(2006) 05 J&K CK 0036

In the Jammu And Kashmir High Court

Shrikant Chavan APPELLANT

Vs

Hotel The Vaishno Devi RESPONDENT

Date of Decision : 05-05-2006

Acts Referred:
Negotiable Instruments Act, 1881 (NI) — Section 138, 2, 72

Citation : (2007) 2 CivCC 368 : (2006) CriLJ 4447 : (2006) 2 JKJ 573 : (2007) 5 RCR(Criminal) 526

Hon'ble Judges : J.P. Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

J.P. Singh, J.—Shrikant Chavan invokes the jurisdiction of this Court u/s 561A of the Criminal Procedure Code for quashing proceedings

pending before Judicial Magistrate First Class, Katra, in Complaint No. 21 of 19th of May, 2005, complaining that the Compliant of respondent,

Hotel the Vaishno Devi, u/s 138 of the Negotiable Instruments Act was incompetent and Judicial Magistrate First Class Magistrate, Katra, had

erred in issuing process against the petitioner in violation of statute in force. Proceedings before Judicial Magistrate, Katra, are sought to be

quashed on the ground that two cheques for Rupees one lac each, drawn on Kotak Mahindra Bank Ltd. on account of the petitioner had not been

presented to the Bank within the period of validity and in that view of the matter, no offence u/s 138 of the Negotiable Instruments Act could be

said to have been, prima facie, established against the petitioner justifying issuance of process against him. In order to support his submissions, the

petitioner relies on the documents placed by the respondents on the file of learned Judicial Magistrate First Class, Katra.

2. Shri Sunil Hali, learned Counsel for the petitioner, relies on Vijaya Rao v. State of Rajasthan and Anr. reported as (2005) 7 SCC 69, and Shri

Ishar Alloy Steels Ltd. Vs. Jayaswals NECO Ltd., .

3. Shri D.C. Raina, learned senior counsel appearing for the respondent, on the other hand, submits that the petitioner's submissions cannot be

considered at this stage because the submissions were essentially based on facts, which were required to be gone into by the trial Court during the

trial of the criminal proceedings pending against the petitioner. Learned senior counsel relies on Gajanand Goyal and Ors. v. Asiya Begum reported

as (2005) 12 SCC 331; Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza, and Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful

Haque and Others, .

4. I have considered the submission of learned Counsel for the parties and gone through the records.

5. It is true that inherent jurisdiction of the High Court saved by Section 561A Cr.P.C. may be exercised to prevent abuse of the process of any

Court or to secure the ends of justice, but such jurisdiction, as held in various judgments of Hon'ble Supreme Court, has to be exercised on facts,

which are either admitted by the parties or may be discerned from the available records. Exercise of such jurisdiction may not be justified in those

cases where some or the other evidence was required to accept one or the other version of the contending parties. Considering the law laid down

in the judgments cited by Shri Raina and Shri Hali, it may, thus, be concluded that jurisdiction u/s 561 A Cr.P.C. may be justified only if the

submissions of the petitioner were found to have been established on the strength of material available on records of the trial Magistrate. The

submissions of the petitioner, would not warrant consideration, if for consideration of those submission, some or the other inference was to be

drawn from the facts appearing from the records. With this legal background in view, I would proceed to examine as to what were the admitted

facts, which appear from the records of the trial Magistrate to find out whether these records would justify the submissions of the petitioner. I find

following documents on the file of the learned Magistrate:

1. Cheque No. 000012 400485002 002908 11 00000 10000000 Dated 01-09-2004 for an amount of Rs. one lac drawn on Kotak Mahindra

Bank on account No. 09582000001312 favouring Hotel the Vaishno Devi.

2. Cheque No. 000011 400485002 002908 11 00000 10000000 dated 10-09-2004 for an amount of Rs. one lac drawn on Kotak Mahindra

Bank on account No. 09582000001312 favouring Hotel the Vaishno Devi.

6. Both these cheques bear undated endorsement of Manager J & K Bank Limited, Katra, but with a round seal on the face of the cheques, which

indicate the receipt of these two cheques by the Jammu and Kashmir Bank Limited, Katra, on 02-03-2005 under Nos. 360 and 361.

7. On the reverse of these two cheques, there is a stamp bearing the seal of Manager, Jammu and Kashmir Bank Limited, Bombay and

computerized date shown as 16-03-2005. A communication dated 17th March, 2005 too forms part of the record of the learned Magistrate,

which indicates that the cheques had been sent back by Kotak Mahindra Bank Ltd., LCC Department to Jammu and Kashmir Bank, indicating

the dishonour of the cheques. The complaint of the complainant does not indicate as to when these cheques were presented by the bankers of the

complainant to Kotak Mahindra Bank Ltd. I do not find any thing in the statement of the complainant, Rakesh Wazir, recorded on 19-05-2005

fromwhere it may be inferred that the two cheques had been presented to Kotak Mahindra Bank Ltd. within the validity period of the cheques.

