

(2011) 12 CAL CK 0083
In the Calcutta High Court
Case No : C.R.R. No. 2984 of 2009

A.K. Maheshwary

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 07-12-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2012) 3 BC 658 : (2013) 1 Crimes 214

Hon'ble Judges : Kanchan Chakraborty, J

Bench : Single Bench

Advocate : Debabrata Roy and Mr. Anirban Mitra, for the Appellant; Ashis Sanyal, Abhra Mukherjee and Mr. Amrita Kundu, for the Respondent

Judgement

Kanchan Chakraborty, J.—The challenge in the revision is to the order passed by the learned Additional District & Sessions Judge, FTC No. VIII, Bihcar Bawan, Calcutta, in C.R. 27 of 2009 whereby the Judgment and order of conviction of the petitioner u/s 138 of the Negotiable Instruments Act in C-146 of 2000 was set aside. This finding has been challenged, mainly, on twofold ground-- (a) that the learned 1st Revisional Court erred in coming to a conclusion that examination of the Power of Attorney holder alone is not enough and (b) that the learned Court erred in holding that the cognizance of offence taken by the Magistrate on a complaint which was barred by limitation. A short reference to the factual aspect giving rise to the grievance to the petitioner is set out below for better appreciation of the entire matter.

2. The petitioner A.K. Maheshwary lodged one petition of complaint through his Power of Attorney holder Ram Chandra Jaju against the O.Ps. Modern Engineering Works and Rajranglal Sardar u/s 138 of N.I. Act alleging therein that the respondent being the proprietor of Modern Engineering Works had taken loan from him and in discharge of such liability, he had drawn a cheque of Rs. 1,00,000 in the name of the complainant. The cheque was dishonoured owing to

"insufficiency of fund". The complainant issued a demand notice by registered post on 9.9.1999. The complainant did not receive any postal report regarding service of the notice on the respondent till 4.11.1999. Therefore, he took up the matter with the postal authorities and on 17.1.2000 was informed by the G.P.O. that the demand notice was served on the respondent on 15.9.1999. Being so informed, he lodged the case within the period of one month. The learned Trial Court found all the essential ingredients of offence u/s 138, N.I. Act were established. Therefore, conviction of the respondent was recorded. The respondent challenged that decision in a revision and the 1st Revisional Court was pleased to set aside the decision of the learned Trial Court on the grounds, (a) that the prosecution was barred by law, and (b) that the complainant ought to have been examined by the Court. The complainant being dissatisfied with that order passed by the Revisional Court has come up with this application challenging the legality, validity and propriety of the order on the grounds already stated.

3. In exercising its revisional jurisdiction, this Court is not supposed to enter into merit of the case and reappraise evidence on record. But, when legal questions have been raised, this Court is duty bound to answer such questions in order to right the wrong. Mr. Roy, learned Counsel for the petitioner/complainant contended that in view of Clause (b) of Section 142 of the Act, a complaint is to be lodged by the payee or holder of the cheque within one month from the date of arising of cause of action. In view of Clause (c) of the proviso to Section 138 of the Act, cause of action only arises when the drawer fails to make payment on expiry of 15 days from the date of receiving of the demand notice. The fact of receiving of the demand notice, Mr. Roy contended, being one of the essential ingredients for constituting the offence u/s 138 of the Act, the payee must know the date of receipt of the demand notice otherwise it will not be possible for him to lodge the prosecution within the statutory period of time, According to Mr. Roy, starting point of limitation would be the date when the payee comes to know the date of receipt of the notice. Mr. Roy, in support of his contention, referred two decisions of this Court in Bhabani Shankar Agarwal Vs. State of West Bengal and Another, and M/s. Grasim Industries Limited (Cement Division) Vs. The State of West Bengal, M/s. Nirmalnaha and Associates and Mr. Niladrinaha .

4. Mr. Sanyal, learned Counsel of the opposite party contended that the cause of action for offence u/s 138 of the N.I. Act arises only once, i.e., on failure of the drawer of the cheque to make payment within 15 days from the date of receiving of the demand notice. There is no scope for any Court to change the position of law. There is no scope also for any Court to allow a payee of a cheque to lodge a complaint after expiry of the 45 days, in all, after the date of receiving of the demand notice by the drawer of the cheque. In support of his contention, Mr. Sanyal relied on a decision in Sadanandan Bhadrar Vs. Madhavan Sunil Kumar, Mr. Sanyal contended further that the first Revisional Court has correctly arrived at a conclusion that the complaint by the petitioner in the Trial Court was barred by limitation and Magistrate should not have taken cognizance on such a

complaint which was barred by the law.

