

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Before:

The Hon'ble Justice Ananda Kumar Mukherjee

**C.R.R. 863 of 2014
With**

CRAN 5 of 2018 (Old CRAN 3376 of 2018)

CRAN 7 of 2019 (Old CRAN 4307 of 2019)

CRAN 9 of 2022

Soumen Sarkar

-Vs-

State of West Bengal & Anr.

For the Petitioner: Mr. Subrata Bhattacharya, Adv.
Mr. Indranuj Dutta, Adv.

For the O.P. No. 2.: Mr. Ayan Bhattacharya, Adv.

Heard on : 06.05.2022.

Judgment on: 19.05.2022.

Ananda Kumar Mukherjee, J. :-

1. This revisional application under section 482 of the Code of Criminal Procedure, 1973 has been filed by the petitioner principally against Jagannath Dubey, opposite party no. 2 praying for quashing of proceedings and impugned order dated 25.7.2013 passed by Learned Additional Chief Judicial Magistrate,

Raghunathpur, District Purulia, in Complaint Case No. 2 of 2013 under section 138 of the Negotiable Instrument Act.

2. In gist, the facts of the complaint case is that opposite party no. 2 filed a complaint under section 138 of the Negotiable Instrument Act against the petitioner before the court of Learned Additional Chief Judicial, Raghunathpur, Purulia, alleging that the petitioner borrowed a some of money from opposite party no. 2 for his business and in discharge of his liability the petitioner issued two cheques of Rs.1,50,000/- and Rs.2,20,00/- in favour of the opposite party no. 2 drawn on Axis Bank Limited, Durgapur Branch. The payee, deposited the cheques with the State Bank of India, Raghunathpur Branch for encashment but both the said cheques were dishonoured due to insufficiency of fund. A complaint was lodged against the petitioner under section 138 of the Negotiable Instrument Act where it was disclosed that due to illness of the petitioner from 15.5.2012 to 11.11.2012 he could not make any contact with the petitioner and on 12.11.2012 he issued a notice to the petitioner demanding repayment of the amount in terms of section 138 of the Negotiable Instrument Act. It was further stated that due to his illness and medical treatment the opposite party no. 2 was prevented from filing the case against the petitioner. Strange enough cognizance was not taken by learned Magistrate on 15.1.2013 but summons were issued. Thereafter on 4.6.2013 a petition was filed by the complainant for condonation of delay.

3. According to the revisionist there has been material suppression of facts in the complaint and the complaint has been lodged beyond the statutory

period under section 142 (a) of the Negotiable Instrument Act, as such the same is not maintainable. The petitioner alleged that learned Magistrate on the basis of the complaint lodged by opposite party no. 2 took cognizance of the offence under section 138 of N.I. Act and issued process to the petitioner. On 19.4.2013 petitioner filed an application for his discharge from the case. In the meantime, on 4.6.2013 the opposite party no. 2 filed an application under section 5 of the Limitation Act praying for condonation of delay in filing of the case of 15.6.2013.

4. After hearing both parties, the application dated 19.4.2013 filed by the petitioner for discharge was rejected on 25.7.2013. It was observed that “the very fact of issuance of summons condones the delay in filing the case.” This hypothetical observation does not dispense the mandatory statutory requirement of condonation of delay or taking cognizance of an offence.

5. Being aggrieved the present application has been filed by the accused petitioner on the grounds inter alia, that the cognizance taken by the learned Magistrate is bad in law and the proceeding is not maintainable as per the provisions under section 138(b) and 142 (b) of the Negotiable Instrument Act. It is urged that learned Magistrate has committed error of law in taking cognizance as the complainant issued the second notice after the lapse of statutory period which is not maintainable under the provisions of section 142. Furthermore the complaint case filed by opposite party no. 2 is barred by limitation and no cognizance of the offence could be taken contrary to the provision under section 142 of the Negotiable Instrument Act. It is the case of

the petitioner that learned Magistrate took cognizance of the offence before considering the petition for condonation of delay and thereby the proceeding in the complaint case is not maintainable and is liable to be quashed.

6. The petitioner has filed a supplementary affidavit enclosing photo copy of legal notice issued to him by the complainant/opposite party no. 2 dated 4.6.2012 and order dated 15.1.2013 passed by Learned ACJM Rampurhat, whereby without condonation of delay and taking cognizance of the offence summons were issued to the petitioner.

7. Learned advocate for the petitioner argued that the present application has been filed not only against the impugned order of learned Magistrate dated 25.7.2013 whereby the prayer for discharge was rejected but he has assailed the entire proceeding as it is barred by limitation and the cognizance taken in the case without condonation of delay is bad in law and cannot be proceeded with.

8. Learned advocate for the petitioner buttress his argument by placing reliance upon the decisions in the case of – (I) Subodh S. Salaskar Vs. Jayprakash M. Shah and Anr.; (2008) 13 Supreme Court Cases 689.

