

(2004) 10 AP CK 0107

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 126 of 2004

S. Sultan and Co. and Another

APPELLANT

Vs

Cement Corporation of India Ltd. and Another

RESPONDENT

Date of Decision : 29-10-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 469(2), 482
Limitation Act, 1963 — Section 12(1)
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142
Penal Code, 1860 (IPC) — Section 407, 420

Citation : (2005) 1 ALD(Cri) 647 : (2006) 1 ALT(Cri) 230 : (2005) CriLJ 1134

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : D. Hanumantha Rao, for the Appellant; Public Prosecutor, for Respondent 2 and D. Nageshwara Sree, for Respondent 1, for the Respondent

Judgement

C.Y. Somayajulu, J.—1st respondent filed a private complaint against the petitioners u/s 138 read with Section 142 of the negotiable Instruments Act (hereinafter referred to as "the Act"), alleging that the 1st petitioner M/s. S. Sultan and Company which subsequently changed its name as M/s. Sultan Transport Private Limited, in settlement of the bills due to it issued three cheques bearing Nos. 0179828, 0179830 and 0179831 dated 14-1-1994 for Rs. 14,78,000/- each drawn on Vijaya Bank, Vijaya Nagar Colony Branch, which when presented for payment were returned dishonoured with an endorsement dated 9-4-1994 "Exceeds arrangement" and so, a statutory notice dated 11-4-1994 was issued by it to the petitioners under registered post with acknowledgment due and also under certificate of posting. The registered notice was returned on 21-4-1994 with an endorsement "premises locked". It could succeed in serving notice personally on the 2nd petitioner on 25-4-1994 but petitioners did not pay the amounts covered by the dishonoured cheques but got issued a reply notice dated 7-5-1994 with false allegations, for which a rejoinder notice was issued on 19-5-1994. Hence the complaint, which was taken

cognizance of as C.C. No. 537 of 2000. This petition is filed to quash the said proceedings in the said C.C.

2. The contention of the learned counsel for the petitioner is that since the 1st respondent clearly alleged in the complaint that it failed to recognize the change of name M/s. S. Sultan & Company as M/s. Sultan Transport Private Limited, it has no right to proceed against M/s. Sultan Transport Private Limited, and in any event since 1st respondent had lodged a complaint u/s 420 and 407, IPC, against the 2nd petitioner and others, which ended in acquittal after full trial, 1st respondent again initiating proceedings u/s 138 of the Act is but an abuse of process of law. It is his contention that in any event since there is no valid service of notice u/s 138 of the Act, on the 1st petitioner as the allegations in the complaint show that the statutory notice sent to the 1st petitioner was returned unserved, and since the notice on the 2nd petitioner is said to have been served on 25-4-1994, which is beyond the period of limitation prescribed by Section 138 of the Act proceedings against the petitioners are liable to be quashed. There is no representation on behalf of 1st respondent, who appeared through a counsel.

3. I am unable to agree with the contention of the learned counsel for the petitioners that the complaint against the 1st petitioner is not maintainable since the allegations in the complaint show that 1st respondent did not recognize the change in the constitution of the firm and the change of name, because as per Section 138 of the Act, offence under that Section is committed when a person "who draws a cheque 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 the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid for the reasons stated in that Section subject to the condition that (i) the cheque should have been presented in the bank within the period of its validity or within six months from the date on which it is drawn, whichever is earlier, and (ii) the payee or the holder in due course of the cheque, must have made a demand for the payment of the amount of money covered by the dishonoured cheques by giving a notice in writing to the drawer of the cheque, within fifteen days from the date of receipt of the information by him from the bank regarding the return of the cheque as unpaid. As per Section 141 of the Act if the person committing the offence u/s 138 of the Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of its business as well as the company, would be deemed to be guilty of the offence u/s 138 of the Act.

4. In this case, three cheques dated 14-1-1994 were drawn by the 2nd petitioner, in his individual capacity, but not for and on behalf of the firm i.e., first petitioner, which is described as "M/s. S. Sultan and Company, later name altered as M/s. Sultan Transport Private Limited, by its Managing Director", As stated above if a company commits the offence its director and the persons in charge of its affairs can be proceeded against but not vice versa. So if a director or the partner of a company or firm issues a cheque in his individual capacity, and if

that cheque is dishonoured, the company or firm of which he is a director or partner cannot be made liable u/s 138 of the Act by invoking Section 141 of the Act, since the cheques which were dishonoured in this case were issued by the 2nd petitioner in his individual capacity, but not on behalf of the first petitioner, whether the 1st respondent recognized the changed name of the erstwhile firm or not, is immaterial, but the complaint against the first petitioner is liable to be quashed because even assuming that all the allegations in the complaint are true, 1st petitioner cannot be said to have committed an offence u/s 138 of the Act for the dishonour of the cheques issued by the 2nd petitioner on an account maintained by him with his banker. t,,,

