

(2012) 04 JH CK 0009
In the Jharkhand High Court
Case No : Criminal M.P. No. 941 of 2007

Ashwani Kumar Sahu

APPELLANT

Vs

The State of Jharkhand and Another

RESPONDENT

Date of Decision : 23-04-2012

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 1 JLJR 233

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : Pandey Neeraj Rai and Rohit Ranjan Sinha, for the Appellant; Manish Kumar for the O.P. No. 2, for the Respondent

Final Decision : Allowed

Judgement

Rakesh Ranjan Prasad, J.—Heard learned counsel appearing for the petitioner and learned counsel for the opposite parties. The order dated 24.3.2007, passed in Complaint Case No. 70 of 2007, whereby and whereunder, learned Judicial Magistrate, Ranchi, took cognizance of the offence u/s 138 of the Negotiable Instruments Act against the petitioner, is being sought to be quashed on the ground that notice demanding money of cheque, which got bounced, has never been served upon the petitioner.

2. Learned counsel appearing for the petitioner submits that in the complaint petition it has simply been averred that a legal notice was sent to the accused, but neither reply nor payment was made by the accused to the complainant and thereby the complainant is absolutely silent as to whether notice had ever been served upon the accused persons. In this regard, it was submitted that even in a given case, presumption of notice being served can be drawn in terms of Clause 27 of the General Clauses Act provided necessary ingredients postulated under that provision is there, but that is also absent and as such, in absence of any averment that demand notice has been served, complaint is not maintainable.

3. Learned counsel in support of his submission has referred to a decision rendered in a case of Shakti Travel and Tours Vs. State of Bihar and Another, , wherein it has been held that where the complainant does not assert that demand notice has been served upon the accused, the complaint itself is not maintainable.

4. As against this learned counsel appearing for the opposite party submits that from the impugned order, it does appear that before taking cognizance, the copy of the legal notice alongwith the cheque which got dishonoured had been produced before the court and the court, on being satisfied that in spite of service of notice, the payment was not made, has taken cognizance and thereby, order taking cognizance never warrants to be quashed.

5. The requirement which has been laid down in proviso (b) of Section 138 of the Negotiable Instruments Act is a precondition for launching prosecution u/s 138 of the Negotiable Instruments Act. The provision reads as follows:-

(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;

6. The aforesaid provision does stipulate that before a complaint is lodged, the complainant is required to give notice in" writing so that a person can make payment of the amount, but here in the instant case, it is absent as in Para-6, no statement is there that a notice was given to the petitioner. The statement made in Para-6 of the complaint petition reads as under:-

(6) That the complainant had informed to the accused about the matter and he sent a legal notice to the accused through his lawyer but no reply and payment has been made by the accused to the complainant till today.

7. From its perusal, it does appear that a statement has been made that he sent a legal notice, but no statement is there about the notice being served which is a prerequisite. Even a presumption cannot be drawn on such statement in terms of Clause 27 of the General Clauses Act in absence of necessary averment that notice had been issued under registered post with requisites stamps and on proper address.

8. Under the circumstances, pre-condition of filing a complaint never appears to have been fulfilled and in that view of the matter, the complaint cannot be maintained, in view of the decision rendered in a case of Shakti Travel & Tours vs. State of Bihar and Anr. (supra).

9. Accordingly, the entire criminal prosecution including the order dated 24.3.2007, under which cognizance was taken against the petitioner in Complaint Case No. 70 of 2007, is hereby, quashed. In the result, this application stands allowed.