8. It now needs to be seen as to whether on the basis of above material, a process was required to be issued by the learned Magistrate against the

petitioner. In order to find answer to this question, we may refer to Section 138 of the Negotiable Instruments Act, which reads thus:

38. Dishonour of cheque for insufficiency, etc., of funds in the account. - Where any cheque drawn by a person 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, 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 and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term

which may extend to one year, or with fine which may extend to twice the amount to the cheque, or with both:

Provided that nothing contained in this section shall apply unless.-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity,

whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money 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; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due

course of the cheque within fifteen days of the receipt of the said notice.

9. Proviso appended to the Section requires the presentation of the cheque to the Bank, which has to make payment, within a period of six months

from the date on which it is drawn or within the period of its validity, whichever is earlier. In other words, offence u/s 138 would be said to have

been committed only if the cheque was presented to the Bank within a period of six months or within the period of its validity, whichever was

earlier.

10. Both the cheques on which the complaint has been filed by the respondent, have been shown to have been issued on 01-09-2004 and 10-09-

2004. In order to fasten liability u/s 138 on the petitioner, who is alleged to have issued the cheques, the complainant was required to show that the

cheques had been presented within the period of six months or period of validity, whichever was earlier.

11. In so far as one of the cheques is concerned, i.e., Cheque No. 000012 400485002 002908 11 00000 10000000 bears 1st of September,

2004 as the date of its issue, which was required to be presented before 1st of March, 2005. The endorsement of the Jammu and Kashmir Bank

Limited, Katra, where the cheque is shown to have been presented for its collection from Kotak Mahindra Bank Ltd., bears the receipt of the

cheque as 2nd of March, 2005. This cheque admittedly was, thus, presented before Jammu and Kashmir Bank Limited, Katra, beyond the period of six months. No action u/s 138 of the Negotiable Instruments Act, 1881, could, thus, be initiated by the petitioner on the basis of this cheque.

The second cheque No. 000011 400485002 002908 11 00000 10000000 bears 10-09-2004 as the date of its issue, which is shown to have

been received for collection by Jammu and Kashmir Bank Limited, Katra, on 2nd of March, 2005. This cheque, however, on its reverse bears the

date of its receipt by the collecting Branch of Jammu and Kashmir Bank Limited at Bombay on 16-03-2005, to which Kotak Mahindra Bank

Limited returns the cheque by dishonouring it vide its communication dated 17th of March, 2005. This cheque having been received by Jammu and

Kashmir Bank Limited, Bombay, on 16th of March, 2005 for its presentation to Kotak Mahindra Bank Ltd., thereafter, had, thus, lost its efficacy

because six months had by then elapsed. No action could, thus, be initiated on the basis of even the second cheque of the respondent.

12. It is no longer res intergra that cheque is required to be presented to the drawee Bank or payee Bank within the period of six months from the

date of its issue, if criminal liability u/s 138 of the Negotiable Instruments Act, 1881, was to be invoked by the person in whose favour the cheque

had been issued. It would be profitable to refer to what was held by Supreme Court of India in Shri Ishar Alloy Steels Ltd. Vs. Jayaswals NECO

Ltd., :

9. It, however, does not mean that the cheque is always to be presented to the drawer's bank on which the cheque is issued. The payee of the

cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of

the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque is drawn within

the period of six months from the date on which it is shown to have been issued. In other words a cheque issued by (A) in favour of (B) drawn in a

bank named (C) where the drawer has an account can be presented by the payee to the bank upon which it is drawn i.e. (C) bank within a period

of six months or present it to any other bank for collection of the cheque amount provided such other bank including the collecting bank presents

the cheque for collection to the (C) bank. The non-presentation of the cheque to the drawee bank within the period specified in the Section would absolve the person issuing the cheque of his criminal liability u/s 138 of the Act, who shall otherwise may be liable to pay the cheque amount to the

payee in a civil action initiated under the law. A combined reading of Sections 2, 72 and 138 of the Act would leave no doubt in our mind that the

law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable. Such presentation is

necessarily to be made within six months at the bank on which the cheque is drawn, whether presented personally or through another bank,

namely, the collecting bank of the payee.

13. I, thus, find that the material on records placed by the complainant along with complaint, unmistakably points out that the two cheques had not

been presented within a period of six months by the complainant to the collecting Bank and in that view of the matter, liability u/s 138 could not be

said to have been incurred by the petitioner. Learned Magistrate has, thus, erred in issuing process against the petitioner vide its order dated 19-

05-2005.

14. For all what has been stated above, this petition is allowed and the proceedings pending before learned Judicial Magistrate First Class, Katra,

in case titled Hotel the Vaishno Devi v. Shrikant Chavan, are quashed.

