

(2009) 07 DEL CK 0514
In the Delhi High Court
Case No : Criminal L.P. 7 of 2007

Canbank Mutual Fund

APPELLANT

Vs

State of Delhi and Others

RESPONDENT

Date of Decision : 30-07-2009

Acts Referred:

Companies Act, 1956 — Section 434
Criminal Procedure Code, 1973 (CrPC) — Section 378(4)
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2010) 1 Crimes 844

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Jay Savala and Arundhati Das, for the Appellant; S. Kohli, APP, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—Crl.M.A.274/2007

This is an application for condonation of delay in filing the application for leave to appeal u/s 378(4) Cr.P.C.

For the reasons stated in the application, the delay is condoned.

Application stands disposed of.

2. Crl.L.P. 7/2007

This order shall dispose of the criminal leave petition filed by the petitioner for grant of leave to file an appeal u/s 378(4) Cr.P.C. against the order dated 12.09.2006 passed by the Metropolitan Magistrate dismissing his complaint filed u/s 138 read with Section 142 of the Negotiable Instruments Act, 1861 (for short .the N.I. Act.) on the ground that it was beyond limitation.

3. Briefly stating, the facts of this case are:

(i) Respondent No. 1 through its Managing Director accused No. 2/respondent No. 2 at the relevant time agreed to subscribe non-convertible debentures (NCDs) to be issued by the first respondent on private placement basis aggregating to Rs. 100 lakhs. Pending allotment of the said debentures, the complainant/petitioner at the request of the accused released advance subscription against NCDs to the extent of Rs. 90 lakhs. This disbursement was made on 25.05.1991. The accused were to pay on the said advance subscription interest at the rate of 18% per annum on quarterly basis. The amount was released to the first respondent.

(ii) That the interest on the amount lent accumulated and it came to about Rs. 71.62 lakhs as on 30.06.95. The respondents were required to allot the debentures within six months from 25.05.91. The complaint/petitioner asked the respondent to clear the interest. The respondent assured the complainant/petitioner that all the amounts due from them in respect of the loan account would be cleared at the earliest. In pursuance of the said assurance, the respondent gave three cheques to clear the interest partly, the details whereof are as under:

Cheque No.	Date	Drawn on	Amount
113304	15.4.95	UCO Bank, Jugiana	10.00 Lakhs
113305	15.5.95	UCO Bank, Jugiana	10.00 Lakhs
13306	15.6.95	UCO Bank, Jugiana	15.00 lakhs

(iii) That when the said cheque was presented for collection, the complainant/petitioner all the three cheques were returned unpaid by the bankers of the respondent with the remarks "insufficient funds".

The complainant/petitioner contacted the respondent within 2/3 days of the dishonour at its Delhi office and informed about the dishonour of the said cheques. It is alleged that the respondent requested the complainant/petitioner to wait for some time so that arrangements may be made to clear the payment against the said cheques. The complainant/petitioner also sent letters to the respondent at its Jugiana address informing about the dishonour of the three cheques. The complainant/petitioner waited for a few days since the complainant/petitioner did not want to spoil the relations with the respondent. After some time, the respondent requested through its Delhi Office to represent the said cheques again for collection and assured the complainant/petitioner that the said cheques shall be cleared this time.

(iv) That the said cheques were again presented for clearing and collection but all the three cheques were against returned unpaid with the remarks "insufficient funds" and the intimation to this effect was received by the complainant/petitioner on 10.8.95.

The complainant then sent a registered notice dated 24.8.95 to the accused, u/s 138 of the Negotiable Instruments Act as amended upto date whereby the accused was requested to clear the outstanding dues within 15 days from the date of receipt of the notice failing which they were notified that necessary action under the amended provisions of the Negotiable Instruments Act would be taken

against them. The respondent has failed to clear the outstandings or to pay the amount of the cheques issued by them, which have been dishonoured.

(vi) after receiving the information of the dishonour of the cheques complainant/petitioner issued a notice under the Act on 29.08.1995. However, despite receipt of the notice the outstanding amounts and the cheques were not cleared and thus they filed a complaint.

