

P. Preetha Vs. Panyam Cements and Mineral Industrial Limited

P. Preetha Vs. Panyam Cements and Mineral Industrial Limited

SooperKanoon Citation : sooperkanoon.com/443544

Court : Andhra Pradesh

Decided On : Dec-18-2001

Reported in : 2002(1)ALD(Cri)525; 2001(6)ALT775; 2002(1)ALT(Cri)142; [2002]112CompCas124(AP)

Judge : B. Sudershan Reddy, J.

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

Appeal No. : Crl. P. No. 6102 of 1999

Appellant : P. Preetha

Respondent : Panyam Cements and Mineral Industrial Limited

Advocate for Def. : C. Srinivas, Adv. and ;Public Prosecutor

Advocate for Pet/Ap. : Milind G. Gokhale, Adv.

Disposition : Petition allowed

Judgement :

ORDER

B. Sudershan Reddy, J.

1. This is an application filed under Section 482 of the Code of Criminal Procedure (for short 'the Code') to quash all and every proceedings in C.C. No. 679 of 1998 pending on the file of the learned XVII Metropolitan Magistrate, City Criminal Courts, Hyderabad, in which the petitioner herein is arrayed as the sole accused.

2. Before advertng to the various contentions advanced by the petitioner herein seeking to quash the proceedings, the relevant facts may have to be noticed.

3. The first respondent filed a complaint against the petitioner herein for the offence punishable under Section 138 of the [Negotiable Instruments Act, 1881](#) (as amended by the Act 66 of 1988) (for short 'the Act'). In the said complaint, it is inter alia stated that the petitioner herein in partial discharge of the amounts due to the respondent-complainant -issued a cheque dated 27.11.1997 for a sum of Rs. 1,00,000/- drawn on Corporation Bank, Thirtha Halli, Shimoga District in favour of the respondent-complainant. The respondent-complainant presented the said cheque in the Bank for realisation and the same was returned dishonoured with a memorandum dated 4.4.1998 for the reason of 'payment stopped by the drawer'.

4. It is the case of the respondent-complainant that the petitioner-accused issued the said cheque without sufficient funds to the credit of her account. In order to avoid the liability, the petitioner-accused issued stop payment instructions to the Banker.

5. The respondent-complainant got issued a notice as is required under the provisions of the Act demanding the payment of the cheque amount on 6.5.1998, which was received by the petitioner-accused on 12.5.1998. The petitioner-accused failed to pay the cheque amount. In the circumstances, the respondent-complainant filed the complaint accusing the petitioner-accused of having committed an offence punishable under Section 138 of the Act.

6. In this petition, it is stated, about which there is no dispute whatsoever, that the respondent-complainant filed the complaint on 22.6.1998, but without any signature of the complainant on the complaint. Even the Vakalatnama filed was not signed on 22.6.1998.

7. Mr. Milind G. Gokhale, learned Counsel for the petitioner submits that the present complaint filed in the Court by the respondent-complainant is barred by limitation. The learned Counsel for the petitioner relies upon certain facts, which are not in dispute, in support of his submission :

Cheque is dated 27.11.1997 issued by the petitioner-accused. It was returned on 4.4.1998. The respondent-complainant is duly informed about the dishonour of the cheque by its Banker on 30.4.1998. Legal notice has been issued on 6.5.1998 and served upon the petitioner-accused on 12.5.1998. The complaint is filed on 22.6.1998 without any signature of the respondent-complainant on the complaint. The learned Magistrate returned the complaint with the following objections :

(a) Complainant not signed on the complaint.

(b) Vakalat not filed.

(c) Supporting documents for.....not filed.

The complaint is re-presented on 2.7.1998.

8. It is the case of the petitioner-accused that the complaint for all practical purposes was filed only on 2.7.1998, which is beyond the period of limitation. The complaint could have been filed only on or before 27.6.1998.

9. In the facts and circumstances of the case, two points would arise for determination, viz.,

(1) Whether the presentation of the complaint on 22.6.1998 is defective, and whether the defect at all could be rectified or cured ?

(2) Whether the same is proper presentation as is required in law

10. The next question that falls for consideration is as to whether the complaint is barred by limitation?

11. It would be appropriate to notice Sections 138 and 142 of the Act to appreciate the said contentions, which reads as follows :

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 the account by agreement made with that Bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount to 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 ademand for the payment of the said amount of money by giving a notice, inwriting, to the drawer of the cheque, within fifteen days of the receipt ofinformation 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.

