

Susanta Kumar Moharana Vs. Ramesh Kumar Bhatta

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Court : Orissa

Decided On : May-11-2005

Reported in : 2006(1)ALD(Cri)29; IV(2005)BC210; 99(2005)CLT753

Judge : A.K. Parichha, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138, 138B and 142 to 146; ;
[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 2, 200 to 202, 203, 204 and 482

Appeal No. : CRLMC No. 2602 of 2004

Appellant : Susanta Kumar Moharana

Respondent : Ramesh Kumar Bhatta

Advocate for Def. : B.N. Mohanty-2, Adv.

Advocate for Pet/Ap. : J. Katikia, ;S. Patra and ;P.P. Das, Adv.

Judgement :

A.K. Parichha, J.

1. Opp. Party as complainant has filed I.C.C. Case No. 113 of 2004 before the Learned S.D.J.M., Nayagarh alleging offence under Section 138 of the Negotiable Instruments Act (in short, 'the N.I. Act') against the petitioner. Learned S.D.J.M.,

Nayagarh after recording statements of the complainant under Section 200 Cr.P.C. took cognizance of that offence and directed issue of process against the petitioner. Aggrieved, the petitioner has filed the present application under Section 482 of the Cr.P.C. for quashing the said Order dated 27.9.2004 passed by the learned S.D.J.M., Nayagarh.

2. Mr. J. Katikia, Learned counsel for the petitioner submitted that the impugned order of cognizance is unsustainable as the statement of the complainant recorded under Section 200, Cr.P.C. does not reveal the essential ingredients of the offence under Section 138 of the N.I. Act. According to him, unless prima-facie case is revealed from the statements of the complaint and witnesses recorded under Section 200 and 202, Cr.P.C., cognizance of the offence cannot be taken even though allegations are borne on the complaint petition. In support of his contention he relied on the decisions in *N. Harihar Iyer v. State of Kerala*, 2000 Cri.L.J. 1251, *Nelson Motis v. Union of India and Anr.*, AIR 1992 SC 1981; *State of Uttar Pradesh v. Union of India and Anr.*, AIR. 1963 SC 946; *Commissioner of Agricultural Income-tax, West Bengele v. Keshab Chandra Mandal*, AIR 1950 SC 265; *S.A. Najundeswara v. Varlak Agrotech (P) Ltd.*, (2003) 25 OCR 721. He also submitted that the order of cognizance is otherwise bad in law because of non-service of statutory notice on the petitioner under Section 138(b) of the N.I. Act and in this regard relied on the case of *V. Rajakumari v. P. Subbrama Naidu and Anr.*, (2004) 29 OCR (SC) 866.

3. Mr. B.N. Mohanty, Learned Counsel for opp. party, on the other hand, submitted that in view of Sections 145 & 146 of the N.I. Act, recording of statement of the complainant under Section 200, Cr.P.C. is not mandatory and that the existence of prima facie case for the offence under Section 138 of the N.I. Act can be determined from the contents of the complaint petition and documents. He submitted that Section 200, Cr.P.C. simply contemplates for recording of the summary of the initial statement made by the complainant and such summary recorded is to be read with the contents of the complainant petition to find out as to whether prima facie case for the alleged offence has been made out. In support of this contention he relied on the cases of *S.A. Najundeswara v. Varlak Agrotech. (P) Ltd.* (Supra); *Prafulla Kumar Samal alias Prafulla Samal and Ors. v. State of Orissa and Anr.*,

(2003) (Supp.) OLR 843. Mr. Mohanty further submitted that the issue relating to proper service of notice under Section 138(b) of the N.I. Act is not required to be decided at the preliminary stage of the case, but it is to be decided at the stage of trial. It is also contended that the opp. party mentioned categorically in the complaint petition that the notice was sent to the petitioner by Regd. Post and A.D. was also received back after due service on the petitioner and in the face of such clear averments cognizance of offence under Section 138, N.I. Act cannot be refused simply because the fact of such service of notice is not specifically noted in the summary of the statement of the complainant recorded under Section 200, Cr.P.C. In this regard, Mr. Mohanty relied on (2004) 29 OCR (SC) 866 (supra); (2000)18 OCR 398 (Biswaranjan Pattnaik v. Tee, Finance Company Ltd., Represented by its Managing Director Bhubaneswar); (2001) 18 OCR 733 (Subrata Kumar Dash v. Pradeep Kumar Ram); (1999) 17 OCR (SC) 555 (K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr.).

