
(2008) 01 UK CK 0014

In the Uttarakhand High Court

Case No : Criminal Miscellaneous Application No. 29 of 2004

K.J. Cosmetical Ltd.

APPELLANT

Vs

State of Uttaranchal and Others

RESPONDENT

Date of Decision : 03-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2008) 8 UC 1011

Hon'ble Judges : B.C. Kandpal, J

Bench : Single Bench

Advocate : Lalit Miglani, holding brief of Pankaj Miglani, for the Appellant;

Final Decision : Allowed

Judgement

B.C. Kandpal, J.—By way of this petition u/s 482 of Code of Criminal Procedure the Petitioner, who is facing trial in criminal case No. 1860 of 2001, M/s Rajeev Agencies v. K.J. Cosmetica for the offences u/s 138 of Negotiable Instruments Act, pending in the court of Special Judicial Magistrate-I, Haridwar, has prayed for quashing the entire proceedings of the aforesaid case.

2. Brief facts of the case are that Respondent No. 3 filed a complaint before the court of Chief Judicial Magistrate, Haridwar alleging therein that an amount of Rs. 6,000/- belonging to complainant/Respondent No. 3 was due towards the Petitioner and in order to repay that amount the Petitioner issued cheque on 20-2-1998. The cheque was presented before the Bank and the Bank, on 18-3-1998, informed that it had to be returned unpaid. Again, the complainant presented the cheque on 2-4-1998, but it was bounced on 28-4-1998. The complainant thereafter sent the notice to the Petitioner on 29-4-1998 which was not received by the Petitioner. However, the complainant again sent a notice on 5-6-1998 and the same was received by the Petitioner. Further, on the request made by the Petitioner, the cheque was again presented in the Bank on

13-7-1998, but again on 29-7-1998 the cheque was bounced and again a notice was sent by the complainant to the Petitioner on 3-8-1998. Thereafter the complaint was filed by Respondent No. 3 against the Petitioner on 9-9-1998. The statement of the complainant was recorded u/s 200 of Code of Criminal Procedure and thereafter the complainant produced the witnesses and their statements were also recorded u/s 202 of Code of Criminal Procedure. The learned Magistrate after having perused the material available on record took the cognizance in the matter and issued summons to the Petitioner for facing the trial. The Petitioner against the order passed by the Magistrate issuing summons against it preferred revision but the revisional court also dismissed the revision.

3. Feeling aggrieved by the orders passed by the courts below, the present petition u/s 482 of Code of Criminal Procedure has been filed by the Petitioner before this Court.

4. Heard Sri Lalit Miglani, holding brief of Sri Pankaj Miglani, learned Counsel for the Petitioner, learned A.G.A. for Respondent No. 1, learned Counsel for Respondent No. 3 and perused the record.

5. The short controversy raised in this case is whether the cause of action to file complaint for non-payment of money despite issue of the notice would arise only once or it would arise even after issuance of the notice on subsequent date after the first notice has already been issued.

6. The complaint filed by Respondent No. 3 is contained in Annexure-1 to the petition, which shows that the cheque was issued to the complainant by the Petitioner on 19-2-1998 and it was dishonoured by the Bank on 18-3-1998. The complainant further presented the cheque with the Bank on 2-4-1998, but it was again bounced on 28-4-1998. Thereafter, the complainant issued the notice to the Petitioner on 29-4-1998, but that notice was not received by the Petitioner. However, the notice was issued by the complainant, as per the allegation mentioned in the complaint, on 5-6-1998 which was received by the Petitioner and on the request made by the Petitioner, the complainant further presented the cheque with the Bank on 13-7-1998, but the same was also dishonoured on 29-7-1998. The complainant thereafter issued subsequent notice to the Petitioner on 3-8-1998 and then filed the complaint before the court concerned on 9-9-1998.

7. It is thus clear that the complainant/Respondent No. 3 had already issued notice to the Petitioner on 5-6-1998 which was received by the Petitioner. Therefore, the cause of action arose with the complainant on the basis of the first notice issued on 5-6-1998. The complainant could not have got the benefit of the provisions of Negotiable Instruments Act in filing the complaint on the basis of subsequent notice allegedly issued by him on 3-8-1998. The right to the complainant was available to present the cheque any number of times during the period of its validity, but on each presentation of the cheque and its dishonour, a fresh right and not a cause of action accrues in favour of the complainant. The

complainant, may, therefore, without taking pre-emptory action in exercise of his right under Clause (b) of Section 138 of Negotiable Instruments 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 the complainant gives a notice under Clause (b) of Section 138, he forfeits such right as in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise. The period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires and 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. Therefore, on reading of the two sections i.e. 138 and 142 of Negotiable Instruments Act in a combined manner, there is no room for doubt that the cause of action within the meaning of Section 142 arises and can arise only once. Therefore, the complainant could not get any benefit under the provisions of Section 142 of Negotiable Instruments Act by issuing subsequent notice dated 3-8-1998 as the cause of action in the instant case arose immediately after the first notice was issued by the complainant on 5-6-1998.

