

Prashant Vs. S.K. Sarkar

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Court : Mumbai

Decided On : Jan-24-2002

Reported in : 2002(2)ALD(Cri)953; 2002BomCR(Cri)672; 2002CriLJ3001; 2002(2)MhLj125

Judge : D.D. Sinha, J.

Acts : Negotiable Instruments Act - Sections 138 and 142; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 482; [Indian Penal Code \(IPC\), 1860](#) - Sections 420

Appeal No. : Criminal Revision Application No. 37 of 2001

Appellant : Prashant

Respondent : S.K. Sarkar

Advocate for Def. : S.D. Dewani, Adv.

Advocate for Pet/Ap. : A.P. Shinde, Adv.

Disposition : Revision dismissed

Judgement :

1. Heard Mrs. Shinde, learned Counsel for the applicant and Shri S.D. Dewani, learned Advocate for the non-applicant.

2. The revision is directed against the judgment and order dated 04.12.2000 passed by the Vth Additional Sessions Judge, Nagpur in Criminal Revision No. 306 of 2000 whereby Additional Sessions Judge allowed the same.

3. Mrs. Shinde, learned Counsel for the applicant, contended that the applicant/complainant filed a complaint under Section 138 of the Negotiable Instruments Act (for the sake of brevity, it will be referred as an Act) against the non-applicant in the Court of Judicial Magistrate First Class, Corporation Court No.1, Nagpur, who was pleased to summon the non-applicant/accused to defend the charge alleged and levied against him.

4. It is contended that the non-applicant/ accused on 21.01.2000 moved an application below Exhibit-15 before the Judicial Magistrate First Class for quashing the proceedings against him on the ground that there was no legal notice issued by the applicant after dishonour of the cheques demanding the money to be paid to the applicant involved in the cheques. The Judicial Magistrate First Class vide order dated 31st March 2000 rejected the application of the non-applicant /accused for quashing of the proceedings/recalling of process. Being aggrieved by the same, the non-applicant /accused filed a revision application No. 306 of 2000 before the Sessions Judge, Nagpur, challenging the validity of the order dated 31st March 2000 passed by the Judicial Magistrate First Class. Same has been allowed by the learned Additional Sessions Judge and quashed the complaint under Section 138 of the Act and discharged the accused of the offence under Section 138 of the Act. Being aggrieved by this order, the applicant/complainant filed the present revision application before this Court under Section 482 of the Code of Criminal Procedure. Before we come to the issue in question, it will be appropriate to consider some of the facts which are as follows.

5. The applicant (original complainant) had advanced an amount of Rs.1,75,000/- to the non-applicant (accused), who promised to return it within six months. Since there was no response from the non-applicant in this regard, the applicant approached to the non-applicant on many occasions and requested him to return the amount of Rs.1,75,000/-. The non-applicant, therefore, issued four post dated cheques - Rs. 50,000/- dated 30.05.1998; Rs.50,000/- dated 02.06.1998;

Rs.50,000/- dated 05.06.1998; and Rs.25,000/- dated 07.06.1998 in favour of the applicant. All these cheques were drawn on UCO bank, Nehru Nagar Branch, Bhilai.

6. All these cheques were deposited in the bank by the applicant on the respective dates. Since the cheques were from out station, it took a long time for clearance. However, at the later point of time, the cheques were dishonoured and returned with the remarks 'funds insufficient'. The cheques were presented again on 12.08.1998 and 14.08.1998. However, the cheques were again dishonoured for the same reason.

7. The applicant issued letter dated 12.10.1998 to the non-applicant in which it was mentioned by the applicant that an amount of Rs. 1,75,000/- was paid to the non-applicant as hand loan since the non-applicant was in urgent need of money in July 1996. The applicant further stated in the said letter that the four cheques issued by the non-applicant in all amounting to Rs. 1,75,000/- were presented on the respective dates in the bank. However, all the above cheques were dishonoured. The cheques were again presented in the bank on 12.08.1998 and 14.08.1998 on the request of the non-applicant. However, this time also the cheques were dishonoured. The information in this regard was provided by the bank to the applicant on 04.09.1998. The last para of the letter reads thus, 'that since I am in the urgent need of money I once again request you to good the payment'.

8. The non-applicant, however, refused to accept the letter and the same was returned as 'not claimed' and the postal communication in this regard was received by the applicant on 16.11.1999. The applicant was given assurance by the non-applicant that if the cheques are again presented to the bank same would be honoured and, therefore, the applicant presented the cheques again on 28.10.1998 bearing No. 481572 for Rs. 50,000/- and another cheque bearing No. 481573 for Rs. 50,000/-. However, same were returned by the bank to the applicant with the endorsement 'payment stopped by the drawer'. The information regarding dishonour of cheques was received by the applicant on 26.11.1998 from the bank. The applicant, in the meanwhile, received telegram dated 21.10.1998

from the non-applicant, denying having borrowed any money and the applicant was informed not to present cheques in the bank for clearance without consulting him.