4. After referring to the judgment delivered in the case of Padmini Polymers Ltd. Vs. Unit Trust of India, but drawing a distinction in the light of the judgment delivered by the Apex Court in the case of Central Bank of India and Anr. v. Saxons Farms and Ors. 1999 Cri. L.J. 4571, the Metropolitan Magistrate dismissed the complaint by holding that in the present case the complaint was beyond limitation. The relevant observation made by the Metropolitan Magistrate, which quotes the judgment delivered by the Apex Court in this regard, is reproduced hereunder:

It has been held by the Hon''ble Supreme Court that on the dishonour of the cheque expression in the notice that .kindly arrange to make the payment to avoid the unpleasant action of my client. is clear demand of payment as required under Clause (b) of proviso to Section 138 N.I. Act. It was further observed that notice indicating intention of drawee to take action under provisions of Penal Code by informing police in addition to taking of legal action then it cannot be said that there was no valid notice u/s 138 N.I. Act. It was further observed in that case by the Hon''ble Supreme court as follows:

Though, no form of notice is prescribed in the above Clause (b) the requirement is that notice shall be given in writing within fifteen days of receipt of information from the bank regarding return of the cheques as unpaid and in the notice a demand for payment of the amount of the cheque has to be made.

The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect honest drawer. Service of notice of demand in Clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint u/s 138 of the Act. In the present appeals there is no dispute that notices were in writing and these were sent within fifteen days of receipt of information by the appellant bank regarding return of cheques as unpaid.

5. The Metropolitan Magistrate has also relied upon the judgment delivered in the case of Malook Chand Agroils Ltd. and Anr. v. Prakash Industries Ltd. 2004 (2) DCR 525, which is based upon the judgment of the Apex Court in Central Bank of India's case (supra). The conclusion drawn by the Magistrate finds mention in para 19 of the judgment, wherein it has been held:

19. Therefore, in the present case the only question which remains to be determined is whether the letters Ex.CW1/DX4, Ex.CW1/DX1 and CW1/DX2 - CW1/DX3 sent by the complainant to the accused therein a demand made by the complainant to the accused therein a demand made by the complainant as

envisaged by the Sub-clause (b) of Section 138 N.I. Act. Perusal of the letter dt. 26.04.95, Ex.CW1/DX4 shows that it was brought to the notice of the accused that the cheque No. 113304 dt. 15.04.95 for Rs. 10 lakhs issued by the complainant was dishonoured with the reason funds insufficient and it was mentioned therein for making the arrangements of the payment and to send the same to the complainant failing which the complainant would be constrained to invoke the relevant section of the Negotiable Instrument Act. Likewise in the letters dt. 08.06.95 Ex.CW1/DX1 and 04.07.95 Ex.CW1/DX2 and Ex.CW1/DX3, the dishonouring of the other two cheques was brought to the notice of the accused and also for making the arrangements and for remit the funds otherwise to face legal action as per relevant section of the Negotiable Instrument Act was sent. Therefore on the perusal of the above said letters there was a clear demand made by the complainant of the three cheques in question as envisaged by Sub-Clause (b) of Section 138 N.I. Act as no form of notice is prescribed u/s 138 of the N.I. Act as held in Central Bank of India v. Saxons Farms by the Hon''ble Supreme Court and what is required that that a demand of payment of the amount of money is to be given by a notice in writing to the drawer of the cheque within 15 days of the receipt of the information regarding dishonouring of the cheques.

6. The Metropolitan Magistrate also observed:

21. Therefore in view of the law laid down in the above said case by the Hon''ble Supreme Court of India, the cause of action in the present case to file the complaint would have been arisen after the expiry of 15 days time of the receipt of the demand letters Ex.CW1/DX4, Ex.CW1/DX1 and CW1/DX2 - CW1/DX3 Consequently the period of limitation would start from arising of the cause of action and the present complaint filed on 29.09.95 is beyond the period of limitation. Therefore, as per Section 142 of the N.I. Act the present complaint with regard to the cheques in question is barred by limitation.

22. Therefore, in view of my above discussions, I hold that the present case is barred by limitation as per Section 142 of the N.I. Act and the accused No. 1 and 2 are hereby acquitted. Bail bond of the accused No. 2 is cancelled. Surety is discharged. File be consigned to record room.

