

(2000) 01 OHC CK 0043

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 2486 of 1997

Biswaranjan Pattnaik

APPELLANT

Vs

Teem Finance Company Limited

RESPONDENT

Date of Decision : 31-01-2000

Acts Referred:

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

Citation : (2000) 01 OHC CK 0043

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : S. Ch. Sahoo, S. Ku. Sahoo, G.C. Swain and A.P. Ray, for the Appellant; Sanjeev Udgata and P.K. Nayak, for the Respondent

Judgement

P.K. Tripathy, J.—Accused in I.CC. Case No. 44 of 1977 in the court of Sub-divisional Judicial Magistrate, Bhubaneswar, has filed this application u/s 482 Code of Criminal Procedure, 1973 (in short "the Code") with the prayer to quash the order of cognizance of taken for the offence u/s 138 of the Negotiable Instruments Act, 1881 (in short "the Act") vide the impugned order dated 30.1.1997. Complainant in that case is the opposite party here.

2. For discharge of the dues (debt) under the agreement dated 20.3.1995, petitioner issued two cheques of State Bank of India (R.I.B. Branch) Rourkela bearing No. 928719 dated 20.9.96 and 928720 dated 20.10.96 for Rs. 59,400/- each (in total Rs. 1,18,800/-). On 30.10.96 opposite party deposited the same with his Banker i.e. Punjab National Bank, - Bapuji Nagar Branch, Bhubaneswar for encashment of both the cheques. The aforesaid branch of State Bank of India on 6.11.96 returned the cheque with the endorsement "insufficient of balance and that intimation was received by the opposite party on 13.11.96. Thereafter, on 26.11.96 complainant sent notice in registered post with Acknowledgment Due (in short "AD.") in accordance with the provision in clause (b) of the Proviso to section 138 of the Act making a demand for payment That registered letter

was received back undelivered on the petitioner with the endorsement of the postal authority "no such addressee at B. 29 Industrial Estate". Such endorsement was made on three dates and the last date was 5.12.96. On 21.1.97, opposite party filed the complaint in the court of S.D.J.M., Bhubaneswar, In the application u/s 482, Cr.P.C. Though it is mentioned that the complaint petition was filed on 20.1.97 but during the course of hearing, petitioner filed Misc. Case No. 2307/99 supported by affidavit of the petitioner along with the certified copy of the order-sheet dated 21.1.97 in the complaint case and made a prayer to correct the date of filing of the complaint as 21.1.97. Though the opposite party in Misc. Case No. 1786/99 (a petition to vacate the stay order) had also mentioned 20.1.97 as the date of filing of the complaint but on 22.12.99, Learned Counsel for the opposite party conceded to the prayer made in the Misc. Case No. 23 07/99. The certified copy of the order-sheet dated 21.1.97 also supports the contention of the petitioner. In view of that the date of filing of the complaint for all intent and purposes is to be read as 21.1.97. Relevant averments the application u/s 482 stands corrected accordingly and that misc. case is allowed.

3. With the above backdrop of facts which has remained uncontroversial petitioner's prayer to quash the cognizance is on three grounds, viz..

(i) The amount of be paid on cheque was adjusted by a payment vide the receipt i.e. Annexure-1 granted by Sri S. Nanda, Sales Executive of the opposite party-company and therefore, petitioner has committed no offence under the Act as the cheques were not en-cashable;

(ii) When the notice sent by registered post was not received by the petitioner the cause of action did not accrue in view of the provisions in clause (b) of the proviso to section 138 read with clause (b) of section 142 of the Act;

(iii) Complaint was not filed within one month from the date of cause of action, therefore, in view of the provision in clause (b) of section 142 of the Act, cognizance could not have been taken.

4. While advancing die counter argument, Learned Counsel for the opposite party argued that the assertion made by the petitioner regarding payment and non en-cash ability of the cheques, as stated by the petitioner, is not correct. Since that is disputed question of fact, this Court should not interfere with the cognizance when there exists a prima facie case from the averments made in the complaint and the statements and documents available in the case. He also argued that the complaint was filed in time and in that respect in counting the period of limitation, petitioner has committed the mistake of not excluding the date on which the cause of action arose. He further argued that opposite party discharged his obligation under law by sending the notice to the petitioner in correct address (as per the agreement). Non-receipt of the notice by the petitioner, under such circumstances does not put the petitioner in any advantageous position.

