

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of order : 23rd January, 2008

CRL.M.C. 2072/2006

GURU SWARUP SRIVASTAVA Petitioner
Through Mr. Sunil Gupta, Sr. Advocate with
Mr. Jatin Zaveri, Advocate.

versus

NATIONAL AGRICULTURAL COOP.MARKETING
FEDERATION Respondent
Through Mr. T.K.Ganju, Sr. Advocate with
Mr. A.K.Thakur and Mr. R.K.Mishra, Advocates.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

ORDER

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

Dr. S. Muralidhar, J. (open court)

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) seeks the quashing of Complaint Case No. 3650 of 2006 pending in the Court of the learned Metropolitan Magistrate, Patiala House Courts, New Delhi (MM) titled “*National Agricultural Co-operative Marketing Federation of India Ltd. (NAFED) v. M/s Swarup Group of Industries & Another*” as well as the Order dated 7th February, 2006 by which the learned MM took cognizance of the complaint and issued summons to the Petitioner to face trial for the offence under Section 138 of the Negotiable

Instruments Act, 1881 ('NI Act').

Background Facts

2. The Petitioner is the proprietor of M/s Swarup Group of Industries which carries on the business of import and export, marketing and sale of several goods including iron ore. The Petitioner approached NAFED in March 2004 with the proposal for a strategic alliance for export of iron ore to China, and accordingly sought funds from NAFED. An assurance is stated to have been given by the petitioner that the firm was in a sound financial condition and that the principal along with the interest would be repaid without any default. Consequently a Memorandum of Understanding (MOU) was entered into between the parties on 24th April 2004.

3. It is stated that the NAFED paid a sum of Rs.2,35,58,41,500/- at the request of the petitioner for the purposes of procuring/exporting iron ore as agreed in the MOU. However, it is alleged that the demands were not honoured and that there were defaults in making repayments. The present complaint pertains to a cheque No.131050 dated 20th August, 2005 for a sum of Rs. 5 crores which was drawn on Lord Krishna Bank, Noida, UP in favour of the NAFED by the Petitioner, towards partial payment of the dues in terms of the MOU.

4. The aforementioned cheque when presented to the bank by NAFED was

returned dishonoured with the remarks “payment stopped by drawer”. NAFED then wrote following letter dated 23rd August 2005 to the Petitioner:

“This has reference to your fax dtd. 22.8.2005 on the above subject.

In the above context, it may be informed that cheque no. 131050 dtd. 20.08.2005 for Rs. 5,00,00,000.00 of Lord Krishna Bank, Noida was deposited in the bank on 20.08.2005 whereas your referred fax was received on 22.08.2005.

The above cheque has been returned unpaid with the remarks “payment stopped by drawer”. The above cheque was given by you against the long outstanding dues. Instead of making efforts for honouring of the cheque, you preferred to give instructions to the banker for stopping the payment. Reason for the same may be intimated to NAFED. Further, you are aware that dishonouring of cheques is punishable crime under Negotiable Instruments Act. A copy of cheques Return Memo is enclosed.

You are requested to arrange payment of the above cheque and inform NAFED, so that the cheque can be represented, otherwise we will be constrained to initiate legal proceedings under Negotiable Instruments Act.

An early reply is requested.”

5. It is stated that in reply to this letter on 29th September, 2005, the Petitioner wrote to the NAFED asking it not to deposit the cheques without confirmation from the Petitioner. On 6th October 2005, the Petitioner wrote the following letter to NAFED:

“Please refer to your letter no. HW/FIN/2005-06 dtd.

23.08.2005

We invite your kind invitation to our letter dtd. 20th April & 29th Sept. 05 wherein we have requested you not to deposit the cheques handed over to you without return confirmation from our office. Besides this, it was also cleared to you that these cheques were to be paid out of proceeds of discounting L/C and written confirmation.

Since the discounting of L/C could not take place, this cheque should be deposited at a later date after getting our written confirmation.

However, we now assure you that this cheque and all your outstandings shall possibly be cleared latest by 30.10.2005, at the time of clearance of dues this cheque of Rs. 500 crores may be re-deposited after written confirmation from our office and release of proportionate charge over our securities.”

