

(2009) 08 JH CK 0044

Jharkhand High Court

Case No: Cr.M.P. No. 849 of 2005

Gopal Mishra

APPELLANT

Vs

The State of
Jharkhand and Pankaj
Kumar Sinha

RESPONDENT

Date of Decision: Aug. 25, 2009

Acts Referred:

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

Citation: (2010) 1 BC 303 : (2010) CriLJ 1550

Hon'ble Judges: Prashant Kumar, J

Bench: Single Bench

Advocate: S.K. Jha, for the Appellant; P.S.N. Roy, APP and Krishana Nand Sahay, for the O.P. No. 2, for the Respondent

Final Decision: Allowed

Judgement

Prashant Kumar, J.

This is an application for quashing the order dated 9.6.2004 passed by Sub-Divisional Judicial Magistrate, Deoghar in P.C.R. Case No. 50 of 2004 corresponding to T.R. Case No. 1402 of 2004/1208 of 2005 whereby and whereunder he took cognizance of the offence u/s 138 of the Negotiable Instrument Act (hereinafter referred to as "the N.I. Act"). Petitioner further pray for quashing the entire criminal proceeding of aforesaid case.

2 It appears that a complaint petition filed by the O.P. No. 2 alleging therein that the petitioner and complainant jointly took some contract work at Deoghar in Minor Irrigation and Irrigation Department and agreed to share the profit equally. It is further alleged that on 25.9.2003 petitioner issued a cheque of Rs. 30,000/- in the name of complainant. It is further alleged that the said cheque was submitted for

encashment in State Bank of India, Bazar Branch, Deoghar but the same was returned to the complainant with endorsement that there is insufficient fund. It is further stated that complainant brought the said fact to the notice of petitioner and on his advice; the cheque was again presented before the SBI Bazar Branch, Deoghar for encashment. It is stated that the said cheque was sent to Main Branch of SBI for collection on 8.2.2004, again same was returned to the complainant on 15.3.2004 with endorsement that there is insufficient fund. Thereafter a lawyers notice given to the petitioner on 19.3.2004. It is further alleged that even after receiving the notice, the petitioner had not given any heed to the request of complainant (O.P. No. 2), hence the present complaint petition filed in the court.

3. It appears that learned court below took cognizance of the offence u/s 138 of the N.I. Act and issued summon to the accused-petitioner. It further appears that the petitioner appeared in the court below and filed an application praying therein that the cognizance was taken beyond the period of limitation, hence the proceeding be dropped against the accused-petitioner. The said application of the petitioner rejected by learned court below vide order dated 20.6.2005, thereafter the present case has been filed u/s 482 of the Cr.P.C. for quashing the order of cognizance and also for quashing the entire criminal proceeding in connection with aforesaid case.

4. It is submitted by learned Counsel for the petitioner that for the first time petitioner presented the cheque on 7.11.2003 and the same was returned to him on 18.11.2003 with endorsement that there is insufficient fund. It is submitted that thereafter on 2.12.2003 the complainant sent a legal notice to the accused-petitioner through Sri Dilip Kumar Sinha, advocate. Thus as per Section 138 Proviso (b) of the N.I. Act, the cause of action arose for prosecution after expiry of 15 days from the date of receipt of notice dated 2.12.2003. It is further stated that as per Section 142(b) of the N.I. Act, the complaint petition ought to have been filed within one month from the date of cause of action. It is further submitted that the complainant instead of filing the complaint petition in court had presented the cheque for the second time on 8.2.2004, which was again returned on 15.3.2004 with endorsement of insufficient amount. It is submitted that for the second time again a pleader notice given on 19.3.2004 and thereafter on 11.7.2004 the present complaint has been filed. It is submitted that once a cheque has been dishonoured and thereafter notice has been given to the drawer then after expiry of 15 days of the notice, cause of action arose and thereafter it is not permissible for the payee to present the cheque second time for creating another cause of action for filing the complaint case.

5. On the other hand, learned Counsel for the complainant (O.P. No. 2) submits that after the amendment the court have power to take cognizance if it satisfied that due to sufficient cause the complaint petition has not been filed within the prescribed period. It is further submitted that the aforesaid amendment had been brought by the Parliament with a view that the culprit should not be acquitted on technical

ground. Accordingly, it is submitted that there is no illegality in the impugned order, thus the same does not require any interference by this Court.

