
(2012) 01 MP CK 0033
In the Madhya Pradesh High Court
Case No : Criminal Revision No. 95 of 2010

Venture Micron

APPELLANT

Vs

M/s Earawat Steel Private Ltd. and another

RESPONDENT

Date of Decision : 13-01-2012

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138 , 142

Citation : (2012) 4 MPHT 248 : (2012) 2 MPHT 4

Hon'ble Judges : M.C. Garg, J

Bench : Single Bench

Advocate : A.S. Garg and Mr. Anuj Bhargava, for the Appellant; Rizwan Nizam, Advocate for the Respondent No. 1, Mr. Deepak Rawal . Govt. Advocate for the Respondent No. 2/State, for the Respondent

Final Decision : Allowed

Judgement

Hon"ble Mr. M.C. Garg, J.—This revision petition has been preferred by the petitioner aggrieved by the judgment and order of conviction dated 22-1-10 passed by learned IX Additional Sessions Judge, Ujjain in Criminal Appeal No. 386 of 09, whereby the learned Addl. Sessions Judge has confirmed the judgment and order of conviction and sentence recorded by Judicial Magistrate First Class, Ujjain, in Criminal Case No. 489 of 08, sentencing the petitioner to undergo SI for one year and to pay fine of Rs. 26,00,000/- as compensation. Briefly stated the facts of the case are that respondent/complainant filed a complaint against the petitioner u/s 138 of Negotiable Instruments Act (hereinafter referred to as "the Act") alleging that on different instances it supplied goods to the petitioner, totally worth of Rs. 23,79,520/- regarding which invoice No. 110, dated 16th May, 07 was prepared. It was also alleged that receipt of goods was duly acknowledged by the petitioner Mr. Mehul, Proprietor of M/s Venture Micron, and that petitioner sent two cheques of Rs. 7,00,000/- (Exh. P-3) and Rs. 16,00,000/- (Exh. P-4) both drawn on HDFC Bank, Godhra Branch, Gujarat. It was further alleged that the said cheques when were presented for

encashment through their bankers State Bank of India, Ujjain Branch, they return unpaid vide return memo dated 27-9-07 (Exh. P-5 and Exh. P-6). As alleged, then complainant sent a legal notice (Exh. P-7) through its Counsel Mr. Sandeep Vyas vide postal receipt (Exh. P-8) and UPC receipt (Exh. P-9) to the petitioner regarding dishonour of cheques. The notice sent through registered post returned unserved and notice sent under postal certificate (UPC) was served. Thus a complaint was filed against the petitioner before the Court of Judicial Magistrate First Class, Ujjain.

2. The learned Magistrate after recording evidence of both the parties, found the petitioner guilty of offence punishable u/s 138 of the Act, convicted and sentenced him to undergo SI for one year and also directed him to pay Rs. 26,00,000/- as compensation to the complainant.

3. Petitioner filed an appeal before the IX Addl. Sessions Judge, Ujjain, which was dismissed maintaining the findings recorded by learned Trial Court. Hence the petitioner has come up in revision.

4. According to the petitioner, the complaint filed by respondent/ complainant was not maintainable, because it was filed by respondent after the return of the cheques on the second occasion and after issuance of notice of the first dishonour which gave a cause of action to the respondent to file complaint, but, within time, prescribed by law. It has been submitted that the complaint was filed after return of the cheques on second occasion and after issuance of second notice, which was barred by limitation and no cognizance of such complaint could have been taken by the Trial Court.

