

(1991) 11 AHC CK 0039

Allahabad High Court

Case No: Criminal Revision No. 189 of 1991

B.S.Bhatnagar

APPELLANT

Vs

Agarwal Investment
Company and Anr.

RESPONDENT

Date of Decision: Nov. 23, 1991

Acts Referred:

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

Hon'ble Judges: Giridhar Malaviya, J

Final Decision: Allowed

Judgement

Giridhar Malaviya, J.

1. This revision is directed against the order dated 17121990 passed by First Addl. Chief Judicial Magistrate, Ghaziabad against the applicant in complaint Case No. 787 of 1990 under Section 138, Negotiable Instrument Act, Police Station Bihani Gate, District Ghaziabad.

2. A complaint dated 23101990 was lodged against the applicant by M/s. Agarwal Investment Co. wherein it had been stated that on 1531990 the applicant had issued a cheque No. 43557 drawn on the National Bank Ltd. Ghaziabad in favour of the complainant for a sum of Rs. 3094 only and when the said cheque was presented by the complainant through their banker State Bank of India, Kavi Nagar, Ghaziabad for collection it was returned with the remark "refer to drawer", the complaint did not question the date when the cheque had been returned by the complainant did mention the fact that a notice by thereafter sent by the complainant to the applicant by registered post on 2061990 asking the applicant to make the payment of the cheque within 15 days. Alleging that despite the receipt of the said registered notice the amount of the cheque had not been paid the prayer was made in the complaint to punish the applicant under Section 138 of the Negotiable Instruments Act as amended by Act 66 of 1986. The Magistrate by the impugned order found that a prima facie case under Section 138 of the Negotiable

Instruments Act had been made out against the applicant with the result that the impugned order summoning the applicant was passed by him,

3. I have heard learned Counsel for the applicant as also learned Counsel for the opposite parties,

4. Learned Counsel for the opposite parties has drawn my attention to proviso (b) to Section 138 of the Negotiable Instruments Act to settle the controversy involved in this case:

"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 drawn out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank paid, 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 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."

5. A perusal of proviso (b) clearly shows that unless the payee or the holder in due course of the cheque gives the notice in writing within 15 days of the receipt of information by him from the bank regarding the return of cheque as unpaid the provisions of Section 138 shall not be attracted. To make out this point learned Counsel for the applicant has drawn my attention to the registered notice sent by the complainant to the applicant in his capacity as the Director of M/s. Anand Prataphool Vitta Nigam Ltd. which has been annexed as Annexure D to the affidavit filed by the applicant here in this Court. A perusal of the said notice indicates that the complainant had clearly averred therein that the

dishonoured cheque was received back by the complainant on 26/3/1990. In view of the fact that the information that the cheque had been dishonoured had become known to the complainant on 26/3/1990, the registered notice as required under proviso (b) to Section 138 had necessarily to be given to the drawer of the cheque i. e. the applicant within 15 days from 26/3/1990 which would be latest upto 10/4/1990. However as has been mentioned above the complaint itself says that this notice was despatched by the complainant on 20/6/1990 which was beyond the period of 15 days as is contemplated in the proviso (b) to Section 138 of the Negotiable Instruments Act, 1881. Consequently due to noncompliance of this condition as is mentioned above the provision of Section 138 could not be attracted against the applicant.

6. However learned Counsel for the opposite parties tried to justify the order of summoning by saying that the period of limitation could well be extended by the Magistrate in view of the provisions of Section 473, Criminal Procedure Code. Learned Counsel for the applicant is correct in his contention that the provisions of Section 138 of the Negotiable Instruments Act and those of proviso (b) to the said section prescribe a special form of procedure and as such Section 473 of the Criminal Procedure Code would not apply to the instant case. He has rightly relied on Section 5 of the Criminal Procedure Code which reads as under:

"Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force,"

7. A perusal of Section 5 leaves no room to doubt that if there is any special form of procedure prescribed by any other law for the time being in force then nothing contained in the Criminal Procedure Code, in the absence of any specific provision to the contrary would apply to that special law. Consequently learned Counsel for the applicant is right in his contention that the period of limitation fixed by proviso (b) to Section 138 cannot be extended by the Magistrate by resorting to Section 473 of the Code of Criminal Procedure. The result is that there being delay in the notice as was contemplated by proviso (b) to Section 138 of the Negotiable Instruments Act, the applicant cannot be proceeded in the case pending in the Court below under Section 138 of the Negotiable Instruments Act. The summoning of the applicant would, therefore, not be justified in the eyes of law.

8. This revision succeeds. The order dated 17/12/1990 passed by the First Additional Chief Judicial Magistrate, Ghaziabad in Complaint Case No. 7S7 of 1990 M/s. Agarwal Investment Co. v. B. S. Bhatnagar is quashed.

Revision allowed.