

(2011) 01 DEL CK 0450

In the Delhi High Court

Case No : Criminal M.C. 3698 of 2009 and Criminal M.A. 12569 of 2009

GVPR Engineers Limited and Others

APPELLANT

Vs

A.K. Tiwari

RESPONDENT

Date of Decision : 31-01-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

General Clauses Act, 1897 — Section 27

Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2011) 01 DEL CK 0450

Hon'ble Judges : Ajit Bharihoke, J

Bench : Single Bench

Advocate : P. Vishwanatha Shetty, G.N. Reddy, Arvind Kumar Aggarwal and Mahesh Kumar, for the Appellant; Ramesh Gupta and Bharat Sharma, for the Respondent

Final Decision : Allowed

Judgement

Ajit Bharihoke, J.—GVPR Engineers Limited, its Managing Director and Directors through this petition u/s 482 Code of Criminal Procedure are seeking quashing of the criminal proceedings initiated against them in Complaint Case No. 441/1 of 2009 titled "A.K. Tiwari v. GVPR Engineers Pvt. Ltd. and Ors".

2. Facts giving rise to this petition are that Respondent filed a complaint u/s 138 read with Section 142 of the Negotiable Instruments Act against the Petitioners, claiming that he was employed by the Petitioner No. 1 company as Vice President with effect from 07.05.2008 and his services were terminated on 25th December, 2008. On termination of services of the Respondent/complainant, the accused company issued a cheque No. 949100 dated 27th December, 2008 for Rs. 2,71,700/- from its Account No. ANWB-000851000103 maintained at ICICI Bank, TGV Mansion, Kheiratabad Branch, Hyderabad as part payment of his dues. Aforesaid cheque, when presented by the complainant in his bank at Delhi, was returned by the bank with the remarks "Insufficient Funds". This fact was

brought to the notice of the accused by the Respondent/complainant and on the advice of the accused, complainant again presented aforesaid cheque in his account maintained in ICICI Bank, Connaught Place, New Delhi. The cheque however was dishonoured and returned by the bank with the remarks "insufficient funds". This information was received by the complainant on 29th January, 2009. The complainant, thus, sent a statutory notice of demand u/s 138, Negotiable Instruments Act, 1881 to the accused persons (Petitioners) through Fax, E-mail and Registered A.D. Post. Despite of service of said notice, Petitioners failed to pay the amount of cheque to the complainant within the statutory period of 15 days, which led to filing of the complaint against the Petitioners.

3. The Petitioners are seeking quashing of the petition on three counts. Firstly it is contended that soon after the filing of the complaint, the Petitioner company sent a demand draft for the cheque amount to the Respondent but the Respondent, vide a legal notice dated 15.04.2009 returned the cheque stating that on the failure of the Petitioners to pay the cheque amount within the statutory period after the receipt of demand notice, the offence was complete. It was, however, stated in the notice that the Respondent was anxious to settle the entire dispute i.e. the dispute relating to the dishonored cheque and Respondent's other claim against the Petitioner company. Learned Counsel for the Petitioners submitted that from the above, it is evident that motive behind the prosecution is to exert pressure upon the Petitioners to accede to unreasonable demand of the Respondent. As such, the complaint, being mala fide, is liable to be quashed.

4. Countering the argument, learned Counsel for the Respondent referred to the judgment of Supreme Court in the matter of Rajneesh Aggarwal Vs. Amit J. Bhalla, and contended that deposit/return of money during the pendency of the trial is of no avail to the Petitioners as subsequent payment of the cheque amount will not absolve the accused person of the law of criminal offence which was complete on failure of the Petitioners to pay the amount of dishonored cheque within the statutory period of 15 days from the date of service of notice.

5. In the matter of Rajneesh Aggarwal(supra), the Supreme Court considered the legal effect of deposit of money during the pendency of the appeals and, inter alia, observed thus:

7. So far as the question of deposit of the money during the pendency of these appeals is concerned, we may state that in course of hearing the parties wanted to settle the matter in Court and it is in that connection, to prove the bona fides, the Respondent deposited the amount covered under all the three cheques in the Court, but the complainant's counsel insisted that if there is going to be a settlement, then all the pending cases between the parties should be settled, which was, however not agreed to by the Respondent and, therefore, the matter could not be settled. So far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereto will not absolve the

accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the court trying the offence. But by no stretch of imagination, a criminal proceeding could be quashed on account of deposit of money in the court or that an order of quashing of criminal proceeding, which is otherwise unsustainable in law, could be sustained because of the deposit of money in this Court. In this view of the matter, the so-called deposit of money by the Respondent in this Court is of no consequence.

