(2017) 02 RAJ CK 0077

In the Rajasthan High Court

Case No : 3775 of 2016

Khayali Ram S/o Nagarmal — APPELLANT

Vs

Udaram Saini S/o Peeru Ram Saini — RESPONDENT

Date of Decision : 20-02-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 482 - Saving of inherent powers of High Court
Negotiable Instruments Act, 1881, Section 138 - Dishonour of cheque for insuffic

Citation : (2017) 02 RAJ CK 0077

Hon'ble Judges : Sabina

Bench : SINGLE BENCH

Advocate : Intjar Ali?V.S. Godara, ?Ram Pratap Saini

Final Decision : Allowed

Judgement

1. Petitioner has filed this petition under Section 482 Code of Criminal Procedure, 1973 challenging the orders dated 5.6.2013 and 29.6.2016.

2. Learned counsel for the petitioner has submitted that respondent has filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the ''Act'') against the petitioner with regard to dishonour of cheque dated 20.9.2009. The cheque in question was presented for encashment on 11.12.2010 and was dishonoured by the bank on account of "insufficient funds". However, the cheque in question was liable to be returned as it has been

presented to the bank after its validity. Hence, the complaint under Section 138 of the Act was liable to be dismissed. Trial court has erred in taking cognizance of the offence vide order dated 5.6.2013. Court of Revision has also erred in dismissing the revision petition on the ground that the petitioner could take the pleas available to him in his defence. Learned counsel has placed reliance on decision of the Apex Court in Criminal Appeal No. 219 of 2001 Special Leave Petition (crl.) 3854 of 2000 SHRI ISHAR ALLOY STEELS LTD. Vs. JAYASWALS NECO LIMITED decided on 22/02/2001.

"The payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque is drawn within the period of six months from the date on which it is shown to have been issued. In other words a cheque issued by (A) in favour of (B) drawn in a bank named (C) where the drawer has an account can be presented by the payee to the bank upon which it is drawn i.e. (C) bank within a period of six months or present it to any other bank for collection of the cheque amount provided such other bank including the collecting bank presents the cheque for collection to the (C) bank. The non presentation of the cheque to the drawee-bank within the period specified in the Section would absolve the person issuing the cheque of his criminal liability under Section 138 of the Act, who shall otherwise may be liable to pay the cheque amount to the payee in a civil action initiated under the law. A combined reading of Sections 2, 72 and 138 of the Act would leave no doubt in our mind that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable. Such presentation is necessarily to be made within six months at the bank on which the cheque is drawn, whether presented personally or through another bank, namely, the collecting bank of the payee. We have perused the judgments of the Punjab & Haryana, Gujarat and Madras High Courts and their conflicting views and are of the opinion that the Madras High Court has not correctly interpreted the provisions of law in this behalf. As, admittedly, in this case the cheque was not presented before the drawer''s bank within the statutory period of six months, the criminal court had no jurisdiction to issue the process against the appellant. The impugned judgment of the High Court being contrary to law is thus not sustainable. The appeal is accordingly allowed and the impugned judgment is set side."

3. Learned counsel for the respondent has opposed the petition and has submitted that the cheque in question had been dishonoured on account of insufficiency of funds. Trial court had rightly taken cognizance of the offence.

4. Section 138 of the Act reads as under:-

"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 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 purposes of this section, "debt or other liability" means a legally enforceable debt or other liability. "

5. Thus, as per the above provision criminal proceedings can be initiated against the drawer of the cheque in case the cheque has been presented to the bank within the prescribed period of its validity and the holder of the cheque gives a notice to the drawer of the cheque within the prescribed period of receipt of information given to him by the bank regarding dishonour of the cheque and in case the drawer of the cheque fails to make a payment within fifteen days from the receipt of the notice to the holder of the cheque.

6. In the present case, the cheque in question was issued on 20.9.2009 in the sum of Rupees one lac by the

petitioner in favour of the respondent. Complainant has stated in Para 3 of the complaint that the cheque in question was presented for encashment on 25.9.2009 and the same was dishonoured on account of insufficiency of funds and he had returned the cheque along with the receipt to the petitioner. Complainant had not filed any complaint at that stage. There is no explanation by the complainant in the complaint as to when he again came in possession of the cheque in question. Thereafter, the cheque was presented for encashment on 20.12.2010 and was dishonoured by the bank with the remarks "funds insufficient" vide memo dated 21.12.2010. In the present case, complaint has been filed by the complainant basing reliance on the dishonour of the cheque by the bank vide memo dated 21.12.2010. Cheque was presented for encashment on 20.12.2010 much beyond the period of its validity. The cheque should have been returned by the bank to the holder of the cheque with the remarks that the validity of the cheque had already expired but the bank erroneously vide memo dated 21.12.2010 opined that the cheque was being returned on account of insufficient funds. Be that as it may, the cheque had been presented for encashment after the period of its validity. Therefore, the complaint could not be entertained for offence under Section 138 of the Act as the first prerequisite for commission of offence was not made out in the present case. The trial court has thus erred in taking cognizance of the offence.

7. Accordingly, this petition is allowed. Impugned orders are set aside. Consequently, complaint Annexure-1 is dismissed.

