

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl.M.C.209/2009

% Reserved on : 02.02.2009
Date of decision : 09.02.2009

DHANJIT SINGH NANDA ...PETITIONER

Through: Mr. Vijay Aggarwal, adv

Versus

STATE & ANR ...RESPONDENTS

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers
may be allowed to see the judgment? YES
2. To be referred to Reporter or not? YES
3. Whether the judgment should be
reported in the Digest? YES

MOOL CHAND GARG, J.

1. By this petition filed under Section 482 of the Code of Criminal Procedure, Petitioner seeks quashing of summoning order dated 29.01.2005 and criminal complaint bearing no. 95/1/2004 pending in the Court of Metropolitan Magistrate Patiala House New Delhi, filed by the respondent u/s 138 of the Negotiable Instruments Act 1881 hereinafter referred to as (NI Act), against the petitioner on account of dishonoring of the cheque issued by the petitioner, for which payment was not made despite service of the notice within the stipulated time. The complaint was filed within the time prescribed. The petitioner caused appearance in response to the issuance of summons on

02.05.2005. This petition has been filed on 24.01.2009.

2. It is the case of the petitioner that the impugned order lacks application of mind as the summoning order dated 29.01.2005 is a stereotyped-one and has been issued in a cyclostyled format. It is also his case that the complaint has been filed in respect of a debt which is not legally enforceable and that the complaint is even otherwise not maintainable as the respondents were not competent are registered under Section 4 of the Punjab Registration of Moneylenders Act and thus were not entitled to initiate the proceedings in the nature of recovery of the amount so lent by them as alleged. He has relied upon the following judgments in support of his aforesaid submissions; .

- i) Ravinder Goel & Anr Vs. State & Anr 2007 (1) JCC 465
- ii) D.A.Mehta & Ors. Vs. The Regional Director E.S.I. Corporation reported in 1991 (3) CRIMES 72,
- (iii) Pepsi Foods Ltd. Vs. Special Judicial Magistrate, reported in 1998 SCC (CrI.) 1400,
- iv) G.Pankajakshmi Amma & Ors Vs. mathai Mathew (Dead) through LRS and Anr reported in (2004) 12 Supreme court Cases 83; And
- (v) Krishnam Raju Finances Vs. Abida Sultana & Ors 2004 (2) JCC (NI) 130.

3. Arguments were heard on the question of admissibility of such a petition the petitioner in addition to oral submission, also filed a written note.

4. In the case of Pepsi Food Limited and Anr. Vs. Special Judicial Magistrate and Ors. (1998) 5 SCC 749 which has been relied upon by the petitioner the scope of the powers vested in this Court under Section 482 and Article 227 have been considered in the light of the judgment delivered by the Apex Court in Bhajan Lal's Case and it has been held:

21. The questions which arise for consideration are if in the circumstances of the case, the appellants rightly approached the High Court under Articles 226 and 227 of the Constitution and if so, was the High Court justified in refusing to grant any relief to the appellants because of the view which it took of the law and the facts of the case. We have, thus, to examine the power of the High Court under Articles 226 and 227 of the Constitution and Section 482 of the Code.

22. It is settled that the High Court can exercise its power of judicial review in criminal matters. In State of Haryana V. Bhajan Lal this Court examined the extraordinary power under Article 226 of the Constitution and also the inherent powers under Section 482 of the Code which it said could be exercised by the High Court either to prevent abuse of the process of any Court or otherwise to secure the ends of justice. While laying down certain guidelines where the Court will exercise jurisdiction under these provisions, it was also stated that these guidelines could not be inflexible or laying rigid formulae to be followed by the courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any court or otherwise to secure the ends of justice. One of such guidelines is where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. Under Article 227 the power of superintendence by the High Court is not only of Administrative nature but is also of judicial nature. This article confers vast powers on the High Court to prevent the abuse of the process of law by the inferior courts and to see that the stream of administration of justice remains clean and pure. The power conferred on the High Court under Articles 226 and 227 of the Constitution and under Section 482 of the Code have no limits but more the power more due care and caution is to be exercised while invoking these powers. When the exercise of powers could be under Article 227 of Section 482 of the Code it may not always be necessary to invoke the provisions of Article 226. Some of the decisions of this Court laying down principles for the exercise of powers by the High Court under Articles 226 and 227 may be referred to.

