

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.10548 OF 2016

ORDER:

The petition, under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C'), is filed challenging the order dated 17.06.2016 passed in CrI.M.P.No.350 of 2014 in C.C.No.3 of 2016 on the file of the Additional Judicial I Class Magistrate, Nidadavole, West Godavari District, dismissing the application filed under Sections 245 and 258 Cr.P.C. for discharge of the petitioner/ accused, for the offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act').

2. The petitioner is the accused in C.C.No.3 of 2016 for the offence punishable under Section 138 of the Act. During pendency of the case before the Magistrate, she filed petition under Sections 245 and 258 Cr.P.C. for her discharge on the ground that the demand made by the complainant by issuing notice is not in consonance with the legal requirements under Section 138 proviso (b) of the Act. Therefore, all the proceedings have to be stopped and the petitioner is entitled for discharge under Section 258 Cr.P.C.

3. Whereas, the 2nd respondent/complainant filed counter denying the material allegations *inter alia* contending that the demand, as required under Section 138 proviso (b) of the Act was made and thereafter the petitioner/ accused failed to comply with

the legitimate demand for debt due and consequently filed the complaint for the offence punishable under Section 138 of the Act.

4. The trial Court held that when the petitioner/ accused was questioned under Section 251 Cr.P.C. questioning substance of the complaint, she denied the same and thereafter the present petition is filed. When questioning under Section 251 Cr.P.C. is completed, the question of stopping of all further proceedings under Section 138 of the Act does not arise and consequently dismissed the petition on the sole ground.

5. Aggrieved by the said order, the present revision is filed while reiterating the same ground i.e. non-compliance of legal requirements under Section 138(b) of the Act and that the trial Court did not consider the bonafide contention of the petitioner in the petition under Sections 245 and 258 Cr.P.C. for discharge of the petitioner.

6. During hearing, Sri Sai Gangadhar Chamarty, learned counsel for the petitioner, would contend that when a notice was issued demanding payment of amount covered by the promissory note, without demanding payment of the amount covered by the cheque, the complaint is liable to be dismissed since no notice as required under Section 138 proviso (b) of the Act was issued, which is mandatory and placed reliance on judgment of the Apex Court in *Rahul Builders v. Arihant Fertilizers & Chemicals*¹.

¹ (2008) 2 SCC 321

7. He also further contended that when alternative remedy of revision under Section 397 Cr.P.C. though available, the petition filed under Section 482 cannot be dismissed on that ground and placed reliance on the expression of the Apex Court in *Ludovico Sagrado Goveia v. Cirila Rosa Maria Pinto*². On the strength of these two contentions, the order passed by the trial Court is erroneous and prayed to set aside the same.

8. Whereas, Sri I.V.N.Raju, learned counsel for the 2nd respondent, would contend that the remedy of revision is available under Section 392(2) Cr.P.C. against the order passed by the Judicial First Class Magistrate in a petition filed under Sections 245 and 258 Cr.P.C. and without exhausting such remedy, the petitioner is not entitled to file the present petition under Section 482 Cr.P.C to quash the proceedings in C.C. for the offence punishable under Section 138 of the Act. He also further contended that it is not short of legal requirement in making demand for payment of the amount covered by the cheque. When there is a reference about the cheque and the debt due under the promissory note, it is sufficient, and thereby, the proceedings cannot be quashed on that ground alone and also placed reliance on the expression of the Apex Court in *Central Bank of India v. Saxons Farms*³.