5. The only question to be answered herein is which would be the date of accrual of cause of action the date when the payee comes to know about the date of receiving of the notice or the date immediately after 15 days from the date of receiving of the notice.

6. The requirement for sending notice after a cheque is returned by the Bank unpaid is set out in Clauses (b) and (c) of the proviso to Section 138 of the Act. It says:

Section 138. "Dishonour of cheque for insufficiency, etc., of funds in the account-

(a)....

(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 thirty days) of the receipt of information by him from the Bank regarding the return of the cheque as unpaid;

(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.

7. Clause (b) of Section 142 of the act relates to taking of cognizance of offence. It says:

Section 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 offences punishable u/s 138 except upon complaint, in writing, made by the payee, or as the case may be the holder of the cheque 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; (Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c)...

8. In the case in hands, demand notice was sent by registered post on 9.9.1999. The complainant had no knowledge as to whether the said notice was actually received by the drawer. He did not receive any postal report regarding service of the notice on the drawer till 4.11.1999. Thereafter, he took up the matter with the postal authorities and was informed on 17.1.2000 that the demand notice sent by him was actually served on the drawer on 15.9.1999. Thereafter, he lodged the complaint. According to the petitioner, since he had no knowledge of the date when the drawer received the notice, he could not take any action on

expiry of 15 days from the date of service of the notice. According to Mr. Ray, cause of action to lodge the complaint did not arise in favour of the complainant before 17.1.2000 because he had no knowledge about the date of receiving of the notice by the opposite party. The date of receiving of the notice being an important factor for the purpose of reckoning the period of 15 days and thereafter one month, the complainant should know the exact date of receiving of the notice in order to lodge a complaint u/s 138 of the N.I. Act.

9. This Court in Bani Sankar Agarwal (supra) was pleased to dismiss the revisional application and directed the learned Trial Court to conclude the trial within six months from the date of communication of the order in view of the fact that the Hon''ble Apex Court allowed the appeal against the decision of this Court in S.S. Industries and Enterprises Limited v. Magma Leasing Limited and Others, with a direction on the Trial Court to proceed with the trial in accordance with law. To be stated preciously, in Bani Sankar Agarwal (supra) the Hon''ble Single Judge did not set any principle of law over the issue as to what would be the starting point of reckoning limitation period when the payee has no knowledge about the date of receipt of the demand notice.

10. In M/s. Grasim Industries Limited (supra), the Hon''ble Single Judge of this Court was pleased to take up the issue directly and it was held that knowledge of the sender of the notice about the date of receipt of the same being an essential requirement of fair play and natural justice, the expression "within 15 days of the receipt of the said notice" used in the aforesaid provision, should clearly mean the date when the sender acquires the knowledge about the date of the receipt of the notice given by him under Clause (b) of the relevant provision. The Hon''ble Judge was pleased to hold further that if a person is given a right to resort to a remedy within a prescribed time, limitation should not be computed from a date earlier than that on which the party aggrieved actually know about the date of accrual of cause of action for making a complaint before the competent Court for seeking redress therefor or else, it might be absurd and unreasonable application of law.

11. The facts, situation of the case and point raised before the Hon''ble Judge in M/s. Grasim Industries Limited are similar to that of the case in hands. The learned Judge has also taken into consideration the decision of the Hon''ble Court in M/s. Sil Import, USA Vs. M/s. Exim Aides Silk Exporters, Bangalore, . In this context, the decision of Hon''ble Court in Criminal Appeal No. 290 of 2006 arising out of the decision of this Court in S.S. Industries and Enterprises Limited v. Magma Leasing Limited and Others, can well be referred to because that was the reason why the Hon''ble Judge of this Court was pleased to allow the revisional application in Bani Sankar Agarwal (supra). In said criminal appeal No. 290 of 2006 arising out of the decision of this Court in S.S. Industries and Enterprises Limited v. Magma Leasing Limited and Others, the Hon''ble Apex Court was pleased to observe that in view of the law declared by the Apex Court in the case of Prem Chand Vijay Kumar Vs. Yashpal Singh and Another, the decision of this