4. From the rival submissions of the Learned Counsel for respective parties the following three points emerge for examination :

(i) Whether the recording of statement of the complainant under Section 200, Cr.P.C. is mandatory after incorporation of Section 145 and 146 of the N.I. Act ?

(ii) Whether the statement of the complainant recorded under Section 200, Cr.P.C. is to be read conjointly with the complaint petition while deciding the issue of cognizance ?

(iii) Whether proper service of notice under Section 138(b) of the N.I. Act is to be considered at the stage of cognizance ?

(iv) Whether order of cognizance and issuance of process to the petitioner in the case was proper ?

5. According to Mr. Mohanty, Learned Counsel for the opposite party after incorporation of Section 145 and 146 of the N.I. Act, the statement of the complainant and witnesses have become optional and cognizance of offence under Section 138 of the N.I. Act can be taken basing on the complaint petition,

affidavit and documents produced by the complainant.

Mr. Katikia, Learned Counsel for the petitioner offers the view that the provisions of Sections 145 and 146 of the N.I. Act are applicable at the stage of trial, and not while considering cognizance of an offence. According to him, the provisions of Sections 200 to 202, Cr.P.C. are squarely applicable to a case involving offences under Sections 138 of the N.I. Act.

6. Section 145 and 146 of the N.I. Act reads as follows :

'145(1). Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

146. The Court, shall in respect of every proceeding under this Chapter, on production of Bank's Slip or Memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.'

The intention behind incorporation of these two sections can be understood if they are read conjointly with Sections 143 to 144 of the said Act. Sections 143 of the N.I. Act mandates summary trial for all offences under Chapter-XVII of the Act so that quick disposal of the case can be achieved as the payee of the cheque would get early justice. Keeping such aim in view, Section 144, of the said Act was incorporated for quick service of summons and Section 145 of the said Act was incorporated for taking evidence on affidavit. A close reading of these sections would reveal that they relate to post cognizance operation and never treat to the pre-cognizance stages. Moreover, the provisions of Sections 145 and 146 of N.I. Act are not mandatory in nature and option has been left open for the parties to take recourse to these provisions or to the normal provisions contemplated under

the Cr.P.C. The language of Sections 142 to 146 of the N.I. Act, rather, the language indicate that the provisions of Cr.P.C. are to be harmoniously read with the procedure laid down in Sections 142 to 146, of the N.I. Act.

7. Section 142 of the N.I. Act specifically says that the Court shall not take cognizance of the offence punishable under Section 138 of the N.I. Act except upon a complaint in writing by a payee or holder in due course of the cheque and unless such complaint is made within one month from the date on which the cause of action arises under Clause (c) of the proviso to Section 138. 'Complaint' has not been specifically defined in the N.I. Act. So by way of harmonious construction the definition given in the Cr.P.C. has to be followed. In Section 2(d) of the Cr.P.C. 'complaint' has been defined as allegation made orally or in writing to a Magistrate with a view to his taking action under the Code. Section 200, Cr.P.C. contemplates examination of the complainant. According to this Section, a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses. Nowhere under Sections 142 to 146 of the N.I. Act there is any indication that recording of the statement of the complainant as provided under Section 200, Cr.P.C. shall be dispensed with rather, it indicates that after filing of the complaint in writing, the Court has to undertake the procedure provided in Chapter-XV and XVI of the Cr.P.C. and decide as to whether cognizance of the offence alleged is to be taken, Thus, the contention of the Learned Counsel for the petitioner that recording of the statement of the complainant has been dispensed with by incorporation of Section 145 and 146 of the N.I. Act is not acceptable.

8. It is contended by the Learned Counsel for the petitioner that the complainant opposite party never disclosed in his statement recorded under Section 200, Cr.P.C. that any notice was served on the petitioner under Section 138(b) of the N.I. Act and that the petitioner after service of such notice failed to make payment of the amount within the stipulated time. According to him, in the absence of such essential statement in the initial statement, cognizance of the offence under Section 138, N.I. Act and issue of process to the petitioner under Section 204, Cr.P.C, was not warranted.

