

Delhi High Court

M/S Vijay Polymers Pvt. Ltd. vs M/S Vinnay Aggarwal on 24 April, 2009

Author: Mool Chand Garg

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CrI.M.C.1682/2008 & CrI.M.A.Nos. 6167/2008 & 12878/2008

% Date of reserve : 21.04.2009
Date of decision: 24.04.2009

M/s. Vijay Polymers Pvt. Ltd. & Anr. ...Petitioners
Through: Mr.P.D.Gupta, Mr.Kamal
Gupta and Mr.Abhishek Gupta, Adv.

Versus

M/s Vinnay Aggarwal ...Respondent
Through: Mr.Balwinder Ralhan,
Adv.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG, J.

1. The basis issues which involved in this case are :-

(i) Whether the complaint dated 13.12.2007 (Annexure P-4) filed under Section 138 of the Negotiable Instruments Act (for short "the N.I. Act") by respondent against the petitioner is not maintainable in law inasmuch as, it is pleaded, that the same is based upon the dishonor of a cheque which was issued by petitioner No.2 in lieu of a debt which was not legally recoverable as alleged at the time of issuance of the said cheque?

(ii) Whether the summoning order is sustainable in the facts of this case in view of the judgment of Apex Court delivered in Special Leave to Appeal being SLP (CrI.)1785/2001 decided on 10.9.2001?

2. This petition has been filed by the accused persons who were summoned to face the trial in this case of a charge under Section 138/141 of the N.I. Act vide order dated 21.01.2008, which order was

passed by the trial court taking note of the averments made in the complaint which was filed in support of the complaint. The same reads as under:-

Complainant examined by way of affidavit. Documents filed along with complaint perused. Material on record prima facie discloses commission of an offence u/s 138 N.I. Act by accused. Let accused be summoned on filing of PF/RC, approved courier, dasti for 25.03.08. Steps be taken within a week.

3. To appreciate the factual matrix of this case, it would be necessary to take note of some of the paragraphs of the complaint which are reproduced hereunder:-

2. That the accused no.2 in the month of Jan 2002 approached and asked from the complainant for a sum of Rs.6,00,000/- (Rs. Six Lakhs Only) for the personal needs/friendly loan as the accused was facing some financial crises. On the accused's request the complainant gave you a sum of Rs.6,00,000/- (Rs. Six Lakhs Only) through cheque no.340787 drawn on Punjab National Bank, Lawrence Road Branch, to the accused no.2 as friendly loan. The said cheque was issued in favour of noticee no.1 and was debited in the account of the complainant on 01-02-2002.

3. That thereafter the complainant waited for some time as the accused had promised to repay the friendly loan after six months but he failed to do so. After considerable persuasion from the complainant the accused no.2 in lieu of the above mentioned friendly loan, issued two cheques bearing no.817758 dated 27-04-2006 and another bearing no.817760 dated 31-05-2006 each for a sum of Rs.50,000/- (Fifty Thousand Only) each, each drawn on Bank of India Rajendra Place Delhi, Branch in favour of the complainant towards the part payment against the outstanding dues towards the accused. The said cheques were however encashed on presentation.

4. That thereafter the complainant again waited for some time and after considerable persuasion from the complainant the accused no.1, again in lieu of above mentioned friendly loan, issued two cheques bearing nos.817772 dated 14-08-2006 and another cheque bearing no.817773 dated 30-08-2006 each for a sum of Rs.50,000/- (Fifty Thousand Only) each, each drawn on Bank of India Rajendra Place Delhi, Branch in favour of the complainant towards the part payment against the outstanding dues towards the accused. The said cheques were dishonored on presentation but however the complainant did not take any action on the request of the accused that the entire payment will be cleared very shortly.

5. That again after great persuasion from the complainant the accused no. 2 issued one cheque bearing no.350562 dated 05-05-2007 drawn on ICICI Bank Limited, Punjabi Bagh branch, New Delhi for a sum of Rs.50,000/- towards the part payment against the outstanding dues towards the accused. That the complainant presented the said cheque with the banker but the same was returned unpaid by the accused banker with the remarks "Funds Insufficient" vide memo dated 07-05-2007. The

complainant contacted the accused and the accused requested the complainant to present the same after some time. The complainant again presented the above cheque with his banker but the same was again returned unpaid by the accused's banker with the remarks "Funds Insufficient" as per memo dated 09-10-2007 of the accused bank and as per memo dated 12-10-2007 the complainant's bank which was received by the complainant on 15-10-2007.

