
(2011) 06 JH CK 0014
In the Jharkhand High Court
Case No : Criminal M.P. No. 1291 of 2010

Rashid Ali

APPELLANT

Vs

The State of Jharkhand and Nilesh Kumar Pandey

RESPONDENT

Date of Decision : 27-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2011) 06 JH CK 0014

Hon'ble Judges : D.K. Sinha, J

Bench : Single Bench

Advocate : Jar Prakash, Yogesh Modi, Chaitali C. Sinha and Shyam Narsaria, for the Appellant; Md. Hatim, APP for the State and Anand Kumar Sinha, for the O.P. No. 2, for the Respondent

Final Decision : Allowed

Judgement

D.K. Sinha, J.—The Petitioner has invoked the inherent jurisdiction of this Court u/s 482 of Code Criminal Procedure for quashment of the entire criminal proceedings arising out of C. Case No. 902 of 2007 for the alleged offence u/s 138 of the Negotiable Instruments Act, 1881 including the order impugned dated 8.7.2010 passed by Sri. O.N. Choudhary, Judicial Magistrate, Ist Class, Palamau at Daltonganj by which prima facie materials were found against the Petitioner Rashid Ali to proceed against him.

2. The prosecution story in short, as unfolded in Complaint Case No. 902 of 2007 filed on behalf of the O.P. No. 2-complainant before the CJM Palamau at Daltonganj, was that he was a Kendu leaves contractor in the district of Latehar and the Petitioner also used to deal in Mohulan leaves in the same district and being the businessmen in the district of Latehar they had developed business contacts as they were having acquaintance to each other and had also developed intimacy by exchanging money. It was alleged in the complaint petition that on 3.4.2007 the Petitioner- accused Rashid Ali came to the complainant opposite

party No. 2 and requested him to lend Mm Rs. 3 lakhs which was urgently required for his business purpose and in lieu thereof he offered to issue a cheque in the name of the complainant-opposite party No. 2 of the same amount. Accordingly the complainant-opposite party No. 2 having been satisfied with the need of the Petitioner delivered a sum of Rs. 3 lakhs in cash to the accused-Petitioner and in lieu of that the Petitioner issued a; cheque No. 687117 on 3.4.2007 for Rs. 3 lakhs, however, with the request to the complainant-opposite party No. 2 to present the same before the Banker after 2/3 months for withdrawal when there would be sufficient money in his account. When the total amount in cash could not be returned to the complainant-O.P. No. 2 within time stipulated, complainant presented the cheque on 2.8.2007, which was issued by the accused-Petitioner at the Punjab and Sindh Bank, Daltonganj Branch in his current A/C No. 830 but the same returned unpaid due to "insufficiency of fund" to which the complainant informed the accused-Petitioner on telephone. The Petitioner then assured that the said cheque would be in cashed within five days and pursuant to such assurance, the complainant presented the said cheque again in the same bank on 9.8.2007 which once again was returned "unpaid" due to "insufficiency of fund" of the account holder in his account. A legal (demand) notice was sent to the accused-Petitioner calling upon to return the money but no satisfactory answer could be given and therefore, complainant-opposite party No. 2 had reason to believe that the intention of the accused-Petitioner was not to return the money to the complainant since very beginning and in that manner he cheated the complainant. A discharge petition was filed on behalf of the accused-Petitioner before the court concerned which was found not being maintainable as the offence was in the nature of summons trial case wherein there was no provision of discharge of any accused. After enquiry u/s 202 Code of Criminal Procedure the learned Judicial Magistrate found prima facie offence u/s 138 of Negotiable Instruments Act against the Petitioner -accused and he was called upon to appear on the date fixed to explain him substance of accusation.

3. The learned Sr. Counsel Mr. Jai Prakash submitted that in course of enquiry u/s 202 Code of Criminal Procedure, the complainant filed photocopies of cheque No. 687117, deposit slips of the said cheque on 2.8.2007 and 9.8.2007, bank memo dated 9.8.2007 and demand notice dated 18.8.2007 and its postal receipt. It was nowhere mentioned in the complaint petition that the demand notice, which was sent by the complainant to the accused-Petitioner, was ever served upon him, in absence of which the complaint was not maintainable as no notice was ever served upon the accused-Petitioner

4. Mr. Jai Prakash, further submitted that the complainant-opposite party No. 2 admitted that he had presented the cheque on 2.8.2007 for the first time which bounced, however, without any action being taken by him against the accused-Petitioner under provision of law by attracting his attention either way. He then presented the cheque in the said bank on 9.8.2007 which was again returned unpaid with the same endorsement of "insufficiency of fund".

