Narsingh Das Tapadia vs Goverdhan Das Partani & Anr on 6 September, 2000

Equivalent citations: AIR 2000 SUPREME COURT 2946, 2000 (7) SCC 183, 2000 AIR SCW 3268, 2000 CLC 2028 (SC), (2000) 3 EASTCRIC 1132, (2000) 6 SUPREME 205, (2000) 4 ICC 589, (2000) 6 ANDH LT 1, (2000) 3 ANDHWR 45, (2000) 4 CIVLJ 840, (2000) 3 CIVILCOURTC 408, (2001) 1 MAHLR 547, (2000) 3 MPLJ 531, (2000) 4 PAT LJR 195, (2000) 6 SCALE 299, (2001) 2 BLJ 76, (2000) 3 CHANDCRIC 50, (2000) 4 ALLCRILR 409, (2000) 4 CRIMES 12, (2000) 2 CURLJ(CCR) 415, (2000) MAD LJ(CRI) 858, (2001) 42 ALLCRIC 159, 2000 CALCRILR 522, (2000) 102 COMCAS 146, (2000) 87 DLT 322, (2000) 2 KER LJ 904, (2000) 3 KER LT 605, (2001) 1 MAH LJ 154, (2000) 2 ORISSA LR 607, (2000) 19 OCR 615, (2001) 1 SCJ 48, (2001) 1 BANKCAS 113, 2001 ALLMR(CRI) 561, (2001) BANKJ 43, (2000) 2 CAL HN 43, (2000) 4 COMLJ 208, (2000) 2 ANDHLT(CRI) 258, (2000) 3 BANKCLR 505, 2000 SCC (CRI) 1326, (2000) 10 JT 141 (SC), (2001) 5 BOM CR 23

Bench: K.T. Thomas, R.P. Sethi

CASE NO.:
Special Leave Petition (crl.) 1636 of 1999

PETITIONER:
NARSINGH DAS TAPADIA

Vs.

RESPONDENT:
GOVERDHAN DAS PARTANI & ANR.

DATE OF JUDGMENT: 06/09/2000

BENCH:
K.T. Thomas & R.P. Sethi.

JUDGMENT:

SETHI,J.

Leave granted.

L...I...T.....T.....T.....T.....T.....T.....T..J On proof of charge, the respondent was convicted by the Trial Court under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act") and sentenced to undergo simple imprisonment for six months. His appeal was dismissed by the Appellate Court confirming the conviction and sentence passed by the Trial Court. However, in revision, the High Court set aside the judgment of the Trial Court as well as the Appellate Court holding that the complaint filed against the respondent was pre-mature.

The facts of the case are that the respondent borrowed a sum of Rs.2,30,000/- from the appellant and issued a post-dated cheque in his favour. When the cheque was presented for demand on 3.10.1994, the same was dishonoured by the bank on 6.10.1994 due to "insufficient funds". The appellant demanded the accused to repay the amount vide his telegrams sent on 7.10.1994 and 17.10.1994. A notice was also issued to the respondent on 19.10.1994 demanding to repay the amount. Despite receipt of the notice on 26th October, 1994, the respondent neither paid the amount nor gave any reply. To prove his case, the complainant/ appellant examined three witnesses and proved documents Exhibits P-1 to P-6. In his statement under Section 313 of the Cr.P.C. the respondent denied the allegations but refused to lead any defence evidence. On analysis of the evidence and after hearing the counsel for the parties, the Trial Court concluded as under:

> "The complainant established that the accused borrowed Rs.2,30,000/- from him and the accused issued Ex.P3; cheque and the cheque was returned due to insufficiency of funds and the accused did not repay the amount inspite of receipt of notice from the complainant and hence the accused is liable for punishment u/s 138 of N.I. Act."

As noticed earlier, the appeal filed by the respondent was dismissed on 19th April, 1997. The High Court found that as the notice intimating the dishonourment of cheque was served upon the accused on 26th October, 1994, the complainant/appellant could not file the complaint unless the expiry of 15 days period. It was found on facts that the complaint filed on 8.11.1994 was returned after finding some defect in it. However, when re-filed, the court took the cognizance on 17.11.1994. The High Court held that the original complaint having been filed on 8.11.1994 was pre-mature and liable to be dismissed.

Section 142 of the Act provides: "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;

(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."

Sub-section (c) of Section 138 which makes the dishonour@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ of cheque an offence provides that nothing contained in the@@ JJJJJJJJJ Section shall apply unless:

> "(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."