5. It is submitted by the petitioner that after dishonour of the cheques, for the first occasion, a notice (Exh. D-2) was served upon the petitioner by the respondent. The said notice was sent under postal certificate. A reply to the said notice was sent by the petitioner under UPC vide Exh. D-3. The notice (Exh. D-2) was issued by the complainant on 9-8-07. A reply thereto Exh. D-3 was given by the petitioner through its Advocate Mr. Liyakat Khan H. Pathan on 21-8-07. The said reply was sent under UPC, which was duly received by the respondent. In these circumstances the complaint ought to have been filed by the complainant within 30 days of the receipt of reply, i.e., by the end of September, 07. This was not done. Thereafter the complainant presented the cheques in question again and with respect to the second presentation, a notice was issued by the complainant upon the petitioner once again vide Exh. P-7 dated 18-10-07. The complaint was filed on 16-11-07. As such, it is submitted that the said complaint was not within limitation. In this regard, learned Counsel has relied upon a judgment of Apex Court delivered in the case of Prem Chand Vijay Kumar Vs. Yashpal Singh and Another, .

6. Learned Sr. Counsel further argued that complainant Abhay Gupta (P.W. 1) when was confronted with Exh. D-2 (previous notice) in cross-examination has admitted in clear words in last 6 lines of Para 18, that notice (Exh. D-2) was sent

to the petitioner/accused through his Advocate Sandeep Vyas. Learned Counsel further submitted that in compliance of the Court order, the documents were supplied to the complainant beforehand. Thus, there was no possibility that complainant by mistake admitted the said notice to have been given through his Advocate Sandeep Vyas. Complainant Abhay Gupta further admitted in cross-examination that cheques were presented more than once with their bankers for encashment. It is a matter of record that the cheques in question contains more than one endorsement about dishonouring of the cheques which are Exh. P-3 and Exh. P-4. The factum of two endorsement regarding presentation and dishonour of the cheques have been proved by the Branch Manager Rajnarayan (P.W. 2) in Para 5 of his statement. The Notice (Exh. D-2) is reproduced hereunder :--

Through UPC/Regd. AD

Dt. 9th Aug., 2007

To, Mr. Mehul Patel Proprietor Venture Micron Opp. Telephone Exchange GIDC, Balasinore Gujarat-388 255

Demand Notice

Dear Madam,

Under the instructions of my client M/s Earawat Steels Private Limited, 78, Janki Nagar, Indore -452 001, I hereby call upon you and bring to your notice as under :--

- (1) That as per your request from time to time my client had supplied to you various material for a total value of Rs. 23,79,520/- (Rupees twenty three lacs seventy nine thousand five hundred twenty) vide Invoice No. 110, dated 16th May, 2007 in consideration of which you have issued cheques to my client.
- (2) That vide your letter dated 12th June, 2007, you have acknowledged receipt of the material to your satisfaction from my client company in your proprietorship concern M/s Venture Micron.
- (3) That in consideration of the said material you had issued two cheques No. 101268 for Rs. 7,00,000/- (Rupees Seven lacs) and No. 101269 for Rs. 16,00,000/- (Rupees Sixteen lacs) payable on HDFC Bank, Godhra Branch, Gujarat, aggregating to Rs. 23,00,000/- (Rupees Twenty three lacs).
- (4) That when my client presented both the cheques to his Bank, i.e., State Bank of India, SBI Service Branch, Ujjain for realisation, the Bank vide its memorandum dated 27th July, 2007. has returned both the cheques with a remark "funds insufficient".
- (5) That after 27th July, 2007, my client reminded you several times to make the payment of Rs. 23,79,520/- (Rupees Twenty three lacs seventy nine thousand five hundred twenty only) however, you have failed to make the payment to

client against the material supplied.

(6) That in terms of provisions of Section 138 of the Negotiable Instruments Act, 1881. the dishonour of cheque for insufficient funds is an offence punishable with imprisonment or with fine or with both. Therefore, I hereby call upon you to make the payment of the amount of the cheque of Rs. 23,00,000/- (Rupees twenty three lacs) to my client within a period of fifteen days of receipt of this notice at the address of office of my client, failing which, my client shall be forced to file a complaint against you before Appropriate Court of law for action against you for the cost and consequences of which you will be personally responsible.

Sd/- Sandeep Vyas Advocate 221-223, Manas Bhawan R.N.T. Marg, Indore-452 001.

