

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on: 15th November, 2018

+ **CRL.L.P. 459/2016**

DR. A S RATHORE Petitioner
Represented by: Mr. Atanu Saikia, Advocate.

versus

VIMAL JAIN Respondent
Represented by: Mr. Surender Tyagi, Advocate

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

CrI.M.A. No. 13545/2018

Learned counsel for the petitioner submits that the petitioner erroneously filed a revision petition against the order of acquittal which has resulted in delay in filing the leave to appeal petition.

Considering the fact stated in the application delay of 1627 days in filing the leave to appeal is condoned.

Application is disposed of.

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1. Aggrieved by the judgment dated 2nd November 2011, whereby the learned Additional Chief Metropolitan Magistrate acquitted the respondent for the offence punishable under Section 138 Negotiable Instruments Act, the petitioner/complainant has preferred the present leave petition.

2. Facts of the case as per the complaint are that the petitioner made a payment of ₹5,00,000/- to the respondent against a residential plot in Safdarjang Enclave, Delhi. Since the deal was not materialized, the

respondent was under an obligation to return the money but he did not return the same. However, the respondent issued a post dated cheque bearing number 379849 dated 20th April, 1999 for a sum of Rs.5,00,000/-. When the cheque was presented for encashment on 28th April, 1999, it was returned unpaid vide memo dated 3rd May, 1999 with remarks '*insufficient funds and signature differ*'. Consequently, legal demand notice dated 12th May, 1999 was sent. Despite notice, the respondent failed to make the payment within the stipulated period of time. Hence, the complaint.

3. Petitioner examined himself as CW-1 and to adduce evidence filed two affidavits on 7th September, 2007 and 22nd August, 2008 and relied upon the complaint, cheque, returning memo, legal notice and postal receipts. Petitioner examined two other witnesses namely Raju Saungra, Clerk from Canara Bank and one N.K. Khanna from Bank of Baroda.

4. Statement of the respondent was recorded under Section 313 Cr.P.C. wherein he denied the allegations of the petitioner.

5. Perusal of the record reveals that the legal notice (Ex.CW-1/D) was issued on 12th May, 1999 and as per the envelope Ex.CW-1/F, the last visit made by the postal authorities was on 20th May, 1999. Thus, it can be presumed that the notice was served on 20th May, 1999. Cause of action arises after the expiry of 15 days from the date of service of notice. However, in the present case, complaint was filed on 28th May, 1999 when no cause of action had arisen, thus, the complaint, being premature in nature, was liable to be dismissed.

6. Thus the issue which arises for consideration is that even if a complaint is filed under Section 138 NI Act before the accrual of cause of action, whether the complaint would be still maintainable if the cognizance

is taken after the expiry of fifteen days' period of notice? This issue has also been dealt with by the Supreme Court in the decision reported as (2014) 10 SCC 713 Yogendra Pratap Singh v. Savitri Pandey wherein it was observed:

“28. For about 7 years since the decision was given by this Court in Narsingh Das Tapadia [Narsingh Das Tapadia v. Goverdhan Das Partani, (2000) 7 SCC 183 : 2000 SCC (Cri) 1326] , the various High Courts, as indicated above, continued to take the view that presentation of a complaint under Section 138 of the NI Act before the accrual of the cause of action does not render it not maintainable if cognizance had been taken by the Magistrate after expiry of 15 days of the period of notice. In such matters, no illegality or impropriety was found to have been committed by the Magistrate in taking cognizance upon such complaint. This legal position, however, was not accepted by a two-Judge Bench decision of this Court in Sarav Investment & Financial Consultancy [Sarav Investment & Financial Consultancy (P) Ltd. v. Llyods Register of Shipping Indian Office Staff Provident Fund, (2007) 14 SCC 753 : (2009) 1 SCC (Cri) 935] . Dealing with the provision under Section 138 of the NI Act, this Court held that Section 138 contained a penal provision; it was a special statute. Having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrant a strict construction. This Court emphasized that clause (c) of the proviso to Section 138 provides that the holder (sic drawer) of the cheque must be given an opportunity to pay the amount within 15 days of the receipt of the notice. The complaint, thus, can be filed for commission of an offence by drawee of the cheque only 15 days after service of the notice. In Sarav Investment & Financial Consultancy [Sarav Investment & Financial Consultancy (P) Ltd. v. Llyods Register of Shipping Indian Office Staff Provident Fund, (2007) 14 SCC 753 : (2009) 1 SCC (Cri) 935] , this Court, thus, held that service of notice in terms of Section 138 proviso (b) of the NI Act was a part of cause of action for lodging the complaint and communication to the accused about the fact of dishonouring of the cheques and calling upon him to pay the amount

within 15 days was imperative in character. It is true that in Sarav Investment & Financial Consultancy [Sarav Investment & Financial Consultancy (P) Ltd. v. Llyods Register of Shipping Indian Office Staff Provident Fund, (2007) 14 SCC 753 : (2009) 1 SCC (Cri) 935] , there is no reference of the decision of this Court in Narsingh Das Tapadia [Narsingh Das Tapadia v. Goverdhan Das Partani, (2000) 7 SCC 183 : 2000 SCC (Cri) 1326] .

29.Sarav Investment & Financial Consultancy [Sarav Investment & Financial Consultancy (P) Ltd. v. Llyods Register of Shipping Indian Office Staff Provident Fund, (2007) 14 SCC 753 : (2009) 1 SCC (Cri) 935] led to the view being taken by the High Courts that a complaint under Section 138 of the NI Act filed before the expiry of 15 days of service of notice was premature and such complaint could not be treated as complaint in the eye of the law and criminal proceedings initiated are liable to be quashed. This is seen from the view of the Calcutta High Court in Sandip Guha [Sandip Guha v. Saktipada Ghosh, (2008) 3 CHN 214] and the judgment of the Himachal Pradesh High Court in Rattan Chand [Rattan Chand v. Kanwar Ram Kripal, 2010 Cri LJ 706 (HP)] .

30. Section 138 of the NI Act comprises of the main provision which defines the ingredients of the offence and the punishment that would follow in the event of such an offence having been committed. Appended to this section is also a proviso which has three clauses viz. (a), (b) and (c). The offence under Section 138 is made effective only on fulfilment of the eventualities contained in clauses (a), (b) and (c) of the proviso. For completion of an offence under Section 138 of the NI Act not only the satisfaction of the ingredients of offence set out in the main part of the provision is necessary but it is also imperative that all the three eventualities mentioned in clauses (a), (b) and (c) of the proviso are satisfied. Mere issuance of a cheque and dishonour thereof would not constitute an offence by itself under Section 138.

31. Section 138 of the NI Act has been analysed by this Court in Kusum Ingots & Alloys Ltd. [Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd., (2000) 2 SCC 745 : 2000 SCC (Cri) 546 : AIR 2000 SC 954] wherein this Court said that the following ingredients are required to be satisfied for making out a case under Section 138 of the NI Act: (SCC p. 753, para 10)

“(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.”

32. We are in agreement with the above analysis.”

7. As held by the Supreme Court, a premature complaint is a complaint without a cause of action having accrued and thus liable to be quashed.

Hence the impugned judgment dismissing the complaint and acquitting the respondent suffers from no illegality.

8. Leave to appeal petition is dismissed.

(MUKTA GUPTA)
JUDGE

NOVEMBER 15, 2018
‘Anu/ga’

