

Manish SharmA. Vs. Manish SharmA.

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Court : Allahabad

Decided On : Jul-02-2010

Judge : A.K. Roopanwal, J.

Acts : N.I. Act - Section 138 ; [The Code Of Criminal Procedure \(CrPC\), 1973](#) - Section 482 ;

Appeal No. : Criminal Misc. Application No.12955 of 2008.

Appellant : Manish SharmA.

Respondent : Manish SharmA.

Advocate for Def. : Mr. Nirvikar Gupta, Adv.

Advocate for Pet/Ap. : Mr. R.P. Dwivedi, Adv.

Judgement :

1. By means of this application under Section 482, Cr.P.C. the applicant has requested for quashing of the entire proceedings of criminal case no.1394/07, under Section 138, N.I. Act, pending before the Civil Judge (J.D.) III, Mathura. In order to appreciate the controversy, a few material facts may be stated thus: O.P. No.3, Pramod Kumar Garg, who filed the complaint against the applicant Manish Sharma and one Rajesh Kumar Agrawal is the sole proprietor of his Firm P.K. Industries. He deals in the sale of metal scrap. The applicant Manish Sharma and O.P. No.2 Rajesh Kumar Agrawal also run a partnership firm in the name and style of "M/s Satnam Udyog Kendra". They manufacture metal parts. Both are active

partners of the firm and are responsible for each and every activity of their firm. The applicant Manish Sharma and O.P. No.2 Rajesh Kumar Agrawal brought a proposal before Pramod Kumar Agrawal for the purchase of metal scrap for their firm. It was agreed upon between the parties that whenever scrap would be supplied its price shall be paid through cheque to Pramod Kumar Garg within a week from the date of the receipt of the consignment. It was also assured by the applicant and Rajesh Kumar Agrawal that the cheque issued by them shall be encashed in every contingency. The proposal was accepted by Pramod Kumar Garg. According to the instructions of the applicant and his partner Pramod Kumar Garg supplied 5,708.500 kg. of scrap @ Rs.225 per kg. through invoice no.68. Its cost was Rs.12,84,412.50/-. The consignment was received by Rajesh Kumar Agrawal, partner of the firm and he gave receipt of the same. The applicant and Rajesh Kumar Agrawal issued a cheque no.432514 dated 5.8.07 for Rs.12,84,412.50/- from their account no.63 maintained in the Bank of India, Mathura in lieu of the price of the scrap. When the complainant Pramod Kumar Garg presented that cheque in his bank HDFC, Gaushala Road, Mathura on 14.9.07 it was dishonoured with the endorsement "insufficient fund". Thereafter, he gave notice to the applicant and Rajesh Kumar Agrawal as contemplated under Section 138, N.I. Act which was refused by Rajesh Kumar Agrawal. The applicant gave the reply of the notice of Mr. Garg through his advocate Radha Raman Sharma. It was said by him in the reply that he does not know as to whether the complainant is the owner of P.K. Industries, Ram Nagar, Mathura or not. It was also said that he never purchased any metal scrap before the dissolution of his firm on 2.8.07 from any firm. Rajesh Kumar Agrawal had no right or interest in "M/s Satnam Udyog Kendra" after its dissolution on 2.8.07 as per the arbitral award given by the arbitrator on 8.8.07. It was also said that the notice was sent with the collusion of Rajesh Kumar Agrawal. It was also said by the applicant that there was a dispute between him and Rajesh Kumar Agrawal and because Rajesh Kumar Agrawal is in collusion of the complainant, hence, the notice was given under Section 138, N.I. Act.

2. Even after the reply no money was paid to the complainant Pramod Kumar Garg, hence, he filed a complaint against the applicant and Rajesh Kumar Agrawal and in support of the complaint gave an affidavit. The trial court after perusal of the

whole evidence on the record found a prima facie case under Section 138, N.I. Act made out against the applicant and Rajesh Kumar Agrawal and summoned them vide order dated 22.1.08 which was challenged by means of this petition. In support of the petition affidavit was filed by the applicant. O.P. No.3 filed a counter affidavit and again a rejoinder affidavit was filed by the applicant.