6. According to NAFED, by a letter dated 25th October, 2005 the Petitioner was informed that the aforementioned cheque would be represented, and thereafter when the cheque was again deposited on 9th November, 2005 for realisation, it was again dishonoured. A lawyer's notice dated 7th December 2005 was then sent under Section 138 of the N.I. Act by NAFED to the Petitioner. After narrating the events that transpired till then, the notice stated as under:

“I, therefore call upon you through this legal notice, to pay to my client amount of Rs.5,00,00,000/- [Rs. Five crores only] by way of demand draft or pay-order within fifteen days from the date of receipt of this legal notice, failing which my client shall be constrained to take necessary legal action under the provisions of Negotiable Instrument Act, and other laws at your risk, costs and consequences.”

7. On 16th January 2006 NAFED filed Complaint Case No. 3650 of 2006 under Section 138 NI Act in the Court of the MM, New Delhi, seeking summons to the Petitioner. After narrating the sequence of events, it was stated in para 15 of the complaint as under:

“That a legal notice dated 07.12.2005 was issued to the accused party informing about the dishonor of the cheque and requesting to pay the amount of Rupees five crores only within 15 days failing which legal action would be taken as per law. A photocopy of the legal notice along with postal receipts are annexed as **Annexure 9-A & 9-B** to this complaint.”

8. Para 21 of the complaint referred to the cause of action for filing of the complaint in the following manner:

“That the cause of action arose on 30.12.2005 when the statutory period of 15 days from the date of service of the legal notice on the accused expired and accused failed to make payment of the amount contained in the dishonoured cheque. Therefore this complaint is within limitation period.”

9. NAFED filed an affidavit dated 6th February 2006 by way of evidence in the above proceedings. Para 16 of the said affidavit, of its Deputy Manager (F&A), who was its authorised representative, is relevant for the purpose of the present petition read as follows:

“That a legal notice dated 07.12.2005 was issued to the accused party informing about the dishonor of the cheque and requesting to pay the amount of rupees five crores only within 15 days failing which legal action would be taken as per law. Copy of the legal notice along with original postal receipts are

Ex. CW-9-A and 9-B.”

10. On 7th February 2006, the following order was passed by the learned MM taking cognizance of the complaint and issuing summons to the Petitioner:

“07.02.2006

Present : AR of complainant with Ld. Counsel.

Evidence by way of affidavit filed.

Heard on summoning.

File perused. The complaint is within limitation. In my view, there is sufficient material on record to summon the accused u/s 138, Negotiable Instrument Act. The accused be accordingly summoned vide PF/RC/Speed Post/Courier for 25.4.2006. Process be also sent through the SHO of the area where the accused resides. Process be also given dasti, if demanded. PF be filed within 15 days.

MM/ND/07.02.2006”

11. The present petition was filed on 15th April 2006 and on 18th April 2006 the following order was passed by this Court:

“Crl. Misc. No. 3322/2006

Notice for 2nd November, 2006.

Learned counsel for the petitioner has urged that respondent No.2 complainant had initiated proceedings under Section 138 of the Negotiable Instruments Act on the basis of second notice dated 7th December, 2005 and not on the strength of the first notice which is against the Provisions of Section 142 of the Act. He also placed reliance on the Judgment of the

Supreme Court in *Sadanandan Bhadran Vs. Madhavan Sunil Kumar* (1998) 6 Supreme Court Cases 514 where too similar questions had come up for hearing. I am prima facie satisfied that it is a fit case where further proceedings in the matter be stayed. Accordingly the proceedings before the trial court shall remain stayed till further orders.”

Contentions of the Parties

12. Mr. Sunil Gupta, learned Senior Advocate and Mr. Jatin Zaveri, learned Advocate presented arguments for the Petitioner and Mr. T.K. Ganju, learned Senior Advocate with Mr. A.K. Thakur, learned Advocate for the Respondent NAFED.

