

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.46252 of 2016

Arising Out of PS. Case No.-3597 Year-2015 Thana- GOPALGANJ COMPLAINT CASE
District- Gopalganj

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Kameshwar Singh @ Bablu Singh son of Phulan Singh resident of Village-
Saraiya, Ward No.3, Block- Colony, P.S.- Gopalganj, District- Gopalganj.

... .. Petitioner/s

Versus

1. The State Of Bihar
2. Avinash Kumar Rai son of Sri Pradeep Kumar Rai
3. Pradeep Kumar Rai son of Late Banke Bihari Rai

Both resident of Village- Saraiya, Ward No.-1, P.O+.P.S. and District-
Gopalganj.

... .. Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr.Ashish Giri Mr. Rajat Kumar Tiwary Mr. Sumit Kumar Jha
For the Opposite Party/s :		Mr. Yogesh Chandra Verma, Sr. Advocate Ms. Priyanka Singh Ms. Kumari Anupama

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA
ORAL ORDER

4 24-02-2020 Heard learned counsel for the petitioner and learned
counsel appearing on behalf of the State.

The petitioner has filed the present miscellaneous
application for quashing the order dated 12.08.2016 passed by
the Court of learned Judicial Magistrate, Gopalganj.

Learned counsel for the petitioner contends that the
petitioner filed a criminal complaint dated 22.12.2015 before the
learned Judicial Magistrate, Gopalganj, bearing Complaint Case



No. R-3597/2015/TR-1490 of 2016. The aforementioned complaint was heard and vide order dated 04.04.2016, the learned Magistrate observed that the case in hand was filed by the complainant within 7 days after sending a legal notice to the accused persons which was in violation of the statutory provisions of Section 138 of the N.I. Act that the payee or holder in due course can file a case under this Section when the drawers fails to pay cheque within 15 days after the receipt of the said notice. He thus observed that there was sufficient material to proceed and issue summons under Section 417 IPC alone against the accused persons. This order by which the Court had declined to issue summons under Section 138 of the N.I. Act was put to test in Cr. Revision No. 1366 of 2016 which was disposed by the Additional District and Sessions Judge, III, vide order dated 21.06.2016 and remanded in the following terms:-

“1. Kameshwar [Singh@Babalu](#) Singh has preferred this revision petition against the order dated 04.04.2016 passed by Shri Harshvardhan, J.M.1st Class, Gopalganj in Trial No. 1490/2016.

2. Heard both the sides.

3. The learned lawyer appearing on behalf of the revisionist submitted that the impugned order dated 4.4.16 is highly erroneous, improper, absurd and bad in the eye of law and the Court below at the time of taking cognizance brushed aside the



facts that the Complainant established that the accused borrowed Rs. 4,50,000/- from him and accused issued cheques and the cheque was returned due to insufficiency of fund and the accused did not repay the amount in spite of receipt of notice from the Complainant but ignoring all the aforesaid facts the learned Court below surprisingly found that the accused is not liable for punishment U/S 138 of the Negotiable Instrument Act only on the ground that the Complainant filed the case within seven days of sending the legal notice. It has further been submitted that the opinion of the Court below and the impugned order is highly illegal in view of spirit of Section 138(C) of the N.I. Act and also in view of Section 142 of N.I. Act and it is settled principle of law that on the ground of pre-maturity the Complainant is not debarred to lodge a Complaint for seeking relief under the umbrella of Section 138 of N.I. Act. It has further been submitted that there are catena of decision of Hon'ble Courts that representation of Complainant an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed for the offence punishable U/s. 138 of N.I. Act and Section 420 and other allied Sections of I.P.C. It has further been submitted that in view of Section 138(b) and 138(C) of N.I. Act, if the accused refuses to repay the amount to the complainant in matter of bouncing the cheque by way of his reply treated as cogent evidence the cause of action will be arisen from the very date of refusal of payment and waiting for 15 days for filing complaint is not only unreasonable but the same is sufficient to frustrate the ambit scope of the provisions of N.I. Act for drawee or holder of the



cheques. On these ground, it has been prayed by the revisionist to set aside the impugned order.