7. The complainant has denied issuance of notice (Exh. D-2) through his Advocate Mr. Sandeep Vyas, who has not been examined to rebut the factum of issuance of first notice, whereas, the petitioner has examined his Lawyer Mr. Liyakal H. Pathan who sent a reply to the notice (Exh. D-2), has proved the reply given by him vide Exh. D-6, which was sent under UPC.

8. I have heard learned Counsel for the parties and perused the record.

9. Learned Sr. Counsel appearing for the petitioner has argued the matter at length, however, on 5-1-12, during course of arguments learned Sr. Counsel appearing for the petitioner has stated that he only relies on the argument, i.e., the complaint was presented by respondent after issuance of second notice pursuant to his second presentation of the cheques. It is submitted that once the cheque was dishonoured earlier and a notice was given by the respondent, then, the cause of action arose in favour of the respondent only after dishonour of the cheque for the first time and issuance of notice pursuant thereto and not on the basis of second presentation and second notice. A Reference has been made to a judgment reported in the case of Prem Chand Vijay Kumar Vs. Yashpal Singh and another, (2005) 4 SCC 417.

10. Learned Sr. Counsel states that he is not pressing any other point in support of the petition.

11. In this case there are many aspects which are undisputed. It is a matter, of record that the complaint by which dishonour has been alleged by the respondent, pertains to the cheque dated 20-7-07 for Rs. 7.00 lacs and the cheque dated 24-7-07 for Rs. 16.00 lacs which are Exh. P-3 and Exh. P-4. Perusal of back portion of these cheques clearly goes to show that the cheques were presented for encashment in the bank belonging to the petitioner on 25-7-07 and again on 28-9-07 and on both occasions, the cheques were dishonoured, as is mentioned in the dishonour memo which has been filed on record by the complainant vide Exh. P-5 and Exh. P-6. The factum of presentation of two cheques twice, has been admitted by the Manager of Bank,

Mr. Rajnarayan, who appeared as P.W. 2. It is also observed that the two notices on which the petitioner is placing reliance. The one is dated 9-8-07 as well as the notice dated 18-10-07, i.e., Exh. D-2 and Exh. P-7 respectively are apparently typed on the same typewriter and letter head of the same Counsel, namely Mr. Sandeep Vyas, who has signed the two notices. The notice (Exh. D-2) has been signed on all the pages. Same is the position of notice (Exh. P-7).

12. A reply to the notice (Exh. D-2) was sent to the petitioner to the complainant vide Exh. D-6 (The translation is Exh. D-6T) through Advocate Shri Liyakat H. Pathan. The original reply is in Gujarati language, the translation is in Hindi (Exh. D-6T). The original postal certificate regarding sending of reply has been filed on record which is Exh. D-3, dated 21-8-07.

13. Mr. Liyakat H. Pathan, the Counsel of the petitioner appeared as a witness before the Trial Court as D.W. 2 and stated on oath that notice (Exh. D-2) was given to the said Counsel on behalf of the petitioner for reply the same to the complainant. A reply to the notice was given by him under UPC vide Exh. D-6.

14. Now coming to the cross-examination of Mr. Abhay Gupta in Para 18 at Page 41 of the Trial Courts record, is an admission of Abhay Gupta that after dishonour of the cheques for the first time, he had a talk with the petitioner on telephone and that he had issued a "Suchna Patra" to the petitioner through Advocate, Mr. Sandeep Vyas. Further, in the note appended by the Presiding Judge on the bank of Page 41 in the cross-examination of Abhay Gupta, it has been observed that :--

15. A perusal of this note goes to show that even the Court had noticed the sending of notice (Exh. D-2) by the complainant to the petitioner.

