(2011) 07 BOM CK 0036

In the Bombay High Court

Case No : Criminal Application No. 1657 of 2010

Leelaben Mahendrabhai Patel and Others — APPELLANT

Vs

Nitin Ramesh Baheti and Others — RESPONDENT

Date of Decision : 25-07-2011

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 204, 482
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 142, 57

Citation : (2011) ALLMR(Cri) 3533 : (2012) 2 BC 431

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : S.S. Joshi, for the Appellant; D.M. Kale . , Assistant Public Prosecutor, For the Respondent No. 6, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—Heard Mr. S.S. Joshi, Advocate for the applicant and Mr. D.M. Kale, A.P.P. for respondent No. 6. Admit.

2. Mr. D.M. Kale, A.P.P. waives service on behalf of respondent No. 6.

3. By this application u/s 482 of the Code of Criminal Procedure, applicants have questioned the judgment and order dated 31.7.2010 delivered the learned Additional Sessions Judge, Akola in Criminal Revision Application No. 240 of 2009 whereby the order of issuance of process dated 18.6.2009 passed by the learned Judicial Magistrate, First Class (Court No. 3), Akola in Summary Criminal Case No. 1350 of 2009 was set aside. Resultantly, the complaint was dismissed on 31st July. 2010.

4. The facts, in brief, are as under:

The complaint was instituted by the present applicants u/s 138 of the Negotiable Instruments Act on the ground that they are the only legal heirs of deceased Mahendrabhai Patel who expired on 30th December, 2008. According to the applicants, the accused firm M/s. Baheti Automobiles issued a cheque bearing

No. 168977, dated 1.2.2009 drawn upon the Akola Urban Co-operative Bank Ltd., Akola, Branch at Adarsh Colony, Akola for a sum of Rs. 50,000/-. The cheque was drawn in favour of the deceased Mahendrabhai Rambhai Patel. It is the contention of the applicants that, in the capacity of legal representatives of said Mahendrabhai Patel, they had presented the cheque with a view to encash the same in the Bank account of deceased Mahendrabhai; however, the cheque was returned dishonoured with the Bankers remark "Account seized by Sales Tax Office". The applicants issued demand notice dated 12.3.2009 by Registered Post A/D. as well as under Certificate of Posting. It is their case that although the accused were served, the amount was not repaid as demanded on the basis of the cheque issued in the name of deceased Mahendrabhai. The learned Judicial Magistrate, First Class, Court No. 3, Akola issued process against the accused u/s 204 of the Code of Criminal Procedure for an offence punishable u/s 138 of the Negotiable Instruments Act. The accused were aggrieved by the Order 5 of issuance of process and hence, challenging legality, propriety and correctness of the said order, they approached the Sessions Court, Akola vide Criminal Revision No. 240 of 2009. The learned Additional Sessions Judge, Akola by the impugned Judgment and Order set aside the order directing issuance of process and dismissed the complaint.

5. The learned Advocate appearing on behalf of the applicants submitted that the learned Additional Sessions Judge ought to have allowed the complaint proceedings to be heard on merits and ought not to have disturbed the order regarding issuance of process. He made a reference to the ruling in the case of Anup Jagdish Agarwal Vs. Nilkunj Lalit Shah and Others, in order to submit that, in the complaint proceedings filed by heirs of deceased drawee, after making reference to special rules of evidence and statutory presumptions u/s 118(g) of the Negotiable Instruments Act, the Bombay High Court agreed with the view that if the original payee is holder in due course, his representative has all his rights and the rights under Sections 138 and 142 of the Negotiable Instruments Act are applicable to the legal representatives also if he derives title from the holder in due course. It appears that, in para 15, this Court, while recording concurrence with the conclusions reached by the Kerala High Court in a decision Chandra Babu Vs. Remani, also expressed that nothing contrary was brought to the notice of this Court, thus, if was concluded that a complaint can be filed by the legal representatives of the payee and, merely because it is so filed, it cannot be held that it is not maintainable and once the complaint can be held to be maintainable, any larger issue need not be gone into at the prima facie stage. Whether the presumption is applicable or whether the burden has been discharged by the accused by leading evidence to the contrary are all matters which must be gone into and decided at the time of trial. The proposition stated as above was mentioned in the peculiar facts of the case when, after the death of late Mr. Shah in that case, heirs had gone through certain documents left by deceased and they found that late Shah had advanced various sums from time-to-time and for due repayment of the same, cheques were issued, which were

deposited by the complainant and they were dishonored.

6. The present case is distinguishable. In the present case, it appears that the cheque itself was issued on 1st February, 2009 when Mahendrabhai had already expired on 30th December, 2008. The cheque in question in this case was issued after one month of the death of Mahendrabhai. So it was drawn in favour of payee who was already dead. Therefore, the learned Magistrate who had issued process punishable u/s 138 of the Negotiable Instruments Act in order to take cognizance of the offence. Section 142 of the Negotiable instruments Act reads thus :

142. Cognizance of offences-- Notwithstanding any thing 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 take 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.]

7. The provision is crystal clear to indicate that the complaint in writing must be made by the payee or as the case may be to the holder in due course of the cheque 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. Section 138 of the Negotiable Instruments Act is a penal provision which punishes the offender with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of cheque or with both. Therefore, in order to entertain a complaint for an offence punishable u/s 138 of the Negotiable Instrument Act, proviso to Section 138 has imposed certain conditions attracting applicability of offence punishable u/s 138, which reads as under :

(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 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.

8. Section 57 of the Negotiable Instruments Act also clarifies that the legal representatives of a deceased person cannot negotiate by delivery only a promissory note, bill of exchange or cheque payable to order and endorsed by the deceased but not delivered.

9. In the present case, admittedly, the cheque was issued in the name of deceased after one month of his death. Prima facie, the applicants, who claim as legal heirs of Mahendrabhai Patel (deceased), were required to honestly inform the Banker of the deceased Mahendrabhai of the fact of his death while they sought to present the cheque in the account of the deceased and to take further steps in respect of account of the deceased with his Banker. None of the applicants were named as payee of the cheque and the learned Additional Sessions Judge rightly observed that there was nothing on record on the basis of which it can be said that the applicants were holder in due course. Under these circumstances, unless the applicants were authorised by Succession Certificate or Letter of Administration or Probate, if any granted by the competent Civil Court in respect of the amount in question payable by the cheque in the name of the deceased, they could not have insisted upon the drawer to pay the amount of dishonoured cheque without lawfully entering into the shoes of the deceased payee. Under these circumstances, the complaint was not maintainable and the order of issuance of process was result of non-application of judicious mind by the learned Magistrate to the essential elements of the offence punishable u/s 138 of the Negotiable Instruments Act. That being so, the impugned judgment and order by Revisional Court is correct, proper and legal and no interference is warranted u/s 482 of the Code of Criminal Procedure. Hence, the application is dismissed.