(2006) 07 P&H CK 0243

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Miscellaneous No. 477-MA of 2005

Haryana State Small Industries		APPELLANT
	Vs	
Laxmi Agro Industries		RESPONDENT

Date of Decision: July 31, 2006

Acts Referred:

- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2007) 1 CivCC 274 : (2006) 19 CriminalCC 269 : (2006) 4 RCR(Civil) 905 : (2006) 4 RCR(Criminal) 999

Hon'ble Judges: Amar Dutt, J; A.N. Jindal, J

Bench: Division Bench

Advocate: Devinder Singh, for the Appellant; R.K. Mittal, for the Respondent

Judgement

A.N. Jindal, J.
Special leave to appeal granted.

This appeal is directed against the order of acquittal dated 18.7.2005 passed by the Judicial Magistrate Ist Class, Faridabad, vide which complaint u/s 138 of the Negotiable Instruments Act filed by Haryana State Small Industries and Export Corporation Limited against Laxmi Agro Industries regarding dishonouring of the cheque dated 23.3.1994 for a sum of Rs. 20,21,521/- against the accused-respondent (hereinafter referred to as `the respondent'') was dismissed and he was acquitted.

2. Facts in the background of the case are that the complainant Haryana State Small Industries and Export Corporation (hereinafter referred to as `the complainant'') was dealing in supply of iron and steel to small scale industries. The respondent was also one of its dealers. On 27.2.1994, the respondent purchased material for a sum of Rs. 29,66,721/- against bill No. 10672 dated 27.2.1994. Out of the aforesaid amount, the respondent paid a sum of Rs. 9,45,200/- against the current cheque dated 28.2.1994 and for the balance amount a post dated cheque No. 765504 dated 23.3.1994 for a

sum of Rs. 20,21,521/- was issued. On 23.3.1994, when the complainant presented the said cheque for encashment with its bankers, then he was informed by Jammu and Kashmir Bank Limited, Naraina, New Delhi (drawee bank) that the cheque was dishonoured because of insufficiency of funds. Then complainant issued notice to the respondent on 7.4.1994 and thereafter also personally requested the respondent for payment and the latter assured that in case the cheque is presented again, it will be honoured. On the said assurance, cheque was again presented on 19.4.1994 through the aforesaid bank but again he was intimated on 21.4.1994 that the cheque was dishonoured for want of sufficient funds. Consequently, the complainant served notice upon the respondent on 29.4.1994 informing him regarding the dishonouring of the cheque. Failing to respond to the notice, the complainant preferred this complaint on 2.6.1994.

3. After holding full trial, the trial Court observed that since the complaint is time barred, therefore, it is bound to be dismissed. Hence this appeal.

4. We have the rival contentions and have scrutinized the record of the case.

5. We observe that the sole controversy involved in the case is (i) whether the previous notice dated 7.4.1994 issued upon the respondent was actually a notice u/s 138(b) of the Negotiable Instruments Act; whether said notice was actually served upon the respondent; and (ii) whether once an assurance has been given by the respondent to tender the cheque for encashment on 19.4.1994, then it gives a fresh cause of action to the complainant.

6. Before laying our hands to appreciate the real position, we need to reproduce some relevant dates. The cheque No. 765504 is dated 23.3.1994. It was tendered for payment on the due date which was dishonoured. A letter was issued by the complainant on 7.4.1994, then there is evidence that the respondent personally requested the complainant to present the cheque again on 19.4.1994. However, despite the cheque was presented on 19.4.1994, Jammu & Kashmir Bank Limited, Naraina, New Delhi informed vide letter dated 21.4.1994 that the cheque was dishonoured for want of insufficient funds. The complainant issued notice to the respondent on 29.4.1994. Consequently, the complainant preferred this complaint within time from 19.4.1994 i.e. on 2.6.1994.

7. Section 138 of the Negotiable Instruments Act is reproduced as under :-

138. Dishonour of cheque for insufficiency, etc. of funds in the account. - 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 be extended to two years, 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) that 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 three 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.

Explanation. - For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

8. On bare reading of provision of Section 138(b) and (c) of the Negotiable Instruments Act, it comes out that to constitute an offence u/s 138 of the Negotiable Instruments Act, the complainant is obliged to prove its ingredients which include the receipt of notice by the accused under Clause (b) of Section 138 of the Act. It is not the giving of notice which makes offence but it is the receipt of notice by the drawer which gives cause of action to the complainant to file the complaint within statutory period. The cause of action would be complete when the drawer of the cheque fails to make payment of the amount within 15 days of the receipt of the notice as contemplated by proviso (b), the offence shall be deemed to have been committed only from the date when notice period expired. Normally cause does not arise until the commission of offence.

