

Dineshbhai Manilal Raval Vs Manshukhbhai Maganbhai Patel and Others

Court: Gujarat High Court

Date of Decision: Jan. 10, 2012

Acts Referred: Constitution of India, 1950 " Article 227

Criminal Procedure Code, 1973 (CrPC) " Section 203

Evidence Act, 1872 " Section 114

General Clauses Act, 1897 " Section 27

Negotiable Instruments Act, 1881 (NI) " Section 138

Penal Code, 1860 (IPC) " Section 120(B), 406, 420

Citation: (2012) 3 BC 195 : (2013) 1 RCR(Civil) 383 : (2013) 1 RCR(Criminal) 319

Hon'ble Judges: M. R. Shah, J

Bench: Single Bench

Advocate: B.P. Gupta, No. 1, for the Appellant; Rituraj and M. Meena, Advocates for the Respondent Nos. 1 and 2, Mr. L.B. Dabhi, Assistant Public Prosecutor for the Respondent No. 3, for the Respondent

Judgement

M.R. Shah, J.

Leave to amend the prayer clauses. Present petition u/s 227 of the Constitution of India has been preferred by the petitioner

-original complainant to quash and set aside the impugned judgment and order dated 2.12.2010 passed by the learned Principal Sessions Judge,

Ahmedabad in Criminal Revision Application No. 170 of 2010, as well as the order passed by the learned Metropolitan Magistrate, Court No.

18, Ahmedabad in Criminal Case No. 223 of 2008 dated 13.1.2010, dismissing the complaint in exercise of powers u/s 203 of the Code of

Criminal Procedure.

2. Facts leading to the present petition, in nutshell are as under:

3. The petitioner herein, original complainant filed complaint being Criminal Case No. 223 of 2008 against the private respondents herein in the

Court of learned Metropolitan Magistrate, Court No. 18, Ahmedabad for the offence u/s 138 of the Negotiable Instruments Act as well as for the

offences punishable under Sections 406, 420, 120(B) of Indian Penal Code or dishonour of the cheque in question. That the learned Metropolitan

Magistrate, Court No. 18, Ahmedabad by order dated 4.4.2009 dismissed the said application. Being aggrieved by and dissatisfied with the order

passed by the learned Metropolitan Magistrate, Court No. 18, Ahmedabad dated 4.4.2009 in dismissing the said complaint, petitioner preferred a

Criminal Revision Application before the Revisional Court and the Revisional Court allowed the said revision application by quashing and setting

aside the order passed by the learned Metropolitan Magistrate and remanded the matter to the learned Metropolitan Magistrate. Thereafter, again

the learned Metropolitan Magistrate, Court No. 18, Ahmedabad dismissed the complaint in exercise of powers u/s 203 of the Code of Criminal

Procedure by order dated 30.1.2010 mainly on the ground that statutory notice u/s 138 of the Negotiable Instruments Act was not served upon

the accused and also on the ground that no case is made out for the offences punishable under Sections 406, 420, 120(B) of Indian Penal Code.

That being aggrieved by and dissatisfied with the order passed by the learned Metropolitan Magistrate, Court No. 18, Ahmedabad dtd.

30.1.2010 in dismissing the complaint being Criminal Case No. 223 of 2008, petitioner herein preferred Criminal Revision Application No. 170 of

2010 before the learned City Sessions Court, Ahmedabad, who by his impugned judgement and order dated 2.12.2010 has dismissed the said

revision application confirming the order passed by the learned Metropolitan Magistrate dismissing the complaint Being aggrieved by and

dissatisfied with the impugned orders passed by both the Courts below in dismissing the complaint filed by the petitioner, original complainant for

the offence punishable u/s 138 of Negotiable Instruments Act, petitioner herein - original complainant has preferred the present petition under

Article 227 of the Constitution of India.

4. Mr. Gupta, learned Advocate appearing on behalf of the petitioner, original complainant has vehemently submitted that the learned Metropolitan

Magistrate has materially erred in dismissing the complaint filed by the petitioner against the private respondents herein for the offence punishable

u/s 138 of Negotiable Instruments Act on the ground that statutory notice upon the accused was not served. Mr. Gupta, learned Advocate

appearing on behalf of the petitioner, has heavily relied upon the decision of the Hon"ble Supreme Court in the case of C.C. Alavi Haji v. Palapetty

Muhammed and Another, VI (2007) SLT 442=III (2007) DLT (CrL.) 214 (SC)=III (2007) BC 533 (SC)=III (2007) CCR 118 (SC)= 2007(1)

GLH 512, more particularly para 17 of the said judgement and has submitted that if it was the case on behalf of the accused that he had not

received the notice sent by post, in that case, it was open for the accused to make payment of the cheque amount within a period of 15 days of

receipt of summons from the Court in respect of the complaint u/s 138 of the Act and thereafter, it was open for the accused to submit that the

complaint is liable to be rejected. Therefore, it is submitted that the learned Magistrate has committed a grave error in dismissing the complaint and

the learned Revisional Court has materially erred in dismissing the revision application and confirming the order passed by the learned trial Court.

