

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 3126 OF 2015

Mr.K.S.Gupta
Gupta Enterprises,
Omkar Chambers,
Opp. Sadvik Asia,
Pune Mumbai Road, Dapodi,
Pune 411 012

..Petitioner (Org. Accused)

v/s.

1. Mr. Ashok Shaligram Gupta
Satara Polymers Pvt. Ltd.
C.O. G.S.Rubber Products,
S-157, MIDC Bhosari, Pune 26
2. Satish Shaligram Gupta
Satara Polymers Pvt. Ltd.
C.O. G.S.Rubber Products,
S-157, MIDC Bhosari, Pune 26
3. Rashmi Ashok Gupta
Satara Polymers Pvt. Ltd.
C.O. G.S.Rubber Products,
S-157, MIDC Bhosari,Pune 26
4. Mrs. Sushma Satish Gupta
through its Authority Holder
Mr. Satish Shaligram Gupta
Satara Polymers Pvt. Ltd.
C.O. G.S.Rubber Products,
S-157, MIDC Bhosari, Pune 26

..Respondents

Mr. Manmohan Amonkar a/w. Rajmohan Amonkar for the Petitioner.
Mr. Bhushan Deshmukh for the respondent.
Mrs.R.V. Newton, APP for the Respondent/State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : OCTOBER 19, 2015
JUDGMENT DATED : NOVEMBER 17, 2015.

JUDGMENT.

1. The petitioner herein has sought to quash the order dated 23.12.2014 of issuance of process under Section 138 of the Negotiable Instruments Act in C.C.No. 1337/SS/2014 pending on the file of the learned Judicial Magistrate, First Class, Khadki, Pune.

2. The Petitioner-accused is the elder brother of the Respondents nos. 1 to 4, who are the complainants in the C.C.No.1337/SS/2014. The Complainants had alleged that Satara Polymers Pvt. Ltd. Company had advanced short term financial loan to the accused. The accused had issued cheque no.909950 dated 30.9.2014 for Rs.40 lakhs towards the repayment of principle amount of the loan. The said cheque was deposited in the bank on 30.9.2014 and was dishonoured on 7.10.2014 with remark 'Exceeds arrangement'. The Complainants had alleged that they had received the said intimation on 7.10.2014. By demand notice dated 7.11.2014, the complainants called upon the accused to repay the said cheque amount. The said notice was received by the accused on 8.11.2014. The accused did not make the payment, hence the complainants filed the complaint dated 22.12.2014 for the offence under Section 138 of the Negotiable Instruments Act.

3. By order dated 23.12.2014 the learned Magistrate had issued process against the accused for the offence under Section 138 of the N.I.Act. The learned counsel for the petitioner has submitted that the cheque was dishonoured on 7.10.2014 and the complainant had received the intimation about the same on the same date. The demand notice was issued on 8.10.2014 and the same was received by the accused on 9.10.2014. He has submitted that the complaint was required to be filed within 30 days from the date of the cause of action. The learned Counsel for the accused has submitted that the complaint was filed on 22.12.2014 i.e 28 days beyond the period of limitation, without filing any application for condonation of delay, the learned Magistrate was therefore not competent to take cognizance of the offence.

4. The learned counsel for the petitioner has further submitted that the cheque was issued by a partnership firm- M/s. Gupta Enterprises in favour of Satara Polymers Pvt. Ltd. Company. It is submitted that neither the company nor the partnership firm is arrayed as accused and as such the complaint itself is not maintainable.

5. Learned Counsel for the respondent has submitted that the complaint was filed within the period of limitation and that there is no merit in the objection raised by the petitioners. It is submitted that the limitation will have to be decided on the basis of the material

produced before the court in the course of the trial.

6. I have perused the records and considered the submissions advanced by the learned Counsels for the respective parties. The grievance of the accused is that the complaint under Section 138 of the N.I.Act was not filed within one month from the date of cause of action. Section 142 of Negotiable Instruments Act which governs taking of cognizance of the offence under Section 138 bars the court from taking cognizance of the offence unless the complaint is filed in writing by the payee or by the holder in due course, as the case may be, within one month from the date the cause of action arises under clause(c) of the proviso to Section 138. The cause of action contemplated under the provisions of Clause (c) would accrue on failure of the drawer to make payment within 15 days from the receipt of the statutory demand notice. Proviso to section 142 (b) empowers the court to condone the delay in filing the complaint upon being satisfied that the complainant had sufficient cause for not making the complaint within such period. The question which arises in facts and circumstances of the case is whether the complaint is filed within the limitation provided under section 142 (b) of N.I.Act.

7. It is not in dispute that the subject cheque was issued on 30.9.2014 and the same was presented in the bank on 30.9.2014. The said cheque was dishonoured on the same day for the reason “exceeded arrangement”. The intimation of dishonour was received

by the complainant on 7.10.2014. The complainants had averred that they had issued the demand notice on 7.11.2014 and the same was received by the accused on 8.11.2014. The accused having failed to pay the cheque amount, complaint under section 138 was filed on 22.12.2014.

