

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.27495 of 2017

Arising Out of PS.Case No. -1056 Year- 2016 Thana -BEGUSARAI COMPLAINT CASE District-
BEGUSARAI

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Subodh Kumar Singh, son of Radha Singh @ Radha Prasad Singh, proprietor of
M/s Gaurav Khad Biz Bhandar at village- Bariyarpur, Post Office- Rahatpur, Police
Station- Balia, District- Begusarai.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Birendra Prasad Sah, son of Late Singheshwar Prasad Sah, proprietor of M/s
Madhvi Khad Bhandar, at N.H. 31, Harhar Mahadev Chauk, Police Station- Town,
District- Begusarai.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Vikramdeo Singh, Advocate
: Mr. Ravi Shankar Pankaj, Advocate
For the Opposite Party No.2 : Mr. S.K.Mishra, Advocate
For the State : Mr. Jharkhandi Upadhyay, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 10-05-2018

Heard learned counsel for the petitioner and learned
counsel for the State.

2. This application under Section 482 of the Code of
Criminal Procedure has been filed by the petitioner for quashing of
the order dated 08.03.2017 passed by the Learned Sessions Judge,



Begusarai, in Criminal Revision No.56 of 2017 whereby and where under the order taking cognizance dated 14.07.2016 passed by the learned Chief Judicial Magistrate, Begusarai in Complaint Case No. 1056(C) of 2016 has been affirmed by which the petitioner was summoned to face trial for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'N.I. Act').

3. It is submitted by the learned Advocate for the petitioner that the order impugned passed by the revisional court affirming the order passed by the learned Chief Judicial Magistrate by which the petitioner has been summoned to face trial under Section 138 of the N.I. Act is bad in law.

4. The submission is that for dishonour of two cheques in the first instance legal notice was issued to the petitioner on 31.12.2015. As the petitioner failed to reply, the reminder notice was issued on 26.02.2016 by the complainant to which the petitioner replied on 02.03.2016 denying his liability where after the complaint has been filed on 11.05.2016. It is submitted that while summoning the petitioner vide order dated 14.07.2016 the learned Chief Judicial Magistrate, Begusarai, erroneously condoned the delay in filing the complaint.

5. It is submitted that since no complaint was filed within one month from the date of issuance of the first notice, the learned



Magistrate could not have taken cognizance of the offence and summoned the petitioner, as under Section 138 read with Section 142 of the N.I. Act, unless a complaint is filed within one month of the date on which cause of action arose, there would be bar in taking cognizance of an offence. In support of his submission, he has placed reliance on the decision of the Supreme Court in *Krishana Exports and Others vs. Raju Das [(2004) 13 SCC 498]*.

6. Per contra, learned Advocate appearing for the complainant submitted that since the Post Office failed to supply any report regarding delivery of the first notice dated 31.12.2015, the second notice was issued on 26.02.2016. According to him, if the first notice itself could not be served upon the petitioner there would be no bar in sending the second notice. He submitted that, whatever was the limitation in filing the complaint has already been condoned by the learned Chief Judicial Magistrate taking into consideration the request made by the complainant that during the intervening period he had fallen ill. His contention is that there is no illegality in the order passed by the learned Chief Judicial Magistrate or by the revisional court.

7. I have heard learned Counsel for the parties and perused the record.

8. The relevant Sections 138 and 142 of the N.I. Act read as



under:-

“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) 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, the holder in due course of the cheque;

(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) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

(2) The offence under section 138 shall be inquired into and tried only by a Court within whose local jurisdiction,-

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.- For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.”

9. From a reading of Section 138 of the N.I.Act, it would be manifest that in order to attract an offence under the said



provisions following five essential elements are required:-

- (i) a person must have drawn a cheque on an account maintained by him in a bank account for the discharge of any debt or other liability;
- (ii) that cheque has been presented to the bank within six months or within a period of its validity whichever is shorter;
- (iii) that cheque is returned by the bank unpaid;
- (iv) the payee or holder in due course of the cheque gives a notice in writing to the drawer of the cheque demanding payment of cheque amount from the drawer within thirty days from the date of receipt of information regarding return of cheque unpaid;
- (v) the drawer of such cheque fails to pay the amount within fifteen days of the receipt of notice.

