A DEVENDRA KISHANLAL DAGALIA

v.

DWARKESH DIAMONDS PVT. LTD. AND ORS.

(Criminal Appeal Nos. 1997-98 of 2013)

B NOVEMBER 25, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND V. GOPALA GOWDA, JJ.]

Code of Criminal Procedure, 1973 – ss.201, 204 & 482 C *– Power of the Magistrate to recall process of summons – Held: Once decision is taken and summons is issued, in absence of power of review including inherent power to do so, remedy lies before the High Court u/s.482 CrPC or under Art. 227 of the Constitution and not before the Magistrate – Once* D *the Magistrate taking cognizance of an offence forms his opinion that there is sufficient ground for proceeding and issues summons u/s.204 CrPC, there is no question of going back following the procedure u/s.201 CrPC – In absence of any power of review or recall of the order of issuance of* E *summons, the Magistrate cannot recall the summon in exercise of power u/s.201 CrPC – Constitution of India, 1950 – Art.227.*

Negotiable Instruments Act, 1881 – s.138 – Offence under – Jurisdiction of the Magistrate to issue summons – F *Held: Offence u/s.138 can be completed only with the concatenation of all the five components, namely, (1) drawing of the cheque; (2) presentation of the cheque to the bank; (3) returning the cheque unpaid by the drawee bank; (4) giving notice in writing to the drawer of the cheque demanding* G *payment of the cheque amount; and (5) failure of the drawer to make payment within 15 days of the receipt of the notice – It is not necessary that all the above five acts should have perpetrated at the same locality – In the case in hand, the*

H

business dealing was held at Mumbai; the products were supplied from Mumbai to New Delhi, cheques were handed over at Mumbai and the cheques were dishonoured by the bankers of respondents at New Delhi, and legal notice was issued from Mumbai – At least one act out of the five ingredients of s.138 having committed at Mumbai, the complaint preferred by appellant before the Magistrate at Mumbai was maintainable.

The questions which arose for consideration in the present appeal were 1) whether the Magistrate after having found sufficient ground for proceeding in case and issued summons under Section 204 Cr.P.C. has the jurisdiction to recall or review the order by exercising its power under Section 201 Cr.P.C.; and 2) whether the petition filed by appellant under Section 138 of the Negotiable Instruments Act, 1881 was maintainable at Mumbai on the ground that goods were supplied from Mumbai to Delhi and cheques were handed over at Mumbai and legal notice was issued from Mumbai.

Allowing the appeals, the Court

HELD:1.1. The Magistrate is required to issue summons for attendance of the accused only on examination of the complaint and on satisfaction that there is sufficient ground for taking cognizance of the offence and that it is competent to take such cognizance of offence. Once the decision is taken and summon is issued, in the absence of a power of review including inherent power to do so, remedy lies before the High Court under Section 482 Cr.P.C or under Article 227 of the Constitution of India and not before the Magistrate. [Para 14] [387-D-E]

1.2. Section 201 Cr.P.C. can be applied immediately on receipt of a complaint, if the Magistrate is not competent to take cognizance of the offence. Once the

A **Magistrate taking cognizance of an offence forms his opinion that there is sufficient ground for proceeding and issues summons under Section 204 Cr.P.C., there is no question of going back following the procedure under Section 201 Cr.P.C. In absence of any power of review**
B **or recall the order of issuance of summons, the Magistrate cannot recall the summon in exercise of power under Section 201 Cr.P.C. [Para 16] [388-B-D]**

Adalat Prasad vs. Rooplal Jindal and others **(2004) 7 SCC 338 – relied on.**
C

2.1. The offence under Section 138 of the Negotiable Instruments Act, 1881 can be completed only with the concatenation of all the five components, namely, (1) drawing of the cheque; (2) presentation of the cheque to
D **the bank; (3) returning the cheque unpaid by the drawee bank; (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount; and (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It is not necessary that all the**
E **above five acts should have perpetrated at the same locality; it is possible that each of those five acts were done at five different localities, but a concatenation of all the above five is a *sine qua non* for the completion of the offence under Section 138 of the Act. [Para 17] [388-F-H;**
F **389-A-B]**

