

GAHC010183752021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./642/2021

NABA SHARMA
SON OF LATE C.K. SHARMA
R/O HOUSE NO. 2,
CHENIKUTHI
P.S. CHANDMARI
GUWAHATI, PIN-781003
DIST. KAMRUP (M), ASSAM

VERSUS

M/S KORANGANI TEA COMPANY PVT LTD
REP. BY ITS DIRECTOR SRI DEBAJIT CHALIHA, JAIN COMPLEX, G.S.
ROAD, GUWAHATI, KAMRUP (M), ASSAM

BEFORE
HON'BLE MR. JUSTICE AJIT BORTHAKUR

Advocate for the petitioner : Ms. S. Sarma
Advocate for the respondents : Mr. M. Khataniar
Mr. J. Deka

Date of hearing : 28.03.2023
Date of Judgment & Order : 29.05.2023

JUDGMENT & ORDER

Date : 29-05-2023

Heard Ms. S. Sarma, learned counsel for the petitioner. Also heard Mr. M. Khataniar assisted by Mr. J. Deka, learned counsel for the respondent.

2. By this petition under Section 482 Cr.P.C., the petitioner has prayed for quashing of the proceedings in Complaint Case No.2654^C/2016 under Section 138 of the Negotiable Instruments Act, 1881 (for short 'N.I. Act'), pending in the Court of learned Chief Judicial Magistrate, Kamrup(M) at Guwahati.

3. The case of the prosecution, in brief, is that the accused company, namely Annada Tea Company (P) Ltd. represented through its Managing Director, Naba Sharma (the petitioner herein) requested the complainant company, namely M/s Korangani Tea Company Pvt. Ltd. for financial assistance to tide over acute financial crisis faced by the accused company. The complainant company, upon good will and good relation prevailing between the two companies agreed to provide financial help to the accused company. The Director of the accused company by communication, dated 17.12.2014, wrote to the complainant company seeking financial assistance and assured that if any financial assistance is received, the same will be adjusted against supply of green tea leaves from the Kaliapani T.E. owned by the accused company within the season for the year 2015. Accordingly, the complainant company (respondent herein) deposited an amount of Rs.23,60,000/- (Rupees Twenty Three Lakhs Sixty Thousand) to the account of the petitioner, the Managing Director of Annada Tea (P) Ltd. by various cheque payments drawn on United Bank of India and the petitioner took personal guarantee to return the money if the same is not adjusted by supply of green tea leaves within the season year, 2015. However, the accused company

failed to supply green tea leaves to the tune of the total amount Rs.23,60,000/-. To adjust the debts against the complainant company, the accused company issued various bills dated, 06.07.2015, 21.06.2015, 02.06.2015, 20.05.2015, 04.05.2015 for supply of green tea leaves to the complainant company and adjusted amounts received in the account of the petitioner towards the advance payment of Rs.23,60,000/-. The last bill sent to the complainant company was dated 06.07.2015, wherein Rs.2,50,000/- advanced to the petitioner was adjusted and balance was Rs.12,60,000/-. After calculation, the complainant company found that total amount of Rs.10,16,106.25/- was found as outstanding amount towards supply of green tea leaves.

4. After six months of completion of the season year, 2015, the accused petitioner, in order to liquidate the liability, issued three number of cheques- (i) Cheque No.547466, dated 01.06.2016 amounting to Rs.2,60,000/- (ii) Cheque No.547459, dated 04.06.2016 amounting to Rs.4,50,000/- and (iii) Cheque No.547456, dated 04.06.2016 amounting to Rs.3,25,000/- drawn on SBI Chenikuthi Branch, Guwahati in favour of the complainant company (total Rs.10,35,000/- including Rs.18,893.75 extra for delay in liquidating the debt on time).

5. The above three cheques were presented for payment on 07.06.2016, but the same were returned unpaid as dishonoured for insufficiency of funds on 08.06.2016 which fact was duly informed by the complainant company to the accused on 09.06.2016. However, the accused did not pay any heed to the grievance of the complainant upon which the complainant issued legal notice, dated 01.07.2016 which was delivered to the accused in his address. After lapse of one month since dispatch of the said legal notice as the accused failed to make payment of the outstanding amount, the instant case was filed against the

accused petitioner.