3. Heard Mr. R.P. Dwivedi, learned counsel for the applicant, Mr. Nirvikar Gupta for O.P. No.3, learned AGA and perused the record.

4. Mr. Dwivedi submitted that no cognizance under Section 138, N.I. Act could be taken by the court below as on the date when the alleged cheque is said to have been issued the bank account from which the cheque was issued had been closed. According to him, in order to constitute an offence under Section 138, N.I. Act, 1881 the following ingredients are required to be fulfilled.

1. a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;
2. the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;
3. that 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;
4. that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank;
5. the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

6. the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

5. Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138, N.I. Act.

6. Mr. Dwivedi contended that on the date when the cheque is said to have been issued account no.63 had already been closed and therefore, the cheque cannot be said to have been issued on an account maintained by the applicant in a bank for the payment of the amount of the cheque alleged to have been issued in favour of Pramod Kumar Garg from out of that account and therefore, the first condition as stated above i.e. a person must have drawn a cheque on an account maintained by him in a bank was not satisfied and thus, no cognizance could have been taken under Section 138, N.I. Act. To the above, it has contended by Mr. Gupta that on the date when the cheque was issued account no.63 was being maintained very well by the applicant and O.P. No.2, therefore, it cannot be said that the cheque was issued on an account which was not existing on the date of issuance of the cheque.

7. In view of the above rival contentions, I would like to decide as to whether on the date of the issuance of cheque account no.63 on which this cheque was issued was in existence or not.

8. From the perusal of annexure-2 of the application under Section 482, Cr.P.C. it would be clear that the partnership firm "M/s Satnam Udyog Kendra" which was in the partnership of the applicant and Rajesh Kumar Agrawal went into arbitration and the arbitral award was given on 8.8.07. From this award it appears that partnership firm "M/s Satnam Udyog Kendra" had been dissolved by the date when the arbitral award was passed. Against the arbitral award matter was taken to the court of District Judge, Mathura by O.P. No.2, Rajesh Kumar Agrawal whose case was dismissed by the District Judge on 5.4.08. Against that order Rajesh Kumar Agrawal filed FAFO No.1076/08 before the High Court and the High Court also did not give any relief. Thus, from the above it is clear that by the date

of arbitral award i.e. 8.8.07 the firm of the applicant and O.P. No.2 had dissolved. From annexure-4 filed with the application under Section 482, Cr.P.C. it appears that O.P. No.2 had requested his Bank of India that account no.63 of the firm be closed and on his request the account was closed. This was informed by the bank of the applicant Manish Sharma vide letter dated 2.8.07. This letter has not specifically been denied by O.P. No.3. Thus, it is very much clear from annexure-4 that the account no.63 of the firm was closed by 2.8.07. Admittedly, the cheque in question was said to have been issued on 5.8.07 i.e. on the date when the account on which this cheque was issued was not in existence or it was not operating and therefore, the first condition to constitute the offence under Section 138, N.I. Act that cheque must be drawn on an account maintained by the drawer of the cheque was missing in the present case and the trial court should not have exercise jurisdiction to take cognizance under Section 138, N.I. Act against the applicant.

Mr. Gupta argued that the powers under Section 482, Cr.P.C. should be exercised very sparingly and that too in the rarest of the rare cases. Now, it is to be seen as to whether present is the case of rarest of the rare cases. In my opinion, once the cognizance was ab initio illegal as it had been taken inspite of the fact that one of the necessary conditions for the application of Section 138, N.I. Act was missing the High Court should not allow a party to be harassed by the other party when the proceedings ab initio were illegal and were initiated in abuse of the process of the court.

9. In view of the above, I find that the summoning order as well as the entire proceedings of complaint case no.1394/07 are illegal as no offence under Section 138, N.I. Act is made out against the applicant. Consequently, the proceedings of the present case are liable to be quashed.

10. Accordingly, application is allowed. Summoning order dated 22.1.08 and the entire proceedings of case no.1394/07, under Section 138, N.I. Act, P.S. Kotwali, District Mathura, pending before the Civil Judge (J.D.) III, Mathura are, hereby, quashed.