13. The following submissions were made on behalf of the Petitioner:

(a) There was only one cheque which forms the subject matter of the dispute and therefore there can be only one dishonour leading to the commission of one offence. Once the first dishonour of the cheque has been acted upon by the payee by issuing a notice to the drawer of the cheque demanding payment there cannot be a second dishonour of the same cheque upon its presentation after the making a demand for payment on the first dishonour. In the above circumstances if the payee fails to take action in terms of Section 138 NI Act after the first dishonour, then the payee stands “absolved” of criminal liability. It is submitted that there is no change in the law in this regard as explained by the Supreme Court in *Sadanandan Bhadran v. Madhavan Sunil Kumar* (1998) 6 SCC 514 even after the introduction of the proviso to Section 142 (b) NI Act.

(b) In the instant case, the letter dated 23rd August 2005 constituted a

demand for payment made by the payee NAFED to the drawer after the first dishonour. In support of this submission reliance is placed on the judgment of the Supreme Court in ***Central Bank of India v. Saxons Farms (1999) 8 SCC 221***. For reasons best known to it NAFED did not file a criminal complaint on that basis. Therefore, NAFED forfeited its right thereafter to file a complaint under Section 138 NI Act on that basis.

(c) A plain reading of the complaint ultimately filed on 16th January 2006 shows that in the understanding of NAFED it was the second demand notice dated 7th December 2005 which was the proper notice under Section 138 NI Act and since it was sent by registered post, a presumption of due service was presumed although according to the petitioner the noticed was not received by him. The complaint was stated to be within limitation only on this basis.

(d) Since in fact NAFED had forfeited its right to file a complaint upon its failure to take action on the first dishonour of the cheque, it could not have filed the criminal complaint on 16th January 2006 on the basis of the second dishonour. The learned MM, therefore, could not have taken cognizance of the complaint presented on 16th January 2006.

(e) Without prejudice to the above, the criminal complaint filed on 16th January 2006 even if construed as being referable to the first dishonour of the cheque in question, was beyond the period of limitation under Section 138 NI Act notwithstanding the proviso to clause (b) to Section 142 NI Act.

(f) In order to invoke the proviso to Section 142 (b), there should be a specific averment in writing in the complainant itself showing 'sufficient cause' for not making the complaint within the period

stipulated under Clause (c) to the proviso to Section 138 NI Act. Reliance is placed on the judgment in ***Shakti Travel & Tours v. State of Bihar (2002) 9 SCC 415***. On the facts of the present case there is no such averment since the entire complaint has proceeded on the footing that the offence took place only when the second dishonour took place and that the proper legal notice was the one dated 7th December 2005. Therefore the complaint is barred by limitation and cannot be saved by the proviso to section 142 NI Act.

(g) Even on the basis of the second notice the complaint was barred by limitation. Given the wording of Section 138 read with Section 142 NI Act, which expresses a “different intention”, Section 27 of the General Clauses Act, 1897 cannot be invoked to presume service of notice only because such notice has been sent by registered post. Further, there is no averment in the complainant that the notice was sent by properly addressing the notice and despatching it by registered post. It is submitted that the recent judgment of the Supreme Court in ***C.C. Alavi Haji v. Palapetty Muhammed (2007) 6 SCC 555*** turned on its own facts as is evident from the question set out in para 2 of the judgment whereas the facts in the present case are entirely different. Not even the High Court can in exercise of its powers under Section 482 CrPC condone the delay in presenting the complaint beyond the time stipulated in Section 138 NI Act.

(h) For all of the above reasons, the order dated 7th February 2006 passed by the learned MM taking cognizance is bad in law.

14. The reply on behalf of the Respondent NAFED was as under:

(a) It is not disputed that the complaint filed by NAFED in which the impugned summoning order was passed, was indeed based on the understanding that the dishonour of a cheque on the second occasion

was the trigger for the initiation of the proceedings under Section 138 NI Act. In other words, it is the notice dated 7th December, 2005 which is understood as being the proper notice for the purpose of Section 138. This is clear from a careful reading of the letter dated 23rd August 2005 which is different from the letter with which the decision in ***Central Bank of India*** was concerned.

