
(2011) 07 JH CK 0139
In the Jharkhand High Court
Case No : Criminal M.P. No. 1328 of 2010

Shahid Ali

APPELLANT

Vs

State of Jharkhand and Ajay Prakash Singh

RESPONDENT

Date of Decision : 04-07-2011

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2012) 1 RCR(Civil) 910 : (2012) 1 RCR(Criminal) 643

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

Bench : Single Bench

Advocate : Jai Prakash, Yogesh Modi and Chaitali C. Sinha, for the Appellant;
Md. Hatim, Assistant Public Prosecutor for the State and Anand Kumar Sinha, for the O.P. No. 2, for the Respondent

Judgement

D.K. Sinha, J.—The Petitioner has invoked the inherent jurisdiction of this Court for quashment of the entire criminal proceedings arising out of Complaint Case No. 903 of 2007 including the order impugned dated 8.7.2010 passed by Sri. O.N. Choudhary, Judicial Magistrate, 1st Class, Palamau at Daltonganj by which prima facie materials were found against the Petitioner Shahid Ali for the alleged offence u/s 138 of the Negotiable Instruments Act, 1881 and he was called upon to answer the substance of accusation to be explained to him.

2. The prosecution story in short, as unfolded in Complaint Case No. 903 of 2007 filed on behalf of the Complainant-opposite party No. 2 herein before the Chief Judicial Magistrate, Palamau at Daltonganj, was that he was a contractor of Kendu leaves in the district of Latehar. The accused-Petitioner also used to deal in Mohulan leaves in the same district and being the businessmen both were known to each other and had also transaction of money between them. It was alleged in the complaint petition that on 17.4.2007 the accused-Petitioner Shahid Ali approached him and requested to lend him Rs. 4 lakhs for business requirement and in lieu thereof he delivered a cheque No. 295158 dated 17.4.2007 as collateral security stating that there was no money in his account

but that will come in his account within 3 /4 months and that The amount shall be returned to him after sale of Mohulan leaves. Upon such assurance and on presentation of cheque referred to above the complainant delivered a sum of Rs. 4 lakhs in cash to the accused-Petitioner and kept the cheque with him. When the accused-Petitioner did not return money in cash within time framed, the complainant then deposited the cheque on 2.8.2007 but it returned unpaid due to "in sufficiency of fund" of the account holder in his account. The complainant then talked to the accused Petitioner on telephone and communicated about bouncing of the cheque whereupon the accused-Petitioner requested to present the cheque once again after five days as he would arrange the money in the meantime and accordingly, the complainant-opposite party No. 2 again deposited the said cheque on 9.8.2007 but this time also the cheque, which was issued by the accused-Petitioner, bounced for the similar cause due to "insufficiency of fund". Thereafter a legal(demand) notice was sent to the accused-Petitioner by the complainant calling upon to return the money but no satisfactory answer was given to such notice and then he lodged the complaint.

3. Mr. Jai Prakash, the learned Sr. Counsel submitted that after statements of the complainant recorded on his solemn affirmation an enquiry was conducted and during enquiry the complainant filed photocopies of cheque No. 295158, deposit slips of the said cheque on 2.8.2007 and 9.8.2007, Bank memo dated 9.8.2007 and legal(demand) notice dated 18.8.2007 with its postal receipt.

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

10. Mr. Anand Kumar Sinha, the Learned Counsel 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 and pursuant to such intention he approached the complainant and persuaded for lending Rs. 4 lakhs which he did pay gladly but such amount was never returned and the Petitioner-accused in the manner defrauded the complainant by issuing a cheque which could not be encashed on presentation.

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 since no acknowledgement receipt of such demand notice could be produced with the counter affidavit in this case. I further find that the complainant-O.P. No. 2 failed to prima facie convince that the demand notice was sent within 30 days of bouncing of cheque on 2.8.2007 which was the date of cause of action. The O.P. No. 2 further failed to satisfy that the complaint was filed against the Petitioner for the 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, which was issued to the accused Petitioner, and thereby the complainant could not comply the mandatory provisions of law before setting the law in motion as such compliance was sine qua non for lodging complaint and for want of which 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. 903 of 2007 and the order impugned dated 8.7.2010 passed by the learned Judicial Magistrate, Palamau at Daltonganj are set aside.