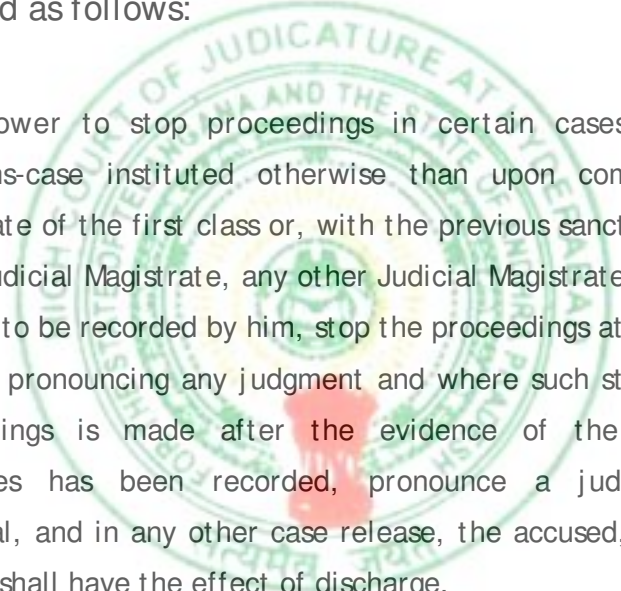
² AIR 2016 SC 4248

³ (1999) 8 SCC 221

9. Admittedly, the 2nd respondent filed complaint under Section 200 of Cr.P.C. for the offence punishable under Section 138 of the Negotiable Instruments Act and procedure to be followed to try offence punishable under Section 138 of the Act is summons procedure. Even according to Section 138 of the Act, the Court can take cognizance only on the basis of complaint. Therefore, when the cheque is dishonoured due to insufficient funds to the credit of the account of accused, the holder of the negotiable instrument has to file a complaint under Section under Section 200 of Cr.P.C. for the offence punishable under Section 138 of the Negotiable Instruments Act and the procedure to be followed by the Courts is summons procedure.

10. Section 248 Cr.P.C. deals with discharge of the accused in a warrant case. The said provision has no application to the present facts of the case since the procedure to be followed by the Courts in the present case is summons procedure. At best, the petitioner is entitled to file an application under Section 258 Cr.P.C. to stop all further proceedings by the Judicial First Class Magistrate or with the previous sanction of Chief Judicial Magistrate or any Magistrate, after recording reasons at any stage, without pronouncing the judgment, and release the accused, which shall have the effect of discharge. The petitioner filed the present petition both under Sections 245 and 258 Cr.P.C. But Section 245 Cr.P.C. has no application. However, so far as Section 258 Cr.P.C. is concerned, the 2nd respondent herein did not raise any objection

regarding maintainability of an application under Section 258 Cr.P.C. But it is the duty of the Court to decide the applicability of Section 258 Cr.P.C., while deciding the present criminal petition. As the petitioner sought for a relief of stoppage of all further proceedings in C.C.No.3 of 2016 on the file of the Judicial First Class magistrate, Nidadavole, for the offence punishable under Section 138 of the Negotiable Instruments Act, it is apposite to extract Section 258 Cr.P.C. for better appreciation and accordingly it is extracted as follows:



258. Power to stop proceedings in certain cases.- in any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case release, the accused, and such release shall have the effect of discharge.

From a bare reading of Section 258 Cr.P.C., it is clear that a Magistrate of the First class or any other Magistrate, with the previous permission of the Chief Judicial Magistrate can stop all further proceedings at any stage without pronouncing the judgment in a case filed otherwise than upon complaint. Thus, Section 258 Cr.P.C. deals with power of the Court to stop proceedings in any summons case instituted otherwise than upon the complaint.

11. The complaint is defined under Section 2 (d) as follows:

“(d) "*complaint*" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;”

Thus, the meaning of complaint is only a complaint made either orally or in writing to a Magistrate to take action on it under the provisions of the Cr.P.C. Though, the complaint has wide meaning and includes even oral allegations, there must be an allegation which *prima facie* discloses the commission of an offence with necessary facts for a Magistrate to take action. Therefore, the complaint filed by the 2nd respondent/ complainant for the offence punishable under Section 138 of the Act would fall within the ambit as defined under Section 2(d) of the Cr.P.C. and that the procedure to be followed in such case is summons procedure. But, Section 258 Cr.P.C. is applicable only to cases filed otherwise than on complaint. But, here, it is purely based on a private complaint filed under Section 200 Cr.P.C. Therefore, Section 258 Cr.P.C. has no application to such cases. A similar question came up before this Court in Coastal Wartsila Petroleum Limited v. Standard

Ferro Alloys Private Limited⁴. A single Judge of this Court while deciding a similar issue held that in any summons case instituted otherwise than upon complaint, a Magistrate of the First class or any other Magistrate, with the previous permission of the Chief Judicial Magistrate can stop all further proceedings at any stage, without pronouncing the judgment. But the offence punishable under Section 138 of the Act is the case, where it is instituted on a complaint by the complainant. In those circumstances, Section 258 Cr.P.C. has no application and, at best, remedy available to the accused is to file an application under Section 482 Cr.P.C. The principle laid down in the above judgment is directly applicable to the facts of the present case and, on the strength of the same, the petitioner cannot claim relief of stoppage of all further proceedings. Section 258 Cr.P.C. applies only to summons case otherwise than upon complaint into two divisions. One division consists of cases in which no evidence of material witness was recorded. The section permits the Court to acquit the accused prematurely only in those summons cases instituted otherwise than upon complaints, wherein the evidence of material witnesses was recorded. But by Section 258 Cr.P.C, the power of the Court to discharge an accused at midway stage is restricted to those cases instituted otherwise than on complaints, wherein no material witness was examined at all vide John Thomas v. Dr.

