

(2000) 04 CAL CK 0033
In the Calcutta High Court

Case No : Criminal Miscellaneous Jurisdiction C.R.R. No. 2391 of 1998

Maruti Equipments Pvt. Limited and Another

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 27-04-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2000) 3 CALLT 37 : (2000) 1 CHN 903

Hon'ble Judges : Debiprasad Sengupta, J

Bench : Single Bench

Advocate : Mr. Soumen Ghosh, Mr. Alope Nath Ghosh and Mr. Nandalal Pradhan, for the Appellant; Mr. Pradip Ghosh and Mr. Joymalya Bagchi, for the Respondent

Judgement

D. Sengupta, J.—This revisional application is for quashing of a proceeding being case No. C-41 of 1993 u/s 138 of the Negotiable Instruments Act.

2. The opposite party No.2 filed a petition of complaint before the Additional Chief Metropolitan Magistrate, Calcutta alleging commission of an offence u/s 138 of the N.I. Act against the present petitioners. It was alleged in the said complaint that the accused/petitioner No.2 issued a cheque bearing No. 156276 dated 10.2.92 for Rs. 7,75,000/- drawn on State Bank of India, Vatva I.E. Ahmedabad. The said cheque was presented for encashment by the complainant with State Bank of India, Baghbazar, Calcutta. The said cheque was dishonoured by the Bank, which by Its debit memo dated 25.11.92 informed the petitioner that the said cheque was returned unpaid for the reason of "Insufficient Funds". The complainant/ O.P. No.2 issued a demand notice on 2.12.92, which was received by the accused petitioner on 10.12.92. On failure to make the payment by the accused within the stipulated period of 15 days the petition of complaint was filed.

3. On receipt of the said complaint the learned Magistrate took cognizance of the offence by an order dated 22.1.93.

4. The present petitioners thereafter filed an application before the learned Magistrate on 25.1.95 praying for dropping of the proceeding on the ground that the petition of complaint was barred by Limitation as the same was filed beyond the statutory period as provided in section 138(b) and (c) of the N.I. Act and the cognizance of the offence was taken in violation of the provision of section 142 of the said Act.

5. By an order dated 22.6.95 the learned Magistrate rejected the said application for dropping of the proceeding. Challenging the said order dated 22.6.95 the present petitioners preferred a revisional application before the learned Judge, City Sessions Court, Calcutta. After a contested hearing the said revisional application was dismissed by the learned Sessions Judge by an order dated 10.7.98. It is at this stage the petitioners came up before this Court praying for quashing of the proceeding.

6. Mr. Soumen Ghosh, learned Advocate appearing for the petitioners submits that the cognizance of the offence taken by the learned Magistrate is bad in law in as much as the same was taken in violation of the provision of section 142(b) of the N.I. Act, which provides that cognizance of the offence cannot be taken on the basis of a petition of complaint which is not filed within the statutory period of one month from the date on which the cause of action arises under clause (c) of the proviso to section 138 of the N.I. Act.

7. Mr. Chosh the learned Advocate of the petitioners further submits that the complainant/opposite party No.2 deliberately suppressed the material facts in the petition of complaint. He points out that the concerned cheque was presented for encashment by the complainant on February 13, 1992. Thereafter the complainant received the cheque unpaid along with return memo with an endorsement "Refer to the Drawer" from the State Bank of India, Ahmedabad dated 26.2.92. The said memo was received by the complainant on 22.3.92. So, according to Mr. Ghosh the complainant was supposed to send the demand notice within 15 days from the date of receipt of the Intimation from the Bank. But in the present case such demand notice was sent to the accused on 2.12.92, i.e., long after expiry of 15 days from the date of receipt of the Return Memo. Mr. Ghosh further submits that when the cheque was returned unpaid with an endorsement in the Return Memo "Refer to the Drawer", this was sufficient to indicate that the cheque was dishonoured for insufficient fund in the account of the accused. So the complainant was supposed to send the demand notice to the accused asking him to make the payment within 15 days from the date receipt of the said notice. But the complainant failed to send such noticed within the stipulated period of 15 days and he Issued such demand notice long after that. Mr. Ghosh submits that it is now well settled that "Refer to Drawer" means insufficiency of fund. In support of his contention Mr. Ghosh relied on a Judgment reported in 1991 CrI. LJ 609 wherein it was held by the Hon"ble single Judge of this Court that the remark "Refer to the Drawer" necessarily means that the cheque is returned for want of funds in the account of the drawer of the cheque.

8. The next judgment relied upon by the petitioner's learned Advocate is reported in M/s. Electronics Trade and Technology Development Corpn. Ltd., Secunderabad Vs. M/s. Indian Technologists and Engineers (Electronics) Pvt. Ltd. and another, wherein it was held by the Hon'ble Apex Court as follows :--

"It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (I) in this case, "(I) refer to the drawer" (2) "Instructions for stoppage of payment" and (3) "stamp exceeds arrangement", it amounts to dishonour within the meaning of section 138 of the Act.

9. The next judgment relied upon by Mr. Ghosh is reported in 1992 CrL LJ 1619. In the said case the accused issued some cheques, of which some were dishonoured by the Bank giving reason "suit failed by the Bank against the account holder". Suit by the Bank was for recovery of loan amount. In such circumstances it was held by the Hon'ble single Judge of Bombay High Court that plain reading of the reason given by the Bank is that the accused had no amount to his credit. There can not be any meaning other than this. So it was held that section 138 of the N.I. Act was very much attracted.

