

(2010) 10 RAJ CK 0043

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 1978 of 2010

Arun Maheshwari and Another

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 25-10-2010

Acts Referred:

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

Citation : (2011) 2 BC 578

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mohammad Rafiq, J.—This criminal miscellaneous petition u/s 482 of Code of Criminal Procedure has been filed by accused-Petitioners, namely, Arun Maheshwari and M/s. Mineral Mining and Trading Company. Cognizance against accused-Petitioners was taken by trial Court way back on 11.12.2001 and charge against them was framed on 27.1.2003. In that criminal case, accused-Petitioners filed an application on 10.8.2010 stating that order of cognizance was wrongly drawn against accused-Petitioners as no case for offence u/s 138 of Negotiable Instruments Act, 1881 was made out because evidence show that cheque in question was presented for payment to the Bank much after closure of the Bank-account. Learned trial Court has rejected application by order dated 21.8.2010. Hence this criminal miscellaneous petition u/s 482, Code of Criminal Procedure on behalf of accused-Petitioners challenging aforesaid order and praying in effect that order of cognizance dated 11.12.2001 be quashed and all proceedings in complaint against Petitioners be quashed and set aside.

2. Mr. S.R. Surana, Learned Counsel for Petitioners, has argued that prerequisite condition for maintaining complaint against accused is that cheque must have been issued on an account being maintained by the accused. Section 138(a) of Negotiable Instruments Act, 1881 (for short, "the Act") provides that an account

must be maintained by accused with a 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. It is only then that such person shall be deemed to have committed an offence u/s 138 of the Act.

3. Learned Counsel submitted that all other cheques that were issued to complainant in present case pertained to 1995 and same were presented for realization and were cleared. This cheque was also issued long ago on 8.6.1995. Although it was a blank cheque but it was meant to be used immediately by complainant. Taking advantage of fact that it was a blank cheque, the complainant put the date 6.4.2001 on said cheque and presented the same with Bank for payment. Learned Counsel submitted that concerning Bank account was closed long ago on 12.9.1998 and the cheque has apparently been prepared two and a half year after the date of closure of Bank account Basic ingredient of Section 138 of the Act that account must be maintained by accused with a Banker was not satisfied in present case. Offence of Section 138 of the Act is therefore not made out. Learned Counsel for Petitioners, in support of his this argument, cited judgment of Supreme Court in Jugesh Segal v. Shamsher Singh Gogi III (2009) BC 690 (SC) : III (2009) CCR 378 (SC) : 2009 (2) WLC (SC) Cri. 401.

4. Mr. S.R. Surana, Learned Counsel for Petitioner, further argued that another ingredient that was necessary to make out offence u/s 138 of the Act is that existing debt should be there which could be enforceable in law. It is contended that there was no evidence whatsoever to show that there was any existing debt or loan pursuant to transaction between parties as on date on which cheque was presented for payment to Banker of accused-Petitioners. Accused-Petitioners ceased to have any transaction with complainant Respondent long ago which is evident from fact that all cheques that were issued to complainant-Respondent were presented to Banker in 1995 and were cleared. This solitary cheque could not therefore be used by complainant Respondent only with a view to filing a frivolous complaint against accused-Petitioners u/s 138 of the Act. Learned Counsel, in support of this argument, cited judgment of Bombay High Court in Sanjay Mishra v. Kanishka Kappor@ Nikiand Another IV (2009) BC 223 : 2009 (3) CCC 80 (Bom), and also various judgments relied on therein.

5. Learned Public Prosecutor opposed the criminal miscellaneous petition and submitted that whether or not there was existing debt or outstanding loan or due, between the parties, was a matter of evidence to be adduced by them and decided by Court. It was premature now to raise such an issue. It was argued that learned trial Court has rightly rejected application of Petitioners observing that if cheque was given on 6.4.2001 for an account which had already been

closed down on 12.9.1998, this issue will be decided on the basis of evidence whether or not offence u/s 138 of the Act is made out. Learned Public Prosecutor has argued that if accused-Petitioners were really acting in bona fide manner, since it is not their case that this cheque was not issued by them, then it was necessary for them to have conveyed to complainant-Respondent that they closed down their Bank account and the Cheque should not be presented for payment. No such case has been set up by accused-Petitioners. Cognizance in present matter was taken long ago on 11.12.2001 and application which was filed nine years thereafter on 10.8.2010 was rightly rejected by learned trial Court.