5. When prayer is made by an accused to quash the order of cognizance u/s 482 of the Code it is to be ascertained by the High Court if the cognizance order is illegal and without jurisdiction or its continuance will be an abuse of the process of Court or quashing of the cognizance is necessary to secure ends of justice. In that respect inherent power should be exercised carefully with due circumspection of the facts and law and it should be invoked sparingly to safeguard the ends of justice.

6. In thrust upon the first of the contentions, petitioner relied upon the ratio in the case of *M/s. Pepsi Foods Ltd., and Others v. Special Judicial Magistrate and Others*, Vol. 14 (1998) (X) C.R.1. In that case finding absence of a prima facie case against the appellants and accordingly not finding justification in the order of the High Court dismissed the writ petition filed under Articles 226 and 227 of the Constitution on the ground that appellants can seek the remedy under the Code from the trial court, the Apex Court held that, it was appropriate for the High Court to consider the contentions of the appellants under Article 227 and/or u/s 482 of the Code. In that context while analysing the power of the High Court u/s 482 of the Code the Apex Court held that

Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. One of such guidelines is where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(Quoted from paragraph 19 at page 12).

7. Petitioner as prayer to quash the cognizance is firstly on the basis of Annexure-1. As rightly argued by Mr. Udgata, Learned Counsel for the opposite party, Annexure-1 is a disputed document and its genuineness is yet to be proved and hence that cannot be the basis to quash the cognizance order. In that respect, he invited attention of the court to the ratio in the case of *J.P. Sharma Vs. Vinod Kumar Jain and Others*, and *Smt. Chand Dhawan Vs. Jawahar Lal and others*, .

8. In the case of *J.P. Sharma (supra)* while disapproving the order of the High Court of Delhi in quashing the cognizance by referring to a subsequent report by the C.B.I. The Apex Court held that:-

51. The grounds upon which the learned Judge seems to have quashed the complaint in the instant case was the subsequent report by the C.B.I, which had not yet been proved and considered in the background of the allegations made and secondly that some of the parties alleged to be in the conspiracy were not made parties. These, in our opinion, are no grounds for quashing the criminal proceedings where on prima facie being satisfied the learned Metropolitan magistrate had taken cognizance. Taking all the allegations in the complaint to be true, without adding or subtracting anything at this stage it cannot be said that

no prima facie case for trial had been made out. That is the limit of the power to be exercised by the High Court u/s 482 of the Code of Criminal Procedure. The High Court in the instant case has exceeded that jurisdiction.

In the case of Smt. Chand Dhawan, Punjab & Haryana High Court quashed the order of cognizance of the offence u/s 494 and 109,1.P.C. by referring to two documents i.e., F.I.R. said to have been lodged by the complainant at Greater Kailas II, New Delhi, alleging the same fact and secondly affidavit of one Vijay Bharti who. in that affidavit, denied to have performed the 2nd marriage of the accused though such marriage as stated in the complaint, was performed by him. Both the said documents were filed in the High Court. The Apex Court did not appreciate and approve the manner in which the additional materials were considered by the High Court. In that context the Apex court stated that-

The High Court has, however, in approaching the question misdirected itself in analysing the truth or otherwise of the allegations on the basis of the materials which could not be relied on without legal proof.

Their Lordships further held that:-

This Court has in various decisions examined the scope of the power u/s 482, Cr.P.C. and has reiterated the principle that the High Court can exercise its inherent jurisdiction of quashing a criminal proceeding only when the allegations made in the complaint do not constitute an offence or that the exercise of the power is necessary either to prevent the abuse of the process of the court or otherwise to secure the ends of justice. No inflexible guidelines or rigid formula can be set out and it depends upon the facts and circumstances of each case wherein such power should be exercised. When the allegations in the complaint prima facie constitute the offence against any or all of the respondents, in the absence of materials on record to show that the continuance of the proceedings would be an abuse of the process of the court or would defeat the ends of justice, the High Court would not be justified in quashing the complaint.

(Both the passages are quoted from paragraph 6 at page 1958).

9. At the risk of repetition, it may be noted that Annexure-1 was not before learned S.D. J.M. when he took cognizance of the offence. Annexure-1 is not an admitted document. On the other hand opposite party disputes correctness and genuineness of the same. Hence the impugned order of cognizance cannot be quashed on the basis of Annexure-1. It is not the case of the petitioner that even without the aid of Annexure-1, factually the complainant does not disclose a prima facie case for the offence u/s 138 of the Act. Thus the first contention of the petitioner is, devoid of merit to quash the cognizance order.