6. From the above, it is evident that the subsequent tender of the cheque amount by the Petitioners after the expiry of the statutory period of 15 days from the date of notice does not absolve the Petitioners of their liability u/s 138 of N.I. Act. Otherwise also, there is no reason to infer mala fide intention on the part of the Respondent because the complaint was filed earlier to the sending of demand draft of cheque amount by the Petitioner. Just because the Respondent, while returning the demand draft expressed his readiness to settle entire dispute with the Petitioner, it cannot be said that he is pursuing the complaint with mala fide intention to exert pressure on the Petitioner to accede to his unreasonable demand.

7. Next contention of the Petitioners is that the complaint against Petitioners No. 2 to 9, who are Managing Directors and Directors of the Petitioner company, is not maintainable in absence of a specific averment in the complaint to the effect that Petitioners No. 2 to 9 were responsible for day to day management and affairs of the Petitioner company.

8. In this regard, perusal of the complaint filed against the Petitioners reveals that in para 1 of the complaint, Respondent has specifically alleged that the accused Nos. 2 to 9 i.e. Petitioners No. 2 to 9 are the Directors of the company, who are responsible for day to day affairs of the company. Therefore, it cannot be said that there is no specific allegation against the Petitioners that they were responsible for day to day affairs of the company. Whether or not Petitioners No. 2 to 9 were actually responsible for day to day affairs of the company is a question of fact which can be determined on the basis of evidence during trial. Thus, I do not find any merit in this contention also.

9. Lastly, it is argued that Delhi courts have no territorial jurisdiction in this case. In this regard, learned Counsel for the Petitioners has contended that undisputedly the Petitioner company is located and doing business at Hyderabad and Petitioners No. 2 to 9 are also located at Hyderabad. The cheque in question was issued at Hyderabad drawn at ICICI Bank, TGV Mansion, Kheiratabad, Hyderabad and the payment of the amount of cheque was to be made at Hyderabad. Even the notice of payment was served on the Petitioners at Hyderabad. Thus, merely by issuing a notice at Delhi and presenting the cheque for encashment by the Respondent in his bank at Delhi, the Respondent cannot confer jurisdiction on Delhi courts. In support of this contention, learned Counsel for the Petitioners has relied upon the judgment of the Supreme Court in the matter of Harman Electronics (P) Ltd. and Another Vs. National Panasonic India

Ltd., .

10. Learned Counsel for the Respondent, on the other hand, has relied upon the judgment of the Supreme Court in the matter of K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, and CrI.M.C.3698/2009 Page 7 of 13 submitted that to constitute an offence u/s 138 of the N.I. Act, following ingredients must be established: (a) drawing of the cheque, (b) presentation of the cheque to the bank, (c) return of the cheque unpaid by the drawee bank, (d) giving notice in writing to the drawer of the cheque demanding payment of cheque amount and (e) failure of the drawer to make payment within 15 days of the receipt of notice. Learned Counsel contended that it is not necessary that all the acts should have been perpetrated at the same locality and it is possible that each of those five acts could be done at five different localities and since aforesaid five different acts constitute the cause of action u/s 138 N.I. Act, the court in whose jurisdiction one of the aforesaid five acts has been committed, has jurisdiction to try the offence u/s 138 N.I. Act.

11. In K. Bhaskaran's case (supra), while dealing with the question of territorial jurisdiction of the courts to try offence u/s 138 N.I. Act, Supreme Court, *inter alia*, observed thus:

"14. The offence u/s 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

16. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence u/s 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence u/s 138 of the Act."

12. The question of territorial jurisdiction of the courts in case u/s 138 N.I. Act again came up for consideration before the Supreme Court in the matter of Harman Electronics (P) Ltd.(supra). In the said case, Supreme Court considered the earlier judgment in K. Bhaskaran's case and, *inter alia*, observed thus:

"9. Reliance has been placed by both the learned Additional Sessions Judge as also the High Court on a decision of this Court in K. Bhaskaran v. Sankaran Vaidhyan Balan. This Court opined that the offence u/s 138 of the Act can be completed only with the concatenation of a number of acts, namely, (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of

the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It was opined that if five different acts were done in five different localities, any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence u/s 138 of the Act and the complainant would be at liberty to file a complaint petition at any of those places. As regards the requirements of giving a notice as also receipt thereof by the accused, it was stated:

"18. On the part of the payee he has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice.

It is, therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address."

The Court, however, refused to give a strict interpretation to the said provisions despite noticing Black's Law Dictionary in regard to the meaning of the terms "giving of notice" and "receiving of the notice" in the following terms:

"19. In Black's Law Dictionary "giving of notice" is distinguished from "receiving of the notice": "A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it". A person "receives" a notice when it is duly delivered to him or at the place of his business.

20. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure."

For the said purpose, a presumption was drawn as regards refusal to accept a notice.

