(2002) 02 AP CK 0028

Andhra Pradesh High Court

Case No: Criminal Pet No. 1826 of 2001

C.E.I. Consultancy and Another		APPELLANT
	Vs	
Modi World Infotech and Another		RESPONDENT

Date of Decision: Feb. 20, 2002

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 397(2), 397(3), 482
- Evidence Act, 1872 - Section 114
- Negotiable Instruments Act, 1881 (NI) - Section 138, 141(2)

Citation: (2002) 1 ALT(Cri) 517 : (2002) 3 CivCC 375 : (2002) CriLJ 2731 : (2002) 4 RCR(Criminal) 337 : (2002) 3 RCR(Criminal) 306

Hon'ble Judges: C.Y. Somayajulu, J

Bench: Single Bench

Advocate: Kameswara Rao, for the Appellant; Shyam Agarwal, for No. 1 and Public Prosecutor for No. 2, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

C.Y. Somayajulu, J.
This petition is filed to quash the proceedings in Criminal R.P.No. 144 of 2000 dated 22-2-2001 confirming the order in Criminal M.P. No. 1257 of 2000 in C.C.No. 313 of 1999 on the file of the Court of the II Metropolitan Magistrate Hyderabad refusing to discharge the petitioners.

2. 1st respondent filed C.C. No 313 of 1999 against the petitioners for an offence u/s 138 of the Negotiable Instruments Act (the Act) contending that the first petitioner, which is a firm, is being run by C.R. Singh and C. Ramesh Singh, who are father and son and who are responsible for day- to -day business of the said firm, have on 29-91999 and 6-10-1999 issued cheques for the amount due to it and when those

cheques were presented for payment they were dishonoured on 5-10-1999 and 13-10-1999 respectively and intimation of the dishonour of both cheques was received on 11-10-1999 and 20-10-1999 and that it has issued a statutory notice on 22-10-1999 to the petitioners, bringing their notice to the dishonour of cheques and demanding payment of the amounts covered by the cheques and those notices were received by them on 27-10-1999 but they have not" paid the amount till the date of filing of the complaint. The learned Magistrate took cognizance of the case and issued process to the petitioners. Petitioners, after being served with summons, filed Crl. M.P. No. 1257 of 2000 to discharge them on the ground that the averments in the complaint do not show any cause of action against them. The learned Magistrate dismissed that petition. Criminal R.P. No. 144 of 2000 filed by them also met with the same fate. Hence this petition.

3. The main contention of the learned Counsel for the petitioners is that the contention of the 1st respondent that it sent legal notices to the petitioners on 22-10-1999 is prima facie false because the postal receipts produced by the 1 st respondent into the Court, Xerox copies of which are filed with this petition as material documents, clearly show that the notices were sent on 25-10-2000, but not on 25-10-1999 as alleged in the petition, and so it is clear that the notices were in fact sent on 25-10-2000 but not on 25-10-1999 as alleged in the petition and since the receipt of notice of dishonour by the drawer of the cheque is sine qua non for initiation of proceedings u/s 138 of the Act, and since there is no material on record to show that the 1st respondent sent notices to the petitioners before filing of the complaint and it was received by them, the complaint is not maintainable. He placed strong reliance on an unreported judgment of the Bombay High Court in Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar, Criminal Writ Petition No. 561/1992 dt.29-7-1992 (since reported in Rakesh Nemkumar Porwal Vs. Narayan Dhondu Joglekar, extracted in "Cases of Dishonour of Cheques by R. Swaroop, 1994", wherein their Lordships refused to take cognizance of the fresh material produced before them, in support of the case of the complainant that there is a proper notice. He relied on the following observation in para 8 of the above judgment reading:

The position, unfortunately, does not appear to be as simple as that. Undoubtedly, Mr. Jahagirdar has produced before us a certificate, which we have no reason to doubt. However, the acknowledgments that are produced before us do not have any date on them, some degree of ambiguity undoubtedly arises. We do not propose to enter into any controvery with regard to the date of actual service of the notice on the accused for the reason that the law is well settled insofar as this Court will necessarily have to be circumscribed by the record that is produced before it. That record is the record of the material that was placed before the learned Magistrate on 9-8-1991. Admittedly, the affidavit and the certificate that are now shown to us were not before the learned Magistrate and, therefore, it would be highly improper and impermissible for us to base any decision on such material that was not before the trial Court. It is well settled law that in proceedings u/s 482 of the Code of

