
(2007) 11 KAR CK 0055
In the Karnataka High Court
Case No : Criminal Appeal No. 1680 of 2003

Sri Gangadhar Baddi

APPELLANT

Vs

Sri. Raghunathasa Magajikondi

RESPONDENT

Date of Decision : 29-11-2007

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 138 (b)

Citation : (2008) CriLJ 1006 : (2008) 4 KarLJ 279 : (2008) 1 KCCR 186

Hon'ble Judges : A.C. Kabbin, J

Bench : Single Bench

Advocate : Vardhaman V. Gunjal, for the Appellant; I.G. Gachchinamath, for the Respondent

Final Decision : Allowed

Judgement

A.C. Kabbin, J.—The point of law that has arisen in the present appeal is:

Whether the cause of action for an offence punishable u/s 138 of the Negotiable Instruments Act arises merely by issuing a notice of dishonour of cheque?

2. The appellant herein was the complainant in C.C. No. 131/1998 on the file of the J.M.F.C. (I Court) Hubli, and the respondent was the accused in that case. The contention of the appellant was that on the request of the respondent he had advanced an amount of Rs. 1,00,000/- as hand loan to the respondent in the month of January 1998 and that when he pressed for its repayment, the accused - respondent had issued a cheque bearing No. 449421 dated 27-03-1998 for Rs. 1,00,000/- drawn on the State Bank of India, but that on presentation of the said cheque it was dishonoured. The appellant alleged that despite service of notice of dishonour, the respondent having failed to pay the amount within the stipulated time, has committed an offence punishable u/s 138 of the Negotiable Instruments Act.

3. The accused pleaded not guilty and claimed to be tried. The complainant examined himself and the bank manager regarding dishonour of cheque. After

the case of the complainant was closed, the accused was examined u/s 313 of the Code of Criminal Procedure to explain the circumstances arising out of the evidence. The accused denied the allegations in the complainant's evidence. No witness was examined on behalf of the accused.

4. The learned Trial Judge, held that the cheque had been issued by the accused in favour of the complainant and it had been dishonoured and also that the respondent - accused had failed to pay the amount despite service of notice. However relying on an admission of the complainant in the cross examination that the cheque had earlier been presented for encashment on 28.03.1998 and that he had issued a notice to the accused with regard to the dishonour of cheque, he held that once notice of dishonour of cheque was issued, cause of action for filing the complaint arose and the complainant was not entitled to represent the cheque and file the complaint on the basis of dishonour of cheque for the second time. In that regard, he placed reliance on two decisions of the Supreme Court. The first decision is in the case of *Sadanandan Bhadran v. Madhavan Sunil Kumar* 1998 Criminal Law Journal 4066 and the second decision is *Unipals India Ltd. and Ors. v. State (Govt. of NCT of Delhi) and Anr.* D.C.R. 2001 Vol. 26 - 2001 Vol. 2 Page 65. In the result holding that the cause of action arose on the issuance first notice on the basis of dishonour of cheque presented on 28.03.1998, the learned Trial Judge held that the complaint filed on the basis of the second notice of dishonour of cheque was not maintainable in law. In the result, he acquitted the accused by judgment dated 20-09-2003, challenging which the present appeal has been preferred.

5. Sri. Vardhaman V. Gunjal, learned advocate for the appellant argues that so called admission of the complainant has been misread by the learned Trial Judge. He submits that though the admission of the appellant (complainant) about issuance of notice was not that he had issued two notices, even if it is taken that a notice had been issued on the dishonour of cheque presented on 28.3.1998, admittedly no such notice having been received by the accused, there was no impediment for the complainant to represent the cheque once again. He points out that it is not the case of the accused that he had received the notice regarding dishonour of cheque presented on 28.03.1998. The learned Counsel for the appellant argues that when no notice of dishonour of cheque had been served on the accused regarding dishonour of cheque presented on 28.03.1998, no cause of action for the complaint had arisen and therefore there was no impediment to present the cheque for the second time. He submits that the decision of the Supreme Court in *M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd.*, , *Sadanandan Bhadran Vs. Madhavan Sunil Kumar*, are very clear and therefore the learned Trial Judge erred in interpreting the said decisions. On these grounds he submits that the order of acquittal may be set aside and the accused may be convicted.

6. Sri. I.G. Gachchinamath, learned advocate for the respondent submits that the answers of the complainant are in the cross-examination to two questions put by

the advocate for the accused. The first question was regarding presentation of the cheque for encashment for the first time. The next question was regarding issuance of notice with regard to dishonour of cheque on that occasion. The complainant having admitted clearly that he had issued a notice with regard to dishonour of that cheque there was no ambiguity with regard to the answer and it has to be construed that the complainant had admitted that he had issued an earlier notice with regard to dishonour of cheque presented on 28.03.1998. On that ground he submits that the learned Trial Judge was right in holding that the cause of action having already arisen, the complainant had no right to present the cheque once again. On this ground, he submits that the appeal may be dismissed.

