
(1993) 09 AHC CK 0034
In the Allahabad High Court
Case No : Writ Petition No. 148 (M/s) of 1993

V.D.Agarwal and others

APPELLANT

Vs

1ST Addl.Munsif Magistrate, Lucknow and others

RESPONDENT

Date of Decision : 21-09-1993

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (1993) 09 AHC CK 0034

Hon'ble Judges : H.N.Tilhari, J

Final Decision : Dismissed

Judgement

H. N. Tilhari, J.—By this writ petition the petitioner has sought relief issuance of a writ or order or direction in the nature of writ of certiorari quashing the proceedings taken against the petitioner under Section 138/141 of Negotiable Instruments Act against the petitioner and pending before opposite party no. 1, that is 1st Additional Munsif Magistrate, Lucknow, as a case no. 7 of 1992. The petitioners have further sought the relief of issuance writ or Order or direction in the nature of mandamus commanding the opposite party no. 1 not to proceed against them that is the petitioners till the final disposal of the writ petition.

2. The facts of the case i.e. the petitioners' case in brief is that petitioner no. 1 is a Director of the Company, that is petitioner no. 2 and is managing the affairs of the Company. That opposite party no. 2 namely Ram Kumar Gupta filed the complaint under Section 138/141 of the Negotiable Instruments Act on 17/9/1991. A copy of the complaint has been annexed as Annexure No. 1 to the writ petition. The petitioner's case is that opposite party no. 1 has taken cognizance of that complaint and issued summons to the petitioners in July, 1992. The petitioner further submits that the petitioner took preliminary objection to the maintainability of the complaint filed under Section 138 of the Negotiable Instruments Act on the ground that notice contemplated under Section 138 of the Act has not been received by the petitioner no. 1. The petitioner's case is that offence could be said to have been committed only on the refusal of the

drawer of the cheque to pay the amount within 15 days of the receipt of the requisite notice to be given by the complainant. The petitioner took the objection to the fact that the complaint was time barred and as such was not tenable. According to the petitioner's case, in alternative, there is no contemplation of subsequent production of the cheque to the Bank after its rejection and the limitation is to be counted only from the date of the rejection of the cheque. The petitioner's further case is that the cheque in question was presented to the Bank firstly on 9/7/1991 and on the same date for the paucity of funds in the said account to honour the cheque at the time, it was presented on 25/7/1991 it was returned unpaid by Bank to Opposite Party No. 2 on the same date and again it was re-presented on 23/8/1991 and was again returned on the same date. The petitioner's case is that once payment had been refused by the Bank in respect of the cheque on account of paucity of fund on 9/7/1991 the opposite party no. 2 should have issued a notice within 15 days thereof but he failed to comply with the said provision and presented the cheque after lapse of 15 days to the Bank, again on 25/7/1991 and when again this time the same was returned by the Bank unpaid, the opposite party no. 2 did not issue any notice within 15 days instead after a lapse of one month therefrom, he again presented the cheque on 30th August, 1991 to the Bank, that is this was third time and this time also cheque was returned back unpaid that after this time the opposite party no. 2 is alleged to have issued notice dated 28/8/1991 but the same has not been served on the petitioner. That complaint has been filed without service of the notice contemplated under the Section 138 of the Act, before opposite party no. 1 on 17/9/1991. So it is bad in law. The petitioner's case primarily is that complaint was not maintainable as no notice has been served on the petitioners. It is also alleged in the petition that the petitioners did not refuse to pay the amount under the cheque to the petitioners. In alternative the second point taken by the petitioners has been that complaint has been time barred as it has not been filed in time after 9/7/1991 when the cheque was first returned by the Bank, after complying with the other requirements of law on the first refusal of the Bank to pay the amount. Once cheque is dishonoured on first presentation, second or subsequent presentation after first refusal is not contemplated in the law. The learned counsel for the petitioner has submitted was not that the complaint maintainable as no notice has been served by the opposite party no. 2 on the petitioners, informing the petitioners that the Bank has refused the payment of the cheque, on its presentation and so that is on account of nonservice of the notice as mentioned above there did not arise any occasion for the petitioners to have refused the payment of the amount of the cheque and there is no allegation to that effect in the complaint that notice had been served and in spite thereof the payment had not been made. The petitioners' counsel submitted in absence of such allegations in the complaint the said complaint is liable to be quashed as there did not arise any cause of action for filing the said complaint. On behalf of the opposite parties the petition has been contested and opposed by Sri S. B. Misra, Counsel for the opposite parties who had also filed the counteraffidavit. In the counteraffidavit vide para 4 of the counteraffidavit to which my attention has

been invited it has been stated as under:

"That in para 4 of the writ petition this much is admitted that preliminary objection was filed. Notice has been served by refusal and the complaint has been filed on the expiry of the 15 days as stated in paragraph 10 of the complaint."

