

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

924 CRIMINAL WRIT PETITION NO.1127 OF 2018

Afrojkhan s/o Bashirkhan Pathan,  
Age 35 years, Occupation Business,  
R/o Shivaji Nagar, Near MSEB Southern  
Side, Tq. Nilanga Dist. Latur. ..Petitioner.  
(Orig.Accused)

Versus

Smt. Mandodara w/o Madhavrao Kendre,  
Age 45 years, occupation Service,  
R/o Anandnagar Daoka Ta. Nilanga  
District Latur. ..Respondent.  
(Orig.Complainant)

...  
Advocate for Petitioner : Ms. M. D. Thube-Mhase.  
Advocate for Respondent : Mr. A. N. Gaddime and  
A. V. Indrale Patil.  
...

**CORAM : SMT.VIBHA KANKANWADI. J.**  
**DATE : 12-12-2019.**

ORAL JUDGMENT :

1. Present petition has been filed under Article 227 of Constitution of India read with Section 482 of the Code of Criminal Procedure to quash and set aside the complaint i.e. Summary Criminal Case No.33 of 2017 filed before learned Judicial Magistrate, First Class, Nilanga District Latur, against the present petitioner alleging that, he has committed offence punishable under Section 138 of Negotiable Instruments Act.

2. The present respondent – original complainant has filed the

said complaint before the learned Judicial Magistrate on 18-01-2017. She had contended that, she had extended amount of Rs.3,00,000/- as hand-loan to the accused. The accused had promised to return the said amount, however whenever asked he avoided and, ultimately, he issued cheque on 03-11-2016 for the said amount drawn on his bank. The complainant presented the said cheque for encashment on 15-12-2016. It was returned for insufficiency of funds by the bank of the accused on 16-12-2016, and the complainant received the cheque along with the memo on 17-12-2016. The complainant issued notice to the accused on 31-12-2016 calling upon him to pay the amount under the cheque. The said notice was refused to be accepted by the accused on 03-01-2017. According to the complainant, the cause of action arose for her to file the complaint on 18-01-2017, and accordingly the said complaint has been filed on 18-01-2017.

3. After the verification, the learned Judicial Magistrate, First Class, Nilanga has passed the order of issuing process against the accused on 15-04-2017. By this writ petition, the accused has prayed for quashment of the proceeding itself.

4. Heard learned advocate Ms. M. D. Thube-Mhase for petitioner and learned advocate Mr. Indrale Patil for respondent.

5. Learned advocate appearing for the petitioner submitted that,

when as per the contents of the complaint the accused had refused to accept the notice on 03-01-2017, the period of 15 days for the compliance after the service or refusal of the notice would have been till 18-01-2017, and the complainant could have filed the complaint on or after 19-01-2017 within the statutory period. However, when she has filed the complaint on 18-01-2017 itself, it cannot be taken as a complaint, and therefore, the complaint is liable to be quashed. She has placed reliance firstly on the full bench decision of Hon'ble Gujarat High Court in *Patel Dinneshkumar Shivram Somdas v. Patel Keshavlal Mohanlal and Another*, reported in 2000 Cri.L.J. 3547, wherein it has been held that,

*"The period of 15 days envisaged by Section 138 (c) of the Negotiable Instruments Act would begin to run on the day next to the day on which service of notice has been effected."*

6. Further reliance has been placed on the decision in *Yogendra Pratap Sing v. Savitri Pandey and Another*, reported in 2014 DGLS (SC) 793, equivalent AIR 2015 (SC) 157, wherein it has been held that,

*"We, therefore, do not approve the view taken by this Court in Narsing Das Tapadia and so also the Judgments of various High Courts following Narsing Das Tapadia (2000) 7 SCC 183 that, if the complaint under Section 138 is filed before expiry of 15 days from the date on which notice has been served on the drawer / accused,*

*the same is premature and if on the date of taking cognizance a period of 15 days from the date of service of notice on the drawer/ accused has expired, such complaint was legally maintainable and, hence, the same is overruled."*

This was the case when two questions were referred for consideration by the three Judges Bench of the Apex Court and those questions were as follows ;

*"(i) Can cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act 1881 be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138 (c) of the Act aforementioned ?" And,*

*(ii) If answer to question No.1 is in the negative, an the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142 (b) for the filing of such a complaint has expired ?*

Out of these two questions, question No.1 was answered in the negative and further observations are as follows ;

*"42. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the NI Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date*

*on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142 (b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Now, since our answer to question (I) is in the negative, we observe that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to question (I). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142 (b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause. Question (ii) is answered accordingly."*

7. The learned advocate appearing for the respondent submitted that, though the complaint was filed on 18-01-2017, the complaint

was registered on the next date i.e. 19-01-2017, and the cognizance was taken by order of issuing process on 15-04-2017, therefore the complaint was maintainable. Still it would be open for the accused to raise before the concerned Court that the complaint is prematured.

8. When the facts are clear, the refusal of the notice by the accused was on 03-01-2017, and the complaint is silent on the point, as to when exactly the complainant received the packet from the post office and taking the date of refusal as the date of starting points as 03-01-2017, yet the 15 days would be over by 18-01-2017, and in view of *Patel Dinneshkumar Shivram Somdas v. Patel Keshavlal Mohanlal and Another (Supra)* the said date of 15<sup>th</sup> day or conversely the day on which the refusal was there should be excluded. The complaint which was filed on 18-01-2017 is definitely prematured i. e. before the expiry of 15 days of the refusal of the notice, and therefore, the point is squarely covered in the decision of *Yogendra Pratap Sing (Supra)*. The complaint in this case cannot be treated 'complaint' in the eye of law, and therefore, it deserves to be quashed and set aside. Hence, in the result the writ petition stands allowed in terms of prayer Clause 'B'.

**(SMT. VIBHA KANKANWADI)**  
**JUDGE**