

(2005) 03 AHC CK 0188

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 91 of 2003

Kushal Pal Singh

APPELLANT

Vs

State of U.P. and Sri Harpal Singh

RESPONDENT

Date of Decision : 22-03-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2005) 2 ALD(Cri) 24 : (2005) 3 BC 464 : (2005) 3 CivCC 392 :
(2005) CriLJ 3035 : (2005) 3 RCR(Criminal) 411

Hon'ble Judges : K.N. Ojha, J

Bench : Single Bench

Advocate : J.P. Pandey, for the Appellant; N.K. Dutta. and Hemandra Kumar and A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

K.N. Ojha, J.—Instant application has been moved u/s 482 Cr.P.C. to quash the prosecution of applicant Kushal Pal Singh in Criminal Case No. 837 of 2001, Harpal Singh v. Kushal Pal Singh pending in the Court of Chief Judicial Magistrate, Firozabad, u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act).

2. Heard Sri J. P. Pandey, learned counsel for the applicant, learned AGA for State of U. P. and Sri N. K. Dutta, learned counsel for O. P. No. 2, Harpal Singh.

3. The facts as revealed from the record is that Harpal Singh, resident of Tundla, district Firozabad, filed Complaint Case No. 837 of 2001 against the applicant Kushal Pal Singh, Managing Director, Inland Development Finance Limited, Rajghat Road, Aligarh, u/s 138 of the Act containing the fact that Kushal Pal Singh had got deposited Rs. 50,000/- from the complainant Harpal Singh in the account of the Firm Inland Development Finance Ltd., Aligarh, and had promised to make payment of interest at the rate of 1.2% per month. On repeated demand ultimately Kushal Pal Singh, applicant, issued a Cheque of Rs.

1,72,500/- in favour of the complainant Harpal Singh, who is O. P. No. 2 in this case. The number of the Cheque was 918256 dated 31.5.2000. Harpal Singh deposited the Cheque in Central Bank of India, Tundla Branch, Firozabad. The Cheque was returned by the Bank with the endorsement that the payment was stopped. The Cheque was received back to complainant Harpal Singh on 21.8.2000. Thereupon Harpal Singh sent notice through his counsel to Kushal Pal Singh, applicant, on 26.8.2000 making demand of the amount of the cheque, which was received back to Harpal Singh on 16.9.2000. Since the Cheque issued by Kushal Pal Singh was dishonoured and in spite of notice being served on him the payment was not made, therefore, the complaint was filed on 25.10.2000.

4. The proceeding of the complaint case has been challenged by the applicant Kushal pal Singh on the grounds mentioned in his application moved u/s 482 Cr.P.C. In paragraph No. 9 it is alleged that the complaint was filed beyond the period of 30 jays and no notice was served upon the applicant as was required u/ s 138 of the Act, therefore, the complaint was not maintainable.

5. In this case two points are in dispute, firstly, whether the notice was served upon the applicant and secondly whether the complaint filed is within the time.

6. According to the applicant notice was never served on Kushal Pal Singh. O. P. No. 2 Harpal Singh of the case has filed his counter affidavit. It is deposed in paragraph 5 of the counter affidavit that when the cheque was dishonoured and it was returned to the complainant, notice was sent to the applicant on 26.8.2000, which was received back by the complainant on 16.9.2000. Annexure No. 15 is photostat copy of the postal receipt dated 26.8.2000 it shows that the notice was sent to the applicant Kushal Pal Singh. When the complaint was filed, applicant moved application to drop the proceeding of the complaint case and order was passed by the learned C. J. M. Firozabad, on 21.11.2002, a copy of which is Annexure No. 5. The order contains the description of the service of notice wherein it is written that the notice dated 25.8.2000 was sent by the complainant on 26.8.2000 acknowledgement of which was received back by the complainant on 16.9.200. On the envelope in which the notice was sent there were two endorsements, one endorsement is dated, 30.8.2000 in which it was written that the addressee was not available at his address. Thereafter another endorsement is made, it is dated 11.9.2000, by the postman "Refused. Returned to sender" and the seal of the post office was affixed below it. Thereafter on 16.9.2000 the notice was received back. The learned Magistrate held that the complaint filed was within the time, hence it was maintainable. The prayer of the applicant being rejected, instant application u/s 482 Cr.P.C. has been moved."

