

(2009) 03 DEL CK 0282

In the Delhi High Court

Case No : Criminal M.C. No. 3214 of 2007

D. Babu

APPELLANT

Vs

Bhartia Industries Ltd.

RESPONDENT

Date of Decision : 04-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142

Citation : (2009) 4 CivCC 684 : (2009) 5 ILR Delhi 262 : (2009) 156 PLR 40 :
(2010) 6 RCR(Criminal) 1213

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Satish Tamta and Ruchi Kapur, for the Appellant; Tuheen Sinha, for the Respondent

Judgement

G.S. Sistani, J.—By way of the present petition filed u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as, "Cr.P.C."), petitioner seeks quashing of the criminal complaint titled as "Bhartia Industries Limited v. D. Babu" filed by the respondent u/s 138 of the Negotiable Instruments Act in the Court of learned Metropolitan Magistrate, Patiala House.

2. The facts of the case, as per the petition are as under.

3. The petitioner was appointed as an authorized systems integrator of the products of respondent. As per Clause 3.2(c) of the agreement (to remain in force till 31.3.2007) entered into between the parties, no order of the petitioner was to be considered for execution by the respondent till the time it was accompanied by a cheque of the ordered amount.

4. On 24.07.2006, the petitioner placed an order worth Rs. 34,880/- and issued a blank cheque numbered 006795 for the said order on the instruction of the respondent that it was the usual practice in the industry and that subject to availability of the ordered items, they used to fill the cheque amount and present

it for collection. On 06.09.2006, the goods ordered, were sent vide invoice No. 2006 801 973.

5. Learned Counsel for the petitioner submits that the respondent should have encashed the cheque No. 006795 for Rs. 34,880/-, but they retained the cheque with them intentionally and fraudulently. Subsequently, the respondent vide invoice No. 2006802354 sent more goods worth Rs. 1,05,792. This transaction was offered by the respondent on its own to the petitioner, which however was not accepted by the petitioner and is not binding on the petitioner. The petitioner also sent an e-mail to the respondent and requested that AC Drives be taken back as neither he had placed the order nor he was in a position to stock the material.

6. However, the respondent intentionally and fraudulently not only filled the blank cheque in question against invoice No. 2006801873 worth Rs. 34,880 but also filled it for invoice No. 20060802354 worth Rs. 1,05,792/-, making the total amount of the cheque as Rs. 1,40,672. The cheque in question was obviously dishonoured for the reasons "funds insufficient. because the cheque was never intended to be for Rs. 1,40,672/- by the petitioner.

7. Learned Counsel for the petitioner submits that thereafter, the respondent sent a demand letter dated 26.03.2007, calling upon the petitioner to pay the amount of the cheque. However, the respondent took no action pursuant to the said demand letter and presented the cheque again, which was dishonoured for the second time on 22.05.2007. Thereafter the respondent issued a second demand Notice dated 04.06.2007 addressed to the petitioner herein. The petitioner replied to the Notice through his counsel on 19.06.2007 and also made a counter claim vide communication dated 26.07.2007.

8. Learned Counsel for the petitioner further submits that the respondent has suppressed the factum of the earlier demand letter dated 26.03.2007 in the complaint filed u/s 138 of the Negotiable Instruments Act which is based on the 2nd Legal Notice dated 04.06.2007. The learned Metropolitan Magistrate has summoned the petitioner.

9. Learned Counsel for the petitioner submits that the petitioner does not owe Rs. 1,40,672/- (Rupees One Lakh Forty Thousand, Six Hundred and Seventy Two only) to the respondent. And owes only Rs. 34,880/- (Rupees Thirty Four Thousand Eight Hundred and Eighty only) to the respondent. The said cheque No. 006795 was issued in the month of July, 2006 towards the transaction and the petitioner maintained sufficient funds to honour the same. But the respondent with illegal motive and malafide intention to make unlawful gain did not present the cheque within reasonable time for collection but presented the same only in the month of December, 2006, which itself clearly shows the respondent misused the cheque to his advantage and disadvantage of this petitioner. The respondent has wantonly, maliciously and with criminal intention suppressed the first date of presentation of cheque and issue of notice dated

26.03.2007. Moreover, in the light of Legal Notice dated 26.07.2007, the petitioner has a counter claim of Rs. 1,74,961/- against the respondent and nothing is due or payable by the petitioner to the respondent.

10. Learned Counsel for the petitioner seeks quashing of the complaint primarily on the ground that the complaint has been filed beyond the period of limitation and hence is not maintainable, thus the summoning order is bad in law. Learned Counsel submits that as per the complaint, petitioner herein had issued Cheque No. 006795, dated 03.12.2006 amounting to Rs. 1,40,672 drawn on Vijaya Bank, Tirupur, Tamil Nadu. It is stated in the complaint that the cheque, in question, on being deposited, was dishonoured and after which a legal notice dated 04.06.2007 under Sections 138 and 141 of the Negotiable Instruments Act was issued. It is also stated that this legal notice was, in fact, a notice of demand and the limitation is to begin from this date. Learned Counsel for the petitioner in support of his contentions has relied upon the case of *Uniplas India Ltd. v. State (Govt. of NCT of Delhi)* reported at 1999 (2) JCC 418 (Delhi) as well as in the case of *Puri International (P) Ltd. v. Ram Lal Bansiwali & Sons*, reported at 135 (2006) DLT 103.

