

AFR

Neutral Citation No. - 2023:AHC:197109

Reserved on 25.09.2023

Delivered on 12.10.2023

Court No. - 81

Case :- MATTERS UNDER ARTICLE 227 No. - 9902 of 2022

Petitioner :- Sunil Kumar

Respondent :- State of U.P. and Another

Counsel for Petitioner :- Narendra Singh Chahar, Girish Kishor Sharma

Counsel for Respondent :- G.A., Mohit Kumar

Hon'ble Mrs. Jyotsna Sharma, J.

1. Heard Sri Narendra Singh Chahar, learned counsel for the petitioner, Sri Mohit Kumar, learned counsel for the respondent no.2 and learned A.G.A. for the State.

2. This petition has been filed by the petitioner- Sunil Kumar with a prayer that the summoning order dated 20.12.2018 passed by the trial court and the order of the revisional court affirming the same, passed on 24.09.2022, be set-aside.

3. Relevant facts related to this petition are as below:-

The respondent no.2 filed a Complaint Case No.63 of 2017 against the petitioner- Sunil Kumar under sections- 420, 467, 468, 471 I.P.C. and section- 138 N.I. Act with the allegations in nutshell that the accused-petitioner gave an account payee cheque to the complainant-respondent no.2, but the same was dishonoured with the remark that there was no account of that number. After hearing the complainant, the learned trial court took cognizance and issued summons to the accused (the petitioner herein) to face the trial under section- 138 N.I. Act. The accused preferred a revision being Criminal Revision No.40 of 2022, however the same was dismissed and the summoning order was affirmed by the order of the revisional court passed on 24.09.2022.

4. The contention of the petitioner is that the petitioner was not under any legal obligation to discharge any debt or liability and therefore no offence under section 138 N.I. Act is made out. The petitioner is working as Deputy Commissioner of Income Tax and that he cannot engage himself in any business of selling buffaloes. The story given in the complaint is false. Secondly, that notice dated 18.01.2017 was sent to the petitioner, which was replied by him on 23.01.2017. As the mandatory period of 15 days did not lapse between date of receipt of demand notice and filing of complaint case, therefore the essential requirements for constituting the offence under section 138 N.I. Act have not been met. Thirdly, that the

orders passed by court below is illegal, inasmuch as, it requires the accused to deposit Rs.16,20,000/- for compounding of the offence. It is said that the orders impugned are illegal and therefore cannot be sustained in law.

5. The contentions of the petitioner are vehemently opposed by the respondents on the premise that the law provides a presumption to be drawn as regards the liability to pay the debt, as provided in section- 118 of N.I. Act. It is argued that the law provides that until contrary is proved, it shall be presumed that every negotiable instrument was made or drawn for consideration.

The provision of **Section- 139 of N.I. Act** have also been referred to by the respondents which says that it shall be presumed, unless the contrary is proved, that the holder of the cheque received the cheque of the nature referred to in section- 138 N.I. Act for the discharge, in whole or in part, of any debt or other liability.

6. In the light of the above provisions of law, it is argued that the accused-petitioner cannot agitate the matters at this stage. He shall have ample opportunity to put before the court below his side of the defence, on both the counts, as referred to above at appropriate stages of the trial. It is further said that the proceedings under section- 138 N.I. Act are summary in nature and that this is not the stage when such issues could be raised. The matter requires to be heard at the earliest and that, unless some flagrant violation of law is shown, the court is not empowered to interfere in the case in exercise of jurisdiction under Article 227 of the Constitution.

7. Following material things emerge from perusal of the papers:-

*The complainant-Om Pal Singh filed a complaint against the accused person under sections- 420, 467, 468, 471 I.P.C. besides section- 138 N.I. Act. The allegation has been that the accused issued a cheque of Rs.13,50,000/-, as the price of 15 buffaloes he bought from the complainant. The aforesaid account payee cheque no.375595 was submitted in the bank for encashment but the same was returned to the complainant on 06.01.2017 with the remark in memo that “**there was no such account**”. The complainant sent a notice of demand on 18.01.2017, but the same was replied with a concocted story. The allegation is that accused has dishonestly, to obtain unlawful benefit for himself, did not pay the price of the buffaloes and has issued a cheque with a non-existent false account number. Reply to notice of demand is dated 23.1.2017 and the complaint was presented on 03.02.2017.*

8. The provisions of section- 138 N.I. Act are as below:-

“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 provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], 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 3 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 thirty 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.”

9. From bare reading of the above, it becomes clear that the provisions of section 138 N.I. Act are attracted when a cheque is dishonoured and returned by the bank unpaid for two reasons – **Firstly**, for insufficiency of funds; **Secondly**, if it exceeds the amount arranged to be paid from that account.

10. This is well-known that a cheque may be dishonoured for a number of reasons, which may range from such innocuous reasons as dissimilarity of signatures, incomplete signatures of the drawer, stopping a withdrawal owing to death of account holder, instrument being post dated or out dated or lacking any proper date, account having been transferred to another branch, lack of endorsement of payee, difference in name and many more. One of the reasons could also be an instruction to stop the payment but that point is not in issue here. Hence, no elaboration is required. The point which I want to emphasize is that, that the cause of action to file a complaint for the offence of section 138 N.I. Act requires dishonour of cheque for a particular reason as given in the section 138 N.I. Act. However, where cheque is dishonoured for any technical reason or reason, which may be categorized as innocuous one, the provisions of section 138 N.I. Act may not be attracted.

