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Court : Andhra Pradesh

Decided On : Jul-12-2005

Reported in : 2005(2)ALD(Cri)736; II(2007)BC45; 2005CriLJ4492

Judge : C.Y. Somayajulu, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138; ;[Companies Act, 1956](#) - Sections 51 to 53

Appeal No. : Criminal Petition Nos. 4017 and 4018 of 2004

Appellant : Narmada Enterprises and anr.

Respondent : State of A.P. and anr.

Advocate for Def. : P.P. for No. 1 and ;B. Vijaysen Reddy, Adv. for No. 2

Advocate for Pet/Ap. : T. Jagdish, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

C.Y. Somayajulu, J.

1. Since both the petitions are interconnected they are being disposed of by a common order.

2. Second respondent in these petitions filed complaints under Section 138 of the [Negotiable Instruments Act, 1881](#) (for short 'the Act') against the petitioners in connection with the dishonour of the cheques issued by the second petitioner on behalf of the first petitioner, alleging that in spite of statutory notice of intimation of dishonour with demand for payment of the amounts covered by the dishonoured cheques being issued, petitioners did not pay the amounts covered by the dishonoured cheques. After service of summons, in the cases, petitioners filed petitions seeking discharge alleging that immediately after dishonour of the cheques in the first instance, second respondent sent a fax message about the, dishonour and so cause of action of initiation of proceedings under Section 138 of the Act arose on issuance of the fax message and since the fact that the cheques were presented for the second time would not arrest the running of time from the date of fax message, complaints filed several months after issuance of fax message are clearly barred by time. The learned Magistrate dismissed the petitions on the ground that the points raised by the petitioners cannot be decided at that stage as those questions can be decided only after full-fledged trial. Questioning that order, petitioners filed these petitions, with a further prayer to quash the complaints against them.

3. The main contention of Sri T. Jagadish, learned Counsel for the petitioners, is that since second respondent immediately after dishonour of the cheques issued a fax message on 22-11-2002 intimating the dishonour and demanding payment within 15 days and since the legal notice dated 11-12-2002, in a way, admits issuance of such message it is clear that the cause of action for initiation of proceedings arose immediately after issuance of the fax message in November, 2002, complaints filed towards the end of February, 2003 are clearly barred by time. It is his contention that the case of second respondent that as per the instructions of petitioners the dishonoured cheques were represented in the bank for payment cannot be accepted because no such communication from the petitioner is produced by the 2nd respondent inasmuch as Section 51 - 53 of the Companies Act, lay down that communication to a company can only be in writing and so it is clear that there cannot be oral communication with or by a company and so it is clear that the alleged representation on 'intimation' from the petitioners is not and cannot be true. It is his contention that since the fax message received

from the second respondent also contains copies of the endorsements received from the bank with copies of the returned cheques and since those documents can only be available with the second respondent but not the petitioners the fax message produced by the petitioners cannot be disbelieved. Relying on Prem Chand Vijay Kumar v. Yashpal Singh : (2005)4SCC417 and SIL Import, USA v. Exim Aides Silk Exporters, Bangalore : 1999 CriLJ2276 , he contended that the complaints are liable to be quashed as time-barred.

4. The contention of Sri C. Padmanabha Reddy, learned senior counsel for the second respondent is that the order of the learned Magistrate dismissing the petitions seeking discharge are unassailable in view of the ratio in Adalat Prasad v. Rooplal Jindal, 2004 SCC (Cri) 1927 : 2004 Cri LJ 4874 and Subramaniam Sethuraman v. State of Maharashtra, 2005 (1) ALD (Cri) 124 (SC) : 2004 Cri LJ 4609. It is his contention that since the genuineness of the fax message cannot be decided in these petitions and can be decided only after trial, these petitions are not maintainable.

5. Cases under Section 138 of the Act are triable like summons case. In Adalat Prasad's case (2004 Cri LJ 4874) (supra) and Subramaniam Sethuraman's case (2004 Cri LJ 4609) (supra), the Apex court clearly held that a petition seeking discharge by an accused in summons case is not maintainable. So the order of the learned Magistrate dismissing the petitions for discharge, filed by the petitioners, needs no interference by this Court.