⁴ 2011(1) ALD (Crl.) 819

K.Jagadeesan⁵. But in the present facts of the case, part of the trial is completed and some of the witnesses were examined. So, it is not a case for discharge, but only to stop further proceedings. In view of the principles laid down in the Apex Court judgment and judgment of this Court, Section 258 Cr.P.C is not at all applicable to the present case, as it is a summons case instituted on complaint under Section 200 Cr.P.C. One of the judgments of our High Court in K.Prabhakar Rao v. the State of A.P.⁶, this Court held that by exercising power under Section 258 Cr.P.C, the Court can stop all further proceedings in a case, for the offence punishable under Section 138 of the Act. But did not discuss anything about the applicability of Section 258 Cr.P.C to the cases filed otherwise than upon complaint. Therefore, the judgment of this Court in K.Prabhakar Rao (supra) cannot be applied, in view of the clear findings recorded in judgments of this Court and Apex Court supra.

12. In view of my discussion, Section 245 Cr.P.C. has no application for discharge of the petitioner as accused, since the case is being tried under summons procedure and Section 258 Cr.P.C. has no application for the reason that it is a complaint case filed under Section 200 Cr.P.C. for the offence punishable under Section 138 of the Act. Thus, both Sections 245 and 258 Cr.P.C. have no application.

⁵ 2001(II) Uttaranchal Cases 250

⁶ 2015(2) ALT (Crl.) 91 (A.P)

13. Though, the counsel for the 2nd respondent raised a contention that the petitioner is not entitled to approach the Court under Section 482 Cr.P.C. to quash the proceedings, when a remedy by way of revision is available under Section 397 Cr.P.C. against the application filed under Section 245 and 258 Cr.P.C. No doubt, if the petition filed for discharge is allowed, it is a final order, but when it is dismissed, it is an interlocutory order, which would not culminate the entire proceedings. Therefore, the bar under Section 397(2) Cr.P.C. is applicable to such cases and consequently no revision is maintainable. Therefore, no remedy by way of revision is available to the petitioner against the orders passed by the trial Court and it is not an alternative remedy. However, this contention was repelled by the learned counsel for the petitioner, placing reliance on judgment of the Apex Court in *Prabhu Chawla v. State of Rajasthan*⁷ to contend that availability of alternative remedy of revision under Section 397 Cr.P.C. by itself is not a ground to dismiss petition under Section 482 Cr.P.C. In the said judgment, the Supreme Court held categorically that mere availability of an alternative remedy, by way of revision under Section 397 Cr.P.C. would not debar the jurisdiction under Section 482 Cr.P.C. and over-ruled the earlier judgment in *Mohit alias Sonu v. State of U.P.* (AIR 2013 SC 2248). Therefore, this contention of the respondent is no more *res integra*, in view of the judgment referred supra. Consequently, the availability of an

⁷ AIR 2016 SC 4245

alternative remedy by way of revision under Section 397 Cr.P.C. is not a bar to exercise jurisdiction under Section 482 Cr.P.C. Accordingly, the contention of the learned counsel for the respondent is rejected.

14. The main contention of the learned counsel for the petitioner/accused is that a notice without satisfying as to what amount was due under the dishonour of cheque is not substantial compliance of Section 138 proviso (b) of the Act and thereby the proceedings in C.C.No.3 of 2016 for the offence punishable under Section 138 of the Act have to be stopped by the Magistrate, exercising jurisdiction under Section 258 Cr.P.C.

15. Whereas, the 2nd respondent counsel contended that notice issued by the respondent is strictly in compliance with Section 138 proviso (b) of the Act.

16. In view of the rival contentions, it is appropriate to apposite Section 138 proviso (b) of the Negotiable Instruments Act, for better appreciation and accordingly it is extracted hereunder:

“(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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;”

In view of the language used in Section 138(b) of the Act, a prior notice demanding payment of the amount covered by dishonour of cheque is mandatory. The learned counsel for the petitioner, Sri

Sai Gangadhar Chamarty, would draw attention of this Court in Rahul Builders (supra), wherein the Apex Court relying on the judgment of the Apex Court in K.R.Indira v. Dr.G.Adinarayana (2003(8) SCC 300), Suman Sethi v. Ajay K.Churiwal (2000 (2) SCC 380) held as under:

“that service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice, making demand of the payment of the amount of cheque, as is evident from the use of the phraseology "payment of the said amount of money". Such a notice has to be issued within a period of 15 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law.”

In the above case, Respondent No.1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts of bills, i.e., Rs.8,72,409/- . The notice was to respond to the said demand. Pursuant thereto, it was to offer the entire sum

of Rs. 8,72,409/ -. No demand was made upon it to pay the sum of Rs. 1,00,000/ -, which was tendered to the complainant by cheque dated 30.04.2000. What was, therefore, demanded was the entire sum and not a part of it.

