

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 1382 of 2017**Judgment reserved on : 16/11/2017Judgment delivered on : 5/12/2017

Dushyant Dang S/o Shri Ramesh Chand Dang, Aged About 22
Years Proprietor - Shiv Traders, R/o Street No. 8, Plot No. 683,
Shanti Nagar, Bhilai, Police Station Supela, Bhilai, Tahsil & District
Durg Chhattisgarh

---- Petitioner**Versus**

Jairam Das Verma S/o Shri Jagdev Verma, Aged About 45 Years
R/o Gayatri Mandir, Near Lok Bharti School, Near Durga Manch,
Beside Bhatia Tailors, Ramnagar, Police Station Supela, Bhilai,
District Durg Chhattisgarh

---- Respondent

For petitioner – Smt. Fouzia Mirza, Advocate.
For respondent – Shri Arvind Dubey, Advocate.

Hon'ble Shri Justice Goutam Bhaduri**CAV Order****5/12/2017**

1. The present petition is against the order dated 11/08/2017 passed in Criminal Revision No.75/2017 by the 4th Additional Sessions Judge, Durg. By such order the learned court below has affirmed the order passed by the JMFC dated 24/03/2017 in Complaint Case No.2025/2016.
2. Facts as would reflect from the order of revisional court and documents attached with this petition is that complainant/petitioner herein has filed a complaint before JMFC, Durg under section 138 of the Negotiable Instruments Act, 1881 after dishonour of the cheque given by the respondent. After registration of the complaint, a preliminary objection

was preferred by the accused on the ground that alleged two cheques which were issued in his favour dated 1/11/2015 and 2/11/2015 respectively were first dishonoured on 2/01/2016 by the bank. Against such dishonour first statutory notice was served on 15/01/2016 claiming the amount of dishonour of cheques. Admittedly after first dishonour and statutory notice no complaint was filed under section 138 of the Negotiable Instruments Act by the complainant. It was alleged in such objection that again the cheques were deposited in the bank in the month of February, 2016 which were dishonoured on 11/02/2016 and second notice for dishonor of the cheque was served on 18/02/2016 which was replied by the accused on 03/03/2016. Thereafter the complaint u/s 138 of Negotiable Instruments Act was filed on 11/03/2016 before the JMFC. It was therefore contended that since after presentation of the cheque for the first time in the month of January, 2016 and after dishonour thereof, since no complaint was preferred within stipulated statutory period i.e. after service of first notice, subsequent complaint on the basis of second dishonour and notice there off is not tenable as the complaint would be barred by time as the cause of action would accrue and start running after first dishonour and notice thereof.

3. Said objection by the accused was allowed and it was held that complaint on the basis of second dishonor of cheque and notice thereof cannot be sustained when no action has been taken on the basis of the first dishonour cheque and statutory notice thereof within the statutory period.

4. Said order of dismissal was further assailed by the complainant before the revisional court of 4th Additional Sessions Judge, Durg. The Additional Sessions Judge also affirmed the order of dismissal by holding that cause of action started running after receipt of first notice itself on

15/01/2016 and when no complaint was filed within statutory period the subsequent complaint on the basis of presentation of the cheque for 2nd time and to get it dishonoured cannot be sustained. The revisional court mainly relied on the judgment of **Babar Hussain Vs. Arjun Singh Netam** reported in **2017(2) C.G.L.J. 413** in Cr.M.P. No.1353 of 2016 which was decided on 14/12/2016 and held that the complaint would not be maintainable on the basis of subsequent presentation and dishonour of cheques.

5. Learned counsel for the petitioner would submit that judgment rendered by the court below is per incuriam and the dictum which has been followed by the court that of **Babar Hussain Vs. Arjun Singh Netam** is based on the judgment of **Prem Chand Vijay Kumar Vs. Yashpal Singh & another** reported in **2005(4) SCC 417**. It is contended the ratio and principles of case which was relied on by revisional court stands over ruled by law laid down in case of **MSR Leathers Vs. S. Palaniappan and another** reported in **(2013) 1 SCC 177**. Thereby order cannot be sustained and requires to be set aside by restoring the complaint.

6. Learned counsel for the respondent on the other hand supported the order of the court below on the ground that no interference is required since order is well merited which do not call for any interference.