(II) Dipak Majumder Vs. Swapan Poddar; C.R.R 154 of 2018, a unreported judgment of learned Single Judge of this court.

(III) A.K. Maheshwary Vs. State of West Bengal; (2012) 2 C Cr LR (Cal) 850 and

(IV) Bangur Finance Limited Vs. Tejesh Ranjan Ghosh; 2007 (2) CHN page 893.

9. Learned advocate for the petitioner referring the decision in the case of **Subodh S. Salaskar Vs. Jayprakash M. Shah and Anr; (2008) 13 Supreme Court Cases 689**, submitted that a case for dishonour of cheque under section 138 of the N.I Act was filed on 20.4.2001. Subsequently, an application to amend the complaint petition was filed by the complainant for adding offence under section 420 of IPC which was allowed on 14.8.2001. The accused filed an application for discharge on the ground that the complaint was barred by limitation but the application was dismissed. The revisional application filed before the Learned Additional Sessions Judge as well as criminal writ petitions were dismissed. The accused preferred an appeal before the Hon'ble Supreme Court where a question arose whether the proviso appended to section 142 (b) of the Negotiable Instrument Act, inserted by the amendment Act of 2002, is retrospective in operation. It was held by the Hon'ble Supreme Court that delayed complaint should not have been allowed. In the said appeal it was further held that, "Ex facie, it was barred by limitation. No application for condonation of delay was filed. No application for condonation of delay was otherwise maintainable. The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of the offence under section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to clause (b) of section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not a

procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under section 5 of the Limitation Act, 1963 or section 473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are not applicable. In any event no such application for condonation of delay was filed. If the proviso appended to clause (b) of section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well settled, in absence of any express provision, cannot be given a retrospective effect or retroactive operation”.

10. It is to be borne in mind that the petition of complaint in the case of Subodh S. Salaskar Vs. Jayprakash M. Shah was filed on 20.4.2001 that is before the proviso to clause (b) of section 142 of the N.I. Act was introduced by amendment in the year 2002. It is true that learned Magistrate has no jurisdiction to take cognizance of any offence under section 138 if the petition is barred by limitation and the process of issuance summons also becomes illegal as he has no jurisdiction to proceed with such matter.

11. The next case relied on behalf of the petitioner is **Dipak Majumder Vs. Swapan Poddar; (C.R.R 154 of 2018)**, where the learned Single Judge of this court also placing reliance upon the ratio in the case of Subodh S. Salaskar Vs. Jayprakash M. Shah, set aside the judgment in a criminal appeal where the learned Additional Sessions Judge failed to consider the issue of limitation in a case arising out of section 138 of the N.I. Act and directed the learned Judge of

the First Appellate Court to adjudicate the issue as to whether the appeal is barred by limitation or not.

12. In **A.K. Maheshwary Vs. State of West Bengal; (2012) 2 C Cr LR (Cal) 850**, the cheque issued for repayment of debt was dishonoured by the bank due to insufficiency of fund. On 9.9.1999 petitioner issued a notice which was served upon the respondent by registered post but no information of service was received. After correspondence it was learn from the post office that the notice was served upon the respondent on 15.9.1999. A complaint under section 138 of the N.I. Act was filed by the complainant through his power of attorney holder within one month. The trial court convicted the respondents for the offence and sentenced him to imprisonment. Being aggrieved the respondent filed a revisional application before the Additional Sessions Judge and the revisional court set aside the judgment of conviction of the trial court. Against this order of acquittal a revisional application was filed before the High Court. On considering the matter involved Hon'ble Court held that there was no illegality in the order impugned as the cognizance taken in the case was barred by limitation. In catena of decisions by the Hon'ble Court it has been held that in a case under section 138 of the Negotiable Instrument Act the interdict incorporated in section 142 of the N.I. Act that "no court shall take cognizance of any offence unless the complaint is made within one month of the date on which the cause of action arises" has to be followed. The same principal has been set out in the case of **Bangur Finance Limited Vs. Tejesh**

Ranjan Ghosh 2007 (2) CHN page 893, which has been relied upon by the petitioner.

13. Mr. Ayan Bhattacharya learned advocate for the opposite party no. 2 argued that the petitioner has filed this application for quashing of proceeding where he has challenged the order dated 25.7.2013 where the prayer for discharge of the petitioner was dismissed. It is contended that the decisions which have been relied upon by the petitioner in the case of Subodh S. Salaskar, A.K. Maheshwary and Bangur Finance Limited are all cases where complaints were lodged under section 138 of the N.I. Act prior to the amendment of the Act in 2002 which incorporated proviso to section 142 (b) of the Negotiable Instrument Act. It is argued that on the introduction and the said proviso, the concerned courts have the jurisdiction to take cognizance of the offence on a complaint which may be filed after the prescribed period if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.

