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Narinder Kumar Vs. Harnam Singh

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Court : Himachal Pradesh

Decided On : Jun-25-1999

Reported in : 2000CriLJ257

Judge : M.R. Verma, J.

Acts : Negotiable Instruments Act, 1881 - Sections 138 and 142; ;Indian Penal Code (IPC) - Sections 406 and 420; ;Code of Criminal Procedure (CrPC) , 1973

Appeal No. : Cr. A. No. 11 of 1996

Appellant : Narinder Kumar

Respondent : Harnam Singh

Advocate for Def. : Dinesh Sharma, Adv.

Advocate for Pet/Ap. : N.D. Sharma, Adv.

Disposition : Appeal dismissed

Judgement :

M.R. Verma, J.

1. Feeling aggrieved by the judgment dated 21-4-1995 passed by the learned Sessions Judge, Solan whereby the judgement dated 29-4-1993 passed by the learned Chief Judicial Magistrate, Solan whereby the accused was convicted

under Section 138 of the Negotiable Instruments Act and was sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 10,000/-, in default of payment of fine, the accused was to undergo simple imprisonment for one month and a sum of Rs. 5000/-out of the amount of fine, if deposited, was to be paid to the complainant by way of compensation, had been set aside and the ac cused has been acquitted, the appellant-complainant (hereinafter to be referred to as 'the complainant') has preferred the present appeal.

2. The case of the complainant, in brief, is that the complainant and the accused are agriculturists and also are carrying on the business as forest lessees. The accused allegedly borrowed a sum of Rs. 30,000/- from the complainant and in lieu thereof, the accused issued cheque dated 20-11-1989 Ex. PW-1 /A in favour of the complainant. When the cheque was presented to the bankers, it was returned with the endorsement 'refer to drawer' meaning thereby that it could not be encashed. The complainant, therefore, issued a notice dated 16-1-1990, a copy whereof is Ex. PW-1/C to the accused which was received by the accused vide AD Ex. PW-1/E on January 22, 1990. As per the notice, the accused was called upon to make the payment of the amount of the cheque within 15 days from the receipt of the notice, but he failed to do so. The complainant again presented the cheque in dispute to the bankers in the month of February, 1990 when it was again returned with the endorsement 'refer to drawer'. The complainant, in the meanwhile, filed a complaint under Sections 406 and 420, IPC and Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act'). On the said complaint, accused came to be tried by the learned Chief Judicial Magistrate, Solan, who convicted and sentenced the accused as aforesaid.

3. Feeling aggrieved, the accused preferred an appeal before the learned Sessions Judge, Solan, who vide the impugned judgement, set aside the conviction and sentence.

4. I have heard the learned counsel for the appellant and the learned counsel for the respondent.

5. The learned Sessions Judge acquitted the accused on the grounds (1) that the version of the complainant that he lent Rs. 30,000/- to the accused and for

repaying the same, the accused issued the disputed cheque Ex.PW-1 /A, neither seems to be true nor inspires confidence and (2) that the complaint was not filed within the prescribed period of limitation.

6. To appreciate the first ground, a reference may be made to Section 138 of the Negotiable Instruments Act, the material part whereof reads as follows :

138. Dishonour of cheque for insufficiency, etc. of funds in the account:

Where any cheque drawn by a person on an account maintained by him with the 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 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) to (b) xxxxxxxxxxxx

Explanation :-- For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability.