8. The complaint would be within the limitation period prescribed under section 142 (b) of N.I.Act, if the cause of action and limitation period were to be computed from the expiry of 15 day 8.11.2014 i.e the date of the receipt of the notice dated 7. 11.2014. It is however to be noted that the accused has placed on record copy of the demand notice dated 8.10.2014, a perusal of which reveals that pursuant to the dishonour of the cheque, the complainants had issued a demand notice dated 8.10.2014 calling upon the accused to pay the cheque amount within fifteen days from the date of receipt of the said notice. The complainant had also forwarded to the petitioner the scanned copy of the dishonoured cheque and the cheque return memo by e-mail dated 8.10.2014, and had called upon the petitioner to pay the cheque amount within fifteen days. The complainants have not disputed having issued the said notice; though the fact of issuance of notice dated 8.10.2014 was suppressed and not referred to in the complaint. The question which therefore arises is whether the period of limitation as envisaged under section 142 (b) N.I.Act has to be computed from expiry of 15 days from the receipt of the first notice dated 8.10.2014 or the second notice dated 7.11.2014.

9. Before advertizing to the facts of the case, it would be advantageous to refer to the decision of the Apex Court in ***MSR Leathers vs. S. Phalaniappan & Anr. 2012 (4) Bom. C.R. (Cri.) 289*** wherein the Apex Court has held that there is nothing in the provisions of the Act that forbids the holder/payee of the cheque to demand by service of a fresh notice under clause (b) of proviso to Section 138 of the act, the amount covered by the cheque, should there be a second or successive dishonor of the cheque on its presentation. It is held that every time a cheque is presented in the manner and within the time stipulated under the proviso to Section 138 followed by a notice within the meaning of clause (b) of proviso to Section 138 and the drawer fails to make the payment of the amount within the stipulated period of 15 days, after the date of receipt of such notice, a cause of action accrues to the holder of the cheque to institute proceedings for prosecution of the drawer. While overruling the decision in ***Sadanandan Bhadran vs. Madhavan Sunil Kumar 1998 (6) SCC 514***, the Apex Court held that while a complaint based on a default and notice to pay must be filed within a period of one month from the date the cause of action accrues, which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires. There is nothing in Section 142 to suggest that expiry of any such limitation could absolve him of his criminal liability, should the cheque continue to dishonor by the bank on subsequent presentations. So long as the cheque is valid and

so long as it is dishonoured upon presentation to the bank, the holders' right to prosecute the drawer for the default committed by him remains valid and exercisable.

10. It is thus well settled that the law does not preclude the payee or the holder in due course, as the case may be, from issuing a fresh notice upon the subsequent dishonour of the cheque and filing a complaint on the basis of fresh cause of action. In the instant case, the complainants had presented the cheque in the bank on 30.9.2014 and upon dishonour of the cheque, by notice dated 8.10.2014 had made a demand for the payment of the cheque amount within 15 days from the receipt of the notice. Undisputedly the accused had not made the payment within 15 days from receipt of the demand notice. Thus all the three requisite conditions having been satisfied, the cause of action as envisaged under section 138 (c) had accrued on expiry of 15 days from 9.10.2014 i.e. the date of the receipt of the notice dated 8.10.2014. The complainants had not filed the complaint within 30 days from the date of accrual of cause of action. The complainants had not presented the cheque again but had issued a fresh demand notice on the basis of the first dishonour of the cheque. Needless to state that for accrual of fresh cause of action the following three essential requisites had to be satisfied. i.e, i) Presentation of the cheque to the bank within the period of six months from the date of which it is drawn or within the period of its validity, whichever is earlier. ii) Demand for the payment of the said

amount of money by giving a notice in writing, to the drawer of the cheque, within 30 days of the receipt of information from the bank regarding the return of the cheque as unpaid, and iii) Failure to make payment of the cheque amount to the payee or as the case may be, to the holder in due course of the cheque, within 15 days of the receipt of said notice. Satisfaction of all the three conditions mentioned above is mandatory for constituting an offence under section 138 of N.I. Act as well as for accrual of cause of action contemplated under section 138 (c) of N. I. Act. In the present case the complainant had not presented the cheque again and hence there was no subsequent dishonour necessitating a fresh demand under clause (b) of section 138 of the Act. Resultantly, failure to pay the amount as per the fresh demand would not accrue a fresh cause of action albeit the compliance with the first two conditions. In the absence of any fresh cause of action, under clause (c) of Section 138, the period of limitation cannot be computed on expiry of 15 days from the receipt of the second notice. The complaint therefore is beyond limitation. The complainants had not filed any application for condonation of delay disclosing sufficient cause for not filing the complaint within the period of limitation. This being the case, the court was not competent to take cognizance of the offence under Section 138 of the N.I. Act.

11. It is also to be noted that the cheque was issued by the petitioner K.S.Gupta as a partner of Gupta Enterprises, in favour of

Satara Polymers Pvt. Ltd. The complaint is not filed by the company, but is filed by the aforesaid respondent nos.1 to 4 without disclosing their relationship with the payee company. It is also to be noted that the complaint is not filed against the partnership firm, the drawer of the cheque, but is filed against the petitioner, one of the partners of the said partnership firm. The notice dated 7.11.2014 on which the complainant has based its cause of action was also not issued to the partnership firm but was issued to the petitioner herein, the partner of Gupta Enterprises. It has been held by the Apex Court in **Anita Hada vs. M/s. Godfather Travels & Tours 2012 AIR (SC) 2795** that for maintaining the prosecution under [Section 141](#) of the Act, arraigning of a company as an accused is imperative. In the light of the principles laid down by the Apex Court in Anita Hada (supra) the accused who is one of the partners of the partnership firm could not have been prosecuted for the offence under Section 138 r/w. 141 of N.I.Act, without arraying the partnership firm as an accused and without issuing a demand notice to the said partnership firm.

12. Under the circumstances, and in view of discussion supra, the petition is allowed. The impugned order dated 23.12.2014 is quashed and set aside.

(ANUJA PRABHUDESSAI, J.)