

GAHC040003692023

2024:GAU-AP:1094



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.Petn./44/2023

M. Srinivasa Kumar S/o Late M.V Krishna Rao,
Managing Director of Absolute Build Concept Private Limited, Bangalore,
Having its office at No. 1417 Main, 3rd Block East Jayanagar Bangalore, PIN
560011, Karnataka.

VERSUS

Mibom Pertin S/o Late Gora Pertin,
R/o Bolung Village, PO/PS Roing, Dist. Lower Dibang Valley, Arunachal Pradesh.
Pin 792110

Advocate for the Petitioner : B.K Mishra,

Advocate for the Respondent : Tony Pertin, T Mize, Mingkong Pertin, H K Jamoh

BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR

Date of hearing : 10.12.2024

Date of Judgment : 10.12.2024

Judgment & Order(Oral)

Heard Mr. S. Bhattacharjee, learned counsel, appearing on behalf of the petitioner. Also heard Mr. Tony Pertin, learned counsel, appearing on behalf of the sole respondent.

2. The petitioner, herein, by way of instituting the present criminal petition, has presented a challenge to an order, dated 01.05.2019, passed by the Court of learned Chief Judicial Magistrate, Lower Dibang Valley District, Roing, taking cognizance in C.R. Case No. 02/2019, against the petitioner, herein.

3. The petitioner and the sole respondent, herein, had executed a memorandum of understanding on 29.09.2018, towards supply of HSD/Diesel in connection with the works involved for the formation cutting work for the execution of two laning of existing Hunli-Anini road as well as to take-over the machineries involved as mentioned in the said memorandum of understanding and accordingly, 5(five) post-dated cheques for payment of the dues, came to be issued by the petitioner, herein.

4. It is submitted that the sole respondent, herein, had taken away the machineries but did not return the cheques so involved. The cheques so involved were for varying amounts and were drawn on Vijaya Bank, Pasighat Branch. It is projected that the cheques, in question, were presented for clearance. However, the same had bounced on account of insufficient funds.

5. It is projected that the sole respondent in respect of the 2(two) cheques that had bounced i.e. (i). Cheque No. 307350, dated 25.10.2018, amounting to Rs. 20,00,000/- which had bounced on 22.01.2019; and (ii). Cheque No. 920882, dated 15.11.2018, amounting to Rs. 20,00,000/- which had bounced on 16.02.2019; sent a legal notice on 22.02.2019, to the petitioner, herein, demanding payment of the amount involved within a period of 15 days.

6. With regard to the other 3(three) cheques i.e. (iii). Cheque No. 920883, dated 30.11.2018, amounting to Rs. 25,00,000/- which had bounced on 27.02.2019; (iv). Cheque No. 920884, dated 15.12.2018, amounting to Rs. 25,00,000/- which had bounced on 13.03.2019; and (v). Cheque No. 920885, dated 31.12.2018, amounting to Rs. 31,33,707/- which had also bounced on 13.03.2019; another legal notice came to be issued by the sole respondent to the petitioner through his Advocate on 29.03.2019.

7. It is seen that the payments involved not being paid by the petitioner, herein; the sole respondent by amalgamating the 5(five) cheques in one proceeding, proceeded to institute a compliant case being C.R. Case No. 02/2019 under Section 142 of the Negotiable Instrument Act, 1881, for commission of an offence under Section 138 of the Negotiable Instrument Act, 1881, *read with* Section 420 of the Indian Penal Code, before the Court of learned Chief Judicial Magistrate, Lower Dibang Valley District, Roing.

8. The learned Chief Judicial Magistrate, Lower Dibang Valley District, Roing, vide order, dated 01.05.2019, noticing the contentions raised in the said complaint petition being C.R. Case No. 02/2019, proceeded to draw a conclusion that there is material of the commission of an offence under Section 138 *read with* Section 142 of the Negotiable Instrument Act, 1881, and accordingly, proceeded to take cognizance of the 5(five) cheques in the matter. The learned trial Court further observed that since the complainant was not present in the Court on 01.05.2019, the matter stood adjourned to 22.05.2019 for recording the statements of the complainant and witness, if any, under Section 200 of the Code of Criminal Procedure, 1973. Having recorded the above; the learned trial Court proceeded to direct for expediting the trial proceedings and in the present case it being a summon procedure; complainant and witness, if any, may like to file the affidavits on or before the next date fixed for hearing. It is further contended by the petitioner that on 19.11.2022 and 16.12.2022, the learned trial Court had issued warrant of arrest against the petitioner, herein.

9. Being aggrieved by the said order, dated 01.05.2019, taking cognizance of the complaint case being C.R. Case No. 02/2019 by the Court of the learned Chief Judicial Magistrate, Lower Dibang Valley District, Roing; the present

criminal petition has been instituted by the petitioner, herein.