(b) If indeed the second legal notice dated 7th December 2005 is the proper legal notice, and it has been sent by registered post, then the presumption of service can be drawn under Section 27 of the General Clauses Act 1897. It is submitted that that the position in law in this regard has now been settled by the judgment of the Supreme Court in ***C.C. Alavi Haji***. The postal receipts were filed, and an averment to this effect made in the complaint and the affidavit by way of evidence of the authorised representative of NAFED also specifically adverted to this fact.

(c) In view of the above circumstances, the learned MM did not err in taking cognizance of the complaint on the basis that it was within limitation, and further did not err in proceeding to issue summons to the petitioner.

(d) Assuming without admitting that it is the letter dated 23rd August, 2005 which constitutes the proper legal notice, then the explanation contained in the complaint itself to the effect that the Petitioner had asked NAFED not to re-present the first cheque for a further period of time, after the expiry of which the complainant presented the cheque, does constitute “sufficient cause” for the learned MM to have, in terms of clause (b) of the proviso to Section 142 NI Act, taken cognizance of a complaint presented beyond the stipulated period under the clause (c) of the proviso to Section 138 NI Act.

(e) While exercising its powers under Section 482 CrPC, this Court would not interfere with the continuation of criminal proceedings if the net result would be the same whether the learned MM took cognizance of the offence on the basis of the letter dated 23rd August, 2005 or the later notice dated 7th December, 2005. The cheque being the same and the Petitioner not denying having signed it, law should be allowed to take its course.

Issues that arise for determination

15. The material facts are not much in dispute. There has been a presentation of one cheque, admittedly signed by the petitioner, for payment twice and it has been dishonoured twice. Also it is not in dispute that after the first dishonour NAFED sent a letter dated 23rd August 2005, which according to the petitioner was the proper legal notice of demand in terms of Section 138 NI Act. On the other hand NAFED has proceeded on the footing that its notice dated 12th December 2005 is the proper one and valid one and its complaint to the learned MM is also based on this understanding. Therefore, the questions that arise for consideration in the following sequence are:

(a) Whether it is the letter dated 23rd August 2005 or the notice dated 12th December 2005, which is the proper legal notice for the purposes of Section 138 NI Act?

(b) If question (a) is answered by holding that it is the notice dated 12th December 2005 which is the proper legal notice, whether the complaint filed on that basis is still within limitation. In other words, in such event, will the complainant NAFED be able to avail of the

provision of deemed service in terms of Section 27 General Clauses Act 1897 given that the notice dated 12th December 2005 was sent by registered post?

(c) If question (a) is answered by holding that it is the letter dated 23rd August 2005 which is the proper notice of demand for the purposes of Section 138 NI Act, then considering that no complaint has been filed by NAFED on that basis, does not the petitioner stand “absolved” of any offence under Section 138 NI Act in terms of the judgment in *Sadanandan Bhadran*?

(d) Assuming without admitting that there is no “absolution” of the petitioner for the first offence of dishonour, then should not the petitioner have, for availing of the benefit of extended period of limitation under clause (b) of the proviso to Section 142 NI Act, specifically shown in writing “sufficient cause” for not making the complaint within time and is not the absence of such averment fatal to the complaint?

(e) A related question in such event would be whether the High Court can, in exercise of its powers under Section 482 CrPC, condone the delay in NAFED making the complaint within time?

The effect of the proviso to Section 142 (b)

16. Before proceeding to answer question (a) it requires to be recapitulated that clause (b) of the proviso to Section 138 NI Act mandates that within “thirty days” of the receipt by the payee of information “from the bank

regarding the return of the cheque as unpaid”, the payee should make “a demand for payment of the said amount of money by giving a notice in writing, to the drawer of the cheque.” The further stages are that in terms of clause (c) of the proviso to Section 138 NI Act, within a period of fifteen days after “receipt of the said notice” of demand, the payee should “fail to make the payment.” Thereafter, in terms of clause (a) of Section 142, the payee should make “a complaint, in writing” to a court and in terms of clause (b) thereof such complaint in writing should be made within “one month” of the expiry of fifteen days within which the drawer of the cheque is expected to make payment in terms of clause (c) of the proviso to Section 138 NI Act. In this chain of events, therefore, the notice of demand for payment issued by a payee to the drawer in terms of clause (b) of the proviso to Section 138 NI Act is an important trigger. If there is a default in the payee adhering to the time schedules in the sequence of stages outlined, it will be open to the drawer to urge that the court should not take cognizance of the complaint.