Court in S.S. Industries (supra) should be set aside. While setting aside the judgment of this Court in S.S. Industries and Enterprises Limited v. Magma Leasing Limited and Others, the Hon"ble Court referred to its earlier decisions in Sil Import, USA (supra) as well as M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., . Therefore, it is necessary to look at the factual aspects of Prem Chand Vijoy Kumar case (supra) and issue raised before the Hon"ble Apex Court for determination. In that case, the cheque was dishonoured due to insufficiency of fund and intimation was given to that effect by the Bank to the payee on 6.2.1995. Demand notice was issued by the payee/ complainant on 17.2.1995. It was admittedly received by the drawer who requested the complainant/payee for giving him sometime for making payment. On his request, the cheque was again presented on 6.7.1995 for encashment. It was dishonoured due to insufficiency of fund. The Bank intimation reached to the complainant on 20.7.1995. The complainant again sent a demand notice on the drawer of the cheque who, however, by a reply dated 10.8.1995, denied the allegation. Thereafter, the complaint was lodged on 28.8.1995.

12. The Hon"ble Court held (i) that Clause (a) of the proviso to Section 138 does not put any embargo upon payee to successfully present a dishonoured cheque during the period of its validity; (ii) that once first notice was received by the drawer, the cause of action commenced and arose when the drawer failed to make payment within 15 days from the date of receipt of the notice and; (iii) a combined reading of Section 138 and Section 142 made it clear that cause of action is to be reckoned from the date immediately following the date in which the period of 15 days from the date of receipt of the notice by the drawer expires. The Hon"ble Court held further that the language used in Section 142 admits of no doubt that the Magistrate is forbidden from taking cognizance of the offence if the complaint was not filed within one month of the date on which the cause of action arises. Completion of the offence is the immediate forerunner of rising of the cause of action. In other words, cause of action would arise soon after completion of offence and period of limitation for filing of the application starts running simultaneously. This is the position of the law declared by the Hon"ble Court in Prem Chand Bijoy Kumar (supra).

13. In Criminal Appeal No. 290 of 2006, the Hon"ble Apex Court passed the following order:

We have heard Counsel for the parties.

Leave granted.

Counsel for the appellant relies upon the decision of this Court in the case of Prem Chand Vijay Kumar Vs. Yashpal Singh and Another, , which follows an earlier decision of this Court in the case of M/s. Sil Import, USA Vs. M/s. Exim Aides Silk Exporters, Bangalore, He has also brought to our notice some observations made by this Court in the case of M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., But those observations have been

considered and explained in the subsequent decisions. In view of the law declared by this Court in the case of Prem Chand Vijay Kumar (supra), this appeal must be allowed and we, accordingly, allow this appeal and set aside the impugned judgment and order and remit the matter to the Trial Court for trial of the case in accordance with law.

14. The Hon''ble Court while allowing the appeal, was pleased to take into consideration its earlier decisions in Sil Import (supra) and Dalmiya Cement (supra) which were considered in Prem Chand Vijay Kumar (supra). In Prem Chand Vijay Kumar (supra), the Hon''ble Court was not dissented from the proposition of law declared in Sil Import, USA and Dalmiya Cement (supra)

15. Again, the Hon''ble Court referred to its earlier decision in Sadanandan Bhardhan v. Madhavan Sunil Kumar (supra) both in Sil Import, USA and Prem Chand Vijay Kumar (supra). In Sadananda (supra) it was held that once a notice under Clause (b) of proviso to Section 138 of the act is "received" by the drawer of the cheque, the payee or holder of the cheque forfeits its right to again present the cheque as cause of action was accrued when there is failure to pay the amount within the presented period and the period of limitation starts to run which cannot be stopped on any account.

16. In Sil Import (supra) case, the question directly raised was whether the sender of the notice must know the date when it was received by the sendee. The Hon''ble Court held that the judgment impugned was erroneous inasmuch as it erases the starting date of the period of 15 days envisaged in Proviso (c) to Section 138 and the Hon''ble Court also held that if a different interpretation is given, the absolute interdict incorporated in Section 142 of the Act that no Court shall take cognizance of offence unless the complaint is made with one month of the date on which the cause of action arises would become otiose. It can be noticed also that the facts in Dalmia Cement case, Prem Chand case and Sil Import case were having factual diversity but in all the cases the decision in Sil Import case was approved.

17. In all the three cases, the Hon''ble Apex Court has taken consistent view on the issue that the date of reckoning the period of limitation would be the date of receiving of the notice by the drawer not from the date of his knowledge of receipt of the notice by the drawer. No other interpretation of the words "within one month of the date on which the cause of action arises under Clause (C) of the proviso to Section 138" can possibly be given which will be contrary to the intention of the Legislature expressed in unambiguous language. In M/s. Grasim Industries Ltd. (supra), the Hon''ble Judge although referred to the decision in Prem Chand Vijoy Kumar (supra) but, desisted from taking the same into consideration. Even, the proposition of law declared by the Hon''ble Apex Court was not discussed at all.

