

(2008) 04 BOM CK 0059
In the Bombay High Court
Case No : Write Petition No. 534 of 1999

Tajudding M. Somji

APPELLANT

Vs

Jivrai Raoji Gandhi and Another

RESPONDENT

Date of Decision : 07-04-2008

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2008) 3 ALLMR 351 : (2008) 4 BC 287 : (2008) 3 BomCR 552 :
(2008) 3 CivCC 503 : (2008) 3 MhLj 609

Hon'ble Judges : Mhatre Nishita, J

Bench : Single Bench

Advocate : T.D. Deshmukh, for the Appellant; D.P. Adsule, Assistant Public Prosecutor for State, for the Respondent

Judgement

Mhatre Nishita, J.—The petitioner has challenged the proceedings in Criminal Case No. 14 of 1991 and the order passed on 22.3.1999 rejecting the application filed by the accused for recalling process issued on 1.2.1991.

2. The petitioner had issued a cheque in favour of respondent No. 1 on 3.12.1990. The cheque was dishonoured on 18.12.1990 with a remark "funds expected, present later". Respondent No. 1, therefore, presented the cheque again on 20.12.1990. It was dishonoured again on 2.1.1991 with the remark "drawer has stopped payment."

3. Respondent No. 1 then issued notice u/s 138 of the Negotiable Instruments Act on 16.1.1991 calling upon the petitioner to pay the amount with interest within 15 days from the receipt of the notice. The petitioner received the notice on 19.1.1991. Respondent No. 1 filed a complaint u/s 138 of the Negotiable Instruments Act on 31.1.1990. The process was issued on 1.2.1999. The petitioner filed an application for withdrawal of the process. However, that application was dismissed on 22.3.1999.

4. Mr. Deshmukh, the learned Advocate for the petitioner, submits that u/s 138,

a complaint which is filed within 15 days from the receipt of the notices issued by the payee of cheque is not maintainable. He submits that it is only after the 15 days" period after receipt of notice as mentioned u/s 138 expires that the complaint can be filed by the payee for the dishonour of a cheque. The learned Advocate then places reliance on the judgment of the Division Bench of this Court in the case of (Rakesh Nemkumar Porwal Vs. Narayan Dhondu Joglekar, .

5. The respondent, though served, is not present.

6. There is no dispute that the notice of dishonour of the cheque was issued on 16.1.1991 and was received by the petitioner on 19.1.1991. Before the expiry of 15 days from 19.1.1991, respondent No. 1 filed the complaint before the Metropolitan Magistrate. Section 138 of the Negotiable Instruments Act stipulates (i) that the cheque must be presented to the bank within a period of six months from the date on which it is drawn; (ii) that the payee makes a demand of the amount by giving notice in writing to the drawer of the cheque within 30 days of the receipt of information of dishonour of the cheque; and (iii) that the drawer of the cheque fails to make payment within 15 days of the receipt of the notice. It is only when these three conditions are satisfied that the provisions of Section 138 would be attracted. The Division Bench has observed that when a complaint is filed within a period of 15 days after the notice is received by the drawer of the cheque, it is not maintainable.

7. Thus, in the present case also, the complaint has been filed on 31.1.1991. The notice was received on 19.1.1991 by the petitioner i.e. the drawer of the cheque and, there fore, the complaint itself is not maintainable. The learned Magistrate could not have taken cognisance of the complaint. In my opinion, the JMFC, Malshiras has erred in issuing process to the petitioner without satisfying himself as to whether the aforesaid three ingredients had been fulfilled in order to attract the provisions of Section 138.

8. The proceedings in Criminal Case No. 14 of 1991 are quashed. The process issued against the petitioner in these proceedings are also quashed and set aside. Petition is made absolute in terms of prayer Clauses (b) and (c).