

**HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**CRIMINAL PETITION No.7166 OF 2017**

**ORDER:**

This petition is filed under Section 482 Cr.P.C. to quash the proceedings in C.C.No.205 of 2017, pending on the file of III Special Magistrate, Miyapur, Ranga Reddy District, registered for the offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act').

The 2<sup>nd</sup> respondent filed private complaint alleging that the petitioner and himself have cordial relationship with each other and the petitioner approached him and requested to arrange hand loan of Rs.12 lakhs to meet her immediate financial necessities as the petitioner wants to invest the same in cinema business to earn good profit as a distributor and assured the 2<sup>nd</sup> respondent to fetch interest @ 2% per month for the said hand loan. Believing the words and friendly relationship with the petitioner, the 2<sup>nd</sup> respondent arranged Rs.5 lakhs and Rs.7 lakhs in two installments vide cheque bearing No.000019, dated 15.09.2016 for Rs.5,00,000/- and cheque bearing No.000018, dated 05.10.2016 for Rs.7,00,000/-, drawn on Andhra Bank, KPHB Colony, Hyderabad. On presentation of the two cheques before the collecting bank for collection, the same were returned by payee bank with an endorsement 'funds insufficient' and returned with cheque returned memos dated 01.12.2016 and 09.12.2016 respectively. Immediately the petitioner got issued legal notice on 28.12.2016 calling upon the petitioner to pay the amount covered by the dishonoured cheques within 15 days from the date of receipt of legal notice. Though notice sent by registered post with acknowledgment due and served on 05.01.2017, the petitioner did not

comply with the legitimate demand for payment of amount covered by the dishonoured cheques. Hence, the complaint.

The present petition is filed only on the ground that the notice was not issued strictly adhering to Section 138 of the Act and that the postal receipt along with registered letter is filed annexed to the registered notice bearing No.A RN133139662IN. But it does not bear any date. However, the petitioner produced a copy of track consignment of the registered letter, which shows that the letter was posted on 04.01.2017. Therefore, notice was not issued in strict compliance of Section 138 of the Act and on the basis of the track consignment, learned counsel for the petitioner requested to quash the proceedings in C.C.No.205 of 2017.

Learned counsel for the petitioner reiterated the same grounds urged in the petition during argument and whereas learned counsel for the 2<sup>nd</sup> respondent disputed the same while contending that the notice was posted to the address of the petitioner within the time permitted under the Act i.e. 28.12.2016. Therefore, on this ground the complaint cannot be quashed exercising power under Section 482 Cr.P.C. and placed reliance on judgment of the Apex Court in **HMT Watches Limited v M.A.Abida and another**<sup>1</sup> in support of his contention.

Filing of complaint is not in dispute, but only the disputed question is whether the notice was posted on 28.12.2016 to the address of the petitioner in compliance of Section 138 of the Act or not?

Issue of notice within 30 days from the date of return of cheques is mandatory. But the cheques bearing No.000018 and 000019 were returned on 01.12.2016 and 09.12.2016 respectively and notice was allegedly sent on 28.12.2016 as per the notice copy annexed to the complaint. If the notice was posted on 28.12.2016 to the address of the petitioner, it is within time. But as per the track consignment of Indian

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<sup>1</sup> (2015) 11 SCC 776

Post, it was posted on 04.11.2017. Therefore, the claim in respect of cheque bearing No.000018, was returned on its presentation for collection on 01.12.2016 is barred by limitation in view of Section 138(b) of the Act. Hence, due to non compliance of mandatory requirement and the issue of notice within one month from the date of return of the cheque is not complied by the petitioner, but such question is a disputed question of fact and the same cannot be decided at this stage.

Learned counsel for the 2<sup>nd</sup> respondent contended that whether the notice was sent on 28.12.2016 or 04.01.2017 is a question of fact that cannot be decided at this stage. In **HMT Watches Limited's case** referred supra, the Apex Court held that the High Court cannot quash the proceedings when a disputed question has to be decided and the Apex Court held that while deciding a petition under Section 482 Cr.P.C., the Court cannot decide the legality, validity or otherwise of the demand notice issued under Section 138 of the Act and authenticity of the signature thereon and the order passed by the High Court was set aside by the Apex Court. If the principle laid down in the above judgment is applied to the present facts of the case whether notice was posted on 28.12.2016 or on 04.01.2017 is a disputed question of fact such question cannot be decided in the proceedings under Section 482 Cr.P.C.

While considering the application under Section 482 Cr.P.C., this Court cannot appreciate the evidence but evaluate the material available on record and the defence of the petitioner cannot be taken into consideration and at best even if the allegations are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, then the proceedings can be quashed. In the present case, the proceedings cannot be quashed under Section 482 Cr.P.C. in view of guideline No.4 i.e. where, the allegations in the FIR do not constitute a cognizable offence but

constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code as held in **State of Haryana v. Bhajan Lal**<sup>2</sup> . The Courts consistently held that while deciding the application under Section 482 Cr.P.C. cannot appreciate any evidence or fact and defence raised by the accused also cannot be looked into at this stage in view of the law declared by the Apex Court in **Umesh Kumar v. State of Andhra Pradesh and another**<sup>3</sup>.

Learned counsel for the petitioner placed reliance in **Kamlesh Kumar v State of Bihar and another**<sup>4</sup> where the Apex Court held that when a cheque was issued on 17.12.2008 pursuant to dishonour of same cheque second time on 10.11.2008 i.e. beyond limitation period of 30 days. Information as to second dishonour was received from Bank on the same day itself. Although the complainant had right to present the said cheque for encashment a second time after its dishonour, the legal notice pursuant to second dishonour had to be issued within 30 days of the receipt of information as to second dishonour from Bank, which was not done. Hence, the complaint filed on the basis of notice dated 17.12.2008 was not maintainable in view of non-compliance with all the three conditions laid down in Section 138 of the Act.

In the present case, the dispute is with regard to the date of sending notice by registered post, but as per the allegations made in the complaint notice was sent on 28.12.2016 itself, but based on the defence set by the petitioner producing track registration of the Indian Post on 04.01.2017 the proceedings cannot be quashed as it is a disputed question of fact. Therefore, by applying the principle laid down in the above referred decision, the criminal petition is liable to be dismissed.

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<sup>2</sup> 1992 Supp. (1) SCC 335

<sup>3</sup> 2013 (10) SCC 591

<sup>4</sup> (2014) 2 SCC 424

Accordingly, the criminal petition is dismissed leaving it open to the petitioner to raise all these contentions before the Court below.

Pending miscellaneous petitions, if any, in this Petition shall stand dismissed in consequence.

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**M.SATYANARAYANA MURTHY, J**

Date: 04.07.2018.  
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