7. The petitioner has assailed the aforesaid order before this Court by submitting that the complaint filed by him was not barred by limitation inasmuch as the letters, Ex.CW1/DX, CW1/DX1 and CW1/DX2, copies whereof are available at pages 97-99, were not the demands u/s 138(b) of the N.I. Act. It has been submitted that the aforesaid letters were only the letters informing respondents about the dishonour of cheque and on the request of the respondent the cheques were again presented as it was assured that the same will be honoured on presentation. It is only after the bank of the petitioner informed the petitioner on 24.08.1995 that the cheques were dishonoured again, a legal notice dated 29.08.95 was sent by the petitioner to respondent Nos. 2 and 3 and since the payment was not forthcoming, the complaint was filed u/s 138 N.I. Act on

29.09.95.

8. The learned Counsel for the petitioner has also relied upon the following judgments:

1. Rahul Builders Vs. Arihant Fertilizers and Chemical and Another,
2. K.R. Indira Vs. Dr. G. Adinarayana,
3. K.A. Abdul Majeed Vs. The State of Kerala and Others,
4. Dr. P. Vijayakumar v. Tata Finance Ltd. 2005 126 912.
5. Padmini Polymers Ltd. Vs. Unit Trust of India, .
6. M/s. Baroda Ferro Alloys and Industries Limited and others Vs. M/s. Span Overseas (Pvt.) Ltd. and another,
7. Central Bank of India and Anr. v. Saxons Farms and Ors. 1999 Cri. L.J. 4571.

9. In Rahul Builders Case (supra) the communication sent by the complainant was not taken as a notice within the meaning of Section 138 of the N.I. Act because the notice served upon the accused was not calling upon him to make the payment of cheque within 15 days from the date of the receipt thereof. One other reason which has prevailed before the Court in that case was that the cheque amount was different from the alleged loan amount but the demand was made not of the cheque amount but of the loan amount.

10. In the case of K.R. Indira (supra) it was the same position which again is not the factual position of the present case.

11. In Uniplas India Ltd."s case (supra), the Apex Court has discussed as to how the cause of action arises for the purpose of filing a complaint u/s 138 of the N.I. Act. The discussion in that case is reproduced hereunder:

9. If any notice is issued u/s 434 of the Companies Act within 15 days of the information from the bank regarding return of the cheque drawn by a company as unpaid, such a notice would as well be good enough under Clause (b) of the proviso to Section 138 of the NI Act. This Court has held in Sadanandan Bhadran that a complainant cannot create successive causes of action with the same cheque. If no complaint is filed on the first cause of action the payee is disentitled to create another cause of action to file a complaint for the purpose of launching a prosecution on it. Para 6 of the said decision contains the thrust of the reasoning. After referring to the four factual premises necessary to concatenate into a cause of action M.K. Mukherjee, J., has said thus: (SCC p. 519, para 6)

If we were to proceed on the basis of the generic meaning of the term "cause of action", certainly each of the above facts would constitute a part of the cause of action but then it is significant to note that Clause (b) of Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the

cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. The reason behind giving such a restrictive meaning is not far to seek. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under Clause (c) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint u/s 142 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.

12. This judgment again is of no consequence in the facts of this case.

13. The case of M/s Padmini Polymers Ltd. (supra) has been taken note of by the Apex Court in the case of Central Bank of India (supra) and in another judgment delivered in the case of Sadanandan Bhadrans Vs. Madhavan Sunil Kumar,

14. For the purpose of appreciating the facts of this case, it would be appropriate to take note of the language of the letters, which have been sent on behalf of the petitioner at the time of first dishonour of the cheque:

Ex.CW1/DX

The Managing Director,

M/s. Thapar Foods Ltd.,

V&P.O. Judgiana, G.T. Road,

Ludhiana - 141 120

Dear Sir,

Sub: Cheque issued towards part payment of overdue interest on NCD placed with your company.

Ref: Cheque No. 113304, dt. 15.04.95 for Rs. 10.00 lacs on UCO Bank, Jugiana, Dist. Ludhiana.