7. Perused the documents and the order of the court below.

8. According to the complaint two cheques one of them bearing number 033604 dated 1/11/2015 for Rs.63,700/- and another cheque bearing number 093605 dated 2/11/2015 for Rs.1 lakh was given by the respondent in discharge of the alleged liability for the purchases made. The initial objection which was made shows that initially first notice was served on 15/01/2016 for dishonour of the two cheques on 2/01/2016.

Admittedly, no complaint was filed on the basis of the first dishonour and the notice of default when the cause of action arose as per section 142(b) and 138(c) of Negotiable Instruments Act. However after first dishonour of cheque, in the month of January, 2016, during its validity period cheques were again deposited subsequently in the month of February and dishonour of the cheques were informed by the bank on 11/02/2016 to the complainant. Thereafter, second legal notice was issued to the accused on 18/02/2016 which was served on the respondent/accused on 19/02/2016. The deposit of cheques dated 1/11/2016 and 2/11/2016 for the second time was made within the validity period of the cheques. As the facts would suggest even after such service of notice of demand no repayment was made within a period of 15 days as such complaint was filed on 11/03/2016. So the complaint was filed within one month of accrual of cause of action u/s 142(b) read alongwith section 138 (c) of the Negotiable Instruments Act, 1881.

9. For the sake of brevity section 138 and 142 of the Negotiable Instruments Act, 1881 are reproduced hereunder:-

“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.”

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.]

“142. Cognizance of offences. —(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a)....X....X....X

(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)X....X....X

(2)X....X....X”

10. As has been held in case of **MSR Leathers Vs. S. Palaniappan and another** (supra) expression “cause of action” has to be understood to mean the bundle of facts and in case of section 142 of the Negotiable Instruments Act which is the only penal provision in a statute which uses the expression “cause of action”. As against this “cause of action” is not defined anywhere in the Code of Civil Procedure. Therefore, while interpreting word “cause of action” under section 142 of the Negotiable Instruments Act in relation to the commission of an offence or the institution of a complaint, reading of section 138 and 142 of the Negotiable Instruments Act makes it abundantly clear that the cause of action to institute a complaint comprises the three different factual prerequisites. It was further held that right of the holder to present the cheque for encashment carries with it a corresponding obligation on the part of the drawer. The omission or the failure of the holder to institute prosecution does not, therefore, give any immunity to the drawer so long as the cheque is dishonoured within its validity period and the conditions precedent for prosecution in terms of the proviso to Section 138 are satisfied. It was further held that so long as the cheque is valid and so

long as it is dishonoured upon presentation to the bank, the holder's right to prosecute the drawer for the default committed by him remains valid and exercisable. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of section 138 proviso clause (b), the drawer gets an extended period to make the payment and thereby benefits in terms of further opportunity to pay to avoid prosecution. Such fresh opportunity cannot help the defaulter on any juristic principle, to get a complete absolution from prosecution.

11. The Supreme Court in case of **MSR Leathers Vs. S. Palaniappan and another** reported in **(2013) 1 SCC 177** has held as under in paras 18, 19 and 35 :-

“18. With utmost respect to the Judges who decided **Sadanandan Bhadran v. Madhavan Sunil Kumar** reported in **(1998) 6 SCC 514** we regret our inability to fall in line with the above line of reasoning to hold that while a cheque is presented afresh the right to prosecute the drawer, if the cheque is dishonoured, is forfeited only because the previous dishonour had not resulted in immediate prosecution of the offender even when a notice under clause (b) of proviso to [Section 138](#) had been served upon the drawer. We are conscious of the fact that Sadanandan Bhadran's case (supra) has been followed in several subsequent decisions of this Court such as in [SIL Import, USA v. Exim Aides Silk Exporters](#), (1999) 4 SCC 567, [Uniplas India Ltd. and Ors. v. State \(Govt. of NCT Delhi\) and Anr.](#), (2001) 6 SCC 8, [Dalmia Cement \(Bharat\) Ltd. v. Galaxy Traders & Agencies Ltd. and Anr.](#), (2001) 6 SCC 463, [Prem Chand Vijay Kumar v. Yashpal Singh and Anr.](#), (2005) 4 SCC 417, [S.L. Constructions and Anr. v. Alapati Srinivasa Rao and Anr.](#), (2009) 1 SCC 500, [Tameshwar Vaishnav v. Ramvishal Gupta](#), (2010) 2 SCC 329.”

