IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No. 3453 of 2015

Arising Out of P.S. Case No.-57 Year-2011 Thana- AMBA District- Aurangabad

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Navin Kumar, Son of Arun Mishra, Resident of Village-Misir Tendua, P.S-Navi Nagar, District-Aurangabad at presently residing at Rewar Toli, Manpur, Gaya.

... ... Petitioner/s

Versus

1. The State of Bihar
2. Abhay Kumar Pandey, S/o Hari Prasad Pandey Village- Amba, P.O. Amba, P.S.- Amba, District- Aurangabad.

... ... Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. Dharmendra Kumar Sinha, Advocate
For the Opposite Party/s	:	Mr. Pramod Kumar Singh and Mr. Sanjay Kumar Singh, Advocates
For the State	:	Mr. Jharkhandi Upadhyay, APP

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

Date : 17-04-2019

Heard learned counsel for the petitioner; learned APP for the State and learned counsel for the opposite party no. 2.

2. The petitioner has moved the Court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') for the following relief:

> *"That the present application is being filed by petitioner for quashing of order dated 16.08.2013 passed by Judicial Magistrate 1st Class, Aurangabad in Amba P.S. Case No.-57/11 Gr. No. 1696/11 whereby and where under a petition filed by the petitioner U/S 239 Cr.P.C. has been rejected and further for quashing of order dated 12.08.2014 passed by the Session Judge, Aurangabad in Criminal Revision No. 135/13 by which the learned*

Session Judge has refused to interfere in the order passed by the Judicial Magistrate 1st Class, Aurangabad."

3. The opposite party no. 2 had filed Complaint Case No. 914 of 2010 before the Chief Judicial Magistrate, Aurangabad on 16.05.2011 alleging offences under Sections 323, 324, 420, 406 of the Indian Penal Code and Section 138 of The Negotiable Instruments Act, 1881 (hereinafter referred to as the 'NI Act'). The same was sent by the Court to the police resulting in institution of Amba P.S. Case No. 57 of 2011. Upon investigation, the police submitted chargesheet under Sections 420 of the Indian Penal Code and 138 of NI Act. Based on the same, by order dated 07.09.2012, the Court took cognizance under Section 420 of the Indian Penal Code and 138 of the NI Act. A petition was then filed by the petitioner under Section 239 of the Code praying for discharge. The same was dismissed by order dated 16.08.2013 by the concerned Judicial Magistrate 1st Class, Aurangabad. Challenge to the same, in Criminal Revision No. 135 of 2013 by the petitioner was also dismissed by order dated 12.08.2014 by the Sessions Judge, Aurangabad.

4. Learned counsel for the petitioner submitted that the initial sending of the complaint concerning non-encashment of a cheque by the Court to the police is bad in law as the law requires that only a complaint before the competent Court is maintainable but no FIR is maintainable. For such proposition, learned counsel relied upon

a decision of the Hon'ble Supreme Court in **N. Harihara Krishnan v. J. Thomas** reported as **AIR 2017 SC 4125**, the relevant being at paragraph no. 24. It was further submitted that on merits, the requirement of law is that within 30 days of the receipt of information from the Bank regarding return of cheque, notice has to be given to the person issuing the cheque for payment and if he fails to make payment within 15 days of receiving the notice, the complaint has to be filed within the next 30 days. Learned counsel submitted that in the present case, admittedly the cheque has been returned to the opposite party no. 2 by the Bank under letter dated 20.10.2009. Thus, it was submitted that the requirement of sending notice within one month, followed by a waiting period of 15 days from the service of notice and thereafter a maximum period of one month for filing the complaint, has been totally ignored as the opposite party no. 2 has filed the complaint only on 16.05.2011.

5. Learned APP and learned counsel for the opposite party no. 2 submitted that notices were sent to the petitioner with regard to return of the cheque but when no payment was made, having no other option, the complaint was filed. However, on a query of the Court as to how the mandatory legal requirements are satisfied with regard to maintainability of any complaint under the NI Act and also the power

of the Court to refer such complaint to police for registering FIR, they could not counter the same.

6. Having considered the facts and circumstances of the case and submissions of learned counsel for the parties, the Court finds that a case for interference has been made out.

7. As has rightly been submitted by learned counsel for the petitioner, the time fixed for sending notice to the signatory of the cheque followed by the waiting period for him to make payment and thereafter for filing of the complaint before the Court, has been specifically incorporated in the NI Act itself. In the light of such statutory provisions, the intimation with regard to non-encashment of cheque by the Bank to the opposite party no. 2 being made on 20.10.2009 and the complaint itself being filed on 16.05.2011 can in no way be permitted. A mere statement that notice was sent, would also not satisfy the requirement of sending such a notice, since neither any date has been mentioned nor copy of such notice brought on record.

8. In this connection, the Court would refer to the decision of the Hon'ble Supreme Court in **Kamlesh Kumar vs. State of Bihar** reported as **2014 (1) PLJR (SC) 299**, where at paragraphs no. 10 to 14, it has been held as under:

*"10. In **MSR Leathers** (supra), this Court analyzed the provisions of Sections 138 and 142 of the N.I. Act in the following manner:-*

> *"The proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonor of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make 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. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.*

Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non obstante clause. It provides that 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, by the holder in due course and 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. In terms of clause (c) to

Section 142, no count inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class is competent to try any offence punishable under Section 138.

