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

Laxmi Devi Singhal and Another Vs. Kailash Singhal

Laxmi Devi Singhal and Another Vs. Kailash Singhal

SooperKanoon Citation : sooperkanoon.com/1182213

Court : Madhya Pradesh

Decided On : Oct-27-2015

Judge : Sujoy Paul

Appeal No. : Misc. Criminal Case Nos. 147 & 148 of 2014

Appellant : Laxmi Devi Singhal and Another

Respondent : Kailash Singhal

Advocate for Def. : Shri. Anmol Khedkar

Advocate for Pet/Ap. : Shri. Raja Sharma

Judgement :

1. In view of commonality of facts and issues involved, on the joint request, matters were analogously heard and are decided by this common order.

Facts are taken from M.Cr.C.147/2014

2. In these petitions filed under Section 482 of Cr.P.C the petitioner has called in question the proceedings of complaint case No. 6199/2013. Shri Raja Sharma, learned counsel for the petitioner, submits that court below has erred in passing the order dated 06.07.2013 whereby complaint preferred by respondent under Section 138 of Negotiable Instrument Act (NI Act) is directed to be registered. The present petitioner was served by issuing notice by registered and ordinary post.

Criticizing this order, learned counsel for the petitioner submits that the respondent filed a complaint under Section 138 of NI Act. In para 4 and 5 of the complaint the description of cheques i.e. date, account number and amount etc were shown. It is further averred that said cheques were bounced. Bank gave finding that insufficient amount is there in the account. The said complaint was filed after undertaking necessary formalities.

3. Criticizing this order, Shri Raja Sharma submits that respondent/complainant filed a Civil Suit No. 59A/2012 before the District Judge, Shivpuri. Said suit was filed for declaration and permanent injunction. If the averments of the said suit is examined in juxta position to the averments of the compliant under Section 138 of NI Act, it will be clear that there are contradictions in the pleadings. He submits that for this reason, at this stage itself, interference can be made. He placed reliance on **2014 (13) SCC 553 (Rashmi Jain v. State of U.P.)**, **2006 (6) SCC 39 (M.S. Narayan Menon @ Mani v. State of Kerala and Anr.)**, **2012 (12) Scale 688 (Paramjeet Batra v. State of Uttarakhand and Ors.)**. Lastly, reliance is placed on **(2014) 2 SCC 236 (John K. Abraham v. Simon C. Abraham and Anr.)** . On the strength of these judgments, it is contended that this Court may set aside the complaint proceeding at this stage itself.

4. Prayer is opposed by Shri Anmol Khedkar, learned counsel for the respondent. He submits that necessary ingredients for taking cognizance under Section 138 of N.I. Act are available in the body of complaint. The Court below has not committed any error of law in registering complaint and taking cognizance. He submits that at this stage no interference is warranted by this Court. It is open for the petitioner to put forth his defence at appropriate stage before the Court below. He submits that disputed questions of facts and law cannot be gone into at this stage. Reliance is placed on judgment of Supreme Court in **(HMT Watches Ltd. v. M.A. Abida and Anr.) reported in 2015 Legal Eagle (SC) 242**.

5. No other point is pressed by learned counsel for the parties.

6. I have heard the parties and perused the record.

7. Before dealing with the rival contentions advanced, it is apposite to quote relevant provision of NI Act., which reads as under :-

"118. Presumptions as to negotiable instruments. Until the contrary is proved, the following presumptions shall be made:

(a)of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

"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."

8. A conjoint reading of these provisions makes it clear that there is a presumption of issuance of Negotiable Instrument in favour of the complainant. However, this presumption is a rebuttable presumption. Complainant, at appropriate stage, can rebut this presumption. This aspect is considered by this Court after taking stock of various Supreme Court judgments recently. The relevant portion of judgment passed in **(Ramswaroop Tyagi v. Omkarnath Pandey) reported in 2015 (3) JLJ 109** reads as under :-

"7. Section 138 of NI Act finds place in Chapter XVII of the NI Act. The object behind introducing this chapter is to instill faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were introduced in order to discourage people from not honouring their commitments by way of payment through cheques. This is trite law that Court should lean in favour of an interpretation which serves the object of the statute. [See: **(2003) 3 SCC 232 (Goaplast (P) Ltd. v. Chico Ursula D' Souza)**].

9. The Apex Court considered Section 139 in **2001 (6) SCC 16 (Hiten P. Dalal v. Bratindranath Banerjee)**. It was held that because both Sections 138 and 139 require that the court 'shall presume' the liability of the drawer of the cheques for

the amounts for which the cheques are drawn. It is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on the accused. Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court 'may presume' a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

10. In **2008 (7) SCC 655 (Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm)** the Apex court opined that under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal.

11. In view of aforesaid judgments, it is clear that a presumption is created by statute itself. In view of this presumption, the initial burden is on the defendant to show that existence of consideration was either doubtful or illegal, then only onus would shift on the plaintiff. The Supreme Court in **(1999) 3 SCC 35 (Bharat Barrel and Drum Mft. Co. v. Amin Chand Payrelal)** held that if the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the

preponderance of probabilities by reference to the circumstances upon which he relies. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist.

12. Thereafter the Apex Court in **2015 SCC Online 233 (H.M.T. Watches Ltd. v. M.A. Abida and Anr; decided on March 19, 2015)** again considered Section 138 and 139 of NI Act and opined that the accused (respondent no.1) challenged the proceedings of criminal complaint cases before the High Court, taking factual defences. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial Court after recording evidence of the parties. Supreme Court held that the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties.

13. This is trite law that parameters of jurisdiction of High Court in exercising its jurisdiction under Section 482 of Cr.P.C. is although of wide amplitude, a great deal of caution is also required in its exercise. Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of such jurisdiction. High Court at that stage would not ordinarily enter into a disputed question of fact [See :- **(2008) 13 SCC 678 (Suryalakshmi Cotton Mills Limited v. Rajvir Industries Limited)**].

14. So far contention of Shri Raja Sharma about pendency of civil suit is concerned, a plain reading of plaint shows that it has nothing to do with the issuance of cheques. The Civil suit is filed for claiming title and injunction etc. on

the "Vatika" marriage garden. In the civil suit, there is no averment in relation to issuance of cheques. The judgment of Rashmi Jain (Supra) is based on different factual scenario. In the said case, the averment of complainant itself did not inspire confidence and therefore, Supreme Court in the facts and circumstances of said case opined that it will be travesty of justice if complaint proceedings are permitted to continue. Said judgment has no application in the present case. Interference in Paramjeet Batra (supra) was made because the dispute was essentially a civil dispute. In the present case, civil suit has nothing to do with the dishonour of cheques. Hence, merely because a civil suit is pending between the same parties on a different subject, no interference can be made in N.I. Proceedings. Judgment of Paramjeet Batra is of no help to the petitioner. The other judgments cited by Shri Raja Sharma are passed after complete adjudication of NI proceedings. In other words, the other judgments cited by the petitioner are passed after the final outcome of the NI proceedings. At this stage, when only cognizance is taken, scope of interference is very limited. If the averments of complaint are accepted on its face value, it cannot be said that necessary ingredients for taking cognizance are not made out. Thus, the said judgments have no application in the factual matrix of the present matter.

15. As analysed above, I find no reason for interference at this stage. Petitioner is at liberty to put forth his defence before the court below. Petitions are dismissed with aforesaid observations.

Petitions dismissed.

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