16. On the other hand, Mr. Sandeep Vyas, who admittedly, has signed the notice (Exh. P-7), has not appeared in the witness box. He was the best witness who could have deposed in favour of respondent/complainant that no notice was sent after first presentation, as is relied upon by the complainant, vide Exh. D-2. The judgment relied upon by the petitioner delivered in the case of Prem Chand Vijay Kumar (supra), is very clear. The relevant Paras 8, 9 and 14 are reproduced hereunder :--

8. Clause (a) of the proviso to Section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transaction it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented against by the payee after some time, on his own volition or at the request of the drawer, in expectation that it would be encashed. The primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, is taken out of compulsion and not choice. On each presentation of the cheque and its dishonour, a fresh right - and not a cause of action - accrues in his favour. He may, therefore, without taking per-emptory 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.

9. But once he give a notice under clause (b) of Section 138, he forfeits such right as 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.

14. Thus, it is well settled that if dishonour of a cheque has once snowballed into a cause of action it is not permissible for a payee to create another cause of action with the same cheque. 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 notice by the drawer expires.

17. It is also relevant to take note of another judgment delivered by the Apex Court in the case of Tameeshwar Vaishnav Vs. Ramvishal Gupta, In this judgment principles of law, as stated above stand reiterated in Para 16 to 19, which are also reproduced for the sake of reference :--

16. On careful scrutiny of the decision in S.L Construction's case (supra), it would appear that the facts on the basis of which the said decision was rendered, were different from a case of mere presentation and dishonour of the cheque after issuance of notice under the proviso to Section 138 of the Act. While the decision in Sadanandan Bhadran's case (supra), clearly spells out that a cheque may be presented several times within the period of its validity, the cause of action for a complaint u/s 138 of the Act arises but once, with the issuance of notice after dishonour of the cheque and the receipt thereof by the drawer. The same view has been reiterated in Prem Chand Vijay Kumar's case (supra). The only distinguishing feature of the decision in S.L Construction's case (supra), is that of the three notices issued, the first two never reached the addressee. It is only after the third notice was received that the cause of action arose for filing the complaint. In effect, the cause of action for filing the complaint in the said case did not arise with the issuance of the first two notices since the same were never received by the addressee.

17. The provisions of Section 138 and clauses (a), (b) and (c) to the proviso thereof indicate that a cheque has to be 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. Clause (b) indicates that the payee or the holder in due course of the cheque, has to make demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and clause (c) provides that if the drawer of the cheque fails to make the payment of the said amount of money to the payee or to the holder in due course of the cheque within 15 days of receipt of the said notice, the payee or the holder of the cheque may file a complaint u/s 142 of the Act in the manner prescribed.

18. In the instant case, it is clear that the first notices were received by the appellant on 14th June, 2006, whereas the complaints were filed on 10th July, 2006. It must, therefore, be held that the complaints were filed beyond the period of limitation and the learned Magistrate erred in taking cognizance on the complaints filed on the basis of the second-notices issued on 7th June, 2006. Similarly, the High Court was also wrong in affirming the order of the learned Magistrate.

19. The appeals must, therefore, succeed and are accordingly, allowed, The orders of the learned Magistrate dated 13th July, 2006 and 17th July, 2006, respectively, taking cognizance on the Criminal Complaint Nos. 339 and 399 of 2006 along with the orders of the High Court impugned in these appeals, are set aside.

18. There is another aspect of the matter that once there is an admission regarding sending of the first notice on behalf of complainant, such admission in the absence of rebuttal is a proof by admission itself. A reference is made to the judgment of the Apex Court delivered in the case of Divisional Manager, United India Insurance Co. Ltd. and Another Vs. Samir Chandra Chaudhary,

19. On behalf of respondent, it has been seriously contended that in this case the complainant had never served the first notice (Exh. D-2). It is also stated that petitioner has accepted this aspect of the matter. As regard the defence witness, Mr. Liyakat H. Pathan, examined on behalf of petitioner as D.W. 2, it has been submitted that the envelope in which Exh. D-2 notice has been received, was not shown to the complainant. The respondent have also relied upon the observation made by learned Magistrate while appreciating the material, which has come on record and observing that cause of action had arisen in favour of respondent only on the basis of notice (Exh. P-7) and not on the basis of Exh. D-2, as alleged by the petitioner. It is submitted that petitioner has not been able to prove the averments made in Exh. D-2 notice.

