
(2007) 09 AHC CK 0237
In the Allahabad High Court
Case No : Criminal M.A. No. 5633 of 2004

Smt. Shobha Kulshreshtha

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 25-09-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 2, 200, 202, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Penal Code, 1860 (IPC) — Section 406, 420

Citation : (2008) 1 ACR 378

Hon'ble Judges : R.K. Rastogi, J

Bench : Single Bench

Advocate : A.R. Gupta, for the Appellant; B.P. Tewari and A.G.A., for the Respondent

Judgement

R.K. Rastogi, J.—This application u/s 482, Cr. P.C. has been filed for quashing the order dated 21.10.2002 passed by Sri Arvind Kumar, Judicial Magistrate, Sadabad district Hathras in Criminal Application No. 117 of 2002 under Sections 420 and 406, I.P.C. and Section 138, Negotiable Instruments Act.

2. The facts relevant for disposal of this application are that the complainant opposite party No. 2 moved an application u/s 156(3), Cr. P.C. against the accused-applicant-Smt. Shobha Kulshreshtha and one Smt. Shakuntala Devi with these allegations that the complainant is owner of a brick-kiln and both the accused-persons purchased bricks from him and gave a Cheque of Rs. 1,35,000 to him on 20.12.2000. This Cheque was sent to the Bank for payment but the Bank refused to make payment on account of insufficient funds. On the basis of this information the complainant gave a notice to the accused persons on 4.10.2001. But neither the accused made payment nor gave any reply in spite of service of above notice. Then the complainant gave another notice on 12.11.2001 but of no avail. Thus, the accused had committed an offence u/s 138 of Negotiable Instruments Act and Section 420, I.P.C. The complainant gave an application in writing to the police station on 28.1.2002 but no action was taken.

Then he moved this application u/s 156(3), Cr. P.C.

3. On the above application the learned Magistrate passed an order for treating it as complaint, and after taking statements of the complainant and his witnesses under Sections 200 and 202, Cr. P.C. he was of the view that prima facie a case under Sections 420 and 406, I.P.C. and Section 138 of Negotiable Instruments Act was made out against the accused persons, and he therefore summoned them vide his order dated 21.10.2002. Aggrieved by that order the accused filed this application u/s 482, Cr. P.C.

4. Counter and rejoinder-affidavits have been filed in this case. I have perused them and have also heard both the parties.

5. It was submitted by the learned Counsel for the applicants that the procedure for taking cognizance for the offence u/s 138 of Negotiable Instruments Act has been provided in Section 142 of the above Act which runs as under :

142. Cognizance of offences. -Notwithstanding anything contained in the Code of Criminal Procedure, 1973:

(a) 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 ;

(b) 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 ;

(c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable u/s 138.

6. He submitted that in the present case no complaint was filed by the complainant before the Magistrate but an application was filed u/s 156(3), Cr. P.C., and so the Court could not take cognizance of the matter. It was further argued that under Sub-clause (b) of the above Section 142 of the Act, the complaint must be made within one month of the date on which cause of action arose under Clause (c) of proviso to Section 138 of the Act. It is to be seen that under the aforesaid Clause(c) the drawer of the cheque has got an opportunity to make payment of the cheque amount within "a period of 15 days from the date of service of the notice and so the cause of action arises on expiry of the above period of 15 days from the date of service of the notice" and the complaint u/s 138 of the Act is to be filed within one month from the above date.

7. The learned Counsel for the applicants submitted that in the present case the complainant has nowhere mentioned in his application u/s 156(3), Cr. P.C. as to on which date he received information from the Bank regarding dishonour of the cheque. He has stated in this application that on 4.10.2001 he had sent a notice to the accused persons. He pointed out that the date of cheque as alleged in the application is 20.12.2000 and it is not clear as to when this cheque was presented and whether notice dated 4.10.2001 was given within a period of 15