6. I have given my anxious consideration to rival submissions and perused material on record.

7. I shall first consider the argument advanced by Learned Counsel for Petitioners that offence u/s 138 of the Act can be attracted only when an account was maintained by accused with the Banker and since in present case, when the cheque was presented, the account had already been closed down about two and a half years there before, the offence would not be made out. Section 138 of the Act inter alia provides that where any cheque drawn by a person on an account maintained by him with a 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. It is not denied nor is it case of accused-Petitioners that cheque in question was not issued by them and that they did not have account in the Bank in question. What is their case is that cheque was issued at a time when accused-Petitioners had ongoing transactions with complainant Respondent and all cheques issued in 1995 in that connection were honoured except cheque in question, which was misused by complainant indicating 6.4.2001 as date of issue and presenting the same for encashment with Banker of accused-Petitioner whereas fact is that account had already been closed down on 12.9.1998. This argument is sought to be substantiated by Learned Counsel with help of judgment of Supreme Court in Jugesh Sehgal (supra). In that case, the Supreme Court held that offence u/s 138 of the Act of 1881 was not attracted because the cheque which is said to have issued and given by the accused to complainant for payment was not from the account which was maintained by accused Jugesh Sehgal but one by Shilpa Chaudhary. It was in those facts that Their Lordships observed that "...there is hardly any dispute that the cheque, subject matter of the complaint u/s 138 of the Act, had not been drawn by the Appellant on an account maintained by him in the Indian Bank, Sonapat branch. That being so, there is little doubt that the very first ingredient of Section 138 of the Act, enumerated above, is not satisfied..."

8. In present case, there is no dispute regarding that account for which cheque was issued, that it was admittedly maintained by accused-Petitioners. Although it is another matter that this account had been closed down on 12.9.1998 and was not being maintained at the time of presentation of the cheque. But then, it cannot be deduced therefrom that the account was not being maintained when the cheque was given by accused-Petitioners to complainant Respondent, which fact even the accused Petitioners do not deny. What would be the effect of making use of blank cheque or presentation thereof at a belated stage, would be examined by learned trial Court on the basis of evidence to be adduced by parties, at the time of final decision of the matter but for the present purpose, this Court is only called upon to decide is whether cognizance was rightly taken in the matter or could not have been taken on the facts of the case. It is in that limited context that this Court is not persuaded to uphold the contention raised by Learned Counsel for Petitioner.

9. Coming next now to submission that the cheque even if dishonoured could be made basis for prosecution of accused-Petitioners only if it was shown that it was issued towards any existing liability and so long as ingredient of existing loan was not satisfied, merely because the cheque was presented to the Banker and was returned with the remark that Bank account was closed down, would not be sufficient to attract provisions of Section 138 of the Act. Judgment of Bombay High Court cited by Learned Counsel for Petitioners did not arise out of a case wherein order taking cognizance was questioned. In that case, trial Court rejected complaint holding that complainant has failed to establish that cheque was issued towards discharge of legally recoverable debt.

10. Even according to provisions of Section 138 of the Act that such cheque must be issued for discharge, in whole or in part, of any debt or other liability, this would be premature to examine this issue at the stage of order taking cognizance particularly when such cognizance was taken nine years ago. In any case this will have to be proved on the basis of evidence to be adduced by both the parties. Suffice it to observe that accused-Petitioners do not dispute issuance of cheque to complainant-Respondent and fact that cheque was given to them in mutual relationship of trust and faith when they had been having business transactions with each other. Obviously, decision on this issue would also have to be based on evidence that is led by the parties before trial Court. This Court is therefore not persuaded to uphold second contention of Learned Counsel for Petitioners either.

11. Surprisingly, while examining present matter, it is noticed that cognizance in the present complaint case u/s 138 of the Act was taken as long back as on 11.12.2001 and evidence in the matter still has not been concluded. If trial Court finds that despite giving sufficient opportunities complainant/Respondent has failed to produce evidence or despite summons repeatedly issued, witnesses are not turning up or the accused is not cooperating in early conclusion of trial, trial Court would not be helpless to pass appropriate order as regards whichever party

wants to lead evidence and is serious about contesting the matter.

12. In peculiar circumstances of case, while dismissing this petition on merits, I direct the Court of Additional Civil Judge (Junior Division) & Judicial Magistrate, 1st Class, No. 11, Jaipur City, Jaipur to conclude the proceedings in the case within a period of six months from date a copy of this order is presented before the Court.

13. Petition is dismissed, however, with aforesaid direction.