Nandkishor Shamkant Sonar And Others Vs Malati Divakar Kulkarni And Others

Court: Bombay High Court (Aurangabad Bench)

Date of Decision: Oct. 18, 2019

Acts Referred: Negotiable Instruments Act, 1881 â€" Section 138
Code Of Criminal Procedure, 1973 â€" Section 161, 200, 202, 204, 397
General Clauses Act, 1887 â€" Section 27
Indian Penal Code, 1860 â€" Section 406, 420

Citation: (2021) 2 ABR (Cri) 247

Hon'ble Judges: Mangesh S. Patil, J

Bench: Single Bench

Advocate: Rashmi Kulkarni, C.V. Joshi

Final Decision: Dismissed

Judgement

Mangesh S. Patil, J

1. Since all these matters though arise out of separate complaints filed by the Respondents from the respective Writ Petitions for the offence

punishable under Section 138 of the Negotiable Instruments Act, the Petitioner is the accused in each of these cases and the Respondents are the

member of one family. Same advocate appears for the Petitioners in all the matters and even the Respondents appear through the same advocate.

Since the parties are unanimous that all these Writ Petitions raise same issues, with a view to avoid repetition all these matters have been heard finally

together with the consent of the parties and are being disposed off by this common judgment.

2. Rule. The Rule is made returnable forthwith. Learned advocate for the Respondents waives service.

3. The Respondents who are the original complainants filed complaints against the petitioner for the offence punishable under Section 138 of the

Negotiable Instruments Act making similar allegations. They alleged that the Petitioner obtained a hand loan from them by promising to repay it. In

tune with his promise he issued them cheques. They presented the cheques for encashment but were returned dishonoured with a bank endorsement.

Statutory notices were issued to him by Registered Post A.D. However, the notices returned with postal endorsement that on inquiry it was found that

the addressee was residing elsewhere and the new address was not known. Since the petitioner failed to pay the amount demanded in the notices

within a month, the complaints were filed. The learned Magistrate issued process by the impugned orders. The Petitioner challenged the orders of

issuance of process by preferring separate revisions under Section 397 of the Code of Criminal Procedure. By the impugned separate judgments the

learned Additional Sessions Judge dismissed the revisions. Hence these Writ Petitions.

4. The learned advocate for the Petitioner vehemently submitted that the learned Magistrate has directed the processes to be issued without (5) cri wp

1715 to 1719.18 application of mind and for this reason alone the revisional Court ought to have intervened.

5. The learned advocate for the Petitioners then submitted that the notices issued pursuant to Clause (b) of the proviso to Section 138 of the

Negotiable Instruments Act which gives rise to a part of the cause of action has not been fulfilled since those were not been served. The complaints

mention that the notice could not be served as the addressee i.e. the Petitioner had left the address. Therefore when according to the Respondents the

notices were not served, the Petitioner could not have complied with the requirement of law of making payment to avoid the prosecution. The very

object of providing such condition precedent for taking cognizance having not being complied with, the Magistrate ought not to have taken cognizance

and issued processes under Section 204 of the Code of Criminal Procedure and should have dismissed it under Section 203 of the Code of Criminal

Procedure. In support of her submission the learned advocate referred to and relied upon the decision of the Supreme Court in the case of Dashrath

Roopsingh Rathod Vs. State of Maharashtra; 2014 ALL MR (Cri) 3333 (Supreme Court).

6. As a corollary to the above submission, the learned advocate for (6) the Petitioner also submitted that there are catena of decisions laying down that

by virtue of the presumption under Section 27 of the General Clauses Act, 1887, whenever notice is sent by Registered Post A.D. but is returned with

a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be

presumed. However according to the learned advocate, the facts in the matter in hand are eloquent enough. The respondent themselves in the

complaint admits that the notice could not be served since the addressee i.e. Petitioner had left the address. Therefore there is no question of any

presumption under Section 27 of the General Clauses Act, 1887 being available.

7. The learned advocate for the Petitioner then submitted that in fact the Respondents and several other persons have already registered Crime No.05

of 2017 against the Petitioner alleging that he had issued the cheques in their favour as a mode of deception and has dishonestly induced them to part

with money and thus has committed the offences punishable under Section 406, 420 etc of the Indian Penal Code. In spite of such separate crime

having been registered, the Respondents are perusing these separate complaints and cannot be allowed to do so since part of the transaction of issuing

the cheques also forms part of the allegation in Crime No.05 of 2017.

