

**Arun Kumar Mohata Vs. Manjushree Singhi**

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**Court :** Kolkata

**Decided On :** Feb-10-2006

**Reported in :** 2006(2)CHN192

**Judge :** S.P. Talukdar, J.

**Acts :** Code of Criminal Procedure (CrPC) , 1873 - Sections 200, 205, 296 and 482; ;[Negotiable Instruments Act, 1881](#) - Sections 123, 138, 139 and 145; ;Specific Relief Act - Section 44

**Appeal No. :** C.R.R. No. 613 of 2005 with C.R.A.N. No. 655 of 2005

**Appellant :** Arun Kumar Mohata

**Respondent :** Manjushree Singhi

**Advocate for Def. :** Biplab Mitra,; Shila Sarkar,; H.J. Sengupta and; D. Acharya, Advs.

**Advocate for Pet/Ap. :** Joymalya Bagchi and; Joydeep Biswas, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

**S.P. Talukdar, J.**

1. The petitioner by filing an application under Section 482 of the Criminal Procedure Code, 1973 sought for quashing of the proceedings in case No. C-186 of 2004 now pending before the learned Judicial Magistrate, First Court, Alipore, South 24-Parganas.

2. The grievances of the petitioner, as ventilated in the application, may briefly be stated as follows :

The constituted Attorney of the opposite party, Smt. Manjushree Singhi, filed an application under Section 138 of the [Negotiable Instruments Act, 1881](#) being case No. C- 186 of 2004 against the present petitioner on 22nd January, 2004. The petitioner was allowed by the learned Trial Court to be represented by his learned Advocate under Section 205 of the Code of Criminal Procedure. The petitioner after obtaining the certified copy of the order-sheet on 23rd February, 2005 came to know that neither the petition of complaint was signed by the opposite party, nor the affidavit in the form of an affidavit under Section 145 of the N.I. Act was affirmed by her. The learned Court took cognizance of the alleged offence on the basis of the affidavit of Prakash Kumar Mohata filed under Section 145 of the NI Act. The said section has no manner of application and does not curtail the procedure established by law under the provisions of Section 200 of the Code. There could be no legal sanction behind relying on the affidavit of Sri Prakash Mohata purportedly under Section 145 of the NI Act as the requirement of law i.e., examination of the complainant and the witnesses present on oath, does not get eclipsed and, as such, the order dated 08.02.2004 issuing process was bad in law. The dispute between the parties is purely of civil nature. It was alleged in the complaint that in pursuance of a purported Memorandum of Agreement, dated 15th October, 2003, the petitioner agreed to pay a total sum of Rs. 14,55,000/- to the opposite party as her settled share in Shree Ratan Mohata (HUF) in respect of certain Bikaner properties and pursuant thereto the petitioner allegedly issued two cheques dated 15th November, 2003 of Rs. 7,27,500/- each to the opposite party and the said cheques were dishonoured on presentation with the remark 'payment stopped by drawer' and the petitioner failed to pay the amount in respect of the said two cheques in spite of service of notice under Section 138(b) of the NI Act.

3. There was, however, no mention of the facts and circumstances under which the petitioner was compelled to issue such cheques. S.R. Mohata HUF is a Hindu Undivided Family wherein S.R. Mohata, the father of the petitioner, was the Karta. He died in the year 2000 leaving behind his widow, Smt. Sushila Devi Mohata, the mother of the petitioner, his two sons, viz., the petitioner and the said Prakash Kumar Mohata and his daughter, the opposite party herein. Upon death of S.R. Mohata, the petitioner became the Karta of the said HUF. Certain properties in Rajasthan were jointly owned by the said S.R. Mohata HUF and one B.R. Mohata. Pursuant to an award dated 7th May, 2001, certain properties at Bikaner, Rajasthan were exclusively allotted to the said S.R. Mohata HUF. Prakash Kumar Mohata and the opposite party herein filed an execution proceeding, being Execution Case No. 35 of 2002, wherein the Hon'ble High Court appointed a receiver to execute and register a partition deed relating to the properties allotted to the said S.R. Mohata HUF and B.R. Mohata under the Arbitration Award. Prior to filing of the execution case, four members of the Mohata family entered into a family settlement on 16th July, 2001. By such family settlement, it was agreed that the petitioner and his mother would pay to the opposite party a sum equivalent to 6.25% of the sale proceeds of a property at Gajner Road, Bikaner. It was also agreed that the petitioner and his mother would sell the Gajner Road property for meeting the liabilities of a company by the name Universal Conveyer Belting Limited. Pursuant to such family settlement, the petitioner and his mother entered into agreement with a third party for sale of Bikaner properties but by reason of orders passed in the Execution Case No. 35 of 2002, the petitioner and his mother could not complete sale of the Gajner property. In pursuance of orders passed in the execution case, the receiver went to Bikaner for execution and registration of the partition deed between B.R. Mohata and the said S.R. Mohata HUF. The said Prakash Kumar Mohata and the opposite party agreed that during such visit another partition deed would also be executed and registered between the members of S.R. Mohata HUF relating to the properties at Bikaner including Gajner Road property. Accordingly, such partition deed was duly stamped and all arrangements were made for execution and registration thereof on 16th October, 2003. The opposite party executed a power-of-attorney in favour of the said Prakash Kumar Mohata for execution and registration of the partition deed.

