

(2005) 05 AHC CK 0210

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 8008 of 2002

Mohammad Inam Ahmad

APPELLANT

Vs

State of U.P., Additional Chief Judicial Magistrate and
Rajendra Kumar Varshaney

RESPONDENT

Date of Decision : 04-05-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 204(2), 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Penal Code, 1860 (IPC) — Section 417, 420

Citation : (2005) CriLJ 4187

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

Bench : Single Bench

Advocate : M.P.S. Chauhan, for the Appellant; S.P. Singh and H.P. Singh and A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

K.N. Ojha, J.—Instant application has been moved by accused Mohd. Inam Ahmad u/s 482 Cr.P.C. to quash the order dated 2.2.2002 and 19.8.2002 whereby the Additional Chief Judicial Magistrate, Court No. 7, Aligarh, summoned the applicant and subsequently issued non-bailable warrant in Criminal Case No. 1342 of 2001, Rajendra Kumar Varshaney v. Mohd. Inam Ahmad, u/s 138 of the Negotiable Instrument Act (hereinafter referred to as the Act).

2. Heard Sri M.P.S. Chauhan, learned counsel for the applicant, Mohd. Inam Ahmad, learned AGA and Sri S.P. Singh, learned counsel for the O.P. No. 3, Rajendra Kumar Varshney.

3. The fact as revealed from the record is that according to O.P. No. 3, Rajendra Kumar Varshney, two cheques Nos. 085194 and 085195 dated 12.11.2000 amounting to Rs. 29,953.75 and Rs. 50,000/- payable at Branch of Vijaya Bank, 13/6, G.T. Road Aligarh, were issued by the applicant Mohd. Inam Ahmad in favour of O.P. No. 3. Rajendra Kumar Varshney, in the course of business

transaction but the said, cheques were dishonoured by Vijiya Bank due to deficiency of the amount in the account on 12.11.2000. The complainant O.P. No. 3 sent legal notice on 25.11.2000 by registered post and thereafter filed a complaint in the Court of Additional Chief Judicial magistrate, Court No. 4, Aligarh, bearing Case No. 1342 of 2001, Rajenora Kumar Varshney v. Nohd. Inam Ahmad, u/s 138 of the Act, police station Delhi Gate, Aligarh. True copies of the legal notice and complaint are annexed as Annexure Nos. 1 & 2 to the application. After examination of the witnesses under Sections 200 & 202 Cr.P.C. the Addl. Chief Judicial Magistrate, Court No. 7, Aligarh, where the case was subsequently transferred, summoned the applicant u/s 138 of the Act by order dated 2.2.2000, copy of which is Annexure No. 3 to the application. When the applicant-accused did not appear the Additional Chief Judicial Magistrate issued, non-bailable warrant on 19.8.2002. According to the applicant he purchased brass worth Rs. 29,953.75 vide bill No. 21/96-97 and gave an undated cheque No. 085914 of the amount and another undated cheque No. 085915 amounting to Rs. 50,000/- as advance was also issued. There was no agreement between the parties in respect of interest. The complainant O.P. No. 3 did not deliver the brass to the applicant; on 2.12.1996 worth Rs. 52,229.20 vide bill No. 52 of 96-97. The applicant issued undated cheque to the O.P. No. 3 due to negligence. Thus the act of the complainant is malafide. Copies of both the cheques are Annexures 4 and 5 to the application. According to the applicant, the O.P. No. 3 did not comply with the requirement of Section 142(b) of the Act, which requires that the complaint must be made within one month from the date when the cause of action arose as contemplated under proviso clause (c) of Section 138 of the Act. It is stated that Vijiya Bank refused the aforesaid cheques on 14.11.2000 and complaint was filed on 21.12.2000. Thus the provisions of Section 142(b) of the Act is not complied with. Besides it while issuing summons and warrant the complainant did not furnish the list of witnesses as required by Section 204(2) of Cr.P.C. On this ground the application has been moved before this Court to set aside the order through which the accused applicant was summoned and subsequently non-bailable warrant was issued against him. Impliedly this applicant wants to quash the proceedings of the case due to non-compliance of the provisions of the Act.

4. O.P. No. 3 filed counter affidavit containing the fact that the two cheques dated 12.11.2000 issued by the applicant were presented before the Bank for encashment which were returned with note that the amount of cheque exceeds the arrangement. The bank informed the O.P. No. 3 this fact on 14.11.2000. The O.P. No. 3 sent legal notice on 24.11.2000. It is alleged that brass was supplied and as a price of it both the cheques were issued. The applicant failed to make payment within 15 days from the date of receipt of the notice. It is alleged that in this case the cheques were returned by the Bank on 14.11.2000 and legal notice was sent by the O.P. No. 3 on 24.11.2000. The applicant was expected to make payment of the amount of cheques within 15 days, therefore, the complaint was filed on 21.12.2000 and therefore the learned Magistrate has

rightly taken cognizance and issued summons to the applicant and when he did not appear non-bailable warrant was issued. It is also established in the counter affidavit that the names of the witnesses have been mentioned. In the complaint in paragraph No. 5, therefore, the allegation that the names of witnesses are not specified is devoid of force and on this ground the proceedings of the complaint cannot be quashed.