The principle laid down in the above judgment is clear that the demand to the drawer must be for payment of the amount covered by the dishonoured cheque and not the total amount due. In the present case, the respondent got issued a notice dated 11.01.2013 through his counsel Sri M.Ravi Kumar, advocate, narrating the transactions between the parties about borrowing of amount, execution of promissory note dated 05.04.2012 for Rs.1,50,000/ -, issue of cheque bearing No.039431 for Rs.1,50,000/ - and its dishonour on its presentation, receiving memo from the bank dated 21.12.2013 etc., but a specific demand is made in para-5 of the notice, which is extracted here for better appreciation:

“Therefore you are herein called upon that repay the entire above said promissory debt amount together with agreed interest within ‘fifteen’ days from the date of receipt of this notice and obtain proper receipt from my client, failing which my client will be constrained to initiate appropriate legal proceedings against you and get necessary reliefs through court of law and you are liable for all consequences and costs.”

Thus, the specific demand made in para-5 of the notice is for payment of debt due under the promissory note, but not the amount covered by the dishonoured cheque. Therefore, the demand was not in compliance of Section 138 (b) of the Act.

17. Learned counsel for the respondent contended that when the amount covered by cheque and the promissory note is one and the same, making demand for payment of amount covered by the promissory note is sufficient demand under Section 138 (b) of the Act and intention of the legislature is only to afford an opportunity to the drawer to pay the amount covered by the cheque not otherwise. In the present case, the petitioner allegedly borrowed Rs.1,50,000/- on 05.04.2012 and executed a promissory note for the said amount on the even date agreed to repay the same together with interest at 24% p.a. The notice was issued on 11.01.2013 i.e., almost after nine months from the date of execution. By the date of notice, the amount due under the promissory note together with interest of Rs.27,000/- and thus total amount payable under the promissory note approximately comes to Rs.1,77,000/- inclusive of interest at 24%p.a., whereas the amount covered by cheque bearing No.039431 was for Rs.1,50,000/- only. Thus, there is lot of variation between the actual amount due under the promissory note and the amount covered by dishonoured cheque, consequently demanding for payment of the amount covered by the promissory note together with interest cannot be equated with demand for payment of the amount covered by cheque. More over, a cheque can be issued either in lieu of the discharge of entire debt or part of it. In the present case, the cheque was issued to discharge part of the debt i.e. Rs.1,50,000/-, though the amount due was more than

Rs.1,77,000/- approximately. In such a case, making a demand for payment of entire amount under the promissory note without demanding the drawer to pay the amount covered by dishonoured cheque is not substantial compliance under Section 138(b) of the Act.

18. Learned counsel for the respondent would contend that the object of notice is to give chance to drawer of the cheque to rectify his omission and also to protect interest and honesty of drawer. Service of notice of demand in clause (b) of proviso to Section 138 of the Act is a condition precedent to file complaint for the offence punishable under Section 138 of the Act and placed reliance on the judgment of Saxons Farms (supra). Even the principle laid down therein are applied to the facts of the present case, service of notice demanding clause (b) of proviso to Section 138 is a condition precedent. What Section 138(b) of proviso says is extracted in the earlier paras and according to it, a notice demanding payment of the amount due covered by the dishonoured cheque is imperative and in the absence of such demand, the complaint is short of the legal requirement and in such a case, the complainant is not entitled to claim any of the reliefs and thereby the accused is entitled for acquittal even after full trial.

19. As held by me in the earlier paras that a petition under Sections 245 and 258 Cr.P.C. is not maintainable in the present facts of the case since the C.C. was filed on a complaint under

Section 200 Cr.P.c. for the offence punishable under Section 138 of the Act, the remedy open to the petitioner is only to file an application under Section 482 Cr.P.C., but not a petition under Section 245 or 258 Cr.P.C. When the impugned order is passed in a petition filed under Section 245 and 258 Cr.P.C., this Court by exercising jurisdiction under Section 482 Cr.P.C. cannot quash such proceedings, since the petition was not filed seeking quashment of the proceedings in C.C.No.3 of 2016. Therefore, by exercising jurisdiction under Section 482 Cr.P.C., the proceedings in C.C.No.3 of 2016 cannot be quashed, as the petition to stop all proceedings in the said C.C. is not maintainable before the trial Court.

20. In the result, the Criminal Petition is dismissed. However, the petitioner is at liberty to take appropriate steps in accordance with law while granting liberty to prosecute the proceedings as per law.

M. SATYANARAYANA MURTHY, J

Date: 12.2016
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