

Raju Vs. Jaiprakash

Raju Vs. Jaiprakash

SooperKanoon Citation : sooperkanoon.com/731175

Court : Kerala

Decided On : Sep-02-2005

Reported in : III(2007)BC172

Judge : Manjula Chellur, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 142; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 156(3), 190 to 199 and 200

Appeal No. : Crl. A. No. 323 of 2002

Appellant : Raju

Respondent : Jaiprakash

Judgement :

Manjula Chellur, J.

1. This appeal is filed challenging the acquittal of the accused in proceedings filed for prosecuting the respondent for an offence punishable under Section 138 of Negotiable Instruments Act.

2. According to the complainant-appellant when the accused persons approached the complainant for advancement of loan, a sum of Rs. 5,50,000 was advanced and in repayment of the said amount a cheque dated 5.12.1997 for Rs. 5,50,000 was drawn on Syndicate Bank, Seshadripuram Branch in favour of the

complainant towards the discharge of the whole debt. As the said cheque was dishonoured for insufficient funds as per the bank endorsement after issuing mandatory notice dated 25.3.1998 the complainant launched the prosecution when the accused failed to pay the amount under the cheque.

3. The respondent/accused appeared and contested the matter. The defence of the accused was there was a sale transaction pertaining to the landed property between the complainant and one Krishnamurthy and the said deal got frustrated. Therefore, this cheque came to be issued as a security as the said sale transaction of the land was entered into between the complainant and the said Krishnamurthy at the instance of the accused persons. Therefore, the said cheque was neither issued towards legally recoverable debt or any other liability as such. They also produced certain documents Exs. D1 to D3 in support of their evidence.

4. The complainant marked 6 documents apart from leading oral evidence. The learned Judge ultimately held that the entire transactions seems to be of a civil nature, therefore, it shall not dispose of the matter on merits as the parties have to resolve their disputes in Civil Court as already a suit was pending between the parties. Incidentally it also held that the complaint did not wait till the expiry of 15th day to launch the prosecution against the accused after service of mandatory notice as contemplated under Section 138 of the Negotiable Instruments Act. However the learned Judge did not believe the defence raised by the accused with reference to Ex. D3 and other documents.

5. Section 138 was brought into Negotiable Instruments Act having regard to the peculiar nature of the problem the Mercantile World was facing. As a matter of fact at one point of time the person who gives the cheque would feel ashamed if the cheque gets bounced. We are at a stage whether the said phenomenon has become an order of the day. This probably compelled the concerned authorities to bring such a law so as to punish the drawer if the cheque issued by him is not honoured by him. This was made penal and the punishment or the sentence under the said provision is either imprisonment or by way of fine. The fine could be double the amount under the cheque.

6. This does not mean the creditor or the person to whom such cheque is given by the accused either towards the debt or liability foregoes his right to recover the said money in a Civil Court. The conviction under Section 138 of the Negotiable Instruments Act need not be fine alone but it could even be imprisonment. In that situation for the offence committed by the accused, he would be punished but so far as the loss caused to the complainant, he has no remedy. Therefore, mere launching of prosecution or even obtaining conviction under Section 138 against the accused does not prevent the complainant from approaching the Civil Court for recovery of the amount which is legally recoverable. Therefore, the learned Judge went on wrong footing saying as the deal was initially a land deal attracting the civil litigation, this has to be resolved in a Civil Court.

7. Any cause of action which gives right to the party to approach the Court if under law he is entitled to prosecute, it is at his option he can do so. Merely because it opts out to proceed on the criminal side, it does not stop him from proceeding in the Civil Court. Section 138 of N.I. Act being a quasi civil and criminal nature, definitely the Trial Court went in wrong saying that the 138 proceedings could not have been launched at all by the complainant because of the pendency of the civil suit. Ultimately at the most if the complainant is successful in getting the fruits of the decree in the civil suit, it would be helpful only as a mitigating circumstances while imposing sentence under Section 138 of Negotiable Instruments Act.

8. Then coming to the premature presentation of the case, as could be seen from the lower Court records, a complaint came to be presented on 6.1.1997. Both the order sheet of the Trial Court and on the complaint itself such a note is made. Here the question is whether the complainant could launch this prosecution on 6.1.1997 as the 15th day after service of notice on the accused happens to be 7.1.1997. The order sheet dated 6.1.1997 reads as under:

The complainant present, registered the case, cognizance taken and put up for sworn statement by 1.3.1997.

However, this does not contain the signature of the Officer on 6.1.1997. But the original complaint which was presented before the Court in person by the complainant contains endorsement with the signature of the Officer which reads as

under:

The complainant present, cognizance taken, register the case and put up for statement by 1.3.1997.

