THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NOs.119 & 1951 OF 2013

COMMON ORDER:

These two criminal petitions can be dealt with together as they arise under the same set of facts and also sought identical relief.

Crl.P.No.119 of 2013 is filed to quash the proceedings in C.C.No.539 of 2009 on the file of I Additional Chief Metropolitan Magistrate at Visakhapatnam, for the offence punishable under Section 138 of Negotiable Instruments Act ('N.I. Act' for short), on the sole ground that, notice was not issued within 30 days from the date of receipt of cheque return memo along with dishonoured cheque.

Similarly, Crl.P.No.1951 of 2013 is filed to quash the proceedings in C.C.No.437 of 2010 on the file of I Additional Chief Metropolitan Magistrate at Visakhapatnam, on the same ground.

The petitioner in Crl.P.No.119 of 2013 is the wife, whereas, petitioner in Crl.P.No.1951 of 2013 is the husband. 2nd respondent/complainant in both the criminal petitions is one and the same.

For the sake of convenience, the facts in Crl.P.No.119 of 2013 are dealt with, for better appreciation of the case.

The 2nd respondent who is the complainant, filed a private complaint under Section 200 Cr.P.C for the offence punishable under Section 138 & 142 of N.I. Act alleging that on 16.07.2008 the petitioner obtained loan of Rs.9,50,000/- at the rate of 14.5% interest by depositing original registered sale deed, the debt is agreed to be paid in

84 instalments at the rate of Rs.18,100/- per each instalment, to the 2nd respondent/bank.

On repeated requests made by the 2nd respondent/bank, the petitioner issued a cheque No. 356182 for Rs.10,12,393/- on 28.08.2009 towards discharge of part legally enforceable debt due to the 2nd respondent/bank, including future instalments, drawn on UCO Bank, Visakhapatnam. On presentation of the cheque on 28.08.2009 for collection, the same was returned on the same day with an endorsement "Insufficient Funds" and issued a cheque return memo to that effect.

The 2nd respondent/bank got issued a legal notice dated 26.09.2009 to the petitioner demanding her to pay cheque amount within 15 days from the date of receipt of the said notice and the said notice was returned with an endorsement that "***Addressee left without intimation***, ***hence returned to the sendor***". The said intimation was received by the bank on 03.10.2009. Thus, the amount covered by the cheque remained unpaid within the stipulated time of 15 days. Therefore, the 2nd respondent/bank filed a private complaint against the petitioner for the offence punishable under Section 138 & 142 of N.I. Act.

As stated above, the only ground for quashing the proceedings in the complaint is non-compliance of Section 138 (a) & (b) of N.I. Act.

Section 138 of N.I. Act deals with dishonour of cheque for insufficiency, etc., of funds in the account. According to Section 138 of N.I. Act, 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.

Thus, the intention of Section 138 is to inculcate fair operations and credibility in the transactions of Negotiable Instruments Act, despite availability of civil remedy for recovery of amounts. Section 138 is intended to prevent dishonesty on the part of persons who issued Negotiable Instrument to draw a cheque without sufficient funds in his account by him and induce the account holder in due course or act upon him. But, Clause (b) of Section 138 clarified that a notice is required to be issued and if the debtor failed to discharge the debt within the time specified, the complaint can be maintained. But, a notice is to be issued within 30 days from the date of return of the cheque. Here, as per the allegations in the complaint, the cheque was returned along with memo on 28.08.2009 and a notice was particularly issued on 26.09.2009. If, 30 days period is calculated from 28.08.2009, the notice dated 26.09.2009 is within the time stipulated. But, according to the learned counsel for the petitioner, the notice was posted on 29.09.2009 with RL.No.4385. Thus, by the date of posting the registered notice by registered post, 30 days time has expired. Therefore, mere mentioning the date as 26.09.2009 and sending the same on 29.09.2009 cannot be held to be within the time of 30 days, as prescribed under Section 138 of N.I. Act.

An identical issue came up for consideration before the Supreme Court in **MSR Leathers v. S. Palaniappan & Anr.[1],** wherein, the Supreme Court considered the scope of Section 138 and Section 142 and held as follows:

> “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 ought 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 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

[1] (2013) 1 SCC 177

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 count 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."

Following the principle laid down in **MSR Leathers** (supra), the Apex Court in another judgment in **Kamlesh Kumar v. State of Bihar & Anr.**[2] held as follows:

"It is, thus, apparent that he received the information about the dishonor of the cheque on 10.11.2008 itself. However, he did not send the legal notice within 30 days therefrom. We, thus, find that the complaint filed by him was not maintainable as it was filed without satisfying all the three conditions laid down in Section 138 of the N.I. Act as explained in para 12 of the judgment in the case of MSR Leathers, extracted above."

The present facts of the case are also almost identical to the above judgment. Here, the cheque was returned with memo on 28.08.2009 and the legal notice was sent by the bank to the petitioner on 29.08.2009 by registered post under registered letter dated 4385. Further, the 30 days mandatory period under proviso(b) to Section 138 of N.I. Act expired on 27.09.2009. But the notice was sent two days thereafter i.e. on 29.09.2009. Thus, the complaint is not maintainable for failure to follow the mandatory requirement under proviso (b) of

[2] AIR 2014 SC 660

Section 138 of N.I Act. On this ground alone, the proceedings in C.C.No.539 of 2010 on the file of I Additional Chief Metropolitan Magistrate at Visakhapatnam are liable to be quashed. Accordingly, Crl.P.No.119 of 2013 is allowed.

As the facts and circumstances in both the criminal petitions is one and the same, and in view of the order passed in Crl.P.No.119 of 2013, Crl.P.No.1951 of 2013 is also liable to be allowed on the same terms. Hence, the proceedings in C.C.No.437 of 2010 on the file of I Additional Chief Metropolitan Magistrate at Visakhapatnam are also liable to be quashed.

In the result, both the criminal petitions are allowed.

Consequently, miscellaneous petitions pending if any, shall also stand closed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:07.04.2017

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