4. On the other hand the Addl. P.P. as well as O.P. No. 2 and 3 have vehemently opposed the submission made by the revisionist and finally submitted that the order of the Court below is just proper and it requires no interference by this Court. As such, pray to dismiss the revision petition.

5. From perusal of the record along with L.C. record attached herewith, I find that a regular Complaint was filed by Kameshwar [Singh@Babalu Singh](#) against Avinash Kumar Rai and Pradip Kumar Rai U/s. 406/420/120B of the I.P.C. and Section 138 of the N.I. Act. Thereafter the Complainant was examined on S.A. and beside this during enquiry the Court below has examined altogether three witnesses of this case and after analysis of materials available on the record passed the detailed order dated 04.04.2016 and found a prima facie case U/s. 417 I.P.C. and excluding the main Section 138 of the N.I. Act.

6. In the instant case, I find that the Court below has opined that the case in hand was filed by the Complainant within seven days after sending a legal notice to the accused person, as such he did not take cognizance of the Offence 138 of the N.I. Act. In the instant case, I further find that in response to the notice sent to accused Avinash Kumar Rai and Pradip Kumar Rai by the Complainant both the accused persons have replied the notice and refused to make further payment and the aforesaid reply was sent on 21.12.15 and the original reply of the notice is attached with this case record which was filed on 17.6.16. Since, the reply has come as such I find that the Complaint case was filed on 22.12.2015 after



receipt of reply of the accused persons and I find that the complaint was filed much after receipt of the reply by the accused persons.

7. Thus, having regard to the facts and circumstances and in view of the above discussions, the impugned order dated 4.4.16 passed by the lower Court is set aside and case record be remitted back to the Court below for passing order afresh in view of above reply of the notice by the accused persons and also in view of aforementioned findings and discussions within one month from the receipt of the order O/C is directed to send a copy of this order along with L.C. record to the Court concerned for information and necessary action in accordance with law.”

After the remand, the learned Court has again passed the impugned order vide order dated 12.08.2016 ignoring the basic fact that after the filing of the notice under Section 138 of the N.I. Act, the opposite parties had filed their reply on 21.12.2015 and it was only thereafter that the petitioner had filed the complaint petition. Therefore, the question of not complying with the provisions of law does not arise.

Learned counsel for the petitioner further submits that taking into consideration, the judgment of the Apex Court, the purpose of the petitioner would suffice if the interim period is considered on account of which the delay was occasioned.

In view of the stipulations as contained in paragraph No. 36 of the judgment of the Apex Court reported in (2014) 10



SCC 713 (Yogendra Pratap Singh Vs. Savitri Pandey & Anr.), the petitioner may be granted liberty to move the Court to file a fresh complaint. Paragraph No. 36, 40 and 41 of is extracted hereunder:-

“36. A complaint filed before the expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint which does not disclose the cause of action the court is not competent to take cognizance. A conjoint reading of Section 138, which defines as to when and under what circumstances an offence can be said to have been committed, with Section 142(b) of the NI Act, that reiterates the position of the point of time when the cause of action has arisen, leaves no manner of doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed under clause (c) of the proviso to Section 138, has, in fact, elapsed. Therefore, a court is barred in law from taking cognizance of such complaint. It is not open to the court to take cognizance of such a complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date on which the notice has been served on the drawer/accused has elapsed. We have no doubt that all the five essential features of Section 138 of the NI Act, as noted in the



judgment of this Court in Kusum Ingots & Alloys Ltd. and which we have approved, must be satisfied for a complaint to be filed under Section 138. If the period prescribed in clause (c) of the proviso to Section 138 has not expired, there is no commission of an offence nor accrual of cause of action for filing of complaint under Section 138 of the NI Act.

40. The other question is that if the answer to Question (i) is in the negative, can 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.

41. 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.”

Learned counsel appearing on behalf of the opposite party does not resist the said submissions.

In view of the law laid down by the Apex Court, the application thus stands disposed off with a direction to the petitioner to approach the Court below under the appropriate provisions of the N.I. Act and in the light of the judgment as



stated hereinabove.

(Anjana Mishra, J)

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