

(1998) 03 RAJ CK 0035

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 988 of 1996

Nakoda Laminators and Others

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 27-03-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 138, 190, 200, 202, 204
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1), 141(2), 142

Citation : (1999) 3 CivCC 599 : (1998) CriLJ 3525 : (1999) 4 RCR(Criminal) 364

Hon'ble Judges : Amaresh Ku. Singh, J

Bench : Single Bench

Advocate : N.P. Gupta, for the Appellant; R.S. Rathore, Public Prosecutor and M.L. Garg, (for No. 2), for the Respondent

Judgement

Amaresh Ku. Singh, J.—Heard the learned counsel for the petitioner, the learned Public Prosecutor and the learned counsel for the non-petitioner No. 2 and perused the original record of the Criminal Case No. 6897/94 India Photographies Co. Ltd. v. Nakoda Laminator pending in the Court of Additional Civil Judge (Jr. Division) and Judicial Magistrate No. 4, Jodhpur.

2. By this petition filed u/s 482, Cr.P.C. the petitioners have prayed that the proceedings of the Criminal Case No. 6897/94 pending in the Court of Additional Civil Judge (Jr. Division) and Judicial Magistrate, Jodhpur in respect of offence u/s 138 of the Negotiable Instruments Act, 1881 be quashed.

3. It appears from the record of the lower court that on 25th April, 1994 the non petitioner No. 2 filed a complaint (Ex. P/37) in which he alleged that an offence u/s 138 of the Negotiable Instruments Act had been committed in respect of Cheque No. 203300 dated 17th Feb. 1994 for a sum of Rs. 49,875/-.

4. The complaint was checked by the office and the office reported that the matter was outside the jurisdiction of the Court. On 26th April, 1994 when the complaint was filed before the learned Judicial Magistrate, the counsel for the

complainant wanted time to argue regarding the jurisdiction. On 2nd May 1994, the learned Judicial Magistrate came to the conclusion that the complaint was not outside his jurisdiction, he therefore, fixed the date for examination of the complainant.

5. On 30th May, 1994 the statement of complainant was recorded u/s 200, Cr.P.C. and thereafter the case was adjourned for hearing arguments regarding cognizance, It appears that from the record of the lower Court that the case was adjourned from time to time and ultimately on 18-5-1995 after hearing arguments and taking into consideration the facts of the case, the learned Judicial Magistrate issued process against the accused persons u/s 204, Cr.P.C. for offence u/s 138 of the Negotiable Instruments Act regarding the Cheque No. 203300 dated 17th Feb. 1994 for a sum of Rs. 49,875/-.

6. The allegation made by the complainant was that he had made certain supplies and seven cheques including the Cheque No. 203300 dated 17th Feb. 1994 were issued by the accused persons. When the cheques were delivered to the bank for payment, they were dishonoured and a notice was sent to the accused persons on 9th March, 94 asking them to make payment, but no payment was made, therefore, another notice was sent through the complainant's counsel on 15th March, 1994 again demanding the payment of the amount of the cheque, but payment was not made after the expiry of the period of 15 days, the complaint was filed within the period of limitation prescribed by law.

7. The learned counsel for the petitioners has challenged the proceedings initiated by the learned Judicial Magistrate on several grounds.

8. The first submission made by the learned counsel for the petitioner is that the petitioner was apprised of the non-payment of the amount of cheques. He deposited the amount in the bank account of the complainant and as such the amount which was due, had already been paid and the offence u/s 138 of the Negotiable Instruments Act is not made out. In para No. 2 of the petitioner, it has been mentioned that on being sounded, the petitioner immediately on 3rd Aprils 94 deposited 5.5. lacs in the bank account of the respondent No. 2 company and then on 24-2-1994 made a payment of another Rs. 6 lacs to the respondent No. 2 company against a proper receipt and thus the payment of all the cheques issued which were dishonoured, was made.

9. I am afraid, unless it is proved that the above mentioned payments were made towards the amount payable under the cheques which had been dishonoured by the bank, the submissions that the offence u/s 138 of the Negotiable Instruments Act is not made out, cannot be said to be true. It is not for this Court to decide whether the alleged payments of Rs. 5.5. lacs and 6 lacs had been made towards the payment payable under the cheques which had been dishonoured by the bank. It would be for the trial Magistrate to decide the question of payment at the appropriate stage in accordance with law. Suffice it to

say that the proceedings pending in the trial Court cannot be quashed on the basis of the averments made in para No. 2 of the petition.

10. The second submission of the learned counsel for the petitioners is that the complaint was filed beyond the period of limitation. His argument is that when the cheques were dishonoured, the notice was sent by the non -petitioner on 9th March, 94 and therefore, the date of this notice should be taken to be the date from which the period of limitation is to be counted. The notice dated 15-3-1994 according to the learned counsel for the petitioners is not relevant for the purpose of determining whether the complaint was filed within the period of limitation prescribed by the Negotiable Instruments Act.