10. Coming to the second point of contention, it is the undisputed fact that the registered letter given by the opposite party was received back with the endorsement "no such addressee in B. 29 Industrial Estate". At this juncture, it is relevant to quote clauses (b) and (c) of the Proviso to section 138 and clauses

(a) and (b) of section 142 of the Act.

138. Dishonour of cheque for insufficiency, etc., of fund in the account:-

X X X X

Provided that nothing contained in this section shall apply unless:-

(a) X X X X

(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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount 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.

142. Cognizance of offences:- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) :-

(a) x x x x

(b) such complaint is made within one month of the date on which the cause of action arises under CI. (c) of the proviso to sec. 138;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under sec. 138.

Mr. Sahu, Learned Counsel for the petitioner, in that context advanced an interesting argument. He argued that cognizance of the offence u/s 138 has been taken by the learned S.D.J.M. overlooking to the fact that cause of action, as proved in section 142 (b) read with clause (c) of the proviso to section 138 of the Act, did not at all arise at this case because the petitioner did not receive the notice as provided in clause (b) of the proviso to section 138 of the Act. In other words, according to by, the cause of action does not arise if the notice is not received by the drawer of such cheque.

11. The above quoted provisions from section 138 makes it clear in clause (b) of the proviso that when a cheque bounces, before instituting a complaint, the payee or the holder in due course of the cheque shall give a written notice to the drawer of the cheque making a demand therein for payment of the said amount of money and such notice within fifteen days from the date of receipt of the information from the bank regarding return of the cheque as unpaid. On the other hand clause (c) of the Proviso to section 138 Provides that cause of action shall accrue in favour of the complainant (i.e. (the payee or the holder in due course of the cheque) if within fifteen days of the receipt of the said notice the drawer of said cheque shall fail to make the payment. Therefore, it is apparent that the payee or- the holder in due course of the cheque has the legal bondage

to give a written notice in a correct address to the drawer of the cheque. Once he discharged that legal obligation, his right to prosecute the offender is not curtailed if the notice validly tendered was not received by the drawer of the cheque. A trick or skilful act or an act of avoiding to receipt such notice in any manner by the drawer of the cheque may successfully, though unholily, may make the notice undelivered upon him and if a literal meaning, in such cases, be given to the term "receipt" then it will have the effect of defeating the purpose of law as well as the right of an innocent victim due to bouncing of the cheque.

12. In the case of M/s. Madan and Company v. Wazir Jaivir Chand. AIR 1999 S.C. 630, while dealing with a similar contention with reference to sections 11 and 12 of (he Jammu and Kashmir Houses and Shops Rent Control Act (34 of 1966). look note of the language used in section 11. In the proviso to section 11 of that Act. it was made obligatory on the part of the landlord, in claiming arrear rents, to serve a notice in registered post on the tenant to pay or deposit the arrears within a period of fifteen days from the date of the receipt of such notice. In that case the registered letter issued by the landlord was returned with the postal endorsement "left without address, returned to the sender". The tenant-appellant thus advanced the defence of non-compliance of the mandatory provision regarding service of notice. In that context the Apex Court taking a pragmatic view held that:-

...It is true that the proviso to Clauses (i)6f section 11 (l)and the proviso to section 12(3) are intended for the protection of the tenant. Nevertheless it will be easy that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insisted that before any amount of rent can be said to be in arrears, a notice has to be served through post. All that a landlord can do to comply with this provision is to post" a prepaid registered letter (acknowledgement due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has to no control over it. It is then presumed to have been delivered to the addressee u/ s 27 of the General Clauses Act.

Their Lordships considering the further argument in that respect, further held that:-

...In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word "served" as "sent by post", correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, we think will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by. the tenant.

(The above quoted passages are from paragraph 6 at pages 633-634),

13. In the case of K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, after referring to the provision in section 27 of the General Clauses Act. the Apex

Court held that:-

24. No doubt section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in section 27 (quoted above) can profitably be imported in a case where the sender has dispatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the send unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.

25. Thus when a notice is returned by the send as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in Clause (d) to the proviso of section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address Note:- In the above quoted passage. Clause (d) should have been correctly printed as "Clause (c)" and that may be read accordingly).

