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

%   *Reserved on: 13th September, 2018*
Decided on: 26th September, 2018

+   **CRL.A. 953/2018**

RAJENDER ..... Appellant
Represented by: Mr. M.M. Singh and, Mr.Prashant Kumar Singh, Advocates.

versus

YOGENDER TYAGI ..... Respondent
Represented by: Mr.S.Satyanarayan, Advocate.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present appeal is directed against the judgment dated 21st September, 2016 passed by the learned Metropolitan Magistrate in CC No.536368/16 titled as '*Rajender v. Yogender Tyagi*, whereby the complaint preferred by the appellant under Section 138 of the Negotiable Instruments Act, 1881 (in short 'NI Act') was dismissed and the respondent/accused was acquitted.

2. Brief exposition of the facts in the complaint are that the respondent approached the appellant for a friendly loan of ₹3,00,000/-. Appellant acceded to the request of the respondent and advanced him the aforesaid loan amount. To discharge the liability, respondent issued cheque bearing number 054499 dated 15th November, 2010 for a sum of ₹3,00,000/-. However, he requested the appellant not to present the cheque till 15th January, 2011 and sought further extension of time till 1st

March, 2011. When the cheque was presented for encashment, it was dishonoured again vide return memo dated 7th March, 2011 with the remarks '*funds insufficient*'. Legal notice dated 8th March, 2011 was sent to the respondent which was duly served upon him on 11th March, 2011. Since the respondent failed to make the payment within the stipulated period of time, the appellant preferred the present complaint.

3. Appellant led pre-summoning evidence and tendered his evidence vide Ex.CW-1/A and relied upon the cheque (Ex.CW-1/1), return memo (Ex.CW-1/2), legal demand notice (Ex.CW-1/3) and delivery/tracking report (Ex.CW-1/4 (colly)).

4. Respondent was summoned vide order dated 1st April, 2011. Proceedings under Section 82 Cr.P.C. were initiated against the respondent and he was declared an absconder vide order dated 7th December, 2012. However, the respondent surrendered thereafter and was enlarged on bail. Notice under Section 251 Cr.P.C. was framed against the respondent to which he pleaded not guilty.

5. Statement of the respondent was recorded under Section 313 Cr.P.C. wherein he stated that the cheque in question was misused by the appellant which he had issued along with two other cheques many years ago as he wanted to purchase land from the appellant. He further stated that he was not given possession of the land. He denied taking any loan from the appellant, however, admitted his signatures on the cheque.

6. Respondent examined himself as DW-1 and deposed that the appellant had shown him a plot of land at Burari for sale. He had given two cheques of ₹50,000/- each as token money. Appellant asked him to pay ₹3,00,000/- as part of sale consideration for which he issued the

cheque in question with the understanding that the appellant would execute the written agreement. Neither the documents were executed nor the receipt of amount received was issued, hence, the respondent did not get the cheque honoured. He stated that he did not receive any legal notice.

7. Learned Trial Court dismissed the complaint on the ground that no cause of action had arisen on 26th March, 2011, the date on which complaint was filed, to attract the provision of Section 138 of NI Act. The complaint was filed before the expiry of 15 days from the date of service of notice, that is 11th March, 2011. Thus one of the issues for consideration in the present appeal before this Court is whether the date on which the notice was served will be counted within the period of fifteen days as stipulated under proviso (c) to Section 138 of the NI Act, after which the complaint is required to be filed for non-payment of dishonoured cheque amount.

8. Aforesaid issue is no longer *res integra* and has been settled by the Supreme Court in the decision reported as (1999) 3 SCC 1 *Saketh India Ltd. v. India Securities Ltd.* wherein cheques dated 15th March, 1995 and 16th March, 1995 issued by the accused therein were dishonoured when presented for encashment. Notices were served on the accused on 29th September, 1995. As per proviso (c) to Section 138 of the NI Act, the accused was required to make the payment of the said amount within 15 days of the receipt of the notice i.e. on or before 14th October, 1995. The accused failed to pay the amount. The cause of action, therefore, arose on 15th October, 1995. It was contended by learned counsel for the complainant therein that for calculating one

month's period contemplated under Section 142(b) of NI Act, the date 15th October, 1995 had to be excluded. However, Learned Counsel for the accused therein submitted that the date on which the cause of action arose i.e. 15th October, 1995 has to be included in the period of limitation and thus the complaint was barred by time. Supreme Court rejecting the contention of the Learned Counsel for the accused held :-

> *"8. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires. The period of 15 days in the present case expired on 14-10-1995. So cause of action for filing complaint would arise from 15-10-1995. That day (15th October) is to be excluded for counting the period of one month. Complaint is filed on 15-11-1995. The result would be that the complaint filed on 15th November is within time."*

9. The view taken by the Supreme Court in *Saketh India Ltd. (*supra) has been upheld by 3 Judge Bench of the Supreme Court in the decision reported as (2014) 11 SCC 769 <u>Econ Antri Ltd. v. Rom Industries Ltd.</u>

10. In the present case, the notice was served upon the respondent on 11th March, 2011 and the complaint was filed on 26th March, 2011. In view of the pronouncements of the Supreme Court, the date of service is to be excluded from reckoning the fifteen days' period within which the accused is required to make the payment. Thus, the cause of action to

file the complaint under Section 138 of NI Act, in the instant case, accrued only on 27th March, 2011. Therefore, the present complaint was premature.

11. Next 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 <u>*Yogendra Pratap Singh v. Savitri Pandey*</u> 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."

12. As held by the Supreme Court, a premature complaint without a cause of action having accrued is no complaint in the eyes of law and thus liable to be quashed. Hence the impugned judgment dismissing the complaint and acquitting the respondent suffers from no illegality.

13. Appeal is dismissed.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 26, 2018
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