“19. All these decisions have without disturbing or making any addition to the rationale behind the decision in Sadanandan Bhadran's case (supra) followed the conclusion drawn in the same. We, therefore, propose to deal with the three dimensions that have been highlighted in that case while holding that successive causes

of action are not within the comprehension of [Sections 138](#) and [142](#) of the Act.”

“35. In the result, we overrule the decision in **Sadanandan Bhadran v. Madhavan Sunil Kumar** reported in **(1998) 6 SCC 514** and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to [Section 138](#) of the Negotiable Instruments Act. The reference is answered accordingly. The appeals shall now be listed before the regular Bench for hearing and disposal in light of the observations made above.”

12. In the afore-said judgment, judgment of **Prem Chand Vijay Kumar Vs. Yashpal Singh & another** reported in **2005(4) SCC 417** was considered and was held as impliedly over ruled. This court while delivering the judgement in case of **Babar Hussain Vs. Arjun Singh Netam** reported in **2017(2) C.G.L.J. 413** has relied on a judgement of apex court which was over ruled on that date.

13. Consequently, this court after going through the judgment in case of **MSR Leathers Vs. S. Palaniappan** (supra) is of the view that judgment rendered in case of **Babar Hussain Vs. Arjun Singh Netam** reported in **2017(2) C.G.L.J. 413** by this court is per incuriam. Therefore, this court in the principles as has been held in case of **Union of India and others Vs. R.P. Singh** reported in **(2014) 7 SCC 340** can ignore the same.

14. The Supreme Court has laid down the law that the judgements which are per incuriam can be ignored and has laid down the principles as under. The principles therefore as laid down at para 18 and 19 of **Union of India and others Vs. R.P. Singh** reported in **(2014) 7 SCC 340** are reproduced hereunder:-

“18. In this regard, we may usefully refer to a passage from [A.R. Antulay v. R.S. Nayak](#) reported in (1988) 2 SCC 602, wherein Sabyasachi Mukharji, J. (as his Lordship then was) observed thus: (SCC p. 652, para 42)

“42....‘Per incuriam’ are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.”

At a subsequent stage of the said decision it has been observed as follows: ([A.R. Antulay v. R.S. Nayak](#) reported in (1988) 2 SCC 602, SCC p. 654, para 47)

“47.... It is a settled rule that if a decision has been given per incuriam the court can ignore it.”

19. In [Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.](#) reported in (2011) 1 SCC 694, while dealing with the issue of ‘per incuriam’, a two- Judge Bench, after referring to the dictum in *Bristol Aeroplane Co. Ltd.* reported in 1944 KB 718 and certain passages from Halsbury’s Laws of England and *Raghubir Singh* reported in (1989) 2 SCC 754, had ruled thus: ([Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.](#) reported in (2011) 1 SCC 694, SCC p. 743, para 138)

“138.The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of Judges of co-equal strength. In the instant case, judgments mentioned in paras 124 and 125 are by two or three judges of this Court. These judgments have clearly ignored a Constitution Bench judgment of this Court in *Gurbaksh Singh Sibbia v. State of Punjab* reported in (1980) 2 SCC 565 which has comprehensively dealt with all the facets of anticipatory bail enumerated under [Section 438](#) Cr.P.C. Consequently, judgments mentioned in paragraphs 124 and 125 of this judgment are per incuriam.”

15. Therefore, this court after going through the facts and principles as laid down is of an irresistible opinion that order passed in Cr.M.P. No.1353 of 2016 decided on 14/12/2016 i.e. of **Babar Hussain Vs. Arjun Singh Netam** reported in **2017(2) C.G.L.J. 413** is per incuriam and consequently impugned order dated 11/08/2017 passed in Criminal Revision No.75/2017 is also rendered per incuriam and requires to be set aside. Accordingly, same is set aside. Complaint is remanded back to the JMFC for adjudication afresh on merits. The parties shall appear before the court of JMFC on 22nd January, 2018.

Sd/-

(Goutam Bhaduri)

JUDGE