2.2. In the case in hand it is admitted that the business dealing was held at Mumbai; the products were supplied from Mumbai to New Delhi, cheques were handed over at Mumbai and the cheques were
G **dishonoured by the bankers of respondents at New Delhi, and legal notice was issued from Mumbai. Thus, at least one act out of the five ingredients of Section 138 of the Act having committed at Mumbai, the complaint preferred by the appellant-complainant before the Magistrate at**
H **Mumbai was maintainable. [Para 18] [394-E, F]**

M/s. Escorts Limited v. Rama Mukherjee, **2013 (11) SCALE 487 – relied on.**

K. Bhaskaran vs. Shankaran Vaidhyam Balan & Anr. **(1999) 7 SCC 510: 1999 (3) Suppl. SCR 271 – referred to.**

Case Law Reference:

(2004) 7 SCC 338	**relied on**	**Para 15**
2013 (11) SCALE 487	**relied on**	**Para 17**
1999 (3) Suppl. SCR 271	**referred to**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1997-98 of 2013.

From the Judgment and Order 06.12.2012 of the High Court of Bombay in Criminal Writ Petition Nos. 3992 and 3993 of 2011.

K.R. Iyengar, Sushil Karanjkar, Ratnakar Singh, Sandeep Singh, K.N. Rai for the Appellant.

Uday B. Dube, Sanjay Kharde, Asha Gopalan Nair, Mohit Monga, H.K. Monga, Parmanand Gaur for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted. These appeals have been preferred by the appellant-complainant against the judgment and order dated 6th December, 2012 passed by the High Court of Judicature at Bombay in Criminal Writ Petition Nos.3992 and 3993 of 2011. By the impugned judgment the High Court set aside the order passed by Sessions Judge in CRA No.301 of 2010 and upheld the order passed by the Special Metropolitan Magistrate.

2. The appellant filed complaints being CC No.3142/SS/2008 and CC No.3286/SS/2008 under Section 138 of

A Negotiable Instruments Act (hereinafter referred to as 'the N.I. Act') in the Court of the Special Metropolitan Magistrate at Small Causes Court on 28th July, 2008 and 18th August, 2008. Learned Metropolitan Magistrate after recording of the pre-summoning evidence issued summons on the accused under B Section 204 Cr.P.C. The accused-respondents 1, 2 & 3 then filed application under Section 201 Cr.P.C. for return of complaint for want of jurisdiction. They alleged that the entire transaction took place at New Delhi and only the legal notice was issued from Mumbai and hence the learned Magistrate has C no jurisdiction to try and entertain the complaint. A similar application was filed by the accused in CC No.3286/SS/2008. Thereafter, the learned Magistrate by order dated 5th January, 2010 allowed the application under Section 201 Cr.P.C. and returned the complaint for want of jurisdiction. A similar order D was passed by the learned Magistrate in CC No.3286/SS/ 2008.

3. Being aggrieved, the appellant-complainant filed Criminal Revision Applications Nos.301 & 302 of 2010 before the Sessions Court, Greater Bombay. Learned Sessions Judge E by the judgment and order dated 2nd November, 2011 allowed the criminal revision applications and set aside the orders of learned Magistrate and the matter was remitted back to the Magistrate. However, at the instance of Respondent Nos.1, 2 & 3 the order passed by the Sessions Judge was set aside F by the High Court by the order impugned.

4. Learned counsel appearing on behalf of the appellant submitted that the Magistrate after finding sufficient ground for proceeding and after issuance of summons under Section 204 G Cr.P.C., has no jurisdiction to recall or review the order by exercising power under Section 201 Cr.P.C. It is further contended that the High Court failed to consider the aforesaid fact and has no answer to the issue as was raised and decided by the learned Magistrate. Further, according to the learned counsel for the appellant, in the matter under Section 138 of H

the N.I.Act the appellant having been issued legal notice from Mumbai, the Magistrate has jurisdiction to try and entertain the complaint.