A plain reading of the above relevant provisions makes it abundantly clear that cheque which is ultimately dishonoured must be for payment of any amount of money to another person from out of the account maintained by the payer with a banker for the discharge, in whole or in part, of any debt or other liability and such debt or other liability must be legally enforceable debt or liability. Therefore, to attract the relevant penal provisions of the Act, the complainant has to prove that the cheque which bounced, was issued for discharging a debt or legal liability in whole or in part. In this regard, the case of the complainant, as set out in the plaint, is that the accused was having very good relations with the complainant as a

friend and the accused represented to the complainant that in connection with the business of forest lessee the accused needed a sum of Rs. 30,000/- and thus, obtained the consideration amount of Rs. 30,000/-from the complainant in the month of November, 1989 on having issued a cheque bearing No. 0044449 dated 20-11-1989 drawn at Union Bank of India, Solan. Thus, as per the contents of the complaint, on request of the accused, complainant paid a sum of Rs. 30,000/- to the accused in November, 1989 in lieu whereof the accused issued the cheque in question. However, the complainant, while appearing as PW-1, has stated that he is a forest contractor and accused also deals in private sale for which he has borrowed money from the complainant. He has further stated that he was also a partner with the accused and it was after settlement of accounts between the two that a sum of Rs. 30,000/- was found payable by the accused to him and it was in lieu thereof that the cheque Ex.PW-1/A was issued by the accused on 20-11-1989. Thus, there is variance in the pleadings and the proof as to the exact nature of the debt/liability inasmuch as according to the complaint, a sum of Rs. 30,000/- was borrowed by the accused from the complainant whereas according to the evidence, it was on settlement of the accounts between them in connection with their forest business that a sum of Rs. 30,000/- was found due from the accused to the complainant. Thus, in view of the variance in the pleadings and the proof, it is not clearly established on record as to whether the due amount in question was lent by the complainant to the accused as claimed in the complaint or it was found due after settlement of the accounts, as stated by the complainant on oath. In any case, the question still remains whether the amount for which the cheque was issued was for a debt or liability which was legally enforceable. To find out answer to this question, a reference may be made to the document Ex.PW-1/H. First part of this document is dated 18-10-1989 which contains that the due amount of Narinder Kumar (complainant) works out to Rs. 1,91,104/- against which after adjustment of a sum of Rs. 45,000/- of the share of the accused, the balance amount remains Rs. 1,46,104/-. The other part of this document is dated 20-10-1989 which contains that on October 20, 1989 accused deposited a sum of Rs. 45000/- in the account of the complainant and for the remaining amount, accused had issued two cheques, one for Rs. 1,14,000/- and another for Rs. 30,000/-. When both these documents are read together then it is not understandable as to

how the balance amount of Rs. 1,14,000/-and Rs. 30,000/- has been worked out in the second part of the document dated 20-10-1989. The first part of the document dated 18-10-1989 works out the payable balance in the sum of Rs. 1,46,104/-. The second part of the document dated 20-10-1989 acknowledges a further payment of Rs. 45,000/- by the accused to the complainant, therefore, after adjustment of the payment of Rs. 45000/- on 20-10-1989 only a sum of Rs. 1,01,104/- would have remained payable against the balance amount of Rs. 1,46,104/- as worked out and found due in the first part of the document dated 18-10-1989, whereas the balance due amount has been shown in the sum of Rs. 1,14,000/-and Rs. 30,000/-. In the absence of any explanation whatsoever, the adjustment and working out of the finally payable amount, has not been correctly done. It is pertinent to point out that the complainant in his statement has admitted that as against the alleged due amount vide Ex. PW-1/H, he has received a sum of Rs. 92,000/- from the accused. However, this part of his statement is also believed by the admitted payments of Rs. 45,000/- on 18-10-1989, another payment of Rs. 45,000/- on 20-10-1989, another payment of Rs. 5000/- vide receipt Ex. D-3 and still another admitted payment of Rs. 12,000/- by a cheque admittedly encashed by the complainant in December, 1989. Thus, as against the payment of Rs. 92,000/- as stated by the complainant, the total admitted payment received by him works out to Rs. 1,07,000/-. The above situation in fact creates serious doubts about the claim of the complainant about the liability of the accused, even on account of the alleged amount having been found due from the accused to the complainant, whereas it is not at all proved that the cheque in question was issued by the accused in favour of the complainant in lieu of a sum of Rs. 30,000/- borrowed by him from the complainant.