3. The opposite parties has further stated that Section 138 of the Negotiable Instruments Act did not bar the subsequent presentation of the cheque for payment within the currency of period of six months. The holder of the cheque is at liberty to present the cheque as many times as possible within that period of six months, in order to obtain payment till the payment has not been made of the same and in doing so that is in presenting the cheque twice or thrice, in order that payment be made as soon as there is sufficient amount in the account of the petitioners so that the cheque that was issued be got paid and honoured instead of going in litigation from very beginning. When the cheque was dishonoured in the last resort the answering opposite party did issue the notice to the petitioners and that the same was served on them by refusal thereof by the petitioner on 29/1/1991 and the complaint was filed on 17/9/1991.

4. Learned counsel for the opposite party no. 2, namely Sri S. B. Misra, Advocate submitted that notice had been issued as mentioned in para 10 of the complaint that notice has been issued on 28/8/1991 and it has been refused on 29/1/1991 and so service thereof has been made on petitioner, of that notice but he failed to pay the amount of dishonoured cheque and so on expiry of 15 days from 29/1/1991, the complaint was filed on 17/9/1991. The learned counsel submitted that the complaint does not suffer from any error of the nature which could be said to render it as not maintainable. Learned counsel further submitted that other aspects of the matter required the evidence and proof and so could be tried and decided on merit by the trial court only, trying the petitioners for offence under Section 138 of Negotiable Instruments Act. He submitted that in view of the well settled principles of law laid down by the Supreme Court that ordinarily the F.I.R. or complaint should not be quashed and the parties should be directed to face the trial. This court should refuse to exercise to its powers to quash the F.I.R. or complaint under Article 226 of Constitution of India, except under very rare and special circumstances and case where there is no prima facie case made out or that on the material it appears that continuance of Criminal Proceedings would be an abuse of process of the court.

5. I have considered the respective contentions of learned counsel for the parties and have also perused the material on record. The law under Article 226 of the Constitution as well as under Section 482 of the Code of Criminal Procedure as regards the quashing of F.I.R. or complaints has been laid in very clear words by Hon'ble Supreme Court in the case of State of Haryana, v. Bhajanlal 1992 (1) Suppl. SCC 335 and by this Court in Ganesh Shanker Pandey v. State of U.P., 1992 LCD 382 Chand Dhawan (Smt.) v. Jawahar Lal 1992 (3) SCC 317.

6. That in the case of *State of Haryana v. Bhajan Lal (Supra)*, the Supreme Court has been pleased to lay down as under :

"In the background of the interpretation of various relevant provisions of the Code under chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of extraordinary power under Article 226 or the inherent powers under Section 482 of Code we have extracted and reproduced above, we give the following categories of cases by way of illustrations wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formula and to give an exhaustive list of myriad cases wherein such power should be exercised.

(i) Where allegations in the first information report or the complaint even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(ii) Where the allegations in the first information Report and other material if any, accompanying the F.I.R. do not disclose any cognizable offence justifying an investigation by Police Officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code,

(iii) Where uncontroverted allegations made in F.I.R. or the complaint and the evidence collected in support of the same do not disclose commission of any offence and make out a case against the accused.

(iv) Where the allegations in the F.I.R. do not constitute cognizable offence but constitute only a noncognizable offence, no investigation is permitted by a Police Officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(v) Where the allegations made in the F.I.R. or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(vi) Where there is an express legal bar engrafted in any of the provisions of the Code or concerned Act (under which a Criminal Proceeding is instituted) to the institution and continuance of proceedings and or where there is a specific provision in the Code or the concerned Act, providing efficacious remedy for the grievance of aggrieved party.

(vii) Where a Criminal Proceeding is manifestly attended with mala fide and/or where proceeding is maliciously instituted with ulterior motive for wreaking vengeance on accused and with a view to spite him due to private and personal grudge."

7. That as laid down above as well as in the case of *Ganesh Shanker Pandey (Supra)* by the Division Bench of this Court, that the power of quashing Criminal

Proceedings is to be exercised vary sparingly and with introspection and that too on rare of the rarest cases.

