1998.

4. The facts in CrI. O.P.No 796 of 1999 are as follows: K.Sambasiva Rao, the petitioner is the accused in the private complaint filed by the respondent/ complainant for the offence under Section 138 of the Negotiable Instruments Act. According to the complainant, the cheque issued by the petitioner towards the payment of the amounts due was presented and the same was dishonored. Therefore, on 5.8.1997, the complainant sent a statutory notice to the accused who acknowledged the same. However, he neither sent reply to the notice nor paid the amount within the period of 15 days. Therefore, the complainant filed a complaint on 23.9.1997 against the petitioner for the offence under Section 138 of the Negotiable Instruments Act in C.C.No. 5917 of 1997. According to the petitioner/ accused, since he had incurred heavy loss in this business, he filed an Insolvency Petition on 1.4.1997 in I.P.No 97 of 1997 under the Presidency Towns Insolvency Act III of 1909 and he was declared by the High Court in the insolvency jurisdiction as an insolvent by the order dated 29.4.1997. This was intimated by the petitioner to the complainant on 26.8.1997. However, the complainant presented the cheque on 4.8.1997 and the same was returned. The petitioner also served the notice of adjudication in I.P.No. 97 of 1997 on the complainant. Despite that, the complaint was filed on 23.9.1997.

5. Mr. Ramachandran, the learned counsel for the petitioners would at length argue stating that the order adjudicating the petitioner in CrI. O.P. 796 as an insolvent was passed on 29.4.1997 and that admittedly the complaint by the complainant against the petitioner was filed on 23.9.97. Therefore, according to the counsel for the petitioner on the date of presentation of the complaint or on the date of taking cognizance of said complaint, the petitioner was insolvent and as such, no proceedings of any nature should be initiated against the insolvent by his creditors without the leave of the Insolvency Court after the date of adjudication.

6. It is further submitted that under Section 17 of the Presidency Towns

Insolvency Act III of 1909, on the making of an order of adjudication the property of the insolvent wherever situate shall vest in the official assignee and no creditor to whom the insolvent is indebted in respect of any debt shall have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose.

7. It is also pointed out that Section 18(1) of the Act empowers the Insolvency Court after making of an order of adjudication, stay any suit or other proceedings pending against the insolvent. Section 18(3) of the Act confers power to the Insolvency Court to stay the proceedings or allow them to continue on such terms as it may think just.

8. The counsel for the petitioner would further point out that Section 25(1) of the Act gives right to the insolvent to apply to the Court for protection and the said Court may make an order for the protection of the insolvent from arrest or detention and that Section 25(3) of the Act would provide that the protection order would protect the insolvent from being arrested or detained in prison for any debt to which such order shall apply.

9. Pointing out Rule 2, Order III of the Insolvency Rules, 1958 the learned counsel for the petitioner would submit that every debtor, soon after his petition is admitted in the Insolvency court shall lodge forthwith in the Office of the Official Assignee all books, papers, etc. relating to the estate and also file a list of creditors and debtors.

10. On the strength of these provisions, the main contention of the counsel for the petitioner is that once the accused in the proceedings under section 138 of the Negotiable Instruments Act is declared as an insolvent, by virtue of Section 17, 18(1) and (3) and 25(1) and (3) of Presidency Towns Insolvency Act III of 1109, the petitioner/ accused is being protected from prosecution for the offence under Section 138 of the Negotiable Instruments Act, since immediately after the declaration as an insolvent, he cannot be permitted to operate the bank account, as the entire estate will be vested with the Official Assignee and as such the prosecution against the petitioner is not maintainable.

11. The above submission, in my view on a careful scrutiny of the provisions of both the Presidency Towns Insolvency Act and the Negotiable Instruments Act, cannot be accepted for the following reasons:

12. Section 17 of the Presidency Towns Insolvency Act would merely provide that on the making of an order of adjudication, the Property of the insolvent shall be vested in the Official Assignee and there can be no suit or other legal proceedings except with the leave of the Insolvency Court. the wordings contained in this Section would make it clear that it would relate to the remedy of the creditor against the property of the insolvent in respect of that debt and the property of the insolvent shall be vested with the Official Assignees. It does not refer about the criminal proceedings, which are filed before the Court praying for the penal action for the offence committed by the accused.

13. As per Section 17 of the Act, no creditor to whom the insolvent is indebted in respect of any debt shall have any remedy against the property of the insolvent in respect of the debt shall commence any suit or other legal proceedings except with the leave of the Court.

14. The wordings " any suit or other legal proceedings " would be mean suit or other legal proceedings relating to the property of the insolvent and not with reference to the personal act committed by the accused constituting the offence liable to be proceed in a criminal Court.

15. The words " suit or other legal proceedings" in Section 17(2) would mean suit or other legal proceedings against the property of the insolvent, which vests with in the Official Assignee and the remedy against which is controlled by the sub- section. Section 17(2) has no application in respect of any suit or other legal proceedings, which is merely a personal actions against the insolvent. This view finds additional support from the provisions of Section 68. Section 68 deals with duty and powers of Official Assignee as to realization. Under Section 68(d), the Official Assignee can institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent.

16. The Section is based on the broad principle that when once a person is adjudicated as an insolvent the creditors seeking any remedy against him shall come to Insolvency Court and the operation of Section 17 affects all the creditors if the petitioner is adjudicated as insolvent, the property vests with the Official Assignee and he has to dispose it of to distribute the assets to all the creditors. The filing of the suit and other proceedings against the property of the insolvent are prohibited,

but not with regard to the criminal cases. The realization of money due through the Official Assignee is entirely different from seeking penal action for the offence committed by the person by not making payment of the cheque amount after dishonor inspite of receipt of the statutory notice.

