

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.7893 of 2014

Arising Out of PS.Case No. -176 Year- 2012 Thana -PATNA COMPLAINT CASE District-
PATNA

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Neeraj Kumar Shrivastav Son Of Nirmal Kumar Shrivastava, Resident Of
Flat No. 203, Lalita Nikunj Apartment, B. Area, Mithapur, Police-Station
Jakkanpur, Patna, District Patna

.... Petitioner/s

Versus

1. The State Of Bihar
2. Chandradeo Sharma Son Of Late Bhopal Sinha Resident Of C/O Madhuri
Niketan, East Of Old Dujara Bhathi, East Budha Colony, P.S. Budha
Colony, Distt- Patna

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Upendra Prasad Ii

For the Opposite Party/s : Mr. Duresh Nandan(App)

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR
ORAL ORDER

9 27-07-2017 Heard learned counsel for the parties.

2. This application has been filed under Section 482 of
Cr.P.C., 1973 by the petitioner challenging the order dated
30.07.2012 passed by Judicial Magistrate-1st Class, Patna in
Complaint Case No.176 (C) of 2012 whereby he has taken
cognizance under Section 138 of the Negotiable Instrument Act (
hereinafter to be referred to as 'the Act').

3. The complainant's case, in brief, is that the accused
petitioner approached the complainant to invest some money in
Sahara India Ltd. He also assured that he would get more return on



investment than the deposit in the bank. The complainant gave Rs.5/- lacs to the petitioner for investment in the suitable scheme of Sahara India Ltd. but no investment certificate was given by the complainant. Ultimately, he issued a cheque of Rs.5/- lacs in the name of the complainant. The cheque was presented by the complainant in the bank which was dishonoured with endorsement payment stopped by drawer and the bank reported to the accused on 10.11.2011. The complainant sent legal notice to the accused on 7.12.2011 but he did not send any reply nor paid the money. So this complaint was filed on 18.01.2012.

4. Learned counsel appearing on behalf of the petitioner contends that it is stated in the complaint that the notice was issued on 7.12.2011 but that the notice was not received by the petitioner as there is no report regarding receiving of the notice or it returned undelivered. It is submitted that petitioner was at Lucknow and Pune during the period of 16.08.2011 to 11.10.2011 in connection with treatment of his old father. So he was not present during these days at his residence at Patna; therefore there is no report of service of notice to the petitioner. The learned counsel further submits that no evidence was adduced during enquiry under Section 202 Cr.P.C. on the point of service of notice to the petitioner. The learned



Magistrate has taken the cognizance in mechanical manner even without any evidence prima facie showing receipt of notice by the petitioner. So only presumption is raised that after expiry of 30 days notice would be deemed to have been received so the presumption of service of notice cannot be before 06.01.2012 since then expiry of 15 days comes to 21.01.2012 but before that the complaint was filed on 18.01.2012. In view of Section 138(C) of the Act N.I. Act after expiry of the 15 days from the date of receipt of notice the cause of action arises for filing the complaint but the present complaint was filed before expiry of 15 days. He placed reliance to the case of Yogendra Pratap Singh vrs. Savitry Pandey reported in AIR 2015 SC 157.

5. Learned counsel appearing on behalf of the O.P.No.2 submits that the notice was returned unserved as the addressee was not found at the address.

6. Having considered the rival submissions and perusal of the record it is apparent that the notice was sent by the complainant O.P. No.2 to the petitioner on 7.12.2011 but there is no averment regarding receipt of the notice, moreover there is no averment in the complaint mentioning the date of return of notice sent by complainant as well as the remark of the postal employee so



deemed service of notice is presumed on expiry of thirty days thereafter 15 days expires on 21.01.2012 but before that the present complaint was filed on 18.01.2012. So, by such date there was no cause of action for filing the complaint in terms of clause (c) of the proviso to Section 138 of the Act. Section 142 (I) clause (a) (b) categorically states that no court can take cognizance of any offence punishable under Section 147 of the Act but such complaint is required to be filed within one month from the date on which the cause of action arises under the proviso to Section 138 of the Act. The cause of action arises only after lapse of 15 days of the receipt of notice when drawer fails to pay the amount.

7. The Hon'ble Supreme Court in case of Yogendra Pratap Singh vrs. Savity Pandey (supra) has decided this issue, the relevant portion of the said Judgment reads as such:-

“ 37. A complaint filed before expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint which does not disclose the cause of action the Court is not competent to take



cognizance. A conjoint reading of Section 138, which defines as to when and under what circumstances an offence can be said to have been committed, with Section 142(2) of the N.I.Act, that reiterates the position of the point of time when the cause of action has arisen, leaves no manner of doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed under clause (c) of the proviso to Section 138, has, in fact, elapsed. Therefore, a Court is barred in law from taking cognizance of such complaint. It is not open to the Court to take cognizance of such a complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date on which the notice has been served on the drawer/accused has elapsed. We have no doubt that all the five essential features of Section 138 of the NIAct, as noted in the judgment of this Court in Kusum Ingots and Alloys Ltd. (AIR 2000 SC 954) and



which we have approved, must be satisfied for a complaint to be filed under Section 138 has not expired, there is no commission of an offence not accrual of cause of action for filing of complaint under Section 138 of the NI Act.”

So, applying same principle in the present case is as the period prescribed under Clause (C) of the proviso to Section 138 of the Act had not expired at the time of filing of the present complaint. So, under misconception this complaint has been filed by the complainant.

8. Now the only remedy to the complainant is to file a fresh complaint and if he files such complaint, the court concerned considering the cause of delay in filing of the complaint in the aforesaid circumstance will proceed further in accordance with law.

9. In the result, this petition stands allowed with aforesaid observation.

(Arun Kumar, J)

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