10. Mr. Bhattacharjee, learned counsel for the petitioner, has submitted that the learned trial Court had miserably failed to examine the matter as to whether an offence was made out in the matter against the petitioner, herein. It is also submitted that while the notices were so issued; the proceeding before the learned trial Court was so instituted beyond the time-frame so mandated under the provisions of Section 142(b) of the Negotiable Instrument Act, 1881.

11. Mr. Bhattacharjee, learned counsel for the petitioner, has further submitted that the learned trial Court without complying with the provisions of Section 200 of the Code of Criminal Procedure, 1973, proceeded to take cognizance. It was further submitted that the learned Trial Court without examining the complainant and/or any witness present, had taken cognizance of the offence. The learned counsel has also submitted that the learned trial Court could not have taken cognizance of the matter without having satisfied itself that an offence under the provisions of Section 138 *read with* Section 142 of the Negotiable Instrument Act, 1881, was borne-out against the petitioner from the materials that were brought on record.

12. Mr. Bhattacharjee, learned counsel for the petitioner, has further submitted that the delay so occasioning in institution of the complaint petition being C.R. Case No. 02/2019 and the same being admittedly beyond the period so prescribed under the provisions of Section 142(b) of the Negotiable Instrument Act, 1881; the learned trial Court ought to have rejected the said complaint petition and no the process in the matter, could have been so issued to the petitioner, herein.

13. Mr. Pertin, learned counsel appearing on behalf of the sole respondent, has fairly submitted that the complaint petition filed on 01.05.2019, insofar as the legal notice, dated 22.02.2019, is concerned; was so filed admittedly beyond the time-frame so prescribed in the provisions of Section 142(b) of the Negotiable Instrument Act, 1881.

14. Mr. Pertin, learned counsel, has further submitted that even considering the legal notice, dated 29.03.2019, also, the complaint case, noted-above, was so filed beyond the period of 30 days stipulated for filing of the present complaint and the same was hit by the provisions of Section 142(b) of the Negotiable Instrument Act, 1881, in being time barred.

15. I have considered the submissions advanced by the learned counsels appearing for the parties and also duly perused the materials made available on record.

16. A perusal of the complaint petition being C.R. Case No. 02/2019, goes to reveal that on bouncing of the said cheques, the said aspect of the matter was brought to the notice of the petitioner, herein, and it is contended that the petitioner had acknowledged the same by issuing *whats app* messages. Accordingly, the bouncing of the cheques being to the knowledge of the petitioner, herein, proximate to the time of bouncing of the same; the period of limitation for institution of the proceeding arose in the matter immediately after the same being brought to the knowledge of the petitioner, herein, by the respondent and accordingly, it is to be construed that the C.R. Case No. 02/2019 was admittedly so filed beyond the period of limitation as mandated under the provisions of Section 142(b) of the Negotiable Instrument Act, 1881.

17. At this stage, the purport of the provisions of Section 138 and Section 142 of the Negotiable Instrument Act, 1881, is required to be noticed:

"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 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 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 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.*

42. 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:*
[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 Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.]"*

18. The proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonor of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have 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. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make 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. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.

19. Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non obstante clause. It provides that 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, by the holder in due course and 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. In terms of clause (c) to Section 142, no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class is competent to try any offence punishable under Section 138.

20. A careful reading of the above provisions makes it manifest that a complaint under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of the proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) of the proviso to Section 138 of the Act.

21. The presentation of the cheque and dishonor thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes "cause of action" within the meaning of Sections 138 and 142 (b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For a dishonor to culminate into the commission of an offence of which a court may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque, and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonor of the cheque that the holder/payee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him.

22. In view of the categorical admission made by Mr. Pertin, learned counsel for the sole respondent, in the matter that the complaint was filed beyond the period of limitation and noticing that the learned trial Court had proceeded to take cognizance of the matter vide the order, dated 01.05.2019, without examining the complainant under the provisions of Section 200 of the Code of Criminal Procedure, 1973, and also examining as to whether an offence in the matter was so made-out against the petitioner in terms of the provisions of Section 138 of the Negotiable Instrument Act, 1881, this Court is of the considered view that the Trial Court erred in passing the order dated 01.05.2019 in the C.R. Case No. 02/2019.

23. In view of the above discussion, the order, dated 01.05.2019, passed by the learned trial Court in C.R. Case No. 02/2019 being so passed in clear

violation of the provisions of Section 142(b) of the Negotiable Instrument Act, 1881, and also in violation of the provisions of Section 200 of the Code of Criminal Procedure, 1973; in the considered view of this Court, the same cannot be so sustained and accordingly, the order, dated 01.05.2019, stands set aside along with all consequential orders passed thereon including the warrants of arrest so issued against the petitioner, herein.

24. With the above directions, this criminal petition stands disposed of.

JUDGE

Comparing Assistant