17. The offence under Section 138 of the Negotiable Instruments Act is a statutory offence and these proceedings are totally different from that of the insolvency proceedings and by any stretch of imagination, it cannot be said that Section 17(2) prohibits the continuation of criminal proceedings initiated for dishonor of the cheque under Section 138 of the Negotiable Instruments Act.

18. Similarly, the wordings in Section 18(1) referring about “stay any suit or other proceedings pending against the insolvent before any Judge or Judges of the Court subject to the superintendence of the Court” would definitely mean only civil proceedings and not criminal proceedings, as criminal courts are not subject to the superintendence of the Insolvency Court.

19. The protection conferred under Section 25(1) and 25 (3) would also refer about the protection to the insolvent from being arrested or detained in civil prison for any debt and not with reference to any offence liable to be convicted by the criminal court.

20. Therefore, none of the provisions referred to by the learned counsel for the petitioner would not be in any way helpful to the petitioner to substantiate his contention.

21. As a matter of fact, this Court in **Kiran v. Ghansyamdass**, I.L.R. 1994 (II) Mad. 1060, Hon’ble Pratap Singh, J. (as he then was,) while considering this question, would hold that merely because the drawer of the cheque was adjudicated as an insolvent, it cannot be said that the drawer cannot be prosecuted for the offence under Section 138 of the Negotiable Instruments Act, as it would not absolve the accused from the criminal charge.

22. The above view (of mine) is also fortified by the decision of the Andhra Pradesh High Court in **Srinivasa Trading Co. v. State of Andhra Pradesh**, 1998 CrI. L.J. 903, wherein in a similar quashing petition against the proceedings under Section 138 of the Negotiable Instruments Act, the accused in that case raised a point that

legal proceedings would include criminal proceedings in view of Section 25(2) of the Provincial Insolvency Act, 1920 and the contingency provision of Section 17 of the Presidency Towns Insolvency Act III of 1909. But the High Court of Andhra Pradesh would specifically hold that "the property of the insolvent which vests with the Official Assignee, but not with reference to the criminal proceedings, particularly, with reference to Section 138 of the Negotiable Instruments Act.

23. As per Section 138 of the Negotiable Instruments Act, once the cheque was dishonored and the statutory notice demanding the cheque amount was received, the accused shall pay the cheque amount within 15 days from the date of the receipt of the said notice. Immediately, on the said 15 days expires, the cause of action arises. In other words, the offence under Section 138 of the Negotiable Instruments Act is complete.

24. When a similar issue was raised the Bombay High Court, in **Emperor v. Mullshankar Harihand Bhat**, I.L.R. Vol. 35 Bom. 63 held that the Magistrate's jurisdiction to try the insolvent for an offence under Section 421 I.P.C. is not taken away by anything in the Insolvency Act.

25. To put it briefly, there is no bar contained in any of the provisions of both the Acts, namely, the Negotiable Instruments Act and the Insolvency Act from approaching the Criminal court to seek for penal action under Section 138 of the Negotiable Instruments Act.

26. While going through the object and scope of the Act, it is clear that there are two ways in which the legislature held the cause of the aggrieved party by facilitating the application of Section 138 of the Negotiable Instruments Act to this case:

- (1) Under Section 139 of the Negotiable Instruments Act, a presumption is created whereby it is presumed, unless the contrary is proved, that the holder of the cheque., I.e.,, the aggrieved party received the cheque for the discharge, in whole or part, of any debt or liability:
and
- (2) Under Section 140 of the Act, the drawer cannot take mere defence of good faith that he had no reasons to believe when he issued the cheque that the cheque may be dishonored on presentment for the reasons stated in that Section. However, honest or innocent, the drawer is said to be adequately protected by this chapter by giving time to the drawer to make the payment.

27. Under these circumstances, the drawer cannot escape from the criminal

liability by putting forward the plea that he is not bound to discharge the liability mentioned in the complaint filed before the criminal court, as he was already declared as an insolvent, especially when there is a Section permitting the Court to presume that there is an existing liability and the issuance of the cheque by the accused was made towards the discharge of the said liability.

28. At the end, the learned counsel for the petitioners would submit by filing a note before this Court that if the principle laid down in the Legal Maxim “ lexnon cogit ad impossible is applied and by virtue of the effect of adjudication under Section 17 of the P.T.I. Act., an insolvent after his adjudication cannot commit the offence under Section 138 of the said Act as amended by Act 66 of 1988.

29. According to the counsel, there is a distinction between the Debtor committing the offence under Section 138 of Negotiable Instruments Act and then adjudicated as insolvent and the debtor already became an insolvent who is said to have committed the offence under Section 138 of the said Act.

30. By virtue of this submission, the counsel for the petitioners would reiterate that the petitioners having been declared as insolvents cannot be compelled through the statutory notice to perform the impossible act, namely, giving the cheque amount.

31. The said question with reference to the impossibility of non-payment cannot be decided by this Court under Section 482, Cr.P.C., in view of Section 139 of the Negotiable Instruments Act raising a presumption and Section 140 of the Act, which does not permit the accused to take the defence of good faith.

32. In view of the detailed discussion made above. I cannot, at this stage decide about the act of impossibility, especially when this is not admitted in the complaints filed by the respondents herein.

33. Therefore, I am of the considered view that mere declaration by the Insolvency Court that the petitioners are insolvents would not disentitle the complainants to seek for the remedy by way of penal action before the criminal court over the offences said to have been committed by the petitioners.

34. Therefore, in the light of the foregoing discussion. I find that there is no merit in these petitions, as I am of the view that the complaints filed in these cases are legally permissible and maintainable. Hence, these petitions are dismissed.