

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.21554 of 2013

Arising Out of PS.Case No. -1079 Year- 2011 Thana -MUZFFARPUR COMPLAINT CASE
District- MUZAFFARPUR

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Amrendra Kumar Son Of Mohan Singh Resident Of Village- Narma P.S. Hathauri
District- Muzaffarpur At Present Residing In Mohalla Sikandarpur Nala Road In
The House Of Sri Prabhat Kumar Advocate, P.S. Town District- Muzaffarpur

.... Petitioner/s

Versus

1. The State Of Bihar
2. Santosh Kumar Gunjan S/O Dinesh Kumar Sharma R/O Village- Nazma P.S.
Hathauri, Distt.- Muzaffarpur At Present Residing In Vill. + P.S. Ahiyapur, P.O.
H.P.O. Distt.- Muzaffarpur

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Shiv Shankar Sharma

For the Opposite Party/s : Mr. Md. Sufiyan

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

ORAL JUDGMENT

Date: 05-09-2016

Heard Sri Shiv Shankar Sharma, learned counsel for the
petitioner and Mr. Md. Sufiyan, learned A.P.P.

In the present case the complainant /opposite party no. 2
has preferred not to appear.

The present petition was filed in the year 2013 with a
prayer to quash an order dated 25.10.2011 passed in Complaint Case
No. 1079 of 2011 by the learned Judicial Magistrate 1st Class,
Muzaffarpur. By the said order the learned Magistrate has taken
cognizance of offence under section 138 of the Negotiable
Instruments Act, 1881 (hereinafter referred to as "N.I. Act") and

directed for summoning the sole accused i.e. petitioner.

Short fact of the case is that a complaint was filed by the opposite party no. 2 on an allegation that the cheque issued by the petitioner in favour of the complainant stood dishonored. After filing complaint enquiry was conducted. Finally the learned Magistrate took cognizance of offence and summoned the petitioner to face trial. Thereafter petitioner approached this court and filed the present case. In this case earlier at the stage of admission notice was directed to be issued to the complainant /opposite party no. 2. However despite valid service of notice he did not appear. Thereafter on 9.5.2016 again the matter was taken up for hearing under the heading "For Admission". The present petition was admitted for hearing vide order dated 9.5.2016. While admitting this court directed for staying further proceeding in Complaint Case No. 1079 of 2011. Lower Court Record was called for and again notice was directed to be issued to the complainant/ opposite party no. 2 in hearing matter. The service of notice was treated as valid since notice was refused to be accepted by the opposite party no. 2.

Learned counsel for the petitioner assailing the impugned order has emphasized that the order impugned is liable to be quashed mainly on the ground that the order of cognizance was in violation of section 142(b) of the N. I. Act. By way of referring to the record it



was argued that a cheque of Rs. 50,000/- which was said to be issued in favour of the complainant was shown dishonored on 31.12.2010. Though the complainant received information regarding alleged dishonor no step was taken for service of notice to the petitioner to clear the cheque amount within the time fixed as mentioned in Section 138 (b) of the N.I. Act. He submits that of course on record a copy of issuance of registered notice was brought on record by the complainant but neither in the complaint petition nor in the statement of the complainant recorded on S.A. he disclosed as to on which date he got the notice served on the petitioner for clearing the cheque amount, whereas notice which has been brought on record is dated 11.1.2011. He submits that in absence of any specific averment regarding issuance of notice and its service report the complaint petition was not required to be entertained since it was in violation of Section 138 (b) of the N.I. Act. He further submits that even though if the copy of notice which has been brought on record dated 11.1.2011 is taken as valid service of notice whereas it has been disputed, the complaint petition was filed on 30.5.2011 which is still in contravention of section 142(b) of the N.I. Act.

Mr. Md. Sufiyan, learned Additional Public Prosecutor after examining the Lower Court Record has not disputed the



averment made by learned counsel for the petitioner that cheque stood dishonored on 31.12.2010 as well as the fact that neither in the complaint petition nor in statement of the complainant recorded on S.A. any statement was made regarding service of notice on the petitioner. He submits that regarding service of notice within time and filing complaint within thirty days the Hon'ble Apex Court in a case reported in **2014(1) PLJR 299 SC (Kamlesh Kumar vs. State of Bihar & Anr.)** has already set the issue at rest. He has referred to paragraph no. 10 of the judgment which is quoted hereinbelow:-

“10. In MSR Leathers (supra) , this Court analyzed the provisions of Section 138 and 142 of the N.I. Act in the following manner:-

“The proviso to Section 138, however, is all important and stipulates three distinct conditions precedent , which must be satisfied before the dishonor of a cheque can constitute an offence and become punishable. The first condition is that the cheque out to have 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. The second condition is that the payee or the holder in due course of the cheque, as the case may be , ought to make 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. The third condition is that the drawer of such a cheque



should have failed to make payment of the said amount of money to the payee or as the case may, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to section 138 as clauses (a), (b) and (c) thereof that an offence under section 138 can be said to have been committed by the person issuing the cheque.

Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non obstante clause. It provides that 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, by the holder in due course and 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. In terms of clause (c) to Section 142, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class is competent to try any offence punishable under Section 138.

A careful reading of the above provisions makes it manifest that a complaint under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of the proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque fails to make the payment of the cheque amount to the payee or the holder of the Cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) of the proviso to Section 138 of the Act.



The presentation of the cheque and dishonor thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes “cause of action within the meaning of Sections 138 and 142 (b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For, a dishonor to culminate into the commission of an offence of which a court may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque, and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonor of the cheque that the holder / payee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him. Therefore, there is, nothing in the proviso to Section 138 or Section 142 for that matter, to oblige the holder / payee of a dishonored cheque to necessarily file a complaint even when he has acquired an indefeasible right to do so. The fact that an offence is complete need not necessarily lead to launch of prosecution especially when the offence is not a cognizable one. It follows that the complainant may, even when he has the immediate right to institute criminal proceedings against the drawer of the cheque, either at the request of the holder /



payee of the cheque or on his own volition, refrain from instituting the proceedings based on the cause of action that has accrued to him. Such a decision to defer prosecution may be impelled by several considerations but more importantly it may be induced by an assurance which the drawer extends to the holder of the cheque that given some time the payment covered by the cheques would be arranged, in the process rendering a time – consuming and generally expensive legal recourse unnecessary. It may also be induced by a belief that a fresh presentation of the cheque may result in encashment for a variety of reasons including the vicissitudes of trade and business dealings where financial accommodation given by the parties to each other is not an unknown phenomenon. Suffice it to say 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 the proviso to Section 138 of the Act, the amount covered by the cheque, should there be a second or a successive dishonor of the cheque on its presentation.”

Besides hearing learned counsel for the parties I have perused the material available on record. It has been noticed that despite repeated issuance of notice to complainant has not appeared. Meaning thereby that complainant is not at all interested to pursue the matter. Moreover, keeping in view the fact that complaint petition was filed beyond statutory period as prescribed under

section 142 (b) of the N.I. Act as well as no specific stand was taken regarding service of notice in compliance with section 138 (b) of the N.I. Act the court is of the opinion that in view of law settled by the Apex Court as quoted hereinabove the order of cognizance may not be allowed to survive. Accordingly the order of cognizance dated 25.10.2011 so far petitioner is concerned in Complaint Case No. 1079 of 2011 pending before Sri Mithilesh Kumar, Judicial Magistrate, 1st Class, Muzaffarpur is set aside.

The petition stands allowed.

(Rakesh Kumar, J)

Praful/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	09-09-2016
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