9. Learned Counsel for the opposite party counters this submission saying that bouncing of cheque issued by the petitioner, issue of notice to the petitioner and non-payment of the amount by the petitioner after service of notice have all been mentioned in the complaint petition and therefore, the complainant was not obliged to speak about all these things in detail in his initial statement. He submits that under Section 200, Cr.P.C. the Magistrate has to record the summary of the statement of the complainant given in support of his complaint and such statement is to be conjointly read with the complaint petition. He claims that the complaint petition and the statement of the complainant of this case read together reveal all the ingredients of Section 138, N.I. Act and so, taking of cognizance and issue of process was justified.

10. Now the question is whether the statement of the complainant recording under Section 200, Cr.P.C. is to be read alone for the purpose of Sections 203 or 204, Cr.P.C. or whether such statement is to be read conjointly with the complaint petition. Section 200, Cr.P.C. clearly says that a Magistrate has to examine the complainant and record the substance of such examination in writing. It does not say that the entries statement of the complainant in verbatim is to be recorded. The examination of the complainant under Section 200, Cr.P.C. is basically for the purpose of ascertaining prima facie truth of the allegations made in the complaint petition. So, the substance of the statement recorded under Section 200, Cr.P.C. cannot be read in isolation from the complaint petition.

11. In the present case, summary of the statement of the complainant-opposite party discloses that petitioner took Rs. 23,000/-from the opposite party, then he gave a cheque towards repayment of the amount, the cheque was presented in the Bank, but it bounced back thereafter, the petitioner did not pay the amount. The only aspect, which is not specifically mentioned in the statement is about the service of notice on the petitioner. In the complaint petition, however, the opposite party has mentioned that the registered notice was served on the petitioner and even after service of the notice, the amount was not paid. A conjoint reading of the initial statement of the complainant and the complaint petition, therefore, clearly reveal the essential ingredients of Section 138, of the Act. So there is no scope to conclude that the statement taken on the face value do not make out any offence

under Section 138, N.I. Act. In that situation, the ratio in the case of S.A. Nanjundeswara v. Varlak Agrotech (P) Ltd., (2003) 25 OCR (SC), 721 will not apply.

12. Learned Counsel for the opposite party has offered an alternative argument by saying that proper service of notice under Section 138 of the N.I. Act is a matter for consideration at the stage of trial and not at the stage of taking cognizance of an offence under Section 138, of the N.I. Act on the plea that the evidence relating to service of notice under Section 138-B of the N.I. Act is wanting. In the case of V. Raja Kumari v. P. Subbarama Naidu and Anr., (2004) 29 OCR (SC), 866 legal notice issued by the complainant was returned with an endorsement that door of the house of the accused was locked and taking this report into account, the complaint was dismissed by the Magistrate with observation that notice was not served on the accused. In revision, the High Court held that the question whether notice as required under Section 138, of the Act has been served has to be decided during trial and the complaint ought not to be dismissed at the threshold on the purported ground that there was no proper service of notice. The matter was carried to the Supreme Court and their Lordships of the Apex Court accepted the view of the High Court that proper service of notice under Section 138(b), N.I. Act is a matter to be decided at the stage of trial and the complaint is not to be thrown out at the threshold for want of service of proper notice. In the case of K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr., (1999) 17 OCR (SC) 555 the Apex Court observed that the Court should take a liberal attitude regarding service of notice under Section 138(b) of the N. I. Act as otherwise an unscrupulous cheque drawer would get premium and escape from the legal consequence of Section 138(b) of the N. I. Act in a manner, which would help a dishonest evader. Similar view was also taken by this Court in the case of Biswaranjan Pattanaik v. Teen Finance Company Ltd., represented by its Managing Director, Bhubaneswar, (2000) 18 OCR 398. The judicial pronouncements thus suggest that a complaint is not to be dismissed at the initial stage for want of evidence or statement relating to proper service of notice under Section 138(b) of the N. I. Act.

13. As has been indicated in the present case though initial statement of the complainant recorded by the Magistrate does not specifically disclose about

service of notice, there is sufficient indication that such notice was served, but in spite of such notice the petitioner did not pay the cheque amount. The complaint petition, which is to be read conjointly with this statement specifically disclose about the service of notice on the petitioner by registered post. So, the Learned Magistrate cannot be said to have committed legal error by taking cognizance of the offence under Section 138, N.I. Act and directing issue of process to the petitioner under Section 204, Cr.P.C.

14. For all these aforesaid reasons, the petition under Section 482, Cr.P.C. filed by the petitioner is found to be without any merit and accordingly dismissed.

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