
(2013) 09 AHC CK 0167
In the Allahabad High Court
Case No : Criminal Revision No. 446 of 2011

Padam Gupta

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Citation : (2014) 1 ACR 567 : (2013) 9 ADJ 434 : (2013) 83 ALLCC 782 :
(2014) 1 BC 457 : (2014) 1 JCC 26

Hon'ble Judges : Bharat Bhushan, J

Bench : Single Bench

Advocate : J.P. Pandey and Saurabh Pathak, for the Appellant; B.M. Singh, M.B. Singh and Sudhanshu Kumar Singh, for the Respondent

Final Decision : Allowed

Judgement

Bharat Bhushan, J.—This criminal revision is directed against the order dated 26.10.2010 passed by learned Additional Chief Judicial Magistrate Ist, Firozabad in Criminal Complaint Case No. 4251 of 2010 (Surendra Kumar Jain v. Padam Gupta) u/s 138 of Negotiable Instruments Act 1881 (in short N.I. Act), P.S. Tundla, District Firozabad. The facts of the case are that opposite party No. 2/ complainant lodged a criminal complaint u/s 138 of N.I. Act in the Court of learned ACJM Ist, Firozabad alleging therein that he was tenant of a shop in a market situated at Tundla Crossing, belonging to the father of revisionist. It is alleged that some portion of the market was demolished on account of road widening and constructions of four lane road by the National Highway Authority. Revisionist asked the complainant for vacating the said shop, promising to restore back the shop after reconstruction. It is also alleged that the complainant was also paid Rs. 1,50,000/- as compensation for the period of closure of the shop. The revisionist is said to have drawn a cheque under his signature being Cheque No. 622350 dated 20.6.2010 for Rs. 1,50,000/- in favour of the complainant payable at SBI Branch Tundla, District Firozabad. When the complainant presented the said cheque in his account No. 13652191003175 in

Oriental Bank of Commerce Branch at Tundla, the same was returned to the complainant on 21.7.2010 by the said bank with an endorsement of "insufficient funds". It is further alleged that the complainant sent a statutory notice through his advocate on 30.7.2010 but the revisionist did not pay Rs. 1,50,000/-.

2. Learned Magistrate after recording the statement of the complainant u/s 200 Cr.P.C. and his witnesses u/s 202 Cr.P.C. summoned the revisionist vide order dated 26.10.2010 to face the trial for the offence u/s 138 Negotiable Instruments Act, 1988. It is against this order, present revision has been filed.

3. Learned counsel for the revisionist has challenged the impugned summoning order on the ground that the cheque in question was never issued by the revisionist to the complainant. Revisionist did not have legally enforceable debt or other liability towards complainant/opposite party No. 2 and the present criminal proceeding has been launched with an ulterior motive for wreaking vengeance due to personal grudge.

4. It is further submitted by the learned counsel for the revisionist that the revisionist runs a Saving Bank Account No. 01170005721 in State Bank of India, Agriculture Development Branch, Tundla in District Firozabad and for operating this account the Bank had issued a cheque book bearing serial No. SBI00/329-622341 to 622360 but the said cheque book containing cheques from serial No. 622349 to 622360 was lost on 31.3.2010 while he was going to the Bank from his house and written information in this regard was given at Police Station Tundla, District Firozabad on 31.3.2010 as well as to the Branch manager, SBI (ADB) Branch Tundla on 21.6.2010 with a request not to make any payment in respect of those cheques.

5. It is also submitted by learned counsel for the revisionist that the said lost cheque book was apparently found by the complainant and by misusing the same he presented the disputed cheque on 28.6.2010 in the revisionist's bank. He submits that the revisionist does not own any market complex or the disputed shop. He has submitted that the essential ingredients of section 138 of N.I. Act are lacking and hence the impugned summoning order is liable to be quashed.

6. Refuting the aforesaid submission of learned counsel for the revisionist, it is contended by learned counsel for the complainant that the impugned order is just and proper and there is no illegality, irregularity or perversity in the impugned order. It is further submitted by learned counsel for the opposite party No. 2 that complainant/opposite party No. 2 is the tenant in the market of the revisionist's father namely Sri Bodhanand since 1997 but due to his old age and infirmity the revisionist was acting as care taker and manager of the market. He further submits that some portion of the market was demolished by the National Highways Authority of India for the purposes of widening and constructing the four lane road in the year 2005 and the National Highways Authority has accepted the complainant/opposite party No. 2 as a tenant of a shop in the market vide its order dated 27.1.2006. It is further submitted by learned counsel

for the complainant that the opposite party No. 2/complainant filed an injunction suit against the father of the revisionist in the year 2006 being Original Suit No. 412 of 2006 when the assurance of the father of the revisionist that subsequent to the renovation and repairing of the market, he will be allotted a shop was not fulfilled.

7. Heard Sri Saurabha Pathak, Advocate, holding brief for Sri J.P. Pandey, learned counsel for the revisionist, Sri Sudhanshu Kumar Singh, learned counsel for the opposite party No. 2 and learned AGA for the State and have also perused the material on record.

8. Before coming to the merits of the case, it would be relevant to quote the provision of Section 138 of Negotiable Instruments Act, which deals with the ingredients of the offence for dishonour of the cheque and the consequent non-payment of the amount due thereon, reads as follows:

138. Dishonour of cheque for insufficiency, etc., of funds in the account.--Where any cheque drawn by a person on account maintained by him with a banker for the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of 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 arrangement made with the 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 a 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, whichever is earlier,

(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 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 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.