Explanation : For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability.

142. Cognizance of offence.--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;

(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.

12. There is no dispute whatsoever that the complaint was presented on 22.6.1998 without the signature of the General Power of Attorney holder representing the company. The complaint is no doubt presented by the Counsel of the respondent-complainant company. But the General Power of Attorney holder representing the company did not file any Vakalat whatsoever for and on behalf of the company. No supporting documents were filed. The complaint was returned on the same day, that is to say, on 22.6.1998. The same was re-presented on 2.7.1998 after duly complying with the objections.

13. The learned Counsel for the petitioner contends that the subsequent duration of the defect is of no consequence. There is no valid presentation of the complaint as is required in law on 22.6.1998. The complaint for all practical purposes shall be deemed to have been presented only on 2.7.1998 and by that time the complaint so filed is barred by limitation.

14. The Madras High Court in *M.A. Abdul Khutoos v. Ganesh and Co. Oil Mills*, 1 (2000) BC 428=1999 CriL LJ. 3432 (Mad.), took the view that 'the complaint which was initially presented without the signature of the complainant is no presentation at all in the eye of law. The subsequent re-representation of the complaint with the signature of the complainant but beyond the period of one month from the date of commencement of cause of action is liable to be quashed as barred by time.' The Madras High Court took the further view that 'there was no presentation of complaint initially for want of signature of the complainant on the complaint and the subsequent presentation would be proper has it been within the period of limitation.'

15. The Supreme Court in *Narsingh Das Tapadia v. Goverdhan Das Partani*, : AIR 2000 SC2946 , observed that 'taking cognizance of an offence' by the Court has to be distinguished from filing of the complaint by the complainant. Taking

cognizance would mean the action taken by the Court for initiating judicial proceedings against the offender in respect of the offence regarding which the complaint is filed. Before it can be said that any Magistrate or Court has taken cognizance of an offence it must be shown, that he has applied his mind to the facts for the purpose of proceeding further in the matter at the instance of the complainant. If the Magistrate or the Court is shown to have applied the mind not for the purpose of taking action upon the complaint but for taking some other kind of action contemplated under the Code of Criminal Procedure such as ordering investigation under Section 156(3) or issuing a search warrant, he cannot be said to have taken cognizance of the offence.

16. The Supreme Court in the said case took note of the fact that mere presentation of the complaint on 8.11.1994 when it was returned to the complainant/appellant on the ground that the verification was not signed by the Counsel, could not be termed to be action of the Magistrate taking cognizance within the meaning of Section 142 of the Negotiable Instruments Act. The Supreme Court further observed that 'the compliance of Clause (c) of proviso to Section 138 enables the Court to entertain a complaint. Clause (b) of Section 142 prescribes a period within which the complaint can be filed from the date of the cause of action arising under Clause (c) of the proviso to Section 139. No period is prescribed before which the complaint cannot be filed, and if filed not disclosing the cause of action in terms of Clause (c) of the proviso to Section 138, the Court may not take cognizance till the time the cause of action arises to the complainant.' It was a case where the complaint was filed by the complainant before the Magistrate even before the cause of action had arisen.

17. In *G.K. Mazumdar v. Mohd. Kasam Mirza*, : AIR1967 Guj15 , the Gujarat High Court took the view that 'it is not necessary for the complainant to sign the complaint'. In the said case a complaint was filed under the Prevention of Food Adulteration Act, which was not signed by the Food Inspector. Summons was issued to the accused. When the accused appeared, he contended that the complaint was not legal, as it was not signed by the complainant. The Food Inspector gave an application to withdraw the complaint on the ground that it did not bear his signature and also requested for permission to file a fresh complaint.

The learned Magistrate passed an order permitting the withdrawal of the complaint with a future permission to file a fresh complaint and acquitted the accused under Section 248 of the Criminal Procedure Code. The Gujarat High Court after referring to the definition of the complaint in the Code of Criminal Procedure hold that 'it is not necessary for the complainant to sign the complaint.'

