

K. Kumar Vs. M. Narendra Prasad

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Court : Karnataka

Decided On : Nov-18-2014

Judge : A.N. Venugopala Gowda

Appeal No. : Criminal Revision Petition No. 108 of 2014

Appellant : K. Kumar

Respondent : M. Narendra Prasad

Judgement :

(Prayer: This Crl.R.P. is filed under S.378(4) r/w AO 1 C.r.P.C., praying to set aside the

JUDGMENT / ORDER

passed by the XV ACMM., Bangalore in C.C.No.19267/2012 dated 10.01.2014 and consequently condone the delay and remand the matter back to the Magistrate Court, for necessary adjudication on merits of the case.)

1. This revision petition was riled against an Order dated 10.01,2014, passed by the XV Additional Chief Metropolitan Magistrate, Bengaluru, in C.C. No.19267/2012, DV which, an application filed by the petitioner, under 5.142(b) of the Negotiable Instruments Act, 1881 (for short, 'the Act'), was dismissed and consequently, the complaint having not been filed within the prescribed period was rejected, i.e., on the ground of bar of limitation.

2. The petitioner was the complainant and the respondent was the accused in the Court below. The petitioner filed a private complaint against the respondent, for the offence punishable under S.138 of the Act. Gist of the complaint is, that a cheque dated 09.07.2012, issued by the respondent, towards discharge of debt, when presented for collection was dishonoured, with an endorsement dated 17.07.2012 - "funds insufficient". The said cheque, when re-presented on 21.07.2012, was dishonoured again and was returned on 23.07.2012, with an endorsement "funds insufficient". An attempt was made for recovery of the cheque amount by issue of a notice dated 18.08.2012. There being failure to make payment, the complaint was filed on 04.12.2012, before the jurisdictional Magistrate, alleging commission of an offence punishable under S.138 of the Act.

3. The complaint having not been filed within the prescribed period, to condone the delay of 67 days, an application was filed under S.142(b) of the Act. Respondent filed statement of objections and contested the prayer in the said application. Complainant got himself examined as PW-1 and Exs.D1 to D3 were marked in his cross-examination. Considering the rival contentions and finding that the delay has not been satisfactorily explained and does not deserve to be condoned, aforesaid order was passed. Feeling aggrieved, this petition was filed for relief.

4. Sri K. Srinivasa, learned advocate, contended that the learned Magistrate has committed error and illegality in refusing to condone short delay of 67 days. He submitted that the respondent having not led rebuttal evidence, the impugned order is perverse. He contended that satisfactory explanation for the delay having been offered, the contrary finding recorded in the impugned order is unsustainable. Learned counsel submitted that a meritorious complaint has been thrown away purely on technical ground of delay and the impugned order having resulted in miscarriage of justice, interference is called for.

5. Sri K.Chandranath Ariga, learned advocate, on the other hand contended that in deciding the application for condonation of delay, learned Magistrate has rightly kept in mind, the special period of limitation prescribed under the Act for filing of the complaint and also the object of expeditious adjudication of the complaint related to cheque bounce. He submitted that there being suppression of material

fact by the petitioner with regard to the reply dated 22.08.2012 sent to the demand notice dated 18.08.2012 and the petitioner having not approached the Court with clean hands and the delay in filing the complaint having not been satisfactorily explained, the finding recorded by the learned Magistrate, with reference to the record of the case being neither perverse nor illegal, interference is not called for. Learned counsel supported the impugned order and sought dismissal of the petition.

6. To decide this petition, it is necessary to refer to the relevant provisions of the Act. S.138 reads as under:

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 provisions of this Act, be punished with imprisonment for a term which may extended to two years, 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 thirty 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."

S.138 defines the ingredients of the offence and the punishment that would follow in the event of such an offence having been committed and the proviso appended thereto makes conditions precedent for taking cognizance in the matter of the commission of the offence.

7. S.142 deals with Cognizance of offences and reads as under:

"142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -

(a) 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, the holder in due course of the cheque;

(b) 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:

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

The above provision prescribes the mode and the time within which a complaint under S.138 can be filed. However, if the Court is satisfied that the complainant had sufficient cause for not filing the complaint within the prescribed period, the complaint may be taken by the Court, even after the prescribed period. Proviso appended to clause (b) of S.142 enables that the cognizance of complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making the complaint within the prescribed period.

8. In respect of the offence under S.138, the Court while dealing with the application for condonation of delay, must keep in mind the special period of limitation prescribed under the Act. The issue of limitation must be examined in the light of the gravity of offence in question and whether the condonation is required in the interest of justice. The period of limitation prescribed under the Act must be observed, but in certain circumstances, if the complainant satisfies the Court that he had sufficient cause for not making the complaint within the prescribed period, the Court may condone the delay, by recording the reasons for the same, in the event, that it is found necessary to condone such delay in the interest of justice.

9. In DASHRATH RUDSINGH RATHOD VS. STATE OF MAHARASHTRA AND ANOTHER, (2014) 9 SCC 129, while considering the place or situs where the S.138 complaint is to be filed, with regard to availability of other remedies in the matter of bounced cheque, Apex Court has held as follows:

"20. We feel compelled to reiterate our empathy with a payee who has been duped or deluded by a swindler into accepting a cheque as consideration for delivery of any of his property; or because of the receipt of a cheque has induced the payee to omit to do anything resulting in some damage to the payee. The relief introduced by Section 138 of the NI Act is in addition to the contemplations in IPC. It is still open to such a payee recipient of a dishonoured cheque to lodge a first information report with the police or file a complaint directly before the Magistrate concerned. If the payee succeeds in establishing that the inducement for accepting a cheque which subsequently bounced had occurred where he resides or ordinarily transacts business, he will not have to suffer the travails of journeying to the place where the cheque has been dishonoured. All remedies under IPC and Cr PC are available to such a payee if he chooses to pursue this course of action, rather than a complaint under Section 138 of the NI Act And of course, he can always file a suit for recovery wherever the cause of action miser, dependent on his choosing."

(emphasis supplied)

10. In the instant case, there is a delay of 67 days in filing the complaint. The cheque was dishonoured on 17.07.2012 and again on 23.07.2012. A demand for

payment of the cheque amount, in terms of clause (b) of S.138 was made on 18.08.2012. Denying the liability, the respondent sent reply on 22.08.2012. In the complaint and in the application seeking condonation of delay and also in the affidavit evidence in lieu of examination in chief of the complainant, the fact of respondent repudiating the demand, when made in terms of clause (b) of S.138 was suppressed. During the course of cross-examination, the complainant, when confronted, has admitted the receipt of reply dated 22.08.2012.

11. In *OSWAL FATS AND OILS LIMITED Vs. ADDITIONAL COMMISSIONER (ADMINISTRATION), BAREILLY DIVISION, BAREILLY AND OTHERS*, (2010) 4 SCC 723, relief was denied on account of concealment of material facts, by making the following observations:

"20. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person."

By applying the ratio of the above judgment to the facts of the instant case, noticed supra, the petitioner being guilty of not approaching the Magistrate Court with clean hands and there being no credible explanation for the delay, the prayer for condonation of delay has rightly been negated.

12. There being no cogent reason assigned to condone the delay in filing the complaint before the Magistrate, the impugned order is neither perverse nor illegal, to warrant interference in exercise of revisional jurisdiction under S.397 read with S.401 of the Code of Criminal Procedure.

In the result, petition is rejected. However, the petitioner is at liberty to avail the other remedy, if he is so advised.