17. In the above stages, a significant change has been introduced by the Parliament by Act 55 of 2002 in the form of a proviso to clause (b) of Section 142 NI Act. For a proper understanding of the effect of the proviso, the whole of Section 142 requires to be reproduced:

“142. 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 : [Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

(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.]”

18. What in effect the proviso does is to enable the court to take cognizance of a complaint which is presented by a payee beyond the period of “one month” after the expiry of the period of fifteen days within which the drawer is expected to make payment of the money demanded in terms of clause (c) of the proviso to Section 138 NI Act. The requirement is that the complainant must satisfy the court that “he had sufficient cause for not making the complaint within such period.” As will be noticed hereafter, this amendment appears to have been introduced to partly offset the legal consequence of ***Sadanandan Bhadran*** where the Supreme Court ruled that there would be an “absolution of the drawer” if the payee fails to make the complaint within one month of the payee failing to make payment after receiving the demand after the first dishonour. In other words, the complaint of a payee who has a valid explanation for not making the complaint within one month of the payee’s failure to make payment can still be taken cognizance of. The idea obviously is to extend the possibility

of a complaint of a bonafide complainant with a valid explanation for delay in coming to the court being taken on board instead of shutting him out to the benefit of the defaulter. This part will be discussed in detail later in this judgment.

Question (a): Which is the proper notice of demand?

19. Although extensive arguments were made on the true effect of the proviso to clause (b) of Section 142, this court is of the view that the answers to questions set out in para 16 in that sequence will really determine whether the aforementioned proviso to clause (b) of Section 142 is attracted in the instant case. Therefore, question (a) is taken up for consideration first.

20. The letter dated 23rd August 2005 has already been extracted above. The penultimate paragraph of the letter which is crucial to the question (a) reads:

“You are requested to arrange payment of the above cheque and inform NAFED, **so that the cheque can be represented**, otherwise we will be constrained to initiate legal proceedings under Negotiable Instruments Act.” (emphasis supplied)

21. It is clear that although NAFED did ask the petitioner to arrange payment, it was only for the purpose that the “cheque can be represented” failing which “we will be constrained to initiate legal proceedings under the Negotiable Instruments Act, 1881”. In other words, NAFED was only

reverting to the stage prior to the presentation of the cheque and not to the next stage of demanding payment of the cheque amount forthwith. To this extent, there appears to be a difference between the facts in the case on hand and those in ***Central Bank of India***. There, as noticed in para 9 of the judgment, the material portion of the notice read as under (***SCC @ 225***):

“Kindly arrange to make payment to avoid the unpleasant action of my client”.

It was held by the Supreme Court that the above wording was sufficient to constitute legal notice for the purpose of Section 138. It is not possible to accept the contention of the Petitioner here that the letter dated 23rd August 2005 constitutes an even stronger demand for payment than the letter in the ***Central Bank of India*** case. The tenor of the letter dated 23rd August 2005 taken as a whole and the penultimate paragraph in particular when read carefully, shows that NAFED was only requiring the Petitioner to arrange for the funds in its account in the bank so that when NAFED presented the cheque again, the cheque would be honoured. This cannot be construed as a demand for immediate payment.

22. In contrast, the penultimate paragraph of the notice dated 12th December 2005, extracted in para 6 of this judgment, leaves no manner of doubt that it is a demand for payment in terms of Section 138 NI Act. In that view of the matter, no fault can be found with NAFED for proceeding on the footing that the proper legal notice was the one dated 7th December 2005 which was issued after the second dishonour. Also, for the purposes of the law laid down in ***Sadanandan Bhadran***, it cannot be said that

NAFED had triggered the process under Section 138 NI Act after the first dishonour by issuing the letter dated 23rd August 2005. Therefore, the NAFED could not be stated to have forfeited its right to proceed against the drawer after the second dishonour only because it issued the letter dated 23rd August 2005 after the first dishonour and did not follow it up by making a complaint under Section 142. Consequently, the learned MM was not in error in taking cognizance of the complaint by treating the notice for demand for the purposes of Section 138 of the NI Act, as the one dated 7th December, 2005.