6. Ms. S. Sarma, learned counsel for the petitioner, submitted that from the materials available on record it is apparent that the petitioner was no longer connected with the affairs of the Annada Tea Company (P) Ltd., which was taken over by the Assam Cooperative Apex Bank Ltd. on 22.07.2015 under the provisions of Section 15(1)(a) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'The SARFAESI Act') and as such, on and from 23.07.2015, he ceased to be the Managing Director of the said Company. Ms. Sarma further submitted that therefore, the cheques in question amounting to Rs.10,35,000/- (Rupees Ten Lakhs Thirty Five Thousand) having been issued by the petitioner in the year 2016 in his personal capacity being not relatable to the amount owed to the respondent company by the company of which he was earlier the Managing Director, no liability can be fastened upon him under Section 138 of the N.I. Act. Pointing out the paragraph No. 9 of the complaint, Ms. S. Sarma, learned counsel for the petitioner, further submitted that there was admittedly delay of 7 days in filing the complaint impleading the company as accused No.1 and the petitioner as the Managing Director of the company without any averment therein that the petitioner, at the time of occurrence of the alleged offence was in charge of the company, in the absence of which, the petitioner cannot be exposed to criminal proceeding.

7. It has been submitted by Ms. Sarma that the complainant/respondent company has not produced any documentary evidence explaining the grounds for delay and the learned Court also by the impugned order while taking cognizance of the offence against the petitioner, has failed to record any reason of satisfaction for condoning the delay at all. Ms. Sarma, therefore, submitted

that as the impugned order, dated 29.11.2016 suffers from material legal infirmities, the same is liable to be quashed and as a whole, the entire complaint case as well. Ms. Sarma has relied on the judgments of the Hon'ble Supreme Court rendered in- i) *Sarah Mathew Vs. Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherian and Ors.*, reported in (2014) 2 SCC 62; ii) *Zandu Pharmaceutical Works Ltd. and Ors. Vs. Mohd. Sharaful Haque and Anr.*, reported in (2005) 1 SCC 122 and iii) *State of H.P. Vs. Tara Dutt and Anr.*, reported in (2000) 1 SCC 230.

8. Mr. M. Khataniar, learned counsel for the respondent company, emphatically submitted that the petitioner is liable for criminal prosecution as he was the Managing Director of Annada Tea Company (P) Ltd. at the relevant time and he issued the cheques in question. Mr. Khataniar submitted that the complainant/respondent, while filing the complaint under Section 138 of the N.I. Act on 23.08.2016, delay of 9 days was caused and the reasons for the aforesaid delay has been satisfactorily explained in paragraph No.9 therein. Therefore, Mr. Khataniar submitted that the learned Magistrate took cognizance of the offence on perusal of the complaint which disclosed the commission of the aforesaid offence and accordingly, took cognizance of the offence under Section 138 of the N.I. Act by the impugned order, dated 29.11.2016. Mr. Khataniar submitted that for the purpose of condoning delay in filing a complaint case under Section 138 against an individual filing of a separate petition is not mandatory under Section 142 of the N.I. Act. Mr. Khataniar submitted that a hyper-technical approach in the matter of condonation of delay to defeat a righteous cause is not permissible in law. It has been submitted that before taking cognizance of the aforesaid offence, the learned Magistrate perused the original documents which were exhibited and referred to in the

complaint and the complaint petition, evidence on affidavit and the exhibited documents and fairly formed an opinion that there was prima facie material to proceed with the case against the petitioner and hence, cognizance of the offence was taken by the impugned order.

9. Mr. Khataniar also submitted that the petitioner as accused avoided his appearance despite receipt of summons as is seen from the order, dated 08.02.2017 onwards on consecutive dates for which the learned Court was compelled to initiate coercive measures by issuing bailable warrants of arrest against him and belatedly on 12.12.2018, he appeared by engaging a counsel and prayed for time for his appearance showing cause. His absentia continued thus and in the result, the learned Magistrate initially issued bailable warrant and then, non-bailable warrants against him.

