

(2011) 12 SHI CK 0309
In the High Court Of Himachal Pradesh
Case No : Criminal MMO No. 162 of 2011

Smt. Bhavna Mukesh Ojha

APPELLANT

Vs

Bhup Singh

RESPONDENT

Date of Decision : 05-12-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 179, 180, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142, 3, 72

Citation : (2011) 12 SHI CK 0309

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Kuldip Singh, Judge

1. The quashing of complaint No. 85-3 of 2010 pending in the court of Judicial Magistrate Ist Class, Court No. 3, Shimla, u/s 138 of Negotiable Instruments Act, 1881 (for short, the Act) has been prayed in the petition filed u/s 482 of the Code of Criminal Procedure by the petitioner.

2. The facts in brief are that respondent has filed complaint u/s 138 of the Act against the petitioner, which is pending in the court of Judicial Magistrate Ist Class, Court NO.3, Shimla. It has been stated in the petition that respondent has misused the blank cheque No. 809278 signed by the petitioner after filling it up and presenting it for encashment. The petitioner even lodged complaint No. 286 dated 1.2.2010 of missing cheque with Byculla, Police Station, Mumbai. It has been stated that complaint filed by the respondent is totally false and frivolous. The cheque in question has been misused and there is no lawful consideration. The respondent has no cause of action to file and maintain the complaint in the courts at Shimla.

3. The cheque in question is alleged to have drawn on petitioner's bank i.e. Bank of India, Mazgaon Branch, Mumbai. The cheque has been dishonoured by the

petitioner's bank at Mazgaon, Mumbai. The Magistrate at Shimla has no jurisdiction to entertain the complaint. It has been stated that mere presentation of cheque at Shimla and issuance of notice from Shimla does not give rise to cause of action at Shimla in the facts and circumstances of the present case.

4. It has been stated that without admitting issuance of cheque in question, even if all allegations contained in the complaint are taken at their face value then also courts in Mumbai have jurisdiction and courts in Shimla have no territorial jurisdiction to adjudicate the complaint. The respondent has misused the cheque in question and complaint has been filed at Shimla with an intention to extract money by harassing the petitioner, who is an old and ailing lady. The respondent has abused the process of law by filing the complaint against the petitioner at Shimla. The prayer has been made for quashing the proceedings.

5. I have heard the learned counsel for the parties. The learned counsel for the petitioner has submitted that without considering the allegations made in the complaint even if the allegations in the complaint are taken at their face value as correct, still no cause of action for filing the complaint has arisen at Shimla and courts at Shimla have no jurisdiction to entertain and try the complaint u/s 138 of the Act filed by the respondent against the petitioner. It has been submitted that issuance of notice and presentation of cheque at Shimla is not part of cause of action nor these acts will give jurisdiction to the courts at Shimla. The learned counsel for the petitioner has relied K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, , Shri Ishar Alloy Steels Ltd. Vs. Jayaswals NECO Ltd., , Musaraf Hossain Khan Vs. Bhagheeratha Engg. Ltd. and Others, , Ahuja Nandkishore Dongre vs. State of Maharashtra & anr. 2007 Cri. L.J. 11 and Harman Electronics (P) Ltd. and Another Vs. National Panasonic India Ltd., and Prabhu Dayal Modi vs. Euro Developers Pvt. Ltd. & anr. 2010 (3) Bom. C.R. (Cri.)801 in support of his submissions.

6. The learned counsel for the respondent has also relied Harman Electronics (P) Ltd. and Another Vs. National Panasonic India Ltd., . The learned counsel for the respondent has argued that averments made in the complaint clearly show that courts at Shimla have the jurisdiction. The cheque in question was presented in Shimla for encashment, respondent came to know dishonour of the cheque at Shimla, therefore, Shimla courts have the jurisdiction to entertain and try the complaint. The section 138 of the Act is as follows:-

138. Dishonour of cheque for insufficiency, etc. of funds in 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 provisions of this Act, be punished with imprisonment for

a term which may be extended to two years, or with fine which may extend to twice the amount of 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 thirty 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.

Explanation.- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

7. In order to appreciate the rival contentions, it is necessary to refer to some case law on the point. In *K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another*, the complainant presented a cheque bearing the signatures of the accused before Syndicate Bank, Kayamkulam (Kerala) for encashment. The complaint was filed by the complainant before the Judicial Magistrate, Adoor (In Pathanamthitta District in Kerala) u/s 138 of the Act. One contention was with respect to territorial jurisdiction of the court to try the case as the cheque was dishonoured at Syndicate Bank, Kayamkulam (Kerala). The Supreme Court held as follows:-

The offence u/s 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

The Supreme court further held:-

Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence u/s 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over anyone of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence u/s 138 of the Act.

8. In *Shri Ishar Alloy Steels Ltd. Vs. Jayaswals NECO Ltd.*, the following questions

were before the Supreme Court:-

(a) What is meant by, 'the bank' as mentioned in clause (a) of the proviso to Section 138 of the Negotiable Instruments Act, 1881?