7. The contention of the applicant as detailed in paragraph No. 12 is that cause of action arose on 16.9.2000 and the complaint was filed on 25.10.2000, therefore, it was barred by time. It is submitted by the learned counsel for the applicant that the cheque issued by the applicant was not honoured by the Bank and the dishonoured cheque was received back by the complainant - O. P. No. 2 on 21.8.2000. It is submitted that the complaint was to be filed within one

month from 16.9.2000 when unserved notice was received to O.P. No. 2. Thus the complaint dated 25.10.2000 being filed after 16.10.2000 is beyond time.

8. For appreciating the contention raised by the parties it would be necessary to reproduce Sections 138 and 142 of the Act, which are as under:

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, or 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.

142. Cognizance of offence- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(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;

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;

(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.

9. Learned counsel for O.P. No. 2 submits that the notice was sent to the applicant on 26.8.2000, when the postman went to the address of the applicant on 30.3.2000 he was not available. Again the postman went to his address on 11.9.2000 the applicant met the postman but he refused to accept this notice then the postman made endorsement of refusal. Thus notice was sufficiently served on 11.9.2000 on the applicant and sufficient service was by way of refusal of notice. The cause of action starts since 11.9.2000. The date 11.9.2000 is to be excluded. Since the payment was not made by 26.9.2000, therefore, the complaint could be filed from 27.9.2000 to 26.10.2000. The complaint was filed on 25.10.2000 therefore, it is within the period as required by Section 142(b) of the Act.

10. The applicant has relied on (38) 1999 ACC 858, Sil Import, USA v. Exim Aides Silk Exporters, Bangalore, in this case notice as envisaged in Clause (b) of proviso to Section 138 of the Act was transmitted by FAX on 11.6.1996. The Hon'ble Apex Court held that "the upshot of the discussion is on the date when the notice a sent by FAX reached the drawer of the cheque the period of 15 days (within which he has to make the payment) has started running and on the expiry of that period the offence is completed unless the amount has been paid in the meanwhile. If no complaint was filed within one month therefrom the payee would stand forbidden from launching a prosecution thereafter, due to the clearinterdict contained in Section 142 of the Act."

11. In cited case the complainant has admitted the fact that the written notice was sent by FAX and the applicant had admitted its receipt on the same date. The last date when the respondents could have filed the complaint was 26.7.96. But the complaint was filed on 8.8.1996 so the Court had no jurisdiction to take cognizance on the said complaint.

12. Thus in the above cited case notice was served on 11.6.1996. 15 days period was with the applicant up to 26.6.1996 to make payment of the amount by cheque. Since it was not paid the complaint could be filed from 27.6.1996 to 26.7.1996 but it being filed on 8.8.1996, the case was held to be time barred. Thus according to the principle laid down by Hon'ble the Apex Court in this case the position of law is clear that the cause of action has to start from the date the notice served on the drawer of the cheque. If the payment of the amount of the cheque is made within 15 days, the cause of action comes to an end and there arises no question of complaint being filed but if the payment is not made within 15 days after the service of notice there remains one month's time for the payee to file the complaint.

13. In instant case the notice was served by refusal on 11.9.2000. The applicant could make payment of the amount of cheque by 26.9.2000. Since the payment of the amount was not made by 26.9.2000 the complaint could be filed by 26.10.2000, but it was filed on 25.10.2000, therefore, the complaint filed by the O.P. No. 2 Harpal Singh against the applicant Kushal Pal Singh is within the time.

14. The O.P. No. 2 has placed reliance on 1998 Company Cases 599, Santa Priya Engineers Pvt. Ltd. and Anr. v. Uday Sankar Das and Anr., wherein it has been laid down by Hon"ble High Court of Calcutta that where the payee sent notice to drawer by registered post acknowledgement due on 28.12.1990 and though it was received by the drawer on 3.1.1991 the acknowledgement was received back by the payee only on 26.2.1991, the complaint filed on 27.2.1991 was held to be within the time. It was held that only on receipt of the endorsement on the notice, the payee has knowledge as to whether the service of the notice has been effected and payment is to be made or not. It was laid down that if a person is given a right to resort to a remedy within a prescribed time, the limitation should not be computed from a date earlier than on which the party aggrieved actually knew about the date of the accrual of the cause of action for making a complaint before the complaint Court for seeking redressal or else, it might be an absurd and unreasonable application of law. It was observed that it is well settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result, which could never have been intended by the Legislature, the court may modify the language used by the Legislature, or even do some violence to it, so as to achieve the obvious intention of the Legislature and produce a rational construction. But in the instant case the notice was received back to the O. P. No. 2 Harpal Singh within 15 days from the date of service on the application, who is drawer of the cheque. The notice was served on 11.9.2000 and it was received back to the O. P. No. 2 on 16.9.2000. The consistent view of Hon"ble the Apex Court is that if the Statute has specified certain and clear dates, different interpretation cannot be made. It is laid down that according to Section 138 of the Act the cause of action has to arise from the date of service of notice on the drawer of the cheque, the interpretation cannot be fetched and shifted to the date of receipt of the notice back to the payee of the cheque, who sent the notice.

