IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 20.09.2021

PRONOUNCED ON: 29.09.2021

CORAM

THE HON'BLE Mr. JUSTICE C.V.KARTHIKEYAN

Crl.O.P.No. 30627 of 2015
And
Crl.M.P.Nos. 1 & 2 of 2015

Mr. M.G.Mohamed Javid ... Petitioner/Accused

Vs.

Mrs. Nayeem Hannan ..Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. to call for the records in C.C.No. 485 of 2015 on the file of the learned Metropolitan Magistrate, Fast Track Court-IV, George Town, Chennai - 600 001.

For Petitioner : Mr. M.Mohammed Rafi

For Respondent : Ms. S.Thamizharasi

ORDER

This Petition has been filed under Section 482 of the Code of Criminal Procedure seeking to call for the records and quash C.C.No. 485 of 2015 now pending on the file of Metropolitan Magistrate IV FTC, George Town, Chennai.

2. The petitioner is the accused in the said calendar case. The respondent had filed a private complaint against the petitioner for offence under Section 138 of the Negotiable Instrument Act.

3. It is the case of the respondent that the parties had entered into a business arrangement and the respondent had received a sum of Rs.10,75,000/- as investment in the business. There were some negotiations and it was agreed to

reduce the amount to Rs.8,75,000/-. The petitioner had issued four cheques all dated 11.12.2014. The cheques were dishonoured. Notice was issued and thereafter, the complaint was filed.

4. It is claimed by the petitioner that the cheques were dishonoured on 13.12.2014 and notice should have been issued in accordance with the proviso of Section 138 of the Negotiable Instruments Act 1881 within a period of 30 days. However, the notice in the instant case had been issued on behalf of the respondent on 13.01.2015 which was after the period of 30 days. It was therefore contended that the complaint is not maintainable and consequently, the calendar case should be struck off or rather quashed.

5. Heard arguments advanced by Mr. M.Mohammed Rafi, learned counsel for the petitioner and Ms. S.Thamizharasi, learned counsel for the respondent.

6. The facts are not disputed. There were some business transactions between the petitioner and the respondent and after negotiations, the petitioner herein was under obligation to pay a sum of Rs.8,75,000/- to the respondent herein. In this connection, the petitioner herein had issued four cheques for a sum of Rs.2/- Lakhs, Rs.2/- lakhs, Rs.1,75,000/- and Rs.3/- lakhs each, all dated 11.12.2014 towards discharge of the said amount of Rs.8,75,000/-. Those cheques were presented for payment. They were returned unpaid on 13.12.2014 with the endorsement “funds insufficient”. Thereafter, the respondent had issued legal notice on 13.01.2015.

7. The learned counsel for the petitioner Mr.M.Mohammed Rafi pointed out that the notice had not been issued within the period of 30 days as stipulated in proviso (b) to Section 138 of the Negotiable Instruments Act 1881.

8. The learned counsel Ms. S.Thamizharasi for the respondent however contended that the notice had been issued within the period of 30 days and later also contended that the information regarding dishonour of the cheques had been received only on 15.12.2014 and therefore, the notice issued on 13.01.2015 was well within the period of 30 days and therefore stated that the complaint was maintainable and the present Petition seeking to quash C.C.No. 485 of 2015 should be dismissed.

9. Section 138 of the Negotiable Instrument Act is as follows:-

"138 Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes 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; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

[Emphasis Supplied]"

10. The entire issue surrounds over the fact whether the legal notice issued on 13.01.2015 was within the period of 30 days as stipulated under proviso (b) to Section 138 of the Negotiable Instruments Act 1881 or after the period of 30 days.

11. In the legal notice, the learned counsel for the respondent had contended as follows:-

> "7. That on your instructions, our client presented the above said cheques on 12.12.2014 with his banker, namely, the Catholic Syrian Bank, Second Line Beach, Chennai - 600 001, for realization. However, our client was shocked to learn on 13.12.2014 that the said cheques were returned by your banker on 13.12.2014 with an endorsement "Funds Insufficient"."
>
> [Emphasis Supplied]

12. In the complaint preferred before the learned Judicial Magistrate, the respondent had stated as follows:-

> "8. The complainant states that when the above said cheque's were presented for collection through its bankers the Catholic Syrian Bank, Second Line Beach, Chennai - 600 001, while the complainant is getting a dismay and found that the cheque's were returned and unpaid on 13.12.2014 with an endorsement of "Funds Insufficient" in the A/c of the accused."
>
> [Emphasis Supplied]

13. In the sworn statement recorded by the Magistrate to take the cognizance of the complaint, the respondent had stated as follows:-

> "The above said cheque's were presented for collection through my bankers the Catholic Syrian Bank Second Line Beach, Chennai - 600 001 and found that the cheque's were returned unpaid on 13.12.2014 with an endorsement "Funds Insufficient" in the A/c of the accused. I immediately sent a legal notice through my advocate dated 13.01.2015 to the accused demanding therein the payment of the sum total amounting to Rs.8,75,000/- (Rupees Eight Lakh Seventy Five Thousand only) within 15 days of the receipt of the notice and the same was delivered on 19.01.2015. "
>
> [Emphasis Supplied]

14. It is thus seen that the date of knowledge of the respondent that the cheques had been returned unpaid was

13.12.2014. The first date for calculating the 30 days period would be 14.12.2014. In December 2014 there would therefore be 18 days. Adding another 12 days, the 30th day would expire on 12.01.2015. Therefore, the notice issued on 13.01.2015 was beyond the period of 30 days.