Criminal Procedure, no new material can be introduced by either party in support of their contentions before the High Court. Reference may only be made to one such decision which is reported in State of Bihar and Another Vs. P.P. Sharma, IAS and Another, and a recent decision of the Supreme Court reported in Smt. Chand Dhavan v. Jawahar Lal 1992 (1) SVLR (CR) 270 Smt. Chand Dhawan Vs. Jawahar Lal and others, The Supreme Court in this case has reiterated once again the well settled position that at the stage of quashing, the Court cannot rely on new material that is sought to be produced before the High Court. This principle cannot be departed from and under these circumstances, we are required to proceed on the basis of the original statement contained in the complaint that the service of the notice was effected on the accused on 29-7-1991. If this date were to be accepted, there can be little dispute about the fact that the complaint presented before the trial Court was well within the time frame of 15 days as prescribed by Section 138(c) of the Negotiable Instruments Act.

Relying on K. Seetharam Reddy v. K. Radhika Rani 2001 (1) Andh LT (Cri) 175, he contended that since the second petitioner is not the drawer of the cheque, the complaint against the 2nd petitioner at least is liable to be quashed.

4. The learned Counsel for the 1st respondent placing strong reliance on Deepti alias Arati Rai Vs. Akhil Rai and Others, and Puran Vs. Rambilas and Another etc. etc., , contended that since both the Magistrate and the learned Sessions Judge, by well considered orders, held against the petitioners, petitioners cannot invoke the jurisdiction of this Court u/s 482, Cr. P.C. and raise the same contentions before this Court and seek quashing of the proceedings when no irregularity is committed by the Courts below. It is his contention that apart from sending the notices by Registered Post, the 1st respondent had also sent notices by Certiflcate of Posting and the office copy of the notice sent by the 1st respondent to petitioners clearly shows that the same was sent by Registered Post Acknowledgment Due and also by Certificate of Posting, and the Certificate of Posting issued by the Postal authorities is also filed along with the complaint, and since the postal acknowledgment received by the 1st respondent from the Postal Department clearly shows that the notices were received by the petitioners in 1999 itself, probably the year ''2000'' mentioned in the receipts given to the 1st respondent by the postal department filed into Court, may be a mistake, and contended that the fact that the postal receipts for registered letters sent by the petitioners contain the year 2000 instead of 1999 by itself is not and cannot be a ground for quashing the proceedings. It is also his contention that the decision in K. Seetharam Reddy (2000 Cri LT 175 relied on by the learned Counsel for the petitioners has no application to the facts of this case, because this is a case where the cheque is issued by a firm and the averments in the complaint clearly disclose that both the petitioners are managing the firm and since as per Section 141(2) of the Act, partnership firm also would be deemed to be a company and the persons in management of affairs of the partnership are also liable for the offence u/s 138 of the Act. 2nd petitioner also can be proceeded against.

5. In reply the contention of the learned Counsel for the petitioners is that since no acknowledgments would be there for letter sent by Certificate of Posting, it is clear that the 1st respondent played fraud on the Court by producing acknowledgments in respect of letter sent by Certificate of Posting, by placing reliance on Clause 31 in Section 1 (General) which relates to "Inland Posf" in the Postal Guide, in support of his contention, which reads--

31. Object in issuing Certificates: The object in granting certificates of posting is to afford the public an assurance that letters and other articles entrusted to servants or messengers for posting have actually been posted. The grant of a certificate will not, however, mean that the letters and articles in respect of which the certificate is issued were fully prepaid with postage stamps, nor will it guarantee in any way the despatch of the articles entered in the certificate on the same day, unless they are handed over well in time to catch the last despatch of mails for the day for the particular destination concerned. It must be clearly understood that the articles in respect of which such certificates are issued are not registered and that they are treated in exactly the same manner as if they had been posted in a letter box. in the event of loss, damage or delay, the certificates will confer no claim for compensation, nor do they furnish any proof of the nature of the contents.

6. Since in para 5 of the complaint it is specifically averred that both C.R. Singh and C. Ramesh Singh, who are father and son, are running the first accused firm and that both are responsible for day-to-day business affairs thereof, K. Seetharam Reddy case (2001 CriLT 175 relied on by the learned Counsel for the petitioners, which arises out of a case filed against a proprietary concern, has no application to the facts of this case.