A careful reading of the above provisions makes it manifest that a complaint under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of the proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) of the proviso to Section 138 of the Act.

The presentation of the cheque and dishonor thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes "cause of action" within the meaning of Sections 138 and 142 (b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For a dishonor to culminate into the commission of an offence of which a court may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque, and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonor of the cheque that the holder/payee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him. Therefore, there is, nothing in the proviso to Section 138 or Section 142 for that matter, to oblige the holder/payee of a dishonoured cheque to necessarily file a complaint even when he has acquired an indefeasible right to do so. The fact that an offence is complete need not necessarily lead to launch of prosecution especially when the offence is not a cognizable one. It follows that the complainant may, even when he has the immediate right to institute criminal proceedings against the drawer of the cheque, either at the request of the holder/payee of the cheque or *on his own volition, refrain from instituting the proceedings based on the cause of action that has accrued to him. Such a decision to defer prosecution may be impelled by several considerations but more importantly it may be induced by an assurance which the drawer extends to the holder of the cheque that given some time the payment covered by the cheques would be arranged, in the process rendering a time- consuming and generally expensive legal recourse unnecessary. It may also be induced by a belief that a fresh presentation of the cheque may result in encashment for a variety of reasons including the vicissitudes of trade and business dealings where financial accommodation given by the parties to each other is not an unknown phenomenon. Suffice it to say that there is nothing in the provisions of the Act that forbids the holder/payee of the cheque to demand by service of a fresh notice under clause (b) of the proviso to Section 138 of the Act, the amount covered by the cheque, should there be a second or a successive dishonor of the cheque on its presentation."*

11. It is thus clear that period of limitation is not to be counted from the date when the cheque in question was presented in the first instance on 25.10.2008 or the legal notice was issued on 27.10.2008, inasmuch as the cheque was presented again on 10.11.2008. For the purposes of limitation, in so far as legal notice is concerned, it is to be served within 30 days of the receipt of information by the drawyee from the bank regarding the return of the cheque as unpaid. Therefore, after the cheque is returned unpaid, notice has to be issued within 30 days of the receipt of information in this behalf. That is the period of limitation provided for issuance of legal notice calling upon the drawer of the cheque to make the payment. After the sending of this notice 15 days time is to be given to the noticee, from the date of receipt of the said notice to make the payment, if that is already not done. If noticee fails to make the payment, the offence can be said to have been committed and in that event cause of action for filing the complaint would accrue to the complainant and he is given one month time from the date of cause of action to file the complaint.

12. Applying the aforesaid principles, in the present case, we find that cheque was presented, second *time, on 10.11.2008. The complainant, however, sent the legal notice on 17.12.2008 i.e. much after the expiry of the 30 days. It is clear from the complaint filed by the complainant himself that he had gone to the bank for encashment the cheque on 10.11.2008 but the cheque was not honoured due to the unavailability of the balance in the account.*

13. The crucial question is as to on which date the complainant received the information about the dishonour of the cheque. As per the appellant the complainant received the information about the dishonour of the cheque on 10.11.2008. However, the respondent has disputed the same. However, we would like to add that at the time of arguments the aforesaid submission of the appellant was not refuted. After the judgment was reserved, the complainant has filed the affidavit alleging therein that he received the bank memo of the bouncing of cheque on 17.11.2008 and therefore legal notice sent on 17.12.2008 is within the period 30 days from the date of information. Normally, we would have called upon the parties to prove their respective versions before the trial court by leading their evidence. However, in the present case, as rightly pointed out by the learned senior counsel for the appellant, the complainant has accepted in the complaint itself that he had gone to the bank for encashment of cheque on 10.11.2008 and the cheque was not honoured due to insufficient of funds, thereby admitting that he came to know about the dishonor of the cheque on 10.11.2008 itself. It is for this reason that appellant has filed reply affidavit stating that this is an after thought plea as no material has been filed before the court below to show that the bank had issued memo about the return of cheque which was received by the complainant on 17.11.2008. The specific averment made in the complaint in this behalf is as under:-

> *"Subsequently the complainant again went to encash the cheque given by the accused on 10.11.2008 which again bounced due to unavailability of balance in the accused account."*

It is, thus, clear from the aforesaid averment made by the complainant himself that he had gone to the *bank for encashing the cheque on 10.11.2008 and found that because of unavailability of sufficient balance in the account, the cheque was bounced. Therefore, it becomes obvious that he had come to know about the same on 10.11.2008 itself. In view of this admission in the complaint about the information having been received by the complainant about the bouncing of the cheque on 10.11.2008 itself, no further enquiry is needed on this aspect.*

14. It is, thus, apparent that he received the information about the dishonor of the cheque on 10.11.2008 itself. However, he did not send the legal notice within 30 days therefrom. We, thus, find that the complaint filed by him was not maintainable as it was filed without satisfying all the three conditions laid down in Section 138 of the N. I. Act as explained in para 12 of the judgment in the case of ***MSR Leathers****, extracted above."*

9. For reasons aforesaid, the application is allowed. The entire criminal proceeding arising out of Amba P.S. Case No. 57 of 2011 (G.R. No. 1696 of 2011), including the order taking cognizance and all consequential and subsequent orders passed by the Courts below at Aurangabad, stand quashed.

(Ahsanuddin Amanullah, J.)

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