

(1999) 01 AHC CK 0011
In the Allahabad High Court
Case No : Criminal Revision No. 1729 of 1998

Premier Vinyl Flooring Ltd. and Others	APPELLANT
Vs	
State of U.P. and Another	RESPONDENT

Date of Decision : 12-01-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (1999) 1 CivCC 659 : (1999) CriLJ 1883 : (1999) 2 RCR(Criminal) 525

Hon'ble Judges : O.P. Jain, J

Bench : Single Bench

Advocate : Samit Gopal, for the Appellant; A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

O.P. Jain, J.—This is a revision against: order dated 7th October, 1998 (Annexure-1) passed by IIIrd Addl. Chief Judicial Magistrate, Ghaziabad, who has rejected an application-filed by the accused for recall of summoning order.

2. The brief facts of the case are that respondent No, 2 M/s. Tarachand and Company filed a complaint against accused persons under Section 138 of Negotiable Instruments Act alleging that the accused issued a cheque on 30th May, 1997 for a sum of rupees two lacs which was drawn on Punjab National Bank. Respondent: No. 2 presented the cheque on 30th August, 1997 to his Bank, Union Bank of India, but it was dishonoured by the Punjab National Bank on 1st of September, 1997. The complainant was informed of the dishonor of the cheque on 3rd September, 1997. On 10th September, 1997 respondent No. 2 issued notices to revisionist No, 1 M/s Premier Vinyl Flooring Ltd. and its Officers, who are revisionists Nos. 2 to 5. In spite of notice dated 10th September, 1997 the payment was not received by respondent No. 2 within 15 days of the notice and therefore, a complaint was filed by respondent No. 2 against the revisionists on 6-11-1997. The complaint is Annexure- II.

3. On this complaint being filed the learned Magistrate summoned the accused on 9th December, 1997. The accused appeared before the Court and filed objection Annexure- IV and it was prayed that the summoning order may be recalled inter alia on the ground that the complaint dated 6th November, 1997 was barred by limitation. According to accused persons, the notices were served on them, on 13th September, 1997 and the period of 15 days fixed for the payment expired on 29th September, 1997, The complaint, was required to be filed on or before 29th October, 1997 but it has been, filed on 6th November, 1997 and therefore, it is barred by limitation.

4. The learned Magistrate has rejected the objection filed by the accused by impugned order dated 7th October, 1998 on the ground that the date of receipt of notice is a question of fact which can be decided only after recording evidence. It has been observed by the learned Magistrate that in the complaint the date of receipt of notice by the accused is not mentioned and acknowledgment receipt is also not on record. Therefore, it cannot be said at this stage that the notice was received by the accused on 13th September, 1997 as alleged by them in their objections. Being aggrieved against the order of the learned Magistrate the present revision has been filed.

5. I have heard Sri G. S. Chaturvedi, learned Senior Advocate and Sri Pankaj Naqvi, learned counsel appearing for respondent No. 2. Learned A.G.A. has been heard on behalf of the State.

6. It is argued on behalf of the revisionists that they filed an affidavit before the lower Court in which it was clearly alleged that the notice was received by them on 12th September, 1997. A copy of the affidavit is Annexure-V to the revision. It is contended that this material was sufficient for the lower Court to come to the conclusion that the notice was actually served on 12-9-1997 particularly when it was not specifically controverted by the complainant in his reply Annexure-VI. It is further contended that it was obligatory for the complainant to have mentioned the date of service of notice in complaint Annexure-II and in the absence of this averment in the complaint, the summoning order should not have been passed.

7. On behalf of respondent No. 2 it is argued that the complainant was not aware of the date on which the notice was actually served. He could give only the date on which the notice was sent by him. As the postal acknowledgment receipt was not received from the post-office nor the registered envelope was received undelivered, the complainant could not have given the date of actual service of notice. According to learned counsel for respondent No. 2 this is purely a question of fact which has to be decided on the basis of evidence led by the parties during the trial and therefore, the learned Magistrate has rightly come to the conclusion that this point will be decided after the evidence is recorded.

