

Ganesh Singh Vs. State of U.P. and Others

Ganesh Singh Vs. State of U.P. and Others

SooperKanoon Citation : sooperkanoon.com/1172401

Court : Allahabad

Decided On : May-26-2014

Judge : Vinod Prasad

Appeal No. : Crl. Misc. Appln. No. 6803 of 2003 connected with Crl. Misc. Appln. No. 7318 of 2003

Appellant : Ganesh Singh

Respondent : State of U.P. and Others

Advocate for Pet/Ap. : Mr. T.B. Pandey

Judgement :

1. In these two connected Applications under Section 482, Cr.P.C., being Application Nos. 6803 of 2003 and 7318 of 2003, two relative applicants Ganesh Singh and his sister-in law Smt. Manju Singh have prayed for quashing of prosecution of complaint case No. 2535 of 2002, Meera Devi v. Ganesh Singh and Others, under Section 138, N.I. Act pending before 1st Judicial Magistrate, Jaunpur. Since the facts and prayer in both the applications are common and it both emanates from the same complaint case, hence by this common judgment they are being decided.

Mr. T.B. Pandey, learned Counsel for the applicants, Mr. V.K. Tiwari, learned Counsel holding brief of Mr. P.N. Tiwari for the complainant-respondent No. 4 and learned AGA for the State have been heard in extenso and record of both the

Applications have been scrutinized carefully.

A priory, preceding facts generating these Applications revealed that a complaint was filed by complainant Smt. Meera Devi/respondent No. 4, before 3rd A.C.J.M., Jaunpur with the allegations that she and her husband, Nanhey Seth, were engaged in a cement business in Jaunpur city. Both the applicants Ganesh Singh and Smt. Manju Singh are members of HUF and are original residents of Village Kapoorpur, P.S. Buxa, District Jaunpur, but in connections with their business, they reside at Teji Bazar, Buxa, District Jaunpur. Having close business relations between them Ganesh Singh, used to purchase cements from the complainant regularly on credit and reimburse the sale prices subsequently, In these business transactions, it is alleged that applicant Ganesh Singh had purchased on credit cements from the complainant but out of total sale price Rs. 22,0001= remained balanced and when the complainant demanded payment he (Ganesh Singh applicant) asked his sister-in-law (bhabhi) applicant Smt. Manju Singh to make the payment, which was made through cheque No. 687510 of PNB Bank. Admitted case of the complainant, which is a significant fact, is that albeit cheque was filled by applicant Ganesh Singh but the drawer of the said cheque is Smt. Manju Singh as it was she who had signed the aforesaid cheque issued in the name of Nanhey Seth. It is further alleged that complainant deposited the said cheque in her PNB Bank, Kesari Bazar branch, but the cheque was dishonoured and received back to the complainant on 8.2.2002 with Bank endorsement of insufficient funds in the drawers account. Statutory notice as is contemplated under Section 138, N.I. Act (hereinafter referred to as the Act) was given to applicant Ganesh Singh only but in spite of service of notice no payment was reimbursed and hence complaint under Section 138 of the Act as well as under Section 420, I.P.C. was filed before the Magistrate to punish both the applicants for the aforesaid offences.

2. Observing complainant case procedure statements under Section 200 of the code of the complainant and Section 202, Cr.P.C. of her husband Nanhey Seth were recorded and learned trial Magistrate, vide summoning order dated 14.8.2002, summoned both the applicants to stand trial only under Section 138 of the Act. The natural corollary that follows is that the complaint was dismissed for offence under Section 420 of the Penal Code. No challenge to said rejection of

complaint concerning offence under the Penal Code has been made by the complainant and hence that has attained finality and the matter stands concluded by the aforesaid summoning order dated 14.8.2002.

3. In the aforesaid background that both the applicants have approached this Court through above Section 482, Cr.P.C. Applications with the prayer to quash their prosecution as aforesaid.

Ganesh Singh applicant, based his prayer for quashing on the reason that he is not the drawer of the cheque and also that the complaint is premature. Another applicant Smt. Manju Singh has prayed for quashing of the complaint on the reasons that the complaint is premature and no statutory demand notice under Section 138, N.I. Act was ever issued to her demanding payment of money of the bounced cheque and, therefore, no complaint in her respect was maintainable before the Court and her prosecution, therefore, is illegal and be quashed.