11. Learned Counsel for the respondent on the other hand has opposed this petition primarily on two grounds. While it is not denied that an earlier communication dated 26.3.2007 was issued to the petitioner it is submitted by learned Counsel for the respondent that the communication dated 26.03.2007 is not a notice of demand in the eyes of law. And secondly, even assuming without admitting that the communication is a notice of demand, the complainant relies upon the Proviso to Section 142(b) of the Negotiable Instruments Act for condonation of delay. The same is reproduced hereunder:

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

(a)

(b) Such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138: Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c)

12. Learned Counsel for the respondent also submits that the principles for the quashing of criminal complaint are well-settled and a complaint or an FIR can be quashed by the High Court in the exercise of its jurisdiction u/s 482 of the Cr.P.C. only when the complaint on the face of it does not disclose any offence.

13. The respondent submits that in any case, the defence raised is palpably false. Whether the goods in question were sent on the demand and order of the petitioner or whether the goods were sent without the order, is a question of fact

to be decided on evidence and cannot be the reason for quashing of the complaint.

14. It is submitted that admittedly the petitioner did not reply to the letter dated 26.03.2007. On receiving the said letter, the petitioner immediately rushed to the respondent, requesting the respondent to give him sometime to make arrangement for sufficient funds. It was only at the request of the petitioner that the complaint was not filed by the respondent pursuant to the said letter and there is virtually a gap of two months between the first presentation of cheque on or about 2nd March, 2007, and the second presentation on or about 22nd May, 2007. This gap of two months between the two presentations coupled with the admitted fact that the petitioner did not reply to the letter dated 26.03.2007 lends sufficient credence to the case of the respondent that it was only at the request of the petitioner that the respondent did not rush forward to file a complaint against the petitioner pursuant to the letter dated 26.03.2007. The proviso to Section 142(b) enables the court to take cognizance even after the prescribed period of one month, if the complainant satisfies the court that he had sufficient cause for not making the complaint within such period. It is further submitted that admittedly the letter dated 26.03.2007 had been received by the petitioner. If the defence now put forward is true, then nothing prevented the petitioner to reply to the said letter dated 26.03.2007 raising these very pleas which are being pressed into service for quashing the complaint. Learned Counsel submits that no ground is made out for quashing the complaint.

15. I have heard learned Counsel for the parties, who have taken me through the records of this case. The factum of issuance of the communication dated 26.03.2007 has not been denied. The first issue that arises for consideration is whether the communication dated 26.03.2007, sent by the respondent to the petitioner, constitutes a notice of demand within the meaning of proviso (b) to Section 138 of the Negotiable Instruments Act, 1881 or not.

16. In the case of *Krishna Exports v. Raju Das* reported at (2004) 13 SCC 498 it was held:

3. ...the learned Counsel for the respondent submits that the first notice dated 15-2-1995 is really not a notice contemplated by Clause (c) of the proviso to Section 138 and it cannot be construed to have given rise to a cause of action to file the complaint. According to the learned Counsel for the respondent, the earlier notice was only in the nature of a communication which does not spell out in clear terms a demand to make the payment. We find it difficult to accept the contention. On a reading of the letter dated 15-2-1995, it is plainly clear that the respondent required immediate payment of the amount of cheque to be arranged failing which he threatened to take legal action in the matter. The said letter certainly qualifies itself as a notice within the contemplation of Clause (c) of the proviso to Section 138. We are, therefore, of the view that the learned Magistrate should not have taken cognizance of the complaint after the expiry of the time-limit prescribed by Clause (b) of Section 142 of the Act. The proceedings taking

cognizance and issuance of the process are, therefore, liable to be quashed.

17. It would be useful to reproduce the communication dated 26.03.2007:

BHARTIA INDUSTRIES LIMITED

Our ref: CBE/D-09

March 26, 2007

M/s Tesa

No.15, Ram Nagar,

1 Street,

Tripur 641 602

Subject: Bounced cheque No. 006795 dated

03/12/2006 for Rs. 140672/- drawn on Vijaya Bank.

Dear Sirs,

Kindly note that your above cited has been returned by the Bank with the remarks "Funds insufficient". Copy of Bank advice is enclosed for your ready reference.

We would request you to kindly send us the payment by DD for Rs. 143585/- drawn in favour of Bhartia Industries Limited, payable at Coimbatore, as per details given below:

Cheque amount : Rs.140672.00 Penalty 2% : Rs. 2813.00 Bank charges : Rs. 100.00 _____ Rs.143585.00 _____

for your ready reference, we reproduce hereinunder our last/current year policy for the bounced cheques:

If the cheque of the dealer bounces once in the financial year, than the dealer will make good by giving a demand draft of the total amount due along with the penalty of 1.0% of the cheque amount within 5 days of dishonour of cheque. The dealer shall also make good for the bank charges and interes levided in such cases.