11. In the instant case, the cheque was dishonoured as no such account was found. The copy of memo is on record which verifies the fact that the cheque in question was dishonoured for that reason only. The demand notice issued by the complainant clearly said that the bank dishonoured the cheque with a remark "ऐसा कोई खाता नहीं है". The respondents in his

counter affidavit has not given any explanation regarding the remark mentioned in the memo of dishonour.

12. Further, it may also be noted that the respondent has never denied that the cheque bore his signature. In his reply to the notice admittedly given by him on 23.01.2017, he has given a different story that his 'signed cheque' was misused by the complainant. He has nowhere given any explanation as regard having no account of that number. In his reply to the notice given by the petitioner, he never said that no legally payable debt was due on him, or that he never purchased any buffaloes from the complainant; or that the allegations in the demand notice dated 18.01.2017 are wholly false. Rather his defence is that his signed cheques were stolen.

13. The summoning order and the order passed by the revisional court affirming the same has been challenged mainly on two grounds – **Firstly**, there was no legally dischargeable debt or liability on him; **Secondly**, that the complainant did not let the prescribed period of 15 days to lapse from the date of the notice. Therefore, the ingredients for constituting the offence under section 138 N.I. Act are not fulfilled, hence the summoning order is bad in law.

These facts are not disputed.

* The cheque was presented on 03.01.2017.

* Same was dishonoured on 06.01.2017 with a remark that “ऐसा कोई खाता नहीं है” and the information was received by him the same day.

* Notice of demand bears a date of 18.01.2017.

* The reply by the accused to the demand notice was given on 23.01.2017.

* The complaint has been filed on 03.02.2017.

14. From the above, it is indisputable that the demand in writing was raised within 30 days of the receipt of information of dishonour of cheque. From the reply given by the accused to the demand notice, it is clear that he received the information of such notice on 21.01.2017. If the above date i.e. 21.01.2017 is excluded from counting, the cheque amount should have been paid by 05.02.2017. 05.02.2017 is the most important date on which, as per the provisions of section 138(c) N.I. Act cause of action actually arose. Now, the provisions of section 142(1)(b) N.I. Act come into play which say that “such complaint has to be filed within one month from the date from which the cause of action arise under clause (c) of proviso to section 138 N.I. Act.

From the papers on record, the position emerges that the complaint was filed on 03.02.2017 i.e. even before the prescribed period of 15 days had elapsed.

15. In **Rajeshwar Prasad Bhardwaj vs. State of U.P. and Others, 2019 (107) ACC 79**, while dealing with similar issue it was held:-

“The provision of section 138, including Clause (c) to the Proviso, being penal, have to be strictly construed. In short, there can be no valid complaint, before the expiry of the period of 15 days from the date of service of a notice of demand, upon the payee by the drawer. Proceedings taken on the basis of a complaint brought earlier, would not at all be maintainable.”

The above conclusion was drawn by the court on the basis of law laid down by the Supreme Court in **Yogendra Pratap Singh vs. Savitri Pandey and Another, 2014 (87) ACC 602 SC**.

The position of law as explained in the above mentioned case of **Rajeshwar Prasad Bhardwaj (supra)**, applies to the facts of instant case, therefore, the summoning order, as far as the offence under section 138 N.I. Act is concerned, is bad in law and is liable to be set-aside.

In my view, the summoning order is against the provisions of law on two grounds – First, that the cheque was dishonoured for the reasons which are not covered under section 138 N.I. Act; Secondly, the complaint is pre-mature, inasmuch as, it was filed before the cause of action arose.

16. The matter does not end here. The story as given in the complaint says that a cheque in question was prepared and executed by the drawer with the intention to cheat the complainant; the complainant was cheated of his money. In the statement given by the complainant under section 200 Cr.P.C., it is stated by the complainant that both the sides are well acquainted with each other; the complainant's in-laws family resided in the same village as the accused persons and that the complainant had faith on him; they were engaged in buying and selling of buffaloes; as a price for certain buffaloes purchased by the accused, he was given a cheque of Rs.13,50,000/-. This fact has come in evidence that the cheque was dishonoured because there was no such bank account. In the reply given by the accused he has said nothing about that bank account number rather (in his reply to notice dated 23.01.2017), he has said that some cheques of his cheque book were missing and he lodged a report with Police Station-Sadar, District-Saharanpur. He has not denied that cheque in question was not signed by him. From perusal of reply to notice and the report, it seems that he is taking a defence that cheque in question, some how fell in the hands of complainant and he misused it.

Now the pertinent question arises whether an offence of ‘cheating’ is prima-facie made out on the basis of the complaint story, the oral evidence under sections 200/202 Cr.P.C. and the papers produced in support thereof.

17. The trial court as well as the revisional court completely ignored the fact whether from the material on record, if not, the offence under section 138 N.I. Act, any other offence is made out.

18. The Court is of the view that no offence under section 138 of N.I. Act is made out and the summoning order has been passed in flagrant violation of law and therefore this is a fit case for exercise of powers under Article 227 of the Constitution of India. Hence the impugned summoning order dated 20.12.2018 of the trial court and the impugned order dated 24.09.2022 of the revisional court are hereby **set-aside**.

19. The learned trial court is directed to give an opportunity of hearing to the complainant and pass a fresh order according to law in the light of the observations given in the body of the judgement.

20. Accordingly, this petition is **disposed of**.

21. Copy of the order be immediately certified to the court concerned for necessary action.

Order Date :- 12.10.2023

Saif/Vikram/-