The compliance of clause (c) of proviso to Section 138 enables the Court to entertain a complaint. Clause (b) of Section 142 prescribes a period within which the complaint can be filed from the date of the cause of action arising under clause (c) of the proviso to Section 138. No period is prescribed before which the complaint cannot be filed, and if filed not disclosing the cause of action in terms of clause (c) of the proviso to Section 138, the Court may not take cognizance till the time the cause of action arises to the complainant.

> "Taking cognizance of an offence" by the court has to be distinguished from the filing of the complaint by the complainant. Taking cognizance would mean the action taken by the court for initiating judicial proceedings against the offender in respect of the offence regarding which the complaint is filed. Before it can be said that any Magistrate or Court has taken cognizance of an offence it must be shown, that he has applied his mind to the facts for the purpose of proceeding further in the matter at the instance of the complainant. If the Magistrate or the Court is shown to have applied the mind not for the purpose of taking action upon the complaint but for taking some other kind of action contemplated under the Code of Criminal Procedure such as ordering investigation under Section 156(3) or issuing a search warrant, he cannot be said to have taken cognizance of the offence [Narayandas Bhagwandas Madhavdas v. State of West Bengal AIR 1959 SC 1118; and Gopal Das Sindhi & Ors. v. State of Assam & Anr. AIR 1961 SC 986].
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> This Court in Nirmaljit Singh Hoon v. The State of West Bengal & Anr. [1973 (3) SCC 753] observed:@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ "Under Section 190 of the Code of Criminal Procedure, a Magistrate can take cognizance of an offence, either on receiving a complaint or on a police report or on information otherwise received. Where a complaint is presented before him, he can under Section 200 take cognizance of the offence made out therein and has then to examine the complaint and his witnesses. The object of such examination is to ascertain whether there is a prima facie case against the person accused of the offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or

> intended only to harass such a person. Such examination is provided therefore to find out whether there is or not sufficient ground for proceeding. Under Section 202, a Magistrate, on receipt of a complaint, may postpone the issue of process and either inquire into the case himself or direct an inquiry to be made by a Magistrate subordinate to him or by a police officer for ascertaining its truth or falsehood. Under Section 203, he may dismiss the complaint; if, after taking the statement of the complainant and his witnesses and the result of the investigation, if any, under Section 202, there is in his judgment 'no sufficient ground for proceeding'."

Mere presentation of the complaint in the court cannot be held to mean, that its cognizance had been taken by the Magistrate. If the complaint is found to be pre-mature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed. Again this Court in D.Lakshminarayana Reddy & ors. v. V. Narayana Reddy & Ors. [AIR 1976 SC 1672] dealt with the issue and observed:

> "What is meant by 'taking cognizance of an offence' by the Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses
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> (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If instead of proceeding under Chapter XV, he, has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigating, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence."

In the instant case mere presentation of the complaint on 8.11.1994 when it was returned to the complainant/ appellant on the ground that the verification was not signed by the counsel, could not be termed to be an action of the magistrate taking cognizance within the meaning of Section 142 of the Act. The High Court appears to have committed not only mistake of law but a mistake of fact as well. No cognizance was taken on 8.11.1994, but the Magistrate is shown to have applied his mind and taken cognizance only on 17.11.1994. The learned Judge of the High Court, without reference to various provisions of the Act and the Code of Criminal procedure, wrongly held thus:

"The date of filing i.e. 8.11.1994 in this case is crucial. The return of the complaint filed by the respondent to comply with some objections and subsequent filing on 17.11.1994 in this case does not have any affect. Therefore, the complaint is pre-mature and is liable to be dismissed." As the impugned judgment is based upon wrong assumptions of law and facts, the same is liable to be set aside.

In view of what has been stated hereinabove, this appeal is allowed by setting aside the impugned order, with the result that the conviction of the respondent under Section 138 of the Act is upheld.

So far as awarding of sentence is concerned, we are inclined to take a lenient view in the light of the subsequent developments in the case. The respondent has filed an affidavit on 24.8.2000 submitting that the appellant has been paid a sum of Rs.3,94,243.33 which includes the cheque amount and the interest payable thereon. In support of his submission he has filed Annexures R-1 and R-2 along with the affidavit. Learned counsel for the appellant has admitted the payment of the amount. Thus, we feel that no useful purpose would be served by sending the respondent back to jail as the interests of justice would be served by imposing a penalty of fine alone in the circumstances adverted to above. Accordingly, upon conviction under Section 138 of the Act, the sentence of imprisonment awarded to the respondent is substituted with the imposition of fine of Rs.5,000/- to be deposited within two months. In case the amount of fine is not deposited within the time specified, the respondent shall suffer imprisonment of three months in default thereof.