9. The applicant served statutory notice dated 03.12.1998 on the non-applicant/accused and demanded repayment of Rs.1,75,000/- from the non-applicant within 15 days from the receipt of this notice and it was also informed by the applicant to the non-applicant that if the non-applicant fails to make the repayment, the applicant would proceed against the non-applicant in the Court of law. The said notice was also returned as 'not claimed' on 19.12.1998. The non-applicant neither returned the amount within the stipulated period of 15 days nor gave any reply to the said notice. The applicant has, therefore, filed Complaint No. 743 of 1998 under Section 138 read with Section 142 of the Negotiable Instruments Act as well as under Section 420 of the Indian Penal Code.

10. On the backdrop of these facts, Mrs. Shinde, learned Counsel for the applicant contended that the statutory notice contemplated under Section 138 of the Act was issued by the applicant on 03.12.1998, demanding the repayment of the amount in question. The postal endorsement shows that same has 'not claimed' by the non-applicant on 19.12.1998. It is contended that though the non-applicant did not claim the statutory notice dated 03.12.1998, it can be treated as a valid service of notice on the non-applicant under sub Clause (b) to the proviso of Section 138 of the Act and it must be treated that the same was duly served on the non-applicant on 19.12.1998. It is further contended that as per clause (c) to the proviso of Section 138 of the Act, the drawer of such cheque fails to make the payment of the said amount of money to the payee or to the holder in due course of the cheque, within fifteen days of the receipt of the said notice, the complaint for the offence under the Negotiable Instruments Act can be filed within one month from the date on which the cause of action arises under sub clause (c) of the proviso to Section 138 of the Act. It is contended that the non-applicant was required to make the payment within fifteen days from 19.12.1998. Since the repayment of the amount in question was not made by the non-applicant within such period, the applicant filed the complaint in the Court of Judicial Magistrate First Class on 28.12.1998 which is well within limitation as contemplated by sub clause (b) of Section 142 of

the Act and hence same is not barred by limitation and is maintainable in law.

11. Mrs. Shinde, learned Counsel for the applicant, contended that communication dated 12.10.1998 cannot be construed as statutory notice contemplated under Section 138 of the Act. Communication dated 12.10.1998 is a letter simpliciter whereby there is no specific demand as such made by the applicant for refund of amount of Rs.1,75,000/-. However, the non-applicant was merely requested in this regard. Therefore, it is contended that the cause of action cannot be said to be accrued as contemplated under sub clause (c) of the proviso to Section 138 of the Act, on the date the said letter was not claimed by the non-applicant and the limitation for filing complaint as contemplated under sub clause (b) of Section 142 of the Act will not commence from such date. It is contended that the approach adopted by the learned Additional Sessions Judge in this regard was not proper and findings given on the issue, therefore, are not correct.

12. Mrs. Shinde further vehemently argued that the limitation for filing complaint in the instant case would start from the date of statutory notice dated 03.12.1998 issued by the applicant which was not claimed by the non-applicant on 19.12.1998. The cause of action would arise on expiration of fifteen days from 19.12.1998 since the payment was not made by the non-applicant and the limitation would commence from that date, and within one month the applicant is entitled to file complaint under Section 138 of the Act. In the instant case, the applicant filed a complaint on 28.12.1998 and, therefore, same is well within limitation and is maintainable in law. It is contended that the reasoning given by the Additional Sessions Judge is bad in law and cannot be sustained. In order to substantiate the contentions, reliance is placed on the judgments of the Apex Court in K. Bhaskaran .v. V.Sankaran Vaidhyan Balan and another (reported in : 1999 CriLJ4606); Hiten P. Dalal .v. Bratindranath Banerjee (reported in : 2001 CriLJ4647) and M/s. Dalmia Cement (Bharat) Limited .v. M/s. Galaxy Traders and Agencies Limited and others (reported in 2001 Cri.L.J. 972).

13. Shri Dewani, learned Counsel for the non-applicant, supported the impugned order dated 4th December 2000, passed by the Additional Sessions Judge and contended that there is no specific form or format provided under Section 138 of

the Act in respect of the notice required to be issued by the payee to the drawer of the cheque. It is contended that the communication dated 12.10.1998 issued by the applicant is the notice under the provisions of Section 138 of the Act and the fifteen days limitation contemplated for repayment under clause (b) of Section 138 of the Act has commenced on 14.10.1998 i.e. the date on which the notice has not been claimed by the non-applicant which is apparent from the postal endorsement and the cause of action for filing complaint has arisen in the present case after completion of fifteen days from 14.10.1998 i.e. 29.10.1998 and the applicant was required to file a complaint within one month from said date as contemplated in clause (b) of Section 142 of the Act. It is contended that in the instant case the complaint is filed much beyond period of limitation i.e. 28.12.1998 and, therefore, the revisional Court was justified in quashing the same. In order to substantiate the contentions, the reliance is placed on the judgment of the Supreme Court in Central Bank of India and another .v. Saxons Farms and others (reported in 2000 (1) Mh.L.J. 366) and the judgment of Kerala High Court in Revathi .v. Asha Bagree (reported in 1992 (1) Crimes 743).

