

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.19506 of 2013

Arising Out of PS.Case No. -671 Year- 2011 Thana -PATNA COMPLAINT CASE District-
PATNA

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Pankaj Kumar @ Pravir Kumar Pankaj S/O Sachchidanand Choudhary Proprietor,
M/S Lalsons Infrastructure Pvt. Ltd. (In Front Of Temple Tower) Birla Mandir
Road, Sabjee Bagh, Police Station- Pirbahore, Town And District- Patna

.... Petitioner

Versus

1. The State Of Bihar.
2. Manoj Kumar Gupta S/O Deo Nath Gupta, Proprietor, Dynamic India, Mohalla-
Sadikpur Sarai, Police Station- Alamganj, Post Office- Gulzarbagh, Town And
District- Patna.

.... Opposite Parties.

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Appearance :

For the Petitioner/s	:	Mr. Pankaj Kumar Sinha, Advocate Mr. Lovekush Kumar, Advocate Mr. Mtritunjay Kumar, Advocate
For the O. P. No. 2	:	Dr. Kislay, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 29-02-2016

By way of the present application preferred under Section 482 of the Code of Criminal Procedure, 1973 (for short “CrPC”), the petitioner seeks quashing of the order dated 06.08.2012 passed by the learned Judicial Magistrate, 1st Class, Patna City in C. A. No. 671 of 2011 by which finding a *prima facie* case to be made out under Section 138 of Negotiable Instruments Act, 1881 (for short “the Act”), the petitioner has been summoned to face trial.



2. It has been contended by the learned counsel for the petitioner that from perusal of the complaint filed by the opposite party no. 2, it would be evident that the demand under the proviso (b) to section 138 of the Act was not made within the prescribed period of thirty days from the date of receipt of information by the opposite party no. 2 from the bank regarding return of the cheques as unpaid. It has been further contended that consequent upon failure to make a demand by issuance of a notice in writing within 30 days from the date of knowledge regarding the return of the cheque as unpaid, the Magistrate could not have taken cognizance of the offence under section 138 of the Act and summoned the petitioner to face trial.

3. On the other hand, learned counsel for opposite party no. 2 has contended that simply because, the notice was not issued by the complainant to the petitioner within 30 days as prescribed under the proviso (b) to section 138 of the Act, the prosecution of the petitioner cannot be held to be bad as the petitioner had issued two cheques of Indian Overseas Bank, Patna in favour of the complainant/ opposite party no. 2 of Rs.1,25,000/- each and on being presented to the bank, both the cheques got dishonored due to insufficiency of fund in the account of the petitioner. He has submitted that there is nothing in the proviso to



section 138 or section 142 for that matter, to oblige the holder/payee of a dishonoured cheque to necessarily file a complaint even when he has acquired an indefeasible right to do so. In support of his submission, he has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **MSR Leathers vs. S. Palaniappan & Anr.**, reported in (2013) 1 SCC 177.

4. I have heard respective counsel for the parties and carefully perused the record.

5. It would be evident from perusal of the complaint that two cheques of Indian Overseas Bank, Patna were issued by the petitioner in favour of the complainant of Rs.1,25,000/- each. The first cheque was issued on 15.04.2011 whereas the second cheque was issued on 28.04.2011. The complainant presented the first cheque dated 15.04.2011 for encashment in his bank, namely, I.N.G. Vaishya Bank, which got dishonoured regarding which he received an information from the bank on 18.04.2011 with a note "insufficiency of fund". Similarly, on the presentation of the second cheque dated 28.04.2011 for encashment in the bank, it was returned to the petitioner on 29.04.2011 with a note "insufficient amount". Thereafter, the complainant-opposite party no. 2 sent notice to the petitioner through his lawyer regarding dishonour of both the cheques on 31st May, 2011, but the petitioner failed to

respond to the notice and accordingly, the complaint was filed on 13th July, 2011.

6. It would be evident from perusal of the impugned order that the complainant was examined on oath under Section 200 CrPC and in support of the complaint, three witnesses, namely, Sanjay Kumar, Ram Tahal Paswan and Raj Kumar were also examined in course of inquiry conducted under Section 202 CrPC. Thereafter, vide impugned order dated 06.08.2012 passed by the Jurisdictional Magistrate, the petitioner has been summoned to face trial for the offence punishable under Section 138 of the Act.