If the cheque of the same dealer bounces more than once in the financial year then the dealer will make good by giving a demand draft of the total amount due along with the penalty of 2.0% of the cheque amount within 5 days of dishonour of cheque to ensure the resumption of supplies from the manufacturer. The dealer shall also make good for the bank charges and interest levied in such cases.

Manufacturer reserves the right to initiate legal action in case the payment along with stated penalty and bank charges is not received within 5 days of cheque

dishonour.

Thanking you,

Yours faithfully,

Bhartia Industries Limited

KK Raghu Verma

Techno Commercial Officer

Encls: As above.

87, Dr. Nanjappa Road, Coimbatore, 641018

Ph.+91(0422) 2305311 Fax.2302599 web site

www.bchindia.com

18. A bare reading of this communication dated 26.03.2007 would show that it has been addressed to the petitioner herein. The number of the bounced cheque, date of the said cheque, amount and the name of the bank finds mention in this communication. It was also brought to the notice of the addressee that the said cheque has been returned with the remarks "Insufficient Funds". A request was made to make the payment, by way of demand draft, of the total amount, due together with penalty @ 2.0 percent of the cheque amount and bank charges. What is most relevant is that in the concluding portion of this communication, the respondent has stated that he reserves his right to initiate legal action in case the payment along with the penalty and bank charges are not received within 05 days of cheque dishonour. A reading of the communication dated 26.03.2007 would show that all the ingredients of a notice of demand are made out.

19. As per Clause (c) of the proviso to Section 138 of the Negotiable Instruments Act, 1881, after a demand notice is served, the drawer of the cheque is required to make the payment of the said amount of money 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. And if the drawer fails to make the requisite payment, then a cause of action arises in favour of the payee or the holder in due course of the cheque, as the case may be. However, Section 142 of the Negotiable Instruments Act, 1881, lays certain conditions before which a court can take cognizance of any offence punishable u/s 138, inter alia a) the complaint has to be in writing, made by the payee or, as the case may be, by the holder in due course of the cheque; b) such a complaint should be made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138. In the case before me, as already held above, the communication dated 26.03.2007 addressed by the respondent to the petitioner, was indeed a demand notice in terms of Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881. Thus the respondent should have filed his

complaint before the competent court within one month of the date when cause of action first arose in his favour. However, the respondent took no action and once again presented the cheque to the bank, which was dishonoured and the respondent sent a second demand notice dated 04.06.2007, to the petitioner. In the case of M/s. Uniplas India Ltd. and Others Vs. State (Govt. of NCT of Delhi) and Another, it was held that a complainant cannot create successive causes of action with the same cheque. Relevant portion of the judgment is reproduced hereunder:

9. ...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.

10. The said decision was followed by this Court in *M/s. Sil Import, USA Vs. M/s. Exim Aides Silk Exporters, Bangalore*,

11. One of the indispensable factors to form the cause of action envisaged in Section 138 of the NI Act is contained in Clause (b) of the proviso to that section. It involves the making of a demand 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". If no such notice is given within the said period of 15 days, no cause of action could have been created at all.

12. Thus, it is well-nigh 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....

20. Section 142(b), I am afraid cannot be relied upon by the respondent, as neither the respondent has invoked this provision nor any application has been

filed in the appropriate court. In fact the respondent in his complaint has failed to disclose that communication dated 26.3.2007 was issued to the petitioner herein. Besides this petitioner has not filed any application before the concerned court to seek condonation of delay and thus not having taken recourse to the provisions of Section 141(b), no benefit can be derived by respondent therefrom.

21. Further, the respondent cannot take a contradictory stand, in as much as, on the one hand it is submitted by him that the first communication is not a notice in the eyes of law and the second plea which is sought to be raised is that the Court can extend the time. For the reasons aforesaid, I find that after the expiry of fifteen days of serving a demand notice dated 26.03.2007, to the petitioner, the period of limitation (one month) started running. Thus the respondent failed to file his complaint within the period of limitation prescribed under the statute. No doubt the legislature in its wisdom has amended Section 142(b) and added a proviso thereto, whereby the Court can take cognizance of the offence beyond the period of limitation provided the complainant satisfies the Court that he had sufficient cause for not making the complaint within the stipulated time period. However, there is nothing on record to show that any application was made for condonation of delay or any attempt was made to satisfy the Court that there was sufficient cause for not making the complaint within the stipulated time period.

22. In view of the aforesaid, I find that the criminal complaint titled as "Bhartia Industries Limited v. D. Babu" filed by the respondent u/s 138 of the Negotiable Instruments Act in the Court of learned Metropolitan Magistrate, Patiala House, has been filed beyond the period of limitation. The same is accordingly quashed.

23. Petition stands disposed of.