

IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl. L.P. No. 45/2003

Judgment reserved on : 28 October, 2009

Judgment delivered on: 2.2. 2010

Santosh AggarwalPetitioners

Through: Mr. Saurav Seth, Advocate

versus

Aushim Kapoor & Anr. Respondents

Through: Mr. J.K. Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR,

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

KAILASH GAMBHIR, J.

1. By the present petition filed under Section 482 Cr.P.C., the petitioner seeks quashing of the order dated 22.1.2003, whereby the

learned Additional Sessions Judge while exercising the powers of revisional court directed dismissal of the complaint filed by the petitioner being premature and not maintainable.

2. The brief facts of the case relevant for deciding the present petition are that the petitioner executed an order placed by the respondent for making garments and in consideration thereof the respondent paid the petitioner vide pay order for Rs.50,000/- and cheque no. 590566 for Rs.39,310/- dated 14.02.1998. Petitioner deposited the said cheque to his banker for payment, which was returned vide memo dated 17.02.1998 with the remarks "Payment Stopped by the drawer". The petitioner sent a demand notice dated 24.02.1998 and the same was received by the respondent on 26.02.1998. Reply to the same was sent by the respondent on 01.03.1998 but since no payment was made by the respondent, the petitioner filed a complaint dated 12.03.1998 before learned M.M under Section 138 and 142 N.I Act and Section 420 IPC. On receipt of same, learned M.M took cognizance and passed an order for recording of statement of petitioner and his witnesses on 12.05.1998 and finally, summons were issued against respondents vide order dated 09.02.2000. On directions of this Court vide order No. F 3(4)/ADJ20065-20115/1185 dated 21.03.2002 the matter was

transferred to the Court of the learned ASJ where the respondents filed application for recalling of the summoning order and vide order dated 22.01.2003, the complaint was dismissed by the learned ASJ on the ground that the complaint filed was premature, and aggrieved by the same, the present petition has been filed by the petitioner.

3. The counsel appearing for the petitioner submitted that the learned Magistrate did not take cognizance of the complaint on 12.3.98 when the complaint was taken up by the magistrate for the first time. As per the counsel for the petitioner the cognizance of the complaint was taken by the learned magistrate only on 28.10.99 and 9.2.2000, when based on the evidence adduced by the petitioner the Magistrate examined the entire matter and after taking a prima facie view directed the process to be issued against the respondents. Counsel thus contended that the complaint filed by the petitioner on 12.03.1998 can not be considered premature as the period of 15 days as then was applicable would be reckoned from the date when the cognizance of the complaint was taken by the Magistrate which in the present case was 28.10.1999 and 9.2.2000. In support of his arguments counsel placed reliance on the judgment of the Apex Court in ***Narsingh Das Tapadia Vs. Goverdhan Das Partani & Anr. (2000)7 SCC 183.***

4. While opposing the present petition, counsel for the respondent submitted that the complaint filed by the petitioner is premature on the very face of it. Counsel for the respondent further submitted that once the Court had directed evidence on the complaint filed by the petitioner then cognizance of the complaint was taken on the same very date and not on the date when the process for summoning the accused was directed by the court. Counsel further submitted that as per the provisions of Section 190 Cr.P.C., the Magistrate can take cognizance either on receiving the complaint or on police report or on information otherwise received. Once the magistrate directs examination of the complainant then it cannot be said that the magistrate did not apply his mind or did not take cognizance of the offence made out in the complaint. Counsel for the respondent further submitted that the position would have been different had the court before taking the cognizance of the complaint, directed investigation in the matter under Section 156 (3) of the Cr.P.C., or directed search warrants for any such ancillary purposes. Counsel thus submitted that the concerned Magistrate had taken cognizance of the complaint on 12.03.1998 and reckoning the period of 15 days from the date of the

receipt of the legal notice the complaint filed by the petitioner on the very face of it was premature.

5. I have heard learned counsel for the parties at considerable length and perused the records.

6. The dishonoured cheque based on which the complaint was filed by the petitioner was dated 14.2.98, legal notice sent by the petitioner was dated 24.2.1998 and was received on 26.2.98 by the respondent. The complaint was filed by the petitioner on 12.3.98. It is not in dispute between the parties that if period of 15 days is reckoned from 12.3.98, then the complaint filed by the petitioner would be premature, but if the date of cognizance of the complaint is taken as 28.10.1999, then certainly the complaint filed by the petitioner would be within time. It is also not in dispute that learned Magistrate had directed evidence of the petitioner on 12.5.98 and the complainant adduced his evidence on 28.10.99 and closed the evidence. The Learned Magistrate heard arguments on 9.2.2000 and after hearing the arguments the court found that prime facie case under Section 138 N.I. Act is made out against the accused persons and accordingly directed summoning of the accused for 17.1.2001.

