

**(2010) 04 P&H CK 0120**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** None

Shivraj Wires Limited and Others

APPELLANT

Vs

State of Punjab and Another

RESPONDENT

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**Date of Decision:** April 26, 2010

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 397, 482
- Negotiable Instruments Act, 1881 (NI) - Section 138, 139, 141
- Penal Code, 1860 (IPC) - Section 120B, 406, 420

**Hon'ble Judges:** Nirmaljit Kaur, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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**Judgement**

Nirmaljit Kaur, J.

This Order shall dispose of Crl. Misc. No. M-19483 of 2008 and Crl. Misc. No. M-19526 of 2008 as the facts, law point and parties in both the cases are common.

2. For the sake of convenience, the facts are being taken from Crl. Misc. No. M-19483 of 2008. The complainant has filed the present complaint against the accused with the allegations that in order to discharge legal liability, accused issued cheques bearing Nos. 850602 dated 06.06.2004 amounting to Rs. 1,77,840, Cheque No. 850604 dated 06.06.2004 amounting to Rs. 1,98,254/- and Cheque No. 850603 dated 06.06.2004 amounting to Rs. 1,87,178/- all drawn on UCO Bank, Civil Lines, Ludhiana, in favour of the complainant. The complainant presented the said cheques in the bank for collection but the same was dishonoured vide memos dated 09.06.2004, 25.06.2004 and 25.06.2004 with remarks "Drawing Power not arranged" and "D.P. is not available." Thereafter, the complainant got issued a legal notice dated 06.07.2004 calling upon the accused to make the payment within 15 days but in spite of receipt of notice, the accused has failed to make the payment within stipulated period. Thereafter, the complaint was filed. After filing of the complaint,

an application P-2 dated 05.02.2007 was filed for bringing out certain amendments in the complaint. The said application was allowed vide Order dated 13.04.2007. After that the evidence was led by the complainant-respondent. On the basis of the same, the accused were ordered to be summoned vide Order dated 19.02.2008 passed by the Judicial Magistrate Ist Class, Ludhiana.

3. While seeking the (a) quashing of the complaint u/s 138 of the Negotiable Instruments Act, 1881 (here-in-after referred to as the Act), pending in the Court of Judicial Magistrate Ist Class, Ludhiana and annexed with the present petition as P-1; (b) quashing of the summoning order dated 19.02.2008 and ; (c ) quashing of the Order dated 13.04.2007, vide which, the complaint has been ordered to be amended, learned Counsel for the petitioners raised the following arguments.

4. Firstly, the petitioners are facing trial on the same allegations under Sections 406, 420 and 120B IPC and a person cannot be tried and prosecuted twice on the same allegations. The FIR is dated 29.07.2004, whereas, the complaint u/s 138 of the Negotiable Instruments Act is of 18.08.2004 on the same set of allegation. Reliance has been placed on the judgment of Orissa High Court titled as Banchhanidhi Mahapatra and Others Vs. State of Orissa and Another, and also on the judgment of Andhra Pradesh High Court, titled as Aluva Balaiahgari Chandra Reddy Vs. The Revenue Inspector, Rajampet and Another, to contend that a person cannot be tried twice for the same offence.

5. Secondly, no specific role has been attributed to the petitioners No. 3 and 4. So no complaint can proceed against them and the same is hit by Section 141 of the Negotiable Instruments Act. The petitioners No. 3 and 4 are neither incharge nor responsible to the accused No. 1 for the conduct of the business of accused No. 1 nor signatory of the petitioner No. 1-Company. Moreover, the petitioner No. 4-Jasbir Kaur is household lady and she has never done nor does any business. Reliance was placed on the judgment of Hon"ble the Apex Court in the case titled as Smt. Katta Sujatha Vs. Fertilizers and Chem. Travancore Ltd. and Another, to substantiate the second argument.

