

(2012) 09 AHC CK 0201

Allahabad High Court

Case No: Application No. 16857 of 2010

Smt. Suranti Devi

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision: Sept. 28, 2012**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Negotiable Instruments Act, 1881 (NI) - Section 138, 14, 142, 142(b)

Citation: (2013) 1 ACR 493 : (2012) 10 ADJ 342**Hon'ble Judges:** Vijay Prakash Pathak, J**Bench:** Single Bench**Advocate:** Siyaram Pandey, for the Appellant; B.P. Singh Kachhawah, for the Respondent**Final Decision:** Allowed

Judgement

Hon'ble Vijay Prakash Pathak, J.

The present petition u/s 482 Cr.P.C. has been filed with a prayer to quash the entire proceedings in Complaint Case No. 302 of 2008, Aneeta Devi Vs. Suranti Devi, u/s 138 of the Negotiable Instrument Act (hereinafter referred to as the Act), PS Pilkhuwa, District Ghaziabad. The brief facts of the case are that opposite party no. 2 Smt. Anita Devi filed a complaint for the offence punishable u/s 138 of the Act against the applicant with the allegations that she had purchased bricks amounting to Rs. 1,33,000/- from opposite party no. 2 for construction of building of her dairy, for which the opposite party no. 2 was given two post dated cheques of Rs. 83,000/- and Rs. 50,000/- mentioning the date as 5.8.2007. The opposite party no. 2 accepted the said cheques for payment but when the said cheques were presented in the Bank account of her firm, the same were received back after being dishonoured on 7.2.2008. It was alleged that the applicant issued the cheques knowingly that she had insufficient amount in her account. Thereafter legal notice was sent on 3.3.2008 through her counsel demanding the said money by registered post as well as by U.P.C. The applicant refused to accept the notice sent through registered post

whereas she received the notice sent through U.P.C. but the amount was not paid. Hence the complaint as aforesaid was filed.

2. The complaint was filed on 29.4.2008 but due to absence of the complainant/opposite party no. 2, the same was dismissed on 31.7.2008. Thereafter on 4.8.2008, the opposite party no. 2 again filed a Misc. Case, which was registered as Misc. Case No. 302/2008 on the same facts with the prayer to summon the applicant. In the said complaint, it was also mentioned that her earlier complaint was dismissed for her no fault as on the date fixed i.e. 31.7.2008, it was informed by her counsel that due to condolence, the counsel could not appear.

3. On the said complaint, the learned Magistrate after considering the entire materials filed along with the earlier complainant, summoned the applicant vide order dated 19.6.2009 for the offence punishable u/s 138 of the Act finding a prima facie case against him.

4. Heard Sri Siya Ram Pandey, learned counsel for the applicant, Sri B.P. Singh Kushwaha, learned counsel for the opposite party no. 2 as well as learned AGA and perused the record.

5. Learned counsel for the applicant has mainly contended that the first complaint was dismissed on 31.7.2008 in absence of the complainant and thereafter a misc. application was moved by the complainant on 4.8.2008. The learned Magistrate summoned the applicant treating the said misc. application as complaint whereas the same was barred by time in view of Section 142(b) of the Act. It is submitted that for a cause of action, the earlier complaint was filed on 29.4.2008, which was dismissed in absence of the complaint on 31.7.2008. Thereafter on the same cause of action, the second complaint filed on 4.8.2008 would be barred by time and hence the learned Magistrate committed illegality in taking cognizance and summoning the applicant.

6. On the other hand, learned counsel for the opposite party no. 2 has submitted that the learned Magistrate has rightly summoned the applicant on the complaint filed by opposite party no. 2 as the earlier complaint was dismissed in her absence on 31.7.2008. It is also contended that there is no illegality in the impugned order passed by the learned Magistrate.

7. I have considered the aforesaid arguments on behalf of the rival parties' counsel and perused the record.

8. A perusal of the record shows that the complainant/opposite party no. 2 had filed a complaint on 29.4.2008 for the offence punishable u/s 138 of the Act for bouncing of the two cheques issued in her favour by the applicant. In the complaint, the date of service of legal notice is not shown but only this much is mentioned that the legal notice was sent on 3/3/2008 by registered post as well as by U.P.C. The said notice by registered post is alleged to have been refused but the notice sent through U.P.C.

was received by the applicant. Although the date of service is not disclosed but the complaint was filed on 29.4.2008 which was fixed for 17.5.2008 and thereafter the same was dismissed on 31.7.2008 due to absence of the complainant. It appears that thereafter the second complaint on the same cause of action was filed on 4.8.2008, which was registered as Misc.No. 302/2008 and of which the learned Magistrate took cognizance and passed the impugned order dated 29.6.2009 summoning the accused applicant to face trial for the offence punishable u/s 138 of the Act.

9. In the counter affidavit, the filing of the first complaint on 29.4.2008 has not been denied and it has been stated that the new complaint was subsequently filed. It is also stated in the counter affidavit that from the letter dated 7.2.08 of the Bank for returning the cheque after being bounced prima facie offence u/s 138 of the Act is made out.

10. Now in the backdrop of the factual aspect, it has to be seen as to whether the second complaint filed on the same cause of action was barred by time.

11. For this purpose, the provisions of Section 138 along with its proviso and Section 142 of the Act would be relevant. Section 138 of the Act provides that 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 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 provided that the 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, as the case may be, 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 thirty 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 fifteen days of the receipt of the said notice, the payee or the holder of the cheque may complain in the manner prescribed u/s 142 of the Act.

12. Section 142 of the Act reads as under:-

Cognizance of offences:- Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1074)-

(a) no Court shall take cognizance of any offence punishable under Sec.138 except upon a complaint, in writing made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Sec.138:

Provided that the cognizance of complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable u/s 138.

13. From a plain reading of the above Section, it is manifest that a competent Court can take cognizance of a written complaint of an offence u/s 138 if it is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138.

14. Now coming to the facts of the present case, it transpires that the cheque was returned back on 7.2.2008 with an endorsement that the funds were insufficient. Legal notice was sent to the applicant on 3.3.2008 demanding the said money. It is stated that the registered notice was returned as refused but the notice through U.P.C was served. The date of service of notice is not disclosed in the complaint. The first complaint was filed on 29.4.08 which was dismissed in absence of the complainant on 31.7.08 with the observation that it appears that the complainant does not want to proceed further in the case. In the circumstances there is no sufficient basis to proceed further and the complaint is liable to be dismissed.

15. Admittedly a new complaint on the same cause of action was filed on 4.8.2008 i.e. much beyond the period of limitation as prescribed u/s 142 sub-clause (b) of the Act. According to which such complaint be made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the Act. Accordingly, the new complaint i.e. Complaint Case No. 302 of 2008 was barred by limitation and hence taking cognizance and summoning the applicant to face trial u/s 138 of the Act by the learned Magistrate vide order dated 19.6.2006 is illegal and without jurisdiction and the subsequent proceedings in lieu thereof are nothing but an abuse of process of the court, which are liable to be quashed and the present petition is liable to be allowed. Accordingly, the present petition is allowed. The entire proceedings of the Complaint Case No. 3032 of 2008, Anita Devi Vs. Suranti Devi u/s 138 of the Act, PS Pilkhuwa, District Ghaziabad are hereby quashed.