IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.07.2020
Pronounced on : 14.07.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.23631 of 2015
and
Crl.M.P.No.1 of 2015

Parivel ... Petitioner

Vs.

C.Parivallal ... Respondent

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the record and quash the proceedings in C.C.No.144 of 2014 on the file of the learned Judicial Magistrate-III, Puducherry.

For Petitioner : Mr.S.C.Vishwanth
For Respondent : Mr.P.Suresh

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ORDER

The petitioner who is an accused in C.C.No.144 of 2014, filed by the respondent for the offence under Section 138 of the Negotiable Instruments Act, 1881, before the learned Judicial Magistrate No.III, Puducherry, has filed this quash petition.

2.For the sake of convenience, the petitioner and the respondent are referred by their ranks in the lower Court.

3.The gist of the case is that the complainant was in the real estate business and the accused is a close friend of the complainant. During December 2013 and January 2014, the accused had requested the complainant for urgent cash loan to meet his family expenses. The complainant gave a sum of Rs.5 lakhs on various dates during this period. The accused in discharge of his liability of loan amount of Rs.5 lakhs, gave post dated cheque vide cheque No.815357, dated 07.07.2014 for an amount of Rs.5 lakhs, drawn on Indian Bank, 100 Feet Road, Pondicherry Branch. The complainant presented the cheque with his bank namely HDFC, 100 Feet Road, Ellaipillaichavady, Puducherry on 07.07.2014 for encashment, the same was returned with an endorsement "Refer to Drawer and Present Again" with bank memo dated 08.07.2014. Thereafter, the complainant informed the accused about the dishonour of cheque. The accused requested the complainant to present the cheque one week thereafter and promised the cheque would be duly honoured. Accordingly, on 18.07.2014, the cheque was presented again for encashment. This time also, the cheque was not honoured and returned with an endorsement "Refer to Drawer and Present Again", vide bank memo dated 18.07.2014. Thereafter, the complainant sent a legal notice dated 07.08.2014 which was received by the accused on 12.08.2014. The accused neither made any payment nor sent any reply. Therefore, the complainant filed a case before the concerned Court. The accused appeared in this case, received the copies and thereafter, the complainant filed his proof affidavit and documents along with Exs.P1 to P6 on 22.05.2016.

4.The contention of the learned counsel for the petitioner/accused is that the cheque in this case was not returned for the reason of insufficient funds and it was returned with endorsement "Refer to Drawer and Present Again", which would not attract the provisions under Section 138 of the Negotiable Instruments Act, 1881. The further contention is that the statutory notice specifying 7 days which is against the provisions. In view of the violation of statutory provisions, the lower Court taking cognizance of the complaint is bad in law and the continuation of proceedings would amount to abuse of process of law and prayed for quashing of the complaint.

5.The learned counsel for the respondent/complainant submitted that the complainant and the accused are close friends, known to each other. During December 2013 and January 2014, the accused sought loan for some urgent family commitments. The complainant by pledging his jewels in HDFC Bank on 10.02.2013, had given the loan of Rs.5 lakhs to the accused. The accused after receiving the amount, promised to pay the loan amount. In discharge of his liability, the accused gave cheque for Rs.5 lakhs drawn on Indian Bank, 100 Fee Road, Puducherry Branch. The said cheque was presented on 07.07.2014 for encashment. Surprisingly the cheque was dishonoured on 08.07.2014 with bank memo "Refer to Drawer and Present Again". The complainant contacted the accused, informed the same, the accused requested the complainant to present the cheque after a week and promised, the cheque would be duly honoured. Believing the same, the cheque was presented again on 18.07.2014, but again the cheque was dishonoured with an endorsement "Refer to Drawer and Present Again", vide bank memo dated 18.07.2014. Thereafter, the complainant sent a statutory notice dated 07.08.2014 to the accused, who on receipt of the same on 12.08.2014, neither made any payment, nor sent any reply. Hence, the complainant filed a case before the concerned Magistrate, which has been taken on file as C.C.No.144 of 2014. The complainant examined himself as PW1 and marked Exs.P1 to P6. At that stage, this quash petition is filed.

6.The learned counsel for the respondent relied upon the judgment of the Hon'ble Apex Court in the case of "Kishore

Sharma Versus Sachin Dubey in C.A.No.1325 of 2019", wherein the Hon'ble Apex Court had clearly held that "legal notice has been sent within statutory period and the reason for return of cheque had been clearly mentioned. If there is any dispute with regard to the facts of the case, it would require the parties to produce the evidence and to be decided during trial and not by way of quash petition."

7.On hearing the submissions and on perusal of the materials, it is seen that the statutory notice was sent to the accused and the accused had received the same. This fact is not refuted by the accused. Further, the cheque has been returned for a reason "Refer to Drawer and Present Again". The relevant portion of Section 138 of the Negotiable Instruments Act, 1881 as under:-

> "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) * * *
>
> (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."

The Act stipulates only demand by giving notice in writing. In this case it has been done.

8.The contention of the learned counsel for the petitioner that the statutory notice should be given with 15 days time. But the respondent had given only 7 days period to repay the loan. Hence, the statutory notice is bad in law cannot be accepted. The Hon'ble Apex Court in the case of "Rahul Builders Versus Arihant Fertilizers and Chemicals and another reported in (2008) 2 SCC 321" had held as follows:-

> "8.Section 138 does not speak of a 15 days' notice. It contemplates service of notice and payment of the amount of cheque within 15 days from the date of receipt thereof. When the statute prescribes for service of notice specifying a particular period, it should be expressly stated. In absence of any such stipulation, it is difficult to hold that 15 days' notice was thereby contemplated. The High Court, therefore, was not correct in arriving at the aforementioned finding."

9.The other contention that "Refer to Drawer and present again" would not attract provisions of 138 of the Negotiable Instruments Act, cannot be accepted and it is clearly held by the Hon'ble Apex Court in the case of "Electronics Trade & Technology Development Corporation Limited, Secunderabad Versus Indian Technologists and Engineers (Electronics) (P) Ltd and another reported in (1996) 2 SCC 739" had held as follows:-

> "5.It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case, "refer to the drawer" (2) "instructions for stoppage of payment" and stamped (3) "exceeds arrangement", it amounts to dishonour within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonour, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied."

10.In this case, it is seen that the statutory notice dated 07.08.2014 have been received by the accused on 12.08.2014 and the bank returned memo has been filed. Further as stated above "Refer to drawer" would attract penal provision of Negotiable Instruments Act. The official of the bank of the accused namely Indian Bank, 100 Feet Road, Puducherry Branch is one of the witness in this case. This witness will give reason for return of cheque and from the statement of account, it can be seen whether the accused was having sufficient balance or not on the date of dishonouring of cheque which fact has to be decided during trial.

11.In view of the above, the contention of the petitioner is not sustainable. The petition is dismissed, accordingly.

12.Taking into consideration the case is pending from the year 2014 and the purpose and object for which the amendment was made in the Negotiable Instruments Act would get defeated, this Court directs the trial Court to proceed with the trial on a day to day basis, conclude the trial within a period of three months from the date of receipt of a copy of this order. No doubt the three months time given would commence after lifting of lock down and normal functioning of the Court below. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(Co MDU)

//True Copy//

Sub Assistant Registrar

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To

The Judicial Magistrate-III,
Puducherry.

Crl.O.P.No.23631 of 2015

A.SK(20/08/2020)