

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Case No 561-A 09/ 2005

Date of decision 22-3-2007.

S. Janak Singh vs Pritpal Singh.

Coram:

HON'BLE MR. JUSTICE Y.P.NARGOTRA

Appearing counsel :

For Petitioner(s)/appellants : Mr. K S Johal, Advocate

For the respondents. Mr. K S Puri, Advocate

The petitioner/ accused allegedly issued a cheque dated 13-9-02 for an amount of Rs 1,25,000/- in favour of the respondent/ complainant. Respondent/ complainant presented the cheque before the Bank for encashment, but the same was dis-honoured by the Banker on 4-10-2002 on the ground that account stood already closed since 8-7-2000.

After the bouncing of the cheque respondent/ complainant issued a notice through his counsel dated 26-10-2002 for calling upon the petitioner/ accused to refund the amount of the cheque alongwith interest within 15 days from the date of the receipt of notice.

Notice was sent to the petitioner/ accused under registered cover which after being delivered to the accused/ petitioner on 02-11-02, the acknowledgement thereof was received by the respondent/ complainant. When the petitioner/ accused did not make

the payment of the amount of the cheque to the respondent/ complainant despite of his having received the notice, respondent/ complainant filed the complaint against him under section 138 of the Negotiable Instruments Act before the learned Sub Judge, Judicial Magistrate Ist Class, Jammu on 11-11-2002.

The learned Magistrate by his order dated 18-1-2003 took the cognizance and issued process against the accused/ petitioner.

Pursuant to the process issued the accused/ petitioner appeared before the trial Court and filed an application for seeking dropping of the proceedings. Learned trial Court vide its order dated 9-12-2004 however, dismissed the application of the accused/ petitioner.

Being aggrieved of the cognizance taken against the accused/ petitioner by the trial Court, he has filed this petition for invoking section 561-A Cr.P.C for seeking quashment of the complaint as well as the order dated 9-12-2004 of the trial Court.

I have heard the learned counsel for the parties and perused the record of the case.

The primary contention of Mr. Johal, learned counsel for the petitioner is that the notice issued by the complainant/ respondent was received by the accused/ petitioner undisputably on 2-11-2002. Under the provisions of section 138 of the Negotiable Instruments Act, the cause of action for filing the complaint against the accused/ petitioner would have accrued to the complainant/ respondent, after the expiry of the period of 15 days. However, the complainant instead of waiting and giving 15 clear days to the accused/ petitioner for making the

payment of the cheque amount, filed the complaint under section 138 of the Negotiable Instruments Act on 11-11-2002. So according to him the complaint having been filed before the accrual of cause of action could not be legally entertained by the trial Court and therefore, the cognizance as well as the process issued on the said complaint is bad in the eyes of law, so the complaint as well as the order of taking cognizance deserves to be quashed.

Section 138 of the Negotiable Instrument 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

From the bare reading of the section 138, it is manifest that in a case of bouncing of the cheque the offences would be constituted only when the following conditions are satisfied-

- (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.

In the present case all the above three conditions prima facie stand satisfied.

Section 142 of the Negotiable Instruments Act provides for the manner in which the cognizance can be taken by a Criminal Court of competent jurisdiction on a complaint alleging the commission of the offence under section 138. It provides:-

“ 142. Cognizance of offence – Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

- (a) no court shall take cognizance of any offence punishable under section 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;
- (b) 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;
- (c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 139”.

Under section 142, the rule for taking the cognizance is that the cognizance can only be taken upon a complaint made in writing by the payee or as the case may be, the holder in due course of the cheque, within a period of one month from the date on which the cause of action arises under clause (c) to the Proviso to section 138 of the Act. In the instant case, the complaint in writing un-disputedly has been made by the payee/ holder of the cheque on 11-11-2002. On 11-11-2002 in the circumstances of the case the cause of action for filing the complaint had not accrued to the complainant/ respondent for the reason that the period of 15 days as contemplated by clause (c) of proviso to section 138 had not expired, meaning thereby that the complaint was premature for having been filed before the accrual of the cause of action. However, there is no bar in the Negotiable Instruments Act which prohibits the filing of the complaint before the accrual of cause of action. The bar contemplated by section 142 of the Act relates only to the taking of cognizance and in the case in hand the

learned trial Court admittedly did not take the cognizance immediately on the presentation of the complaint, but had taken the cognizance and issued the process much-after the expiry of the stipulated period of 15 days. In this view of the matter the question arising for consideration is whether filing of the complaint before the accrual of cause of action vitiates the complaint as well as the cognizance order.