Question (b): Can there be a presumption of deemed service of notice?

23. The argument that there cannot be presumption that service of notice under Section 27 General Clauses Act vis-a-vis the notice dated 7th December 2005 is without merit. For this purpose, a reference may be made to the exact wording of the said provision:

“27. Meaning of service by post. Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

The word “served” occurring in Section 27 General Clauses Act connotes the receipt of the notice by the addressee. In essence this is no different from the word “receipt” occurring in clause (c) of the proviso to Section

138. In other words there is no “intention to the contrary” in the NI Act which can preclude the applicability of Section 27 of the General Clauses Act. This position has been settled authoritatively by the Supreme Court in **C.C. Alavi Haji**. The law was explained thus (**SCC @ p. 564**):

“Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed. [Vide **Jagdish Singh v. Natthu Singh**; **State of M.P. v. Hiralal and Ors.** and **V. Raja Kumari v. P. Subbarama Naidu and Anr.**] It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.”

24. Applying the law as explained by the Supreme Court it is held that the notice dated 7th December, 2005 having been sent by the registered post with acknowledgment due, as also evidenced by the postal receipts filed along with the complaint and reiterated in para 16 of the affidavit of the

complainant filed by way of evidence, there has to be a presumption of service of notice on the addressee within the usual time taken for service of such registered letters. In that view of the matter, no delay has occurred in presenting complaint and the learned MM was right in holding that the complaint was within limitation. Question (b) is answered accordingly.

25. Since questions (a) and (b) stand answered in favour of the complainant, and the order dated 7th February 2006 passed by the learned MM having been held to be valid, this Court need not answer questions (c) to (e). But in view of the fact that in a large number of cases the question of the legal consequence of the repeated presentation of a cheque dishonoured earlier does arise, this Court ventures to answer the remaining questions as well.

Questions (c) to (e): The law in *Sadanandan Bhadran*

26. The facts of the case on hand do concern a second presentation of a cheque that has already been dishonoured. This situation has arisen earlier as the facts in *Sadanandan Bhadran*, apparent from para 2 of that judgment, reveal:

“2. On 04.01.1991, the respondent handed over a cheque for Rs. 30,000 to the appellant in liquidation of the loan he obtained from the latter. The cheque was presented in the bank for encashment on 05.01.1991 but was returned for want of sufficient funds in the account of the respondent. **The appellant then sent a lawyer's notice to the respondent on 15.01.1991 calling upon him to pay the aforesaid amount.**

On receipt of the notice the respondent approached the appellant and requested for some time to pay the amount. **In view of the assurance so given the appellant did not initiate any further proceeding but as the respondent did not keep his promise he presented the cheque in the bank once again on 04.05.1991. This time also the cheque was dishonoured** for want of sufficient funds. Another notice complaint against the respondent on 30.06.1991 under Section 138 of the Negotiable Instruments Act, 1881 ('Act' for short). On that complaint cognizance was taken and the respondent was summoned to face the trial.....”

27. The Supreme Court after discussing the above facts and the wording of Section 138 of the NI Act held as under (**SCC @ p. 518**):

“This apart, in course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after sometime, on his own volition or at the request of the drawer, in expectation that it would be encashed. Needless to say, the primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which normally, is taken out of compulsion and not choice. For the above reasons it must be held that a cheque can be presented any number of times during the period of its validity. Indeed that is also the consistent view of all the High Courts except that of the Division Bench of the Kerala High Court in Kumaresan (supra) which struck a discordant note with the observation that for the first dishonour of the cheque only a prosecution can be launched for there cannot be more than one cause of action for prosecution.”

28. Having explained the position that “a cheque can be presented for encashment on any number of occasions within the period of its validity,” the Court proceeded to answer the next question “whether dishonour of the cheque on each occasion of its presentation gives rise to a fresh cause of action within the meaning of Section 142(b) of the Act”. It must be recalled that at the time the Supreme Court rendered the above judgment, the proviso to clause (b) of Section 142 had not been introduced. This proviso was inserted only by Act 55 of 2002 with effect from 6th February, 2003. On the basis of Section 142 as it then stood, the Supreme Court opined as under (SCC @ p. 519):

“The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142(c) arises - and can arise - only once.”

