

Shailesh Kumar Agrawal Vs. State of U.P. and Another

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SooperKanoon Citation : sooperkanoon.com/481197

Court : Allahabad

Decided On : Mar-27-2000

Reported in : 2000(3)AWC2431; 2000CriLJ2921

Judge : B.K. Rathi, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 139

Appeal No. : Crl. Misc. Application Nos. 847 of 1998 and 3542 of 1997

Appellant : Shailesh Kumar Agrawal

Respondent : State of U.P. and Another

Advocate for Def. : L.P. Naithani and ;Amrendra Nath Singh, Advs. and A.G.A.

Advocate for Pet/Ap. : Shashi Kant Gupta, ;V.K. Agnihotri and ;K.K. Arora, Advs.

Judgement :

B. K. Rathi, J.

1. Both these petitions Involved the same question of fact and law. The petitioner in both the cases is same person and opposite parties in Petition No. 3542 of 1997 is the wife of the opposite party in Petition No. 847 of 1998. Therefore, both these petitions are being disposed of by this common Judgment.

2. I have heard Sri K. K. Arora, learned counsel for the applicant and Sri L. P. Nalthani, learned counsel for the opposite party No. 2 and perused the record.
3. Two complaints under Section 138. N. I. Act were filed against the applicant, one each by opposite party of these petitions. It is admitted that the applicant Shailesh Kumar Agrawal and the opposite party, Dinesh Kumar Agrawal are real brothers and opposite party, Smt. Sandhya Agrawal is the wife of Dinesh Kumar Agrawal. The two brothers Shailesh Kumar Agrawal and Dinesh Kumar Agrawal were partners in the firm M/s. Chhotlwala Bhojnalaya, Swarg Ashram, Pauri Garhwal. Thereafter a family settlement on 15.2.1995 was taken place and the firm M/s. Chhotlwala was allotted to the share of Dinesh Kumar Agrawal. According to the agreement, some movables were allotted and in respect of the same, it was agreed that the applicant will get Rs. 5.75,000 in four Instalments and that amount was paid by Dinesh Kumar Agrawal. That in the first week of April, 1995, the applicant offered to return Rs. 2.20.000 to Dinesh Kumar Agrawal in respect of certain other settlement. That accordingly, the applicant issued two cheques : first, for Rs. 1 lac in favour of Smt. Sandhya Agrawal and another cheque for Rs. 1,20,000 in favour of Dinesh Kumar Agrawal. Both the cheques are dated 6.4.1995. Both the cheques were presented to the bank and they were returned with the endorsement of insufficient funds vide memo of bank dated 30.9.1995. That thereafter Dinesh Kumar Agrawal and Sandhya Agrawal sent separate notices dated 10.10.1995 through registered post to pay the amount. The said amount was not paid within 15 days of the service of notices and, therefore, two complaints were filed against the applicants, one by each of them under Section 138. N.I. Act. The applicant has made a request for quashing the proceedings of both these complaints.
4. The first contention of the learned counsel for the applicant, which is in regard to the Petition No. 3542 of 1997 only, is that family settlement took place between two brothers, the applicant and his brother, Dinesh Kumar Agrawal. That amount was payable to Dinesh KumarAgrawal. That thereafter there was no liability of payment to Smt. Sandhya Agrawal, wife of Dlnesh Kumar Agrawal. That, therefore, the cheques in favour of Smt. Sandhya Agrawal was not for the 'discharge of any debt or liability against the applicant'. That, therefore, no offence

under Section 138, N.I. Act is made out. That, therefore, a necessary ingredient of Section 138, N.I. Act that the cheque should be in discharge of the debt or liability does not exist in this case. No offence under Section 138, N.I. Act is made out.

5. I have considered the argument. In my opinion, it is without merit. The reason is that Section 139, N.I. Act reads as follows :

'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.'

6. Therefore, there is presumption in favour of the complainant that the cheque is regarding the discharge of the liability and it is for the applicant to prove the contrary and to rebut this presumption. This can be rebutted by the applicant by evidence only. Therefore, at this stage, there is no ground to quash the complaint. The first contention of the learned counsel for the applicant cannot be accepted. In *Maruti Udyog Limited v. Narendra and others*, 1999 (1) SCC 113, the Apex Court has held that there is presumption in favour of holder of cheque under Section 139, N.I. Act and the accused should prove otherwise.

7. The next contention of the learned counsel for the applicant is that cheques dated 6.4.1995 were once presented and they were dishonoured for insufficient funds prior to 30.9.1995. They were again presented and dishonoured on 30.9.1995 and thereafter the required notice under proviso (b) to Section 138, N.I. Act was given. That no notice was given after dishonour of the cheques- earlier and, therefore, the claim is time barred and no offence under Section 138, N.I. Act is made out.

8. The complete reply to this argument has been given by Hon'ble Supreme Court in the case of *Sadanandan Bhadrans v. Madhavan Sunil Kumar*. 1998 ACC 574 (SC). It was held that Section 138, N.I. Act does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. That cause of action arises only when the notice is served. On each presentation of the cheque and its dishonour, only a fresh right arises and not a fresh cause of action. Once the notice was given under clause (b) of Section 138,

N.I. Act. cause of action arises and thereafter the payee forfeits his right to further present the cheque. It was observed 'that now, the question is how the apparently conflicting provisions of the Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour, and that too within one month from the date the cause of action arises, can be reconciled. Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonised, with the interpretation that on each presentation of the cheque and its dishonour, a fresh right and not cause of action-accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his such right under clause (b) of Section 138, 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 he gives a notice under clause (b) of Section 138, he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time, he would be liable for the offence and the cause of action for filing the complaint will arise.'

9. In view of this decision of the Apex Court, the argument of the learned counsel cannot be accepted.

10. The last contention of the learned counsel for the applicant is that the notice sent by the complainant is not in respect of the amount of the cheques only. In the notices besides the amount of cheques, Rs. 550 has also been demanded as cost of the each notice. It is, therefore, contended that the notice is not valid. Learned counsel in support of the argument has also again referred to clause (b) of Section 138, N.I. Act which provides that the payee or holder in due course of the cheque makes a demand for the payment of the 'said amount' (emphasis given) of money by giving a notice in writing to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. It is therefore, contended that 'said amount' (emphasis given) means that the notice should be in respect of the demand of the amount of the cheque only and if it exceeds the amount of the cheque, the notice is illegal and invalid. Learned counsel in support of the argument has referred to the decision of this Court in Criminal Misc. Application No. 163 of 1994, decided on 5.4.1999. In that case, the cheque was for Rs. 20,000. The notice was issued for Rs. 2,26,473. It

was held that the notice is invalid. The facts of the case were different. As against, this learned counsel for the opposite party has referred to the decision of Apex Court in the case of Suman Sethi v. Ajay Kumar, Churiwal and another, JT 2000 (1) SC 493. It was held that :

'Where in addition to 'said amount', there is also a claim by way of interest, cost, etc. whether the notice is bad would depend on the language of the notice. If in a notice while giving up break up of the claim, the cheque amount, interest, damages, etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not Invalidate the notice.'

11. In view of the decision, the contention of the learned counsel for the applicant cannot be accepted as in the present case the amount of cheque has been clearly mentioned in the notice. It may also be added that after the service of the notice, no amount was tendered by the applicant, in case he would have tendered the amount of the cheque. It might have been argued that no offence under Section 138. N.I. Act is made out. The applicant cannot avoid the payment after the service of the notice on the ground that the cost of the notice was also demanded.

12. No other point have been pressed in these petitions. Both the petitions therefore fails and are hereby dismissed.