

(2004) 02 JH CK 0022

Jharkhand High Court

Case No: Criminal Revision No. 138 of 1998 (R)

Om Prakash Kapoor

APPELLANT

Vs

State of Bihar (now Jharkhand)
and Another

RESPONDENT

Date of Decision: Feb. 23, 2004

Acts Referred:

- Negotiable Instruments Act, 1881 (NI) - Section 138, 142

Citation: (2004) CriLJ 3229 : (2004) AIR Jhar HCR 1990 : (2004) 23 AllIndCas 547 : (2004) 4 BankCas 431 : (2004) 2 BLJR 1282 : (2004) 3 CurCriR 519 : (2004) 2 EastCriC 277 : (2005) 1 CivLJ 294 : (2005) BankJ 121 : (2005) 1 BankCLR 592 : (2004) 4 BC 43

Hon'ble Judges: Vikramaditya Prasad, J

Bench: Single Bench

Advocate: Jal Prakash and R.K. Bobby, for the Appellant; A. Sinha, for the Respondent

Final Decision: Allowed

Judgement

Vikramaditya Prasad, J.

This revision is directed against the judgment dated 18.2.1998 passed in Cr. Appeal No. 35/1993, whereby and whereunder the learned appellate Judge set aside the conviction of the revisionist u/s 420 IPC, but confirmed the conviction u/s 138 of the Negotiable Instruments Act (hereinafter referred to as the Act) and also confirmed the sentence of one year R.I. passed by the trial Court. .

2. The impugned judgment has been mainly challenged on the grounds that the notice required u/s 138 of the Act was not served upon the revisionist; consequently, the cause of action did not arise to the complainant and in view of the provisions of Section 142(1) of the Act, the cognizance could not have been taken. Therefore, the prayer made is to set aside the conviction and acquit the revisionist.

3. The aforesaid conviction arises out of the short facts that the revisionist used to carry business in the name of M/s. P.K. Enterprises and M/s. Everest Trading

Company having its office at P.P. Compound, Ranchi. According to the prosecution story, the complainant brought two consignments from Faridabad to Ranchi which were booked by M/s. S.K.N. Associates (P) Ltd. in favour of the revisionist vide consignment No. 209346-47. Since the complainant carried these goods to Ranchi and informed the revisionist to take delivery after producing consignee copy of bill. However, the revisionist on 1.7.1987 requested and got delivered these consignments on promise to submit the consignee copy within thirty days. When the consignee copy was not submitted to the complainant and the payment was not made to the original consignor, the complainant demanded Rs. 63,882/- from the revisionist through letters. However, the revisionist in spite of repeated request and reminders paid only Rs. 5,200/- in cash and further issued four post dated cheques payable at State Bank Of India, Doranda Branch, Ranchi, bearing Nos. 216451 dated 30.7.1989, 216452 dated 30.8.1989, 216454 dated 30.9.1989 and 216455 dated 30.10.1989, all of Rs. 15,000/- each. The revisionist further assured the complainant that these cheques would be cleared on dates mentioned over it. However, this promise also was found unfulfilled because these cheques when sent for collection were dishonoured. The complainant again approached the revisionist, who was again reassured that by 30.8.1989 these payments would be cleared. In spite of the assurance, the cheques mentioned above bounced and returned dishonoured. This led to serving a notice on the revisionist without any reply. Therefore, the complainant finally had to file the complaint case on 30.11.1989.

3. The admitted position is that the revisionist had delivered cheques bearing Nos. 216451, 216452, 216454 and 216455, Ext. 3 series and they were drawn on 30.7.1989, 30.8.1989, 30.9.1989 and 30.10.1989 respectively. The first cheque was presented for encashment on 12.8.1989, it was dishonoured on 14.8.1989. The second cheque was presented in the Bank on 30.8.1989, it was dishonoured on 1.9.1989. The third cheque was presented on 3.10.1989 and was dishonoured on 4.10.1989. With regard to first and second cheques i.e. 216451 and 216452, an Advocate's notice was sent, vide Ext. 17, which appeal to have been returned with endorsement of the postal peon "Ranchi Se Bahar Gaya Huhe Hai", vide Ext. 7 and 77A and with regard to the third cheque, i.e. 216454, a registered Advocate's notice was sent on 10.10.1989, Ext. 11, and that was returned with endorsement of the postal peon as "refused", Ext. 10 and 1071. This endorsement is of 21.10.1989. The complaint was filed on 3.1.1989.

