

Subrata Kumar Dash Vs. Pradeep Kumar Sen

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Court : Orissa

Decided On : May-12-2000

Reported in : 2000CriLJ3614

Judge : L. Mohapatra, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 136 and 142

Appeal No. : Criminal Revn. Nos. 28 to 30 of 1996

Appellant : Subrata Kumar Dash

Respondent : Pradeep Kumar Sen

Advocate for Def. : D.P. Dhal, ;S. Lanka, ;D.K. Das, ;S.K. Nayak-3, ;S. Mohanty and ;S. Mishra, Advs.

Advocate for Pet/Ap. : S.C. Mohapatra, ;S. Pradhan and ;N. Pradhan, Advs.

Disposition : Petition dismissed

Judgement :

ORDER

L. Mohapatra, J.

1. These three revisions were taken up together for hearing and are being disposed of by this common judgment, in view of the fact that the petitioner in all

the three cases is the same person and points of law involved are also the same.

2. Criminal Revision No. 28 of 1996 has been filed challenging the order dated 5-1-96 passed by the learned S.D.J.M., Bairangpur in ICC No. 75 of 1994 (T.C. No. 481/94) rejecting the prayer of the petitioner for dropping the proceeding on the ground that the mandatory requirements of Section 136 of the Negotiable Instruments Act have not been complied with. On similar grounds applications were also filed in ICC No. 74 of 1994 pending in the same Court which has given rise to Criminal Revision No. 29 of 1996 and in ICC No. 77 of 1994 of the same Court giving rise to Criminal Revision No. 30 of 1996. The impugned orders in all the three cases have been passed on the same date.

3. In Criminal Revision No. 28 of 1996, the case of the complainant is that the petitioner had approached him for a loan of Rupees 20,000/- on 30-3-94, but the opposite party had advanced a sum of Rs. 25,350/- on 30-3-94. The money was returned by the petitioner to the opposite party-complainant by way of a cheque drawn on Bank of India, Bairangpur Branch, and the said cheque was presented in the Bank on 14-6-94 but it was dishonoured due to insufficiency of fund. Thereafter a demand notice was sent to the petitioner through registered post, but the same returned without being served. Thereafter the complaint has been filed.

4. In Criminal Revision No. 20 of 1996 the petitioner had taken a loss of Rs. 60,000/- on 31-3-94. The case of the complainant is that the petitioner paid back the money by way of cheque which was presented in the Bank on 10-6-94, but the cheque was dishonoured due to insufficiency of funds. Thereafter the complainant sent the demand notice by registered post on 26-3-94 and the same returned back to the Advocate of complainant-opposite party without being served. Thereafter the complaint was filed.

5. In Criminal Revision No. 30 of 1996 it is alleged that the petitioner had taken a loan of Rs. 50,000/- on 31-3-94 from the complainant and the said amount was paid back by way of a cheque. The cheque was presented in the Bank but it was dishonoured due to insufficiency of funds. Thereafter the complainant-opposite party sent a demand notice to the petitioner by registered post, but the same returned back unserved whereafter the complaint was filed.

6. The learned Magistrate after due inquiry took cognizance under Section 138 of the Negotiable Instruments Act ('the Act', for short) and issued process against the petitioner in all the three cases. On 18-9-95 the petitioner filed petitions in all the three cases for dropping the proceeding and the said petitions were rejected by reasoned orders passed by the learned Magistrate.

7. Learned Counsel for petitioner in all the three cases submits as follows :

(a) Mere dishonour of a cheque does not by itself constitute an offence under Section 138 of the Act.

(b) The provision further envisages that a notice must be sent to the accused who had issued the cheque, intimating that the charge has been dishonoured and further demand has to be made. Only when the accused fails to pay within fifteen days from the date of receipt of notice, the offence is committed under the said provision. In the present case admittedly notice as required has not been served on the petitioner.

(c) Section 142 of the Act specifically provides that a complaint has to be filed within one month from the date on which the cause of action arose under clause (c) of the Proviso to Section 138 and the complaints were filed beyond the statutory period.

Three grounds were also pressed before the learned Magistrate and the learned Magistrate was of the view that evasion of receipt of notice sent by registered post would also amount to constructive service of notice and further held that the application for dropping the proceeding having been filed more than a year after the order taking cognizance was passed, did not deserve any consideration. Similar orders have also been passed in the other two cases.

8. Copies of the complaint petitions in all the three cases having been filed before this Court by the learned Counsel for petitioner. In all the three complaint petitions it is averred that the complainant in each case had issued registered letters through Advocate to the petitioner to pay the amount claimed within 15 days from the date of receipt of the notice. The said notices addressed to the

petitioner were returned back to the Advocate. It is also stated in the complaint petition that the petitioner had left Rairangpur and was present at Baripada and had all along discussed over telephone on different dates about the notice sent to him and therefore, deliberately avoided to receive the notice. Under these circumstances, the question that is to be decided is whether the provisions of Section 138 of the Act have been duly complied with or not. Learned Counsel for petitioner has referred to the following decisions : (i) 1998 (2) Crimes 179 (sic), Ramanna v. T. Jayaprakash; (ii) (1994) 4 Cur Cri R 2425 (Cal), Santa Priya v. Uday S. Das; (iii) AIR 1991 Andh Pra 74, Mahalakshmi Enterprises v. Sri Mishra Trading Co.; (iv) (1994) 1 Cur Cri 587 (Mad), Rahamtullah v. G. Ramalingam; (v) (1999) 3 SCC 1 : 1999 Cri LJ 1822, Saketh India Ltd. v. India Securities Ltd.

