

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

Criminal Petition No.16498 of 2016

ORDER:

The petitioner is the sole accused in C.C. No.259 of 2016 pending on the file of III Special Magistrate, Visakhapatnam, wherein the learned Magistrate has taken cognizance for the offence punishable under Sections 138 and 142 of Negotiable Instruments Act, 1881 from the private complaint of 2nd respondent. Now, the Petitioner is seeking to quash the said proceedings of the private complaint for the offences supra.

2) Heard learned counsel for the petitioner and learned public prosecutor representing the respondent—State and perused the material on record.

3) The contents in the grounds of quash petition are that the cognizance order of the learned Magistrate is unsustainable, baseless, without jurisdiction, by non-application of judicial mind to the facts in a mechanical manner. As per the contest, the cheque is returned on 31.05.2014 and the complainant issued legal notice on 09.06.2014, that was received by the accused on 13.06.2014 and the complaint filed was in fact on 14.08.2014 which is beyond statutory period of 15 days without waiting for the reply to the notice and within one month of cause of action and thereby, the cognizance order of the learned Magistrate is unsustainable.

4) A perusal of the complaint averments show that the accused borrowed an amount of Rs.2,00,000/- on 17.05.2013 to repay with interest. After several demands made by complainant, the accused

issued a cheque bearing No.454467 dated 30.05.2014 for Rs.1,00,000/- for discharge of debt. The complainant presented the same in State Bank of Hyderabad, Marripalem Branch for collection of the amount on even date and it was returned unpaid on 31.05.2014 with an endorsement of 'no sufficient funds in the account' and within the stipulated time, the complainant sent statutory legal notice dated 07.07.2014 and accused did not honour and the same was returned unserved as unclaimed despite intimation and thereby, he is liable for prosecution.

5) Learned counsel for respondent—complainant in contra to the above contention of the complainant with reference to the complaint averments submits that the case is filed within one month from accrual of cause of action after expiry of period of waiting from service of notice and the complaint is in time and there is nothing to quash the proceedings.

6) Another Bench of this Court, on 02.12.2016, while admitting the quash petition granted stay of all further proceedings in C.C. No.259 of 2016 on the file of III Special Magistrate Court, Visakhapatnam, for a period of two months from the said date and the same is extended from time to time. In the course of hearing, this Court to resolve the disputed facts, on 23.08.2017, while observing that the parties are entitled to approach the trial Court and obtain docket proceedings of the date of filing of the complaint and date of numbering and whether there was any petition to condone the delay contemplated by Section 142 of N.I Act, directed the Registry to call for the above particulars from the trial Court.

7) The Court received the record, from the learned Magistrate pursuant to the direction, which shows that the complaint was filed on 14.08.2014 and there is no separate petition to condone the delay along with complaint and the cognizance was taken on 27.08.2014 and the case was registered as C.C. No.1600 of 2014 and the complaint was returned to the complainant on 22.01.2015 in view of the judgment of the Apex Court in **Dasarath Rup Singh Rathod vs State of Maharastra and another**¹ for presentation in proper Court having territorial jurisdiction, within one month. The complaint was re-presented before the II Additional Chief Metropolitan Magistrate on 23.01.2015 and it was returned with some office objection on 30.01.2015 and again the complaint was re-presented on 13.02.2015. Cognizance was taken for the offence under Section 138 of N.I Act against the accused on 15.06.2015 and registered as C.C. No.234 of 2015. During the stage of summons, the case was transferred to the Court of III Special Magistrate, Visakhapatnam on 03.04.2015 and renumbered as C.C. No.259 of 2016.

8) From the material received from the Court of learned Magistrate, the date of cheque is 30.05.2014, the date of cheque return memo from presentation of cheque on even date is 31.05.2014, the date of statutory notice is 07.06.2014, wrongly mentioned as 07.07.2014 in the list of documents with complaint, and the Court finally numbered. The date of notice received by 1st respondent was on 13.06.2014. It is after receipt of notice, there shall be 15 days waiting to enable the accused to pay the amount and the non-payment gives cause of action to maintain the

¹ 2014 (2) ALD CrI. 190 (SC)

complaint from accrual within one month and if it is beyond that period, an application to condone the delay in filing is required to be filed under Section 142 (2) of N.I Act from the combined reading of Section 138 and 142 of N.I Act.

9) The core issue of the quash petition from the contention of the quash petitioner/ accused is that it is beyond the said period.

10) In fact, the date of service of notice is to be excluded in computing the period as per Sections 8 and 9 of General Clauses Act as per the settled law. There is, no doubt, legal position covered by the Apex Court in ***Kamlesh Kumar vs State of Bihar and another***², which says the legal notice to the drawer must be issued within thirty days from the date of dishonour of cheque which matures into complaint and even in case of successive notices, it was held that legal notice must be issued within 30 days of second representation and dishonour and it was not done, thereby the complaint for non-compliance of the statutory conditions cognizance taken held unsustainable referring to the expression of the Apex Court in ***MSR Leathers vs S.Palaniappan***³

11) In fact, it is not only giving of notice for dishonour within 30 days but also after service of notice, for making payment of the dishonour cheque amount, 15 days time to be given and if not paid within that time, cause of action accrues and from that date of accrual of cause of action, complaint to be filed within one month as laid down in Kamalesh (supra) and if it is found beyond 30 days

² 2014 (2) SCC 424

³ (2013) 1 SCC 177

time after service of statutory notice as held Division Bench of the Apex Court in ***Pavan Kumar Ralli vs Mahinder Singh Narula***⁴, the complainant can be permitted to file an application to condone the delay before the trial Court to consider on its own merits. As held in Pawan Kumar Ralli (supra), the trial Court can decide the issue, if any application is filed by accused as to the complaint is in time and the cognizance taken is barred by limitation and if so any application filed to condone the delay can be considered and if so with what terms and on own merits.

12) With the above observation, the criminal petition is disposed of.

Miscellaneous petitions, pending if any in this Criminal Petition shall stand closed.

Date:28.11.2017
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JUSTICE Dr. B.SIVA SANKARA RAO

⁴ CrI.A. No.1684 of 2014 dated 11.08.2014