

Shivaraj Vs. Gurudeva

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Court : Karnataka

Decided On : Nov-11-2003

Reported in : 2005(1)ALD(Cri)10; II(2004)BC146; ILR2003KAR5168

Judge : Huluvadi G. Ramesh, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 142; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 200 and 204(2); Indian Penal Code (IPC) - Sections 420

Appeal No. : Crl. P. No. 3673/2001

Appellant : Shivaraj

Respondent : Gurudeva

Advocate for Def. : Jagadish D. Hiremath, Adv.

Advocate for Pet/Ap. : Basavaraj V. Sabarad, Adv.

Judgement :

ORDER

Huluvadi G. Ramesh, J.

1. Heard the learned Counsel appearing for the petitioner and the learned Counsel appearing for the respondent.

2. The brief facts are that being aggrieved by the issue of process by the I Adl.C.J.(Jr.Dn.) Gadag, in respect of the alleged offence punishable under Section 138 of the Negotiable Instruments Act and Section 420 IPC. The petitioner has filed this petition wherein the private complaint has been filed by the respondent under Section 200 Cr.P.C. and it is alleged that the accused obtained a hand loan for his family necessity on 20.12.2000 and executed a hand loan agreement in favour of the respondent and also agreed to return the same within three months from the date of agreement and had also issued a cheque drawn on Canara Bank dt. 20.3.01. The said cheque when presented on 20.5.2001 was returned with an endorsement 'exceeds arrangements'. Thereafter, a legal notice was served on 2.6.01. In spite of service of notice, no payment has been made, hence the complaint.

3. The same has been assailed on various grounds regarding maintainability stating that issue of process is without jurisdiction and no witness list has been filed, even though the witness list has not been furnished, process has been issued in violation of the mandate to Section 204(2) Cr.P.C. and cheque issued was for a proprietary concern which is not made a party before the Magistrate and also alleging that the complaint has been filed beyond the time prescribed and sought for setting aside the impugned order dt. 3.9.2001.

4. The point that arises for consideration in this petition is whether the impugned order initiating proceedings under Section 138 of the N.I. Act and issuance of process is liable to be set aside.

1. SAKETH INDIA LTD. AND ORS. v. INDIA SECURITIES LTD. ILR 1999 Kar 2291

2. FAKIRAPPA v. SHIDDALINGAPPA AND ANR. ILR 2002 Kar 181

5. Out of the several grounds urged, the main ground of attack is that the process ought not to have been issued having regard to the fact that the complaint is filed after the prescribed time of expire. In that regard it is urged that the complaint is filed beyond 45 days.

6. However, the learned Counsel for the respondent submitted that the complaint has been filed well within time of 45 days and also submitted in computing the time, the rule observed is to exclude the first day and to include the last, i.e. the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires. Prima facie it appears there is shown to be compliance of Section 138 & 142 of N.I. Act and even otherwise it is a matter of evidence.

7. Further, regarding the issue of process, even in the absence of list of witnesses being filed, the learned Counsel appearing for the petitioner relied upon a ruling reported in ILR 2002 Kar 181, a decision of this Court wherein it is held that the defect being not curable one, the order directing the issue of process has to be set aside.

8. Per contra, it is submitted by the learned Counsel for the respondent that there is no need for the complainant being examined, but if need be, he could be examine. In this context he submitted that it does not vitiate the impugned order passed as that irregularity is curable.

9. However, since the point of law has been settled in the citation relied upon by the counsel for the respondent, the impugned order is to be interfered with a direction to the complainant to file the list of witnesses or if he has no other witnesses, then he has to file a memo to that effect either that he is the only sole witness or any other witness will be examined. On such a list of memo being filed, thereafter, the learned magistrate may direct issue of summons.

10. The next submission of the learned Counsel for the petitioner is in respect of not making the proprietary concern a party to whom the cheque is issued.

11. In this regard it is sufficient to say that the signatory of the cheque was made a party and also patently when there is said to be an agreement entered into by the signatory and a copy of the agreement is produced before the Court to that effect, despite not impleading the concern, under the circumstances it cannot be said that the complaint is not maintainable against the petitioner. And also it is not

necessary to implied the proprietary concern as a party when it is sole proprietary concern.

12. According, the petition is disposed of. The matter is remanded back to the Court below by setting aside the impugned order dt. 3-9-2001 with direction to the Magistrate to issue summons after the list of witnesses or a memo to that effect is filed and to dispose of the case in accordance with law.

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