14. I have given anxious thought to the various contentions canvassed by the respective counsel and also perused the provisions of the Act and the judgments cited and referred to by the respective counsel in support of their contentions.

15. Before I adjudicate on merits of the matter, it will be appropriate to consider the scheme of provisions of Section 138 as well as Section 142 of the Act. Section 138 is incorporated in Chapter XVII of the Act which deals with penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts. Section 138 of the Act contemplates that where any cheques 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 the 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. Proviso to the said section contemplates that the person can be charged with the offence under Section 138 only when such cheque has been

presented to the bank by the payee within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier as contemplated by clause (a) of the proviso. The payee or the holder in due course of the cheque, 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, as contemplated under clause (b) of the said proviso; and the drawer of such cheque fails to make the payment of the said amount of money to the payee within fifteen days of the receipt of the said notice, as contemplated in clause (c) of the proviso, the payee is entitled to file a complaint under Section 138 of the Act against such drawer.

16. It is, therefore, evident that the cheque issued by the drawer to the payee should be for discharge of any debts, liability and it must be returned to the payee by the bank with the endorsement that the cheque is returned for insufficiency of funds. However, when the cheque is dishonoured for insufficiency of funds and before filing of complaint against the drawer for the offence under Section 138 certain statutory formalities are required to be complied with by the payee are provided in the proviso to Section 138 of the Act. There are three basic requirements in this regard, (i) the payee has to present the cheque to the bank during the validity of the same i.e. either six months or within the period of its validity whichever is earlier; (ii) the payee is required to issue notice in writing to the drawer within fifteen days of the receipt of the information by him from the bank demanding the payment regarding return of cheque as unpaid; and (iii) if the drawer of such cheque fails to make the payment of the amount of money to the payee within fifteen days from the receipt of such notice, the payee is entitled to file a complaint against such drawer for the offence under Section 138 of the Act.

17. The limitation for filing such complaint is provided in Section 142 of the Act. Section 142 contemplates that no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the Act.

18. The cause of action contemplated under the provisions of clause (c) would accrue immediately on completion of fifteen days in case the drawer fails to make the payment to the payee and one month limitation for filing complaint under clause (b) of Section 142 of the Act would commence from the 16th day. The payee has to file complaint within one month from said date. If the payee fails to file complaint within one month from the date cause of action has accrued to him then such complaint cannot be entertained by the Court since same would be barred by limitation as contemplated under provision of Section 142 of the Act. It will be appropriate to consider the facts and circumstances of the present case of the above referred legal position vis-a-vis the provisions of Section 138 as well as 142 of the Act.

19. Sub clause (b) of the proviso to Section 138 of the Act only requires notice to be given in writing by the payee to the drawer in which there should be a demand made by the payee. This clause does not prescribe any form or format for such notice. In absence thereof what has been contemplated by this clause is, the communication in writing by the payee to the drawer asking the drawer to pay the amount involved in the cheque which is dishonoured.

20. The crucial question which needs consideration by this Court involved in the present case is as to whether, the communication/letter dated 12.10.1998 issued by the applicant/payee to the non-applicant demanding repayment of Rs. 1,75,000/- can be construed as statutory notice contemplated by clause (b) of the proviso to Section 138 of the Act or notice dated 03.12.1998 issued by the payee to the drawer can be said to be the statutory notice under clause (b) of the proviso to Section 138 of the Act.

21. The recitals in the letter dated 12.10.1998 would show that all the material particulars are mentioned by the applicant/payee in the said letter. The applicant requested the non-applicant/drawer to make the payment of Rs.1,75,000/- since all the cheques issued by the drawer for the amount of Rs. 1,75,000/-were dishonoured by the bank even though they were again presented to the bank for encashment on two occasions. The letter/communication dated 12.10.1998, in view of the recitals therein, in my opinion, can be construed as notice

contemplated under sub clause (b) of the proviso to Section 138 of the Act. The applicant has given reference to the fact of dishonour of cheques in the said letter. Same is in writing and the amount is also demanded by the applicant. All these factors fulfill the requirement of notice contemplated in clause (b) and, therefore, I have no hesitation to hold that the communication/letter dated 12.10.1998 is in fact can be construed as notice provided in clause (b) of the proviso to Section 138 of the Act.

