

Crl. Misc. No. M-37890 of 2017
Date of Decision: March 07, 2019

Harish Chand Pandey

.....Petitioner

versus

M/s Roger Med.

.....Respondent

CORAM: HON'BLE MR.JUSTICE SUDHIR MITTAL

Present: Mr. G.S. Bedi, Advocate
for the petitioner

None for the respondent

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Sudhir Mittal, J. (Oral)

The petitioner is a Director of Company known as Phynix Comglomerate Ltd. (hereinafter referred to as 'Phynix'). He has been summoned as an additional accused on an application filed under Section 319 Cr.P.C. vide order dated 28.07.2017, which is under challenge in the present quashing petition.

The aforementioned Phynix was wholesale distributor of medicines and the complainant – M/s Roger Med. supplied medicines to it for further distribution. In discharge of its liability, a cheque dated 30.08.2016 for a sum of Rs. 2 lacs was issued in favour of the complainant but the same was dishonored. Consequently, a notice under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') was issued to the accused mentioned in the complaint (copy of which is Annexure P-1). Since the cheque amount was not paid even after expiry of the statutory period provided under Section 138 of the Act, complaint dated 02.11.2016 was filed. Affidavit of authorized person of the complainant was filed in the pre-summoning evidence on 03.11.2016. The said affidavit is identical in language to what has been stated in the complaint. Thereafter, a Clerk from the

record, according to which the petitioner was also a Director of Phynix on the date of issuance of the cheque. Consequently, application dated 16.03.2017 was filed under Section 319 Cr.P.C. and vide the impugned order dated 28.07.2017 the petitioner was summoned to face trial as an additional accused.

Learned counsel for the petitioner submits that proviso to Section 138 of the Act makes it abundantly clear that cause of action to file a complaint arises only upon issuance of notice to an accused person and non-payment of the cheque amount despite notice having been served within the statutory prescribed period. The petitioner was not issued any notice under Section 138 of the Act and, thus, no cause of action arose in favour of the complainant to file a complaint against him. The offence under Section 138 of the Act is 'person specific' and a Court can only take cognizance against an accused after the conditions prescribed in the proviso to Section 138 of the Act have been fulfilled. No Court can take cognizance of an offence under Section 138 of the Act while summoning a person as an additional accused in exercise of jurisdiction under Section 319 Cr.P.C. Reliance is placed upon *N. Harihara Krishnan vs. J. Thomas, Criminal Appeal No. 1534 of 2017 decided on 30.08.2017*.

Office report indicates that the complainant-respondent was duly served but none has put in appearance on its behalf, even though number of dates have gone by between the date of service and today.

The contentions of learned counsel for the petitioner are fully justified. Proviso to Section 138 of the Act lays down that the conditions mentioned therein must be fulfilled before filing of a complaint. These conditions are -

- (a) presentation of the cheque within the period of its validity.
- (b) issuance of notice to the accused persons within 30 days of the date of knowledge of dishonor of the cheque.
- (c) Non-payment of the cheque amount within 15 days of service of the notice.

Cause of action to file a complaint under the aforesaid provision arises only upon fulfilment of these three conditions. If any authority is needed, reference can be made to ***MS Leathers vs. S. Palaniappan and another, 2012(4) RCR(Civil) 485.***

In the present case, admittedly no notice was ever served upon the petitioner because he has been summoned as an accused on an application filed under Section 319 Cr.P.C. Cause of action, thus, never arose in favour of the complainant so far as the petitioner is concerned and, thus, summoning him as an additional accused is illegal. Reference can be made with advantage to ***N. Harihara Krishnan(supra).*** In this case, a person was sought to be summoned as an additional accused on an application filed under Section 319 Cr.P.C., as in the present case, which was allowed by the trial Court. The petition seeking quashing of the summoning order was dismissed by the High Court, which order was challenged before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court held as under:-

“By the nature of the offence under Section 138 of THE ACT, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of THE ACT before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide cause of action for prosecution. Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the

offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a Court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, the Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non-obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint.”

The case of the petitioner is covered by the ratio of the said judgment.

The impugned order dated 28.07.2017 is, thus, patently illegal. The same is quashed and the petition is, accordingly, allowed.

March 07, 2019

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[SUDHIR MITTAL]
JUDGE

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No