7. What further renders the case of the complainant a cooked up matter, is the admitted fact that the author of the document Ex. PW-l/H is the complainant himself. Even the cheque Ex. PW-1/A i.e. the cheque in question has also been filled in by the complainant. There is no explanation as to why this cheque was not filled in by the accused. The only evidence on record is that on 20-11-1989 complainant paid a sum of Rs. 10,000/- to the accused vide receipt Ex. PW-3/A and this amount was agreed to be repaid on 28-12-1989. However, in lieu of this amount of Rs. 10,000/- a cheque for alleged receipt of Rs. 30,000/- in cash could

not have been issued and if such a cheque was prepared by the complainant and payment thereof in the sum of Rs. 30,000/- was not received, the accused cannot be held responsible for the same. It has been suggested to the complainant in his cross-examination that he drew a sum of Rs. 17,000/-from the accounts of Harnam Singh fraudulently which suggestion the complainant has denied. The questions have also been put in cross-examination to the complainant that the complainant had been filling in the cheques in the name of the accused for different amounts at his will and has been dealing with the same in the manner he liked and it appears from the records that it was so. It is admitted by the complainant that the cheque dated 14-11-1989 for Rs. 1,14,000/-Ex.D-1, cheque dated nil for Rs. 1,00,000/-Ex. D-2 and partially written cheque dated nil Ex. D-6 mentioning no amount therein have been filled in by the complainant though purports to have been signed by the accused. It is not explained as to why these cheques were filled in and why these were not encashed and again why these were not filled in by the accused himself, but were so filled in by the complainant. Against this background, the only irresistible conclusion which can be drawn is that the complainant was in a position to fill in cheques on behalf of the accused at his leisure and pleasure and deal with the same as desired by him. Thus, the possibility of cheque Ex.PW-1/A having been filled in by the complainant as per his own volition for no lawful consideration is a strong possibility which cannot be ruled out and moreso when this cheque is not proved to have been issued in lieu of the alleged amount of Rs. 30,000/- borrowed by the accused from the complainant.

8. A perusal of the complainant reveals that there is no averment that a reply to the notice Ex. PW-1 /C issued under proviso (b) to Sec. 138 to the accused was ever received by the complainant. Even in his statement in the Court, the complainant has tried to conceal the factum of the accused having replied to the said notice vide Ex.D-5 when he denies the suggestion that reply to the said notice was sent to his Advocate Mr. Rajinder Kumar Garg, though at a later stage he has admitted that a reply to the said notice was given by Mr. Laxmi Narain, Advocate.

9. While replying to the notice Ex. PW-1/C vide reply Ex.D-5, contents of para 1 of the notice have been stated to be false and have been denied and it has been

averred that no cheque for Rs. 30,000/- in favour of the complainant was issued by the accused and that the complainant had filled in many cheques on behalf of the accused as he used to draw money on his behalf and for that purpose he had got certain cheques signed from the accused and the issue of cheque for Rs. 30,000/- for consideration has been specifically denied and it has been claimed that the said notice has been issued only to pressurise the accused to extract money from him by preparing false documents. The stand taken in the reply Ex.D-5 stands substantiated by the inferences which can be drawn from the material on record particularly the admitted fact that the cheques Ex.D-1, D-2 and D-6 had been admittedly filled in by the complainant, two of them authorising payment in his favour.

10. The above discussion leads to the irresistible conclusion that no subsisting debt or other liability is found to have been established which the accused was legally bound to discharge or was legally enforceable debt or other liability not it is proved that the cheque was issued with a view to discharge such debt/liability. The accused, thus, is entitled for acquittal solely on this ground and the learned first appellate Court has rightly come to this conclusion as aforesaid.

