
(1993) 02 KL CK 0053
In the High Court Of Kerala
Case No : Criminal M.C. No. 1648 of 1992

Smt. Sosamma

APPELLANT

Vs

Rajendran and Another

RESPONDENT

Date of Decision : 23-02-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 420

Citation : (1993) 2 CivCC 268 : (1994) 80 CompCas 503 : (1993) CriLJ 2196 :
(1993) 3 RCR(Criminal) 213

Hon'ble Judges : L. Manoharan, J

Bench : Single Bench

Advocate : G. Hariharan, for the Appellant; K.P. Dandapani and K. Usha, for the Respondent

Final Decision : Dismissed

Judgement

L. Manoharan, J.—This petition u/s 482, Criminal Procedure Code is to quash annexure A-1-complaint. The petitioner is the accused in C. C. No. 368 of 1992 on the file of the Judicial First Class Magistrate's Court, Nedungundam. Annexure A-I-complaint was filed by the first respondent u/s 138 of the Negotiable Instruments Act, 1881 (for short, "the Act"), and Section 420 of the Indian Penal Code. The allegation was that the petitioner borrowed Rs. 30,000 on May 8, 1992, from the first respondent promising to repay the same on May 13, 1992, and issued a cheque with date May 13, 1992. The cheque when presented was returned unpaid with the endorsement "funds insufficient". The first respondent further alleged that only then he could know that he was cheated and deceived with the intention of not paying the amount. It is further alleged that, a notice demanding the amount was issued within time ; but was returned without acceptance by the petitioner with the endorsement "unclaimed". The petitioner alleges that the cheque itself is a forged one and that no offence u/s 420, Indian Penal Code, or Section 138 of the Act is" committed, therefore, the complaint is

liable to be quashed.

2. It was contended by learned counsel for the petitioner that, the petitioner's husband had sold a bus to the first respondent and in that transaction, there was some difference of opinion between them that the first respondent managed to get a cheque leaf from the petitioner's house and he forged the signature of the petitioner. In support of the said argument, learned counsel for the petitioner relied on annexure A-3 agreement purported to have entered into by the first respondent. According to learned counsel, a breach of agreement or a dishonour of a postdated cheque cannot constitute an offence u/s 420, Indian Penal Code. The remedy, if at all, according to learned counsel is to file a suit for recovery of the amount. Then, it was also contended that, since no notice was served or received by the petitioner, the offence u/s 138 of the Act also is not made out. That being the position according to him the complaint and the proceedings have to be quashed.

3. On the other hand, learned counsel for the first respondent contended that, the question as to the genuineness of the cheque is a matter to be decided at the trial and that since the notice was returned "unclaimed" on account of the default of the petitioner, it would constitute service and the same in the circumstances has to be treated as receipt of notice by the petitioner.

4. Learned counsel for the petitioner relied on page 293 of Law of Dishonour of Cheques by S.K. Awasthi, second edition, in support of his contention that, when a post-dated cheque is dishonoured, no offence of cheating is committed and the remedy of the complainant lies in a civil court for breach of contract. It is true, that a breach of contract simpliciter cannot give rise to a criminal prosecution ; "cheating" depends upon the intention of the accused at the time of the alleged inducement.

5. Deception u/s 415, Indian Penal Code, should be by express words or visible representation as the same may be practised by conduct or implied in the transaction itself. The question whether there was an intention to deceive is a matter to be inferred from the proved circumstances. In the context of Section 482, Criminal Procedure Code, the factor to be looked into is the allegation in the complaint. In paragraph 2 of the complaint, the first respondent alleges that, when the petitioner passed the cheque to him, it was represented that, there would be no difficulty in collecting the amount when the same is presented on May 13, 1992, and that he believed the said representation ; and in paragraph 4, it is alleged that, only when the cheque was dishonoured he realised the deception. As regards the contention that, a combined ground u/s 138 of the Act and Section 420, Indian Penal Code cannot be maintained, it has to be noted that a single transaction could spell out more than one offence and in that event such offences can be the basis of a complaint.

6. As to whether the allegations as regards the commission of the offences are true, inclusive of the question regarding the genuineness of the cheque are

matters which the complainant has to establish at the trial. Such disputed questions of fact cannot be gone into in a matter u/s 482, Criminal Procedure Code.

