
(2008) 11 RAJ CK 0063
In the Rajasthan High Court

Shasha Sippy

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 27-11-2008

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2009) 2 CivCC 503 : (2009) 3 RLW 2181 : (2009) 2 RLW 2181

Hon'ble Judges : Raghuvendra S. Rathore, J

Bench : Single Bench

Judgement

Raghuvendra S. Rathore, J.—As both these criminal misc. petitions arise out of the complaint No. 197/98 filed by the respondent and the question involved in them are identical, therefore, they are being decided by a common order.

2. The petitioners, in these petitions, have challenged the order dated 02.04.1999 passed by the learned Judicial Magistrate No. 1, Ajmer, whereby he has rejected the objections raised by the accused-petitioners against the order of taking cognizance. Being aggrieved of the said order, the petitioners had filed revision petitions before the learned Sessions Judge, which came to be decided by the Special Judge, SC/ST Court, Ajmer, whereby he had dismissed the same and affirmed the order passed by the learned Magistrate.

3. Broadly speaking, the facts of the case are that a private complaint came to be lodged by Sunil Mittal, Director, Mittal Capital India Ltd. in the Court of Judicial Magistrate, 1st Class No. 1, Ajmer, against seven persons including the petitioners for the offence u/s 138 of the Negotiable Instruments Act, 1881. It was stated in the said complaint, inter alia, that the accused No. 1 M/s. Sippy Films had taken financial assistance to the tune of Rs. 25 lacs as a loan from M/s. Mittal Capital Service Private Ltd. The said firm had subsequently changed its name as M/s. Mittal Capital India Ltd. Further, it was averred in the complaint that a part of the aforesaid amount was repaid, through different cheques, on behalf of accused No. 1. But the cheques were not encashed for want of sufficient amount in the account. It was also stated in the complaint that when

the cheques were given to the complainant, an assurance was given to him that the cheques shall be encashed on the date for which it was being issued. On the said assurance, the cheques were said to have been received but when they were submitted for encashment, the same were dishonoured and remain unpaid.

4. The said complaint was filed on 07.11.1998. Thereafter, the statement of the complainant was recorded on 10.11.1998. On the basis of the complaint and the evidence on record, the learned Magistrate took cognizance for the offence u/s 138 of the Negotiable Instruments Act, vide his order dated 11.11.1998 and issued process against the accused persons. After appearance before the learned trial court, through their counsel, applications were filed on behalf of the accused persons. One such application was moved u/s 204 Cr.P.C, on 23.02.1999, raising objections against taking of cognizance. The learned trial court, after considering their applications, rejected the same, vide its order dated 02.04.1999.

5. Being aggrieved of the order dated 02.04.1999 passed by the learned Magistrate, the petitioners filed a revision petition before the learned Sessions Judge, Ajmer, which came to be transferred to the court of Special Judge, SC/ST Court, Ajmer. The learned revisional court, by the impugned order dated 17.08.1999, dismissed the revision petition and affirmed the order passed by the learned Magistrate.

6. The learned Counsel for the petitioners has submitted that the accused-petitioners had no concern with the borrowing firm, namely M/s. Sippy Films. Further, he has submitted that the accused persons were not partners of the Firm, accused No. 1, at the relevant time. He has also taken objection in respect of provisions of Section 141 of the Negotiable Instruments Act and submitted that the accused persons were not incharge/responsible for the working of the partnership Firm.

7. On the other hand, the learned Counsel for non-petitioner No. 2 has submitted that the accused-petitioners have sought to challenge the order of cognizance, wherein broad facts with regard to commission of the offence and material on record for the purpose of proceeding with the matter are to be looked into. He has also submitted that the questions with regards to partnership, etc. are the questions of facts, which are to be threshed out after tendering of evidence during the course of trial.

8. I have given my thoughtful consideration to the rival submissions made by the parties. In this case, after filing of the complaint before the learned Magistrate, statement of complainant was recorded and after having gone through the material on record, the learned Magistrate issued process against the accused persons, after having taken cognizance of the offence. Needless to say that it is a settled principle of law that at the stage of cognizance, the Court has only to assess the material as to whether it is sufficient to proceed in the matter and nothing more.

9. Apart from it, in the instant case, the learned Magistrate had taken cognizance

in the matter, vide his order dated 11.11.1998. Even after the process, having been affected on the accused persons, they did not challenge the order of cognizance before the higher Court. On the contrary, an application was filed before the learned Magistrate raising objection against taking of cognizance. In view of the settled principle of law laid down by the Hon"ble Supreme Court, the concerning Magistrate is not vested with the power/jurisdiction to reconsider the order of cognizance, on the application filed by the accused persons.

10. In the case of Adalat Prasad Vs. Rooplal Jindal and Others, , it has been held by the Apex Court in para 11 to 16 that:

11. We will examine the above findings of this Court in the background of the scheme of the Code which provides for consideration of complaints by Magistrates and commencement of proceedings before the Magistrate which is found in Chapters XV and XVI of the Code.

12. Section 200 contemplates a Magistrate taking cognizance of an offence on complaint to examine the complaint and examine upon oath the complainant and the witnesses present if any. If on such examination of the complaint and the witnesses, if any, the Magistrate if he does not want to postpone the issuance of process has to dismiss the complaint u/s 203 if he comes to the conclusion that the complaint, the statement of the complainant and the witnesses has not made out sufficient ground for proceeding. Per contra if he is satisfied that there is no need for further inquiry and the complaint, the evidence adduced at that stage has materials to proceed, he can proceed to issue process u/s 204 of the Code.