11. The limitation for the purpose of filing a complaint in respect of offence u/s 138 of the Negotiable Instruments Act is prescribed by Section 142 of the Negotiable Instruments Act, which reads :-

142. Cognizance of offences. - 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;

(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.

12. A bare perusal of the Section 142 of the Negotiable Instruments Act shows that the complaint is required to be made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138.

13. Under the proviso to Section 138 of the Negotiable Instruments Act, the cause of action under Clause (c) arises when the drawer of such cheque fails to make the payment of the 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. So far as the notice is concerned, it is Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, which provides that the notice must be served to the drawer within a period of 15 days from the date of the receipt of the information from the bank. After the service of notice on the drawer of the cheque, fifteen days time is given by the Legislature to the drawer of the cheque to make payment. If within this period of fifteen days, the drawer of the cheque does not make payment then a cause of action would arise in favour of the payee or as the case may be, the holder in due course of the cheque and found the date of accruing the cause of the action, the complaint must be filed within a period of 30 days.

14. In the instant case, Cheque No. 203300 was issued on 17-7-1994. The

cheque was sent to the bank for payment within a period of six months prescribed by Clause (a) of the proviso to Section 138. The information for the bank about the dishonouring of the cheque was issued on 1st March, 1994 as revealed by Ex. P 23A. According to the averments made in the complaint (Ex.P/36), this information was received from the bank on 9th March, 1994 and on the same day, the first notice dated 9th March, 1994 was sent to the petitioner asking him to make the payment of the amount. Thus, it appears that the notice dated 9th March, 1994 was issued within the prescribed period of fifteen days.

15. Under Clause (c) of the provision to Section 138 of the Negotiable Instruments Act, the drawer of the cheque can make the payment within the period of fifteen days from the date of service of the notice. Therefore, it is proper to hold that the drawer of the cheque was entitled to make the payment of the cheque upto 25th March, 1994. It is alleged that the amount of the cheque was not paid. The cause of action thus accrued to the non-petitioner No. 2 on the expiry of 25th March, 1994. He was entitled to file the complaint relating to offence u/s 138 of the Negotiable Instruments Act within a period of 30 days after the accrual of the cause of action. The period of 30 days was to expire on 25th March, 94 and the complaint (Ex.P37) was filed on 25th April, 1994. In view of these facts, it must be held that the complaint is within limitation as provided, in Section 142 of the Negotiable Instruments Act.

16. The learned counsel for the petitioners has submitted that even though the complaint was filed on 25th April, the cognizance of the offence was not taken on that day and it was taken long after the filing the complaint and therefore, it should be held that the cognizance of the offence u/s 138 was barred by limitation.

17. I am afraid, this submission has no force- Clause (b) of Section 143 of the Negotiable Instruments Act requires that the complaint should be filed within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138. This period of limitation has been provided from filing of the complaint or making the complaint in the Court. There is nothing in Clause (b) of Section 142 of the Negotiable Instruments Act to indicate that it intends to prevent the Magistrate from taking of the cognizance on the basis of the complaint, which is filed within the period of limitation. In other words, the period 30 days has been prescribed for filing of the complaint, in the Court and not for taking cognizance of the offence by the Magistrate. Therefore, even if the cognizance of the offence was taken by the Magistrate after 25th April, 1994, the cognizance cannot be said to be barred by limitation, because the complaint was filed within the period of limitation prescribed by Clause (c) of Section 142 of the Act.

18. The third submission of the learned counsel for the petitioner is that in this case the learned Judicial Magistrate took cognizance of the offence after the expiry of the period of limitation prescribed in Section 468, Cr.P.C. The maximum

period for which an offender may be sent to imprisonment u/s 138 is not more than one year Under Clause (b) of Sub-section (2) of Section 458, Cr.P.C., 1973 the period of limitation within which cognizance of the offence must be taken is one year. The offence in the instant case occurred on 25th March 94 when the amount payable under the cheque was not paid by the drawer of the cheque within a period of fifteen days after the service of the notice dated 9th March, 1994. Therefore, the period of one year is to be reckoned from 25th March, 1994. A perusal of the record shows that on 8th May, 1994 the learned Judicial Magistrate passed an order to the effect that the complaint was within his jurisdiction and simultaneously directed that the case be listed on 30th May, 1994 for the examination of the complainant. On 30th May, 1994 he recorded the statement of the complainant and adjourned the case to 13th June, 1994 for arguments and on cognizance, and therefore, the case was adjourned from time to time for arguments and on cognizance and the order by which process was issued against the accused persons was passed on 15th May, 1995. The learned counsel for the petitioners has submitted that for the purpose of computing the "period of limitation prescribed by Section 468(2) (c), Cr.P.C. the date of taking cognizance is 15th May, 1995, which is beyond the period of one year from the date of commission of the offences u/s 138 of the Negotiable Instruments Act.