days from the date of receipt of information regarding dishonour or not. He further pointed out that another notice was given on 12.11.2001 but the date of service of this notice has also not been mentioned in the complaint. He further pointed out that the cause of action arose on the date of service of first notice and the second notice cannot be availed for the purpose of extension of limitation period. He further pointed out that the application u/s 156(3), Cr. P.C. was filed on 10.3.2002, i.e., after expiry of the period of one month to be computed on expiry of 15 days allowed for payment from the date of service of notice. He pointed out that in the present case the cheque is dated 20.12.2000. So it was valid upto 20.6.2001 only. The date of its presentation and return from the Bank have not been specified in the complaint, but the first notice regarding dishonour was given on 4.10.2001 and the second notice was given on 12.11.2001. The dates of service of either of these notices have not been mentioned in the application u/s 156(3), Cr. P.C., nor this fact has been asserted that the notice was served upon the accused which was mandatory in view of the ruling of the Hon'ble Supreme Court in *Shakti Travel and Tours v. State of Bihar and Anr.* 2003 (Supp) ACC 663 : 2000 (3) ACR 1907 (SC). As such no cognizance of the offence u/s 138, Negotiable Instruments Act could be taken by the Magistrate in view of the aforesaid lacuna. He further pointed out that the aforesaid particulars regarding date of information of dishonour of cheque and the date of service of notice etc. have not been mentioned even in the counter-affidavit filed before this Court.

8. It was submitted by the learned Counsel for the opposite party No. 2 in reply that the complainant opposite party No. 2 filed an application u/s 156(3), Cr. P.C. and that application was ordered to be treated as complaint by the Magistrate so the defect of not filing any complaint had been cured. I do not agree with this contention. The word "complaint" has been defined in Section 2(d) of the Cr. P.C. which runs as follows:

"Complaint" means allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

9. It is apparent from perusal of the above definition of the "complaint" that an application u/s 156(3), Cr. P.C. before the Magistrate for directing the police to take action cannot be treated to be a complaint in its technical term and since in the present case an application u/s 156(3), Cr. P.C. was moved before the Magistrate, there was no compliance of the requirement of Section 142(a) of the N. I. Act.

10. Moreover, it is also to be seen that cognizance of the offence punishable u/s 138, Negotiable Instruments Act, could not be taken for want of particulars regarding date of dishonour of cheque and date of service of notice etc., pointed out above. As such the learned Magistrate acted illegally by taking cognizance of the offence punishable u/s 138 of Negotiable Instruments Act.

11. Learned Magistrate has also taken cognizance of the offence punishable u/s 406, I.P.C. Section 406, I.P.C. is in respect of criminal breach of trust and there must be entrustment of some property for that purpose. There is no allegation to the effect in the application u/s 156(3), Cr. P.C. to constitute this offence that any property was ever entrusted with the accused and that any criminal breach of trust in respect of that entrustment was committed. The complainant has also not prayed for taking any action against the accused persons u/s 406, I.P.C. Learned Magistrate committed a legal error by taking cognizance u/s 406, I.P.C.

12. Learned Magistrate has also taken cognizance of the offence punishable u/s 420, I.P.C. It was submitted by the learned Counsel for the applicants that no case u/s 420, I.P.C. was made out as there is nothing to show that the intention of the accused was dishonest from the very inception. I am of the view that this question of fact can be properly adjudicated at the stage of evidence. As such the proceedings of the case for the offence punishable u/s 420, I.P.C. cannot be quashed at this stage.

13. The position, in this way, is that the application of the applicants u/s 482, Cr. P.C. deserves to be partly allowed. The proceedings for the offences punishable u/s 406, I.P.C. and Section 138 of the N.I. Act deserve to be quashed. But, so far as the offence punishable u/s 420, I.P.C. is concerned, I do not find any sufficient ground to interfere with the impugned summoning order in this regard passed by the learned Magistrate at this stage.

14. This application u/s 482, Cr. P.C., so far as it relates to quashing of the proceedings u/s 406, I.P.C. and Section 138, Negotiable Instruments Act, is thus partly allowed ; but so far as this application relates to quashing of the proceedings u/s 420, I.P.C., it is dismissed. The result is that the case shall now proceed u/s 420, I.P.C. only.