

Pradeep Kumar Abrol Vs. Rakesh Seth

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Court : Himachal Pradesh

Decided On : Jun-19-2006

Reported in : 2006(2)ShimLC285

Judge : Deepak Gupta, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 142; ;Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 - Section 9; ;
[Motor Vehicles Act, 1988](#) - Section 166 and 166(3); ;Motor Vehicles (Amendment) Act, 1994; ;Indian Penal Code (IPC) - Section 420; ;Code of Criminal Procedure (CrPC) - Sections 204 and 227

Appeal No. : Cr. A. No. 498 of 2005

Appellant : Pradeep Kumar Abrol

Respondent : Rakesh Seth

Advocate for Def. : Ashok Sood, Adv.

Advocate for Pet/Ap. : B.K. Malhotra, Adv.

Disposition : Petition dismissed

Judgement :

Deepak Gupta, J.

1. This appeal by the complainant is directed against the order of the Additional Chief Judicial Magistrate, Sundernagar in case No. 6-I/2003/2-III/2003 dated 24.9.2005, whereby he has discharged the accused.

2. The facts in brief are that the complainant Ashwani Kumar Abrol had filed a complaint through his General Attorney Pardeep Kumar against respondent Rakesh Seth under Section 138 of the Negotiable Instruments Act read with Section 420 IPC. In the trial Court on behalf of the complainant, it was submitted that the complaint be treated as being under Section 138 of the Negotiable Instruments Act, only.

3. The complaint relates to dishonouring of cheque No. SML/CD No. 0350714 dated 25.4.2002 alleged to have been issued by Rakesh Seth in favour of the complainant. According to the averments made in the complaint the cheque was deposited by him in his bank for encashment and thereafter the same was dishonoured on 5.10.2002 with the remarks 'insufficient funds'. Thereafter legal notice dated 31.10.2002 was sent by the complainant to the accused through his Counsel which was received by the accused on 5.11.2002. The complaint was instituted on 27.12.2002. Apparently the complaint had not been filed within time. However, when the office report was made no such objection was recorded. On 6.1.2003 the matter was adjourned to 22.5.2003 without recording any statement. On 22.5.2003 the complainant filed an application under Section 142(b) of the Negotiable Instruments Act for condoning the delay in filing the complaint. Thereafter, the preliminary evidence of the complainant was recorded on 16.1.2004 and on 21.2.2004 the Court issued process against the accused and directed him to appear on 15.3.2004. It is pertinent to mention that no order was passed on the application under Section 142(b) of the Negotiable Instruments Act nor any notice thereof was given to the accused.

4. The accused was served and put in appearance on 12.8.2004. He was granted bail on the next date i.e. 6.11.2004. The accused filed an application under Sections 204 and 227 of the Code of Criminal Procedure, praying that the complaint had been filed beyond time and as such there was no properly constituted complaint and no cognizance of the complaint could have been taken

and therefore the accused may be discharged. Reply to this application was filed and the trial Court vide impugned order dated 24.9.2005 dismissed the application for condonation of delay filed by the complainant and consequently dismissed the complaint, and discharged the accused.

5. It would be pertinent to mention that the 2nd proviso to Section 142(b) of the Negotiable Instruments Act empowering the Court to condone the delay in filing a complaint was inserted by Section 9 of the Negotiable Instruments (Amendment & Miscellaneous Provisions) Act, 2002 with effect from 6.2.2003. As noticed above, the complaint in the present case was filed on 27.12.2002. At that time there was no power with the Court to condone the delay. The application for condonation of delay was filed on 22.5.2003. By that time the provision permitting the Court to condone the delay had been inserted. The contention of the accused is that as on the date when the complaint was instituted there was no power to condone the delay and as such the complaint was not properly constituted and could not have been entertained and should have been rejected by the Court itself without issuing any notice. It is contended on behalf of the complainant that the amendment empowering the Court to condone the delay is procedural in nature and therefore will apply with retrospective effect.

6. I have heard Mr. B.K. Malhotra, learned Counsel for the complainant and Mr. Ashok Sood, learned Counsel for the accused. Mr. Malhotra has relied upon the judgment of Division Bench of this Court in *Sadh Ram v. State of H.P. and Anr.* 1996 (1) Sim. LC. 334, wherein this Court was dealing with the provisions of the [Motor Vehicles Act, 1988](#) as amended in the year 1994. Section 166(3) of the [Motor Vehicles Act, 1988](#) provided that every claim petition for grant of compensation should be filed within a period of six months from the date of accident and further provided that the claims Tribunal may entertain the application after the expiry of six months but not later than 12 months in case sufficient cause is shown. Therefore under the un-amended Act of 1988 the Tribunal had no power to condone the delay in case the claim petition was filed more than 12 months after the date of accident.