6. Having heard the submission, I have gone through the record of the case. In the complaint petition it has been admitted by the complainant that the cheque was issued on 25.9.2003 and the same was presented in the SBI Bazar Branch, Deoghar for encashment and same was returned with an endorsement that there is insufficient fund. It is also stated that thereafter complainant approached the accused-petitioner for payment. However, the complainant suppressed the date on which the cheque returned to him with endorsement that there is insufficient fund. The complainant had also suppressed the fact as to how he approached the accused-petitioner for payment after dishonour of the cheque. However, from perusal of annexure-2, the application filed by the petitioner in the court below for dropping the proceeding initiated against him, it appears that for the first time the cheque was returned on 18.11.2003 and thereafter on 2.12.2003 complainant sent pleader notice to the petitioner for payment. From perusal of annexure-3, the order passed on the petition as contained in annexure-2, it appears that the complainant (O.P. No. 2) had not controverted the aforesaid facts brought on record by the accused-petitioner. Thus it appears that the complainant admitted the aforesaid fact that first notice was given on 02.12.2003. It is admitted by the complainant that second time the cheque was again produced in the bank on 8.2.2004 which was returned on 15.3.2004 and second legal notice was given on 19.3.2004, thereafter the present complaint petition filed on 11.7.2004.

7. Section 138 and 142 of the N.I Act are relevant for resolution of the controversy between the parties. On the joint reading of aforesaid two sections of the N.I. Act the following facts are required to be proved successfully for prosecuting the drawer of the cheque:

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt or liability and the said cheque was produced in the bank for encashment within six months.

(b) The cheque was dishonoured

(c) The payee send written notice to the drawer within 30 days from the date of receipt of information regarding the dishonour of the cheque

(d) The drawer failed to make payment within 15 days of the receipt of the notice.

Section 142(b) of the N.I. Act prohibits a court from taking cognizance if the complaint has been filed after one month of the date on which the cause of action arose under Clause (C) of Proviso to Section 138 of the N.I. Act.

8. As Noticed above in the instant case for the first time the cheque was returned on 18.11.2003 with endorsement of insufficient fund thereafter an advocate notice was sent to the accused-petitioner on 2.12.2003. The complainant at paragraph No. 5 of

the complaint petition admitted that on being approached the accused-petitioner assured that the cheque will be honoured if the same will be presented for the second time for encashment. The aforesaid fact shows that the notice dated 2.12.2003 has been received by the accused-petitioner and the same was in the knowledge of complainant. It has been held by their Lordships of Supreme Court in [Sadanandan Bhadran Vs. Madhavan Sunil Kumar](#), that once a notice under Clause (b) of Section 138 of the N.I. Act is received by the drawer of the cheque, the payee or holder of the cheque forfeit his right to again present the cheque as cause of action has accrued when there was failure to pay the amount within the prescribed period and the period of limitation start to run which cannot be stopped on any account.

9. In Prem Chandra Vijay Kumar v. Yaspal Singh and Anr. reported in (200)4 SCC 417 it has been held by Hon''ble Supreme Court that it is well settled that if the dishonour of a cheque has once snowballed into the cause of action it is not permissible for payee to create another cause of action with the same cheque.

10. The cheque in question returned to the complainant for the first time on 18.11.2003 with endorsement of insufficient fund and thereafter the pleader notice was given on 2.12.2003 and the same had already been received by the accused-petitioner, thus in view of the aforesaid law laid down by their Lordship of Supreme Court, it is not permissible for the complainant to present the cheque for the second time for creating another cause of action. In the instant case, I find that the complaint petition has been filed on 11.7.2004 much after the period of limitation as prescribed u/s 142(b) of the N.I. Act.

11. The contention of learned Counsel for the petitioner that as per the Proviso to Section 142 Clause (b), the court can take cognizance of the offence even beyond the prescribed period if the complainant satisfied the court that he had sufficient cause for not making a complaint within such period, appears to be misconceived.

12. From perusal of the impugned order, I find that the learned court below had no where stated that the complainant (O.P. No. 2) had shown sufficient cause for not making a complaint within such period. In other words, the learned court below had not condoned the delay for filing the complaint petition beyond the period of limitation. Under the said circumstance, the proviso to Clause (b) of Section 142 of the N.I. Act have no application in the facts of this case. Hence the aforesaid contention raised by learned Counsel for the petitioner is hereby rejected.

13. Since the complaint petition has been filed beyond the period of limitation, therefore, I am of the view that the impugned order is violative of Section 142 Clause (b) of the N.I. Act; therefore the same cannot be sustained.

14. In the result, this application is allowed. The impugned order dated 9.6.2004 passed by Sub-Divisional Judicial Magistrate, Deoghar in P.C.R. Case No. 50 of 2004 corresponding to T.R. Case No. 1402 of 2004/1208 of 2005 is hereby quashed.

Consequently, the entire criminal proceeding in the aforesaid case is also quashed.