

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.3058 of 2012

Prabhat Satapathy @ Prabat ***Petitioner***
Kumar Satapathy

-versus-

Pratap Kumar Samal ***Opposite Party***

CORAM: JUSTICE S. PUJAHARI

ORDER

30.06.2022

Order

No.

09.

1. This matter is taken up through hybrid mode.
2. This application under Section 482 of Cr.P.C. has been filed by the Petitioner with a prayer to quash the order of cognizance dated 21st March, 2011 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. No.428 of 2011. The aforesaid case has been instituted upon a complaint being lodged by the opposite party against the petitioner alleging commission of offence under Section 138 of the Negotiable Instruments Act, 1988 (hereinafter called 'the N.I. Act').
3. Heard the learned counsel appearing for the Petitioner and Mr. H.N. Mohapatra, learned counsel appearing for the Opposite Party-Complainant.
4. As it appears, in this case, a cheque was drawn by the Petitioner to repay certain debts to the Opposite Party and the cheque having been dishonored when presented for

encashment, the Petitioner was issued with the statutory notice as contemplated under Section 138(b) of the N.I. Act by the Opposite Party to make payment within the statutory period. Since the Petitioner did not pay the same within time stipulated, he sought for certain accommodation. Thereafter, the cheque was stated to have been presented again and the same having been dishonored again, second notice was given to the Petitioner. The Petitioner having not made payment pursuant to the said notice within the time stipulated, the aforesaid criminal prosecution has been launched against him alleging offence under Section 138 of N.I. Act.

5. Petitioner has challenged the order of cognizance on the ground that since pursuant to the first statutory demand notice, a cause of action arose, but the said cause of action having not been acted upon within the time stipulated as prescribed under the N.I. Act, the Petitioner though was entitled to present the cheque within the period of validity for any number times to get the payment, but the same does not entitle him to claim fresh cause of action for criminal prosecution due to dishonor of the cheque by giving second statutory notice demanding payment. According to the petitioner, the Court below could not have taken cognizance on the basis of second statutory notice for failure of the payment pursuant to the earlier note. Reliance in this regard has been placed on the decision of the Apex Court in the cases of *Prem Chand Vijay Kumar v. Yashpal Singh & Another*, reported in 2005 (2) Crimes 195 (SC), *M/s. SIL Import, USA v. M/s. Exim Aides Silk Exporters*, reported in

1999 (3) Crimes 21 (SC) and Sadananda Bhadran v. Madhaban Sunil Kumar, reported in 1998 (3) Crimes 217 (SC).

6. However, learned counsel for the Opposite Party submits that in this case cheque was dishonored and thereafter the Petitioner made part payment to the Opposite Party and requested Opposite Party to re-present the cheque once more. The Opposite Party when re-presented the said cheque again pursuant to such request, it was dishonored again. Hence, he gave the second statutory notice. Therefore, it cannot be said that earlier there was any cause of action and the Opposite Party having not availed of the same, by presentation of the cheque again, he could not have a fresh cause of action. As such, the complaint is bad in view of the law laid down supra as cited by the Petitioner. The learned counsel for the opposite party submits that in given facts and situation, pursuant to a second statutory notice, a complaint is competent. Reliance has also been placed by him on a decision of this Court rendered in the case of ***Radhesyam Pradhan v. Ashok Kumar Sahu, reported in 2018 (I) OLR – 742.***

7. It appears that in the decision cited by the learned counsel for the Petitioner in unequivocal terms, it has been held that when the cause of action arises once for dishonor of a cheque and it was not acted upon, even if the cheque was valid and there is no impediment to present the same for any number time within the period at its validity to get back the amount, but

on dishonor of cheque on such subsequent occasion, by giving a fresh statutory notice as contemplated under Section 138(b) of N.I. Act demanding payment and on failure of the drawer to comply the demand, the payee cannot resurrect a dead cause of action.

8. The law, therefore, is that though there is no impediment in successive presentation of a cheque to get the amount within its period of validity, even if its presentation on different occasions, inasmuch as the Complainant is interested in getting back his money rather than a proceeding against the accused criminally, which is also apparent from Section 138(b) of the N.I. Act. Section 138(b) of the N.I. Act reveals that on dishonor of cheque, the same immediately does not give rise to criminal liability of the drawer of the offending cheque, but to give the drawer of the offending cheque a chance of payment of the amount, by giving him statutory notice within the period prescribed, i.e., to preempt the criminal prosecution. It is only on his failure to repay the amount, the same can attract the criminality. However, on dishonor of a cheque, once notice was issued under Section 138(b) of N.I. Act and the drawer did not comply with such statutory demand to make payment of the cheque amount within the period stipulated, if the payee/holder in due course of the cheque did not file complaint within the period stipulated, on expiry of the statutory period, by giving second statutory notice after re- presentation of the cheque, on the request of the drawer or not, it cannot resurrect a dead cause of action. Allowing such interpretation would be offending the

very statutory provisions with regard to launching of criminal prosecution in relation to an offending cheque.

9. In the case of ***Radhesyam Pradhan*** (supra), it was not emerging from the complaint that cheque was presented for the second time and pursuant to the second demand notice, prosecution was launched. Though such a contention was raised by the accused, this Court refused to quash the proceeding on that ground therein, especially taking note of the settled position of law to interfere in the order of cognizance at the threshold. Therefore, the contentions advanced by the learned counsel for the Opposite Party-Complainant on the basis of the said decision is not acceptable. That apart, the decision of the Apex Court has precedent over contrary view, if any, of this Court on the issue.

10. In the case of ***Pepsi Foods Ltd. and Another v. Special Judicial Magistrate and Others, reported in (1998) 5 SCC 749***, the Apex Court with regard to initiation of criminal prosecution and issuing of summons, have held that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence

both oral and documentary in support thereof to find out as to whether that would be sufficient for the complainant to succeed in bringing home the charge to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the materials brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise, and then to examine if any offence is prima facie committed by all or any of the accused persons. The learned Magistrate appears to have remained oblivious to the aforesaid law laid down by the Apex Court while taking cognizance of the offence and issuing process against the petitioner.

11. Hence, this Court is of the view that the trial court in a most mechanical manner and without taking note of the aforesaid law and mandate of Section 138 of N.I. Act., summoned the Petitioner in the aforesaid case, even though the complaint was incompetent prima facie.

12. I would, therefore, allow this Criminal Misc. Case and quash the impugned order as well as the entire criminal prosecution launched against the Petitioner vide I.C.C. No.428 of 2011 on the file of the learned S.D.J.M., Bhubaneswar. The trial court shall do well to comply with this order on production of the certified copy of this order.

13. However, it goes without saying that the same would not stand on the way of the complainant to recover the cheque amount by filing a suit in an appropriate civil proceeding invoking the exclusion clause of limitation, if available to him.

14. Urgent certified copy of this order be granted on proper application.

(S. Pujahari)
Judge

DA/MRS