7. The Parliament amended Section 166 by the Amendment Act, 1994 and in this Amended Act there was no limitation provided. The question, which arose for consideration, was whether the amended Act would apply even in cases, which had been filed prior to the amendment made in the year 1994. The Court held that the technical plea of limitation would not survive and that limitation being a matter of procedure the amendment would have retrospective effect.

8. Mr. Malhotra has also relied upon some other judgments. In *Anant Gopal Sheorey v. The State of Bombay* : 1958 CriLJ1429 , the Apex Court held as follows:

No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective.

8. The Apex Court in *Punjab Tin Supply Co., Chandigarh etc. etc. v. Central Government and Ors.* : [1984]1SCR428 , held as follows:

All laws which affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous effect will have to be given to the provision in question in accordance with its tenor. If the language is not clear then the Court has to decide whether in the light of the surrounding circumstances retrospective effect should be given to it or not.

9. Mr. Ashok Sood learned Counsel for the respondent has relied upon a number of decisions of various High Courts in which it has been held that the Court has no

power to condone the delay in filing complaint under Section 138 of the Negotiable Instruments Act. I need not refer to these decisions since in all these cases the complaints as well as decisions were rendered prior to the amendment made in the Negotiable Instruments Act.

10. The question, which has to be decided, is whether the amendment, which was incorporated with effect from 6.2.2003 would have retrospective effect and could be applied to complaints instituted prior to the said date. Normally provisions regarding limitation are taken to be procedural in nature and therefore are given retrospective effect. However, when substantive rights are affected the law is not given retrospective effect unless there is special provision in this regard. Here we are dealing with a criminal case which has penal consequences. If a complaint is not instituted within the prescribed period a vested right accrues to the accused. He cannot be prosecuted for the criminal offence. The complainant can no doubt file civil proceedings for the recovery of the amount but can not prosecute a criminal complaint.

11. The pertinent question which arises in the present case, is whether the delay could have been condoned in case the present complaint was filed on or after 7th February/ 2003? In my opinion, keeping in view the fact that a vested right accrued to the accused under the un-amended Act that he could not be prosecuted in case complaint was not filed within 30 days of cause of action arose under clause 'c' of proviso 2 of Section 138 i.e. within one month after 15 days of the receipt of the notice by the drawer the delay cannot be condoned. In this context, the change in limitation cannot be held to be only a matter of procedure. It affects the substantive rights of the parties and must operate prospectively. The vested right accrued could not be taken away by the amending Act. In case the legislature had intended so, specific provision in this behalf would have been made. Therefore in my considered view the amendment to Negotiable Instruments Act can only apply prospectively. It will apply to those cases only where limitation to file the complaint had not expired before 7th February, 2003.

12. In this case I also find that when notice was issued to the accused even the application for condonation of delay had not been decided. The Courts in such like

cases, before issuing any process on the complaint must first decide the question of limitation. Unless the issue of limitation is decided in favour of the complainant there can be no properly constituted complaint. The Court should normally issue notice in the application for condonation of delay only. The learned trial Court proceeded to issue process, knowing fully well that the complaint was time barred without even issuing notice to the accused of the application for condonation of delay. Therefore, in my opinion there was no properly constituted complaint.

13. The learned trial Court was therefore absolutely correct in entertaining the application filed by the accused and re-considering the matter since he had issued process in the complaint without taking into consideration the fact that the complaint was admittedly time barred. Even on merits, I find that the learned trial Court has on the basis of the material on record rightly held that the explanation given for condoning the delay does not appear to be correct. The complaint was filed by the General Attorney of the complainant. This General Attorney was executed in the month of August 2002. Even assuming that the complainant was unwell from 20.11.2002 onwards then also there was nothing, which prevented the attorney from filing the complaint. The illness of the complainant is no ground to condone the delay since admittedly the power of attorney holder was not unwell. Furthermore, the complainant did not produce any record or document to prove his illness.

14. In view of the above discussion, I find no merit in the petition, which is accordingly dismissed.