Similarly, the mother of the petitioner executed a separate power-of-attorney in favour of the petitioner for execution and registration of such partition deed. On 16th October, 2003 Prakash Kumar Mohata refused to execute and register the partition deed unless the petitioner executed a purported Memorandum of Agreement dated 15th October, 2003 and issued two separate cheques for Rs. 7,27,500/- each in favour of the opposite party. The petitioner was left with no choice but to execute the said purported Memorandum of Agreement dated 15th October, 2003 and to issue two cheques for Rs. 7,27,500/- each in favour of the opposite party. One of the cheques was dated 15th November, 2003 and the other one was undated. Thus, the cheques were wrongfully and illegally procured by the said Prakash Kumar Mohata from the petitioner. This was duly intimated to the opposite party by letter dated 12th November, 2003 and the opposite party was requested not to encash the said two cheques but to return the same. Upon receipt of the notice under Section 138 of the NI Act, the petitioner by letter dated 22nd December, 2003 clearly stated that the opposite party was only entitled to a sum of Rs. 2,60,234/- as 6.25% of the then sale proceeds of Bikaner property and, accordingly, the petitioner sent two separate bank drafts of Rs. 1,30,117/- each to the Advocate of the opposite party. The said bank drafts were, however, returned and the Advocate of the opposite party sent two letters to the Advocate of the petitioner dated 26th December, 2003 and 6th January, 2004 respectively. The petitioner's Advocate replied to the said letters by letter dated 10th January, 2004. The mother of the petitioner filed a suit before the learned Court of Civil Judge (Junior Section) of Bikaner being Suit No. 6 of 2004 for a declaration that the purported Memorandum of Agreement is illegal, unjust, unauthorized and void. A temporary order of injunction was passed against the defendants, which includes the present opposite party, restraining them from using the said purported document in any proceeding until disposal of the Bikaner suit. In view of such order of injunction the opposite party cannot claim any right, title or interest under the same purported Memorandum of Agreement. Thus, the order was passed on the basis of materials, which did not disclose the facts and circumstances as stated. In such circumstances the petitioner prayed for quashing all further proceedings.

4. Mr. Joymalya Bagchi, learned Counsel appearing for the petitioner, submitted that the cheque must relate to legally enforceable debt or liability. Section 139 of the NI Act deals with presumption in favour of holder. It reads as follows:

Section 139. Presumption in favour of holder.- 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.

5. Thus, the sine qua non for the applicability of Section 138 is that the cheque in question has been issued for the discharge, in whole or in part, of any debt or other liability. It is, however, rebuttable presumption but the Court is bound to take the fact as proved until evidence is adduced to disprove it.

6. Section 145 of the NI Act reads as follows :

Section 145. Evidence-on-affidavit.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), 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 or examine any person giving evidence on affidavit as to the facts contained therein.