15. In M/s. Saketh India Limited and others Vs. M/s. India Securities Limited, the Hon"ble Apex Court has held that where the notice of return of the cheque as unpaid was served on the drawer on 29.9.1995 the 15 days period for making of the payment drawer under proviso (c) to Section 138 of the Act expired on 14.10.1995, therefore, the cause of action to file a case arose on 15.10.1995. In computing one month's limitation period u/s 142(b) of the Act for filing the complaint against the drawer was up to 15.11.1995.

16. In 2000 Crl. L. J. 3547, Patel Dinnesh Kumar Shivram Somdas v. Patel Keshavlal Mohanlal and Anr., it was held by Hon"ble the Apex Court that notice as contemplated u/s 138(c) was issued on 6.2.1993. It was served on the drawer of the cheque on 9.2.1993. Since no payment was made on or before 24.2.1993 the complaint was filed on 24.2.1993 itself. Since 15 days period with the drawer was up to 24.2.1993, therefore, it was held that the complaint was pre-matured because the period of one month for filing the complaint started since 25.2.1993 as 15th day expired on 24.2.1993.

17. In 2001(1) U.P.Cr.R. 431, Dalmia Cement (Bharat) Ltd. v. Galaxy Traders and Agencies Ltd. and others, it was laid down by Hon''ble the Apex Court that the notice was sent u/s 138 of the Act on 15.6.1998, the respondents intimated on 20.6.1998 that envelope was empty, cheque was again dishonoured on 21.7.1998, the notice was again sent, which was received by the accused on 27.7.1998, the complaint was filed on 9.9.1998, it was held that the complaint was not time barred because 15 days period started to run since 27.7.1998 and the payment could be made by the drawer of the cheque up to 11.8.1998 and the complaint could be filed from 12.8.1998 to 10.9.1998.

18. Thus in instant case when the notice was refused on 11.9.2000, a payment of the amount of the cheque could be made by 26.9.2000, the complaint could be filed up to 26.10.2000, but the complaint was filed on 25.10.2000. Thus in view of the law laid down by Hon''ble the Apex Court in the above cited cases the complaint filed by the O. P. No. 2 is within the time.

19. Now question arises as to whether the service, which is denied by the applicant was sufficiently made on him on 11.9.2000 or not. The O. P. No. 2 has relied on 2001(1) U.P.Cr.R. 431, Dalmia Cement (Bharat) Ltd. v. Galaxy Traders and Agencies Ltd. and Ors., wherein it has been laid down by Hon''ble the Apex Court that a notice refused to be accepted by the addressee can be presumed to have been served on him. This law has been laid down in Harcharan Singh Vs. Smt. Shivrani and Others, and Jagdish Singh Vs. Natthu Singh, also a.

20. In 2005(1) U.P.Cr.R.14, V. Raja Kumari v. P. Subbarama Naidu and Anr., it has been laid down by Hon''ble the Apex Court that notice refused to be accepted by the addressee can be presumed to have been sufficiently served.

21. In this case first the postman went to the address of the applicant and the applicant did not meet him at his address on 30.8.2000 then again when the postman went to the applicant's address and wanted to make service of the notice on 11.9.2000 the applicant refused to accept the notice and thus the endorsement was made by the postman concerned that the applicant refused to accept the notice. There is presumption that such endorsement was correctly made unless proved otherwise. At present while disposing of the application u/s 482 Cr.P.C. the presumption is that the notice was sufficiently served on the applicant by refusal on 11.9.2000 and taking the service sufficient it is found that the complaint was filed within the statutory period of limitation. Of course when the complaint case proceeds it is open to the parties to adduce evidence and it is open to the applicant to prove that the notice was not sufficiently served. To prove this fact evidence is required, which may be adduced by the parties during the course of the trial.

22. In view of the above observations there is no merit in the application. The application u/s 482 Cr.P.C. filed by Kushal Pal Singh is rejected.