(b) Does such bank mean the bank of the drawer of the cheque or covers within its ambit any bank including the collecting bank of the payee of the cheque?

(c) To which bank the cheque is to be presented for the purposes of attracting the penal provisions of Section 138 of the Act?

In that case the appellant issued check drawn at State Bank of Indore, Indore in favour of respondent. The cheque was presented by the respondent to its bank State Bank of India at Raipur. The cheque reached the drawer bank after six months from the date it became payable. The cheque was returned unpaid by the bank of the respondent. A notice as required under proviso (b) of Section 138 of the Act, which was received by the appellant. The complaint u/s 138 of the Act was filed at Raipur. The Supreme Court has observed that some High Courts have held that cheque must be presented to the bank on which it is drawn within six months from the date of issue of the cheque and some High Courts have taken the view that cheque can be presented either in the payee's bank or in the drawer's bank and the date of presentation of the respective banks will be reckoned for calculating the period of six months from the date it was drawn. The first view has been taken by Punjab and Haryana High Court and Gujarat High Court. The second view has been taken by Madras High Court and Madhya Pradesh High Court. On those facts, the Supreme Court has held as follows:-

..... 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 3, 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.

The Supreme Court approved the view taken by Punjab & Haryana High Court, Gujarat High Court and not approved the view taken by Madras High Court.

9. The Supreme Court in Musaraf Hossain Khan Vs. Bhagheeratha Engg. Ltd. and Others, has held as follows:-

35. In Prem Chand Vijay Kumar Vs. Yashpal Singh and Another, we may, however, notice that it was held that for securing conviction under Negotiable Instruments Act, 1881 the facts which are required to be proved are:

(a) that the cheque was drawn for payment of an amount of money for discharge

of a debt/liability and the cheque was dishonoured;

(b) that the cheque was presented within the prescribed period;

(c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and

(d) that the drawer failed to make the payment within 15 days of the receipt of the notice.

36. For the purpose of proving the aforementioned ingredients of the offence u/s 138 of the Act, the complainant-appellant was required to prove the facts constituting the cause of action therefor none of which arose within the jurisdiction of the Kerala High Court. It is, apt to mention that In Prem Chand Vijay Kumar (supra) this Court held that cause of action within the meaning of Section 142(b) of the Act can arise only once.

10. The learned single Judge of Bombay High Court in Ahuja Nandkishore Dongre Vs. State of Maharashtra and Another, has held as follows:-

Likewise if the High Court of Kerala has, relying on Bhaskaran's case, held that Court, within whose jurisdiction the cheque was presented could entertain such a complaint, I respectfully disagree. As already stated, in my humble view, the observations in Bhaskaran's case do not support such a conclusion. At the cost of repetition it has to be pointed out that the wording of Section 138 of the Negotiable Instruments Act too does not support such a view. If the Courts, within whose jurisdiction the cheque was merely presented for realization, were to be allowed to entertain complaints, the result would be opening flood gates for harassment to persons who issued cheques. A person who issues a cheque on his bank indicates by his act that he intends to make payment at the drawee bank and not elsewhere. Therefore, for the reasons stated above, I am in respectful disagreement with the views taken by the Andhra Pradesh, Delhi and Kerala High Courts, because in all these judgments, significance of the word 'the' in clauses (2) and (3) in paragraph 14 of the judgement in Bhaskaran's case has been lost sight of.

11. The question of territorial jurisdiction to try an offence u/s 138 of the Act was considered by the Supreme Court in Harman Electronics (P) Ltd. and Another Vs. National Panasonic India Ltd., In that case, the complainant issued a notice upon the accused asking him to pay amount from New Delhi. The notice was served upon the accused at Chandigarh. The complaint was filed at Delhi. The trial court took cognizance of the complaint. The matter was taken to High Court where criminal miscellaneous petition was dismissed. In the Supreme Court a contention was raised that court at Delhi has no jurisdiction to take cognizance of the offence as the entire cause of action arose at Chandigarh. The Supreme Court held as follows:-

It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a

cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence u/s 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act are intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.

The principle that debtor must seek creditor was not approved by the Supreme Court in criminal case. The Supreme Court noticed *Mosaraf Hossain Khan* (supra), where it has been held that sending of cheques from Ernakulam or the respondents having an office at that place did not form an integral part of 'cause of action' for which the complaint petition was filed by the appellant and the cognizance of the offence u/s 138 of the Negotiable Instruments Act, 1881 was taken by the Chief Judicial Magistrate, Suri.