Kindly recall the series of discussions we have been having with Delhi office and your office as well as on serious irregularities like persisting overdue interest and pending securitisation. As the response from your end has not been encouraging the divisional manager from Delhi along with DM of Bombay called on your office personally and you had issued three post dated cheques amounting to Rs. 35 lacs of which above referred cheque was one.

We are really perturbed to inform you that your banker had returned the cheque not once but twice, for the reason ?FUNDS INSUFFICIENT?. We, therefore, hereby request you to remit the funds immediately, failing which we would be constrained to invoke the relevant section of the negotiable instrument act. Kindly send your remittance by way of demand draft made on our Bombay office in favour of CANBANK MUTUAL FUND.

Please keep us abreast of the progress in creating the security in favour of the DEBENTURE TRUSTEE.

Yours faithfully,

Authorized signatory.

Ex.CW1/DX1

The Managing Director,

M/s. Thapar Foods Ltd.

V&P.O Jugiana, G.T. Road

Ludhiana - 141 120

Sir,

Sub: Cheque issued towards part payment of overdue interest on NCD placed with your company.

Ref: Cheque No. 113305 dt. 15.05.95 for Rs. 10.00 lacs on UCO Bank, Jugiana, Dist. Ludhiana.

This is in continuation to our letter DCIMS/Cr.T2/919/95 dated 24.05.95. We are really perturbed to inform you that the above cheque has also been returned by your banker, for the reason ?FUNDS INSUFFICIENT?.

We, therefore, hereby request you to remit the funds immediately, failing which we would be constrained to invoke the relevant section of the negotiable instrument act. Kindly send you remittance by way of demand draft made on our Bombay office in favour of CANBANK MUTUAL FUND.

Please keep us abreast of the progress in creating the security in favour of the DEBENTURE TRUSTEE.

Yours faithfully,

Authorized signatory.

Ex.CW1/DX2

The Managing Director,

M/s. Thapar Food Ltd.

V&P.O. Jugiana, G.T. Road,

Ludhiana - 141 120

Dear Sir,

Sub: Cheque issued towards part payment of overdue interest on NCD placed with your company.

Ref: cheque No. 113306, dt. 15.06.95 for Rs. 15.00 lacs on UCO Bank, Jugiana, Dist. Ludhiana.

This is in continuation to our letter dt. 08.06.95. We are very perturbed to inform you that your above cheque has also been returned by your banker, for the reason ?FUNDS INSUFFICIENT?.

We therefore hereby request you to remit the funds immediately, failing which we would be constrained to invoke the relevant section of the Negotiable Instruments Act. Kindly send you remittance by way of demand draft made on CUT Bombay office in favour of CANBANK MUTUAL FUND.

Please keep us abreast of the progress in creating the security in favour of DEBENTURE TRUSTEE.

Yours faithfully,

Authorized signatory.

15. A perusal of the aforesaid letters reveals that the complainant wanted the notice to intimate the following facts i.e.

(i) Dishonour of the cheque issued by the respondents, giving full particulars of the cheque which was dishonoured

(ii) Informing the reasons for the dishonour of cheque.

(iii) Intimating the respondents that in the event of not remitting the funds immediately in view of the dishonoured cheques, they would be constrained to invoke the relevant Section of the N.I. Act.

16. There is no dispute that no complaint was filed pursuant to the issuance of these letters within the time prescribed under the N.I. Act.

17. It may now be appropriate to also take note of the observations made by the Apex Court in the case of Central Bank of India (supra), which explains as to how the communication issued by the beneficiary of a cheque, which has been dishonoured, can be considered as notice u/s 138 of the N.I. Act and what is the period of limitation for filing a complaint in such a case after the dishonor of a cheque:

4. We have heard the learned Counsel for the parties and the short question to be decided is whether there were valid notices as required under Clause (b) of the proviso to Section 138 of the Act.

5. We extract below the relevant portion of the notices which is same in both the notices:

The bouncing of the two cheques is a most serious matter. The said act of issuance of cheques knowing fully well that the same shall not be paid statutes (constitutes) an offence u/s 138 of the Negotiable Instruments Act. As per the

provisions of this Act my client through this notice informs you that my client shall represent the two cheques again and if the same are returned unpaid, my client shall report the matter to the Police for initiating appropriate criminal action against you all. My client further reserves the right to file criminal case against all of you for the non-payment of the cheques in question and details given above. Kindly arrange to make the payment of the cheques if you intend to avoid the unpleasant action of my client.