4. Section 138 of the Act reads as follows :-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.--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 debt or other liability, is returned by the bank unpaid, 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 the 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."

Under the aforesaid proviso (b) of Section 138 of the Act, the payee has to send a notice in writing within 15 days of the receipt of the information regarding return of the cheque as unpaid and if after receipt of such notice, within 15 days the drawer does not make payment, he (drawer) becomes liable under this section. No doubt, there is no mandatory requirement that notice must be sent by registered post but the written notice must be received by the drawer of the cheque and if the notice has not been received by the drawer, then the aforesaid requirement under this section is not fulfilled and consequently, no cause of action does arise against the drawer of the cheque. So in order to find whether there was cause of action or not, the prosecution has to prove that the notice was sent by the payee within 15 days of the information of dishonour of the cheque and the payee has to wait for 15 days after the date of receipt of such notice by the drawer and after expiry of 15 days from the date of receipt of the notice by the drawer, the cause of action arises. Here the facts stated do show that so far the first and second cheques bearing Nos. 216451 and 216452 are concerned, though the information of their being dishonoured was of 14.8.1989 and 1.9.1989, yet as per the Ext. 17, the notice was sent on 20.9.1989; thus, it is clear that this registered notices were sent after one month and five days of the dishonour of the first cheque and 19 days after the dishonour of the second cheque. Though in the notices, Ext. 17, it has been stated that earlier also, the drawer of the cheque had been asked to make payment but no document has been brought on record that any previous notice was given prior to this notice (Ext. 17). So that statement in the notices, Ext. 17, does not help the prosecution. Thus, it is clear that notice, which was required to be sent within 15 days of the information of the dishonour of the cheque, has not been complied, so far the first and second cheques are concerned. Moreover, this notice, Ext. 17, had been returned unserved because the postal peon wrote "Ranchi Se Bahar Gaye

Huain Hai".

Coming to the third cheque, it is found that the notice was served on 21.10.1989 as per Ext. 10/C. As this cheque was dishonoured on 4.10.1989 and the notice was sent on 10.10.1989, the notice was within time of 15 days and as it is said to have been served on 21.10.1989, the cause of action could have been arisen only after expiry of 15 days computed from 21.10.1989, i.e. 7.11.1989. The instant complaint as it appears from the perusal of the Lower Court records was filed on 3.11.1989. The learned Appellate Court did not examine this aspect of the matter. Section 142 of the Act reads as follows :--

"142. Cognizance of offences.--Notwithstanding anything contained in the Code of Criminal Procedure, 1973,--

no Court shall take cognizance of any offence punishable u/s 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;

(a) such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138;

(b) 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."

6. The discussion aforesaid shows that the last notice, which is found to have been refused, includes recitation of the dishonour of all the three cheques bearing No. 216451, 216452 and 216454. Thus, the last notice, Ext 11/A, which was refused, clubs all the three dishonoured cheques in one notice, when it is clearly found that with regard to first two cheques, neither the notice was given within the statutory period, nor it was served upon the revisionist, nor the complaint in respect of those two cheques was filed within one month of the cause of action, rather it will be fair to say that in respect of those two cheques, because of the notice having been issued after expiry of 15 days, yet it is being not served upon the revisionist, the cause of action did not arise, so far as the first two cheques are concerned. But this is not with regard to the third cheque because the notice was given within time and it was also served, but the complaint was filed prior to the date on which the cause of action against the third cheque arises. In a similar case, where the four cheques were dishonoured on four occasions and four instances were clubbed together in a single case by the Magistrate, the Madras High Court in the case reported in [M/s Printo Stick and another Vs. M.L. Oswal](#), held that it violated the provisions of Section 219 Cr PC and the Magistrate was directed to ask the complainant on each of those four cheques, he would have prosecution maintained. In this case, as the complaint was filed before the cause of action having been arisen, Such direction is not also required because in absence of any cause of action, the prosecution could not have been maintained. Consequently, I find that the question raised by the revisionist has legal force and for the reasons discussed above, the answer is in

affirmative.

7. In the result, this revision is allowed and the conviction u/s 138 of the Act and the sentence thereunder is set aside. The revisionist is acquitted of the charge with obvious consequences.