10. Mr. Ghosh cited another judgment reported in 1998 Cr.LJ 4066. I have carefully gone through the Judgment of the Hon'ble Apex Court and in my opinion the said case was decided in the facts and circumstances of that particular case which is quite different from the present case. In the said case the point for decision was whether the payee or the holder of a cheque can initiate prosecution for an offence u/s 138 of the N.I. Act for its dishonour for the second time, if he had not initiated such prosecution on the earlier cause of action. It was held by the Hon'ble Apex Court that cause of action within the meaning of section 142(c) of the Act arises and can arise only once.

11. In the present case, according to petitioners' learned Advocate there is no valid cause of action. As per provision of the statute demand notice is to be sent by the drawee within 15 days from the date of the receipt of the return memo from the Bank and the drawer of the cheque is to make the payment within 15 days from the date of receipt of the demand notice. On failure to make such payment within the period the cause of action arises. Petition of complaint is to be filed within one month from the date when cause of action arose. According to Mr. Ghosh there cannot be any cause of action since no demand notice was issued by the drawee (complainant) in time, i.e., within the stipulated period of 15 days from the date of receipt of intimation from the Bank.

12. Mr. Pradip Ghosh learned Advocate appearing for the complainant/ opposite party submits that the endorsement "Refer to the Drawer" means so many things including dishonour of cheque due to insufficiency of fund. So unless it is ascertained that the cheque was dishonoured for insufficiency of fund a demand

notice cannot be issued by the complainant. In the present case after receiving the return Memo on 22.3.92 from the Bank with the remark "Refer to Drawer" the complainant wanted to ascertain through a telegram whether there was sufficient amount in the account of the firm. The complainant also wanted to ascertain by sending a letter by registered post with A/D to the S.B.I. Vatva, I.E. Branch, Ahmedabad as to whether the company was having sufficient fund in its account. The accused/petitioners came to know on 25.11.92 by a letter issued by their Banker that the Cheque was dishonoured due to Insufficiency of fund. Thereafter a demand notice was sent on 2.12.92, which was received by the accused/petitioners on 10.12.92. When the petitioners failed to make the payment within 15 days, the petition of complaint was filed In Court. According to Mr. Ghosh the petition of complaint was filed within time and it was not barred by limitation.

13. Mr. Ghosh relied on a judgment reported in 1991 Company Cases (Vol.71) page 273. It appears from the said Judgment that in an application for quashing of the proceeding the learned single Judge of this Court held that "Refer to the Drawer" necessarily means that the cheque is returned unpaid for want of fund in the account. Prima facie it was found that the cheque bounced because of Inadequacy of funds in the drawers account. So, it was held by this Court that it would be premature to hold that the accused persons had not committed any offence. Accordingly the revisional application was dismissed.

14. Mr. Ghosh next relied on a Judgment of the Hon"ble Apex Court reported in M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi, , wherein it was held by the Apex Court that even if a cheque is dishonoured because of "stop payment" instruction to the Bank, section 138 of the N.I. Act gets attracted. It was further held by the Hon"ble Court that the Court taking cognizance of the offence u/s 138 of the N.I. Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque gets an opportunity u/s 139 of the Act and as such it was held that High Court was not Justified in quashing the complaint u/s 482 Cr.PC at the threshold. I have gone through the said Judgment and in my opinion the said Judgment Is not at all applicable In the facts and circumstances of the present case.

15. I have heard the learned Advocates of the respective parties. It appears from the facts of the case that the concerned cheque was presented for encashment by the complainant on 13.2.92. Thereafter the complainant received the cheque unpaid alongwith the return memo with an endorsement "Refer to Drawer". Said memo was received by the complainant on 22.3.92. So as per the provision of the Act the complainant was supposed to send the demand notice within 15 days from the date of receipt of such return memo. This was not done by the complainant and he issued the demand notice on 2.12.92, i.e., long after expiry of the said period. It also appears from the petition of complaint that this fact was suppressed by the complainant for the reasons best known to him. In paragraph 9 of the complaint it was stated that for the first time he came to

know about the dishonour of the cheque on 25.11.92, which is not at all correct. It has now been well settled In number of decisions of the Hon"ble Apex Court and also of other High Courts that the endorsement "Refer to Drawer" means the cheque returned for want of funds and it amounts to dishonour of the cheque. There was no reason for the complainant to send a letter again to the concerned Bank for further clarification and to ascertain as to whether there was sufficient fund in the account of the accused company. By such an explanation the delay in sending the demand notice in violation of the specific provision of the Act cannot be justified. Clause (b) to the proviso of section 138 of the N.I. Act runs as follows :

"Provided that nothing contained In this section shall apply unless-

(a) *****

(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 fifteen days of receipt of information by him from the bank regarding return of the cheque as unpaid :

(c) *****

16. From a reading of the aforesaid provision of the Act it becomes clear that the time fixed by section 138(i)(b) of the Act is mandatory.

In view of the discussions made above I am of the opinion that the impugned orders of both the Courts below suffer from illegality and the same should be set aside.

Accordingly the revisional application succeeds and the same is allowed. The impugned proceeding being Case No. C-41 of 1993 pending in the Court of learned Metropolitan Magistrate, 11th Court is hereby quashed.

17. Application succeeds.