20. The respondent has also relied upon the judgments delivered in the case of Hiten P. Dalal Vs. Bratindranath Banerjee, , Goaplast Pvt. Ltd. Vs. Shri Chico Ursula D'Souza and Another, , MMTC Ltd. and another Vs. Medchl Chemicals and Pharma (P) Ltd. and another, reported in (2002) 1 SCC 234.

21. In nut-shell, the submissions made on behalf of respondent is that once the dishonour of the cheque has been proved, it should be presumed that it was issued by the petitioner for consideration and once it was dishonoured, presumption will arise that petitioner was not interested in making payment thereof. It is also submitted that once the petitioner has failed to prove Exh. D-2, the cause of action for filing complaint had arisen only after the second dishonour and issuance of notice (Exh. P-7) and thus the complaint was within lime.

22. Having examined the record and clear admission of the Director, respondent/complainant, in his cross-examination about sending of intimation letter of

dishonour of the cheques through its Counsel to the petitioner which is Exh. D-2 and non-production of Mr. Sandeep Vyas, who, admittedly, sent the notice (Exh. P-7) and whose signatures are available not only on Exh. P-7 and Exh. D-2, which are similar on a simple perusal thereof by a naked eyes, this Court is of the considered view that in this case, the complainant has committed a mistake in not filing the complaint after issuance of first notice (Exh. D-2) within prescribed limitation. He had a right to present the cheque within time till the cheque was valid for presentation, but the cause of action would have arisen in favour of the complaint only after issuance of first notice and failure of the payment by dishonour of the cheque. Thus cause of action had arisen in favour of the complaint within 15 days of the receipt of notice (Exh. D-2). As such the complaint should have been filed within 45 days of the receipt of notice. This was not done, rather the complainant just to save himself to take a second chance, got issued a fresh notice, but, unfortunately, through the same Counsel whose letter head has been used. His signatures were also available on the two notices and can be seen by naked eyes. Apparently to cover his notice, the second notice was issued, thereafter the complaint was filed.

23. Mr. Abhay Gupta (P.W. 1) who appeared on behalf of complainant, has admitted that two cheques were initially presented on 20-9-07 and that the cheques were returned back on 27-9-07. Interestingly, he has not made any reference regarding presentation of the cheque in July, 07. Apparently this mis-statement is to avoid the consequence of first dishonour and issuance of that notice which also gives support to the case of the petitioner. Non-examination of Mr. Sandeep Vyas further corroborates the version of the petitioner.

24. In view of aforesaid, nothing is further required to be said in the matter. In the light of admission of Mr. Abhay Gupta, statement made by Mr. Liyakat II. Pathan. Advocate as D.W. 2; availability of two notices on record (Exh. D-2 and Exh. P-7); reply (Exh. D-3) and the endorsement on the back of cheques (Exh. P-5 and Exh. P-6), which establishes that the cheques were presented twice it does not lie the mouth of complainant to say that notice (Exh. D-2) was not issued by them through their Advocate.

25. Thus, it is proved on record that after first dishonour of the cheques, the complainant got issued the notice of their dishonour through their Advocate, Mr. Sandeep Vyas vide Exh. D-2, but, did not file the complaint within limitation. Since the Apex Court has held that no cause of action would be available to the complainant once he failed to avail the limitation after the first notice sent after dishonour of the cheques, the complaint filed by respondent in this case was barred by limitation of which no cognizance ought to have been taken by the learned Magistrate. At this stage, it may be noticed that it is not a case where the delay has been condoned by the Magistrate. As such the present revision is allowed. The impugned judgment of both the Courts are hereby set aside. The conviction and sentence awarded to the petitioner is hereby quashed. The bail bond of the petitioner shall stand discharged.