

Ashok Kumar Vs. Kailash Chandra

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Court : Rajasthan

Decided On : Jul-04-2002

Reported in : I(2003)BC412; 2003CriLJ284; RLW2003(3)Raj1944; 2002(4)WLC637; 2002(5)WLN198

Judge : D.N. Joshi, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 142; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 258 and 482

Appeal No. : S.B. Crl. Misc. Petn. No. 670 of 2001

Appellant : Ashok Kumar

Respondent : Kailash Chandra

Advocate for Def. : Himanshu Maheshwari, Adv.

Advocate for Pet/Ap. : Sachin Acharya, Adv.

Disposition : Petition dismissed

Judgement :

D.N. Joshi, J.

1. The instant petition under Section 482, Cr.P.C. has been filed by the petitioner with a prayer that the criminal complaint case No. 461/94 under Sections 138 and

142 of the [Negotiable Instruments Act, 1881](#) (hereinafter called as the Act) pending in the Court of learned Judicial Magistrate No. 2. Bhilwara against the petitioner may be quashed.

2. Heard Mr. Sachin Acharya, learned Counsel for the petitioner and Mr. Himanshu Maheshwari, for the respondent.

3. The facts giving rise to the present petition are that a complaint was filed by Ashok Kumar on 24.1.1994 before the Trial Court alleging inter alia that in pursuance to a family settlement, a cheque of Bhilwara Urban Cooperative Bank Ltd. was handed over by the petitioner on 1st July, 1993 amounting to Rs. 50,000/- . It was further alleged that when the cheque was presented in the Bank, it could not be honoured due to the instructions of stop payment. It was also averred in the complaint that the cheque was again presented in the Bank on 7th December, 1993, but the same was again dishonoured and a memo to this effect was received by the complainant on 7.12.1993 itself. Upon this, a notice dated 14th December, 1993 was sent by the complainant to the accused-petitioner calling upon him to pay the aforesaid amount. When the accused-petitioner did not make payment as per notice of demand even after 15 days of receiving the notice, the complaint was filed.

4. As per argument of the learned Counsel for the petitioner, charge under Section 138 of the Act was read over to the petitioner on 4th June, 1997, but the complainant concealing the material facts succeeded in initiation of the present proceedings. According to him, the cheque presented by the complainant was returned vide memo dated 16.7.1993, for which a legal notice dated 25.7.1993 was sent by the complainant through his Counsel. Thereafter, a legal notice was again issued on 30.7.1993 through postal certificate and this fact has been concealed by the complainant. As per argument of the learned Counsel, the cause of action was available to the complainant after the notice dated 25.7.1993 was received by the accused petitioner on 30.7.1993. But, concealing this material fact the complainant again presented the cheque, got it dishonoured and sent a notice dated 14th December, 1993 and filed the present petition on 24.1.1994, which was clearly beyond 30 days after the arising of cause of action on 15.8.1993 in favour

of the petitioner and the complaint could be filed under Section 142(b) within one month of the date on which, the cause of action arises under Clause (c) of the proviso to Section 138, according to which if the drawer of such cheque fails to make the payment of the said amount of money to the payer 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 i.e. upto 14.8.1993, on which date the cause of action could be said to have arisen in favour of the complainant. The complaint filed after 15.9.1993 is, therefore, time-barred. The learned Counsel for the petitioner relied upon the admission of the complainant in his cross-examination. Learned Counsel has cited the judgment of the Hon'ble Apex Court in *Sadanandan Bhadran v. Madhavan Sunil Kumar*, VII (1998) SLT 157=III (1998) CCR 428=1 (1999) BC 691 (SC)=1998 Cr.L.R. (SC) 690. in support of his contention.