5. In the complaint against the 2nd petitioner, since the question whether, he owes any amount to the 1st respondent or not is not relevant for disposal of this petition, in view of Section 139 of the Act, which mandates the Court to presume that the dishonoured cheque was drawn towards discharge in whole or in part of a debt or other liability, the burden to establish that the dishonoured cheque were not issued towards any lawfully enforceable debt or other liability would be on the drawer of the cheque i.e. the 2nd petitioner but not on the payee of the cheque i.e. 1st respondent. That apart the language employed in Section 138 of the Act shows that for the drawer to become liable there under it is not necessary that he should be the debtor of the payee or holder in due course thereof. So even when a person draws a cheque in respect of any debt or liability of a third party he would be liable to be proceeded against, if that cheque is dishonoured and if the other conditions mentioned in Section 138 of the Act are satisfied. So the complaint against the 2nd petitioner cannot be quashed on the ground that he does not owe any money to the 1st respondent, in his individual capacity.

6. The fact that prosecution launched by the 1st respondent against the 2nd petitioner and others for offences u/s 420 and 407, IPC is said to have ended in acquittal is of no consequence for deciding this petition, because cause of action for launching prosecution u/s 138 is different from that of the offences u/s 420 and 407, IPC for alleged misappropriation of the stock supplied by the 1st respondent. Moreover as held in State of Madhya Pradesh Vs. Awadh Kishore Gupta and Others, by the Apex Court, this Court while deciding a petition u/s 482, Cr. P.C. should not take into consideration the defence of and the documents relied on by the accused and act like a trial Court for finding out if the accused would ultimately be convicted or not and if the allegations in the complaint, when taken to be true, disclose commission of the offence alleged, the complaint cannot be quashed.

7. The next contention relates to service of statutory notice. Since I held that proceedings against the 1st petitioner are liable to be quashed question whether there is valid service of notice u/s 138 of the Act on the 1st petitioner is not necessary to be gone in to. With regard to the 2nd petitioner no doubt the allegations in the complaint show that 1st respondent tried to serve notice

personally, but since 2nd petitioner made himself scarce and so notice could be served on the 2nd petitioner only on 25-4-1994. In fact in para 5 of the complaint it is alleged ;

"all the cheques were dishonoured and the complainant received the endorsement dated 9-4-1994 from its Banker enclosing endorsement of Vijaya Bank dated 6-4-1994 that the cheques were returned unpaid for reason that "Exceeds arrangement."

The date of receipt of the endorsement dated 9-4-1994 is not mentioned in the complaint. Since the endorsement prepared by the banker of the 1st respondent is dated 9-4-1994, possibly, it could not have been served on the 1st respondent on 9-4-1994 itself. Even assuming that the said endorsement was served on the 1st respondent on 9-4-1994 itself, in view of Section 12(1) of the Limitation Act read with Section 469(2) Cr. P.C. 9-4-1994 shall have to be excluded while computing the period of limitation and when so excluded, service of the statutory notice on 25-4-1994, on the 2nd, petitioner, would be within the period of 15 days prescribed by Section 138 of the Act,

8. That apart the allegations in para 7 of the complaint show that after receipt of the endorsement from the bank notice dated 8-4-1994 was sent to the accused by registered post and under certificate of posting. Section 138 contemplates notice of dishonour with a demand for payment of the amount covered by the dishonoured cheque being issued to the drawer. It does not mandate that such notice should be sent by registered post only. So notice sent under certificate of posting also is a valid notice. Whether notice under certificate of posting in fact was sent to the 2nd petitioner or not is a question of fact which has to be decided as per the evidence adduced during the course of trial. As stated earlier while deciding this petition, this Court has to presume that the allegations in the complaint are true. So, from the allegations in the complaint, it cannot be said that the statutory notice u/s 138 of the Act was not sent to the 2nd petitioner within 15 days from the date of receipt of information of dishonour of the cheque by the 1st respondent.

9. For the above said reasons, the Criminal Petition is allowed in part and the proceedings against the 1st petitioner only in C.C. No. 537 of 2000 on the file of the XXIII Metropolitan Magistrate are quashed. Petition of the 2nd petitioner is dismissed.