5. Per contra, according to the learned counsel for the respondents, the High Court of Bombay has taken due course and settled all the questions raised in the complaint filed by the appellant. The complaint filed by the appellant is silent with regard to place where (a) the order was given by the respondent; (b) goods were supplied; (c) the payment was agreed to be made: (d) the cheques in question were issued: (e) the cheques in question were dishonoured and (f) the parties to the petition intended to make and receive the same. It is accepted that the notice in question was issued from Mumbai. It is contended that issuance of notice would not by itself give rise to a cause of action for filing the complaint at Mumbai.

6. Further, according to the respondents the appellant has concealed the relevant facts purposefully, particularly the fact that the entire transaction had taken place at Delhi and, therefore, the Magistrate has returned the complaint under Section 201 Cr.P.C.

7. We have heard learned counsel for the parties and perused the record.

8. The main questions involved in the present case are :

(i) Whether the Magistrate after having found sufficient ground for proceeding in case and issued summons under Section 204 Cr.P.C. has the jurisdiction to recall or review the order by exercising its power under Section 201 Cr.P.C.; and

(ii) Whether thepetition under Section 138 of the N.I. Act was maintainable at Mumbai on the ground

A *that goods were supplied from Mumbai to Delhi and cheques were handed over at Mumbai and legal notice was issued from Mumbai.*

9. To decide the issue, it is necessary to notice the relevant B provisions of the Cr.P.C. as discussed hereunder:

Chapter XV of Cr.P.C. relates to complaints to the Magistrates whereas Chapter XVI relates to commencement of proceedings before the Magistrates.

C 10. Section 200 of Cr.P.C. relates to examination of complaint. A Magsitrate taking cognizance of an offence on complaint is required to examine the complaint and both the complainant and witness present, if any. On such examination of the complaint and the witness, if the Magistrate is of the D opinion that there is no ground for proceeding, he has to dismiss the complaint under Section 203 Cr.P.C.

11. Section 201 Cr.P.C. lays down the procedure to be followed by the Magistrate not competent to take cognizance of the offence. If the complaint is made to a Magistrate who is E not competent to take cognizance of the complaint he shall return the written complaint for its presentation before a proper court and if the complaint is not in writing, direct the complainant to move before the proper court.

F 12. Section 202 contemplates "postponement of issue of process" on receipt of a complaint in the circumstances mentioned therein. If the Magistrate is of the opinion that there is no sufficient ground for proceeding, under Section 203 Cr.P.C. he can dismiss the complaint by briefly recording his G reasons.

13. The commencement of proceedings before the Magistrate under Chapter XVI starts with issue of process under Section 204 Cr.P.C. If in the opinion of a Magistrate taking cognizance of the offence there is sufficient ground for H

proceeding, and the case appears to be a summons-case, he shall issue his summons for the attendance of the accused, but if it is a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction. No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed. In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

14. The aforesaid provisions make it clear that the Magistrate is required to issue summons for attendance of the accused only on examination of the complaint and on satisfaction that there is sufficient ground for taking cognizance of the offence and that it is competent to take such cognizance of offence. Once the decision is taken and summon is issued, in the absence of a power of review including inherent power to do so, remedy lies before the High Court under Section 482 Cr. P.C or under Article 227 of the Constitution of India and not before the Magistrate.

15. Issue with regard to the power of Magistrate to recall process of summons fell for consideration before a three-Judge Bench of this Court in *Adalat Prasad vs. Rooplal Jindal and others*, (2004) 7 SCC 338. Therein the following observation was made by this Court:

> ***"15.*** *It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a*

review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code."

16. Section 201 Cr.P.C., as noticed earlier, can be applied immediately on receipt of a complaint, if the Magistrate is not competent to take cognizance of the offence. Once the Magistrate taking cognizance of an offence forms his opinion that there is sufficient ground for proceeding and issues summons under Section 204 Cr.P.C., there is no question of going back following the procedure under Section 201 Cr.P.C. In absence of any power of review or recall the order of issuance of summons, the Magistrate cannot recall the summon in exercise of power under Section 201 Cr.P.C. The first question is thus answered in negative and in favour of the appellant.