5. Learned Counsel for the non-petitioner supporting the order of the Trial Court and relying upon the judgment of the Hon'ble Apex Court given in *Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd.*, I (2001) BC 684 (SC)=I (2001) SLT 613= I (2001) CCR 159 (SC)=2001 AIR SCW 315, argued that the case of *Sadanandan* (supra) was considered by the Hon'ble Apex Court in *MA. Dalmia Cement's case* (supra), in which it was held that Clause (a) of the proviso to Section 138 did not put any embargo upon the payee of successively presenting dishonoured cheque during the period of its validity. On each presentation of the cheque and its dishonour a fresh right and not cause of action accrues. It was further held that the payee or holder of the cheque may, therefore, without taking pre-emptory action in exercise of his right under Clause (b) of Section 138 of the Act, 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. The Apex Court while dealing with the matter emphasised by holding that 'needless to say the period of one month from filing the complaint will be reckoned from the date immediately falling the day on which the period of 15 days from the date of receipt of the notice by the draper expires'.

6. In *M/s. Dalmia Cement (Bharat) Ltd.* (supra), it was held :

'To constitute an offence under Section 138 of the Act the complainant is obliged to prove its ingredients which include the receipt of notice by the accused under Clause (b). It is not the giving of the notice which makes the drawer which gives the cause of action to the complainant to file the complaint within the statutory period.'

7. In *Fakirappa v. Shiddalingappa, etc.*, I (2002) CCR 565=11 (2002) BC 313=2002 Cr.L.J. p. 1926 (Karnataka), relying upon the judgment of the Hon'ble Supreme Court in *Sridhar M.A. v. Metalloy N. Steel Corporation*, III (2000) SLT 675=1998 AIR SCW 4112 held, that a decision about the service of notice under Clause (b) of proviso, to Section 138 of the Act should be taken only after the evidence is led and on appreciation of the evidence concerned, and not at the initial stage.

8. It was held in *M.M. T.C. Ltd. v. Medchi Chemicals & Pharma (P) Ltd.*, IV (2001) CCR 316 (SC)=VIII (2001) SLT 83=I (2002) BC 280 (SC)=2002 Cr.L.J. p. 266, as under:

'Inherent power of quashing criminal proceedings should be exercised very stringently and with circumspection. Court exercising inherent powers is not justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability and quash complaint. It is not necessary to allege specifically in the complaint that there was a subsisting liability and enforceable debt and to discharge the same, the cheques were issued. There is therefore no requirement that the complaint must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondent. This they have to discharge in the trial. At this state, merely on basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability.'

9. In *Uniplas India Ltd. v. State (Govt. of NCT of Delhi) and Anr.*, III (2001) CCR 92=III (2001) SLT 272=II (2001) BC 742 (SC)=AIR 2001 SC 2625, (case under the Companies Act), it was held, as under :

'The mode of making such demand is also delineated in the section. Clause (b) of the proviso to Section 138 of the Act also contemplates the making of a demand for payment of the cheque amount as an indispensable step a snowball into a cause of action.'

10. In the above decision, the cases of *Sadanandan Bhadran 's (supra)* and *SIL Import, USA v. Exim Aids Silk Exporters, Bangalore*, 1999 AIR SCW 1218, were also referred.

11. It was held in *M/s. Dalmia Cement's case (supra)* that the Negotiable Instruments Act and Section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instrument is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctify to the instrument of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged.

Section 138 of the Act reads as under:

'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 provision of this Act, be punished with imprisonment for a term 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.'

Section 142 of the Act reads as under :

