
(2015) 02 AHC CK 0155

In the Allahabad High Court

Case No : Criminal Misc. Application No. 4648 of 2015

Om Prakash Singh

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 18-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 139
Penal Code, 1860 (IPC) — Section 406, 420

Citation : (2015) 3 ADJ 686 : (2015) 5 ALJ 82 : (2015) 89 ALLCC 497 : (2015) 3 BC 246 : (2015) 3 CCR 229

Hon'ble Judges : Karuna Nand Bajpayee, J

Bench : Single Bench

Advocate : Nandan Singh, for the Appellant

Final Decision : Dismissed

Judgement

Karuna Nand Bajpayee, J.—This criminal misc. application under Section 482 Cr.P.C. has been preferred with a prayer for quashing of the impugned summoning order dated 19.1.2012 passed by the Court of A.C.J.M., Court No. 7, Bareilly in complaint case No. 4791 of 2011 (M/s. Brijraj Associates v. Om Prakash Singh) under Section 138 Negotiable Instrument Act, P.S. Subhash Nagar, district Bareilly. Heard learned counsel for the applicant and learned A.G.A. Perused the record.

The submission of the counsel for the applicant is that the cheque in question dated 5.12.2010 for an amount of Rs. 5,80,000/- was dishonored by the S.B.I., Branch Sahupuri, Varanasi with an endorsement that the signature of the drawer of the cheque do not match with the signatures available with the bank and the signature of the drawer is incomplete on the cheque. Such endorsement of the Bank does not constitute the offence under Section 138 of N.I. Act in view of the language used therein.

2. It has also been submitted by the counsel for the applicant that the opposite

party has also lodged the F.I.R. against the present applicant which was registered as case crime No. 654 of 2013, under Section 420 and 406 I.P.C. at P.S. Subhash Nagar district Bareilly for the same controversy and as such, two prosecutions cannot be launched against the applicant for the same incident.

3. In support of his submissions, learned counsel for the applicant has placed reliance on two case laws which are as under:

1. Mrs. Aparna A. Shah Vs. Sheth Developers Pvt. Ltd. and Another, (2013) 5 ABR 119 : (2013) 10 AD 505 : AIR 2013 SC 3210 : (2013) 3 BC 491 : (2014) 118 CLA 366 : (2013) 3 CompLJ 449 : (2013) CriLJ 3743 : (2013) 3 JCC 169 : (2013) 9 JT 258 : (2013) 3 RCR(Civil) 680 : (2013) 3 RCR(Criminal) 686 : (2013) 8 SCALE 140 : (2013) 8 SCC 71 ,

2. Shri Babulal Nainmal Jain Vs. Shri Khimji Ratansha Dedhia and others, (1998) 4 ALLMR 287 : (1999) 5 BomCR 72 : (2001) 105 CompCas 849 : (1998) CriLJ 4750 .

4. Per contra, learned A.G.A. has opposed submissions of applicant's counsel and has submitted that the difference in signatures of the applicant in the cheque very well make out the offence under Section 138 N.I. Act and the pronouncement of Apex Court in Laxmi Dyechem Vs. State of Gujarat and Others, (2013) 4 ABR 956 : (2013) 1 BC 140 : (2013) 1 CompLJ 137 : (2013) CriLJ 3288 : (2013) 1 Crimes 101 : (2012) 6 CTC 690 : (2013) 1 JCC 41 : (2012) 1 JCC 41 : (2012) 12 JT 65 : (2013) 1 RCR(Civil) 353 : (2013) 1 RCR(Criminal) 260 : (2012) 11 SCALE 365 : (2013) 117 SCL 93 : (2013) AIRSCW 3468 : (2012) 8 Supreme 274 lays down that any such technical reason or endorsement of Bank for dishonour of cheque does not affect/disqualifies the prosecution under Section 138 N.I. Act and would constitute the offence under Section 138 N.I. Act.

5. I have considered the rival submissions of the parties in the light of record of criminal misc. application and the case laws cited by the parties.