5. The learned Sr. Counsel submitted that the complainant had admitted in the complaint petition that he had sent legal(demand) notice to the accused-Petitioner after his cheque was bounced for the second time and the alleged money could not be returned to him but the service of notice if at all, could not be produced so as to substantiate that there was valid service and even then money was not paid back. The learned Sr. Counsel relied on the decision reported in Harman Electronics (P) Ltd. and Another Vs. National Panasonic India Ltd., The Supreme Court of India in Harman Electronics Private Limited and Anr. v. National Panasonic India Private Ltd. held:

A court derives jurisdiction only when the cause of action arises within its jurisdiction. The same cannot be conferred by any act of omission or commission on the part of the accused. A distinction must also be borne in mind between the ingredient- of an offence and commission of a part of the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a Service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, the commission of an offence completes. Giving of notice, therefore, cannot have any precedent over the service.

6. Similarly in M/s Shakti Travel and Tours " v. State of Bihar and Anr. reported in 2000 (3) East Cr. C. 837 (S.C) the Apex Court held:

The accused has a right to pay the money within 15 days from the date of the service of notice and only when it fails to pay, it is open for the complainant to file a case u/s 138 of the Negotiable Instruments Act. That being the position and in the complaint itself having not been mentioned that the notice has been served, the complaint itself is not maintainable.

7. The learned Sr. Counsel Mr. Jai Prakash further submitted that the law is well settled that if the cheque once, bounced on the presentation before the banker, no further cause of action arose by filing the same cheque again on another date. In the instant case the complainant stated that he deposited the cheque for the first time on 2.8.2007 and again on 9.8.2007 but he calculated the limitation from the date of presentation of cheque for the second time on 9.8.2007 being the cause of action for filing complaint which cannot be sustained under law.

8. In Prem Chand Vijay Kumar v. Yash Pal Singh and Anr. reported in 2005 (3) East Cr. C.126 (SC) the Apex court observed:

One of the indispensable factors to form the cause of action envisaged in Section 138 of the Act is contained in Clause (b) of the proviso to that section. It involves the making of a demand by giving a notice in writing to the drawer of the cheque "within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid". If no such notice is given within said period of 15 days, no cause of action could have been created at all.

""Thus, it is well settled that if dishonour, of a cheque has once snowballed into a

cause of action it is not permissible for a payee to create another cause of action within the same cheque."

9, To sum up the argument of Mr. Jai Prakash, the learned Sr. Counsel, the complainant petition was also not filed within the time stipulated under law and hence complaint petition filed against the Petitioner was not maintainable and therefore, criminal proceeding including the order impugned dated 8.7.2010 are liable to be quashed.

10. Mr. Anand Kumar Sinha, the Learned Counsel appearing on behalf of the opposite party No. 2 opposed the contention raised on behalf of the Petitioner-accused and submitted that the Petitioner-accused had otherwise intention to cheat the complainant since the very beginning he approached latter and persuaded for lending Rs. 3 lakhs which he did pay but that amount was never returned and the Petitioner-accused thereafter defrauded the complainant by issuing cheque which could not be encashed for the reasons already discussed.

11. Heard Mr. Md. Hatim the learned A.P.P. appearing on behalf of the State.

12. Having regard to the facts and circumstances of the case, arguments advanced on behalf of the parties, I find substance in the arguments of the learned Sr. Counsel that there was no evidence on the record that the legal(demand) notice claimed to be issued by the complainant against the Petitioner -accused was ever served upon him. I further find that no explanation could be made by the Learned Counsel appearing on behalf of the O.P. No. 2 in this regard by way of filing receipt or acknowledgement of such notice by filing counter affidavit in this case. I further find that the complainant-O.P. No. 2 failed to present his case that the demand notice was sent within 30 days of bouncing of the cheque on 2.8.2007 being the date of cause of action. The O.P. No. 2 further failed to satisfy that the complaint was filed against the Petitioner for offence u/s 138 Negotiable Instrument Act within 30 days of the receipt of notice by the Petitioner. Section 142 of the said Act deals with Cognizance of offence which speaks:

No court shall take cognizance of any offence punishable u/s 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque; such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 provided that, the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.

13. In the instant case complainant neither disclosed that demand notice was sent within 30 days of bouncing of cheque nor it has been disclosed that the complaint was filed within 30 days of the receipt of the demand notice any thereby the complainant could not comply the mandatory provision of law before filing complaint which is sine qua, as such criminal proceeding of the Petitioner cannot be sustained under law. Accordingly, this petition is allowed and the

criminal proceeding of the Petitioner in Complaint Case No. 902 of 2007 along with the order impugned dated 8.7.2010 passed by the learned Judicial Magistrate, Palamau at Daltonganj is set aside.