Mr. Johal, learned counsel for the petitioner/ accused submits that the defect in filing the complaint vitiates the proceedings. He argues that the complaint filed being pre-mature was not maintainable. In support of his contention he relies upon the case *Sardar Singh Vs Karam Singh*, 1997 Cr.L. J 3751.

In the said case the notice for making the demand had been received by the accused on 16-9-1994 so cause of action for filing the complaint would have accrued to the complainant on 2-10-1994 after the expiry of 15 days period on 1-10-1994. However, the Magistrate before whom the complaint was filed on 1-10-1994 had taken the cognizance on the filing of the complaint. The accused filed an application for dropping the proceedings before the trial Court. The trial Court dismissed the application vide its order dated 6-9-1995. The accused/ petitioner preferred a criminal revision against the said order before the learned Sessions Judge, Jammu who vide his order dated 12-2-1996 made a reference to this Court for setting aside the order of the Magistrate and this Court while accepting the reference observed:-

“The Clause (c) of the Proviso confers on the accused a total period of immunity for a period of 15 days from the date on which the notice has been served on him and within this notice period, it is open to the petitioner to save himself from the consequences of prosecution under section 138 of the Act. The statutory period of 15 days for making the payment by the accused means also that period made available to the accused is for the purpose that during this period no complaint can be filed against him and till the expiry of the period of 15 days no offence can be said to have been committed by the accused”.

Thus the view expressed in the above judgment has been that before the expiry of the period of 15 days from the date of the receipt of the notice issued in terms of clause (c) of section 138 no complaint could be filed by the complainant. The view expressed no longer holds the field and cannot be considered as a good law, in view of the law laid down by the Apex Court. In case *Narsing Dass Tapadia Vs Goverdhan Dass Partani and another*, AIR 2000 SC 2946 Supreme Court while considering the fact of filing of the complaint under section 138 of the Negotiable Instruments Act before expiry of the notice period contemplated by section 138 (c) held as follows:-

“Mere presentation of the complaint in the Court cannot be held to mean, that its cognizance had been taken by the Magistrate. If the complaint is

found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed.

It was further observed:-

“The failure of drawer of cheque to make payment of the cheque within 15 days of the receipt of notice of the payee enables the Court to entertain a complaint. Clause (b) of S. 142 prescribed a period within which the complaint can be filed from the date of the cause of action arising under clause (c) of the proviso to S. 138. No period is prescribed before which the complaint cannot be filed and if filed not disclosing the cause of action in terms of clause (c) of the proviso to S.138, the Court may not take cognizance till the time the cause of action arises to the complainant. Taking cognizance of an offence by the Court has to be distinguished from the filing of the complaint by the complainant. Taking cognizance would mean the action taken by the Court for initiating judicial proceedings against the offender in respect of the offence regarding which the complaint is filed. Before it can be said that any Magistrate or Court has taken cognizance of an offence it must be shown that he has applied his mind to the facts for the purpose of proceeding further in the matter at the instance of the complainant. If the Magistrate or the Court is shown to have applied the mind nor for the purpose of taking action upon the complaint but

for taking some other kind of action contemplated under the Code of Criminal Procedure such as ordering investigation under S. 156 (3) or issuing a search warrant, he cannot be said to have taken cognizance of the offence.”

Thus, in a case where the complainant presents the complaint for an offence under section 138 of the Act before expiry of the notice period contemplated by section 138 (c) the complaint is pre-mature. The Magistrate before whom such complaint is presented may either await maturity i.e. the expiry of the period of notice contemplated by section 138 (c) for taking cognizance or return the same to the complainant for filing the same later after the expiry of the period of 15 days. The Magistrate is not empowered to take cognizance upon such complaint before the expiry of the period of notice contemplated by proviso to clause (c) of section 138. In the present case, the Magistrate took the cognizance on 18-1-2003 while the period of notice had expired on 16-11-2002. Therefore, no illegality or impropriety can be said to have been committed by the learned Magistrate of the Court below in taking cognizance upon the complaint of the complainant. There is no merit in the above contention of Mr. Johal.

Mr. Johal next contends that there was insufficient material available before the learned trial Magistrate in the shape of preliminary statement on which the process could have been issued. This contention is without any force. The memo for returning the

cheque, cheque in original as well as the acknowledgement due indicating the receipt of the notice issued have been placed on record by the complainant/ respondent and in his statement he has clearly spelled out the necessary facts which constituted the offence. Thus, there is no force in this contention of Mr. Johal.

For the afore-said reasons, the petition is dismissed. The record of the trial Court be sent back alongwith the copy of this order for proceeding in the complaint in accordance with law. Mr. Johal shall cause the appearance of the accused/ petitioner before the trial Court on 16-4-2007.