12. In *Prabhu Dayal Modi vs. Euro Developers Pvt. Ltd. & Anr.* 2010 (3) Bom. C.R. (Cri.)801, the petitioner had drawn the cheque in favour of respondent against the Bombay Mercantile Co operative Bank, Jaipur Branch. The cheque was deposited by the respondent No. 1 with his banker i.e. H.D.F.C. Bank, Juhu Branch at Mumbai for presentation to the Bombay Mercantile Co-operative Bank, Jaipur Branch i.e. drawee bank for encashment. The cheque was dishonoured by drawee bank at Jaipur. The question before the court was whether Metropolitan Magistrate at Bombay has the jurisdiction to try the complaint u/s 138 of the Act. The court noticed *Ahuja Nandkishore Dongre* (supra) and held that there remains no doubt that payment was to be made at Jaipur, as such no part of transaction had taken place at Mumbai, none of the ingredients of the offence u/s 138 of the Act had taken place at Mumbai and, therefore, Magistrate at Mumbai could have no jurisdiction to entertain the complaint. The territorial jurisdiction would be with the Magistrate exercising the jurisdiction at Jaipur.

13. In the present case, it has been stated in the complaint that on 3.12.2009, petitioner had borrowed a sum of rupees two lacs from the respondent for the business of her husband, a post dated cheque No. 809278 dated 15.2.2010 for Rs.2,00,000/- payable at Bank of India, Mazgaon Branch, Mumbai was issued in favour of the respondent, who presented the said cheque for collection through his banker Indian Bank, Shimla. The cheque was returned by the banker with the remarks "insufficient funds". The intimation regarding dishonouring of cheque was received by the respondent alongwith refusal memo from his banker. The

learned counsel for the petitioner has contended that court at Shimla has no jurisdiction to entertain and try the complaint.

14. In *Mosaraf Hossain Khan* (supra), it has been held that for proving the ingredients of offence u/s 138 of the Act the complainant was required to prove the facts constituting the cause of action. In *Shri Ishar Ally Steels Ltd.* (supra), the term 'the bank' mentioned in clause (a) of proviso to section 138 of the Act has been interpreted in the light of questions (b) and (c) noticed in the judgement for counting period of six months for presentation of cheque to 'the bank'. It has been held that the cheque to be presented at the bank on which it is drawn if drawer is to be held criminally liable. Therefore, it cannot be said that complaint cannot be filed where the cheque was deposited for collection by the complainant and returned after bouncing. In *Harnam Electronics Private Limited and another* (supra), the Supreme Court has held that receipt of a notice would give rise to cause of action for filing a complaint, issuance of notice would not by itself give rise to cause of action but communication of notice would.

15. In *K. Bhaskaran* (supra) the Supreme Court has held that returning of the cheque unpaid by drawee bank is one of the components of offence u/s 138 of the Act. The Supreme Court has also held that complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. The returning of the cheque unpaid by drawee bank is one of such five components constituting offence u/s 138 of the Act. The cheque in the present case was returned unpaid at Shimla to complainant through his collecting bank by drawee bank from Mumbai.

16. The payments through cheques in business transactions are very common these days. The purpose of section 138 of the Act is to proceed criminally against defaulting person in case of bouncing of cheque. The criminal proceeding is speedy, efficacious and less expensive remedy in comparison to civil proceeding. Before initiating proceedings u/s 138 of the Act, some steps are to be completed, the intention is to give opportunity to the defaulting person to make payment. The payee of the cheque is interested in the money, invariably cheque is deposited by the payee to his bank for collection. The purpose of the Act will be defeated if the payee of the cheque in case of bouncing of cheque is required to file the complaint u/s 138 of the Act at the place from where the cheque was issued instead of the place where cheque is returned to the payee where he deposited the cheque for collection. In case a cheque is issued by a person in Kerala to a person in Himachal Pradesh for payment and the cheque is deposited by the said person in Himachal Pradesh to his banker for collection and the cheque is returned to the said person in Himachal Pradesh after bouncing and if the said person in Himachal Pradesh is required to file complaint u/s 138 of the Act in Kerala against the defaulting person, it will defeat the spirit of section 138 of the Act.

17. The section 179 Cr.P.C. provides when an act is an offence by reason of

anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a court within whose local jurisdiction such thing has been done or such consequence has ensued. The Supreme Court in *State of Punjab Vs. Nohar Chand*, after noticing Section 179 of the Code has held that if one manufactures the substandard fertilizer, wherever it is marketed the inter-relation or casual connection is of cause and effect. The situation will be adequately covered by Sections 179 and 180 of the Code of Criminal Procedure. The Supreme Court approved the decision of the Division Bench dated 9.3.1983 that the court where the substandard fertilizer is being marketed will equally have the jurisdiction to try the manufacturer of substandard fertiliser.

18. The respondent had deposited the cheque in question for collection to his banker at Shimla. The cheque in question was returned to respondent through his banker after dishonour at Shimla. The return of cheque after dishonour has direct relation for completion of commission of offence u/s 138 of the Act. The court having territorial jurisdiction over the place where cheque has been returned after bouncing shall have also territorial jurisdiction to try complaint for offence punishable u/s 138 of the Act. In the complaint necessary averments regarding territorial jurisdiction of Shimla court have been pleaded. Therefore, Shimla court has jurisdiction to try the complaint. There is no merit in the petition.

19. In view of above, the petition is dismissed, so also all the pending applications.