17. The question concerning the jurisdiction of Magistrate to issue summons fell for consideration before this Court in *M/s. Escorts Limited vs. Rama Mukherjee* (Criminal Appeal No.1457 of 2013), 2013 (11) Scale 487. In the said case the Court noticed the earlier decision in *K. Bhaskaran vs. Shankaran Vaidhyam Balan & Anr.*, (1999) 7 SCC 510. In the light of the language used in Section 138 of the Act, the Court found five components in Section 138 of the Act, namely,

(1) drawing of the cheque;

(2) presentation of the cheque to the bank;

(3) returning the cheque unpaid by the drawee bank;

(4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount; and

(5) failure of the drawer to make payment within 15 days of the receipt of the notice."

After saying so, this Court held that offence under Section 138 of the Act can be completed only with the concatenation of all the above components and for that it is not necessary that all the above five acts should have perpetrated at the same locality; it is possible that each of those five acts were done at five different localities, but a concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Act. Having noticed the aforesaid provisions, this court in Escorts Ltd. held as follow:

> *"5. It is apparent, that the conclusion drawn by the High Court, in the impugned order dated 27.4.2012, is not in consonance with the decision rendered by this Court in Nishant Aggarwal vs. Kailash Kumar Sharma, [2013(7) Scale 753] . Therein it has been concluded, that the Court within the jurisdiction whereof, the dishonoured cheque was presented for encashment, would have the jurisdiction to entertain the complaint filed under Section 138 of the Negotiable Instruments Act.*
>
> *6. In addition to the judgment rendered by this Court in Nishant Aggarwal's case, another bench of this Court has also arrived at the conclusion drawn in Nishant Aggarwal's case, on the pointed issue under consideration. In this behalf, reference may be made to the decision rendered in FIL Industries Limited vs. Imtiyaz Ahmed Bhat, Criminal Appeal No. 1168 of 2013 (arising out of SLP (Crl.) No.8096 of 2012), decided on 12.8.2013. This Court in the above matter held as under:*
>
> > *"3. The facts very briefly are that the respondent delivered a cheque dated 23rd December, 2010 for an amount of `29,69,746/-(Rupees Twenty Nine lakhs sixty nine thousand seven hundred forty six only) on Jammu and Kashmir Bank Limited, Branch Imam Saheb, Shopian, to the appellant towards some business dealings and the appellant deposited the same in UCO Bank,*

Sopore. When the cheque amount was not encashed and collected in the account of the appellant in UCO Bank Sopore, the appellant filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 before the Chief Judicial Magistrate, Sopore. The respondent sought dismissal of the complaint on the ground that the Chief Judicial Magistrate had no territorial jurisdiction to entertain the complaint. By order dated 29th November, 2011, the learned Chief Judicial Magistrate, Sopore, however, held that he had the jurisdiction to entertain the complaint. Aggrieved, the appellant filed Criminal Miscellaneous Petition No. 431 of 2011 under Section 561A of the Jammu and Kashmir Criminal Procedure Code and by the impugned order dated 2nd June, 2012, the High Court quashed the complaint saying that the Court at Sopore had no jurisdiction to receive and entertain the complaint.

4. We have heard learned counsel for the parties and we find that in K.Bhaskaran v. Sankaran Vidyabalan and Another, (1999) 7 SCC 510, this Court had the occasion to consider as to which Court would have the jurisdiction to entertain the complaint under Section 138 of the Negotiable Instruments Act and in paras 14, 15 and 16 of the judgment in the aforesaid case held as under:-

"14. The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence: (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the

drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

15. It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at 5 different localities. But concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Act. In this context a reference to Section 178(d) of the Code is useful. It is extracted below:

"Where the offence consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

16. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act."