'Cognizance of Offences.--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. In the case before hand, the complaint is alleged to have been filed on 24.1.1994. It is alleged that the cheque was handed over on 1st July, 1993, but it is not clear, on which date, it was issued. It is also not clear when it was presented to the Bank. The said cheque alleged to have been presented on 1st July, 1993 could not be honoured due to instructions of stop payment by the accused-petitioners. As per averments in the petition, the cause of action was available to the complainant after the notice dated 25th July, 1993 was received by the accused petitioner on 30th July, 1993. There is a contradictory stand of the accused about the receipt of notice. The factum of receipt of notice dated 25th July, 1993 is denied, on one hand and on the other, there is admission of notice on 30th July, 1993 sent under postal certificate. The facts relating to receipt, refusal or service of the statutory notice are to be decided after recording the evidence of both the parties and it is not safe to quash the proceedings under Section 482 of the Code of Criminal Procedure at this stage on so-called admission of the complainant in his cross-examination which is so far not completed. The cheque handed over on 1st July, 93 could have been presented successively within its validity period i.e. six months from the date of issue. The date of issue of the cheque is a subject matter of fact. The alleged concealment of interim fact by the complainant is also a disputed fact and that too is to be decided after recording evidence of both the parties. At this stage, there is no basis to arrive at the conclusion, which is sought to be arrived as per argument of the learned Counsel for the petitioner. Therefore, the argument of the learned Counsel for the petitioner that the second notice issued under the postal certificate was received on 30th July, 1993 and, therefore, the present complaint could be filed up to 15th September, 1993 is time-barred, is liable to be rejected and is hereby rejected.

13. In the opinion of the Court, the complainant could have presented the cheque for the second time on 17th December, 1993 during its validity period in view of the judgment of the Hon'ble Apex Court In M/s. Dalmia Cement's case (supra) and on that basis, the notice dated 14th December, 1993 could have been issued by the complainant and upon its refusal by the accused-petitioner, the complaint could have been filed on 24th January, 1994, which was prima facie well within the prescribed period under Section 142(b) of the Act. The statement of P.W.1 Kailash Chandra has not been completed so far and his cross-examination is also to be

completed. The accused-petitioner cannot be allowed to take benefit of his so-called wrong-doings for giving instructions of stop payment. At this stage, it cannot be said that the continuation of the proceedings against the accused-petitioner would amount to abuse of the process of the Court. The fact of dishonour of cheque is a disputed fact. All these facts will have to be established on evidence during the trial laid by both the parties and cannot be the subject matter of decision under Section 482 of the Code. The merits of the case even on limitation, which is mixed question of law and fact, cannot be examined and the complaint cannot be quashed at this initial stage.

14. As far as the applicability of Section 258, Cr.P.C. is concerned, the said section is reproduced as below:

'258. Power to stop proceedings in certain cases.--In any summons case instituted otherwise than upon complaint, a Magistrate of the first class, or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal and, in any other case, release the accused, and such release shall have the effect of discharge.'

Section 258 applies to summons cases instituted otherwise than on a complaint. It does not apply to a case instituted on a complaint. The wording of Section 258 is undoubtedly wide, but it is doubtful whether the section was intended to be applied to cases in which there are , no special circumstances, which make it difficult or impossible or even highly undesirable to proceed in the normal way under Section 254. The powers given to the Magistrate to stop the proceedings at any stage have to be sparingly used and that too in exceptional or unusual circumstances attending the case. In the absence of special or unusual circumstances which make it difficult or impossible for the Magistrate to proceed with the case, he cannot invoke this section and stop further proceedings. But, such exceptional circumstances may arise in the case in which not even a prima facie case is made out against the accused or the accusation may not actually constitute any offence

or the prosecution may become invalid for not following a particular formality or on account of some technical defect in the prosecution.

15. The present case was instituted upon the complaint and the provisions invoked does not apply.

16. To conclude the provisions of Section 482, Cr.P.C., it can be exercised for advancement of justice, if any attempt is made to abuse the process of the Court and the Court considers its interference absolutely necessary. But, at the same time, it has to be borne in mind that extraordinary powers under this section have to be exercised sparingly and it should not be resorted to like the remedy of an appeal. Sadanandan Bhadrans case (supra) relied by the learned Counsel for the petitioner has been detailed in M/s. Dalmia Cement's case (supra). The Court is, therefore, of the considered opinion in the facts and circumstances of the case that no intervention is called for to quash the proceedings pending before the learned trial Magistrate. The petition under Section 482, Cr.P.C. is misconceived and is liable to be dismissed and is hereby dismissed.