6. Complaints, in both the cases do not show that prior to the statutory notice got issued to the petitioners, after the bouncing of the cheques for the second time, any notice or fax message intimating the petitioners about the dishonour of the cheques being issued. It is well known that till the issuance of statutory notice under Section 138 of the Act cause of action for filing a complaint under that section does not arise and so the cheque can be presented into the bank any number of times during the period of its validity.

7. The facts in Prem Chand Vijay Kumar's case : (2005)4SCC417 (supra), relied on by the learned Counsel for the petitioners are narrated in para 3 thereof as :

'. . . The cheque was dishonoured due to inadequacy of funds in the account. Intimation was given on 6-2-1995. Notice was issued by the appellant demanding payment by lawyer's notice dated 17-2-1995. The amount was not paid. The respondents requested the appellant for sometime to make the payment. On the request of the respondents, the cheque was again presented on 6-7-1995 and it was again dishonoured due to inadequacy of funds. Intimation in this regard was sent to the appellant on 10-7-1995. Again, lawyer's notice was sent on 24-7-1995. Reply was sent by the respondents on 10-8-1995 refuting the allegations contained in the legal notice. The complaint was lodged on 28-8-1995.'

The facts in SIL Import's case (supra) relied on by the learned Counsel for petitioners are;

Fax message intimating the dishonour was sent by the complainant to the drawer of the cheque on 11-6-1996. On the next day notices by registered post was sent and the same was served on the drawer of the cheque on 25-6-1996. Complaint was filed on 8-8-1996. Accused filed a petition for discharge on various grounds including limitation. The learned Magistrate allowed the petition and discharged the accused. High Court allowed the complainants petition and set aside the order of the Magistrate. On appeal by the accused, the Apex Court set aside the order of the High Court and restored the order of Magistrate on the ground that notice sent by fax also is a valid notice under Section 138 of the Act, and since the complaint filed beyond the limitation prescribed, after receipt of the notice by fax.

From the facts of the above cases it is seen that the complainants in those cases admitted issuance of notice by fax immediately after dishonour of the cheque. In these cases, there is no reference to any fax message in the complaints. When the allegations in the complaint do not disclose that cause of action had arisen prior to the dates mentioned in the complaint, question whether the fax message relied on by the petitioners was sent by the second respondent or not, and when it was sent and when it was received would be disputed questions of fact which can be decided only on the basis of the evidence to be adduced. In view of the ratio in *State of Karnataka v. M. Devendrappa*, : 2002 CriLJ998 question of quashing the complaints on the basis of the defence of the petitioners is not possible.

8. In my considered opinion, reference to Sections 51 - 53 of the Companies Act, at this stage, has no relevance. The averment in the notice dated 11-12-2002 got issued by the second respondent to the petitioners is;

'My client presented the cheque bearing No. 145349, dated 31-5-2002 for sum of Rs. 1,20,00,000/- (Rupees one crore and twenty lakhs only) on 22-11-2002 through his banker and the same was dishonoured for the reason 'insufficient funds.' On intimation of the same, you have directed my client to represent the cheque and as per your instructions my client represented the cheque on 29-11-2002 through his banker Standard Chartered Bank, Samajiguda, Hyderabad.'

(Underlining mine)

'Intimation' mentioned in the above notice, need not necessarily be through a document, because any responsible employee in the first respondent-company or even the second respondent can 'ask' or 'intimate' the any person in the 2nd respondent to represent the cheque, Since oral communication by one officer of one company to another officer in another company is not prohibited by the Companies Act, and since Sections 51 - 53 of the Companies Act only lay down how a 'company,' an artificial person, can be communicated with, those sections do not help the petitioners in deciding his petitions, more so because how the 'intimation' referred to the notice dated 22-11-2002 was sent, is a question of fact to be decided on the basis of evidence to be adduced. In view thereof, without any evidence, the contention that 'fax message' relied on by the petitioners is the 'intimation' referred to in the notice dated 22-11-2002 cannot be accepted and as stated earlier the said question can be decided only after taking evidence.

9. In view of the above, I find no merits in these petitions, and hence these petitions are dismissed.