

IN THE HIGH COURT OF PUNJAB AND HARYANA

AT CHANDIGARH

CRM No. M- 25105 of 2013(O&M)

Date of decision: 10.03.2015

Kamal Singh

.....Petitioner

versus

Mukesh Sharma and others

.....Respondents

CORAM: Hon'ble Mr.Justice Kuldip Singh

Present: Mr.R.S.Mamli, Advocate for the petitioner
Mr.R.S.Sihag, Advocate for respondent No.1
Mr.Chetan Sharma, AAG Haryana
for respondent No.2

1. *Whether Reporters of Local Newspapers may be allowed to see the judgment ? yes*
2. *To be referred to the Reporters or not ? yes*
3. *Whether the judgment should be reported in the Digest? yes*

Kuldip Singh, J.

Petitioner has filed this petition under Section 482 Cr.P.C. for setting aside the judgment dated 22.7.2013 (Annexure P3), passed by the learned Additional Sessions Judge, Gurgaon, reversing the order dated 27.1.2012 (Annexure P2), passed in criminal complaint No.118 dated 27.1.2009, by learned Judicial Magistrate 1st Class, Gurgaon.

The short controversy is that respondent No.1 Mukesh Sharma had filed a criminal complaint against the petitioner and others under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act'). It comes out that there was four days delay in filing the complaint. The complaint was filed on 18.8.2009. On the

same day, the process was issued. On 14.2.2010, notice of accusation was served upon respondent No.3 –Kamal Singh (petitioner herein). On 20.10.2011, when the case was at the stage of the evidence of the complainant, an application was filed by the complainant, seeking condonation of delay of four days in filing the complaint. It was stated that the delay was due to oversight of the complainant. The application was accompanied by an affidavit of the complainant. Learned Judicial Magistrate 1st Class, Gurgaon, vide order dated 27.1.2012, dismissed the said application and held that the complaint has been filed beyond the period of limitation. It was further stated that since the summoning order and order of notice of accusation have already been set aside by the appellate Court, therefore, there is no need to proceed with the complaint. In the revision filed by the complainant Mukesh Sharma before learned Additional Sessions Judge, Gurgaon, order of learned Magistrate was reversed and it was held that delay of four days in filing the complaint stands condoned. However, it was made clear that the order of condonation of delay will not be extended to condone the delay with regard to other lapses, if any, more particularly, delay in issuing notice as contemplated under Section 142(b) of the Act. The revision was allowed.

I have heard learned counsel for the parties and have carefully gone through the file.

Factual position is not disputed. A complaint titled as Mukesh Sharma v. The Bank Employees Co-operative SE Thrift & Credit Society Limited and others, including the present petitioner

Kamal Singh was filed on 18.8.2009. On the same day, the process was issued. On 14.2.2010, notice of accusation was served upon the accused No.3- Kamal Singh. The application for condonation of delay was filed on 28.10.2011 at the stage of evidence of the complainant. The learned Magistrate refused to condone the delay. However, the same was condoned by the learned Additional Sessions Judge, Gurgaon.

The perusal of order of the learned Additional Sessions Judge, Gurgaon shows that the learned Additional Sessions Judge relied upon the authority R.Kanithimathi and others v. Bank of India, 2007(4) RCR (Criminal) 191 (Madras) and ICICI Bank Ltd. V. Prafull Chandra 2007(4) RCR (Criminal) 2003 (Delhi). The learned Additional Sessions Judge also relied upon the provisions of section 142(b) of the Act, to condone the delay. Some other authorities were also relied upon. Thereafter, it was held that the application for condonation of delay is not necessarily to be filed with the complaint and can be filed at a later stage and if the Court is satisfied with the reason assigned for the delay, the same can be condoned. Section 142(b) of the Act, provides as under:-

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.