5. Thus, the crux of the aforesaid judgment is that the powers vested in this Court under Section 482 of Cr.P.C and under Article 227 of the Constitution of India would depend upon the facts and

circumstances of each case with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

6. In the case of Chandrapal Singh Vs. Maharaja AIR 1982 SC 1238 it was held that;

“11.A frustrated landlord after having met his Waterloo in the hierarchy of Civil Courts, has further enmeshed the tenant in a frivolous criminal prosecution which prima facie appears to be an abuse of the process of law. The facts when stated are so telling that the further discussion may appear to be superfluous.

In para 14 it was also said;

“We see some force in the submission but it is equally true that chagrined and frustrated litigants should not be permitted to give vent to their frustration by cheaply invoking jurisdiction of the criminal court. Complainant herein is an advocate. He lost in both Courts in the rent control proceedings and has now rushed to the criminal court. This itself speaks volumes. Add to this the fact that another suit between the parties was pending from 1975. The conclusion is inescapable that invoking the jurisdiction of the criminal court in this background is an abuse of the process of law and the High Court rather glossed over this important fact while declining to exercise its power under Section 482 Cr.P.C.”

7. In another judgment delivered by the Apex Court in the case of State of Bihar Vs. Murad Ali Khan & Ors (1988) 4 SCC 655 the Apex Court held:

“15. It is trite to say that jurisdiction under Section 482 Cr.P.C, which saves the inherent power of the High Court, to make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising that jurisdiction the High Court should not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. That is the function of the trial Magistrate when the evidence comes before him. Though it is neither possible nor advisable to lay down any inflexible rules to regulate that jurisdiction, one thing, however, appears clear and it is that when the High Court is called upon to exercise this jurisdiction to quash a proceeding at the stage of the Magistrate taking cognizance of an offence the High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet, do not in law constitute or spell out any offence and that resort to criminal proceedings would, in the circumstances, amount to an abuse of the process of the court or not.”

8. In the same judgment the Apex Court also relied upon another judgment delivered in the case of Municipal Corporation of Delhi Vs. R.K. Rohtagi (1983) 1 SCC 1 where it was said

16. It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 of the present code.

9. In the case of Kailash Verma Vs. Punjab State Civil Supplies Corporation and Anr. 2005 2 SCC 571 where the petitioner wanted to invoke provisions under Section 482 after exercising right of revision, the Apex Court held as under:

“29. Section 482 of the Criminal Procedure Code starts with the words ‘Nothing in this Code’. Thus the inherent jurisdiction of the High Court under Section 482 of the Criminal Procedure Code can be exercised even when there is a bar under Section 397 or some other provisions of the Criminal Procedure Code. However as is set out in Satya Narayan Sharma case this power cannot be exercised if there is a statutory bar in some other enactment. If the order assailed is purely of an interlocutory character, which could be corrected in exercise of revisional powers or appellate powers the High Court must refuse to exercise its inherent power. The inherent power is to be used only in cases where there is an abuse of the process of the court or where interference is absolutely necessary for securing the ends of justice.”

10. In the present case the summoning order was passed on 29.01.2005 and has not been challenged by the petitioner before the Addl. District Judge or before this Court by exercising the rights available to him under Section 397 of Cr.P.C. within limitation. The petitioner has approached this Court directly under Section 482 Cr.P.C. that also after a period of 4 years without explaining the delay.

11. Now coming to the facts of this case, the petitioner seeks quashing the order of summoning only on technical grounds. His

first submission is that the summoning order dated 29.01.2005 was a cyclostyled order and has been passed by the Magistrate without any application of mind. However, this is not correct inasmuch as the learned Metropolitan Magistrate in the impugned order has observed:

“PR: A/R of the complainant.

Fresh complaint received on assignment. Be checked and registered.