29. The Supreme Court in ***Sadanandan Bhadran*** identified the factors that “negate the concept of successive causes of action”. The first was that for the dishonour of one cheque, there could be only one offence and once such offence has been committed by the drawer immediately upon his failure to make the payment within 15 days of the receipt of the notice served in accordance with clause (c) of the proviso to Section 138. In other words, after a notice is issued for the first dishonour, a payee could not issue another notice after the second dishonour and get a “a right to file a complaint treating the second offence as the first one.” The Supreme Court explained that by failing to pursue the case after issuing a notice for the first dishonour, the payee would have absolved the drawer of the first offence. It was explained that “at that stage, it will not be a question of

waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him, and which cannot be committed by him again”.

30. The second reason was explained in para 8 as under (**SCC @ p. 519**):

“The other impediment to the acceptance of the concept of successive causes of action is that it will-make the period of limitation under Clause (c) of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes the Court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that the every part should have effect the above conclusion cannot be drawn for, that will make the provision for limiting the period of making the complaint nugatory.”

31. The Supreme Court was faced with the situation where there was an apparent conflict between the provisions of the NI Act (**SCC @ p. 519**):

“.....one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour, and that too within one month from the date the cause of action arises, can be reconciled.”

32. This conflict was sought to be harmonised in the following manner (**SCC @ p. 519-20**):

“.....that on each presentation of the cheque and its dishonour

a fresh right - and not cause of action - accrues in his favour. He may, therefore, **without taking pre-emptory action in exercise of his such right under Clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But, once he gives a notice under Clause (b) of Section 138 he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise.** Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer, expires.” (emphasis supplied)

33. A careful reading of the above decision in *Sadanandan Bhadran* reveals that the law as explained by the Supreme is as under:

(a) For one cheque there can be only one dishonour that is actionable in terms of the NI Act. If the payee chooses to make a demand for payment soon after the first dishonour, he has to logically follow it up by making a complaint under Section 142. Else, the payee will be ‘absolved’ of the offence under Section 138 NI Act vis-a-vis that cheque altogether notwithstanding that the same cheque may be presented again and still be dishonoured. The complainant in such event forfeits his right to proceed against the complainant for the offence under Section 138 NI Act.

(b) If the payee does not invoke the legal process under Section 138 after the first dishonour, i.e. the payee does not make a demand for

payment of the money from the drawer, then he can trigger the legal process by making a demand after the second dishonour. But he would have to follow it up by making a complaint under Section 142 and within the time stipulated therein by treating the failure of the payee to make payment within fifteen days of the demand made after second dishonour as the cause of action. If he has not made a demand even after the second dishonour he can choose to make a third presentation and then treat the third dishonour as the actionable one and so on. In other words, once the payee triggers the legal process by making a demand for payment after a dishonour, then there could be no further actionable dishonours on further re-presentation of that very cheque. The door of Section 142 will be shut to a payee who upon making a demand for payment after a dishonour, fails to make a complaint within the period of that particular dishonour in terms of the provisos to Section 138 NI Act.

(c) If the payee, after, triggering the process by making a demand for payment in terms of clause (b) of the proviso to Section 138 chooses not to make a complaint but re-presents that very cheque which then results in a second dishonour, the drawer of the cheque would not only stand absolved of the offence of the first dishonour but the payee would also forfeit his right to proceed against the drawer for the second dishonour by treating it as the first dishonour.

34. One of the reasons highlighted by the Supreme Court in ***Sadanandan Bhadran*** was that since the period of limitation was fixed, the

interpretation consistent with the intention of the Legislature at that point in time should be honoured for otherwise the payee would be able to avail of an endless period of limitation notwithstanding the fact that after issuing a notice of demand in terms of clause (b) of the proviso to Section 138 he had failed to make a complaint within the time stipulated in Section 142. This is also the ratio of the decision of the Supreme Court in ***Prem Chand Vijay Kumar v. Yashpal Singh (2005) 4 SCC 417***, where of course, the question of the applicability of the proviso to Section 142 (b) did not arise.

