
(2007) 01 JH CK 0019

In the Jharkhand High Court

Case No : Criminal M.P. No. 651 of 2006

Gautam Verma and Others

APPELLANT

Vs

The State of Jharkhand and Basanti Devi

RESPONDENT

Date of Decision : 12-01-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 323

Citation : (2008) 1 BC 248 : (2007) 2 BLJR 1989 : (2007) 3 JCR 39

Hon'ble Judges : Dilip kumar sinha, J

Bench : Single Bench

Advocate : Sunil Kumar Sinha, for the Appellant; Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

D.K. Sinha, J.—The present petition u/s 482 of the Code of Criminal Procedure has been filed by the petitioners herein for quashment of the order impugned dated 15.12.2006 passed by the S.D.J.M. Dumka in P.C.R. No. 633 of 2005 whereby and whereunder the cognizance has been taken against the petitioners under Sections 323/504 of the Indian Penal Code as well as u/s 138 of the Negotiable Instrument Act 1881 (Herein after referred as N.I. Act) and also for quashment of the entire criminal prosecution against the petitioners.

2. The brief fact of the case is that the opposite party No. 2. Basanti Devi brought about a complaint case vide P.C.R. No. 633 of 2005 stating inter alia that her husband was working as Mozdoor in Ishika Cold Storage owned and possessed by the petitioner No. 1 Gautam Verma and her husband was killed on 24.9.2005. Subsequently dead body of her husband was thrown in a ditch near Telia Bandh and in this connection Saraiya Hat Police Station Case No. 141 of 2005 was registered u/s 304(A) and 201 of the Indian Penal Code against the accused persons. It was alleged in the complaint petition that the petitioner No.

1 Gautam Verma after entering into compromise with the complainant in the said police case issued three post dated cheques of Rs. 50,000/- in the name of three minor daughters of the complainant. Two of the above cheques Bearing Mo. 778096 and 778097 were returned from the bank with the endorsement "stop payment" by the drawer. A pleader's notice was given to the petitioner No. 1 Gautam Verma on 9.11.2005 under registered cover which was returned. Third cheque No. 778098 of Rs. 50,000/- was issued on 21.11.2005 which was returned by the bank management with the advise to contact drawer for which a separate notice was given under registered cover on 24.11.2005. The opposite party No. 2/complainant further alleged that when she called on the owner of Ishika Cold Storage Babudih on 15.12.2005 all the accused persons (petitioners) variously armed with sticks assaulted and abused her. It was finally alleged that all the petitioners with deceptive intention issued the aforesaid cheques in the name of her three daughters which could not be honoured.

3. The learned Counsel appearing on behalf of the petitioners submitted that after institution of Sharaiyahat P.S. Case No. 141 of 2005 against the petitioners, the police entered into investigation and it was found that Kishori Mandal i.e. husband of the complainant died due to Asphyxia as a result of drowning and no mark of external injury was found on the person of Kishori Mandal and on the basis of which final form was submitted after investigation of case by the police exonerating the criminal liability of the petitioners. The learned Counsel submitted that it would not be out of place to mention that a counter case was also instituted giving rise to Sharaiyahit P.S. Case No. 141 of 2005 against the witnesses of the complaint case as well as many other total 16 in number for the offence u/s 147/148/149/452/325/307/427/435/379 of the Indian Penal Code for the attempts made by them to commit murder of the petitioner No. 1 Gautam Verma after attacking on his Cold Storage and in the same sequence they damaged Santro Car and scooter parked in the premises of the Cold storage. The petitioner No. 1 was assaulted by the unruly mob as a result of which he was referred to Mumbai for urgent operation of his knee. On the information given by the petitioner No. 1 and others, the police arrived and attempted to pacify the unruly mob and on the advise of the police, the petitioner No. 1 issued three post dated account payee cheques of Rs. 50,000/- in the name of the daughters of the deceased Kishori Mandal and even after accepting the cheques the violent mob went on rampage of the business premises. As a matter of fact the cheques were issued under coercion and threat for the protection of life and property of the petitioner No. 1 and from being more assaulted. Therefore, the petitioner No. 2 being the partner sent a letter to the Manager of Bank not to honour the cheques as it were issued under threat and coercion. The complainant's witnesses were examined in course of the enquiry u/s 202 of Cr.P.C. and they unanimously said that the present complaint was brought about to put pressure on the petitioners to make payment but the learned S.D.J.M. Dumka took cognizance of the offence under Sections 323/504 of the Indian Penal Code as well as u/s 138 of N.I. Act. against all the petitioners erroneously in absence of

prima facie case and without application of judicial mind.

4. Advancing his arguments the learned Counsel submitted that the petitioner No. 1 does not owe any liability to make payment of the compensation to the family of the deceased as Kishori Mandal did not die during course of employment under him rather cause of death in the post mortem of Kishori Mandal was found due to his drowning and as such under the explanation of Section 138 of the N.I. Act the alleged liability is not legally enforceable and hence no case u/s 138 N.I. Act is made out against the petitioners. The learned Counsel submitted that no notice as required under the proviso (b) of Section 138 of N.I. Act has been served upon the petitioner No. 1 nor the complainant brought the alleged notice on record claimed to have been sent to the petitioner No. 1, in course of enquiry u/s 202 Cr.P.C. and as such the impugned order taking cognizance of the offence u/s 138 N.I. Act is unsustainable and is fit to be quashed.