8. Lastly, the learned advocate for the Petitioner referring to various documents produced along with the petition submitted that in fact the Petitioner

had promptly intimated his banker about loss of several cheques which he had kept signed but were blank and has also intimated the police about it

and therefore he has not committed any offence and lost cheques are being misused. The learned advocate also referred to the statements of several

witnesses recorded under Section 161 of the Code of Criminal Procedure in connection with Crime No.05 of 2017 and submitted that apart from the

Respondents there were several other persons who had claimed to have lend money to the Petitioner and he having issued cheques in their name.

However while narrating their occupation they have been shown to be labourers, home makers, students and still have stated to have lend lakhs of

rupees to him by way of hand loans which is highly improbable. Therefore Petitioner cannot be allowed to face the prosecution on the basis of such

state of affairs.

9. The learned advocate for the Respondents vehemently contended that no detailed order is expected of a Magistrate while taking cognizance and

directing a process to be issued. The question to be asked is as to whether the necessary ingredients for the offence can be made out from the

complaint and its accompaniments and if the answer is in the affirmative, it will have to be assumed that the Magistrate had applied his mind. Section

204 of the Code of Criminal Procedure does not require him to assign detailed reasons. Therefore no fault can be found in the impugned orders

directing the process to be issued.

10. The learned advocate for the Respondents also submitted that though the Petitioner is now agitating and trying to make capital of statements in the

complaints that he had left the address and therefore the statutory notice was not served upon him, which is a condition precedent for initiating the

prosecution, the revisional Court has elaborately considered his such argument and has rightly refuted it with an objective assessment of the record.

Such leaving of the addressee by the Petitioner and inability to serve for this reason itself is demonstrative of the fact that he has refused the service.

The learned Additional Sessions Judge has also noticed that the Petitioner's address in the complaint has been mentioned as the same on which

address the notices were sent. Even on the Vakalatnama in the title clause of the revision memo he mentioned his same address. It is after noting all

these aspects and by referring to the decision in the case of Pawan Kumar Ralli Vs. Maninder Singh Narula; (2014) 15 Supreme Court Cases 245, the

learned Additional Sessions Judge has rightly considered that it will have to be presumed that there was compliance with the mandate of law of

serving notice.

11. The learned advocate then submitted that filing of separate complaint under Section 406, 420 etc. has nothing to do with the instant cases which

give a separate and independent right to the Respondents to proceed against the Petitioner under Section 138 of the Negotiable Instruments Act.

Besides the present complaints were filed prior to registration of Crime No.05 of 2017 and therefore there was no occasion for the Magistrate even to

consider this aspect.

12. I have carefully gone through the papers. Obviously, the factual aspects and the possible defences which the Petitioner may take during the trial

cannot be gone into and the material produced by him cannot be sifted in these Writ Petitions. Therefore probability or otherwise of Respondents

paying the money to the Petitioner as a hand loan etc. are not relevant considerations for deciding these Writ Petitions.

13. Again, so far as the orders passed by the Magistrate directing processes to be issued are considered, true it is that the orders are cryptic and do

not assign specific reasons which prompted the learned Magistrate to take cognizance and to issue processes. However it is not the form but the

substance which is relevant. When a complaint is presented to a Magistrate he is excepted to proceed under Section 200 of the Code of Criminal

Procedure. By taking recourse to Section 202 of the Code of Criminal Procedure or even without it, on the basis of statement of the complainant

recorded under Section 200 of the Code of Criminal Procedure he may proceed to examine the complaint, statement and the papers to ascertain if all

the necessary ingredients for constituting the offence can be made out and then to direct a process to be issued under Section 204 of the Code of

Criminal Procedure. The wording of Section 204 of the Code of Criminal Procedure also clearly shows that it is the subjective satisfaction of the

learned Magistrate which is important and it nowhere requires that he should indulge in meticulous scanning and should assign elaborate reasons. If on

the basis of the material before him he forms an opinion that there was sufficient ground for proceeding he can take cognizance and direct the process

to be issued. This being a trite legal position no fault can be found with the order passed by the Magistrate simply on the basis of this argument, if

independently, as would be discussed herein-after the material on the record can be said to be sufficient enough for the Magistrate to have taken

cognizance.

14. Now turning to the crucial aspect, there can be no dispute that as interpreted by the Supreme Court in the case of Dashrath Roopsingh Rathod

(supra) Section 138,the substantiative provision speaks as to when the offence can be said to have been committed. Different Clauses in the proviso to

that section only lay down certain conditions which need to be complied with before cognizance can be taken and the cause of action for filing a

complaint can arise. By virtue of Clause (b) of the Proviso to Section 138, it is mandated that the payee issues a notice to the drawer within thirty days

of the former receiving intimation from his banker about dishonour of the cheque and making a demand for the amount of cheque.

