

(2010) 03 DEL CK 0075

Delhi High Court

Case No: Criminal M.C. No"s. 842 and 843 of 2009

Swastik Sales
Corporation and Others

APPELLANT

Vs

Advanced Medical
Optics (I) Pvt. Ltd.

RESPONDENT

Date of Decision: March 3, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Negotiable Instruments Act, 1881 (NI) - Section 138, 3, 72

Citation: (2010) 03 DEL CK 0075

Hon'ble Judges: V.K. Jain, J

Bench: Single Bench

Advocate: Chirag M. Shroff, for the Appellant; Mohit Mathur and Maneesh, for the Respondent

Judgement

V.K. Jain, J.

These are two petitions u/s 482 of the Code of Criminal Procedure seeking quashing of the criminal complaint filed against the petitioners, by the respondent, u/s 138 of Negotiable Instruments Act. The quashing has been sought primarily on the ground that Delhi Court has no jurisdiction to hear and try these complaints.

2. This is not the case of the complainant that cheque in question was issued and delivered to it in Delhi. There is no such allegation to this effect in the complaint and during the course of arguments also no such stand was taken by the learned Counsel for the complainant. It is an admitted case that the petitioners are the resident of Mumbai and do not have either a residence or a place of work in Delhi. It is an admitted case that cheques in question were drawn on a bank in Mumbai and were dishonoured by that bank at Mumbai. It is also an admitted position that the notice of demand, though issued from Delhi, was sent to the petitioners at Mumbai. This is nowhere the case of the complainant that the notice of demand was served upon the petitioners in Delhi.

3. The averments made in the complaint show that according to the complainant, the cheques issued by the petitioners was deposited by it with Bank of America, New Delhi and the Notice of Demand was also issued from Delhi.

4. The question whether issue of Notice of Demand from Delhi to a person who resides and works for gain outside Delhi came up for consideration before the Hon"ble Supreme Court in [Harman Electronics \(P\) Ltd. and Another Vs. National Panasonic India Ltd.](#), . In that case, the appellant was carrying business at Chandigarh. The complainant had its head office at Delhi and a branch office at Chandigarh. The cheque in question was issued, presented and dishonoured at Chandigarh. The respondent/complainant issued notice to the appellant from Delhi. The notice was served upon the appellant at Chandigarh. On failure of the appellant to pay the amount of the cheque, a complaint was filed at Delhi. An application filed by the appellant questioning jurisdiction of the court at New Delhi was dismissed on the ground that since the notice was sent by the complainant from Delhi, the appellant had failed to make payment at Delhi and the respondent was carrying out business at Delhi, the Delhi court had jurisdiction to entertain the complaint.

5. As regard, issue of notice from Delhi, Hon"ble Supreme Court held that issuance of notice would not by itself give rise to a cause of action but communication of notice would give. The Hon"ble Court was of the view that for Constituting offence u/s 138 of Negotiable Instruments Act, the notice must be received by the accused, though it may be deemed to have been received in certain situations.

6. It was noted that while issuance of notice by the holder of Negotiable Instrument is necessary, service thereof is also imperative and only after service of such notice and failure on the part of the accused to pay the demanded amount, within a period of 15 days thereafter, the commission of an offence completes and, therefore, giving of notice cannot have precedence over the service. The Hon"ble Court declined to apply the civil law Principle that the debtor must seek the creditor, to a criminal case. Holding that jurisdiction in a criminal case is governed by the provisions of Criminal Procedure Code and not on common law principle, it was held that Delhi Court had no jurisdiction to try the case.

7. The following observations made by the Hon"ble Supreme Court in this case are pertinent:

A distinction must also be borne in mind between the ingredient of an offence and commission of a part of the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, the commission of an offence completes.

8. This issue has been examined by me in a number of cases, including the WP.(Crl.).861/09, 884/09, 885/09 decided on 8th February, 2010, Crl.M.C.1841/2009 decided on 17th February, 2010, Crl.M.C.3309/2009 & Crl.M.C.3334/2009 decided on 24th February, 2010. After referring to the decision of the Hon"ble Supreme Court in the case of Herman Electronics (supra), this Court, inter alia, held as under:

Proviso (b) to Section 138 of Negotiable Instruments Act requires payee of the cheque or its holder in due course, as the case may be, to make a demand of the amount of the cheque by giving a written notice to the drawer of the cheque. The question which arises for consideration is as to whether the demand is made at the place where the drawer of the cheque resides or works for gain or it is made at the place from where the notice of demand is dispatched to the drawer of the cheque. Since the requirement of the proviso will not be fulfilled without service of notice upon the drawer and considering the decision of the Hon"ble Supreme Court in the case of Harman Electronics (supra) holding therein that civil law principle that the debtor must seek the creditor does not apply to a criminal case, the demand shall be deemed to have been made at the place where the notice is served upon the drawer and not at the place from where it is dispatched to him. In fact in view of the decision in the case of Harman Electronics (supra), the notice shall be deemed to have been given at the place where it is served upon the addressee and not at the place from where it was dispatched.

9. In [Shri Ishar Alloy Steels Ltd. Vs. Jayaswals NECO Ltd.](#), the Hon"ble Supreme Court inter-alia, held that "the bank" referred to in Clause (a) to the proviso of Section 138 of the Act would mean the drawee bank on which the cheque is drawn and not all the banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued."

It was further observed that "the payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or Payee bank on which the cheque is drawn within the period of six months from the date on which it is shown to have been issued."

In para 10 of the judgment the Hon"ble Supreme Court further observed that "Sections 3, 72 and 138 of the Act would leave no doubt in our mind that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable."

10. The ratio of the above referred judgment of the Hon"ble Supreme Court is that a cheque is deemed to have been presented to the banker of the drawer irrespective of the fact whether it is deposited by the payee in his own bank. The banker of the payee, after receiving the cheque from him, is required to present it to the banker of the drawer and therefore if the cheque issued from a bank outside Delhi is deposited in Delhi, the bank in which it is deposited in Delhi, is required to present it to the bank outside Delhi, for the

purpose of encashment.

11. Relying upon the decision of the Hon"ble Supreme Court in [K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another](#), and [Smt. Shamshad Begum Vs. B. Mohammed](#), it is contended by the learned Counsel for the respondent that if the place where the drawee bank, is situated, is taken as the place of presentation of cheque, that would mean that the place of presentation as well as the place of return of the cheque will be one and the same and in that case, it will not be possible for each Court in whose area any of the five essentials of the offence u/s 138 of Negotiable Instruments Act is committed, to have jurisdiction to entertain and try the complaint.

12. In my view, the contention cannot be accepted, considering the authoritative pronouncement of the Hon"ble Supreme Court in Shri Ishar Alloy Steels Ltd. (supra). Neither in the case of K. Bhaskaran (supra) nor in the case of Shamshad Begum (supra), the Hon"ble Supreme Court was concerned with the interpretation of the expression "the bank" in Clause (a) to the proviso to Section 138 of Negotiable Instruments Act, whereas in the case of Shri Ishar Alloy Steels Ltd. (supra), the Hon"ble Supreme Court directly dealt with this issue and made an authoritative pronouncement that the place where drawee bank is situated will be the place where the cheque is presented for encashment.

13. For the reasons given in the preceding paragraphs, I am of the view that Delhi Court has no jurisdiction to entertain and try this complaint. It is, therefore, directed that the complaint filed by respondent be returned to it within four weeks for presenting it before a competent court having jurisdiction in the matter.