7. As regards the contention that since the notice was returned with the endorsement "unclaimed", no offence u/s 138 of the Act is committed, it is necessary to note the ingredients to constitute an offence u/s 138 of the Act. It has to be proved that the cheque was issued in discharge of a debt or liability, the cheque was presented within six months or within the period of its validity whichever is earlier, the cheque should have been dishonoured either because the amount of money in the credit of that account is insufficient or it exceeds the amount arranged to be paid, notice of dishonour should have been sent within 15 days of receiving information of dishonour, the drawer did not pay the amount within 15 days of the receipt of notice. Here the contention is, as there is no case that any notice was received by the petitioner, no offence u/s 138 of the Act is made out.

8. Learned counsel for the first respondent contended that, inasmuch as the notice was returned with an endorsement "unclaimed" that under law would amount to acceptance and receipt of notice and the complaint is, therefore, maintainable. Reliance was made by learned counsel on the decision in M/s. Madan and Co. Vs. Wazir Jaivir Chand, in support of the said contention. The said decision arose under Sections 11 and 12 of the J & K Houses and Shops Rent Control Act (34 of 1966), where the tenant was in arrears, notice terminating the tenancy was sent through registered post to the correct address, the same was returned for nonavailability of the addressee. The Supreme Court in such circumstances held (at page 634) :

"The more reasonable, effective, equitable and practical interpretation of the proviso to Section 11(1)(i) would be to read the word "served" as "sent by post", correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter."

9. Therefore, a valid tender by the postal peon, was held to be service and receipt of the notice for the purpose of the said section, provided the letter was sent to the correct address. The contention of learned counsel for the first respondent is, since the notice was returned as "unclaimed", that would constitute receipt of the notice.

10. Section 138 of the Act being a penal provision as is held in Tolaram Relumal and Another Vs. The State of Bombay, , if two possible and reasonable constructions can be put on the said provision the court should lean towards that construction which would exempt the subject from the penalty rather than the one which would impose penalty. In this connection, it is necessary to note the difference between the provision of notice in Section 94 and Section 138 of the Act. Section 94 of the Act prescribes the mode in which notice can be given. As per the said section though such notice of dishonour could be oral or written and

may if sent through post be in any form, proviso (b) to Section 138 of the Act insists that the said notice should be in writing ; and the liability u/s 138 of the Act would arise only if the accused defaulted in payment within 15 days of the "receipt" of notice. This has got special significance ; only if the person accused of the offence knows as to the dishonour can he pay the amount within the stipulated time. The purpose and object of the said provision cannot be lost sight of in interpreting the provision regarding service of notice.

11. Now, it is necessary to see whether a notice when returned with the endorsement "unclaimed" would be sufficient service for the purpose of Section 138 of the Act. There may be cases where notice is returned unclaimed on account of the deliberate evasion by the accused when the same was tendered by the post man. With due regard to the principles laid down in *M/s. Madan and Co. Vs. Wazir Jaivir Chand*, where it is proved that the notice was returned "unclaimed" due to the evasion by the accused when tendered at the correct address that can be treated as service. Since the general burden to prove the prosecution case, rests with the complainant, it is necessary for the complainant to prove the facts constituting the sending of notice and its receipt. The tender of the notice by the postal peon at the address of the accused has to be proved and if the same could not be actually served due to the culpable default or deliberate evasion of the accused, then the same would constitute "receipt" of notice. The burden to establish those facts rests with the complainant.

12. Therefore, it is open to the complainant where the notice was returned "unclaimed" to prove the said elements mentioned above in support of the prosecution case. In paragraph 5 of the complaint, sending of notice and the return of the same with the endorsement "unclaimed" are alleged. Therefore, the said aspect too is a matter for evidence. As noticed, in a matter u/s 482, Criminal Procedure Code, this court cannot go into disputed questions of fact and those matters are to be proved at the trial. Since the complaint discloses the necessary allegations, the same is not liable to be quashed. In this regard, the observation of the Supreme Court in *State of Haryana and others Vs. Ch. Bhajan Lal and others*, , after adverting to the circumstances where a complaint or an FIR can be quashed, is important (at page 629) :

"We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases ; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice".

13. In view of the above, the criminal miscellaneous case is liable to be dismissed, which accordingly is hereby dismissed.