15. In the matter in hand, the Petitioner is trying to salvage some ground by pointing out that in the complaints itself it has been mentioned that the

notices sent by the Respondent nos.2 were returned with an endorsement that there was a lock to the shop and the house and on inquiry it was

informed that the person was residing elsewhere and the address was not known. According to the learned advocate, if the Respondents are admitting

such state of affairs, there is no question of resorting to the provision of Section 27 of the General Clauses Act. Even otherwise the presumption under

that provision being rebutable, this statement in the complaint itself is sufficient to conclude that presumption stands rebuted and therefore no

cognizance could have been taken by the Magistrate, since it is a condition precedent for taking cognizance. The very purpose of this provision is to

enable the drawer to make amends by making the payment demanded in the notice and to thwart the impending prosecution. The Petitioner having lost

that opportunity, the purpose and object of the provision itself has been lost.

16. It must be borne in mind that as has been observed herein-above there are series of judgments on the point regarding the presumption under

Section 27 of the General Clauses Act, 1887 vis a vis requirement under Clause (b) of the Proviso to Section 138 of the Negotiable Instrument Act.

The decisions in the case of Jagdish Singh Vs. Natthu Singh; (1992) 1 SCC 647, State of M.P. Vs. Hiralal and Others; (1996) 7 SCC 523, V. Raja

Kumari Vs. P. Subbarama Naidu and Another; (2004) 8 SCC 74 lay down that when the notice is send by registered post and is returned with a postal

endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', it has to be presumed under Section

27 of the General Clauses Act that it was a due service. It is conspicuous that it is not that the situations include only positive act of 'refusal' endorsed

by the postman but even where the endorsements read that the 'house is locked' or 'not available in the house' or 'shop is closed' or 'addressee not in

station' which are passive in nature give rise to the presumption under Section 27 of the General Clauses Act.

17. In the matter in hand the endorsement is to the effect that on. inquiry it was informed that the concerned person resides in a different town and the

address is not known. Though the purport of providing for clause (C) in the Proviso to Section 138 of the Negotiable Instrument Act is to enable the

drawer to rectify his mistake and make payment and thereby avoid impending prosecution, it cannot be said that the legislature intended to provide him

some opportunity to avoid the prosecution by issuing the cheque and then leaving the address so that there would be no compliance regarding service

of notice after the cheque was dishonored. It would be then easier for anybody to first issue a cheque in discharge of a liability and then avoid the

prosecution by simply leaving the address and kill the time of thirty days so that no prosecution could thereafter be launched. It is under these peculiar

facts, such an endorsement about the Petitioner having not found at the address and having started residing at a different town made by the postman is

nothing but a one more contingency in the line of the above contingencies like endorsement of 'refused', 'not available in the house', 'house locked' etc.

I find no discernible difference in the situation in the matter in hand and these categories of endorsements.

18. Though the argument of the learned advocate is ingenuous it does not take into account the purport of the provision and the consequences of the

drawer conveniently avoiding the service of notice by resorting to ingenuous methods. In my considered view therefore, even the situation in the

matter in hand with such an endorsement stands duly covered by the decisions in the case of Jagdish Singh, State of M.P. Vs. Hiralal and V. Raja

Kumari (supra). If that be so, a presumption under Section 27 of the General Clauses Act was available to be drawn by the Magistrate.

19. There is one more aspect which has been referred to by the learned Additional Sessions Judge. He has demonstrated by referring to various

documents as to how in spite of such an endorsement on the envelopes containing statutory notices, there is a room to believe that the Petitioner has

been residing at the same address or it is his address for correspondence. The learned Additional Sessions Judge has specifically noted that the

original hand loan receipts, Vakilpatras, personal recognizance bond executed by him, the title clause of the revisions preferred by him, mention his

address as the same on which the statutory notices were sent. This circumstance clearly demonstrates that not only when the cheques were issued

but even after these complaints were filed he continued to mention the same address. If this is the state of affairs, this would be another feather in the

cap of the Respondents and justifies the inference drawn by the learned Additional Sessions Judge that a presumption under Section 27 of the General

Clauses Act would come in handy to demonstrate compliance with the requirement of serving a statutory notice contained in Clause (b) of the Proviso

to Section 138 of the Negotiable Instrument Act.

20. The upshot of the above discussion, there was sufficient material before the Magistrate to form an opinion that there was sufficient ground to

proceed against the Petitioner for an offence under Section 138 of the Negotiable Instruments Act and the learned Additional Sessions Judge has

rightly upheld the orders. Such concurrent decisions are neither perverse or arbitrary so as to enable this Court to intervene by invoking writ

jurisdiction.

21. All the Criminal Writ Petitions are dismissed. The Rules are discharged