9. Perusal of aforesaid legal provision contemplates that section 138 creates an offence for which the mental elements are not necessary. It is enough if a cheque is drawn by the accused 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 discharge in whole or in part, of any debt or other liability due.

10. From reading of the aforesaid, the main part of the provision can be segregated into three compartments, namely, (i) the cheque is drawn by a person, (ii) the cheque drawn on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of a debt or other liability, is returned unpaid, either because the amount of money standing to the credit of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an arrangement made with the bank and (iii) such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of the Act, be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both.

11. The proviso to the said section postulates under what circumstances the section shall not apply. In the case at hand, the Court is not concerned with the said aspect. It will not be out of place to state that the main part of the provision deals with the basic ingredients and the proviso deals with certain circumstances and lays certain conditions where it will not be applicable. The emphasis has been laid on the factum that the cheque has to be drawn by a person on the account maintained by him and he must have issued the cheque in discharge of any debt or other liability.

12. Coming back to the facts of the present criminal revision, it is not in dispute that the building was constructed at Tundla Chauraha by the father of the revisionist in which the opposite party No. 2 was admitted as tenant. Tenancy of the shop in the market by the complainant/opposite party No. 2 was also accepted by the National Highways Authority. Said building was demolished by the National Highway Authority of India for widening of the road and after demolition of the said market the Highway Authority under the rehabilitation Scheme had offered compensation to the owner of the market which was accepted by the father of the revisionist and the Highway Authorities had also sanctioned rent allowances to the tenants of the market including the complainant/opposite party No. 2 as is evident from Annexure 2 to the counter-affidavit.

13. Complaint discloses that the cheque was issued by the revisionist as compensation for the loss sustained by the complainant on account of destruction of the rented shop by the National Highway Authority whereas the revisionist claims that the cheque book in question was misplaced on 31.3.2010 while he was going to the Bank from his house and the same has been misused by the complainant. Revisionist has submitted that he informed the police about the loss on 31.3.2010 itself almost eighty days prior to the date of issuance of the cheque. Information was also sent to the concerned bank on 21.6.2010. However, the complainant by misusing the cheque in question dated 20.6.2010 presented the same in the Bank but the same was not honoured and returned with an endorsement of "insufficient funds" on 21.7.2010.

14. In the rejoinder-affidavit, it is stated that the revisionist had no concern with the disputed shop. Said building was constructed by the father of the revisionist. Complainant/opposite party No. 2 was admitted as tenant by the father of the revisionist. This building was completely demolished by the National Highway Authority for widening of National Highway on 4.10.2007. Since then the disputed shop is not in existence therefore the complainant/opposite party No. 2 is no longer tenant of his father since 4.10.2007.

15. It is admitted position that if the disputed transaction is ignored then revisionist does not owe any money or has any liability towards the complainant/opposite party No. 2. If disputed transaction is taken into account even then it is apparent that the complainant/opposite party No. 2 was not tenant of revisionist. There was no occasion for him to personally issue the said cheque to the complainant/opposite party No. 2. He did not have any commercial relationship with the complainant/opposite party No. 2. Opposite party No. 2 was the tenant of father of the revisionist. Revisionist had no personal liability towards the tenant. Contents of Original Suit No. 912 of 2006, filed by the tenant/complainant-opposite party No. 2 also makes it clear.

16. Ingredients of Section 138 of N.I. Act presupposes the existence of legally enforceable debt or liability. Unless cheque is issued in discharge of such debt or liability, no offence is made out even if the cheque is returned due to insufficiency of funds.

17. In the facts of the present case, it is apparent that revisionist personally did not have legally enforceable debt or liability towards the complainant/opposite party No. 2. He did not own the disputed shop. Facts of the complaint (Annexure 8) do not disclose ingredients of offence u/s 138 of N.I. Act against the revisionist.

18. Learned Magistrate should have inquired from the complaint and the evidence both oral and documentary in support thereof and should have come to the conclusion as to whether prima facie case is made out to bring home the accused for the offence as alleged during the course of inquiry as mandated by Apex Court in Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, , wherein the Apex Court has held as under:

Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused.

Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

19. Similarly, in *M.N. Ojha and Others Vs. Alok Kumar Srivastav and Another*, , Apex Court held as under:

The case on hand is a classic illustration of non application of mind by the learned Magistrate. The learned Magistrate did not scrutinize even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

20. Thus, in view of the aforesaid legal position, it is incumbent upon Magistrates to ensure that the judicial process should not be an instrument of needless harassment. In complaint cases no one is present to watch the interest of prospective accused at initial stage. Therefore, it is duty of the Magistrates to ensure precise and fair enquiry in order to arrive at reasonable conclusion. His energetic participation at initial stage is required in order to obviate or reduce false implications. Impugned order does not reflect required participation by the Magistrate before summoning the revisionist to face the trial for the offence u/s 138 of the N.I. Act. In view of above, the criminal revision is allowed. The impugned order dated 26.10.2010 passed by learned Additional Chief Judicial Magistrate Ist, Firozabad in Criminal Complaint Case No. 4251 of 2010 (*Surendra Kumar Jain v. Padam Gupta*) u/s 138 of Negotiable Instruments Act 1881, P.S. Tundla, District Firozabad is hereby quashed.

Office is directed to send the copy of the order to learned Court below within a fortnight.