10. Only after proof of the afore-stated five elements, the court may take cognizance of the offence under Section 138 of the N.I. Act.

11. It would be manifest from a plain reading of Section 142 of the N.I.Act that a court can take cognizance of an offence under Section 138 of the N.I.Act if it is made within one month of the date on which the cause of action arises under clause (c) to the proviso to Section 138 of the N.I.Act.

12. The Supreme Court in *Sadanandan Bhadran vs. Madhavan Sunil Kumar*, [(1998) 6 SCC 514] laid down the law in the following terms:-



“Besides the language of Sections 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them is that for dishonour of one cheque, there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour, the drawer cannot be liable for any offence nor can the first offence be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under clause (c) of Section



142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes the Court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part should have effect the above conclusion cannot be drawn for, that will make the provision for limiting the period of making the complaint nugatory.”

13. The only question which arises for consideration in the instant case is as to whether the aforementioned legal requirements were complied with by the complainant so as to enable him to maintain the complaint petition or not.

14. So far as the present case is concerned, the case of the complainant is that when return of memo from the bank regarding dishonoured cheque was received by him on 04.12.2015, he sent first



legal notice on 31.12.2015. The complainant claims that neither the notice nor the acknowledgement sent by him was returned. The contention of the petitioner is that the complainant cannot take a plea of non-service of the first notice for creating a fresh cause of action. Per contra, the contention of the complainant is that there is a clear averment in the complaint itself that despite efforts made by him, the postal department failed to disclose as to whether or not the notice sent to the petitioner was ever served upon him and, thus, the second notice was issued on 26.02.2016.

15. In this regard, position in law is well settled. Where the sender has despatched the notice by post with correct address, it can be deemed to have been served on the sendee unless it is proved by the sender or the sendee that it was not really served.

16. The Supreme Court in *K. Bhaskaran vs. Sankaran Vaidhyan Balan and another*, [AIR 1999 SC 3762] held as under:-

“ No doubt Section 138 of the Act does not require that the notice should be given only by “post”. Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he



was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.

Thus, when a notice is returned by the sendee as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in Clause (d) to the proviso of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address.”

17. That being the position in law, the Court would presume that the notice sent by the complainant under registered post on 31.12.2015 was duly served on the petitioner. Thereafter the cause of action to file complaint had accrued. Admittedly, the complainant failed to file the complaint within the statutory period of thirty days as prescribed under the N.I. Act in pursuance to the issuance of first notice.

18. It is not permissible for a payee to create another cause of action in respect of the same cheque. In this regard learned counsel for the petitioner has rightly placed reliance on the decision of the



Supreme Court in *Krishana Exports and Others vs. Raju Das* (supra) in which the ratio laid down by the Supreme Court in *Sadanandan Bhadran vs. Madhavan Sunil Kumar* (supra), has been reiterated. The issue as to whether after the notice issued under Clause (b) of Section 138 of the N.I. Act, the payee or holder of the cheque, who does not take any action on the basis of such notice within the prescribed period under Section 138 of the N.I. Act is entitled to issue a fresh notice in respect of the same cheque and, thereafter, proceed to file a complaint under Section 138 of the N.I. Act was once again considered by the Supreme Court in *Prem Chand Vijay Kumar vs. Yashpal Singh and Another [(2005) 4 SCC 417]* wherein after discussing the facts of the case, it held that the Magistrate erred in law in taking cognizance on the complaint filed on the basis of the second show cause notice after service of the first notice.

19. For the foregoing discussions, the order taking cognizance of the offence and summoning the petitioner under Section 138 of the N.I. Act cannot be sustained. The revisional court also erred in appreciating the facts and law while passing the impugned order dated 8th May, 2017.

20. Consequently, the impugned order dated 08.03.2017 passed by the learned Sessions Judge, Begusarai in Criminal Revision No.56 of 2017 and the order dated 14.07.2016 passed by the learned



Chief Judicial Magistrate, Begusarai in Complaint Case No.1056(c) of 2016 are hereby set aside.

21. The application stands allowed.

(Ashwani Kumar Singh, J)

Md.S./-

AFR/NAFR	NAFR
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