6. Thirdly, the alleged debt is not legally enforceable and the same is clearly time barred since the alleged date of transaction is of February to April, 1998 and the cheques are alleged to be of June, 2004 and lastly, the order dated 13.04.2007 allowing the amendment of complaint is illegal. Reliance has been placed on the judgments of this Court titled as Kumar Rubber Industries, Kapurthala v. Sohan Lal reported as 2002 (2) RCR (Criminal) 111, V.K. Gupta v. Manjit Kaur reported as 2008 (3) R.C.R. (Criminal) 430, as well as, the judgment of Madras High Court titled as Vinayagam and Ors. v. Subhash Chandran and etc. 2000 (3) R.C.R. (Criminal) 4 to state that an amendment which may result in covering the limitation cannot be permitted and that there was no provision in the Cr.P.C for amendment.

7. Learned Counsel for respondent No. 2, however, raised two preliminary objections. Firstly, the petitioners have filed the present petition u/s 482 of Cr.P.C. without putting even their personal appearance before the trial court. They put in their appearance only when the warrants of arrest were issued and stated that the petition should be dismissed on this ground alone and relied on the judgment in the case titled as M/s J.K. Syntheics Ltd. and Ors. v. Sh. N.C. Sharma 1993 (2) RCR 426. Secondly, the petitioners have sought quashing of the summoning order P-4 and all subsequent proceedings, as well as, the order of amendment which is amenable to revision u/s 397(2) of the Cr.P.C. Hence, the petitioners, instead of filing the revision against the summoning order P-4 have straightway invoked the jurisdiction of this Court and, therefore, should be relegated to the remedy of filing the revision petition.

8. Learned Counsel for the parties have been heard at length.

9. With respect to the first argument that the petitioners are being prosecuted twice on the same allegations, the respondents have specifically stated in the written statement that the allegations, as well as, the subject matter of the said FIR and the complaint u/s 138 of the Act, 1881 are absolutely on different footing. As per the judgment relied on by the learned Counsel for the petitioners himself in the case Banchhanidhi Mahapatra and Ors. (supra), it was held as under:

10. I would accordingly direct that proper course to adopt would be that the two cases should be tried together by the same court but should not be consolidated, that is to say, the evidence would be recorded separately in both the cases one after the other, except to the extent that witnesses for the prosecution who were common to both the cases be examined in one case and their evidence be read as evidence in the other. The trial Court should, after recording the evidence of prosecution witnesses in one case, withhold the judgment and then proceed to record the evidence of the witnesses in the other case and thereafter he shall proceed to simultaneously dispose of the cases by two separate judgments, taking care that the judgment in one case is not based on the evidence recorded in the other case.

10. Thus, there is no ground for quashing of the complaint on the ground that an FIR had also been filed. If at all, both the cases can be tried together in the same terms as referred to in the judgment above. However, there is no such prayer made before this Court. In any case, the petitioners always have the liberty to file a separate petition for quashing of the FIR which would be considered by the appropriate Court on its own facts but the subsequent registration of the FIR cannot be a ground for quashing of the present complaint u/s 138 of the Act, 1881 which is a special law for dealing with dishonoured cheques.

11. While meeting the second argument of learned Counsel for the petitioners that no specific role has been attributed to the petitioners No. 3 and 4 and that they are

neither incharge nor responsible to the accused No. 1 for the conduct of the business of accused No. 1 nor signatory of the petitioner No. 1-Company, attention of this Court was invited to para 11 of the complaint which reads as under:

11. That the accused No. 2 to 4, namely, Avtar Singh Dev, Shivraj Singh and Jasbir Kaur, Managing Director and Directors of the Company i.e. M/s Shivraj Wires Limited are Incharge and responsible to the said company for the conduct of the business of the said company and as such, all the accused i.e. accused Nos. 1 to 4 are liable to pay the amount of the cheques so issued in favour of M/s Walia Marketing Company.

12. There is no denial to the averments made in para 11 of the complaint. Thus, it cannot be said that there is no specific allegation or that they are not responsible for the conduct of the business of the aforesaid Company at this stage.