7. As regards issuance of cheque, a contention had been taken by the respondent during trial before the Trial Court that the complainant had stolen a blank cheque without his signature kept in his shop and that had been misused by the complainant by filling up the cheque and forging his signature. That suggestion had been denied by the complainant. The accused has not placed any material to substantiate this contention. Infact he has not denied that he received notice of dishonour of cheque issued on 23.4.1998. The acknowledgment card for having received the notice is produced at Ex.P-5. He has not cared to reply to the said notice. I fear the complainant had stolen a blank cheque leaf from the shop of the accused, as suggested to the complainant during the course of the cross examination of the complainant, natural reaction of the accused, on receipt of notice regarding payment of amount under the cheque would have been that he would have replied to that notice (Ex.P4). Therefore the contention of the accused that a blank cheque without his signature had been stolen by the complainant and that it had been misused by the complainant has to be rejected outright.

8. The next question that arises is whether the learned Trial Judge was right in holding that the cause of action arose on issue of first notice and therefore the complainant was not entitled to present the cheque once again. In this regard, reliance has been placed by the learned Counsel for the respondent on the following portion of the evidence of the complainant.

It is true to suggest that I had presented the cheque in the bank on 30.03.1998. I have issued notice to the accused for dishonour of the said cheque.

9. It is argued by the learned Counsel for the respondent that this clearly shows the admission of the complainant regarding issuance of notice with reference to the dishonour of cheque on 30-03-1998. It is not disputed by the complainant that the cheque was presented on 28-03-1998 and it returned to him dishonoured on 30-03-1998. Since at the time of cross examination, the cross examining advocate is not required to put questions chronologically, it cannot be said as a certainty that the above admission of the complainant was with regard to the issuance of notice on the return of dishonour of cheque on 30.03.1998. That answer may apply to the notice regarding dishonour of cheque on the

second occasion also.

10. Accepting for argument's sake that the above admission was in relation to the dishonour of cheque intimation regarding which was received by the complainant on 30-03-1998, it has to be seen as to whether the presentation of the cheque once again by the complainant and the issuance of notice of dishonour of cheque based on the second dishonour of cheque were bad in law as held by the Trial Court.

11. The principle laid down by the Supreme Court in the case of *Sadanandan Bhadran Vs. Madhavan Sunil Kumar*, as reproduced below shows that the learned Trial Judge has not properly read the decision and has committed the mistake in interpreting the decision:

A cheque can be presented any number of times during the period of its validity by payee. On each presentation of the cheque and its dishonour a fresh right - and not cause of action - accrues in his favour. He may, therefore, without taking preemptory action in exercise of his such right, under Clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But, once he gives a notice under Clause (b) of Section 138 he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer, expires.

(Paras 5, 10)

Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under Clause (c) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint u/s 142 is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142 arises and can arise only once."

(Para 7)

12. The stress of the decision was regarding cause of action and it was not the observation of the Supreme Court that the cause of action arose immediately after the issuance of notice of dishonour of cheque. The above observation to the effect:

But, once he gives a notice under Clause (b) of Section 138, he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise.

clearly indicate that what the Supreme Court meant by issuing a notice is regarding service of notice also; for unless the notice is served, the question of liability for paying the amount on the part of the drawer does not arise. The decision in Premchand Vijayakumar v. Yashpal Singh and Anr. 205 (2) Dishonour of Cheque Reporter Page 1 also stresses on the cause of action and holds that the cheque has once snowballed into cause of action, it is not permissible for the payee to create another cause of action with the same cheque.

13. This is further clear from the observations of the Supreme Court in M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., which indicate that for the offence punishable u/s 138 of the Negotiable Instruments Act, the complainant is obliged to prove its ingredients which include the receipt of notice by the accused under Clause (h). It is not this giving of the notice which starts cause of action u/s 138 of the Negotiable Instruments Act, but it is the receipt of the notice by the drawer and his failure to pay the amount within the time stipulated which gives the cause of action to the complainant to file the complaint within the statutory period.