9. In the decision reported in 1998 (2) Crimes 170 (supra), the Kerala High Court held that it is the date of actual service of the complainant's demand notice on the accused which gives rise to a cause of action for filing a complaint. In the reported case a statement was made in the complaint that the demand notice was sent to the accused and the certificate disclosing postal despatch of the said notice was filed. The Court held that from the postal certificate disclosing despatch of the said notice to the accused, no inference of service of notice on the addressee could be drawn or presumed.

In the decision reported in (1994) 1 Cur Cri 587 (Mad) (supra), the accused had furnished a particular address to the complainant and the statutory notice was sent to the accused in the said address. The notice could not be served because of insufficient address. Under these circumstances the Madras High Court held that the accused having furnished the said address cannot turn round and allege that the address was insufficient and therefore, statutory notice had not been served.

10. So far as the period of limitation for filing the complaint is concerned the learned Counsel has relied upon the decision reported in (1994) 4 Cur Cri R 2425 (Cal) (supra). In the said decision the Calcutta High Court observed that a fair and reasonable construction of clause (c) of Section 138 of the Act should be read into it so that the expression therein 'within fifteen days of the receipt of the said notice' should be made to mean 'within 15 days from the date of knowledge of the sender

about the receipt of the notice so that such like complaint may not fail for default on the part of the Postal Department, without any fault on the part of the complainant. On such construction cause of action for such complaint so far as the complainant is concerned would accrue on the failure of the drawer to make payment within fifteen days from the date of knowledge of the complainant about receipt of the notice by the former (drawer) which would either (sic) be prejudicial to him (drawer/ accused), rather beneficial to him as he would get longer time to make payment of the amount and thus avoid criminal liability for non-payment. It would indeed be in the interest of such like complainant to (file) complaint for such offences within the prescribed period so that the same may not be turned down for having been filed beyond the prescribed period resulting in failure of the remedy available to him under law on such technical ground'.

Reliance is also placed on a decision reported in AIR 1991 Andh Pra 74 (supra), where the Court observed that the period of limitation starts from the 16th day onwards after receipt of notice of dishonour by the drawer.

Reliance is also placed on a decision reported in (1999) 3 ACC 1 : (1999 Cri LJ 1822) (supra). The Apex Court in the said decision has held that the date from which the limitation period is to be commuted has to be excluded. In the said decision there Lordships have held that if the fifteen days' period for making of payment by the drawer under Proviso (c) to Section 138 expired on 14-10-1994, the cause of action to file the complaint against the drawer arose on 16-10-1995 and in computing one month limitation under Section 142(b) for filing the complaint, the date 15-10-1995 has to be excluded.

11. Section 138 of the Act reads as follows :

138. Dishonour of cheque for insufficiency, etc. of funds in the accounts-

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 that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions 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 of 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 a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information 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 purpose of this section, 'debt or other liability' means a legally enforceable debt or other liability.

The contention of the learned Counsel for the petitioner is that the notice having not been served on the petitioner as admitted in the complaint petition, no cause of action for filing the complaint arose because of non-compliance of clause (c) to the Proviso to Section 138. It is stated in the complaint petition that the complainant through his Advocate Shri S. K. Lenka had requested the petitioner by a registered letter to pay the amount within fifteen days from the receipt of notice. This notice was despatched from Rairangpur Post Office on 25-6-94 vide postal receipt No. 780. But the aforesaid notice returned to the Advocate without being served on 14-7-94. It is further stated in the complaint that the accused had left Rairangpur in the first week of June, 1994 and was present at Baripada from 25th June, 1994 wherefrom he had discussed over telephone with the father of the complainant as

well as with Shri Pradeep Kumar Ram of Rairangpur on different dates about the notice sent to him. There is no dispute that the notice sent by the complainant was in the address of the accused-petitioner. Whether the accused-petitioner avoided to receive the notice and left Rairangpur or the notice could not be served for any other reason is to be decided after evidence is collected. At this stage it is difficult to say as to whether the petitioner avoided to receive notice or not. In the event it is proved that the petitioner left Rairangpur in order to avoid receipt of the notice, in my opinion, he may not be entitled to take a stand that the statutory notice had not been served on him. This view of mine is also getting support from the decision of the Madras High Court in Rahimtullah's case 1994 (1) Cur Cri R 587 (supra).

12. Coming to the second question as to whether the complaint has been filed within the period of limitation or not, will again depend on the fact as to on which date the accused came to know about the notice but failed to make payment within the prescribed period. It appears from the complaint petition that from 25th June, 1994 the petitioner was at Baripada and had discussed about the notice with the father of the complainant as well as with Sri Pradeep Kumar Ram over telephone. If this statement is proved to be correct, then the petitioner came to know about the notice after 26-6-94 and the period of limitation has to be counted accordingly. This is not the stage where in absence of any evidence a decision can be taken as to whether the accused-petitioner avoided to receive the notice or not, or as to whether the complaint has been filed within the period of limitation or not. The said questions can only be decided after evidence is led.

I, therefore, do not find any reason to quash the impugned orders in all the three cases and accordingly dismiss the revisions. Petition dismissed.