Similar view has been expressed by the Andhra Pradesh High Court, in the case of G.S. Srikanth, MD, Talavadi Rock and Mineral Products, Madras and others Vs. Sri Lakshmi Financiers and Others, . which related to a case of non-return of the postal cover with any acknowledgment. In the case of Bhanwar Lal Vs. State of Rajasthan and Others, a similar view has been expressed by the Rajasthan High Court because notice sent by registered post on correct address was received back unserved as the garage of the accused was found closed and in that case, the Rajasthan High Court has relied upon the ratio in the case of M/s. Madan and Company (supra).

14. In the application u/s 482, Cr.P.C. petitioner has simply stated that the opposite party managed to obtain the above noted endorsement and the envelop by gaining over the postal Peon. In other words he does not dispute the correctness of the address noted on the envelope. The question of gaining over the postal Peon is a factual allegation and it has to be considered only at the time of trial and that to by referring to the evidence, which may be adduced. When the opposite party has prima facie makes out a case of tendering a valid notice in due and correct address, at (his stage, it is not required for this Court to consider the possible defence plea of the petitioner. Hence the impugned order of cognizance is not liable to be disturbed on the aforesaid ground.

15. The other contention of the petitioner that the complaint petition is barred by limitation is on the basis of clause (b) of section 142 read with clause (c) of the proviso to section 138 of the Act. According to him, when the last postal endorsement was made on 5.12.96, the period of 15 days expired on 20.12.96 and cause of action for filing the complaint arose on 21.12.96. So complaint should have been filed within one month from the date i.e. by 20.1.97. Thus, the

complaint, which was filed on 21.11.97 was barred by one day. In that respect, contention of the opposite party is that in view of the provisions in section 12 of the Limitation Act, the day from which such period is to be reckoned is liable to be excluded. Therefore, according to the opposite party the complaint was filed within the period of limitation. In that respect in the case of M/s. Saketh India Limited and others Vs. M/s. India Securities Limited, , a similar contention was raised before the Apex Court. In that case, notice u/s 138 making the demand for payment was served on the accused on 29.9.95. Hence the cause of action for filing the complaint arose from 15.10.95 and the complaint was filed on 15.11.95. Referring to proviso to section 12 of the Limitation Act, section 9 of the General Clauses Act. and the ratio in the case of Haru Das Gupta Vs. The State of West Bengal, the Apex Court held, in the following manner, that the complaint filed on 15.11.95 was within time.

8. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer, expires. Period of 15 days, in the present case, expired on 14th October, 1995. So cause of action for filing complaint would arise from 15th October, 1995. That day (15th October) is to be excluded for counting the period of one month. Complaint is filed on 15th November, 1995. The result would be that the complaint filed on 15th November is within time.

Similar view has been expressed, regarding the computation of the period of limitation, by the Andhra Pradesh High Court in the case of PGM Spinning Ltd., Hyderabad and others Vs. APSFC, Hyderabad and another, . Following the same principle, if the period of limitation shall be counted in this case, then, the complaint petition is found to be in time if 21.12.96 i.e., the date of the cause of action shall be excluded. In other words, when the cause of action in this case arose on 21.12.96, and that date is excluded then the complaint should have been filed within one month commencing from 22.12.96 which expired on 21.1.97. Under such circumstance, the complaint petition is found to be in time.

16. An off shoot argument was advanced by both the parties relating to condonation of delay u/s 5 of the Limitation Act and in that respect, relying on the cases of Janardhan Mohapatra Vs. Saroj Kumar Choudhury, . opposite party contended that the delay, if any, can be condoned u/s 5 of the Limitation Act. On the other hand relying on the cases of Poornasree Agencies Vs. Universal Enterprises and Another, , 1997 Cn.L.J. 4275 (Andhra Pradesh High Court) petitioner argued that delay cannot be condoned. In view of the decisions of this Court in the preceding paragraph that the complaint petition was filed in time, the above contention relating to condonation of delay is not required to be considered in this case.

17. All the three contentions raised by the petitioner having no favour from the facts and law discussed above and the impugned order of cognizance being found to be legally sustainable, this Court refuses to invoke the inherent power as prayed for by the petitioner and as a result the Criminal Misc. case is dismissed. L.C.R. be forthwith sent to the lower court to proceed with the case in accordance with law.