14. In support of his argument learned advocate for the contesting opposite party no. 2 relied upon a decision in the case of **Pawan Kumar Ralli Vs. Maninder Singh Narula; 2014 Vol 15 Supreme Court Cases 245**, where the Hon'ble Supreme Court held that when the issue of limitation was raised for the first time before the High Court, High Court ought to have dealt with that issue on merit as per proviso to section 142 (b) of the N.I. Act, 1881. The said proviso was inserted in the year 2002 with a legislative intent to overcome the technicality of limitation period only with a view to obviate the difficulties on

the part of the complainant, parliament inserted the said proviso to section 142 (b) of the N.I. Act, which confers a jurisdiction upon the court to condone the delay.

15. Having considered the facts and circumstances involved in this case and the argument advanced by learned advocates for the parties, it appears to me that the moot question which needs to be resolved during hearing is whether the order passed by learned Magistrate, supposed to have taken cognizance of the offence is tenable under the provisions of section 138 and 142 of the Negotiable Instrument Act. It may be gathered from the impugned order dated 25.7.2013 that two cheques of Rs.1,50,000/- and as Rs.2,20,000/- were drawn by the petitioner on 2.5.2012 in favour of opposite party no.2. The cheques were presented for encashment but were dishonoured due to insufficiency of fund. On the ground of illness the complainant issued notice to the accused petitioner only on 12.11.2012 demanding payment of the cheque amounts. The complaint was lodged on 15.1.2013. This case was filed after amendment of the N.I. Act in 2002. Therefore the decisions in the case of Subodh S. Salaskar, A.K. Maheshwary and Bangur Finance Limited would not apply to the facts and circumstances of this case. In the case of **Dipak Majumder Vs. Swapan Poddar (CRR 154 of 2018)**, learned Single Judge of this court referring to the substantive provision incorporated in proviso to clause (b) of section 142 of the Negotiable Instrument Act by way of amendment, observe that the Appellate Court failed to consider the issue of limitation while disposing of the Appeal, therefore, the judgment passed in the Criminal Appeal was set aside and the

learned Judge in the court of appeal was directed to adjudicate the issue as to whether the appeal is barred by limitation or not and pass a reasoned order on the basis of the submissions made by learned advocates.

16. In **Pawan Kumar Ralli Vs. Maninder Singh Narula**, relied on behalf of the opposite party no. 2, the Hon'ble Supreme Court held that the issue of limitation raised for the first time before the High Court ought to have been dealt with on merit as per proviso under section 142 (b) of the N.I. Act. It is therefore necessary that before taking cognizance of the offence, the point of limitation if raised in the case should be decided at the very inception. It is apparent that the complaint was filed long after the lapse of the statutory period of thirty days from the date of cause of action that is the expiry of fifteen days from the date of service of the notice as laid down in section 138 (c) of the Negotiable Instrument Act. In section 142 (1)(a) it has been laid down that notwithstanding anything contained in the Code of Criminal Procedure, no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing made by the payee or, as the case may be, the holder in due course of a cheque and section 142 (1)(b) provides that such complaint is to be made within one month of the date on which the cause of action arises under clause(c) of the proviso to section 138. In the instant case learned ACJM, Raghunathpur has acted beyond his jurisdiction by issuing summons to the petitioner without even taking cognizance of the offence, contrary to the provision laid down in the Act, without having any occasion of being satisfied for condoning the delay. Taking of cognizance on satisfactory

condonation of delay are statutory requirements which cannot be presumed on issuance of process to accused. The impugned order is bad in law and is not tenable under such circumstances. Therefore, the order dated 15.1.2013 and all the successive orders is proceeding are bad in law and are set aside.

17. It is to be borne in mind that with the amendment of section 142 in the year 2002, a proviso has been introduced which lays down that cognizance of a complaint may be taken by the court after the prescribed period if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period of thirty days. There is material on record to indicate that a complaint has been lodged under section 138 of the N.I. Act against the petitioner for dishonour of his cheques and for which notice has already been issued to him demanding repayment. It is also to be seen if notice was issued to the drawer within thirty days of dishonour of the cheques in compliance with section 138 proviso (b) of the N.I. Act.

18. Learned Magistrate shall provide an opportunity to the complainant to exercise his legal right under the proviso to section 142 (b) of the N.I. Act to satisfy the court if he had sufficient cause for not filing the complaint within statutory time. After considering such grounds learned Magistrate shall proceed in accordance with the law and record an order if cognizance can be taken fulfilling the statutory provisions.

19. The revisional application is therefore allowed. Interim order if any stands vacated. Let a copy of this judgment be sent to the court of Learned

ACJM, Raghunathpur, Purulia for information and necessary compliance.

Complainant shall appear before the concerned court within a fortnight.

20. Urgent Photostat certified copy of this judgment, be supplied to the parties if applied for, maintaining all formalities.

(Ananda Kumar Mukherjee, J.)