9. In this case, first of all the letter issued by the complaint on 7.4.1994 cannot be termed as a notice u/s 138(b) of the Negotiable Instruments Act as; though not necessary, it was not got issued from any lawyer. It also does not contain any clause with regard to requirement of payment by the respondent within 15 days of the receipt of the notice and the letter dated 7.4.1994 was issued even before the cause of action was to accrue to the complainant to file the complaint, therefore, mere issuance of this letter by the complainant never meant that it was a legal notice strictly in the terms of Section 138(b) of Negotiable Instruments Act to file complaint on failure to make the payment by the respondent. It has been pleaded by the complainant in his complaint as well as proved in his statement that on assurance made by the respondent to tender the cheque again, cheque was tendered. The variety of the circumstances may permit the complainant to tender the cheque for second time so as to file complaint on fresh cause of action. For example :-

(i) if the envelope addressed to the complainant is lost or damaged or destroyed in transit;

(ii) the letter does not reach the respondent for want of correct address;

(iii) the envelope so received by the respondent is short of notice and it is blank;

(iv) the letter so posted is not received by the actual addressee and the postage is stolen in transit; and

(v) As assured and promised by the respondent, the cheque has been tendered for the second time.

10. Thus, as per provisions of Section 138(b) of the Negotiable Instruments Act, cause of action arises on the receipt of the notice u/s 138(b) of the Negotiable Instruments Act but on failure of receipt of notice, no cause of action will arise to the complainant to file the complaint. Similarly, in case once the respondent puts off the complainant with an assurance that if he tenders the cheque for the second time, then it will be honoured, then certainly tendering of the cheque for the second time will not frustrate the cause of action which arose to him on tendering the cheque for the second time.

11. In one of the similar circumstances, Hon''ble Apex Court took the same view in case M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., In this case, a notice was sent by its holder on 13.6.1998. The respondent vide their letter dated 20.6.1998 intimated the holder of the cheque that they had received one empty envelope without any content in it, therefore, they were to send the contents, if any. This intimation was received by the appellant on 30.6.1998, the day on which the period of limitation, on the basis of the earlier notice, was to expire, therefore, they issued fresh notice by again presenting the cheque. The respondents did not deny the issuance of their letter dated 20.6.1998. However, they while applying for quashing the complaint took the plea that the same was time barred as no cause of action was available to the complainant on tendering of the cheque for the second time. The Hon''ble High Court accepted the said plea of the respondents. However, the Hon''ble Apex Court while allowing the appeal, observed in para Nos. 10 and 11 of the judgment as under :-

10. The High Court fell in error by not referring to the letter of the respondents dated 20th June, 1998 and quashing the proceedings merely by reading a line from para 6 of the complaint. The appellant in para 7 of their complaint had specifically stated that "Even though the complainant is not admitting the said allegation, on abundant caution the complainant presented the cheque again on 1.7.1998 to the drawee bank through the complainants'' bankers, Punjab National Bank. The cheque was again dishonoured by the drawee bank on 2.7.1998 a registered lawyer notice was issued to the 1st accused firm as well as to the 2nd accused intimating the dishonour of the cheque and demanding payment. The accused have received

the notice on 27.7.1998. The accused did not make any payment so far." The receipt of the second notice has concededly not been denied by the respondents.

11. Under the circumstances the appeal is allowed and the order of the High Court quashing the complaint filed by the appellant is set aside. The trial Magistrate is directed to proceed against the respondents in accordance with the provisions of law and expeditiously dispose of the complaint.

12. Similarly, in this case, it would be pertinent to mention that the respondent has not come to the Court with clean hands to state as to when this notice was received by him or whether he actually received the notice. Except tendering the copy of the letter Ex. D-1 no other document has been produced in order to show as to when it was received. Case of the complainant is that on assurance given by the respondent, he tendered the cheque for the second time on 19.4.1994. If the respondent had received the notice on 18/19.4.1994 and assured the complainant on that date then the complaint filed within one month from 18/19.4.1994 is quite within time. It may further be observed that the respondent is blowing hot and cold in the same breath. On one side, he is using the sword of letter dated 7.4.1994 but in the same breath he denied having received the notice dated 7.4.1994 Ex. D-1 in his statement u/s 313 of Cr.P.C., translation copy of which (the relevant part of statement of the respondent) reads as under :-

Q-3. That on 23.3.1994, the cheque was presented in the bank, but the same was returned by the bank of the accused firm on account of insufficient funds. In this regard, a notice was sent on 7.4.1994. Thereafter on the assurance given by the accused firm, the cheque was presented on 19.4.1994. But the said cheque was returned on both occasions on account of insufficient funds. What you have to say in this regard ?

Ans. - It is incorrect. The complaint is time-barred.

13. As such, in this case also, the respondent has not come to the Court with clean hands and is playing hide and seek. On one hand it is stating that the notice of dishonour of the cheque has not been received by them and on the other hand they are praying for dismissal of the complaint on the plea that the same is barred by time in view of the notice served by the complainant. As such, the plea of the respondent is not only self-contradictory but an after- thought also and has been apparently carved out to resist the claim of the complainant thereby frustrating the provisions of law.

14. In the wake of aforesaid discussion, we have no hesitation to interfere with the findings returned by the trial Court.

15. It may be pointed out that the trial Court dismissed the complaint by limiting its observations on the point of limitation only and merits of the complaint were not touched. Consequently, we accept the appeal, set aside the impugned judgment

dated 18.7.2005 passed by the Judicial Magistrate Ist Class, Faridabad and remit the case back to the trial Court to proceed in accordance with law. Since the case is complete in all respects, therefore, trial Court is directed to dispose of the case within one month from the date of receipt of the copy of this order.