

(2007) 03 CAL CK 0020
In the Calcutta High Court
Case No : C.R.R. No. 1911 of 2006

Alok Munshi

APPELLANT

Vs

Satinath Mukherjee and Another

RESPONDENT

Date of Decision : 09-03-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2008) 2 CHN 1033

Hon'ble Judges : Sailendra Prasad Talukdar, J

Bench : Single Bench

Advocate : Madhusudan Sur, S.S. Roy, for the Appellant; T. Chanda, for O.P. No. 1, for the Respondent

Judgement

Sailendra Prasad Talukdar, J.—By filing such application u/s 397/401/482 of the Criminal Procedure Code the present petitioner sought to quash the proceeding being C.R. Case No. 274 of 2006 now pending before the learned Court of Additional Chief Judicial Magistrate, Serampore, Hooghly.

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

Opposite party No. 1, as complainant, alleged in the complaint filed before the learned Court that in response to request made by the present petitioner, he gave him an accommodation loan of Rs. 3,48,500/-. On repeated demands, the present petitioner issued two Account Payee Cheques being No. 134819 dated 2.12.2005 of Rs. 51,500/- and No. 134820 dated 2.12.2005 of Rs. 2,97,000/- drawn on United Bank of India, Chanditala Branch, Hooghly. The said cheques were deposited on 6.4.2006 for encashment but the same were dishonoured on the ground of "insufficient of fund". Opposite party No. 1 issued a demand notice to the petitioner on 19.4.2006 with a request to arrange payment of the said amount of Rs. 3,48,500/- within 15 days from the receipt of the notice. It was received by the accused/petitioner on 21.4.2006. Opposite party No. 1 issued

one notice through his lawyer demanding payment of Rs. 3,48,000/- and in the said letter, seven days time for payment was given. The notice was also not properly drafted. For all such reasons, request was made to treat the said notice as cancelled.

3. On the basis of such petition of complaint the said case being C.R. Case No. 274 of 2006 was started. Before issuance of the notice dated 19.4.2006, another notice dated 22.3.2006 was given by registered post with acknowledgement card due as well as under certificate of posting which were posted on 22.3.2006 and were received by the petitioner 24.3.2006 respectively. It was stated inter alia that the petitioner took a loan of Rs. 3,48,500/- on diverse dates and undertook to repay the same within a short time. Two A/c. payee cheques for the amount of Rs. 51,500/- and Rs. 2,27,000/- being cheque Nos. 134819 and 134820 respectively were drawn on United Bank of India, Chanditala Branch on 2.12.2005.

4. Opposite Party No. 1 duly presented the said cheques which were not encashed and the same were returned with the endorsement "full cover not received" on 7.2.2005 and the O.P. No. 1 demanded immediate payment of the said amount within seven days from the date of receipt of the notice.

5. The petitioner claimed that he received the first notice dated 22.3.2006 on 24.3.2006 and 26.3.2006 respectively but, thereafter, the O.P. No. 1 did not take any step to file the complaint within the statutory period of one month from the date of expiry of the notice. The O.P. No. 1 thus relinquished his statutory right to file the complaint. It was further alleged that giving of seven days time for payment was also in violation of the statutory provision.

6. Since O.P. No. 1 came to know about the dishonour of the cheques on 7.2.2006, notice should have been given by 6.3. 2006 but the same was given on 22.3.2006.

7. It was further claimed on behalf of the petitioner that the O.P. No. 1 did not take any step to file complaint within time and issued second notice on 19.4.2006 demanding payment of the cheque amount within fifteen days from the date of receipt of the notice. In such subsequently issued notice it was admitted that the notice which was sent earlier was defective and request was made to treat the same as cancelled.

8. Petitioner received the notice dated 19.4.2006 on 21.4.2006 and, thereafter, the O.P. No. 1 filed a complaint on 10.5.2006. Such initiation of proceeding on the basis of the second notice was improper and, as such, prayer was made for quashing of the entire proceeding.

9. At the time of hearing of the case various decisions were referred to by the learned Counsel for the parties. Observation made by the Apex Court in the case of *Sadanandan Bhadran Vs. Madhavan Sunil Kumar*, , may profitably be reproduced as follows:

Now, the question is how the apparently conflicting provisions of the Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour, and that too within one month from the date the cause of action arises, can be reconciled. Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonised with the interpretation that on each presentation of the cheque and its dishonour a fresh right -and not cause of action-accrues in his "favour. He may, therefore, without taking pre-emptory action in exercise of his such right under Clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But, once he gives a notice under Clause (b) of Section 138 he forfeits such right, for, in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for" filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer, expires.

10. Such decision was also referred to by the Apex Court in the case of *Sil Import, USA v. Exim Aides Silk Exporters, Bangalore* reported in 1999 C Cr. LR (SC) 227, wherein it was held that cause of action would arise soon after completion of the offence, and the period of limitation for filing the complaint would simultaneously start running.