6. That the above said cheque bearing no. 350562 dated 05-05-2007 drawn on ICICI Bank Limited, Punjabi Bagh branch, New Delhi for a sum of Rs. 50,000/- was issued by the accused no.2 to the complainant with the clear understanding that the same will be encashed on presentation.

7. That upon return of the said cheques, the Complainant issued a notice dated 12-11-2007 i.e. within a stipulated period from the date of dishonoured cheques having been handed over by the Complainant's banker to her. The said notice was duly served upon the Accused/Respondent. However, the Accused/Respondent neither complied with the terms of the said notice nor replied the same.

4. A perusal of the affidavit annexed with the complaint which has been relied upon by the Metropolitan Magistrate while passing the impugned order also shows that only the averments made in the complaint have been reiterated by the deponent.

5. One thing which is important and can be taken note of is that neither in the complaint nor in the notice nor in the affidavit it has been stated that the debt which became time barred i.e. the amount of Rs. 6 lakhs which was paid by the complainant to petitioner No.1 at the asking of petitioner No.2 on 1.2.2002 was ever acknowledged within the period of limitation so as to keep the liability alive.

6. A perusal of the complaint and other documents as referred to above goes to show that the complainant had paid a sum of Rs. 6 lakhs by way of cheque to petitioner No.1 at the asking of petitioner No.2 somewhere in January, 2002 and the said cheque was credited in the account of petitioner No.1 on 1.2.2002 and was payable after six months and was not paid within three years from 31.8.2002 that is the period within which it was under limitation and as such the loan became time barred as on 31.8.2002. A perusal of the complaint also clarified that first two cheques which stated to have been paid to the complainant by the petitioners were paid on 27.4.2006 and 31.5.2006. Thus those cheques were paid after three years of the friendly loan having become time barred. Similarly, the cheques issued in lieu of the original cheque i.e. a cheque of Rs. 50,000/- bearing No. 817773 dated 30-08- 2006 and another cheque bearing No. 350562 dated 05-05- 2007.

7. It is submitted on behalf of learned counsel for the petitioners that in view of provisions of Section 138 of the N.I. Act and if the same read along with explanation, it is apparent that the offence under Section 138 of the N.I. Act as per the scheme of the Act can be fastened on an accused only if he commits a default in repayment of the dishonoured cheque which was issued in discharge of a legally recoverable debt.

8. Counsel for the petitioners relies upon a judgment delivered by the Apex Court in SLP (Crl.)1785/2001 reported in Sasseriyil Joseph Vs. Devassia decided on 10.09.2001. The same is reproduced hereunder:-

We have heard learned counsel for the petitioner. We have perused the judgment of the High Court of Kerala in Criminal Appeal No. 161 of 1994 confirming the judgment/order of acquittal passed by the Addl. Sessions Judge, Thalassery in Criminal Appeal No. 212 of 1992 holding inter alia that the cheque in question having been issued by the accused for due which was barred by limitation the penal provision under Section 138 of the Negotiable Instrument Act is not attracted in the case.

On the facts of the case as available on the records and the clear and unambiguous provision in the explanation to Section 138 of the Negotiable Instrument Act the judgment of the lower appellate court as confirmed by the High Court is unassailed.

Therefore, the special leave petition is dismissed.

9. Counsel for the complainant/respondent on the other hand tried to suggest that in view of Section 25 of the Contract Act, once the cheque was issued by the petitioners in lieu of their admitted liability, the dishonor of a cheque issued by them and non-payment thereof despite receipt of the notice makes out a case against them under Section 138 of the N.I. Act and therefore, the complaint filed by the complainant was maintainable in accordance with law.

10. To appreciate the contentions of parties, the provisions contained under Section 138 of the N.I. Act are reproduced hereunder:-

Section 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 provisions of this Act, be punished with imprisonment for¹[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,²[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.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

11. At this juncture, it would also be appropriate to take note of Section 18 of the Limitation Act which deals with acknowledgement and explanation of limitation which reads as under:-

Section 18 - Effect of acknowledgment in writing(limitation act) (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.--For the purposes of this section,--

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

12. A perusal of the aforesaid provision clearly goes to show that for analyzing the limitation of a civil liability beyond a period of three years, the acknowledgement, if any, must be there before period of limitation is over, which is not the case.

