
(2013) 03 AHC CK 0125
In the Allahabad High Court
Case No : Criminal Appeal No. 6503 of 2008

Lakhan Singh

APPELLANT

Vs

State of Uttar Pradesh and Another

RESPONDENT

Date of Decision : 18-03-2013

Acts Referred:

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

Citation : (2013) 03 AHC CK 0125

Hon'ble Judges : Arvind Kumar Tripathi (II), J

Judgement

Arvind Kumar Tripathi II, J.—The present criminal appeal arises out of the judgment/order dated 11.5.2007 passed by the trial court under Section 138 of Negotiable Instrument Act whereby learned Magistrate has acquitted Smt. Indresh Sharma respondent no.2 of the offence under Section 138 of the Negotiable Instrument Act.

2. As per the record, a complaint was filed by Lakhan Singh (the present appellant) against Smt. Indresh Sharma under Section 138 of the Negotiable Instrument Act on 24.12.2002. The court below has registered the complaint and ordered that statement under Section 200 Cr.P.C. be recorded. After recording of the statement under Section 200 Cr.P.C. and 202 Cr.P.C., accused was summoned on 6.3.2003 under Section 138 of the Negotiable Instrument Act to face trial. Accused appeared and the accusation was explained to her. Statement of prosecution witnesses were examined and after statement under Section 313 Cr.P.C. of the accused defence witness were examined and after hearing the arguments the court below acquitted the accused on the ground that the filing of the complaint was premature and also the cognizance taken was also premature as 15 days has not elapsed after service of notice.

3. Feeling aggrieved this criminal appeal has been filed.

4. Heard Sri K.M.Asthana, learned counsel for the appellant and learned A.G.A. Respondent No.2 did not appear despite personal service.

5. It has been argued by the side of learned counsel for the appellant that the registered notice of demand dated 5.12.2002 was sent by the appellant to the accused respondent and admittedly, it was received by her but she did not pay the amount and did not discharge her liability of debt. Hence, offence under Section 138 of the Negotiable Instrument Act was made out. It was argued that the ground of acquittal was wrong because the Magistrate is said to have taken cognizance on 6.3.2003 while the accused was summoned after going through the statement of witnesses under Sections 220 and 202 Cr.P.C. and after perusal of the complaint.

6. In support of his arguments learned counsel for the appellant has relied upon the case of Narsingh Das Tapadia V. Goverdhan Das Partani and Another reported in (2000)7 SCC 183 and Akash Garg V. State of U.P. and others reported in 2011(11) ADJ, 849.

7. In the case of Akash Garg V. State of U.P. and others (supra), it was held by this Court that a Magistrate can be said to have taken cognizance of offence if he has taken judicial notice of the accusation and applies his mind to the allegation made in the complaint or in the police report or the information received otherwise and the material filed therewith. In other words when a Magistrate applies his mind to the facts of the case and material collected during investigation and is satisfied that the allegations constitute an offence and initiate proceeding against the accused he can be said to have taken cognizance of the offence. Relying upon this decision it was argued that the complaint was filed on 24.12.2002 and from the order dated 24.12.2002 it is nowhere reflected that the Magistrate has ever applied his mind to the facts and materials on record. Therefore, order dated 24.12.2002 cannot be described with an order "taking cognizance" of the offence. In the case of Narsingh Das Tapadia V. Goverdhan Das Partani and Another (supra) it has been held that where the complaint was filed before the cause of action arose in terms of Section 138(c) of N.I. Act in stead of dismissing it, taking of cognizance can be postponed till the cause of action arose.

8. Learned counsel for the appellant again relied upon a decision of Apex Court in the case of Fakhruddin Ahmad V. State of Uttaranchal & Anr. reported in 2008 AIR SCW 5881, the Apex Court in para 14 and para 15 has held that :

"14. From the aforementioned judicial pronouncements, it is clear that being an expression of indefinite import, it is neither practicable nor desirable to precisely define as to what is meant by "taking cognizance". Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action.

15. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint

or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender. "

9. Heard the rival submissions of the appellant's counsel and gone through the record. The cases relied upon by the appellant Akash Garg V. State of U.P. and others (supra) is a case which was investigated by the police and a charge sheet was submitted.

10. In the case of Narsingh Das Tapadia V. Goverdhan Das Partani and Another (supra) Apex Court has held that :

"The compliance of clause (c) of proviso to Section 138 enables the court to entertain a complaint. Clause (b) of Section 142 prescribes a period within which the complaint can be filed from the date of the cause of action arising under clause (c) of the proviso to Section 138. No period is prescribed before which the complaint cannot be filed, and if filed not disclosing the cause of action in terms of clause (c) of the proviso to Section 138, the court may not take cognizance till the time the cause of action arises to the complainant. "

11. In the case of Fakhruddin Ahmad V. State of Uttaranchal & Anr. (supra) Apex Court has held that :

"One of the courses open to the Magistrate is that instead of exercising his discretion and taking cognizance of a cognizable offence and following the procedure laid down under Section 200 or Section 202 of the Code, he may order an investigation to be made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case. When such an order is made, the police is obliged to investigate the case and submit a report under Section 173(2) of the Code. On receiving the police report, if the Magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence, he may take cognizance of the offence under Section 190 (1) (b) of the Code and issue process straightway to the accused. However, Section 190(1)(b) of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation makes it a case against the accused. Undoubtedly, the Magistrate can ignore the conclusion(s) arrived at by the investigating officer."

12. In above decision pertains to taking of cognizance on a police report hence, it is not applicable in this case as it has to be decided as to when a complaint case is filed what will be the date of taking cognizance. Whether it is the date when Magistrate registers the complaint case and passes order for recording statements under Section 200 Cr.P.C. or it is the date when accused persons are

summoned under Section 204 Cr.P.C.

13. In the case of Superintendent and Rememberancer of Legal Affairs, West Bengal Vs. Abni Kumar Banerji, AIR (1950) Cal. 437 it has been held that :

"What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence".

14. This proposition of law was approved by the Apex Court in the case of R.R. Chari Vs. State of U.P. (1951) SCR 312.

15. In the case of Gopal Das Sindhi and anr. Vs. State of Assam and anr. AIR (1961) SC. 986, it was observed as follows :

"It is clear, however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because Section 200 states that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint."

16. In the case of Mohd. Yousuf Vs. Smt. Afaq Jahan & Anr.(2006)1 SCC.127 the Apex Court after going through all the propositions of law held that :

"Obviously it is only when a Magistrate applies his mind for the purpose of proceeding under Section 200 Cr.P.C. and subsequent Sections of Chapter XV of the Code of Criminal Procedure or under Section 204 Cr.P.C. under Chapter XVI of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance."

17. In the case of Devrapalli Lakshminarayana Reddy and ors. Vs. V. Naryana Reddy and ors. AIR 1976 Supreme Court 1672, the Apex Court has held that :

"It is well settled that when a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint, disclose the commission of an offence. This is clear from the use of the workds "may take cognizance" which

in the context in which they occur cannot be equated with "must take cognizance." The word "may" gives a discretion to the Magistrate in the matter. If on a reading of the complaint he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself.

This raises the incidental question: What is meant by "taking cognizance of an offence" by the Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding Sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If instead of proceeding under Chapter XV, he has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence. "

18. The same view has earlier been taken by Apex Court in the case of *Bhagat Ram Vs. Surinder Kumar* (2004)11 SCC 622.

19. From the above view it is very much clear that when a Magistrate makes up his mind to examine the complainant on oath and the witnesses present then it shall be said that the Magistrate has taken cognizance of the offence.

