

M. Shashikala Vs. Krishna Murthy

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Court : Karnataka

Decided On : Mar-05-2015

Judge : A.N. Venugopala Gowda

Appeal No. : Criminal Petition No. 263 of 2014

Appellant : M. Shashikala

Respondent : Krishna Murthy

Judgement :

(Prayer: This Crl.P. Is Filed U/S.482 Cr.P.C., Praying To Quash The Entire Proceedings In C.C.No.51 S59/20i3 On The File Of Xiv A.C.M.M., Mayo Hall Unit, Bangalore Vide Annexure-D; And Etc.)

1. The petitioner is facing trial in a complaint filed by the respondent under Section 138 of the Negotiable Instruments Act, 1881 ('Act' for short) Contending that the complaint is not maintainable and no prosecution proceeding can be launched and seeking quashing of the proceeding in CC.No.51659/2013 pending on the file of the XIV Addl. Chief Metropolitan Magistrate, Mayohall Unit, Bengaluru, this petition was filed under Section 482 of the Cr.P.C,
2. Sri P. Narayanappa, learned advocate, contended that even on admitted facts, the complaint is not maintainable, as the statutory notice was not issued within the stipulated period and therefore, the cognizance taken and the process issued being illegal, the impugned proceeding is liable to be quashed.

3. Sri Deepak J., learned advocate, on the other hand, submitted that, if this petition is allowed, then, the respondent may be reserved with the right to institute a suit against the petitioner, for recovery of the cheque amount.

4. Undisputed facts are that, a complaint under Section 200 of the Act was filed by the respondent, on the basis of a cheque bearing No 000020, dated 17.12.2012, drawn on Bank of Baroda, Indiranagar Branch, Bengaluru, which had been issued by the petitioner, when presented, was returned dishonoured on 19.12.2012 by the Bank. A notice dated 19.01.2013 was sent demanding payment of the cheque amount. Payment having not been made, a complaint was filed on 28.02.2013. Sworn statement of the complainant was dispensed with and the complainant was permitted, on 23.08.2013, to file an affidavit in lieu thereof. Learned Magistrate being of the opinion that the ingredients of Section 138 of the Act has been made out, a criminal case was directed to be registered against the petitioner for the aforesaid offence.

5. Thus, there is no dispute that the notice was not issued within 30 days' period from the date, on which the cheque was returned dishonored by the Bank. In the circumstances, the question for consideration is:

Notice having not been issued within the period as stipulated under Sections 133 of the Act, whether the prosecution of the petitioner is illegal?

6. In MSR LEATHERS Vs. S.PALANIYAPPAN, 2013 (1) SCC 177, Apex Court having analysed the provisions of Section 138 and 142 of the Act, has held as follows:-

12. The 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.

13. Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non- obstante clause. It provides that no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, by the holder in due course and such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. In terms of sub-section (c) to Section 142, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class is competent to try any offence punishable under Section 138.

14. A careful reading of the above provisions makes it manifest that a complaint under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) of the proviso to Section 138 of the Act.

16. Presentation of the cheque and dishonour thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes 'cause of action' within the meaning of Sections 138 and 142(b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For a dishonour to culminate into the commission of an offence of which a court

may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonour of the cheque that the holder/pavee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him."

(emphasis is supplied)

7. In view of the above, for the purpose of limitation, in so far as serving legal notice is concerned, period is 30 days from the date of receipt of information by the drawee from the bank regarding return of the cheque, as unpaid. Therefore, after the cheque is returned as unpaid, a notice has to be issued within 30 days of the receipt of information in that regard.

8. Applying the principles laid down in the aforesaid decision and reiterated in *KAMLESH KUMAR Vs. STATE OF BIHAR*, 2014(2) SCC 424, in the present case, I find that the cheque presented on 17.12.2012 was returned on 19.12.2012 and the legal notice demanding payment of the cheque amount was sent on 19.01.2013 i.e., after the expiry of 30 days' period. Therefore, the complaint filed on 28.02.2013 is not maintainable, as it was filed without satisfying a mandatory condition laid down in Section 138 of the Act, as was made clear in para 12 of the judgment in *MSR LEATHERS*, extracted supra.

9. The learned Magistrate, without noticing the fact that the complainant has not made the demand for the payment of the returned cheque amount, by giving notice in writing to the drawer of the cheque, within the period of 30 days of receipt of information by him, from the bank, regarding the return of the cheque, as unpaid, has taken cognizance and has ordered for issue of process. In view of non-compliance of the said mandatory condition, as has been made clear in para 16 of the decision in *MSR LEATHERS*(Supra), the complaint filed being not maintainable and further prosecution being abuse of process of court, is liable to

be quashed.

In the result, this petition is allowed and C.C.No.51659/2013 pending on the file of the XIV Addl. Chief Metropolitan Magistrate, Mayohall, Unit, Bengaluru, and all further proceedings thereto, is quashed. However, it is made clear that this order would not come in the way of the respondent instituting a suit for recovery of the cheque amount and at the same time, the defence of the petitioner is kept open.

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