The main thrust of the counsel for the applicant has been in respect of the structural defect in the cheque causing dishonour thereof. The perusal of record go to show that the complainant Brijraj Associates is a company engaged in construction of building and the present applicant had taken an amount of Rs. 5,80,000/- on 5.12.2010 from the complainant to get contract of construction of Government premises. However, after much persuasion and demand for the return of said amount, the applicant handed over a cheque of the S.B.I., Branch Sahpuri, Varanasi with denomination of Rs. 5,80,000/- on 15.6.2011. The complainant deposited the cheque in his account for encashment, whereupon the Bank informed that the signatures of drawer of the cheque are different and the signature on the cheque is incomplete too. With such endorsement, the cheque was returned as dishonoured. The complainant sent a registered notice A.D. to the applicant with an intention to have the payment of said amount of cheque within fifteen days, but no payment was made by the applicant. The complainant

filed complaint case No. 4791 of 2011 before the Court of A.C.J.M.-VII, Bareilly with an allegation that the applicant has given said cheque to the complainant with knowledge that the cheque will not be honoured due to difference in signatures and due to his incomplete signature.

6. I have carefully gone through the case laws of Mrs. Aparna A. Shah v. Sheth Developers Pvt. Ltd and another (Supra) and Babulal Nainmal Jain v. Khimji Ratansha Dedhia (Supra) cited by the counsel for the applicant. The case law of Mrs. Aparna A. Shah's case has no application in the facts of present case as the same relates with controversy wherein the Apex Court was dealing with an issue of vicarious liability in respect of dishonour of cheque in the facts of case, where the cheque in question was issued by the signature of husband of the appellant Mrs. Aparna A. Shah but the complaint was filed against the appellant and her husband both and the Metropolitan Magistrate issued process against both of them for offence under Section 138 N.I. Act. Under such facts, the Apex Court held that it is only the drawer of cheque who can be made an accused in any proceedings under Section 138 N.I. Act. In the present case, the issue is entirely different and hence, this ruling does not give any benefit to the present applicant.

7. Another case cited by the counsel is Babulal Nainmal Jain's case pronounced by the High Court of Bombay on 24.8.1998, wherein it has been held that if a cheque is returned on account of any structural defect i.e. any defect in its form, want of signature or because the date has not been properly written or the figure of the amount has been over written or the eraser in the drawer's name have been used, the same will not amount to an offence punishable under Section 138 of the Negotiable Instruments Act.

8. With great respect, this Court has not been able to persuade itself to fall in agreement with the aforesaid proposition of law. The said view of single Judge of High Court of Bombay is against the aim and object of Negotiable Instrument Act, 1881 (Act No. 26 of 1881), which is a special Act enacted by the legislature with an intention to encourage the culture of use of cheques and for enhancing the credibility of the instrument. This Act was amended in the year 2002 by Amendment Act No. 55 of 2002 to bring out increase in the punishment and introduced several other changes to provide expeditious disposal of cases under Negotiable Instrument Act by further strengthening the procedure of such cases.

9. The structural defect in the cheque issued by any drawer may have several reasons, which may either be bona fide, unintentional or be dishonest and mala fide. It would be very unreasonable to say that the receiver of any cheque issued by any drawer should first ensure as to whether there is any structural defect in the cheque or not and further to ensure as to whether such structural defect is an out come of either of the aforesaid reasons. Such structural defects can in most cases come to the knowledge of receiver of the cheque, when the same is returned by the Bank as dishonoured with an endorsement mentioning reasons for its dishonour. The difference in signatures and incomplete signature is one of several categories of structural defects and the reason of such structural defect is

a matter of trial and is required to be adjudged after appreciation of the evidence.

10. This view finds support by the pronouncement of Apex Court in *Laxmi Dyechem Vs. State of Gujarat and Others*, (2013) 4 ABR 956 : (2013) 1 BC 140 : (2013) 1 CompLJ 137 : (2013) CriLJ 3288 : (2013) 1 Crimes 101 : (2012) 6 CTC 690 : (2013) 1 JCC 41 : (2012) 1 JCC 41 : (2012) 12 JT 65 : (2013) 1 RCR(Civil) 353 : (2013) 1 RCR(Criminal) 260 : (2012) 11 SCALE 365 : (2013) 117 SCL 93 : (2013) AIRSCW 3468 : (2012) 8 Supreme 274 , wherein the Apex Court looked into the similar issue of dishonoring of cheque on the ground that the signatures of drawer of the cheque did not match the specimen signatures available with the Bank. It had so happened in the said matter that several cheques issued by the respondent company before Apex Court were dishonoured by the Bank on the ground that the drawers' signatures were incomplete or that no image was found or that the signatures did not match. The said dishonour of cheques gave rise to various complaints for offence under Section 138 of N. 1. Act and the matter reached upto the High Court of Gujarat. While deciding the petition preferred by the respondent company charged for the offence under Section 138 Negotiable Instrument Act the High Court of Gujarat at Ahmadabad quashed complaints by taking the view that such dishonour of cheque would not make out the penal provisions of Section 138 Negotiable Instrument Act. The High Court of Gujarat relied upon the decision of the Apex Court in *Vinod Tanna and Another Vs. Zaheer Siddiqui and Others*, (2005) 3 BC 379 : (2001) 10 JT 345 : (2002) 3 SCALE 320 : (2002) 7 SCC 541 .