13. The third argument raised by learned Counsel for the petitioners was that the complaint is not maintainable as the amount towards the dishonoured cheque is not legally enforceable on account of the fact that it was time barred. It was alleged that as per the complaint, the date of transaction is from February to April, 1998 and the cheques are alleged to be of June, 2004, whereas, the complaint was filed on 18.08.2004. Meaning thereby that the amount was due on April 1998 which was now beyond three years and hence, the same was not legally enforceable. There is no merit in the argument raised by learned Counsel for the petitioners.

14. Explanation to Section 138 of the Act, 1881 reads as under:

Explanation: For the purposes of this Section, "debt or other liability" means a legally enforceable debt or other liability.

15. The requirement for a complaint u/s 138 of the Act, 1881 is that the cheque has to be towards payment of an amount for the discharge of whole or part of the debt or liability.

16. In para 3 of the complaint, it is specifically mentioned that accused No. 1 through accused No. 2 to 4 had purchased non-alloys steels from complainant vide different invoices on credit with promise to pay the invoices value with interest @ Rs. 350/- per ton per month from the date of invoice till payment. In this manner, they were under debt to the tune of Rs. 11,48,799/- plus interest and in discharge of part of their debt, the accused had issued Cheque No. 850602 dated 06.06.2004 worth Rs. 1,77,840/- drawn on UCO Bank, Civil Lines, Ludhiana in favour of M/s Walia Marketing Company and Cheque No. 850604 dated 06.06.2004 worth Rs. 1,98,254/- drawn on UCO Bank, Civil Lines, Ludhiana in favour of Walia Marketing Company with the assurance to the complainant that the said cheques shall be honoured as and when the same are presented by complainant for encashment through its bankers. The argument of learned Counsel for the petitioners that since the last invoice was dated 01.04.1998 and agreement to pay was within 40 days of the

invoice, the complaint was beyond three years" limitation required for a recovery suit, is not sustainable in the facts of the present complaint which is filed u/s 138 of the Act, 1881 being a special law dealing with the criminal offence committed for a dishonoured cheque.

17. Hon"ble the Supreme Court, in the case of Harman Electronics (P) Ltd. and Another Vs. National Panasonic India Ltd., held that even for the purpose of jurisdiction of a Court trying an offence under the Negotiable Instruments Act for dishonoured of a cheque the principle that the debtor must seek the creditor cannot be applied in criminal cases as the same is governed by the provisions of the criminal Procedure Code and not on common law principle and held in paras 25, 26 and 27 as under:

25. We cannot, as things stand today, be oblivious of the fact that a banking institution holding several cheques signed by the same borrower cannot only present the cheque for its encashment at four different places but also may serve notices from four different places so as to enable it to file four complaint cases at four different places. This only causes grave harassment to the accused. It is, therefore, necessary in a case of this nature to strike a balance between the right of the complainant and the right of an accused vis-à-vis the provisions of the Code of Criminal Procedure.

26. Learned Counsel for the respondent contends that the principle that the debtor must seek the creditor should be applied in a case of this nature.

27. We regret that such a principle cannot be applied in a criminal case. Jurisdiction of the Court to try a criminal case is governed by the provisions of the Criminal Procedure Code and not on common law principle.

18. For the purpose of Negotiable Instruments Act, the following ingredients have to be satisfied :

(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 thirty 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.

19. Nothing has been pointed out to show that the above three ingredients are not satisfied. For the purpose of the offence to fall u/s 138 of the Act, it is the date of the cheque that has to be seen and not the date of the liability and admittedly, as per

the complaint, the payment towards the invoice was within 40 days of the date of invoice to be paid with interest till payment for which the cheques were stated to be issued on 06.06.2004. The cheques were submitted to the Bank which were dishonoured on account of insufficient funds. The cheques were presented within time i.e. before the expiry of six months of the validity period of a cheque. The complaint was filed on 18.08.2004 which is within the period of limitation and thus, by no stretch of imagination it is time barred.

