
(2015) 03 AHC CK 0148
In the Allahabad High Court
Case No : Case No. 82 of 2011

Rajendra Pratap Singh

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 27-03-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2015) 3 ACR 2965 : (2015) 89 ALLCC 886

Hon'ble Judges : Akhtar Husain Khan, J

Bench : Single Bench

Advocate : Amit Chaudhary, for the Appellant

Final Decision : Allowed

Judgement

Akhtar Husain Khan, J.—Present petition has been moved under section 482 Cr.P.C. by accused-petitioner Rajendra Pratap Singh with prayer to quash the proceedings of Case No. 2468 of 2010 Gangeshwar Mahadevji Trust v. Rajendra Pratap Singh, under section 138 of Negotiable Instruments Act pending in the Court of Additional Chief Judicial Magistrate (Ayodhya Prakaran), Lucknow. I have heard learned Counsel for petitioner and learned Additional Government Advocate. None appeared for opposite party No. 2, even after list was revised.

2. Perusal of copy of complaint annexed with petition shows that both the cheques in question have been returned to complainant by Bank unpaid with endorsement that the drawer of the cheque has restrained payment. It has been alleged by learned Counsel for the petitioner that the area of land agreed to be transferred by opposite party No. 2 complainant (Gangeshwar Mahadevji Trust) was found lesser than the area shown to be transferred by opposite party No. 2. Therefore, petitioner has instructed, Bank not to honour both cheques in question. Learned Counsel for the petitioner contended that offence under section 138 of Negotiable Instruments Act is made out only when cheque is dishonoured because of insufficiency of amount in the account of drawer. Learned

Counsel for petitioner contended that it is apparent from section 138 of Negotiable Instruments Act that no offence is made out if payment has been stopped on the instructions of drawer.

3. Learned Additional Government Advocate contended that summoning order passed by Magistrate is revisable. Therefore, no interference is justified under section 482, Cr.P.C.

4. I have considered the submissions made by learned Counsel for the parties.

5. In the case of Dhariwal Tobacco Products Ltd. v. State of Maharashtra, 2009 (64) ACC 962 (SC) : 2009 (75) AIC 265 Hon''ble Supreme Court has held that alternative remedy is no bar for invoking jurisdiction under section 482 Cr.P.C. in appropriate cases.

6. In view of above judgment of Hon''ble Supreme Court this petition under section 482, Cr.P.C. cannot be rejected merely on the ground that summoning order passed in the case is revisable.

7. Perusal of section 138 of Negotiable Instruments Act shows that offence under section 138 of Negotiable Instruments Act is made out only when the cheque is dishonored and is returned unpaid by Bank either because of the amount of money standing to the credit of account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

8. In the case of M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi, (1998) 2 AD 117 : AIR 1998 SC 1057 : (1998) 92 CompCas 88 : (1998) CriLJ 1397 : (1998) 1 Crimes 268 : (1998) 1 CTC 402 : (1998) 2 JT 198 : (1999) 122 PLR 634 : (1998) 2 SCALE 112 : (1998) 3 SCC 249 : (1998) 1 SCR 1192 : (1998) AIRSCW 842 : (1998) 2 Supreme 471 Hon''ble Apex Court has made certain observations after having considered sections 138 and 139 of Negotiable Instruments Act. Relevant paras 18, 19, 20 and 21 of judgment of Hon''ble Court are quoted below:--

"(18) The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of sections 138 and 139 of the Act. If we are to accept this proposition it will make section 138 a dead letter, for, by giving instructions to the Bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed.....

(19) Section 138 of the Act is a penal provision wherein if a person draws a cheque 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 any debt or other liability, is returned by the Bank unpaid, on the ground 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 agreement made with that bank, such person shall be deemed to have committed an offence. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person, draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawer, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

(20) On careful reading of section 138 of the Act, we are unable to subscribe to the view that section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and, therefore, amounts to an offence under section 138 of the Act.....

(21) It is needless to emphasize that the Court taking cognizance of the complaint under section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold."

9. Proposition laid down by Hon"ble Apex Court in the aforesaid case of Modi Cement Ltd. v. Kuchil Kumar Nandi makes it clear that if the drawer of cheque has not sufficient money in his account to pay amount of cheque and cheque is dishonoured and returned unpaid even with endorsement that the drawer has instructed to stop payment, the drawer of cheque shall be deemed to have committed offence under section 138 of Negotiable Instruments Act unless drawer proves genuine reason for stoppage of payment to rebut presumption arising under section 139 of Negotiable Instruments Act. But complainant opposite party No. 2 has not stated in complaint that the petitioner had not sufficient money in his account to pay amount of cheques and no enquiry has been made by Magistrate on this issue.

10. In view of discussion made above I am of the view that summoning order passed by Magistrate against petitioner for offence under section 138 of Negotiable Instruments Act is against provision of section 138 of the Act.

11. In view of above, it is a fit case for interference under section 482 Cr.P.C. Petition is allowed. Summoning order passed by Magistrate in Complaint Case No. 2468 of 2010 Gangeshwar Mahadevji Trust v. Rajendra Pratap Singh is quashed with direction to Magistrate to make further enquiry and to pass fresh appropriate order in accordance with law in the light of proposition laid down by Hon"ble Apex Court in case of M/s. Modi Cements Ltd. v. Kuchil Kumar Nandi 1998 (36) ACC 593 (SC).