8. The Hon"ble Apex Court in a case *Sadanandan Bhadran Vs. Madhavan Sunil Kumar*, , has held as under:

6. The next question that falls for our determination is whether dishonour of the cheque on each occasion of its presentation gives rise to a fresh cause of action within the meaning of Section 142(b) of the Act. Section 142 reads as under:

Not with standing anything contained in the Code of Criminal Procedure, 1973-

(a) no court shall take cognizance of any offence punishable u/s 138 except upon a complaint, in writing, made by the payee, or, as the case may be, the holder in due course of the cheque,

(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,

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable u/s 138.

From a plain reading of the above Section it is manifest that a competent Court can take cognizance of a written complaint of an offence u/s 138 if it is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138.

7. In a generic and wide sense (as in Section 20 of the Code of Civil Procedure, 1908) "cause of action" means every fact which it is necessary to establish to support a right of obtain a judgment. Viewed in that context, the following facts

are required to be proved to successfully prosecute the drawer for an offence u/s 138 of the Act:

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured.

(b) that the cheque was presented within the prescribed period.

(c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and

(d) that the drawer failed to make the payment within 15 days of the receipt of the notice.

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 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.

8. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action there are other formidable impediments which negates the concept of successive causes of action. One of them is that for dishonour of one cheque there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with Clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour the drawer cannot be liable for any offence nor can the first offence be treated as nonest so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage it will not be a question of waiver of the right of the payee to prosecute the drawer but of the absolution of the drawer of an offence, stands already committed by him and which cannot be committed by him again.

9. The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under Clause (c) of Section 142, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes the Court always

presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that the every part should have effect the above conclusion cannot be drawn, for, that will make the provision for limiting the period of making the complaint nugatory.

10. Now, the question is how the apparently conflicting provisions of the Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour and that too within one month from the date the cause of action arises can be reconciled. Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonized with the interpretation that on each presentation of the cheque and its dishonour, a fresh right and not a cause of action accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his right under Clause (b) of Section 138 of Negotiable Instruments 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 he gives a notice under Clause (b) of Section 138 he forfeits such right as in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer, expires.

9. The Hon''ble Apex Court in a subsequent case Prem Chand Vijay Kumar v. Yashpal Singh and Anr. reported in 2005 SCC (Cri) 1153, has held as under:

Clause (a) of the proviso to Section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after some time, on his own volition or at the request of the drawer, in expectation that it would be encashed. The primary interest of the payee is to get his money and not prosecution of the drawer recourse to which, normally, is taken out of compulsion and not choice. On each presentation of the cheque and its dishonour, a fresh tight and not a cause of action accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his right under Clause (b) of Section 138, 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 he gives a notice under Clause (b) of Section 138, he forfeits such right as in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise.

In a generic and wide sense (as in Section 20 of the Code of Civil Procedure, 1908) "cause of action" means every fact which it is necessary to establish to

support a right of obtain a judgment. Viewed in that context, the following facts are required to be proved to successfully prosecute the drawer for an offence u/s 138 of the Act are (a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured; (b) that the cheque was presented within the prescribed period; (c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and (d) that the drawer failed to make the payment within 15 days of the receipt of the notice.

Proceeding, 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 Clause (b) of Section 142 gives it a restrictive meaning, in that, it refers to only 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. A combined reading of Sections 138 and 142 makes it clear that cause of action 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(b) arises and can arise only once.

One of the indispensable factors to form the cause of action envisaged in Section 138 of the 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.

Thus, it is well 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. The period of one month for filing the complaint will be reckoned from the date immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires.

10. On the basis of the aforesaid decisions of the Hon''ble Apex Court as well as in the light of the facts and circumstances of the present case, it is quite clear that the learned Magistrate was not justified to take the cognizance of the offence, in case if the complaint was not filed within one month of the date on which the cause of action arose and the cause of action in the instant case arose on 5-6-1998 when the first notice was issued by the complainant/Respondent No. 3.

11. For the reasons stated above, I am of the view that this petition is liable to be allowed. The proceedings of criminal case No. 1860 of 2001, Rajeev Agencies v. K.J. Cosmetica for the offences u/s 138 of Negotiable Instruments Act, pending in the court of Special Judicial Magistrate-I, Haridwar, are also liable to be quashed. In case, if the proceedings of the criminal case are permitted to continue against the Petitioner the same would amount to abuse of process of court as no cause of action could have accrued against the Petitioner on the basis

of subsequent notice issued by the complainant/Respondent No. 3 in view of stipulated principle 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.

12. Accordingly, the petition is allowed. The proceedings of criminal case No. 1860 of 2001, Rajeev Agencies v. K.J. Cosmetica for the offences u/s 138 of Negotiable Instruments Act, pending in the court of Special Judicial Magistrate-I, Haridwar, are hereby quashed.