Proviso to Section 142(b) of the Act provides that **'cognizance of a complaint'** may be taken after the prescribed period if the complainant satisfies the Court that he has sufficient cause for not making the complaint within such period. It shows that the proviso talks of a situation, arising before cognizance of the complaint is taken. Meaning thereby, before cognizance of the complaint is taken by the Magistrate, if the complainant satisfies the Court that he has sufficient cause for not making the complaint within the prescribed period, the Magistrate can condone the delay.

Now, it is to be seen as to whether proviso to Section 142(b) of the Act is attracted in the present case? I am of the view that it is not so. In this case, the complaint was filed on 18.8.2009. The Magistrate took the cognizance and issued the process. The notice of accusation was issued to accused –Kamal Singh on 14.2.2010 i.e. about six months later. The case was then adjourned for the evidence of the complainant. It was on 28.10.2011 i.e. nearly after one year and eight months of taking of cognizance of the complaint by the Court when the case was fixed for the evidence of the complainant, that an application for condonation of delay of four days was filed.

Now the question would arise as to whether when the complaint is fixed for the evidence of the complainant, whether it is to

be treated as the cognizance stage? The obvious reply is 'NO'. The stage of cognizance of the complaint was already over much earlier and therefore, the complainant could not take the shelter of proviso to Section 142(b) of the Act.

Learned counsel for the complainant has relied upon the authority of Hon'ble Supreme Court in the case Yogendra Pratap Singh v. Savitri Pandey and another, 2012(2) RCR (Criminal) 578. I am of the view that in the said case, following two questions arose for consideration. The relevant extract from the said judgment is reproduced as under:-

2. This appeal assails an order passed by the High Court whereby it has allowed a petition under Section 482 of the Criminal Procedure Code and quashed the order passed by the Magistrate taking cognizance of an offence punishable under Section 138 of The Negotiable Instruments Act, 1881. The following two questions arise for consideration:

- (i) Can cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act 1881 be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138 (c) of the Act aforementioned? And,*
- (ii) If answer to question No.1 is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142 (b) for the filing of such a complaint has expired?*

The said questions were referred to Full Bench in view of the conflict in the judicial pronouncements. The opening line of the order itself shows that in the said petition, challenge was to the order

of the Magistrate taking cognizance of the offence, which is different from the present case, where the case was at stage of the evidence. The questions formulated for reference by Apex Court are also quite different from the controversy in the present case. In R.Kanithimathi's case (*supra*), Madras High Court did not quash the complaint on the ground of delay and directed the complainant to file affidavit setting out the reason and the trial Court was directed to provide opportunity to the accused to raise their defence and then decide the same on merits. Therefore, that authority of Madras High Court is also not attracted in the present case. In Rameshwar Lal alias Ramesh v. Ram Niwas Singania, 2010(1) CriLR (Rajasthan) 103 (Rajasthan High Court), It was held that Magistrate can take cognizance of the complaint after the prescribed period if he satisfies the Court that he has sufficient cause for not making the complaint within the prescribed period. Therefore, the said authority is also regarding taking of the cognizance by the Magistrate. Authority M/s Brushman India Ltd. & another v. Standard Chartered Bank, 2013 (7) RCR (Criminal) 3297 also talks of taking cognizance of the offence after the prescribed period of one month of intimation of dishonour of cheque if the complainant satisfies the Magistrate that he has sufficient cause for not making the complaint within the prescribed period of limitation.

Therefore, I am of the view that the learned Additional Sessions Judge, Gurgaon fell in error when he took a view that said application for condonation of delay can be filed at any stage. The language of Section 142(b) itself is very clear. It talks of stage before

taking of cognizance or at the time of taking of cognizance and not after that. In the present case, that stage was already over long back and the case was at the stage of evidence of the complainant. Therefore, the complainant could not take shelter of proviso to Section 142(b) of the Act.

Consequently, the impugned order dated 22.7.2013 (Annexure P3), passed by the learned Additional Sessions Judge, Gurgaon is set aside and that of learned Judicial Magistrate 1st Class, Gurgaon dated 27.1.2012 stands restored.

The petition is accordingly allowed.

10.03.2015
gk

(Kuldip Singh)
Judge