10. We may, before proceeding to advert to the contentions raised by the parties hereto, refer to another decision of this Court in *Dalmia Cement (Bharat) Ltd. v. Galaxy Traders and Agencies Ltd.* wherein this Court categorically held:

"7. Section 27 of the General Clauses Act deals with the presumption of service of a letter sent by post. The dispatcher of a notice has, therefore, a right to insist upon and claim the benefit of such a presumption. But as the presumption is a

rebuttable one, he has two options before him. One is to concede to the stand of the sendee that as a matter of fact he did not receive the notice, and the other is to contest the sendee's stand and take the risk for proving that he, in fact, received the notice. It is open to the dispatcher to adopt either of the options. If he opts the former, he can afford to take appropriate steps for the effective service of notice upon the addressee. Such a course appears to have been adopted by the Appellant Company in this case and the complaint filed, admittedly, within limitation from the date of the notice of service conceded to have been served upon the Respondents."

It was furthermore held:

"8. ... The payee or holder of the cheque may, therefore, without taking pre-emptory action in exercise of his right under Clause (b) of Section 138 of the Act, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque.

But once a notice under Clause (b) of Section 138 of the Act is "received" by the drawer of the cheque, the payee or the holder of the cheque forfeits his right to again present the cheque as cause of action has accrued when there was failure to pay the amount within the prescribed period and the period of limitation starts to run which cannot be stopped on any account. This Court emphasised that "needless to say the period of one month from filing the complaint will be reckoned from the date immediately falling the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires".

13. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence u/s 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act are intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.

21. We cannot, as things stand today, be oblivious of the fact that a banking institution holding several cheques signed by the same borrower can not only present the cheque for its encashment at four different places but also may serve notices from four different places so as to enable it to file four complaint cases at

four different places. This only causes grave harassment to the accused. It is, therefore, necessary in a case of this nature to strike a balance between the right of the complainant and the right of an accused vis-?-vis the provisions of the Code of Criminal Procedure.

13. In the matter of Shri Ishar Alloy Steels Ltd. Vs. Jayaswals NECO Ltd., , the Supreme Court held that the expression "the bank" occurring in proviso (a) to Section 138 of the N.I. Act means the drawee bank and not the collecting bank. Hence, in order to attract the criminal liability u/s 138, N.I. Act, the cheque must be presented to the drawee bank within the statutory period either personally or through a collecting bank. That being the law, the place of location of collecting bank through which cheque was sent to some other branch jurisdiction would not confer jurisdiction on the courts having territorial jurisdiction over that place.

14. In the instant case, undisputedly the Petitioner company as well as other Petitioners are located at Hyderabad. The cheque was issued from Hyderabad and it was sent for collection through bank of the Respondent to the drawee bank at Hyderabad. Therefore, it is obvious that only the Magisterial court at Hyderabad had territorial jurisdiction to try this matter.

15. Learned Counsel for the Respondent has drawn my attention to the photocopy of the cheque in question, wherein it is typed at left side bottom "payable at par at all branches of ICICI Bank Limited in India".

From this, learned Counsel has urged this Court to infer that the cheque was payable at Delhi branch of ICICI Bank and, therefore, Delhi courts have territorial jurisdiction in this matter.

16. I am not convinced with the above argument. Undisputedly, the cheque in question was drawn at ICICI Bank Limited, Hyderabad Branch and the cheque amount was supposed to be paid from the account of the Petitioner company maintained at Hyderabad Branch. If ICICI Bank, as a result of computerization, adopted a policy to provide a facility of encashment of cheques at par at any branch of ICICI Bank irrespective of the account holder not having bank account in the said branch, it is only for the convenience of the customer but the encashing branch, by no means, becomes the drawee bank for the reason that before encashing the cheque at par, the branch in question is expected to verify from the drawee branch whether or not there was any impediment in encashment of the cheque drawn at the said branch.

Since in the event of encashment, the amount of cheque was to be debited in the account of the Petitioner maintained at ICICI Bank, Hyderabad Branch, the amount was only payable by the drawee branch i.e. Hyderabad Branch. Thus, the aforesaid printed words "payable at par at all branches of ICICI Bank Limited in India" will not change the character of drawee bank and will not confer territorial jurisdiction on Delhi Courts.

17. In view of the discussion above, I am of the opinion that Delhi courts have no

territorial jurisdiction to try the instant complaint. Accordingly, the petition is allowed and the criminal proceedings on CrI.M.C.3698/2009 Page 13 of 13 criminal complaint CC No. 441/1/2009 in case titled "A.K. Tiwari v. GVPR Engineers Pvt. Ltd. and Ors." are quashed and the concerned Metropolitan Magistrate is directed to return the complaint to the Petitioners to be filed in the court of appropriate jurisdiction.

18. Petition is disposed of accordingly.