By making above submissions and relying upon above decision, it is requested to allow the present petition.

5. Mr. Meena, learned Advocate appearing on behalf of the private respondent Nos. 1 and 2, original accused has tried to support the orders

passed by both the Courts below by submitting that admittedly statutory notice upon the accused was unserved with endorsement of ""Left House"".

Therefore, it is submitted that when admittedly statutory notice was not served upon the accused, both the Courts below have rightly dismissed the

complaint against the accused for the offence u/s 138 of the Negotiable Instruments Act.

6. Mr. Dabhi, learned Additional Public Prosecutor has requested to pass appropriate order in the facts and circumstances of the case.

7. Heard the learned Advocates appearing on behalf of the respective parties at length.

8. At the outset, it is required to be noted that the petitioner herein, original complainant has filed the impugned complaint against the private

respondents herein, original accused for the offence punishable u/s 138 of Negotiable Instruments Act for dishonour of the cheque. It is not in

dispute that as such the statutory notice was sent by the petitioner herein, original complainant to the accused by RP/AD, however, the said notice

returned unserved with endorsement of ""Accused Left House"". Therefore, it was the contention on behalf of the private respondents, accused that

as the statutory notice u/s 138 of the Negotiable Instruments Act was not received by the accused, such a complaint u/s 138 of the Negotiable

Instruments Act is not maintainable. The aforesaid has been accepted by the learned Magistrate and consequently, the learned Metropolitan has

dismissed the said complaint in exercise of powers u/s 203 of the Code of Criminal Procedure. The said order has been confirmed by the

Revisional Court.

9. Identical question came to be considered by the Hon"ble Supreme Court in the case of C.C. Alavi Haji (supra) and in para 17, the Hon"ble

Supreme Court has observed and held as under:

17. It is also to be borne in mind that the requirement of giving notice is a clear departure from the rule of Criminal Law, where there is no

stipulation of giving a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of

receipt of summons from the Court in respect of the complaint u/s 138 of the Act, make payment of the cheque amount and submit to the Court

that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore the complaint

is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint

u/s 138 of the Act, cannot obviously contend that there was no proper service of notice as required u/s 138, by ignoring statutory presumption to

the contrary u/s 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, in any other interpretation of the proviso would defeat the

very object of the legislation. As observed in Bhaskaran's case (supra) if the "giving of notice" in the context of Clause 9(b) of the proviso was the

same as the ""receipt of notice"" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and

escape from legal consequences of Section 138 of the Act.

10. Considering the above decision of the Hon"ble Supreme Court, it is clear that both the Courts below have committed an error in dismissing the

complaint. As observed by the Hon"ble Supreme Court, if the drawer-private respondents claim that they did not receive notice sent by Post, they

could have within 15 days of receipt of Summons of the Court in respect of the complaint u/s 138 of the Act, made payment of the cheque amount

and thereafter could have submitted before the Court that they have made the payment within 15 days of receipt of summons and, therefore, the

complaint is liable to be rejected. As observed by the Hon"ble Supreme Court in the said decision, a person who does not pay within 15 days of

receipt of the summons from the Court along with the copy of the complaint u/s 138 of the Act, cannot obviously contend that there was no proper

service of notice as required u/s 138, by ignoring statutory presumption to the contrary u/s 27 of the General Clauses Act and Section 114 of the

Evidence Act. Under the circumstances, the learned Magistrate has materially erred in dismissing the said complaint preferred by the petitioner

herein - original complainant and Revisional Court has also committed an error in confirming the order passed by the learned Magistrate. Under the

circumstances, the impugned orders passed by both the Courts below deserve to be quashed and set aside and the matter is to be remanded to

the learned Magistrate for deciding the same afresh, in accordance with law and on merits for the offence punishable u/s 138 of Negotiable

Instruments Act. In view of the above and for the reasons stated above, present petition succeeds. The impugned judgement and order passed by

the learned Principal Sessions Judge, Ahmedabad in Criminal Revision Application No. 170 of 2010 dated 2.12.2010 as well as the order passed

by the learned Metropolitan Magistrate, Court No. 18, Ahmedabad in Criminal Case No. 223 of 2008 dated 30.1.2010, are hereby quashed and

set aside and the complaint being Criminal Case No. 223 of 2008 filed by the petitioner herein - original complainant, is ordered to be restored to

file of the learned Metropolitan Magistrate, Court No. 18, Ahmedabad for the offence punishable u/s 138 of Negotiable Instruments Act and the

private respondents herein, shall be tried for the aforesaid offence u/s 138 of Negotiable Instruments Act in accordance with law and on merits. All

the defences available to the accused under the law are kept open which may be considered by the learned Magistrate at the time of trial in

accordance with law and on merits, for which this Court has not expressed any opinion in favour of either of the parties. Rule is made absolute to

the aforesaid extent.