5. In this case it is not denied that the cheques of above mentioned amounts were issued by the applicant in favour of the O.P. No. 3 on 12.11.2000. No rejoinder affidavit has been filed denying the allegations of the O.P. No. 3 in the counter affidavit that Vijiya Bank informed the O.P. No. 3 that there was no sufficient fund in the account of the applicant and this information reached the O.P. No. 3 on 14.11.2000. According to the complainant O.P. No. 3 sent notice on 24.11.2000 informing the dishonouring of both the cheques and thereby allowing the applicant 15 days time to make payment of the amount of the cheques. It is hot denied that the amount of cheques has not been paid and the complaint was filed on 21.12.2000. Neither in the affidavit of the applicant nor in the counter affidavit of the O.P. no. 3 it has been specified on which date the legal notice dated 24.11.2000 informing the dishonour of the cheque and demanding payment within 15 days was served upon the applicant. Thus it is a matter to be proved on evidence as to whether the notice was sent at the correct address of the applicant through registered as is alleged by the O.P. No. 3 and it was sufficiently Served on the applicant.

6. 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, whenever is earlier;

(b) the payee or the holder in due course of the cheque as the case may be, makes a demand from 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.

7. Thus from the provisions of the Act it becomes clear that when notice of dishonour of the cheque is received by the complainant from, the bank concerned, he has to send a notice to the drawer of the cheque and the drawer of the cheque has 15 days time to make payment of the amount of the cheque from the date the notice is served on him. If the payment is not made within 15 days from the date of the service of notice, the complainant payee has one month's time to file the complaint against the drawer of the cheque as is mentioned in Section 142(b) of the Act. If the registered notice as served, the date of service of notice is material, which has not been specified by either of the parties in this case. Since the notice is said to have been sent through registered post there is presumption of the service of notice, but it is rebuttable and for this purpose evidence of the parties is required.

8. In *M/s. Madan and Co. Vs. Wazir Jaivir Chand*, , it has been laid down by Hon"ble the Apex Court that if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed the addressee's own conduct.

9. In *Indian Bank Vs. Datla Venkata Chinna Krishnam Raju*, , it has been held by Hon"ble the Apex Court that when notice was sent by registered post but neither the acknowledgement card nor the unserved registered cover was received back the presumption is that service was made.

10. In *M/s. Attabira Regulated Market Committee Vs. M/s. Ganesh Rice Mills*, , it has been observed by Hon"ble the Apex court that though notice was sent to the respondent but neither acknowledgement nor unserved letter was received.

Under these circumstances the notice must be deemed to have been served on the respondents.

11. In G.S. Srikanth, MD, Talavadi Rock and Mineral Products, Madras and others Vs. Sri Lakshmi Financiers and Others, , it has been laid down by the Hon''ble High Court of Andhra Pradesh that whereas it is established that notice was sent under registered post acknowledgement due and if neither the postal cover nor the acknowledgement is returned the presumption available is that the addressee has received the notice. It would be the case of deemed service of notice. In such case requirement of Section 138 of the Act shall be deemed to have been complied with.

12. The learned counsel for the applicant has cited 2000(2) JIC 512 (SC) Shakti Travel & Tour v. State of Bihar, wherein it has been said down by Hon''ble the Apex Court that when the complaint is filed and it is not disclosed that legal notice was sent and payment was not made within 15 days, the conditions of Section 138 of the Act are not complied and therefore the complaint was not maintainable. But in instant case the position is otherwise. The case of the O.P. No. 3 is that when Vijaya Bank informed him on 14.11.2000 that the payment could not be made for want of sufficient fund in the account, the notice was sent through registered post on 24.11.2000 and the complaint was filed on 21.12.2000 u/s 138 of the Act and under Sections 420, 417 I.P.C. police station Delhi Gate, Aligarh. Thus in view of the law laid down by Hon''ble the Apex Court if legal notice has been sent, it is to be ascertained as on what date the cause of action arose. There is presumption of service of the notice and it can be ascertained as only when the parties adduce evidence as to whether really the notice was served or not, which was the date on which the notice was served 15 days time is for the drawer of the cheque from the date of service of notice to make the payment of the amounts of the cheque and if 15 days expire and payment is not made thereafter remains one month's time to file the complaint.

13. This fact can be ascertained only on evidence, which is to be adduced by the parties.

14. In this the legal notice is said to have been sent through registered post and according to O.P. No. 3 the conditions of Sections 138 and 142 of the Act have been complied with, therefore, the order summoning the accused-applicant to face trial cannot be quashed at this stage.

15. It may be mentioned that the parties are businessmen and there is dispute of supply of brass materials. In these circumstances instead of compelling the attendance of the applicant through coercive process of non-bailable warrant to give opportunity to the applicant or appearing in the court below would be in the interest of justice, therefore the order issuing non-bailable warrant against the applicant deserves to be set aside.

16. The application moved by Mohd. Inam Ahmad u/s 482 Cr.P.C. is rejected, but the order dated 19.8.2002 passed by the learned Additional Chief judicial

Magistrate, Court No. 7, Aligarh, in Case No. 1342 of 2001, Rajendra Kumar Varshaney v. Mohd Inam Ahmad, is set aside. The applicant Mohd. Inam Ahmad is allowed 30 days time to appear in the Court of the learned Magistrate concerned to file bail bonds to the satisfaction of the Court and participate with the proceedings of the case. The stay order dated 4.9.2002 passed by this Court is vacated. After the applicant puts in his appearance before the Court concerned, the learned Magistrate will proceed with the case to decide it in accordance with law.