15. It had been contended by the learned counsel for the respondent during the course of arguments that 13.12.2014 was a second Saturday and therefore was a bank holiday and that further, 14.12.2014 was a Sunday and also a bank holiday and that the respondent came to know about the dishonour of the cheques only on 15.12.2014. It was therefore contended that the notice issued on 13.01.2015 was within the period of 30 days. It had been further contended that the return of the cheque was reflected in the pass book only on 15.12.2014. A copy of the pass book had also been produced.

16. But this statement made across the bar goes contrary to what the respondent had stated at the earliest instance in the legal notice, in the complaint and in the sworn statement recorded before the Magistrate. In all the aforesaid documents, the respondent had very categorically stated that he came to know that the cheques had been dishonoured on 13.12.2014.

17. The crucial aspect is date of knowledge and that was on 13.12.2014. The further fact contended by the learned counsel for the respondent was that 13.12.2014 was a second Saturday and therefore was a bank holiday.

18. This statement is not correct.

19. The Government of India declared that the second and fourth Saturdays of every month as public holidays for banks in India only by a notification issued on 20.08.2015. Till 01.09.2015 and definitely in December 2014, the banks worked on all Saturdays.

20. The notification issued by the Government of India is as follows:-

"To be published in the Gazettee of India, Extra Ordinary, Part II, Section 3, Sub-section (ii)

MINISTRY OF FINANCE
(DEPARTMENT OF FINANCIAL SERVICES)

NOTIFICATION
NEW DELHI, THE 20 AUGUST, 2015

S.O. - (E) In exercise of the powers conferred by Section 25 of the Negotiable Instruments Act, 1881 (26 of 1881), the Central Government hereby declares the second and the fourth Saturday of every month as public holiday for banks in India, whether or not such banks are included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934), with effect from the 1st day September, 2015.

[F.No.4/1/7/2015-IR]
(Mohammad Mustafa)
Joint Secretary to the Government of India

To
The Manager
Government of India Press,
Ring Road, Mayapuri
New Delhi – 110 064."

21. Thus the statement made across the bar is not a correct statement and as a matter of fact is misrepresentation.

22. In (2013) 1 SCC 177 [MSR Leathers Vs. S.Palaniappan], the Hon'ble Supreme Court has held as follows:-

> " 12. The proviso to Section 138, however, is all-important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour 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 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 be, 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.”

(emphasis supplied)”

23. This Judgment had been subsequently followed in (2014) 2 SCC 424 [ Kamlesh Kumar Vs. State of Bihar and Another], wherein the Hon'ble Supreme Court had held as follows:-

> “15. It is, thus, apparent that the complainant received the information about the dishonour 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 NI Act as explained in para 12 of the judgment in MSR Leathers [MSR Leathers v. S. Palaniappan, (2013) 1 SCC 177 : (2013) 1 SCC (Civ) 424 : (2013) 2 SCC (Cri) 458] , extracted above.
>
> 16. We have, thus, no hesitation in allowing this appeal and setting aside the impugned order of the High Court. As a consequence, the petition filed by the petitioner under Section 482 CrPC is also allowed and the complaint of the complainant is dismissed. ”
>
> [Emphasis supplied]

24. In view of the above position of law that the notice under Proviso (b) to Section 138 of the Negotiable Instruments Act 1881 should be issued within a period of 30 days and in the instant case had been issued beyond the said period of 30 days, I have no hesitation to hold that the complaint should not have been taken cognizance by the Magistrate. Therefore, C.C.No. 485 of 2015 now pending on the file of the learned Metropolitan Magistrate – Fast Track Court IV, George Town, Chennai, is quashed.

25. Accordingly, this Criminal Original Petition is allowed and C.C.No. 485 of 2015 pending on the file of the learned Metropolitan Magistrate – Fast Track Court IV, George

Town, Chennai, is quashed. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS-VIII)

//True copy//

Sub Assistant Registrar

vsg

To

The Metropolitan Magistrate,
Fast Track Court-IV,
George Town, Chennai - 600 001.

+1cc to Ms. S.Thamizharasi, Advocate SR.No.50656

Crl.O.P.No. 30627 of 2015
And
Crl.M.P.Nos. 1 & 2 of 2015

GPL(CO)
GMY(22/10/2021)