7. The contention raised by the counsel for the petitioner that cognizance of the offence was not taken on 12.3.98 but the same was taken only when the evidence of the petitioner was recorded and finally when the arguments on summoning were heard by the Magistrate i.e. on 28.10.1999 does not find favour with the court in view of the settled legal position that 'taking cognizance' means cognizance of offence not of an offender. The word cognizance has no esoteric significance in criminal jurisprudence and it is the stage when the Magistrate for the first time applies his judicial mind to the averments made in the complaint to find as to whether the averments made in the complaint constitutes commission of an offence or not.

8. In ***Devarapalli Lakshminarayana Reddy and Ors. Vs. V. Narayana Reddy and Ors. - (1976) 3 SCC 252***, the Hon'ble Apex Court explained the expression "*taking cognizance of an offence*" in following terms:

"12. This raises the incidental question : What is meant by "taking cognizance of an offence" by a 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 (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 investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence.

9. In ***CREF Finance Ltd. Vs. Shree Shanthi Homes Pvt. Ltd. and Anr. AIR 2005 SC 4284***, also the Hon'ble Apex Court explained the expression 'cognizance' as follows:

"7. In Ajit Kumar Palit v. State of West Bengal, : AIR1963SC765 , this Court observed :-

"The word "cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means --- become aware of and when used with reference to a Court or Judge, to take notice of judicially. It was stated in Gopal Marwari v. Emperor by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in R.R. Chari v. State of Uttar Pradesh 1951CriLJ775 that the word, 'cognizance' was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in Emperor v. Sourindra Mohan Chuckerbutty "taking cognizance does not involve any formal action ; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled."

10. From the aforesaid discussion, it is manifest that 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).

11. Counsel for the petitioner placed reliance on the judgment of the Apex Court in **Narsingh Das Tapadia vs. Goverdhan Das Partini & Anr. (supra)**. The said judgment does not augment the case of the petitioner rather on the contrary supports the case of the respondent. It would be worthwhile to reproduce the relevant para of the said judgment here:

"7. "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 CrPC such as ordering investigation under Section 156(3) or issuing a search warrant, he cannot be said to have taken cognizance of the offence (Naravandas Bhagwandas Madhavdas v. State of West Bengal : 1959CriLJ1368 ; and Gopal Das Sindhi and Ors. v. State of Assam and Anr: AIR 1961 SC 986.

This Court in Nirmaljit Singh Hoon v. The State of West Bengal and Anr. : [1973]2SCR66 observed:

Under Section 190 of the CrPC, 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 82 investigation, if any, under Section 202, there is in his judgment 'no sufficient ground for proceeding'."

12. It would be manifest from above that there has to be application of mind and not ordering of any other ancillary proceedings like that under section 156(3) Cr.P.C by the magistrate. Applying the above stated principles to the instant case, the Magistrate on 12.3.1998 passed the order for taking evidence of the petitioner on 12.5.1998 and hence applied his mind to the complaint for deciding whether or not there is sufficient ground for proceeding. He thus brought into motion the machinery of Chapter XV of Cr.P.C. by directing evidence of the complainant or his witnesses under Section 200, Cr.P.C., which is the first step in the procedure prescribed under Chapter XV of the Code of Criminal Procedure. Thus, clearly, the Magistrate took cognizance of the offence on 12.3.1998.

13. Now, what remains to be seen is that whether the complaint filed by the complainant was premature or not. It is a well settled position

that to constitute an offence under S. 138 N.I. Act the following ingredients are required to be fulfilled:

- (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;
- (ii) The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;
- (iii) that 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;
- (iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank;
- (v) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;
- (vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;

Being cumulative, it is only when all the afore-mentioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act.

14. In the instant case, the bank returned the cheque vide memo dated 17.2.1998, the legal demand notice was sent on 24.2.1998, which was received by the respondent on 26.2.1998 and complaint was filed on 12.3.1998. Clearly, the said complaint was filed prior to the expiry of the 15 days period, the period statutorily required to bring home the offence under S. 138 N. I. Act.

15. From the aforesaid discussion, it is manifest that the order dated 22.1.2003, passed by Ld. ASJ does not suffer from any infirmity and therefore, the same is not interfered with.

16. Hence, in the light of the above discussion, there is no merit in the present petition and the same is hereby dismissed.

2nd February, 2010

KAILASH GAMBHIR,J