11. This aspect was also dealt with in the case of *Prem Chand Vijay Kumar v. Yashpal Singh and Anr.* reported in 2005(2) C Cr. LR (SC) 26. It seems to be the settled position of law that Clause (a) of the proviso to Section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. On each presentation of the cheque and its dishonour, a fresh right and not a cause of action-accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his such right under Clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But, once a notice is given under Clause (b) of Section 138, he forfeits such right in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint will arise.

12. The Apex Court in the said case held that a combined reading of Sections 138 and 142 makes it clear that cause of action is to be reckoned accordingly. The combined, reading of the above two Sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142(c) arises - and can arise-only once. The period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires. If no notice is given within the said period of fifteen days, no cause of action could have been

created at all.

13. The Apex Court further observed that it is well-settled that if dishonour of a cheque has once snowballed into a cause of action it is not permissible for a payee to create another cause of action with the same cheque. The decision in the case of Prem Chand Vijay Kumar v. Yashpal Singh and Anr. (supra) was also referred to by the learned Counsel for the opposite party in support of his contention that without taking pre-emptory action in exercise of the right under Clause (b) of Section 138, one can go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque, it was contended that one of the indispensable factors to form the cause of action is that notice must be given within the period of fifteen days of the receipt of information from the bank regarding the return of the cheque as unpaid.

14. Referring the decision in the case of M/s. Uniplas India Ltd. and Others Vs. State (Govt. of NCT of Delhi) and Another, , it was submitted that if no notice is given within the period of thirty days of the receipt of information from the bank regarding the return of the unpaid cheque, no cause of action could have been created.

15. The legal position being settled, as discussed, it is necessary to analyse the same in the context of the facts and circumstances of the present case. According to learned Counsel for the petitioner, the complaint u/s 138 of the Negotiable Instruments Act was filed on the basis of the second notice. Complaint having not been filed within the statutory period, the proceeding under reference, cannot be sustained. It seems to be the claim of the opposite party/complainant before the learned Trial Court that the cheques under reference being No. 134819 dated 2.12.2005 and No. 134820 dated 2.12.2005 were deposited on 06. 04. 2006 for encashment. The same were refused due to insufficiency of fund. Demand notice was sent on 19.4.2006 by registered post with acknowledgement due card with a request to pay the amount under reference within fifteen days from the date of the receipt of the notice. The notice was received on 21.4.2006 but the aforesaid amount was not paid in discharge of liability.

16. It seems to be the accepted position in this case that the opposite party No. 1/complainant issued one notice through his lawyer demanding the amount of Rs. 3,48,000/-. Seven days time was given for payment in the said notice. The amount of money, as referred to in the cheque, was wrong. There had been other defects in the said notice for which the O.P./complainant was under compulsion to issue the second notice.

17. Having regard to the legal position, as referred to earlier, the grievance of the present petitioner in regard to the legality and validity of the subsequent notice cannot just be brushed aside. With the issuance of the first notice, the cause of action accrued.

18. The facts and materials on record reveal that first notice was sent by letter

dated 22.3.2006. Thereafter, by letter dated 19.4.2006, it was stated that the said notice is defective and is not in accordance with the provisions of the Negotiable Instruments Act. It was then sought to be treated as cancelled. It was, thereafter, mentioned that such letter dated 19.4.2006 was a relevant notice in accordance with the Negotiable Instruments Act and the accused/petitioner was called upon to pay the complainant a sum of Rs. 3,48,000/- within fifteen days from the receipt of the said notice.

19. In the petition of complaint it was specifically mentioned that by the subsequent notice dated 19.4.2006, it was specifically stated that the earlier notice dated 22.3.2006 may be treated as cancelled and no cause of action could arise out of the same.

20. The question that naturally arises as to whether the facts and circumstances of the case permit the learned Court to treat the first notice dated 22.3.2006 as "non est" in the eyes of law. Unfortunately, for the O.P./complainant, there was no scope for the same as by operation of law, cause of action arose on the basis of issuance of the said notice dated 22. 3. 2006.

21. Service of such notice being the sine qua non for proceeding with a complaint u/s 138 of the Negotiable Instruments Act, it cannot be disputed that the proceeding on the basis of the purported subsequent notice dated 19.4.2006 could not be said to be valid in the eyes of law.

22. In such circumstances, the grievance, as ventilated on behalf of the petitioner, cannot just be brushed aside. The proceeding thus suffers from inherent legal defect and quite naturally, this Court cannot afford to remain a passive onlooker to such further proceeding of the case. In view of the inherent illegality in the proceeding, this Court considers that continuation of further proceeding will amount to an abuse of the process of Court.

23. Accordingly, the present case being C.R.R. No. 1911 of 2006 succeeds.

24. The proceeding being C.R. Case No. 274 of 2006 now pending before the learned Court of Additional Chief Judicial Magistrate, Serampore, Hooghly, be quashed.

25. The accused person in the said case, if on bail, be discharged from bail bond at once.

26. The copy of the order be sent to the learned Trial Court for information and necessary action. It is perhaps needless to mention that such order will not prevent the O.P./complainant to take appropriate action in accordance with law.