18. However, the learned Counsel for the respondent complainant would place reliance upon the judgment of this Court in *Pritama Reddy v. Charminar Cooperative Urban Bank Limited*, . A learned Single Judge of this Court in the said judgment in more or less similar circumstances took the view that 'the defect in the complaints for want of signature of the complainant will not, in my considered view, affect the merits of the case if any and such a defect can be cured at a large stage.' In the said judgment it is observed :

'Section 2(d) of the Code defines 'complaint'. According to this definition, complaint means any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence. The definition does not specifically say that it should be signed. However, under the Civil Procedure Code, Section 26, Order 4, Rule 1, and Order (sic), Rule 14, say that the plaint shall be presented before the Chief Ministerial Officer of the Court and every pleading shall be signed by the patty and his pleader but such a requirement under the provision was held to be a matter of procedure and any mistake or omission therein can be cured or amended subsequently. It has been held by a Division Bench of the Madras High Court in *Subbiah Pillai v. Sankarapandyam Pillai*, AIR 1984 Mad. 369, that the omission to sign or verify a complaint was not such a defect as could affect the merits of the case or the jurisdiction of the Court. In view of this clear legal position, I am afraid I cannot concur with the view expressed by the Madras High Court in *M. A. Abdul Khutoos v. Ganesh and Co. Oil Mills*, 1999 CrL. L.J. 3432 (Mad.). There is no gainsaying that the complainant was present physically before the Court. The complaints were signed by his Counsel. Therefore, the defect in the complaints for want of signature of the complainant will not, in my considered view, affect the merits of the case if any and such a defect can be cured at a later stage. When that is permissible, even when the complaints were re-presented subsequent to

the date of limitation since the initial date of presentation is the criterion as was held by the Division Bench of this Court in its decision referred to supra, the complaints, in these cases cannot be said to be barred by limitation. In *D. Venkata Rao and Ors. v. State*, 2000(2) ALT (Cri.) 272=2000(2) ALD (CrI.) 458, this Court held on fact that as cognizance was taken after 5 years after the offence under Section 406 of the IPC it was barred by limitation. No ratio that the period of limitation shall be reckoned from the date of offence to the date of presentation of the complaint or to the date on which the complaint was taken was involved. On facts since it was more than 5 years when the cognizance was taken, as it was a clear case, it was held so. That cannot be taken to mean that as a proposition of law it was held so.'

19. But the question that falls for consideration is as to whether Section 2(d) of the Code which defines the complaint, would be of any help at all to decide the issue in hand. Section 2(d) of the Code defines 'complaint' :

'Complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.'

20. Section 142 of the Act which is admittedly a special provision contained in a special Act clearly excludes the applicability of Section 2(d) of the Code. As has been noticed, Section 142 of the Act declares that notwithstanding anything contained in the Code or Criminal Procedure, 1973 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. Such a complaint is required to be made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138.

21. A plain reading of Section 142 of the Act would make it clear that a complaint, in writing, is required to be made by the payee or the holder in due course of the cheque to enable the Court which is not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of First Class to take cognizance of any offence punishable under Section 138 of the Act. The complaint is required to be in writing. It can only be filed by the payee or the holder in due course of the cheque. Such complaint, in

writing, can be made only before a Court which is not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of First Class. No Court shall take cognizance of any offence punishable under Section 138 unless the said requirements are complied with and fulfilled. Whereas, the complaint under the Code of Criminal Procedure could be made orally or in writing, it need not be necessarily in writing. It can be made to any Magistrate. It need not contain the name or names of any person committing the offence. The complaint, as envisaged under Section 2(d) of the Code, could be made by any person by making an allegation orally or in writing to a Magistrate, with a view to his taking action under the Code. Such complaint, however, does not include the police report. The Code of Criminal Procedure provides for investigation into such complaints.

22. Section 2(h) of the Code in turn defines the 'investigation'. 'Investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.

23. The package of provisions of Chapter-XVII of the Act dealing with the penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts does not contemplate for any investigation. The offence punishable under Section 138 of the Act is said to be committed by a person if the cheque drawn by him 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 sufficient (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. It is not a cognizable offence in respect of which any person could make complaint either in writing or oral and set the law in motion. The package of provisions (Sections 138 - 142) requires that a complaint of any offence punishable under Section 138 of the Act could be filed only in writing and that too by the payee or the holder in due course of the cheque. The complaint could be filed against the drawer of the cheque and in case of any offence by the companies against the company as well as the persons who, at the time offence

was committed, were in-charge and responsible to the company for the conduct of the business of the company.