6. 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 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, such person shall be deemed to have committed an offence under the above section. According to the proviso to the said section unless the three clauses mentioned therein are fulfilled the provisions of the section shall not apply. In these appeals we are concerned with Clause (b) which is quoted below:

138(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.

7. Though, no form of notice is prescribed in the above Clause (b) the requirement is that notice shall be given in writing within fifteen days of receipt of information from the bank regarding return of the cheques as unpaid and in the notice a demand for payment of the amount of the cheque has to be made.

8. The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect honest drawer. Service of notice of demand in Clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint u/s 138 of the Act. In the present appeals there is no dispute that notices were in writing and these were sent within fifteen days of receipt of information by the appellant- bank regarding return of cheques as unpaid. Therefore, only question to be examined whether in the notice there was a demand for payment.

9. The last line to the portion of notice extracted above reads as under:

Kindly arrange to make the payment to avoid the unpleasant action of my client.

In our opinion it is a clear demand as required under Clause (b) of Section 138.

18. After taking into consideration the last line as incorporated in paragraph 9 of the aforesaid judgment, the Apex Court considered the communication sent by the complainant in that case as a valid notice within the meaning of Section 138 of the N.I. Act.

19. In these circumstances, I am of the view that the case of the petitioner is squarely covered by the case of Central Bank of India (supra), wherein it has been observed:

10. Regarding demand for payment, the High Court was of the opinion that "the intention in the notice was that cheque was being presented again and the applicant/petitioner should arrange the payment on representation of the cheque". The High Court overlooked the last line of notice as indicated above and, therefore, erred in holding that there was no demand of payment.

11. A cheque can be presented any number of times to the bank within the period of its validity. In view of the above, appellant-bank had a legal right to represent the cheques to the bank as indicated in the notices and, therefore, respondents could have arranged payment either through bank or directly to the appellant bank. By not doing so the provision of Section 138 is clearly attracted.

12. In the notices it was stated that on re-presentation of the cheques if returned unpaid, the appellant Bank would report the matter to the police for initiating appropriate criminal action against the respondents. Drawing our attention to the above statement in the notices it is urged on behalf of the respondents that the intention of the appellant Bank was to start police investigation and not to file complaint u/s 138 of the Act.

13. u/s 142 of the Act, the court can take cognizance of an offence punishable u/s 138 only on a complaint in writing made by the payee. Therefore, the police could not have started investigation u/s 138 of the Act. But if a cheque is dishonoured the drawer may expose himself to prosecution under various sections of the Indian Penal Code which are cognizable and the police could take up investigation. What was indicated in the notice was that in addition to the legal action by the appellant Bank under the Act, option was kept open for taking action against the respondents under the provisions of the Indian Penal Code by informing the police. Therefore, the contention of learned Counsel for the respondents has no force.

14. For the reasons stated above we hold that the notices were valid and proper and, therefore, the High Court erred in holding that there was no proper notice for payment as required u/s 138 of the Act.

20. In this case also all the three ingredients i.e. intimation about the return of cheque as unpaid; giving a chance to the drawer of the cheque to rectify his omission and also to protect honest drawee; and, the intimation to drawer about the legal provisions for invoking the relevant sections of the N.I. Act, are implicit in all the three letters i.e. Ex.CW1/DX dated 24.05.1995, Ex.CW1/DX2 dated 8.6.1995 and Ex.CW1/DX3 dated 4.7.1995, which makes them valid notices within the meaning of Section 138(b) of the N.I. Act.

21. This view has been reiterated by this Court in Crl. M.C. 5538- 39/2005 titled as Delhi Automobiles Ltd. and Anr. v. Mohan Exports India Ltd. decided on

4.3.2009.

22. Consequently, I am of the view that the complaint filed by the petitioner was rightly dismissed by the Metropolitan Magistrate as being barred by limitation. In these circumstances, there is no occasion to grant leave to file appeal. Consequently, Crl.L.P.7/2007 is dismissed. The effect of this is that the appeal also stands dismissed. TCR, if any, be sent back forthwith along with a copy of this judgment.