11. When the matter came up to the Apex Court, it expatiated upon the issue at length and discussed various provisions of Negotiable Instrument Act, 1881 alongwith its aim and object as well as the intention of the legislature. The Apex Court after considering and discussing several case laws held in its paragraph No. 16 as follows :

"16. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in *NEPC Micon Ltd. Vs. Magma Leasing Ltd.* , that the expression " amount of money ... is insufficient" appearing in Section 138 of the Act is a genus and dishonour for reason such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act.

16.1. This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonour of the cheque issued by them. For instance this Court has held that if after issue

of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories. There is in our view no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied.

16.2 There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial Court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration."

and also in para No. 30 and 31, as follows:

"30. Thus, dishonour of cheques simpliciter for the reasons stated in Section 138 of the NI Act although is sufficient for commission of offence since the presumption of law on this point is no longer *res integra*, the category of "stop payment" instruction to the bank where the account holder has sufficient funds in his account to discharge the debt for which the cheque was issued, the said category of cases would be subject to rebuttal as this question being rebuttable, the accused can show that the stop payment instructions were not issued because of insufficiency or paucity of funds, but stop payment instruction had

been issued to the bank for other valid causes including the reason that there was no existing debt or liability in view of bona fide dispute between the drawer and drawee of the cheque. If that be so, then offence under Section 138 although would be made out, the same will attract Section 139 leaving the burden of proof of rebuttal by the drawer of the cheque. Thus, in cases arising out of "stop payment" situation, Sections 138 and 139 will have to be given a harmonious construction as in that event Section 139 would be rendered nugatory.

31. The instant matter however does not relate to a case of "stop payment" instruction to the bank as the cheque in question had been returned due to mismatching of the signatures but more than that the petitioner having neither raised nor proved to the contrary as envisaged under Section 139 of the NI Act that the cheques were not for the discharge of a lawful debt nor making the payment within fifteen days of the notice assigning any reason as to why the cheques had at all been issued if the amount had not been settled, obviously the plea of rebuttal envisaged under Section 139 does not come to his rescue so as to hold that the same would fall within the realm of rebuttable presumption envisaged under Section 139 of the Act. I, therefore, concur with the judgment and order of learned Brother Thakur, J. subject to my views on the dishonour of cheques arising out of cases of "stop payment" instruction to the bank in spite of sufficiency of funds on account of bona fide dispute between the drawer and drawee of the cheque. This is in view of the legal position that presumption in favour of the holder of a cheque under Section 139 of the NI Act has been held by the NI Act as also by this Court to be a rebuttable presumption to be discharged by the accused/drawee of the cheque which may be discharged even at the threshold where the magistrate examines a case at the stage of taking cognizance as to whether a prima facie case has been made out or not against the drawer of the cheque."

The above noted proposition of law makes it amply clear that the mala fide or ill-intended structural defect amounts to a deliberate act of stopping the payment by the drawer of cheque. As already observed, it falls within the purview of the trial Court to find out whether the structural defect is mala fide or bona fide. One more fact is relevant in such type of cases that in case, the structural defect is bona fide, the drawer of the cheque may make payment at the earliest as soon as he gets the statutory notice under Negotiable Instrument Act or gets information of such structural defects otherwise. In the present matter, the applicant has taken plea of such structural defect just to get rid of his criminal liability by seeking quotient of impugned order in question without making any plea about the non-liability of amount to make payment or the plea of any debt or other liability of complainant to rebut the stand of complainant. No attempt to make payment good has been made at any stage. Even here, when the counsel was asked whether the applicant has any intention to clear his liability he shirked the issue and did not come out clean.

So far as registration of F.I.R. dated 7.5.2013 is concerned, the same has no bearing to the proceeding under Section 138 N.I. Act in as much as the same is subsequent to the summoning order dated 19.1.2012 and makes out a distinct offence under the facts narrated in the F.I.R., hence the applicant cannot take any benefit thereof.

In view of the afore-discussed facts, there is no good ground to interfere in the impugned order.

Application being sans merit stands dismissed.