5. The learned Counsel for the petitioners submitted that the petitioner No. 1 has admitted that cheques were issued by him under pressure and coercion and by none else and as such no case u/s 138 N.I. Act is made out against the rest of the petitioners and therefore, the cognizance of the offence u/s 138 of the N.I. Act against remaining petitioners is nothing but misuse of process of the court. As a matter of fact account payee cheques were issued in the name of the daughters of the complainant but it was nowhere stated by the complainant or the witnesses that those cheques were presented in the bank for encashment in the account of daughters of the complainant nor the memo of dishonour of the cheques issued by the bank has been brought on record in the complaint case and the learned S.D.J.M. on wrong notion took cognizance of the offence without appreciating the provision of N.I. Act which is mandatory in nature and therefore, the cognizance is fit to be quashed. Similarly no specific allegation has been attributed against any of the petitioners either in the statement of the complainant on solemn affirmation or by her witnesses for the alleged offence u/s 323/504 of the Indian Penal Code and without finding prima facie case the cognizance of the offence under those sections against the petitioners is also unsustainable.

6. The learned Counsel submitted that the similar situation was felt for consideration in *Shakti Travel and Tours v. State of Bihar and Anr.* reported in 2001 BAN 299 in which the Apex court ruled:

Accused who is the Appellant, assails the order of the High Court refusing to quash the complaint filed u/s 138 of the Negotiable Instruments Act. The only ground on which the learned Counsel for the appellant prays for quashing of the complaint is that on the assertions made in paragraph 8 of the complaint, it must be held that notice has not been served and, therefore, an application u/s 138 could not have been maintained. Undoubtedly, the accused has a right to pay the money within 15 days from the date of the service of notice and only when it fails to pay, it is open for the complainant to file a case u/s 138 of the Negotiable

Instrument Act. That being the position and in the complaint itself having not been mentioned that the notice has been served, on the assertions made in paragraph 8, the complaint itself is not maintainable. We accordingly quash the complaint.

7. It is evident from the certificate copy of the complaint petition (Annexure-1) filed in the court of C.J.M. Dumika on 20th December, 2005 that nowhere it was mentioned as to on which date two cheques No. 778096 and 778097 were issued by the petitioner No. 1 and subsequently they were stopped for payment in writing by the petitioner No. 2 for which the pleader's notice was issued on 9.11.2005 under registered cover with A/D which returned. However, it is mentioned in the complaint petition that third cheque No. 778098 was issued on 21.11.2005 of Rs. 50,000/- which was returned to the payee by the drawer's bank with advice to contact drawer for which a pleader's notice was sent on 24.11.2005 under registered cover with A/D.

8. Chapter XVII of N.I. Act 1881 deals with penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts.

Section-138 of the said Act is more specific which speaks:

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 and shall without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years] or with fine which may extend to twice the amount of the cheque, or with both.

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(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; and

(c) the drawer of such cheque fails 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.

Explanation-For the purpose of this section, "debt or other liability" means a

legally enforceable debt or other liability.

9. Though it is not clearly mentioned in the complaint petition as to on which date first two cheques were presented before the drawer's bank for payment but it shall be presumed that the cheques were presented within six months of the issuance on the ground that the husband of the complainant was found to be dead on 24.9.2005 and only thereafter the cheques were issued by the petitioner No. 1. The pleader's notice to the petitioner No. 1 was issued on 9.11.2005 under registered cover but the date of return of such unserved notice has not been mentioned for the purpose of calculation of the limitation as contained in Proviso (b) of Section 138 of the N.I. Act. Notice in the said provision was required to be given within 30 days of the dishonour of the cheque. Similarly there is provision of the limitation of one month thereafter of the return of the notice as required u/s 142 of the N.I. Act for taking cognizance of the offence by a competent court. The third cheque No. 778098 was returned by the drawer's bank with the advise to contact the drawer for which the pleaders notice was given under registered cover with A/D on 24.11.2005 but the complaint petition is silent as to whether the subsequent pleader's notice was received by the petitioner No. 1 or its service was refused by him.

10. The offence u/s 138 of the N.I. Act 1881 is technical in nature and certain limitation of period have been inserted to avoid vexatious prosecution of the drawers. In the instant case it may be presumed that all the three cheques were presented within six months of its issuance but the dates of its dishonour or return of the cheques have not been mentioned in the complaint petition admitted to be issued by the petitioner No. 1. The mandate of law is that notice was required to be sent to the drawer within 30 dates of the dishonour of the cheque but the complaint petition is silent as to whether the notices were issued within 30 days to the petitioner No. 1 with respect to two cheques issued earlier. However, 3rd cheque No. 778098 was returned by bank on 21.11.2005 to which pleader's notice was sent on 24.11.2005 under registered cover with A/D but it is no where mentioned about its service or refusal. However, it is alleged that when the complainant approached the petitioner No. 1 on 15.12.2005 the payment of cheques was refused and complaint was filed after five days on 20th December 2005.

11. From perusal of the order impugned taking cognizance on 15.2.2006 passed by the S.D.J.M. Dumka it is no where mentioned that after consideration on the cheques which returned back unpaid and perusal of the pleader's notices which returned unserved or any other materials on record the learned court below took the cognizance of the offence u/s 138 of the N.I. Act against the petitioners and therefore, it can safely be observed that cognizance was taken by the court below without application of judicial mind I further find that the cheques were issued by the petitioner No. 1 and the payments of cheque was stopped by the petitioner No. 2 in writing. I further find that remaining seven petitioners were unconcerned with the said transaction through cheques but the cognizance of the

offence under the N.I. Act has been taken against all the nine accused persons which is, apparently misuse of the process of court and hence unsustainable.

12. Under the facts and circumstances of the case, cognizance taken against the petitioners u/s 138 of the N.I. Act, 1881 is set aside and the matter is remanded back to the S.D.J.M. Dumka for reconsideration in accordance with law. With the aforesaid observation this petition is allowed.