7. I am unable to agree with the contention of the learned Counsel for the petitioners that the 1 st respondent played fraud on the Court. The documents produced by the 1st respondent along with the complaint include the office copy of the notice dated 20-10-1999 said to have been issued by the 1st respondent to the petitioners and one Kishore Kathera, said to be an employee of the first petitioner, which shows that the same was sent by Registered Post Acknowledgement Due and Certificate of Posting also. There is no bar for a person sending the notice of dishonour both by Certificate of Posting and also by Registered Post. What all Section 138 of the Act requires is sending of notice in writing to the drawer of the cheque demanding payment of the amount covered by the dishonoured cheque. The Section does not lay down that the notice of dishonour should be sent by Registered Post only. in several cases drawers of the cheques, to whom statutory notices of dishonour are sent by Registered Post, manage to evade service of the notice, by getting an endorsement made by the postman that they are not available or absent or that the door is locked for seven days. Obviously with a view to get over of such return of notice sent by Registered Post, statutory notice would be sent by Certificate of Posting and also by Registered Post Acknowledgment Due. Whenever

a notice is sent by Certificate of Posting, a presumption u/s 114 of the Evidence Act would arise, and so it can be presumed that the letter sent under Certificate of Posting was received by the addressee. in this case since notice of dishonour was sent by the Certificate of Posting on 25-10-1999 a presumption can be drawn that within a few days from 25-10-1999 the addressees received the said notice sent by Certificate of Posting. Clause 31 of ''Postal Guide'' relied on by the learned Counsel for the pettioners, accused only states that despatch of the article entered in the Certificate may not be made on the same day, unless it was handed over well within time to catch the last despatch of mails for the day for the particular destination concerned. Therefore, if not on 25-10-1999, the letters sent by Certificate of Posting must have left the post office on the next day, and they can be presumed to have been received by the addressee on the next day or two days later. Therefore, the contention of the learned Counsel for petitioners that notice of dishonour was not served on the petitioner-accused cannot, prima facie, be accepted or believed.

8. I am also not able to agree with the contention of the learned Consel for the petitioners that the 1st respondent played fraud by producing the postal acknowledgments in respect of letters sent by postal certificate. It is not the case of the complainant that the postal acknowledgment filed along with the complaint relate to the letters sent under Postal Certificate. According to the complaint the postal acknowledgment relates to letter sent by registered post. in fact the postal receipts produced by the 1st respondent into Court contain the Court seal dated 13-12-1999. It obviously means that those receipts were produced into Court on 13-12-1999 itself. When the receipts are produced into Court on 13-12-1999 itself, the fact that they contain the date 25-10 2000 obviously means that the year ''2000 mentioned therein is a mistake. It would not be possible for any person to produce a receipt dated 25-10-2000, issued by the Postal Department, info Court on 25-12-1999, because a post-dated receipt dated 25-10-2000 would not be issued by the Postal Department in 1999. If the Court stamp is not avail able on the postal receipts, the contention of the learned Counsel for the petitioners that notices of dishonour were not sent by registered post in 1999 can be said to have some force. When the postal receipts con taining the year 2000 were produced into Court in 1999 itself it is easy to see that the year was wrongly noted as 2000, therein. Moreover, the question as to whether the postal acknowledgments produced by the 1st respondent into Court relate to the notices sent by Registered Post to the petition ers or not has to be decided at the time of trial and not at this stage.

9. There is prima facie material on record to show that the complaint was instituted within the period of limitation after follow ing the procedural requirement mandated by Section 138 of the Act. Therefore, I find no grounds to quash the complaint at this stage.

10. In view of my above conclusion if is really not necessary to decide the various decisions of the Supreme Court relied on by the learned Counsel for the petitioners,

but it is suffice to say that in Krishnan and another Vs. Krishnaveni and another, also the Supreme Court held that the provisions of Section 482, Cr. P.C. cannot be used for circumventing the pro visions of Section 397(3) or 397(2) of the Code. It held that the High Court u/s 482, Cr. P.C, has power to find out even suo motu whether the orders passed by the subordinate Courts are proper or not, in its supervisory jurisdiction. in view thereof, it is clear that merely because the High Court, in its supervisory jurisdiction, can suo motu look into the question whether the order passed bv the subordinate Courts is proper or not, the parties who lost in two Courts can make use of the provision contained in Section 482, Cr. P.C. as a mailer of right, and circumvent the provisions of Section 397(3) of the Code, by seeking review or review of the order of Revisional Court. In this ease the petitioners availed the remedy of revision available to them before the Sessions Court, and had lost the ease before the Sessions Court. Unless they are able to establish that the order passed by the Sessions Court is irregular or unsustainable, they cannot question the order of the Sessions Court in this Court u/s 482, Cr. P.C. Nothing is brought to my notice to show that the order passed by the learned Sessions Judge is erroneous or is unsustainable. For that reason also I find no merits in this petition, which cannot but be said to be an abuse of process of Court.

11. In the result, the petition is dismissed.