4. After hearing both the sides, since the facts as have been slated herein above have not been snipped or controverted by both the contesting sides therefore, question to be determined lies in a very well defined and demarcated realm on pure legal questions.

5. For a successful prosecution under Section 138, N.I. Act, there are some legal requirements which have to be fulfilled and these legal requirements are (a) that the accused has to be the drawer of the cheque issued in the name of complainant in the discharge of a legal liability, (b) the cheque so issued should be presented for encashment in the Bank during subsistence of its life period, which is now three months (earlier it was six months), (c) that the cheque should bounce because of insufficiency of funds in the account of the drawer from which the cheque was issued or closure of his account, (d) after receiving the intimation from the Bank, the drawee or holder in due course of the said cheque serves a notice within the statutory period of limitation intimating the drawer of the cheque that his cheque has been bounced and he has to make good the payment of cheque amount with fifteen days of the receipt of the notice, (e) the drawer of the cheque, after receiving the notice as aforesaid do not make the payment with the statutory period of fifteen days, (f) if the drawer of the cheque does not make payment as

demanded then the offence is committed and cause of action arises for prosecution of the drawer of the cheque under Section 138, N.I. Act, (g) one month limitation period is provided under the Act for institution of a complaint under Section 138, N.I. Act. In the event any of above sine qua non ingredients for making out offence under Section 138 of the Act remains unfulfilled, prosecution of the accused for the said offence will be incompetent and illegal as not disclosing any offence under the Act.

6. In the legal background mentioned herein above when the facts of the present Applications are vetted minutely, it becomes apparent that so far as Ganesh Singh applicant is concerned, he is not the drawer of the cheque. No criminal liability under the Act, which is a strict liability, therefore, can be fastened on Ganesh Singh as he is not the drawer of the cheque. The drawer of the cheque is Smt. Manju Singh, who is his bhabhi. Merely because Ganesh Singh had filled in the cheque, will not make him liable under Section 138 of the Act as the Act does not contemplates any such situation. Learned Counsel for the informant was unable to successfully built the argument that such a fact situation will also anoint offence on Ganesh Singh and will bring him with the purview of Section 138 of the Act. He reluctantly conceded that so far as Ganesh Singh is concerned, his prosecution under the Act is incompetent and cannot be permitted to go on.

7. Coming to the case of bhabhi Smt. Manju Singh, another applicant, who is drawer of the cheque, the admitted facts are that no notice of demand under Section 138(b) of the Act was issued to her at any point of time by demanding the payment of the cheque amount. In that eventuality, the sine qua non uneschewable ingredient for disclosing offence under Section 138, N.I. Act against Smt. Manju Singh is missing from the complaint. Demand notice statutorily required has been annexed along with 482, Cr.P.C. Application No. 6803 of 2003, Ganesh Singh v. State of U.P. and Others as Annexure No. 4. A bare perusal of the said notice indicate that only Ganesh Singh was given the notice and not applicant Smt. Manju Singh. Learned Counsel for the informant also had to accept that no notice of demand was served on Smt. Manju Singh at any point of time as is ordained under Section 138(b) of the Act.

8. Another common contention by both the applicants seeking quashing of their prosecution is that complaint was filed prematurely is also well founded and has merit and substance in it. Admittedly, the cheque was issued by Smt. Manju Singh on 31.12.2002 and the statutory demand notice was given on 15.2.2002 in the name of Ganesh Singh. Without completion of statutory period of fifteen days, the complaint was filed on 28.2.2002 and it was registered on the same day and cognizance was taken. In such a view, by a pure common sense, the complaint was filed prior to lapse of statutory period of fifteen days, during which drawer of the cheque could have rectified the committed mistake. That being the situation in the present case the complaint, therefore, is premature and the Magistrate was not entitled to take cognizance of the offence as on the day on which, the complaint was registered and cognizance was taken of the offence under Section 138 of the Act, in fact, no such offence on that date was committed at all. The Apex Court has settled of these aspects by a catena of decisions, which are referred to herein below:

9. In *M/s. Sarav Investment and Financial Consultants Pvt. Ltd. and Anr. v. Llyods Register of Shipping Indian Office Staff Provident Fund and Anr.*, IV (2007) CCR 233 (SC)=IV (2007) DLT (Cri) 474 (SC)=IV (2007) BC 677 (SC)=AIR 2007 (240) SC (Supp) 1688, it has been held by the Apex Court as under:

16. Section 138 of the Act contains a penal provision. It is a special statute. It creates a vicarious liability. Even the burden of proof to some extent is on the accused. Having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrants a strict construction. Proviso appended to Section 138 contains a non obstante clause. It provides that nothing contained in the main provision shall apply unless the requirements prescribed therein are complied with. Service of notice is one of the statutory requirements for initiation of a criminal proceeding. Such notice is required to be given within 30 days of the receipt of the information by the complainant from the Bank regarding the cheque as unpaid. Clause (c) provides that the holder of the cheque must be given an opportunity to pay the amount in question within 15 days of the receipt of the said notice. Complaint Petition, thus, can be filed for commission of an offence by a drawee of a cheque only 15 days

after service of the notice. What are the requirements of service of a notice is no longer res integra in view of the recent decision of this Court in Cc. Alavi Haji v. Palapetty Muhammed and Anr., VI (2007) SLT 442=III (2007) DLT (CrI.) 214 (SC)=III (2007) BC 533 (SC)=III (2007) CCR 118 (SC)=JT 2007(7) SC 498.

17. Service of notice in this case was not sought to be effected under registered cover with acknowledgment due. It was sought to be done by the agent of the complainant itself. The agent of the complainant sought to serve the said notice through their own employees.

18. The notice was only required to be dispatched. Its contents were required to be communicated. Communication to the appellant about the fact of dishonouring of the cheques and calling upon him to pay the amount within 15 days is imperative in character. It is not a case, where, actual communication was not necessary. Service of notice is a part of cause of action for lodging the complaint.

19. In K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr. [III (2005) BC 158 (SC)=VIII (1999) SLT 147=IV (1999) CCR 63 (SC)=(1999) 7 SCC 510], importance of service of notice has been pointed out stating

19. In Blacks Law Dictionary giving of notice is distinguished from receiving of the notice (vide p. 621): A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it. A person receives a notice when it is duly delivered to him or at the place of his business.

20. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the Court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

21. In Maxwells Interpretation of Statutes, the learned author has emphasized that provisions relating to giving of notice often receive liberal interpretation (vide p. 99 of the 12th Ed.). The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in Clause (b) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to make a demand by giving notice. The thrust in the clause is one the need to make a demand. It is only the mode for making such demand which the Legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is dispatched his part is over and the next depends on what the sendee does.

10. In *Yogendra Pratap Singh v. Savitri Pandey and Anr.*, II (2012) CCR 172 (SC)=II (2012) BC 520 (SC)=III (2012) SLT 349=II (2012) DLT (Cri) 206 (SC)=AIR 2012 SC 2508, it has been observed as under:

5. Proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have 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. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make 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. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as Clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.

11. Before parting with this decision it would but be appropriate to mention that the question of complaint being premature has been referred to a three Judge Bench of the Apex Court in Yogendra Pratap Singh (supra), but the same does not alter the position as other grounds respecting Ganesh Singh being not the drawer of the cheque and another applicant Smt. Rekha Singh was not at all served with any notice under Section 138(b) still comes to the rescue of the applicants from their aforesaid prosecution.

Concluding residue of the aforesaid discussion is that the prosecution of both the applicants under the N.I. Act through the aforesaid complaint case is incompetent, illegal and, therefore, it has to be quashed by exercising inherent power under Section 482, Cr.P.C. Application to do ex debito justitiae.

Both the 482, Cr.P.C. Applications are hereby allowed. Prosecution of both the applicants through the aforesaid complaint case No. 2535 of 2002, Meera Devi v. Ganesh Singh and Others, under Section 138, N.I. Act pending before 1st Judicial Magistrate, Jaunpur is hereby quashed.

Let a copy of this judgment be communicated to the learned Magistrate for his intimation.

Applications allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com