7. In order to appreciate the rival submissions made on behalf of the parties, I think it proper to refer to sections 138 and 142 of the Act which 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.

(underlining mine)

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.] ”

8. It would be evident from the perusal of section 138 of the Act that section defines the necessary ingredients of the offence and punishment that can be awarded for the commission of the offence.

9. It would be further evident that section 142 deals with cognizance of the offences. It bars the Court from taking cognizance of any offence punishable under Section 138 of the Act, if the complaint is not made within one month from the date on which the cause of action arises under clause (c) of the proviso to section 138.

10. The ingredients of the offence as contemplated under section 138 of the Act are as under:- (i) the cheque must have been drawn for discharge of existing debt or liability; (ii) cheque must be presented within six months or within the validity of period



whichever is earlier; (iii) cheque must be returned unpaid due to insufficient fund or it exceeds the amount arranged; (iv) fact of dishonour be informed to the drawer by notice within 30 days of the receipt of the information by the bank regarding the return of the cheque as unpaid; and (v) drawer of the cheque must fail to make payment within 15 days of the receipt of the notice.

11. Clause (b) of the proviso to section 138 of the Act provides that the payee or the holder in due course of the cheque, as the case may be, should demand for the payment of the amount of money by giving a notice in writing, to the drawer of the cheque, within 30 days of the receipt of the information by him from the bank regarding the return of the cheque as unpaid.

12. Coming back to the facts of the present case, undisputedly, the communication to the petitioner about the dishonouring of the cheque was not made by giving a notice in writing within the stipulated period of 30 days of the receipt of the information by the complainant from the bank regarding the return of the cheque as unpaid as provided under clause (b) of the proviso to section 138 of the Act. In that view of the matter, no legal complaint could have been filed against the petitioner for the offence under section 138 of the Act.

13. It is true that in **MSR Leathers vs. S.**



Palaniappan & Anr. (supra), the Hon'ble Supreme Court has ruled that not only can a cheque be presented any number of times during its validity, but also it is not necessary that a case needs to be filed at very first instance of dishonour of cheque. It is held that if the stipulated time after sending a legal notice is over and a case has not been filed, the payee or the holder in due course of the cheque is not barred from filing a case, at any subsequent time, if he again presents the cheque and it is dishonoured, provided that three distinct conditions precedent are satisfied so as to constitute an offence and be liable for punishment.

14. The law laid down by the Hon'ble Supreme Court in **MSR Leathers vs. S. Palaniappan & Anr.** (supra) has got no application to the facts of the present case. It is not a case of successive presentation of the cheque during its validity. The issue involved in the present case is that the notice was not sent to the petitioner by the complainant in terms of a proviso (b) of section 138 of the Act as it was issued beyond the stipulated period of 30 days.

15. It would be relevant to note here that in the matter of **K. R. Indira vs. Dr. G. Adinarayana**, reported in (2003) 8 SCC 300, the Hon'ble Supreme Court has observed that the offence under section 138 of the Act could be completed if all the

components are satisfied.



16. In the matter of **Sarav Investment & Financial Consultancy Private Limited and Another vs. Llyods Register of Shipping Indian Office Staff Provident Fund and Another**, [(2007) 14 SCC 753], the Hon'ble Supreme Court has ruled that service of notice in terms of proviso (b) of section 138 of the Act is a part of cause of action for lodging the complaint and communication to the accused about the fact of dishonouring of the cheques and calling him to pay the amount within 15 days is imperative in character. It is held that section 138 of the Act contains a penal provision under a special statute and having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrants a strict construction.

17. As noted above, the complainant had received information from the bank regarding dishonour of the first cheque on 18th April, 2011 and regarding dishonour of the second cheque on 29th April, 2011, but he sent notice to the petitioner regarding dishonour of both the cheques on 31st May, 2011. The notice sent to the petitioner was certainly beyond 30 days of the receipt of information by the complainant from the bank regarding the return of the cheques as unpaid.

18. In that view of the matter, I am of the opinion that one of the necessary ingredients of section 138 of the Act is clearly wanting in the present case. Under such circumstance, allowing the prosecution to continue would certainly amount to an abuse of the process of the Court.

19. Accordingly, the impugned order dated 06.08.2012 passed by the learned Judicial Magistrate, 1st Class, Patna City in C. A. No. 671 of 2011 is hereby quashed.

20. The application stands allowed.

(Ashwani Kumar Singh, J.)

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