8. It may be mentioned, at this stage, that on behalf of the accused-revisionists Annexure-III has been filed in this Court which is a letter purporting to be issued by Post and Telegraph Department in which it is stated that the registered letters

in question were delivered to accused persons on 12-9-1997. It is rightly pointed out on behalf of the respondent No. 2 that this letter was never produced before the trial Court and the accused are not entitled to file any additional evidence in this Court. Therefore, for the purposes of deciding the present revision Annexure-III letter is being ignored.

9. The learned Magistrate has observed that the accused is not entitled to produce any evidence at this stage and no order can be passed on the basis of the date of receipt of notice disclosed by the accused in his objection or in his affidavit.

10. Learned counsel for the revisionists has relied on Suresh Kumar Bhikamchand Jain Vs. Pandey Ajay Bhushan and Others, in support of the contention that the accused is not required to wait till framing of the charges or cross-examination of prosecution witnesses. He is not debarred from producing relevant documentary materials which can be legally looked into without any formal proof.

10-A. A close reading of the above authority shows that these observations were made particularly in the context of sanction u/s 197, Cr. P.C. In paragraph 22 of the above authority the following observations have been made :

After giving our careful consideration to the facts and circumstances of the case and the respective submissions of the learned counsel for the parties it appears to us that the question of requirement of sanction u/s 197 Criminal Procedure Code should not be confused with the scheme of trial under the Code of Criminal Procedure and the stage at which an accused against whom the cognizance of offence has been taken by the learned Magistrate can lead evidence in support of this defence.

11. In paragraph 24 of the same ruling the Court has observed as under :

On the other hand it would be logical to hold that the matter being one dealing with the jurisdiction of the Court to take cognizance, the accused would be entitled to produce the relevant and material documents which can be admitted into evidence without formal proof, for the limited consideration of the Court whether the necessary ingredients to attract Section 197 of the Code have been established or not.

12. It is, therefore, apparent that the observations were made particularly in the context of sanction u/s 197 Cr. P.C. and it has not been laid down that in every case the accused can place material in support of his contention at the stage of summoning order. Even in the context of sanction u/s 197 Cr. P.C. the accused was permitted to produce documentary material which can be legally looked into without any formal proof. In the instant case the accused-revisionists have not produced any document which can be looked into without any formal proof. The affidavit of the accused cannot be accepted as evidence during the trial. Even Annexure-III which is said to be a letter issued by the Postal Department is not a

document which is admissible in evidence without formal proof. The contents of Annexure-III will have to be proved by examining the Post-man who delivered the registered letters to the accused or by the evidence of the person who received the same.

13. A similar question arose before a Division Bench of this Court in the case of V.D. Agarwal v. Ist Addl. Munsif Magistrate, Lucknow Writ Petition No. 148 (M/S) of 1993, decided by Lucknow Bench, reported in 1993 Lucknow Civil Decision 1108 and it was observed in paragraph 19 that it is for the petitioner to show that he did not receive any notice and it is for the petitioner to prove at the time of trial that the notice was not served on him at all or that 15 days time did not expire on the date on which the complaint was filed. These questions of fact are to be decided by Court of competent jurisdiction and as such giving any finding at this stage on that point one way or the other may prejudice either party in the course of trial.

14. It was argued by the learned counsel for the revisionists that the date of service of notice issued by the complainant must have been mentioned in the complaint and in the absence of such particulars in the complaint, the complaint itself is not maintainable. Learned counsel has argued that in the case of a plaint, it is necessary to mention the date on which the cause of action arose and similarly the date on which the cause of section arose to the complainant in the instant case should have been mentioned.

15. This Court is unable to agree with the above contention. In the CPC there is a whole chapter devoted to the drafting of the plaint. The rule applicable are to be found in Order VII of CPC. In the Code of Criminal Procedure there is no such provision. On the contrary according to the definition of "complaint" given in Section 2 sub-clause (d) of complaint can also be oral. Therefore, the giving of the date of cause of action in the complaint cannot be made mandatory.

16. In view of the above discussion, this Court comes to the conclusion that the learned magistrate was right in saying that the date of service of notice is a question of fact which will be decided after recording evidence. The revision therefore has no force and is hereby dismissed.