

(2011) 11 CHH CK 0068

In the Chhattisgarh High Court

Case No : Criminal Misc. Petition No. 195 of 2010

National Highways Authority of India and others

APPELLANT

Vs

Ramesh Kumar Suryawanshi and another

RESPONDENT

Date of Decision : 30-11-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 482

Negotiable Instruments Act, 1881 (NI) — Section 138, 142, 143, 145, 146

Citation : (2012) 2 MPHT 12

Hon'ble Judges : Manindra Mohan Shrivastava, J

Bench : Division Bench

Advocate : Amrito Das, for the Appellant; Saurabh Sharma, for the Respondent

Final Decision : Allowed

Judgement

Manindra Mohan Shrivastava, J.—This petition u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.PC") has been filed by the petitioner aggrieved by order dated 4-4-09 passed by the Judicial Magistrate, 1st Class, Raipur in Case No. 1386/2009 by which, cognizance of the offence under Negotiable Instruments Act, 1881 (for short "the Act of 1881") has been taken against the petitioners. The respondents filed a complaint in the Court of Judicial Magistrate, 1st Class, Raipur alleging commission of offence u/s 138 of the Act of 1881 against the petitioners. In the complaint, it has been averred that the petitioners had issued cheques towards discharge of his liability in the matter of payment of arrears of rent of the premises owned by the respondents, but when the cheques were presented, the same were returned as dishonoured with the endorsement of "stop payment". It is further averred that a demand notice was given but as the payment was not made within the time stipulated, complaint has been filed. After taking into consideration the contents of the complaint, the learned Magistrate took cognizance of the offence and issued process, against which, instant petition has been filed by the petitioners.

2. Though several grounds have been raised to assail the order passed by the

learned Magistrate, during the course of submission, learned Counsel for the petitioners confines submission to the sole issue with regard to non-examination of the complainant on oath before taking cognizance and issuing process. The submission of learned Counsel for the petitioners is that the complainants were neither examined nor their submissions were recorded prior to taking cognizance of the offence and issuance of notice to the petitioners. In support of his submission, learned Counsel for the petitioners relied upon the order dated 19-10-2011 passed in Cri. M.P. No. 128/10, Raj Kumar Singhania Vs. Ashok Jain, and connected matters and submits that non-examination of complainant on oath render proceedings illegal and also vitiates the order and proceedings taking cognizance. He submits that in the cases of National Small Industries Corporation Ltd. Vs. State (NCT of Delhi) and Others, also, the Supreme Court has reiterated the view taken by it in earlier cases, referred to in the cases, i.e., Cri. M.P. No. 128/10.

3. On the other hand, learned Counsel for the respondents submits that in the case of Amarjit Singh Vs. Jasjit Singh, 2011 (2) CGLR 49, decided on 20-4-2011, it has been held that the provisions with regard to examination of complainant on oath have been held to be directory and not mandatory. He submits that the aforesaid decision has been rendered, relying upon the decision in the case of Damodar S. Prabhu Vs. Sayed Babalal H., Learned Counsel for the respondents submitted that the provisions contained in the Negotiable Instruments Act provide special procedure with regard to taking cognizance and conduct of trial in the matter of commission of offence u/s 138 of the Act of 1881. He further submits that the provisions contained in Sections 142 to 146 of the Negotiable Instruments Act have overriding effect and will therefore, prevail over the provisions contained in the Cr.PC, which is a general law.

4. The effect of non-examination of the complainant on oath before taking cognizance in a case of commission of offence u/s 138 of the Act of 1881 was considered by this Court in the case of Raj Kumar Singhanm (supra), and connected matters. After taking into consideration the statutory scheme engrafted in Section 200 of the Cr.PC and considering the effect and impact of special provisions contained in Sections 142 to 145 of the Negotiable Instruments Act and its interface, this Court, relying upon the judgment of the Supreme Court in the case of Nirmaljit Singh Hoon Vs. The State of West Bengal and Another, , Adalat Prasad Vs. Rooplal Jindal and Others, and Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, 3086, as also many other decisions, came to the conclusion that the Magistrate, while entertaining complaint u/s 200 of the Cr.PC, taking cognizance upon a complaint, is mandatorily required to examine on oath, the complainant and his witnesses, present if any, and further that the aforesaid requirements cannot be dispensed with even in cases where the complaint relates to commission of offence u/s 138 of the Negotiable Instruments Act. In the case of National Small Industries (supra), the Supreme Court while examining the statutory scheme u/s 200 of Cr.PC in the matter of complaint alleging commission of offence u/s 138 of the

Act of 1881 has also held that the mandatory requirements of Section 200, Cr.PC is that a Magistrate taking cognizance of an offence on a complaint, shall examine upon oath the complainant and that the substance of such examination, reduced to writing, shall be signed by the complainant. Reliance on the decision in the case of Amarjit Singh (supra), is misplaced for the reason that the issue whether examination of complainant on oath is necessary before taking cognizance in the matter of complaint u/s 138 of the Act, was neither raised nor decided. That was a case where order taking cognizance was challenged on the ground that as the accused resides outside the territorial jurisdiction of the Magistrate, provisions u/s 202, Cr.PC required enquiry or investigation to be made before taking cognizance. The provisions contained in the Act including the effect of non obstante clause in various provisions of the Negotiable Instruments Act were considered in the background of the aforesaid issue which had cropped up for consideration before the Court. The aforesaid decision therefore, does not lay down the proposition of law that in view of the special provisions contained in the Negotiable Instruments Act, examination of complainant on oath is not mandatory. Otherwise also, in view of the decision of the Supreme Court in the case of National Small Industries (supra), it is now quite settled that the requirements of examination of complainant on oath even in cases of complaint alleging commission of offence u/s 138 of the Negotiable Instruments Act is mandatory. Though, learned Counsel for the respondent made an attempt to distinguish the aforesaid decision of the Supreme Court by submitting that the aforesaid decision was rendered in different perspective and back ground, I am not inclined to accept the same because the Supreme Court considered the requirement of Section 200 of Cr.PC keeping in view the provisions contained in the Negotiable Instruments Act as would be clear from the findings recorded in Paragraph 12 to Paragraph 16 of the decision. In the result, it has to be held that the order taking cognizance is illegal and unsustainable in law and is therefore, set aside. The petition is accordingly allowed. The Magistrate shall always be at liberty to proceed in accordance with law.