8. Let us examine the facts of the present case which are as under. According to the Annexure1 to the writ petition the case of the petitioner has been stated as under :

"That on the payment of dues of the complaint against the accused No. 2 (Petitioner No. 1) the accused No. 1 (Petitioner No. 1) who is Director of the Company gave to the complainant at Lucknow Allahabad Bank Cheque No. 720704 dated 571991 for due amount of Rs. 24,266/ under his own signature and seal of the Company as Director. That the complainant presented the cheque for realisation through its Banker M/s. Bank of India, Mahanagar Branch, Lucknow on 971991 but the same was dishonoured by the bankers of the complainant. That the complainant approached the accused no. 1 at Lucknow told him that he should present it after 10 or 12 days and it would be cashed. complainant again presented the cheque through his banker M/s. Bank of India, Mahanagar Branch, Lucknow on 2571991 but it was again dishonoured and returned to the complainant. The complainant again met the accused No. 1 at Lucknow and told him that the cheque has been again dishonoured. The accused No. 1 showed his regrets and requested the complainant to wait for few days more and present it again and assured the complainant that the cheque would be cashed. In paragraph6 it was stated that believing the assurance of the accused No. 1 the complainant lastly on 23891 presented the said cheque for realisation through his bankers M/s. Bank of India, Mahanagar Branch, Lucknow but the same was returned with the memo of Allahabad Bank insufficient funds dated 2381991."

9. In paragraph7 it has been stated that the complainant sent a registered A. D. notice under section 138 (b) Negotiable Instruments Act to the accused No. 1 at the Company address on 2881991 demanding the payment of the amount of the dishonoured cheque within 15 days of the receipt of the notice, but no payment has been done till now.

10. In paragraph 9 it has been stated "that the cause of action under Section 138(c) has accrued to the complainant against the accused no. 1 and 2 who have failed to make payment of the said amount of money to the complainant within 15 days of receipt of the notice. In paragraph 10 it has been stated "that the complaint is within time as it has been filed within one month after expiry of the period of notice." Having examined the contents of the complaint it is necessary to have birds" eyeview of the relevant provision of the Act in order to arrive to conclusion as regard to respective contentions of learned counsels for the parties. Section 138 of the Negotiable Instruments Act reads as under :

"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 provision of this Act, be punished with imprisonment for a term which may extend to one year, 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 fifteen 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."

11. The other relevant section is Section 142 of the Act which provides how and when the cognizance of offence under the act shall be taken. Section 142 of the Act reads as under :

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973

(2 of 1974) :

(a) no court shall take cognizance of any offence punishable under Section 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 under Section 138.

12. A perusal of Section 138 shows that in cases where the cheque had been drawn by a person on an account maintained by him with a Bank for payment of any amount of money to another person from that very account, that is account maintained in the Bank, for the purpose of discharging his whole or part, of any debt or other liability, and that cheque is returned by the Bank unpaid either (a) because of the amount of money standing to the credit of that account is not sufficient or is insufficient to honour the cheque or (b) that the amount of the cheque exceeds the limit of the amount arranged to be paid from that account by an agreement made with that Bank, then such a person, that is, the person

drawing the cheque shall be deemed to have committed an offence under that section and be liable to be punished with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of the cheque or with both. A perusal of the Section 138 of the Act shows that the offence is deemed to have been committed by such person in cases where the conditions referred to above are shown to exist. The offence in such cases even if there is no mens rea, is deemed to have taken place in view of the provisions of Section 138. Then come the proviso to main enacting clause in Section 138 of the Act. As regards the functions of a proviso ordinarily a proviso attached to Section operates to create exception or to exclude something which would otherwise have fallen within the scope or field of the main enacting clause or section. The function of proviso, is to deal with and exclude the cases which would otherwise have fallen within main provision or the language of the main substantive section. It at times operates as a limitation or qualification or exception to the main enacting provision of the section. Thus ordinarily proviso operates as an exception to the enacting clause. (See *Ishverlal v. Moti Bhai Nagji Bhai* AIR 1966 SC 459, 1966(1) SCR 367 (373), *S. Sunderam v. Pallabhiraman* AIR 1985 SC 582, 1985(1) SCC 591).

13. In the case of *S. Sunderam* (Supra) Hon"ble the Supreme Court has been pleased to lay down as under

"To sum up a proviso may serve four different purposes :

(a) qualify or excepting certain provisions from main enactment:

(b) it may entirely change the very concept of intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable :

(c) it may be so embedded in the Act itself as to become an integral part of enactment and thus acquire the tenor and colour of the substantive enactment itself and,

(d) it may be used merely to act as an operational addenda to the enactment with the sole object of explaining the real intendment of statutory provision."