20. In fact, in many cases, post dated cheques are issued. In the case of post dated cheque, the period of validity is reckoned from the date which has been put on the cheque and not the date when the cheque was delivered. Thus, for an offence u/s 138 of the Act, the date of the cheque that has to be seen. Section 118A incorporates a presumption that every Negotiable Instruments Act was made or drawn for consideration. Hence, when a cheque is issued, it is presumed to be considered for an existing debt or liability. The fact that the last transaction was in the year 1998 will not absolve the Company from dishonoured of the cheque merely for that reason. In fact, in the present case, there is a specific averment in the complaint that the cheques were towards the discharge of liability. Section 139 of the Act, 1881 reads as follows:

139. Presumption in favour of the holder - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

21. Thus, the complaint cannot be quashed at the threshold itself by examining this question without any evidence. Thus to say that because the payment was supposed to be due in the year 1998 and the complaint having been filed in the year 2004, the amount due towards the petitioners- accused is legally not enforceable as the time limit is three years under the recovery suit, is not tenable in the facts of the present case.

22. Even, as per the judgment cited by learned Counsel for the petitioners himself in the case of M/s Kumar Rubber Industries, Kapurthala (supra), learned Single Bench of this Court relied on the judgment rendered by the Hon'ble Apex Court in the case titled as Mahaplasto Ltd. v. Bhushan Steels and Strips Ltd. 2000 (1) R.C.R. (Criminal) 557, where the Hon'ble Apex Court in para 36 held as under:

36. Relying upon this provision, the learned Counsel for the 1st respondent/complainant contends that there being a presumption that the cheques were issued in discharge of pre-existing liability or a debt, it is for the petitioners to rebut the same, and for this purpose the petitioners will have to lead evidence, that too, before the trial Court only. He further contends that the purpose for which the cheques were issued, is a matter which could be decided only by the trial Court. Therefore, he contends that the complaint cannot be quashed at the threshold itself by examining this question without any evidence.

23. Thus, the fact that the same is not legally enforceable will not be a ground for quashing in the facts of the present case, in as much as, the accused would get an opportunity to put forward his case during trial.

24. Taking up the last argument of learned Counsel for the petitioners that the amendments made in the complaint are illegal and that there is no provision, vide which, the complaint could be amended and that the same was only to bring the case under limitation, is also not sustainable in the facts of the present case.

25. There is no argument with the proposition of law laid down in the judgments relied on by the learned Counsel for the petitioners in the cases titled as M/s Kumar Rubber Industries, Kapurthala v. Sohan Lal reported as 2002 (2) RCR (Criminal) 111, V.K. Gupta v. Manjit Kaur reported as 2008 (3) R.C.R. (Criminal) 430, as well as, the judgment of Madras High Court titled as Vinayagam and Ors. v. Subhash Chandran and etc. 2000 (3) R.C.R. (Criminal) 4. However, the same do not help the petitioners in the facts of the present case.

26. In the present case, the application for amendment sought to be brought out was prior to even recording of the preliminary evidence. Thus, no prejudice has been caused to the petitioners by the amendments. The Court was taken through the amendments sought to be made in the complaint vide P-2. The amendments as made do not change the complexion of the case. One of the grounds raised while challenging the amendment expressed by the petitioners is that the same would result in bringing the case within the limitation and create a liability that is legally enforceable. This argument does not hold good in view of what is held while deciding the argument No. 3 above. Thus, even if these amendments are not allowed, the argument that the cheques are not legally enforceable on account of it being filed after five years from the date of the amount due, is in any case, not sustainable in view of this Court already having held that for an offence to fall u/s 138 of the Act, 1881, the date of the cheque has to be seen and not the date when the liability was due. The order allowing the amendment is dated 13.04.2007, whereas, the preliminary evidence in support of the complaint was led subsequently and thereafter the summoning order was passed on 19.02.2008. Thus, there is no reason to quash the order of amendment in the facts of the present case as discussed above.

27. In view of the facts of the present case and above discussion, the petitions are, hereby, dismissed as devoid of merit.