THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.5077 of 2017

ORDER:

This petition is filed under Section 482 of Criminal Procedure Code to quash the proceedings in C.C.No.202 of 2016, pending on the file of Judicial Magistrate of First Class, Alur, Kurnool District, for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act').

2. The 2nd respondent filed private complaint against the petitioner alleging that the petitioner borrowed an amount of Rs.25,00,000/- from him agreeing to repay the same with interest @ 24 per annum. When the 2nd respondent orally demanded the petitioner several times for repayment of the said loan amount with accrued interest thereon, the petitioner issued a cheque bearing No.000018, dated 02.06.2016 for Rs.25,00,000/- drawn on City Union Bank Limited, Ongole District towards discharge of legally enforceable debt.

3. On 03.06.2016, when the 2nd respondent presented the said cheque for collection in State Bank of Inida, Aluru Branch, the same was returned with a cheque return memo dated 16.06.2016 on the ground 'account closed' and that itself is sufficient to fasten the criminal liability against the petitioner. Thereupon, the 2nd respondent got issued legal notice on 30.06.2016 calling upon him to repay the amount covered by the dishonoured cheque within fifteen days from

the date of receipt of notice. As the time granted in the legal notice was expired, the 2nd respondent filed complaint before the Magistrate on 28.07.2016.

4. The petitioner having received summons in the calander case, filed the present criminal petition on the sole ground that the allegations made in the complaint do not give rise to file complaint and based on incomplete and hazy allegations in the complaint. The trial Court committed an error in taking cognizance against the petitioner and prayed to quash the proceedings in C.C.

5. The 2nd respondent filed counter denying the material allegations reiterating the allegations made in the complaint regarding borrowing, issuance of cheque, presentation of cheque and its dishonour by the bank and issue of notice in compliance of Clause (b) to proviso to Section 138 of the Act. Further contended that the reply notice was got issued by the petitioner on 28.07.2016 through his counsel Sri I.Hanumantha Rao and Sri R.Hazrathaiah, Advocates for the counsel of the 2nd respondent Sri D.I.V.Vijaya Raju and that the complaint is strictly in accordance with the compliance and prayed to dismiss the criminal petition.

6. During hearing, learned counsel while contending that there was absolutely no cause of action for filing the complaint since the 2nd respondent failed to pay the amount within the time prescribed in the notice and placed reliance on **N.Harihara Krishnan v J.Thomas** (Crl.A.No.1534 of 2017), **Subodh S Salaskar v Jayaprakash M.Shah and**

another, (Crl.A.No.1190 of 2008) and **C.C.Alavi Haji v Palapetty Muhammed and another** (Appea(Crl.) No.767 of 2007). On the strength of these three judgments, learned counsel for the petitioner sought to quash the proceedings in the calendar case.

7. Whereas, learned counsel for the 2nd respondent contended that reply notice was also served on the 2nd respondent counsel denying the liability of the petitioner to pay the amount covered by dishonoured cheque, which returned unpaid and that is suffice to conclude that the petitioner did not repay the amount covered by the dishonoured cheque and the other allegations made in the complaint are suffice to constitute the offence punishable under Section 138 of the Act and prayed to dismiss the petition.

8. As seen from the contents of the complaint, the petitioner allegedly borrowed an amount of Rs.25,00,000/- from the 2nd respondent, but the date of borrowing is not mentioned. Moreover, the cheque was allegedly issued on 02.06.2016, and when it was presented on 03.06.2016 for collection, it was returned on 16.06.2016 with an endorsement account closed. In compliance of Clause (b) of proviso to Section 138 of the Act, notice was issued on 30.06.2016 calling upon the petitioner to pay the amount covered by the dishonoured cheque and filed complaint on 28.07.2016 before the Magistrate. The consequences for filing the complaint are that the amount covered by the

dishonoured cheque was not paid. The reply notice dated 08.07.2016 allegedly received by the 2nd respondent is not placed on record before the Magistrate to establish denial of liability of the petitioner to pay the amount covered by the dishonoured cheque. In the absence of any specific allegation about the denial of liability or failure to pay the amount, the allegations would not give rise to any cause of action for filing the complaint. It is evident from the allegations made in the complaint that notice was issued on 30.06.2016 and complaint was filed on 28.07.2016. By that time, 15 days time prescribed under clause (b) of proviso to Section 138 of the Act was over. Therefore, filing complaint in the absence of tendering payment within the specified time under the dishonoured cheque would give rise to cause of action for filing the complaint and that itself is suffice to file a complaint. Even otherwise, the reply notice got issued by the petitioner on 08.07.2016, if accepted, it is suffice that the petitioner refused to pay the amount covered by the dishonoured cheque. Therefore, mere failure to refer reply notice and the date of postal acknowledgment due to inartistic drafting of the complaint cannot be thrown over head, at the threshold of the proceedings.

9. Learned counsel for the petitioner while placing reliance on three judgments referred above would draw the attention of this Court in **N.Harihara Krishnan** referred supra, the Apex Court specified the requirements to constitute the offence. The ingredients of the offence punishable under

Section 138 of the Act are (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that inspite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

10. If this principle is applied to the facts of the present case, it is for the drawer of the cheque, the petitioner to prove that he made payment as demanded in the notice issued. The said notice was also in dispute because acknowledgment

was not placed on record before the Magistrate, but issued a reply notice is not in dispute. Therefore, it is for the petitioner to prove that he paid the amount within the period prescribed i.e. 15 days from the date of receipt of the notice. Similarly in **Subodh S.Salaskar** referred supra, the Apex Court at para 20 held referring judgment in **Jindal Steel and Power Ltd. and Another v. Ashoka Alloy Steel Ltd. and Others**[1], it was finally concluded that the cause of action accrued only on the day when the drawer failed to pay the amount within time prescribed i.e. 15 days after receipt of the notice issued as per clause (b) of proviso to Section 138 of the Act. In similar situation, the Apex Court in **C.C.Alavi Haji v Palapetty Muhammed and another**[2] at para 17 held as follows:

> *"17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, <u>can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the GC</u>*

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[1] (2006) 9 SCC 340
[2] (2007) 6 SCC 555

Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

11. In the present case, the petitioner though received summons along with the complaint copy in the year 2016 itself did not tender the amount covered by the unpaid cheque as held by the Three Judge Bench of the Apex Court in **C.C.Alavi Haji** case referred supra, if he paid the amount covered by the dishonoured cheque within 15 days then the complaint is liable to be rejected.

12. Here, the only contention before this Court is that no notice was served on the petitioner as required under clause (b) of proviso to Section 138 of the Act. In fact, it is implied service in view of the reply notice got issued by the petitioner on 08.07.2016, the petitioner suppressed the factum of issue of reply notice, filed this petition to gain advantage of the inartistic drafting of the complaint by the counsel for the 2nd respondent. Even now the petitioner did not pay the amount covered by the unpaid cheque. In such a case, basing on the ground that there was no allegation in the complaint that the petitioner did not repay the amount after receiving the notice within stipulated time prescribed, these proceedings cannot be quashed. Therefore, I find no merit in the contention

raised by learned counsel for the petitioner and consequently, the criminal petition is liable to be dismissed as it lacks merit.

13. Accordingly, the criminal petition is dismissed. However, it is left open to the petitioner to raise all these pleas before the Judicial Magistrate of First Class, where C.C. is pending and that the Magistrate concerned is directed to decide those pleas, uninfluenced by the observations made hereinabove, independently based on evidence.

Miscellaneous petitions, if any, pending in this criminal petition shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

19.12.2017
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