On 1.3.1997 the case was called and the complainant was present but sworn statement was not recorded, the matter was adjourned to 5.4.1997. On 5.4.1997 the order sheet reads as under:

The complainant present, cognizance taken, sworn statement recorded, arguments heard, for orders by 19.4.1997.

9. It is well settled now that mere presentation of the case under Section 138 before a Court would not mean taking of the cognizance. If the cognizance of the offence is taken by the Court after expiry of 15 days contemplated under Section 138, the premature presentation will not affect the case of the complainant in any manner legally. It all depends upon when the cognizance of the offence is taken by the Court. Taking cognizance would only mean application of judicious mind of the Court to the facts of the case pertaining to the offence and not the offender because as on the date of taking cognizance, the offender need not even be before the Court. The Court has to apply its mind to the offence complained of against the offenders. It could be a case where there is more than one offender. Therefore, the Court has to take cognizance against each offender may not be the right position. When once the cognizance of the offence is taken irrespective of the number of the offenders whether produced before the Court on the date of presentation of the case or subsequently, it would not matter, because the Court is required to take only cognizance of the offence. In the present case as already stated above on two different dates i.e., on 6.1.1997 and 5.4.1997 the Court has taken cognizance.

10. There are good number of decisions which would go to show that subsequent to the recording of sworn statement, question of taking cognizance would not arise. On presentation of the case cognizance of the offence has to be taken. If the Court refuses to take cognizance, it would return the complaint to the complainant. In order to issue summons to the accused under Section 156(3) of Cr. P.C., it can

form such opinion after recording sworn statement. Depending on its opinion further action would be taken. Therefore, unless cognizance is taken, question of recording sworn statement would not arise.

11. As already stated above taking cognizance would only mean proper application of mind of the Court to the facts pertaining to the offence complained of against the accused. The very order on 6.1.1997 which was again repeated on 5.4.1997 just before recording the sworn statement would only mean the Court did not apply its mind on 6.1.1997. Otherwise there was no necessity for the Court to say once again on 5.4.1997 the complainant was present and cognizance was taken. If nothing was said on 5.4.1997 regarding the cognizance, probably we could have said cognizance was already taken on 6.1.1997. Under these circumstances one can only come to conclusion that the Trial Court took cognizance of the case in the present case only on 5.4.1997 and not on earlier date. The law laid down in III (2000) CCR 160 (SC) : I (2001) BC 113 (SC) : AIR 2000 SC 2946 at paras 10 and 11 it is held as under:

Para 10: Mere presentation of the complaint in the Court cannot be held to mean, that its cognizance had been taken by the Magistrate. If the complaint is found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself for the criminal liability for the offence committed. Again this Court in D. Lakshminarayana Reddy v. V. Narayana Reddy : 1976 CriLJ1361 , dealt with the issue and observed:

What is meant by taking cognizance of an offence by the Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a Court only when the Court taken cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in Clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the

circumstances of the particular case including the mode in which the case is sought to be instituted and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint the Magistrate applied his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If instead of proceeding under Chapter XV he has in the judicial exercise of his discretion, taken action of some otherkind, such as issuing a search warrant for the purpose of investigating or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence.

Para 11: In the instant case mere presentation of the complaint on 8.11.94 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 an action of the Magistrate taking cognizance within the meaning of Section 142 of the Act. The High Court appears to have committed not only mistake of law but a mistake of fact as well. No cognizance was taken on 8.11.94, but the Magistrate is shown to have applied his mind and taken cognizance only on 17.11.1994. The learned Judge of the High Court, without reference to various provisions of the Act and the Code of Criminal Procedure, wrongly held thus: The date of filing i.e., 8.11.94 in this case is crucial. The return of the complaint filed by the respondent to comply with some objections and subsequent filing on 17.11.94 in this case does not have any effect. Therefore, the complaint is premature and is liable to be dismissed.

The above said paras would mean the expiry of notice period contemplated under Section 138 comes into effect only on the day when the Court took cognizance.

12. Under these circumstances it would be just and proper to allow the parties to go before the Trial Court once again for disposal on merits in this case as the Trial Court proceeded on the footing that legally the complaint itself was defective. So far as the question of limitation, taking cognizance, premature presentation of the complaint and the dispute of civil nature, the Trial Court shall not indulge itself again on those issues. It shall proceed on merits of the case only. Based on the facts both the parties are at liberty to lead further evidence, if any. The Trial Court shall dispose of the matter as expeditiously as possible but not later than six

months.

13. Accordingly, the appeal is allowed in part. The matter is remitted back to the Trial Court for fresh disposal of the case on merits in the light of above observations.

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