14. In the above mentioned decision in Dalmia Cement's case, the contention of the accused with regard to the first notice of dishonour was that the cover received by him was empty without any contents and on the basis of that contention, though not admitting that contention, but as an abundant caution, the appellant had presented the cheque once again and on its dishonour once again had issued another notice. The accused did not make payment even after the service of that notice. Within the statutory period the said complaint was filed. The accused filed a petition u/s 482 of the Code of Criminal Procedure in the High Court for quashing the complaint, allowing which the complaint was quashed. On appeal to the Supreme Court, the following observations were made by the Supreme Court in Paras 9 and 10:

9. It is conceded in this case that in response to the notice sent by the appellant through their counsel on 13th June, 1998, the respondents herein, vide their letter dated 20th June, 1998, intimated "received one empty envelope without any content in it. Therefore request you to kindly send the content, if any". This intimation was received by the appellant on 30th June, 1998, the day on which the period of limitation on the basis of earlier notice was to expire. They had exercised the option to accept the averments made by the respondents in their letter dated 20th June, 1998 and issue a fresh notice after again presenting the cheque. The respondents have not denied the issuance of their letter dated 20th June, 1998. Despite admitting its contents, they opted to approach the High Court for quashing the proceedings merely upon assumption, presumption and conjectures. They tried to blow hot and cold in the same breath, stating on the one hand that the notice of dishonour has not been received by them and on the other praying for dismissal of the complaint on the plea that the complaint was barred by time in view of the notice served by the appellant which they had not received. The plea of the respondents was not only contradictory, and

afterthought but apparently carved out to resist the claim of the complainant and thereby frustrate the provisions of law.

10. The High Court fell in error by not referring to the letter of the respondents dated 20th June, 1998 and quashing the proceedings merely by reading a line from para 6 of the complaint. The appellant in para 7 of their complaint had specifically stated that "Even though the complainant is not admitting the said allegation, on abundant caution the complainant presented the cheque again on 1-7-1998 to the drawee bank through the complainant's bankers, Punjab National Bank. The cheque was again dishonoured by the drawee bank on 2-7-1998 a registered lawyer notice was issued to the 1st accused firm as well as to the 2nd accused intimating the dishonour of the cheque and demanding payment. The accused have received the notice on 27-7-1998. The accused did not make any payment so far." The receipt of the second notice has concededly not been denied by the respondents.

The above mentioned decision also referred to an earlier decision i.e., M/s. Sil Import, USA Vs. M/s. Exim Aides Silk Exporters, Bangalore, , wherein it had been observed that time for payment starts to run from the date notice reaches the drawer.

15. From the discussion made above, it is clear that cause of action for filing a complaint for the offence punishable u/s 138 of the Negotiable Instruments Act does not commence merely on the issuance of a notice under Clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, but it commences from the date of service of such notice on the drawer of the cheque. The right of the drawee to present the cheque once again within the time does not extinguish, if such a notice is not served on the drawer of the cheque for if the notice is not served, no cause of action has arisen.

16. In the present case, it was nobody's case that the accused had received the notice sent regarding dishonour of cheque presented on 28.03.1998. Nowhere the accused contended that he had received such a notice. The question of he paying the amount of cheque on receipt of such notice did not arise. Consequently, no cause of action on the basis of dishonour of cheque presented on 28.03.1998 arose and there was no bar on the complainant to represent the cheque once again and on its dishonour to issue a notice of dishonour of cheque. Though the decision of the Supreme Court in Sadanandan Bhadran's case had been brought to the notice of the Trial Court, without properly understanding the principles laid down in that, decision, the Trial Court, has proceeded on the basis that by issuance of first notice, the cause of action had arisen and presentation of the cheque once again was not permissible.

Since no cause of action had arisen on the basis of dishonour of the cheque presented on 28.03.1998, the complainant was entitled to present the cheque once again within the time. It was dishonoured and the notice of dishonour of cheque was given to the accused. It was received by the accused on 25.04.1998.

Admittedly he did not make any payment nor did he reply to the notice. Consequently he had committed the offence punishable u/s 138 of the Negotiable Instruments Act. The complaint presented on 12.05.1998 was within the time. The learned Trial Judge without considering the facts and principle of law in proper perspective has proceeded to hold that the offence u/s 138 of the Negotiable Instruments Act had not been made out.

17. For the above said reasons, the appeal is allowed and setting aside the acquittal of the respondent in judgment dated 20.09.2003 passed by the learned J Additional Civil Judge (Jr. Dn.) & JMFC, Hubli, in CC.No.482/2001, the respondent is convicted for the offence punishable u/s 138 of the Negotiable Instruments Act.

As the learned advocate for the respondent prays for some time to argue on the question of sentence, adjourned to 04.10.2007. The respondent shall be present on that day.

ORDER REGARDING SENTENCE

The petitioner and the respondent are present. The respondent submits that he has settled the matter with the petitioner and he has paid the amount due. The petitioner and his advocate both admit that the full amount has been paid by the respondent. Hence, in view of the payment of the amount by the respondent due to the petitioner, a lenient view is taken and the respondent is sentenced to pay a fine of Rs. 1,000/- in default, he should undergo S.I for one month. He is granted one month's time to pay the fine amount in the trial court.