10. However, Mr. Khataniar submitted, the petitioner has preferred the instant petition before this Court under Section 482 Cr.P.C. praying for quashing of the proceeding including the impugned order, dated 29.11.2016 citing the basic grounds of having no liability towards the complainant respondent and on the point of delay, which are mixed questions of law and facts amenable to trial by the Court of learned Magistrate. Therefore, Mr. Khataniar submitted that the grounds cited in the instant petition by the accused petitioner may be taken before the learned trial Court where he has already appeared by engaging learned counsel. Mr. Khataniar relied on the judgments of the Hon'ble Apex Court rendered in- (i) *Meghraj Vs. Jesraj Kasturjee and Anr. in C.R.P. No. 1279/1971* (ii) *Standard Chartered Bank Vs. State of Maharashtra and Ors., reported in (2016) 6 SCC 62;* (iii) *Pankaj Mehra and Anr. Vs. State of Maharashtra and Ors. reported in (2002) 2 SCC 756;* (iv) *Ajay Kumar Bishnoi Vs. Tap Engineering, reported in 2020 SCC OnLine Mad 22579* (v) *Kirshna Texport*

and Capital Markets Ltd. Vs. Ila A. Agarwal and Ors., reported in (2015) 8 SCC 28; (vi) Rallis India Ltd. Vs. Poduru Vidya Bhushan Ors., reported in (2011) 13 SCC 88; (vii) MSR Leathers Vs. S. Palaniappan and Anr., reported in (2013) 1 SCC 177 and (viii) S.P. Mani and Mohan Dairy Vs. Dr. Snehalatha Elangovan, reported in 2022 SCC OnLine SC 1238.

11. I have given due consideration to the above submissions made by the learned counsel of both sides and perused records as well as the citations.

12. Sections 138 and 142 of the N.I. Act respectively read as under:

“138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.]

142. Cognizance of offences.- (1) 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

(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,-

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.-- For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account. ”

13. A perusal of the above quoted Section 138 of the NI Act shows that to prove the aforesaid offence, it has to be established that (a) the cheque was drawn for payment of an amount of money for discharge of a debt/ liability and the cheque was dishonoured; (b) that the cheque was presented within the prescribed period, that is, within the period of its validity; (c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and (d) that the drawer failed to make payment of the money within 15 days of the receipt of the notice. It is upon the failure of the drawer to pay the money within the aforesaid specified period as envisaged under Clause (c) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of 1(one) month for filing the complaint under Section 142 is to be reckoned accordingly. However, it is settled, Section 142 empowers the learned Magistrate to admit the complaint and take cognizance of the offence even

when presented after the specified period of limitation as contained in Clause (b) of Section 142, if it is specified that the complaint had sufficient cause for not presenting it within time. The proof of sufficient cause to the satisfaction of the learned Magistrate is the condition precedent for the exercise of the discretionary jurisdiction of the learned Magistrate. In such a situation, the discretion has to be exercised to advance substantial justice taking into account the totality of the facts and circumstances liberally without a rigid or hyper-technical view to those facts and circumstances, after due notice upon the accused applying the principle of natural justice. In this regard, acceptance of explanation furnished should be the rule and refusal an exception, more so when no negligence of inaction or want of bona fides can be imputed to the defaulting party. To ascertain the sufficiency of causes for delay in approaching the court may, often, requires some inquiry by the learned Magistrate for his satisfaction.

14. Now, a perusal of the allegations and counter-allegations of the parties herein, firstly reveal that the complainant/respondent herein alleged of existence of a legally enforceable debt arising out of contractual obligations, stated, in short, above, for which the accused/ petitioner herein issued the cheques in question and on presentation to the bank, the same were dishonoured for insufficiency of funds and the amount due was not paid even after notice of demand was issued and served. However, in the instant petition, the accused/ petitioner has resisted the claim of the complainant on the ground that he is not liable to make the payment as he ceased to be the Managing Director of Annada Tea Company (P) Ltd. since it was taken over by the Assam Cooperative Apex Bank Lt. on and from 23.07.2015. These are the mixed questions of law and fact and as such, in exercise of the jurisdiction under

Section 482 Cr.P.C. cannot be interfered as the same will amount to embarking on an enquiry as to whether the evidence laid is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, because that is the function of the trial Court Judge.