24. It is thus clear that certain provisions including Section 2(d) of the Code are expressly excluded and would not be applicable for making a complaint for the offence punishable under Section 138 of the Act.

25. It is not necessary to burden this judgment with the various authorities to indicate and highlight the distinction between making of the complaints and taking cognizance of such complaints by the Magistrate. The distinction is well known. Section 142 of the Act does not mandate that a Metropolitan Magistrate or a Judicial Magistrate of First Class is required to take cognizance of any offence punishable under Section 138 of the Act within one month of the date of which the cause of action arises under Clause (c) of the proviso to Section 138. The requirement in law is that the complaint in writing should be made by the payee or the holder in due course of the cheque, as the case may be, within one month from the date on which the cause of action arises under Clause (c) of proviso to Section 138. The Magistrate concerned may take cognizance of the offence punishable under Section 138 of the Act at any time after the complaint is made, in writing, by the payee or the holder in due course of the cheque within one month of the date on which the cause of action arises under Clause (c) of proviso to Section 138. The complaint, if so filed, cannot be held to be not maintainable or bad in law merely because there is some delay in taking cognizance of the offence by the learned Magistrate, Taking cognizance of the offence by the learned Magistrate is totally immaterial. It may depend upon the variety of circumstances, can be held responsible, if there is any delay in taking the cognizance of the offence by the learned Magistrate.

26. Therefore, the crucial question that falls for consideration is as to what is the meaning to be ascribed to the expression 'upon a complaint, in writing, made by the payee...' used in Section 142(a) of the Act.

27. A plain reading of the provision would make it abundantly clear that the complaint is required to be made in writing and by the payee. A complaint, in writing presented before the Magistrate without the signature of the complainant

thereon can never be treated as a 'Complaint made in writing by the payee'. Such complaint cannot be taken cognizance by the learned Magistrate for the offence punishable under Section 138 of the Act.

28. It is true that the complaint can be returned for complying with the objections/requirements in law. Such complaint can be re-represented by curing the defect. Defective complaint is not liable to be thrown out automatically. But such defective complaints cannot be deemed to have been presented in writing by the payee or the holder in due course of the cheque. The presentation shall be deemed to be a proper presentation only when it is re-represented by duly complying with the objections. The complaint shall be deemed to have been made in writing, only when such complaint is duly signed by the payee or the holder in due course of the cheque. The complaint shall be deemed to have been made only on such date when the complaint is presented after affixing the signature of the complainant. If such presentation is made 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, there can be no legal impediment for taking cognizance of the offence by the learned Magistrate at any time.

29. For the purpose of considering whether the 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 of the Act, the proper presentation of complaint alone is a relevant date and not mere presentation before the Magistrate. A complaint, in writing, shall be deemed to have been made as is required in law only when such complaint is made in writing and duly signed by the complainant. That is the relevant date for the purpose of calculation of the limitation.

30. In such view of the matter, there is absolutely no difficulty whatsoever to hold that the presentation of the complaint in the instant case on 22.6.1998 is not relevant for the purpose of calculating the limitation. The complaint is properly made and presented only on 2.7.1998. Admittedly by the said date, the complaint is barred by limitation.

31. No doubt, the judgment of Pritama Reddy (supra) may to some extent support the point urged by the learned Counsel for the respondent-complainant. But, in the

said judgment, this Court has not noticed the true purport, nature and scope of Section 142 of the Act. The Court did not notice the relevant provision. The judgment is rested upon an interpretation of Section 2(d) of the Code. In the circumstances the said judgment is not an authority dealing with any proposition as to the presentation of complaint and as to the meaning of 'complaint in writing, made by the payee....' within the meaning of Section 142 of the Act.

32. For the aforesaid reasons, it is held that by the time the respondent-complainant complied with the defects, the complaint is barred by the limitation. The presentation of the complaint on 22.6.1998 would not amount to making the complaint, in writing, as is required under Section 142 of the Act.

33. Both the points are accordingly answered.

34. The proceedings in C.C. No. 679 of 1998 on the file of the learned XVII Metropolitan Magistrate, City Criminal Courts, Hyderabad are accordingly quashed.

35. The Criminal Petition is accordingly allowed.

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