Affidavit in lieu of preliminary evidence filed. Arguments heard. I have carefully scrutinized the preliminary evidence brought on record by the complainant. The factum of issue and dishonor of cheque is fully established. Legal notice as per law has been duly served. However, no payment has been made. The complaint has been filed within the statutory period. I am of the view that prima facie an offence punishable under Section 138 of N.I. Act is deemed to have been committed by the accused. I take cognizance.

Let the accused be summoned on filing of P.R. And R.C. and through courier for 2.5.05.

M.M./N.Delhi”

12. At the time when the aforesaid order was passed the trial Court had on its record the complaint filed by the respondent under Section 138 of N.I. Act a copy of which has been placed on record by the petitioner himself at page 14 of the paper book. The said complaint categorically states that a loan of Rs. 10 lakhs was given by the respondents to the petitioner on various terms and conditions as set out in the agreement executed between the parties on 05.07.2004 which was to carry interest at the rate of 18% per annum and was to be repaid within a period of 3 months together with an interest totaling to Rs. 10,45,000/-. This fact is also borne out from the reading of the agreement copy of which has been placed on record by the petitioner himself as is available on page 29-37 of the paper book.

13. Para 5 of the complaint further states that it is for the repayment of the aforesaid loan amount the accused handed-over the post dated cheque 05.10.2004 bearing no. 938613 drawn on Punjab National Bank, Greater Kailash Part-II, New Delhi, which was not a cheque for security but had been issued for repayment of loan amount after a period of 3 months from the date of giving of the loan and includes the element of interest also. However when the cheque was presented for encashment on 16.11.2004 it was returned unpaid with the endorsement "funds insufficient". Accordingly the respondent/complainant issued a legal notice dated 22.11.2004 by registered post as well as under certificate of posting which fact is born out from the complaint but despite receipt of the said notice the petitioner failed to make the payment in lieu of the aforesaid cheque and, thus, he became liable to be prosecuted under section 138 read with 142 of Negotiable Instruments Act 1881.

14. It is also borne out from the order passed by the Learned Magistrate that before issuing the summons an affidavit in lieu of the preliminary evidence was also filed, arguments were also addressed and it was only after carefully scrutinizing the preliminary evidence brought on record by the complainant the factum of issue and dishonor of the cheque and sending legal notice which has been duly served and no payment has been made by the petitioner the Court after being satisfied even with

the aspect of the filing of the complaint within the statutory period has issued the summons. Thus it is not a case where the Magistrate had not applied his Judicial Mind before summoning the Petitioner.

15. The judgment delivered in the case of Ravinder Goel Vs. State (supra) only lays down that at the time of issuing of the summons the Metropolitan Magistrate is required to form an opinion. In the present case as stated above there was sufficient material to make out a case for issuing the summons under section 138 of the N.I. Act. Same is the view expressed in the second judgment cited on behalf of the petitioners i.e. in the case of D.A. Mehta and Ors Vs. The Regional Director E.S.I. Corporation 1991 (3) CRIMES 72. The N.I. Act was amended by Parliament taking into consideration the increasing trend of dishonouring of the cheque and to save the commercial transactions which are undertaken by the parties based upon negotiable instruments such as a cheque and it is with a view to ensure that once a cheque is issued it is encashed on presentation, the amendments were made and in particular provisions of Sections 138 and 142 were incorporated, which reads as under:

“138. Dishonour of cheque for insufficiency, etc., of funds in the accounts

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 provisions of this Act, be punished with imprisonment for ²["a term which may extend to two 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 induce 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, ³["within thirty days"] of the receipt of information by him from the bank regarding the return of the cheques 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.

142. Cognizance of offences

¹[Cognizance of offences

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:

²["Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

(c) No court inferior to that of a Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138].

16. Reading of the complaint in the light of these provisions coupled with the documents filed by the respondent with the complaint reveals:

- (a) That an agreement was reduced in writing by the parties acknowledging receipt of a loan of Rs. 10 lakhs by the petitioner from the respondent which was to be repaid after a period of ninety days along with interest @ 18 % which amount was to be repaid by means of the cheque in question after ninety days.