35. The latter part of the law as explained by the Supreme Court in ***Sadanandan Bhadran*** has undoubtedly undergone a change after the insertion of the proviso to Section 142 (b) although the substantive part of the judgment in ***Sadanandan Bhadran*** that there could be only one actionable offence committed vis-a-vis one dishonour still holds good. The change in the law is that upon the dishonour of a cheque, the period of one month within which the cognizance ought to be taken by the MM in terms of clause (b) to section 142 has been extended by the period for which a payee is able to show “sufficient cause” and satisfy the court why the complaint could not be made within time. In other words, merely on account of the fact that the complaint has not been made within the time stipulated in clause (b) to Section 142 calculated on the basis of the first **actionable** offence for which a notice of demand has been issued to the drawer by the payee, the payee does not automatically forfeit his right to make a complaint. This seems to be based on the broad principle of *ubi jus ibi remedium*. In other words, a payee who is a victim of the offence of

dishonour who otherwise has a right to proceed against the person committing the offence under Section 138 NI Act should not be rendered remediless only because he has re-presented the very same cheque hoping it will somehow get honoured on subsequent presentation. But whenever, he chooses to make a complaint thereafter, the period of limitation for the purpose of Section 142 (b) will be calculated from the date of the **first** demand for payment issued by the complainant to the drawer. It may be mentioned here that it is not disputed by the complainant that the proviso to Section 142 (b) became effective even before the events in the present case took place.

36. As regards the incidental question as to what should be the form of pleadings relevant for the applicability of the proviso to Section 142 (b), this Court holds that even if the complaint does not expressly state that these are facts relevant for the purposes of explaining the delay in making the complaint, it should be so read given the purpose for which the proviso has been introduced in clause (b) to Section 142. In other words, a court asked to take cognizance of the offence under Section 138 will scan the complaint to see if it contains the necessary averments that explain the delay in making the complaint. The reasons of course have to be bona fide and this will depend on the facts of individual cases.

37. Turning to the case on hand if, as is sought to be urged by the petitioner, the letter dated 23rd August 2005 is to be construed as the proper demand in terms of clause (b) of the proviso to Section 138 NI Act, then

the further question that arises would be if the payee NAFED could avail of the benefit of the proviso to Section 142 (b) to explain the delay resulting from having made the complaint only on 16th January 2006. That question is indeed academic in view of the finding of this Court that it is the legal notice dated 12th December 2005 which is the proper legal notice. Still, even if the contention of the petitioner is upheld on this count, the relevant paragraphs of the complaint as extracted do constitute an explanation by the complainant of “sufficient cause” for not making the complaint within the time stipulated in Section 142. The complaint refers to the petitioner’s letter of 6th October 2005 asking the complainant NAFED not to present the cheque till 31st October 2005 and that being the reason for not presenting the cheque again till 9th November 2005. Therefore, had the learned MM proceeded on the footing that the letter dated 23rd August 2005 was the proper demand for payment in terms of clause (b) of the proviso to Section 138 NI Act, then he would have been justified in condoning the delay in the payee making the complaint within the time stipulated in Section 142 (b) and proceeding to issue summons to the petitioner.

38. This Court has ample power under Section 482 to exercise such powers that the MM could have exercise while entertaining the complaint particularly when it is judicially reviewing the order of the MM taking cognizance in issuing summons. If this Court finds that the impugned order of the learned MM can be sustained for reasons independent of the ones adduced by the learned MM, and which are apparent from the record, then there is no need for the order of the learned MM taking cognizance and

issuing summons to be upset. As far as the present case is concerned the net result would be the same whether the learned MM took cognizance of the offence on the basis of the letter dated 23rd August, 2005 or the notice dated 7th December, 2005. The impugned order of the learned MM taking cognizance and issuing summons therefore does not call for interference.

39. For all the aforementioned reasons, this Court finds that no case has been made out for either quashing the criminal complaint or the impugned order of the learned MM.

40. The petition is dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J.

JANUARY 23, 2008
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