20. Taking cognizance and summoning of accused are two different things.

21. In the instant case, the Magistrate has passed orders on 24.12.2002 for recording the statement of the complainant under Section 200 Cr.P.C. Thus, from the proposition of law discussed above and formulated by Apex Court, it is clear that the Magistrate has taken cognizance on 24.12.2002. Undoubtedly, the notice was served on 10.12.2002. Thus the complaint was filed before 15 days of the service of notice and cognizance was also taken before 15 days of the notice.

22. Relying upon the decision of *Narsingh Das Tapadia V. Goverdhan Das Partani and Another* (supra) this Court has in the case of *Smt. Hemlata Gupta Vs. State*

of U.P. and Anr.2002 Criminal Law Journal 1522 held that: "controversy in the case has been finally settled by Apex Court that in case of complaint filed prior to expiry of 15 days of the notice it can be said to be incompetent. The bar of expiry of 15 days is for taking cognizance."

23. From the above it is abundantly clear that under Section 142 Sub Clause(b) first Proviso and Section 138 (c), cognizance cannot be taken before 15 days of the notice has elapsed because the cause of action arises after 15 days of the notice.

24. In the instant case, cognizance has been taken on 24.12.2002, so till then no cause of action has arisen.

25. The purpose of notice under Section 138(b) of the Act is to afford opportunity for making payment so that initiation of criminal proceeding may be avoided. The complaint was filed before 15 days of service of notice so there was still an opportunity for the respondent no.2 to repay the amount. The complaint petition should have been filed on 26.12.2008. Hence, the Court had no jurisdiction to take cognizance as the condition precedent for taking cognizance under Section 138(c) and 142 (b) N.I.Act was not present.

26. Learned court below has found the complaint premature and also came to the conclusion after going through the other evidence that accused is liable to be acquitted.

27. In this case as it has been discussed above that when the complaint was filed there was no cause of action for filing the complaint, the cognizance which has been taken was also premature.

28. In order to bring appellant to Section 138 NI Act, the complaint must show :

(I) That cheque was issued,

(II) The same was presented to the bank"

(III) It was dishonoured on presentation,

(IV) A notice in terms of the provisions was served on the person shocked to be made liable.

(V) Despite service of notice, neither any payment was made nor other obligations, if any, were complied within 15 days from the date of receipt of the notice.

29. From the above, it is clear that the respondent no.2 had still 15 days time to pay the amount and avoiding committing of offence under Section 138 of the Act, thereby avoiding prosecution.

30. Any complaint filed before the cause of action arose would not only be premature but no Court could have taken cognizance thereon in view of Section 142 of the Act. It is in such circumstances that the Apex Court in Narsingh Das

Tapadia V. Goverdhan Das Partani and Another (supra) has observed that even if a complaint is a premature complaint, still it can await maturity, or it can be returned to the complainant for filing it later and its mere presentation at an early date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability of the offence committed. On the facts of the case being dealt with by the Apex Court, though, the complaint was presented prematurely, cognizance was taken after the cause of action arose under Clause (c) of the Proviso to Section 138 of the Act and before the time limit provided under Clause (b) of Section 142 of the Act. That does not mean that where a complaint is presented prematurely the Magistrate is dutybound to return it. In my opinion, there is no such mandate and the decision of the Apex Court cannot be understood in that sense. If the Magistrate returns the complaint on the ground that it is premature and asking the complainant to present it after the cause of action arises, it is well and good. But it is not obligatory on the part of the Magistrate to do so, and any failure on the part of the Magistrate in that regard cannot be made use of advantage by the complainant. It is for the complainant to present his complaint on the date on which it has to be presented in accordance with law. If he presents it prematurely he cannot expect the Magistrate to do the duty which is of the complainant, more so when in a case like the one concerned herein, on the date the complaint is presented, the complainant invites the learned Magistrate to apply his mind and to take cognizance.

31. In view of the above, I have to conclude that the complaint was premature and the learned Magistrate has no alternative but to acquit the accused.

32. Appeal is dismissed.