19, I am afraid. This arguments has no force. Taking cognizance of the offence u/s 190, Cr.PC has not been defined any where in the Code of Criminal Procedure. This expression was defined by a Division Bench of the Calcutta High Court in *Emperor v. Sourindra Mohan* ILR (1910) Cal 412, wherein it was observed by the Division Bench that "taken cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence. The definition given by the Calcutta High Court has been consistently approved by the Hon'ble Supreme Court and High Courts in India. Since, no formal action is necessary for the purpose of taking cognizance of the offence, sometimes, it is difficult to find out whether the Magistrate has or has not taken cognizance of offence within the facts are ought to his notice, whether orally or by submitting before him a complaint or any other documents. In all such cases, it is to be ascertained whether the Magistrate paid attention to the facts placed before him and after noticing the facts, wherein he decided to take action by proceeding judicially in the matter or he decided to take action by directing investigation by the police or he did not take any action at all in the matter when the facts were brought to his notice.

20. In view of the law laid down by then Hon'ble Supreme Court in *R.R. Chari Vs. The State of Uttar Pradesh*, , if the Magistrate on perusal of the complaint decides to conduct an inquiry Under Sections 200 and 202, Cr. P.C., he must be said to have taken the cognizance of the offences constituted by the facts mentioned in the complaint, because the inquiry Under Sections 200 and 202, Cr. P.C. cannot be conducted by a Magistrate unless cognizance of the offence has been taken by him. In the instant case, the learned Judicial Magistrate after

perusing the complaint, observed in his order dated 2nd May, 94 that the complaint was within his jurisdiction and the case should be listed on 30th May, 94 for examination of the complainant. The contents of the order dated 8th May, 1994 clearly indicate that on that date, the learned Judicial Magistrate applied his mind to the offences alleged in the complaint with a view to exercise his judicial powers and therefore, he considered the question of jurisdiction and after satisfying himself that the matter was within his jurisdiction, he decided to conduct an inquiry Under Sections 200 and 202, Cr. PC. and therefore, he directed that the case should be listed on 30th May, 94 for examination of the complainant. In view of the law declared by the Hon'ble Supreme Court in R.R. Chari Vs. The State of Uttar Pradesh, and several later judgments of the Hon'ble Supreme Court and this Court, it must be said that the learned Judicial Magistrate took cognizance of the offences u/s 138, Cr. P.C. as early as on 8th May, 94. The offence was committed on 25th March, 94 and cognizance was taken on 8th May, 94. It is obvious that the cognizance of the offence was taken by the Magistrate within the period of limitation prescribed by Clause (b) of Sub-section (2) of Section 468, Cr. P.C. I, therefore, do not find any force in this submission that the learned Judicial Magistrate took cognizance of the offence beyond the period of limitation prescribed by Section 468, Cr.P.C.

21. The last submission of the learned counsel for the petitioners is that no prima facie case is made out against the non-petitioner No, 3, namely, Miss Dipali Gupta D/o Shri Sudhir Kumar Gupta as she was a sleeping partner in the firm and she was not a party to the issue of the cheques and the dishonouring thereof by the bank.

22. So far as the offences committed by the company is concerned, Section 141 of the Negotiable Instruments Act provide that :

141. Offences by companies.- (1) If the person committing an offence u/s 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this subsection shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in Sub-section (1), where any offence under this Act has been committed by a company and it is proved that offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

23. In the instant case, the cheque was issued by Shri Anil Gupta (non-petitioner No. 2), who is the partner of the petitioner firm. The offence u/s 138 is therefore, prima facie committed by M/s India Photographies Co. Ltd. as well as by Shri Anil Gupta (non-petitioner No. 2). So far as Miss Dipali Gupta (non-petitioner No. 3) is concerned, there is nothing on the record to suggest that she was in charge of the business of the company or was in any manner responsible for; the conduct of business of company within the meaning of Sub-section (1) of Section 141 of the Negotiable instruments Act. Similarly, there is no evidence to show that she was responsible in any manner for the alleged offence under Sub-section (2) of Section 141 of the Negotiable Instruments] Act. I, therefore, find sufficient force in the; submission that so far as Miss Dipali Gupta (non-petitioner No, 3) is concerned, there is no ground ; to proceed against her for the offence u/s 138 of the Negotiable Instruments Act. The learned Judicial Magistrate does not appear to have apply his mind on this aspect of the case, and therefore the impugned order dated 15th May, 95 deserves to be quashed and set aside so far as the issue off process against Miss Dipali Gupta (non-petitioner No. 3) is concerned.

24. For the reasons mentioned above, the petition is partly allowed. The order dated 15th May, 95 passed by the learned Judicial Magistrate is hereby quashed and set aside. So far as issue of process against Miss Dipali Gupta (non-petitioner No. 3) is concerned, the proceedings which were initiated against her are hereby dropped The prayer to quash the proceedings against the petitioner and the non-petitioner No. 2 deserve to be rejected and is hereby rejected.

25. A copy of this order along with the record of the lower Court be returned to the lower Court without delay.