13. It may also be relevant to take note of the judgment delivered by the Bombay High Court in Smt. Ashwini Satish Bhat Vs. Shri Jeevan Divakar Loliengar & Another [2000(5) Bom CR 9], wherein

also in a similar case when a cheque was dishonoured which issued beyond the period of limitation the appeal filed by the complainant was dismissed. The relevant observations made in this regard in the aforesaid judgment are reproduced hereunder:-

3. On the other hand, learned Advocate Shri C.A. Ferreira, appearing for the respondent, submitted before me that the dishonoured cheque in question was not in respect of a legally enforceable debt and in view of Explanation to section 138 of the said Act, the Magistrate has rightly acquitted the respondent on the said count as well as on the ground that there was doubt as to whether the amount mentioned in the said cheque was in the handwriting of the respondent as the defence of the respondent is that he had handed over to the appellant a blank cheque. In support of his submission that the dishonoured cheque in question is not in connection with any legally enforceable debt, reliance was placed by him on *Girdhari Lal Rathi v. P.T.V. Ramanujachari and another*, 1998 Bank J. 127 : 2000 DoCh. (A.P.)420. He, therefore, submits that there is no case for interference with the acquittal.

4. The complainant, respondent and one Shankar Prabhudessai had entered into partnership vide Partnership Deed Exhibit P.W. 1/D on 24th August 1990. This partnership was dissolved on 13th June 1991 after an agreement was executed between the parties under which the respondent agreed to pay a sum of Rs. 1,53,724 to the appellant/complainant within 12 months and in case he fails to make the said payment during the said period, the said amount was to carry bank interest from the date of the agreement. The case of the complainant further is that the respondent did not pay the amount as agreed under the said Agreement dated 13th June, 1991, but on 19th July, 1996 the respondent issued cheque for Rs. 3,87,500/- and this cheque has bounced.

5. The defence had taken the stand that the dishonoured cheque was not in relation to any legally enforceable debt and, as such, the respondent could not be held guilty under section 138 of the said Act. The contention of learned Advocate for the appellant is that this cheque dated 19th July 1996 itself is an acknowledgement of debt and, as such, there is no merit in the submission of the defence that the liability under dishonoured cheque is not on account of legally enforceable debt. Insofar as the dishonoured cheque is concerned, the stand taken by the respondent is that the cheque was not written by him and it is not in his handwriting and that he had, in fact, issued a blank cheque in favour of the appellant for certain purpose. This stand was specifically taken by the respondent in the course of the trial and, as such, it was necessary for the complainant to have sought the opinion of handwriting expert in case her case was that the cheque in question was in the handwriting of the respondent, so as to rebut the theory of blank cheque taken by the respondent. It is in these circumstances that the Magistrate had come to the conclusion that the dishonoured cheque in question cannot be treated as acknowledgement under section 18 of the Limitation Act, since the acknowledgement should be before the period of limitation is over and that it should be in writing. In view of this position,

the Magistrate was right in coming to the conclusion that it had not been proved that the dishonoured cheque was in relation to a legally enforceable debt or liability in law. The dishonoured cheque admittedly was issued after 5 years of the said Agreement dated 13th June 1991.

6. The ruling upon which reliance has been placed by the learned advocate for the respondent is applicable on all fours. In that case loan was advanced in the year 1985 and the cheque was issued in the year 1990. By the time the cheque was issued, the debt was barred by limitation because no acknowledgement was obtained before the expiry of 3 years from the date of loan. In these circumstances, it was held there that the debt was not legally enforceable at the time of issuance of cheque and the accused could not be punished under section 138 of the said Act. In the light of Explanation to the said section, it was further held therein that in case a cheque is issued for time barred debt and it is dishonoured, the accused cannot be convicted under section 138 on the ground that the said debt was not legally recoverable.

7. For the aforesaid reasons, I do not find any merit in this appeal and the appeal is liable to be dismissed. The appeal is accordingly dismissed.

14. No contrary judgment has been cited on behalf of the complainant/respondent. Accordingly the petition is allowed. The complaint dated 13.12.2007 and all the proceedings emanating therefrom are hereby quashed. Crl.M.A.Nos.6167/2008 and 12878/2008 In view of the orders passed, applications are disposed of.

MOOL CHAND GARG, J.

April 24, 2009 dc