

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

CRL.M.C. 1189/2018 and CRL.M.A. 4326/2018 (stay)

Reserved on : 28.01.2020

Date of Decision : 30.01.2020

IN THE MATTER OF:

AMIT KUMAR MISHRA Petitioner
Through: Mr. Nihit Dalmia, Advocate

versus

THE STATE (GOVT OF NCT OF DELHI & ANR) Respondents
Through: Dr. M.P. Singh, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present proceedings are instituted under Section 482 Cr.P.C. seeking quashing of the Complaint case No.696/2017 filed under Section 138 of Negotiable Instruments Act, 1881.
2. Vide order 01.04.2019, it was noted that the complainant/respondent No.2 was duly served. However, noting that neither the complainant nor his counsel appeared, he remained unrepresented and vide order dated 26.09.2019, his right to file reply was closed.
3. Learned counsel for the petitioner submitted that as per the case of the complainant, the petitioner was given cash loan of Rs.50,000/- on 20.04.2016 which was promised to be returned in eight months. After eight months, the complainant approached the petitioner who paid back Rs.19,500/- and sought time of one month to pay the balance amount. In December 2016, the petitioner issued a cheque bearing No.893122 dated

30.12.2016 drawn on Dena Bank, Gandhi Nagar, for Rs.30,500/-, which on presentation, was dishonoured through return memo dated 02.01.2017 with remarks “*funds insufficient*”. The complainant sent a legal notice dated 06.02.2017 vide postal speed post No. ED242453767IN and registered postal receipt no. RD638849549IN dated 06.02.2017.

4. Learned counsel for the petitioner contended that the proceedings pending before the trial court need to be quashed as the legal notice was sent beyond 30 days of knowledge of the dishonour of cheque. It was contended that no offence under Section 138 of the NI Act is made out as clause (b) of the proviso to Section 138 NI Act is not proved. In support of the submission, reliance was placed on the decisions in Kamlesh Kumar v. State of Bihar and Anr. reported as **(2014) 2 SCC 424** and Dheeraj Jain v. State and Anr. reported as **2012 SCC OnLine Del 1687**.

5. It was further contended that the present complaint was rather filed to pressurise the petitioner to withdraw his complaint filed before the concerned Authority under Delhi Shops and Establishment Act, 1954 for withholding the petitioner’s salary as the petitioner was an employee of the complainant. The complainant has deposited and withdrawn cash amounts in the account of the petitioner by misusing his cheque books for which the petitioner had filed a complaint dated 15.12.2016 with the Branch Manager of the bank.

6. In Kamlesh Kumar (supra), Supreme Court held as under:-

“15. 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.”

7. In Sivakumar v. Natrajan reported as (2009) 13 SCC 623, the Supreme Court re-affirmed the following observations made in Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd. reported as (2009) 1 SCC 720:-

13. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.”

8. In Sivakumar (supra), it was further held as under:-

“10. We may, however, at the outset notice that both clauses (a) and (b) of the proviso appended to Section 138 of the Act employed the term “within a period”. Whereas clause (a) refers to presentation of the cheque to the bank within a period of six months from the date on which it is drawn, clause (b) provides for issuance of notice “to the drawer of the cheque, within thirty days of the receipt of information”. The words “within thirty

days of the receipt of information” are significant. Indisputably, intimation was received by the respondent from the bank on 3-12-2003.

11. Parliament advisedly did not use the words “from the date of receipt of information” in Section 138 of the Act. It is also of some significance to notice that in terms of Section 9 of the General Clauses Act, 1897, whereupon reliance has been placed by the High Court, the statute is required to use the word “from” and for the purpose of including the last in a series of days or any other period of time, to use the word “to”. The departure made from the provisions of Section 9 of the General Clauses Act by Parliament, therefore, deserves serious consideration.

12. Indisputably, the notice was issued on the 31st day and not within a period of thirty days from the date of receipt of intimation from the bank. If Section 9 of the General Clauses Act is not applicable, clause (b) of the proviso appended to Section 138 of the Act was required to be complied with by the respondent for the purpose of maintaining a complaint petition against the appellant.

13. In Munoth Investments Ltd. v. Puttukola Properties Ltd, (2001) 6 SCC 582 construing clause (a) of the proviso appended to Section 138 of the Act, this Court held: (SCC pp. 583-84, para 5)

“5. In our view, the High Court committed material irregularity in not referring to the aforesaid evidence which was recorded by the Metropolitan Magistrate. Section 138(b) of the Act inter alia provides that the payee has to make demand for the payment of money by giving a notice „to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid’. So fifteen days are to be counted from the receipt of information regarding the return of the cheque as unpaid. In the present case, it is the say of the complainant that the cheque was presented for encashment on 12th; it was returned to the Bank on 13th and information

was given to the complainant only on 17th, as 14th, 15th and 16th were Pongal holidays. The learned counsel fairly pointed out that in the complaint it has been stated that the complainant had received intimation with regard to the return of the said cheque from his banker on 13-1-1994. However, he submitted that this is an apparent mistake and for explaining that mistake the appellant has led the evidence before the trial court. Undisputedly, he pointed out that in the State of Tamil Nadu, 14-1-1994 to 16-1-1994 there were Pongal holidays and, therefore, the appellant came to learn about the dishonour of his cheque on 17-1-1994.”

We, with respect, agree with the approach of the learned Judges.”

9. A Co-ordinate Bench of this Court in Dheeraj Jain (supra) held as under: -

“8. A perusal of the Clause (b) to proviso to the Section clearly states that nothing contained in the section shall apply unless the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the amount of cheque by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding return of the cheque as unpaid. It may be noted that in the present case admittedly, as per the complaint, affidavit and legal notice, Respondent No. 2 came to know about the dishonor of the cheque on the 10th July, 2010. The demand made by Respondent No. 2 was beyond the period of 30 days and now Respondent No. 2 cannot agitate that he be permitted to lead evidence to show that he received the knowledge of dishonor of the cheque on 12th July, 2012, which was not the case even before the learned Trial Court.”

10. To decide the present controversy, I deem it fit to produce the relevant paras of the complaint as under:-

“5 That as per assurance given by accused, complainant lastly presented said cheque in his bank i.e. Axis BANK, Gita colony Branch DELHI-31, but it was utter surprised when the said cheque was returned unpaid and was dishonoured by the banker of accused with the remarks ‘FUNDS INSUFFICIENT’ Vide returning memo dated 02.01.2017.

*6 That **immediately** complainant contacted accused and disclosed about dishonour of said cheque and demanded the cheque amount in cash, but it was utter surprise to complainant when accused did not give any satisfactory answer.*

7 That consequently, the complainant sent a legal notice dt. 06.02.2017 through speed post/registered post, vide postal speed post No.ED242453767IN and registered postal receipt No.RD638849549IN dt. 6.2.2017....”

11. The evidence by way of the affidavit filed by the complainant before the trial court reiterated what was stated in the complaint in as many words.

12. In the present case, the complainant has already led his evidence and it has come on record that on receipt of the return memo, the complainant immediately got in touch with the accused and on not receiving any satisfactory answer, the legal notice was given on 06.02.2017. From a reading of the above, it is apparent that the legal notice of demand was issued beyond 30 days from the date of the return memo. I am of the opinion that in view of the above-mentioned enunciation of law, the complaint is not maintainable and the same is accordingly quashed. The pending application is also disposed of.

13. Copy of this order be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

JANUARY 30, 2020

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