22. As far as the notice dated 19.12.1998 is concerned, same is a subsequent communication by the applicant to the non-applicant/drawer reiterating the same demand of return of money made by the applicant in the notice dated 12.10.1998. The only difference between these two communications is the communication dated 19.12.1998 is in the form of statutory notice as such and the earlier communication dated 12.10.1998 is in the form of letter. As I have already observed hereinabove, the provisions of the Act does not provide any form in which the notice or the communication is required to be sent by the payee. What is required under the provisions of the Act, is the communication which should be in writing, sent within fifteen days of the receipt of the information by the payee from the bank regarding return of the cheques as unpaid and payee must demand repayment of amount of money and nothing else. All these ingredients are very much there in the communication dated 12.10.1998 and, therefore, I have already held that this communication can be construed as notice contemplated by clause (b) of the proviso to Section 138 of the Act.

23. The next crucial question needs to be decided is at what point of time the cause of action would accrue to the applicant for filing complaint against the non-applicant under Section 138 of the Act. In the instant case, the notice dated 12.10.1998 was not claimed by the non-applicant on 14.10.1998 and when a notice is returned as 'not claimed' such date would be the commencing date in counting the period of fifteen days contemplated in clause (c) of the proviso to Section 138 of the Act. This aspect is concluded by the judgment of the Apex Court in K. Bhaskaran .v. V.Sankaran Vaidhyan Balan and another (supra). In para 25 of this judgment, the Apex Court observed thus :-

'Thus when a notice is returned by the sender as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in Clause (d) to the proviso of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address.'

In view of the ratio laid down by the Apex Court, the period of limitation of fifteen days contemplated in clause (c) was commenced on 14.10.1998, the date on which the drawer has not claimed the notice dated 12.10.1998 and since the drawer fails to make the payment within fifteen days the cause of action would accrue to the applicant immediately after expiration of 15th day from 14.10.1998 i.e. 29.10.1998. The period of limitation of one month for filing complaint in the instant case, in view of the facts referred to hereinabove commenced on 29.10.1998 and within one month from 29.10.1998, the complaint was required to be filed by the applicant under the provisions of clause (b) of Section 142 of the Act. It is not disputed that in the instant case, the complaint is filed on 28.12.1998 i.e. undoubtedly beyond the period of limitation.

24. As far as the judgment of the Apex Court in Hiten P. Dalal .v. Bratindranath Banerjee (supra) is concerned, same is in the different set of facts and the ratio of the said decision does not further the case of the applicant since in the present case issue pertains to the aspect of notice contemplated under Section 138 and the limitation for filing complaint contemplated under Section 142 of the Act.

25. Similarly, the another judgment of the Apex Court in M/s. Dalmia Cement (Bharat) Limited .v. M/s. Galaxy Traders and Agencies Limited and Ors. (supra) is concerned, I fail to see how the ratio in the said judgment would benefit the contentions canvassed by the learned Counsel for the applicant, particularly in view of the observations in para 7 of the judgment, which reads thus :-

'In Sadanandan Bhadrans .v. Madhavan Sunil Kumar : 1998 CriLJ4066 , this Court held that clause (a) of the proviso to Section 138 did not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. On each presentation of the cheque and its dishonour a fresh right and not cause of action accrues. The payee or holder of the cheque may, therefore,

without taking pre-emptory action in exercise of his right under clause (b) of Section 138 of the Act, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But once a notice under clause (b) of Section 138 of the Act is received by the drawer of the cheque, the payee or the holder of the cheque forfeits his right to again present the cheque as cause of action has accrued when there was failure to pay the amount within the prescribed period and the period of limitation starts to run which cannot be stopped on any account. This Court emphasised that 'needless to say the period of one month from filing the complaint will be reckoned from the date immediately falling the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires.'

The observations of the Apex Court in the above referred para would show that once the notice under clause (b) of Section 138 of the Act was received by the drawer of the cheque, the payee forfeits his right to again present the cheque as the cause of action is accrued when there was failure to pay the amount within the prescribed period and the period of limitation starts to run which cannot be stopped on any account. On the other hand, the observations in para 7 are beneficial to the case of the non-applicant and, therefore, the contentions canvassed by the learned Counsel for the applicant in this regard cannot be accepted.

26. As far as the case of K. Bhaskaran .v. V.Sankaran Vaidhyan Balan and another (supra) is concerned, in view of observations in para 25 also do not further the case of the applicant and hence the contentions canvassed by the counsel for the applicant in this regard also cannot be accepted.

27. For the reasons stated hereinabove, the Criminal Revision is devoid of substance and hence dismissed.