14. The proviso to Section 138 of the Act provides, the exceptions and for exceptional circumstances in which cases the provision of main enacting provision Section 138 of the Act, whereunder an offence is deemed to have been committed by the person concerned, shall not apply, or say provides that doctrine of deemed offence under Section 138 is not to apply in cases or circumstances covered by the exception provided by the proviso. In the present case the proviso provides that nothing contained in Section 138 of the Act shall apply (a) if the cheque has not 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) if the payee or the holder in due course of the cheque, as the case may be, does not make a demand for the payment of the said

amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid ; or (c) the drawer does make the payment of said money to payee or to holder in due course of the cheque within 15 days period from the date of receipt of the said notice. In other words if no notice is served on the drawer or no notice is received by drawer then failure to make payment will not make drawer liable to offence. In case where notice requisite is served on drawer then within 15 days from the receipt of the notice it is open of him to pay & it is only when after expiry of 15 days period he does not pay that money he will be charged, may be deemed to have committed the offence under Section 138. Learned counsel for the petitioner had made submission, one of limitation or its expiry to the effect that once cheque had been dishonoured as mentioned in the application on 971991, it was the duty of the opposite parties to have issued the notices and thereafter if the petitioner would not have paid the opposite parties could move under Section 138 but he could not wait and present cheque for times again as this is not contemplated to give fresh cause of action.

15. A reading of the Section 138 does not show or disclose that it makes it incumbent on the payee not to wait and see that sufficient account becomes available within the reasonable time in the account of the drawer nor does it debar it from presenting the cheque for the second time and to avoid criminal litigation as far as possible. No doubt if the first presentation cheque had been dishonoured by the Bank on the ground that in account of the drawer of the cheque the money standing to the credit of the drawer is insufficient to honour the cheque he may lodge the complaint after having given a notice to the drawer of the cheque to pay that amount and waited for 15 days from the date of service of the notice, but not doing so and making second attempt to get the cheque honoured and to present the same for second or third time within the period of validity of the cheque on its having been honoured by the Bank in the last resort does not debar the payee from moving the Court under Section 138 after having complied with all necessary requisite as last measure. A reading of Section 138 and 142 of the Act together indicates that court can take cognizance of offence punishable under Section 138 on complaint being made in writing by payee or holder in due course thereof, provided the complaint is made within the period of one month from the date of accrual of cause of action or in other words within the period of one month from the date of cause of action arises under clause (c) proviso 138. The cause of action under the proviso (b) and (c) taken together for filing complaint cannot be said to arise merely on the cheque being dishonoured but will arise only after the giving of notice of demand of the amount of the cheque by payee or holder in due course of the cheque to the drawer of the cheque and coupled with the failure of the drawer of the cheque to pay that amount within 15 days of the date of service/receipt of notice on or by him. Till notice has not been given as referred to Clause (b) to the proviso and the same has not been served on the drawer of the cheque and the drawer of the

cheque has not failed to pay amount within 15 days, the cause of action for filing of the complaint cannot be said to have arisen. Section 142 of the Act vide Clause (b) thereafter prescribes the limitation of one month from the date of accrual of cause of action as referred to above for the filing of the complaint.

16. In the complaint para 17 it has been stated that notice of demand requisite under Section 128 (b) of the Act demanding the amount of dishonoured cheque within 15 days had been issued on 20/8/1991 and that no payment till the date of complaint had been made. Therefore, the complaint cannot be said to be barred by the limitation or not maintainable as rightly submitted by the learned counsel for the respondent and thus considered there is no substance in the first two contentions of Sri Raj Kumar, learned counsel for the petitioner that the complaint has been time barred and therefore, it should be quashed. Sri Raj Kumar's contention as such is rejected being without substance. Last contention of Sri Raj Kumar had been that in the complaint it has not been indicated that notice has been served on drawer of cheque. That Sri Raj Kumar, counsel for the petitioner, further submitted that the representation of cheque is not contemplated to provide for an ingredient of cause of action under proviso to Section 138 is without substance as indicated above. The language of Section 138 is itself very clear and in particular read with proviso one itself indicates that cheque may be presented at anytime within six months or within the period of validity thereof. The Section does not put any restriction or limitation or restriction on the number of times when cheque may be presented if it has on an occasion been dishonoured. When statute has not laid down any limitation on the number of times a cheque may be presented within the period of six months or under any shorter period under clause of (a) proviso of Section 138, it will not be desirable to read into the said clause any such restrictions as to the number of times cheque may be presented. It is common knowledge as regards commercial practice a cheque during the period of its validity may be presented for being honoured at a number of times till honoured during the period of its validity. So putting up of a rider or to say that there can be only one presentation, no further presentation, will be tantamount to an act adding some words in the Section or its proviso (a) which is not permissible in law as the words used in and language of Section 131 and 142 of the Act by itself are very clear and unambiguous and are reasonably susceptible of only one meaning. It is well settled principles of law as has been observed in the Crawford's construction of statute, 1940 edition, Section 169 at page 270 as under:

"Where statutes" meaning is clear and explicit words cannot be interpolated. In the first place, in such a case they are not needed. If they should be interpolated a statute would more than likely fail to express the legislative intent as the thought intended to be conveyed might be altered by the addition of new words."

17. Their Lordships of Supreme Court in the cases of Sri Ram Narain Medhi v. State of Bombay AIR 1959 SC 459 1959 (Supp). (1) S.C.R. 489, Vishwa Nath

Pillai v. Shammugham pillai AIR 1969 SC 493, 1969(1) SCC 188), British India General Insurance Co. Ltd., v. Captain Itbar Singh AIR 1959 SC 1337, 1960(1) SCR 168 and Maharashtra State Financial Corporation v. Jaycee Drugs & Pharmaceuticals 1991(2) SCC 637 (651) have laid down the principle of law to the above effect as mentioned above.

18. In the case of Maharashtra State Financial Corporation (Supra) 1991(2) SCC 637 at page 651 the Supreme Court lays it down as under :

"It is a settled rule of interpretation of statutes that if the language or the words used are plain and unambiguous, the full effect must be given to them as they stand and in the garb of finding out the intention of the legislature no words should be added thereto or subtracted therefrom. Likewise it is again a settled rule of interpretation that the statutory provision should be construed in a manner which subserves the purpose of enactment and does not defeat it and that no part thereof is rendered surplus or otiose."

19. Sri Raj Kumar, learned counsel for the petitioner had made reference to some decisions in Kerala High Court in Kuwaresan v. Ameerappa (1992 Volume 1 Crimes page 23) as well as to the decision of the Madras High Court in Mrs. R Jayalakshmi v. Mrs. Rashida 1982 (1) Crimes page 5 but with all due respect I am unable to agree with a view taken by the Kerala and Madras High Court particularly for the reason that those decisions are based on non consideration of Section 142 of the Negotiable Instruments Act which relates to and which provides that cognizance shall be taken of offence under Section 138 and when complaint can be filed. Section 142 of Act is a provision which I have mentioned earlier, has got material bearing on the interpretation of Section 132 and the proviso thereto and, therefore, in my opinion law laid down in those cases are not correctly laid and is not binding on this Court. I feel myself unable to accept the view taken with those cases. I find the case of Richard B. Sherratt v. State of A.P. and another reported in 1993 (1) Banking case p.23 supports the view which has been taken by me, & in that case scheme of Section of the Act has been taken into consideration by the Andhra Pradesh High Court. According to the clause (b) it is necessary to be pleaded that the notice demand in writing was given to drawer of cheque and no payment had been made irrespective thereof. A notice ordinarily given on a correct address may be considered and assumed to have been served within three to four days and unless otherwise shown and this is a question of evidence whether the notice sent by the opposite party no. 2 had been served on the petitioners or not. It is for the petitioner to show that he did not receive any notice, it is for the petitioner to prove at the time of trial that notice alleged to have been sent on 28/8/1991 was not served on him at all or that 15 days time did not expire on the date the complaint was filed. These questions of facts are to be decided by Court of competent jurisdiction and as such although in the counteraffidavit it has been said that notice has been served on the petitioner on 29/8/1991 by refusal, and giving any finding at this stage on that point one way or other questions of facts and application of law may prejudice

any or either party in course of trial. Thus considered, I do not find this to be a fit case in which this court should exercise its power under Article 226 of the Constitution for quashing the complaint. As the trial court will be competent court to record the finding on materials, that may be placed before it by parties on question of facts. Power under Art. 226 of the Constitution are not meant to be exercised for this purpose at this stage. Thus it appears there is no ground at present to quash the complaint as the case does not come within the purview of those exceptional cases in which this court can under Article 226 quash the F. I. R. or complaints in accordance with the law laid down in the case of State of Haryana v. Bhajan Lal 1992(1) Supp. SCC 335 2 AIR 1992 SC 604.

20. Thus considered the writ petition appears to be without force and is hereby dismissed.

Costs of the writ petition is made easy.

(Petition dismissed.)