7. According to Mr. Bagchi provision of law cannot be, by any stretch of imagination, a substitute for a statement under Section 200 of the Code of Criminal Procedure. He urged that apart from the affidavit, there was no statement on oath before the learned Magistrate so as to justify his taking of cognizance of the offence and assurance of process. In response to this, inviting attention of the Court to the aforesaid Section 145 of the said Act, Mr. Biplab Mitra, learned Counsel for the opposite party, submitted that such evidence-on-affidavit could very well be sufficient justification for the learned Magistrate for taking cognizance of the offence. He submitted that there cannot be any statutory compulsion of mandatory nature to record evidence on receipt of a complaint under Section 138

of the NI Act

8. Section 296 of the Code of Criminal Procedure is as follows:

296. Evidence of formal character on affidavit.-(1) The evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

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

9. Thus, it is clear that merely on the ground that the learned Magistrate took cognizance on the basis of evidence-on-affidavit cannot be justification for any interference. Mr. Mitra is perfectly justified in mentioning that if the prerequisites of Section 138 of the NI Act are satisfied, the issuance of process is inescapable.

10. The following conditions are required to be satisfied to constitute the offence within the meaning of Section 123 of the N I Act:

(1) Drawing of cheque;

(2) Presentation of the cheque to the bank;

(3) Returning of the cheque unpaid by the drawee bank;

(4) Giving of notice in writing to the drawer of the cheque demanding payment of the cheque amount;

(5) Failure of the drawer to make payment within 15 days of the receipt of the cheque.

11. Mr. Bagchi submitted that the decision of Civil Court is binding on Criminal Court but the converse is not true. Inviting attention of the Court to the order of injunction passed in connection with the civil suit, as referred to earlier, he submitted that enforceability is to be decided by the Civil Court. As such, he contended that the instant criminal proceeding is required to be stayed. In this

context he also referred to the decision in the case of Karamchand Ganga Prasad and Anr. v. Union of India and Ors., reported in AIR 1971 SC 1244.

12. In response to this Mr. Mitra contended that the order of injunction was challenged by preferring an appeal and it was stayed. He also invited attention of the Court to Section 44 of the Specific Relief Act. Relying upon the decision in the case of Iqbal Singh Marwah and Anr. v. Meenakshi Marwah, reported in JT 2005(3) SC 195, it was submitted that judicial notice can be taken of the fact that the Court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. In the said decision the Apex Court referred the statutory interpretation by Francis Bennion. The Apex Court also took note of the fact that the learned author referred to Sheffield City Council v. Yorkshire Water Services Ltd. 1991(1) WLR 58, wherein it was held as under :

Parliament is taken not to intend the carrying out of its enactments to be unworkable or impracticable, so the Court will be slow to find in favour of a construction that leads to these consequences. This follows the path taken by Judges in developing the common law. The common law of England has not always developed on strictly logical lines, and where the logic leads down a path that is beset with practical difficulties the Courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society.

13. In support of his emphatic assertions that the learned Magistrate was perfectly justified in acting on the basis of the affidavit as per Section 145 of the N I Act, Mr. Mitra relied upon the decision in the case of K. Srinivasa v. Kashinath, reported in 2004 Cr.LJ 4566. True, the enabling provision of Section 296 of the Code of Criminal Procedure seems to be a departure from the usual mode of giving evidence. But the object of providing such an exception is to help the Court to gain the time and cost.

14. After careful consideration of the facts and materials it appears that in the present case the cheques were issued on 15th November, 2003 and were deposited on the said very date. Intimation was received on 2nd December, 2003. Notice was sent on 8th December, 2003. Complaint was filed on 25th January,

2004, whereas the order of injunction, as referred to earlier, was passed on 1st May, 2004.

15. Considering all such facts and circumstances I am inclined to hold that there is no merit in the grievances as ventilated on behalf of the petitioner in this case. The proceeding sought to be quashed does not suffer from any such infirmity, which calls for or justifies any interference by this Court at this stage. By no stretch of imagination it can be said that the allegations made do not constitute an offence. It also cannot be said that the continuation of the proceedings will amount to abuse of process of Court. In the facts and circumstances the present case being C.R.R. No. 613 of 2005 along with C.R.A.N. No. 655 of 2005 be dismissed on contest. Interim order, if any, stands vacated.

16. Let a copy of this order along with L.C.R., if any, be sent to the learned Trial Court immediately for information and necessary action.

17. Department is directed to supply xerox certified copy of this order, if applied for, to the learned Counsel of the parties as expeditiously as possible.

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