- (b) The cheque in question was issued for repayment of the aforesaid loan after 90 days and was presented accordingly by the complainant. Thus, it was not a security cheque but was a cheque issued for repayment of the loan.
- (c) However, the cheque was dishonoured on presentation by the bankers of the petitioner.
- (d) Notice as required under section 138 of the NI Act was issued to the petitioner within limitation calling upon the petitioner to pay the amount of the dishonoured cheque but it was not complied with.
- (e) The complaint was filed within the period of limitation.

17. As stated above, the summoning order was passed by the Learned Metropolitan Magistrate concerned taking into consideration all the aforesaid facts which have not been denied by the petitioner.

18. In these circumstances to say that the order was passed without any application of mind is without any basis. More so when such an argument is raised after a period of more than four years of the passing of the aforesaid order without challenging the same by way of revision, which is basically to avoid repayment of the amount and to escape the liability and is not bona fide. The Judgment relied upon by the petitioner in support of this argument also does not come to his rescue as it is only when the order is passed without any application of mind some interference can be passed.

19. The submission that the complaint was filed in respect of the security cheque is a misnomer in view of the written

agreement executed between the parties copy of which agreement has been placed on record by the petitioner himself which goes to show that the cheque was issued to repay the loan. Moreover this issue even if has can only be raised during evidence. Reference can be made to a Judgment delivered by the Apex Court reported in the case of A.V. Murthy Vs. B.S. Nagabasavanna (2002) 2 SCC 642 wherein it has been held in view of Sections 118 and 139 of the Negotiable Instruments Act, Section 25(3) of the Contract Act, 1872 and in the presence of a documentary evidence which might amount to acknowledgement reviving the period of limitation. The present case was not one where the cheque was drawn in respect of a debt or liability, which was completely barred from being enforced under law. However, these are matters to be agitated before the Magistrate by way of defence of the respondent. But at this stage of the proceedings, to say that the cheque drawn by the respondent was in respect of a debt or liability which was not legally enforceable, was clearly illegal and erroneous. Therefore, it was held that the Sessions Court and the High Court erred in quashing the complaint proceedings.

20. I have also gone through the other judgments cited by the petitioner but they are of no help in his case in the light of the discussion made above.

21. The next argument addressed by the petitioner that the respondent was debarred from recovering the loan amount being

not a registered money lender does not lie in the mouth of the petitioner for two reasons: The petitioner took the loan from the respondent voluntarily and even executed an agreement in this regard whereby he agreed to repay the same after ninety days with interest. At the same time he also issued the cheque in question for the repayment of the loan but became dishonest when the cheque was presented for encashment. The 2nd reason to reject the argument of the petitioner is that the proceedings under Section 138 of NI Act are not recovery proceeding but are proceedings to punish a person who after issuing a cheque fails to honour the same and also commits a default in paying the said amount on receipt of the notice. The judgment relied upon by the petitioner delivered by Andhra Pradesh High Court is not binding on this Court for the reasons stated above.

22. The powers vested in this court are not to be exercised to help dishonest persons like the petitioner but are meant to avoid miscarriage of Justice or to avoid abuse of the process of court.

23. To conclude, I would say, that in the facts of this case:-

- i. The summoning order was passed based upon the materials available on record.
- ii. The cheque in question was not a security cheque but was issued to repay the loan, which was to be encashed only after 90 days of the loan.
- iii. The question of the petitioner being not a registered money lender is an issue which requires evidences. In any case the point raised is mala fide as it has been

raised after 4 years of the passing of summoning order, obviously to avoid the repayment of loan amount.

- iv. In any event it is not a case where the issuance of summons on the complaint of the respondent has caused any miscarriage of justice or can be said to be abuse of process of the court calling for any interference by this Court in exercise of its powers vested in this Court under Section 482 Cr.P.C. and/or under Article 227 of Constitution of India.

24. In these circumstances the petition filed by the petitioner is dismissed at this stage itself with cost of Rs.50,000/- which shall be deposited by the petitioner with Delhi High Court Mediation Cell within a period of 15 days from today.

February 09, 2009
ag

MOOL CHAND GARG, J.