11. So far as the conclusion of the learned Sessions Judge that the complaint is not within limitation is concerned, it is based on misconception of law and is unsustainable. The relevant part of the judgement of the learned Sessions Judge, on this point, reads as follows:

9. It is also significant to state that as per version of the complainant, he presented the disputed cheques to the bank for the first time for encashment on 5-1 -1990 and it was dishonoured as per Ex.PW-1/B and then he sent notices Ex.PW-1/C by registered post as well as under postal certificate as per the receipt Ex.PW-1/D and the duplicate postal receipt Ex.PW-1/E. But the accused did not make the payment and then he filed the present complaint on 20-2-1990. The above postal receipt Ex.PW-1/D bears the date of 17-1-1990. The duplicate postal receipt also bears the same date. If the version of the complainant that the notice Ex.PW-1/C was sent vide receipt Ex.PW-1/D and Ex.PW- 1/E on 17-1-1990, then the instant complaint having been filed beyond 15 days is apparently barred by limitation.'

12. Thus, the learned Sessions Judge proceeded on the premises that the starting point of limitation for instituting a complaint under Section 138 of the Act is the date on which the legal notice demanding payment of the cheque amount is issued and that the prescribed period of limitation which will start running on the said date is 15 days. This view, apparently, is illegal and not in conformity with the relevant provisions of the law.

13. To answer the questions as to when the cause of action to file a complaint regarding commission of an offence punishable under Section 138 of the Act arose, when the limitation started running and what is the period of limitation, a reference may be made to the proviso to Section 138 and Section 142 of the Act, which respectively read as follows:

138. xx xx xx

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 the course of the cheque, within fifteen days of the receipt of the said notice.

142. 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.

A combind reading of the above quoted provisions will make it clear that a complaint regarding commission of an offence punishable under Section 138 of the Act will not be maintainable unless the conditions laid down in Clauses (a) to (c) of the proviso to Section 138 of the Act are complied with/satisfied. Therefore, at the first instance, the cheque will have to be presented to the bank within six months from the date on which it is drawn or within the period of its validity whichever is earlier and if it bounces, the payee or the holder in due course of the cheque will have to make a demand for the payment of the cheque amount by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by such payee or holder from the bank regarding return of the cheque as unpaid. In case the drawer of such cheque fails to make the tpayment of the amount for which the cheque was drawn within 15 days of the receipt of such notice, the cause of action will accrue to the payee/holder, as the case may be, to file a complaint against the drawer of the bounced cheque. It is on expiry of this period of 15 days that in the event of nonpayment of the amount of cheque, that limitation will start running. As per provisions contained in Section 142 of the Act, the period of limitation for lodging the complaint after expiry of the said period of 15 days, is one month.

14. In the instant case, the cheque in. question is stated to have been presented to the bank on 5-1-1990 and has been returned unpaid by the banker with the endorsement 'refer to drawer' vide memorandum Ex.PW-1/B. Thereafter, the legal notice as contemplated under Clause (b) of the proviso to Section 138 of the Act dated 16-1-1990 a copy whereof is Ex.PW-1/C had been sent to the accused on 17-1 -1990 vide postal receipts Ex.PW-1/B and Ex.PW- 1/F, i.e. on the 15th day of the receipt of information regarding bouncing of the cheque and this action has been taken by the complainant correctly as per the provisions of Clause (b) to the

proviso to Section 138. The acknowledgement of the receipt of the registered notice by the accused is dated 22-1-1990. Thus, the accused received the legal notice on 22-1-1990. The period of 15 days as contemplated by Clause (c) of the proviso to Section 138 of the Act from the date of receipt of the legal notice, thus, expired on 6th of February, 1990 but no payment was made during this period. Therefore, the period of limitation started running for the purpose of institution of the complaint in this case on 7th February, 1990. The complaint was presented on 21-2-1990, thus, well within a period of one month as prescribed by Section 142 of the Act. The complaint, therefore, has been filed within the prescribed period and the learned Sessions Judge has wrongly held that it was filed beyond the period of limitation.

15. In conclusion, however, the order of acquittal does not call for interference, for the reason that no subsisting debt or other liability which the accused was legally bound to discharge is found be established against him.

16. Resultantly, the appeal fails and is accordingly dismissed. The bail bonds furnished by the accused are discharged.

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