13. Section 202 contemplates "postponement of issue of process". It provides that if the Magistrate on receipt of a complaint if he thinks fit, to postpone the issuance of process against the accused and desires further inquiry into the case either by himself or directs an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding, he may do so. In that process if he thinks it fit he may even take evidence of witnesses on oath, and after such investigation, inquiry and the report of the Police if sought for by the Magistrate and if he finds no sufficient ground for proceeding he can dismiss the complaint by recording briefly the reasons for doing so as contemplated u/s 203 of the Code.

14. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons u/s 204 of the Code. Therefore what is necessary or a condition precedent for issuing process u/s 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated u/s 202 that there is sufficient ground for proceeding with the complaint hence issue the process u/s 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the

stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew's case before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises u/s 203 of the Code at which stage the accused has no role to play therefore the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint u/s 203 of the Code for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

15. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 & 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Code.

16. Therefore, in our opinion the observation of this Court in the case of Mathew (supra) that for recalling an order of issuance of process erroneously, no specific provision of law is required would run counter to the Scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew's case that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law.

11. This principle laid down in the case of Adalat Prasad (supra) has also been reiterated by the Hon"ble Supreme Court in the cases of Subramaniam Sethuraman v. State of Maharashtra and Anr. (2004) 13 SCC 324 ; N.K. Sharma Vs. Abhimanyu, Everest Advertising Pvt. Ltd. Vs. State, Govt. of NCT of Delhi and Others, and Bholu Ram v. State of Punjab and Anr. (2008) 9 SCC 140.

12. Besides, coming to the question of facts and material on record on the basis of which the learned Magistrate has taken cognizance and the same has been affirmed by the revisional court, it is to be noted that concurrent finding of facts have been given by them. In my considered opinion, it would not be appropriate for this Court to interfere in the finding of facts given by both the courts below, particularly, while considering the question of cognizance. This view of mine is supported by the Apex Court in the case of Ramkaran v. Gyarsi and Anr. (2005) 12 SCC 341, wherein the Hon"ble Supreme Court has held as under:

We have perused the order of the High Court and we also requested counsel appearing for the respondent to show us from the judgment of the High Court any reason recorded by the High Court for setting aside the concurrent findings

of fact recorded by the courts below. We have found none, and counsel for the respondent has also not been able to find any, nor could he point out any consideration of the evidence in the judgment of the High Court to satisfy us that after consideration of the material on record the High Court for reasons recorded by it has set aside the concurrent findings of fact by the courts below. The High Court has simply observed that a bare reading of Chapter IX of the Criminal Procedure Code would show that necessary provisions have been made for maintenance of wife, children and parents under the law. The court has only to consider all circumstances on the basis of evidence brought on record. It further observed that in the present case, the petitioner wife has been able to prove that she has sufficient reasons for her not to live with her husband. The above observations only record a conclusion without any reasoning or consideration of evidence. It was submitted before us by counsel for the respondent that the High Court was exercising inherent jurisdiction u/s 482 Cr.P.C. Even if it be so, there is nothing in law which empowers the High Court to set aside the concurrent findings of fact recorded by the courts below even without advert to the evidence or recording reasons. We find the judgment of the High Court to be perverse.

13. It may also be mentioned that the learned Counsel for the petitioners has submitted that the case of the co-accused Smt. Draupadi Devi @ Smt. Maya Sippy has been dropped by the High Court, vide order dated 04.02.2000 against whom the instant complaint was also filed. Suffice it to say that a perusal of the order passed in the case of Smt. Draupadi Devi, the High Court had observed as under: - "Counsel for respondents states that even a minor or a infant child can be held liable for criminal action of a deceased partner being his legal heir. To my mind such a submission of counsel for respondent is to be rejected straightway in view of the settled law that no other person than the criminal himself can be punished or tried in courts of law for the offence committed by said person."

14. However, the decision of this misc. petition would not restrain the accused persons from producing the relevant documents in support of their cases and also take all their objections before the court concerned, at the stage of framing of charge. The Hon'ble Supreme Court in the case of Laxminarayan and Ors. v. North East Securities Ltd. and Ors. (2004) 13 SCC 447, held as under:

By the impugned judgment a prayer made in terms of Section 482 of the Code of Criminal Procedure, 1973 (in short "CrPC") was rejected. On going through the orders of the High Court we find no infirmity in the conclusions arrived at. It is pointed out by the learned Counsel for the appellants that in a connected matter the Court while considering whether charge is to be framed, discharged accused persons, the appellants and that too in a case which involved same parties. Mere dismissal of the application u/s 482 Cr.P.C. does not take away the right of an accused to place materials at the time when the question of framing of charge is taken up to show that the materials do not justify framing of charge. It shall be open to the appellants to place such materials as are legally permissible to be

placed before the court when the question of framing charge is taken up by the court concerned. We express no opinion upon the aspect. The appeal is accordingly disposed of.

15. For the aforementioned reasons, I am of the considered opinion that both these criminal misc. petitions are devoid of merit. However, the accused-petitioners will be at liberty to raise their objections, at the relevant time before the trial court.

16. With the aforesaid observations, these criminal misc. petitions are disposed of. The record of the trial court be sent forthwith.