

(2012) 09 AHC CK 0105
In the Allahabad High Court
Case No : Criminal Revision No. 352 of 2009

Hazi Bhoore Hussain Ansari	Vs	APPELLANT
State of U.P. and another		RESPONDENT

Date of Decision : 27-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 138, 138(b), 139, 200, 202
Negotiable Instruments Act, 1881 (NI) — Section 138, 138(b), 142

Citation : (2013) 1 ACR 487 : (2012) 10 ADJ 305 : (2013) 2 BC 231 : (2013) 1 BC 719

Hon'ble Judges : Het Singh Yadav, J

Bench : Single Bench

Advocate : Rajesh Yadav, for the Appellant;

Judgement

Hon'ble Het Singh Yadav, J.—This Criminal Revision u/s 397/401 Cr.P.C. is directed against the Order dated 12.1.2009 taking cognizance by learned judicial Magistrate, Thakurdwara, Moradabad in a complaint case No. 1676 of 2008 (Smt. Kamlesh Lata v. Hazi Bhoore Hussain Ansari) u/s 138 Negotiable Instruments Act (hereinafter referred as "the N.I. Act"), Police Station Thakurdwara, Moradabad. None present for the revisionist.

2. Heard learned AGA and perused the record.

3. In order to appreciate the controversy involved in this revision a few material facts may be stated thus:

On 5.6.2002, the complainant said to have paid Rs. 2,00,000/- as earnest money to the revisionist/accused as a part payment of a sale consideration of land of the revisionist, which he agreed to sale transfer and convey in favour of the complainant for a consideration of Rs. 2,50,000/-. However, the deal could not be materialised. It is alleged that later on it was mutually agreed that the revisionist will return the amount so received by him as earnest money to the complainant. The revisionist drew a cheque of Rs. 1,00,000/- in favour of the complainant on

14.8.2008 towards part payment of the earnest money, so paid to him by the complainant. The cheque presented by the complainant for the discharge of his liability in part was returned by the Bank unpaid on the ground that the amount of money standing to the credit of the account of the revisionist is insufficient to honour the cheque. The complainant received information of dishonour of cheque on 25.8.2008. The complainant thereafter made a demand for the payment of the amount of the bounced cheque by giving a notice in writing to the revisionist on 6.11.2008. The complainant again sent a notice on 18.11.2008 and subsequently, on 2.12.2008, which was not replied by the revisionist. The complainant thereafter lodged complainant u/s 138 of N.I. Act on 22.12.2008 before the Magistrate concerned. The Magistrate after recording the statements of the complainant and the witnesses under Sections 200 and 202 Cr.P.C. respectively had taken cognizance against the revisionist under challenge in this revision.

4. Dishonour of cheque is always not an offence, it is only offence, when it comes under the preview of Section 138 of the Negotiable Instruments Act, 1881, which reads thus:

138. Dishonour of cheque for insufficiency, etc., of funds in the account.--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 provision 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 purposes of this section, " debt or other liability" means a

legally enforceable debt or other liability.

5. It is manifest from a bare perusal of Section 138 N.I. Act that to constitute an offence u/s 138 of the Act following ingredients are required to be fulfilled :

I. A person must have drawn a cheque on an account maintain by him in a bank for payment of certain amount of money to any person out of his account.

II. The cheque should have been drawn for the discharge of any debt or any liability in whole or in part.

III. The cheque has been presented to the Bank within a period of six months from the date on which it was drawn or within a period of its" validity, whichever is earlier.

IV. The cheque 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 the Bank.

V. 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 within thirty days of the receipt of the information by him from the bank regarding the return of the cheque as unpaid and

VI. The drawer of such cheque fails to make payment of said amount of money to the payee or the holder in due course of the cheque, within 15 days of the receipt of the said notice.

6. It is after fulfilment of the above conditions that cause of action for filing the complaint u/s 138 will arise and as per Section 142 of N. I. Act the complaint may be made within one month of the date when the cause of action arises under clause (c) of the proviso of Section 138.

7. The core questions, which arises for consideration in this revision is as to whether the notice dated 6.11.2008 was issued within the stipulated period of thirty days from the date of receipt of intimation of the dishonour of the cheque. Section 138(b) of the N.I. Act inter alia, provides that the payee has to make a demand in writing for the payment of money by giving a notice to the drawer of the cheque within thirty days of the receipt of information by him from the Bank regarding return of the cheque as unpaid. Therefore, thirty days, are to be counted from the date of the receipt of the information regarding the return of the cheque as unpaid. In this case, the complainant has clearly mentioned in her complaint that she received information of dishonour of cheque on 25.8.2008 from the Bank about return of the cheque unpaid. The complainant has made a demand of her money in writing from the revisionist (drawer of the cheque) of the amount of dishonoured cheque, on 6.11.2008 through a registered notice. The complainant in her statement u/s 200 Cr.P.C. simply stated that the accused issued a cheque of Rs. 1,00,000/- in her favour on 14.8.2008, the same was

deposited by her in her account with State Bank of India. The cheque was however, dishonoured by the Bank of the drawer due to insufficient funds. The dishonoured cheque has misplaced from her regarding which she has already given information to Kotwali Police Jaspur. There is even not a whisper in her statement about the date of receiving information of dishonour of the cheque and the date of sending the notice of demand. Two witnesses were examined by her in the Court u/s 202 Cr.P.C., have stated nothing about the date of information of dishonour of cheque received by the complainant and the date on which the notice was served upon the revisionist/accused calling upon him to pay the amount of cheque.

8. Thus, from the facts disclosed in the complaint itself, the notice in writing demanding the amount of the dishonoured cheque was issued much later of 30 days period as required u/s 138(b) of N. I. Act.

9. The Supreme Court in Jugesh Sehgal v. Shamsheer Singh Gogi delivered on 10 July, 2009 has clearly held that it is only when all the aforementioned conditions of Section 138 of N. I. Act are satisfied that the person, who had drawn the cheque can be deemed to have committed an offence u/s 138 of the Act. The important ingredients of Clause (b) to the proviso of Section 138 is absolutely not fulfilled in this case.

10. It would not be out of place to mention here that the complainant has not filed any agreement to sale alleged to have been executed by the accused/revisionist in her favour and document showing payment of Rs. 2,00,000/- by her to the accused towards earnest money. Even the dishonoured cheque has also not been filed. Thus, she has failed to discharge her initial burden to prima facie, establish that the revisionist had issued of the dishonour cheque for the discharge in whole or in part of any debt or other liability. Presumption u/s 139 N. I. Act is only applicable when the complainant has discharged initial burden to establish that the cheque was issued for the discharge in whole or in part of any debt or other liability. The Supreme Court in P. Venugopal Vs. Madan P. Sarathi, , held :

The presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. The presumption raised does not extend to the extent that the cheque was issued for the discharge of any debt or liability which is required to be provided by the complainant. In a case of this nature, however, it is essentially a question of fact.

11. Learned Magistrate while passing the impugned order has failed to consider aforesaid important aspects of the matter and had wrongly taken cognizance on the complaint of the complainant against the accused/revisionist.

12. The impugned order is not in conformity with the entire ingredients of Section 138 of the N.I. Act, therefore, is illegal and as such, deserves to be set aside. Revision is allowed. The impugned order dated 12.1.2009 taking cognizance by learned judicial Magistrate, Thakurdwara, Moradabad in a complaint case No.

1676 of 2008 is quashed.