18. Since the decision in Prem Chand Vijoy Kumar has set the principle of law clearly, this Court finds it inexpedient to accept the decision in M/s. Grasim

Industries Ltd. (supra).

19. The issue can also be considered from another angle. Supposing a payee after sending of notice neither gets any postal information nor intimation from the drawer regarding service of notice. In such a case, questions would obviously arise, how long he would wait? For a reasonable time? What would be the reasonable time in such a case as there is nothing in the N.I. Act in this regard. But, a proviso is added to the Section 142 of the Act enabling the Court to take cognizance after the prescribed period if the complainant satisfies the Court for such delay. The Act itself has given a remedy of the situation which, however, was not availed of by the complainant in this case on hands. He was not helpless in such a situation at all.

20. In this context, decision of A.P. High Court in G.S. Srikanth, MD, Talavadi Rock and Mineral Products, Madras and others Vs. Sri Lakshmi Financiers and Others, will be appropriate to take into consideration. It was held that:

Once it is established that notice was sent under Registered Post Acknowledgement due and if neither the postal cover nor the acknowledgement is returned, the presumption available is that the addressee had received the notice. In such cases requirement of Section 138 of the Negotiable Instruments Act shall be deemed to have been complied with. In Court's considered opinion, if the holder or the payee of a cheque makes a demand for payment by giving a notice, in writing to the drawer of the cheque under Registered Post Acknowledgement Due and if neither the unserved postal cover nor the acknowledgement is received by the payee or the holder of the cheque, a presumption would arise about the service of notice upon the drawer of the cheque. The complaint filed after expiry of fifteen days from the date of the said notice would satisfy the requirement of law.

21. The position of law has been dealt with elaborately by this Court in Bangur Finance Ltd. v. Tejesh Ranjan Ghosh, 2007 (2) E.Cr. Notes 635. His Lordship was pleased to take into consideration of almost all the decisions of the Hon'ble Apex Court while deciding the issue. The Court quashed the complaint on the ground that it was not filed within the period stipulated by the Act.

22. In view of discussion above, this Court is of considered view that there is no illegality in the order impugned. The cognizance was taken on a time barred complaint which law does not permit. This matter is not required to be referred to a Larger Bench as the position of law is settled on this issue in view of the decision of the Hon'ble Apex Court in Prem Chand Vijay Kumar (supra). So, the point raised by Mr. Ray is not accepted.

23. Next point is related to filing of a complaint u/s 138 of the Act by a Power of Attorney Holder on behalf of the complainant. Mr. Sanyal contended that in view of the decision in Shankar Finance and Investments Vs. State of Andhra Pradesh and Others, , where the proprietor of a proprietary concern has personal knowledge of the transaction and signed the complaint, he has to be examined u/

s 200 of the Code of Criminal Procedure. In the case in hands Mr. Sanyal contended A.K. Maheswary is a proprietary firm and therefore, learned Magistrate ought to have examined him u/s 200 of the Code.

24. The factual aspect of this case is quite different than that of said case. The cheque in dispute was issued in the name of A.K. Maheswary. He has given Power of Attorney in favour of Ram Chandra Jaju to lodge the complaint and sign it on his behalf. Mr. Jaju was examined u/s 200 of the Code. So, in view of the decision itself, i.e., Shankar Finance & Investment (supra), the requirements of Section 142 stood fulfilled. It is to be noted here that the cheque in question was not issued in the name of proprietary concern and also not signed by the proprietor. It is trite law that attorney holder is the agent of the grantor and when he is authorised by the grantor to initiate legal proceedings, he does so as the agent of the grantor and initiation of the proceeding is by grantor represented by his attorney holder, not in his personal capacity. So such a proceeding is maintainable. Reference can also be taken in support of this from the decision in Sk. Abdur Rahim Vs. Amal Kumar Banerjee and Others, ; and Arbee International v. State of West Bengal & Anr., 2010 (1) CHN 273. Therefore, the contention of Mr. Sanyal cannot be accepted.

25. Be that as it may, it appears that the learned Revisional Court was absolutely correct in acquitting the O.P. from the case on the ground that the cognizance was taken on a time barred complaint. The order impugned therefore, is not required to be interfered with.

26. This revision application fails and is disposed of. No order as to cost is passed. Urgent photostat certified copy of the judgment, if applied for, be handed over to the parties on compliance of necessary formalities.