15. So far the second point in issue regarding the delay in filing the complaint beyond the prescribed period of limitation is concerned, the petitioner has alleged that admittedly there was a delay of 7 (seven) days (as averred in Paragraph No. 9 of the complaint), against the company/accused No.1 and the petitioner as Managing Director of Annada Tea Company (P) Ltd. without any averment in the same that the petitioner was at the time of commission of the alleged offence was In-Charge of the aforesaid company, in absence of which the petitioner cannot be subjected to the criminal process as the Managing Director of the company. It has been further alleged that the aforesaid delay of 7(seven) days in filing the complaint without any supporting document explaining the same nor any reasoned order being passed thereon, renders the complaint not maintainable. However, it has been alleged that the learned Magistrate while taking the cognizance of the offence on 29.11.2016 overlooked the delay which was fatal to the case. The complainant/respondent, M/s Korangani Tea Company Pvt. Ltd. has contested the instant issue referring to the Paragraph No.9 of the complaint wherein explanation has been given as for what caused the delay of 7(seven) days in filing the complaint with a prayer for condoning such delay.

16. The impugned order, dated 29.11.2016, passed in C.R. Case No.2654/2016 by the learned Judicial Magistrate, First Class, Guwahati is extracted hereinbelow-

“29.11.2016

Complainant is present and has submitted the original documents. Documents are exhibited and original documents are returned to the complainant on his oral prayer after keeping the proved in original copy with the case record.

Seen the complaint petition, evidence on affidavit and exhibited documents. It appears that prima facie materials are there to proceed with this case against the accused. Hence, cognizance of offence punishable U/s 138 of N.I. Act is taken against the accused.

Issue summons to the accused by registered post.

Complainant is directed to take steps for issuance of summons to the accused.

Fixed 8/2/17 for appearance.

*Judicial Magistrate
1st Class, Guwahati”*

17. In *Sarah Mathew(supra)*, the Hon’ble Supreme Court reiterated the previous view held in a catena of judgments that for the purpose of computing the period of limitation, the relevant date is the date of filing of the complaint or initiating criminal proceeding and not the date of taking cognizance by a Magistrate or issuance of a process by Court. It has been further held that it is absurd to hold that the Courts should issue notice to the accused for condonation of delay, explain the delay caused at its end and then pass an order condoning or not condoning the delay. The law cannot be reduced to such absurdity. In *Tara Dutt(supra)*, the Hon’ble Apex Court held that the Court may take cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognized principles by a speaking order. In *Meghraj(supra)*, it has been held that if under explainable circumstances an appeal or an application is filed in Court but, without a formal application or a written application for excusing the delay in the presentation of the same, then the Court should circumvent

technicality and afford a reasonable opportunity to the aggrieved party to mend matters. Otherwise, it would lead to miscarriage of justice.

18. A perusal of the above impugned order taking cognizance of the offence under Section 138 of the N.I. Act, the learned Magistrate appears to have omitted to apply his mind to the unavoidable aspect of delay of 7(seven) days as stated in filing the complaint although the circumstances in which the delay has been caused are stated in Paragraph No.9. This Court finds that the learned Court ought to have computed the period of delay in filing the complaint based on the recognized principle of law, some of which are referred to above, while applying the judicial discretion in this regard. The question of delay is the subject matter within the domain of discretion of the learned trial Court which apparently failed to find its manifestation.

19. Therefore, the instant petition stands **partly allowed** setting aside the impugned order with direction to the learned trial Court to decide the issue of delay in filing the complaint in question and then, to decide afresh the matter of cognizance of the offence complained of.

20. Accordingly, both the parties are directed to appear before the Court of learned Judicial Magistrate, First Class, Kamrup (M) at Guwahati **on 12.06.2023** to receive further instructions.

With the above direction, the petition stands disposed of.

JUDGE

Comparing Assistant