5. It will be clear from the aforesaid paragraphs of the judgment in K. Bhaskaran's case (Supra) that five different acts compose the offence under Section 138 of the Negotiable Instruments Act and if any one of these five different acts was done in

a particular locality the Court having territorial jurisdiction on that locality can become the place of trial for the offence under Section 138 of the Negotiable Instruments Act and, therefore, the complainant can choose any one of those courts having jurisdiction over any one of the local area within the territorial limits of which any one of the five acts was done. In the facts of the present case, it is not disputed that the cheque was presented to the UCO Bank at Sopore in which the appellant had an account and, therefore the Court at Sopore had territorial jurisdiction to entertain and try the complaint.

6. Learned counsel for the respondent, however, relied on the decision of this Court in Harman Electronics Private Limited and Another v. National Panasonic India Private Limite,d, (2009) 1 SCC 720, to submit that the Court at Shopian would have the territorial jurisdiction. We have perused the aforesaid decision of this Court in Harman Electronics Private Limited (Supra) and we find on a reading of paragraphs 11 and 12 of the judgment in the aforesaid case that in that case the issue was as to whether sending of a notice from Delhi itself would give rise to a cause of action for taking cognizance of a case under Section 138 of the Negotiable Instruments Act when the parties had been carrying on business at Chandigarh, the Head Office of the respondent-complainant was at Delhi but it had a branch at Chandigarh and all the transactions were carried out only from Chandigarh. On these facts, this Court held that Delhi from where the notice under Section 138 of the Negotiable Instruments Act was issued by the respondent would not have had jurisdiction to entertain the complaint under

Section 138 of the Negotiable Instruments Act. This question does not arise in the facts of the present case.

7. For the aforesaid reasons, we allow the appeal, set aside the impugned judgment of the High Court and remand the matter to the Chief Judicial Magistrate, Sopore for decision in accordance with law."

(emphasis is ours).

7. In view of the above, having taken into consideration the factual position noticed by the High Court in paragraph 13 of the impugned judgment, we are of the view, that the High Court erred in concluding that the courts at Delhi, did not have the jurisdiction to try the petition filed by the appellant under Section 138 of the Negotiable Instruments Act. The impugned order dated 27.4.2012 passed by the High Court is accordingly liable to be set aside. The same is, therefore, hereby set aside.

8. Despite the conclusion drawn by us hereinabove, it would be relevant to mention, that our instant determination is based on the factual position expressed by the High Court in paragraph 13 of the impugned order. During the course of hearing, whilst it was the case of the learned counsel for the appellant (based on certain documents available on the file of the present case) to reiterate that the cheque in question, which was the subject matter of the appellant's claim under Section 138 of the Negotiable Instruments Act, was presented for encashment at Delhi; it was the contention of the learned counsel for the respondent, that the aforesaid cheque was

presented for encashment at Faridabad. It was accordingly submitted, that the jurisdictional issue needed to be decided by accepting, that the dishonoured cheque was presented at Faridabad. It is not possible for us to entertain and adjudicate upon a disputed question of fact. We have rendered the instant decision, on the factual position taken into consideration by the High Court. In case, the respondent herein is so advised, it would be open to him to raise an objection on the issue of jurisdiction, based on a factual position now asserted before us. The determination rendered by us must be deemed to be on the factual position taken into consideration by the High Court (in paragraph 13, extracted above), while disposing of the issue of jurisdiction. In case the respondent raises such a plea, the same shall be entertained and disposed of in accordance with law."

18. In the case in hand it is admitted that the business dealing was held at Mumbai; the products were supplied from Mumbai to New Delhi, cheques were handed over at Mumbai and the cheques were dishounoured by the bankers of respondents at New Delhi, and legal notice was issued from Mumbai. Thus, at least one act out of the five ingredients of Section 138 of the Act having committed at Mumbai, the complaint preferred by the complainant before the Magistrate at Mumbai was maintainable. The second question is thereby, answered in affirmative and in favour of the appellant.

19. In view of the reasons recorded above, we have no other option but to interfere with the impugned order passed by the High Court. We accordingly, set aside the order dated 6th December, 2012 passed by the High Court, affirm the order passed by the Sessions Judge and allow the appeals.

Bibhuti Bhushan Bose Appeals allowed.