

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 2829 of 2005

Sonam Tenzing Bhutia

-Vs-

The State of West Bengal & Anr.

For the Petitioner: Mr. Sandipan Ganguly, Adv.,
 Mr. Arkadeb Bhattacharya, Adv.

Heard on: 07 April, 2022.

Judgment on: 16 December, 2022.

BIBEK CHAUDHURI, J. : –

1. Order dated 22nd August, 2005 passed by the learned Additional Sessions Judge, 3rd Court at Darjeeling in Criminal Appeal No.2 of 2001, thereby dismissing the appeal filed on behalf of the petitioner and affirming the judgment and order dated 30th July, 2001 passed by the ld. Chief Judicial Magistrate, Darjeeling in C.R Case No.36 of 1999 is under challenge in the instant revision.

2. It is pertinent to mention at the outset that the opposite party no.2 filed a court complaint alleging commission of offence under Section 138 of the Negotiable Instruments Act against the present petitioner which was registered as C.R Case No.36 of 1999. The said case was disposed of by a judgment and order dated 30th July, 2001 thereby convicting the petitioner of the charge under Section 138 of the Negotiable Instruments

Act and sentencing him to suffer rigorous imprisonment for six months and to pay fine of Rs.8,34,526/-, in default to suffer further imprisonment for two months.

3. The case of the complainant/opposite party No.2 was as follows:-

4. The petitioner had approached the opposite party No.2 for a loan amounting to Rs. 2.5 lakhs to meet the financial hardship. The opposite party No.2 duly forwarded the said loan on 28th November, 1996. After obtaining the said loan, the petitioner failed to make re-payment of the loan amount within the reasonable period of time. Subsequently on 8th November, 1998 the parties had entered into an agreement in writing in presence of the witnesses, therein agreeing to pay the loan amount together with interest amounting to Rs.4,17,263/- and issued a post dated cheque in favour of United Corporation being Cheque No. 0064465 dated 5th April, 1999 drawn on Union Bank of India. The opposite party No.2 deposited the said cheque on 6th April, 1999 for encashment but it was returned dishonored with the remark "Exceeds arrangement". The banker of the opposite party No.2 informed regarding dishonour of the said cheque to the opposite party No.2 on 9th April, 1999. Thereafter the opposite party No.2 sent a notice through his learned Advocate calling upon the petitioner to make payment of the said amount with threat of legal consequence under registered post with acknowledgement due. Since the A/D card was not returned for long, the opposite party No.2 wrote a letter to the Postmaster of Darjeeing Post Office on 11th May, 1999 and in reply thereto the Postmaster informed the ld. Advocate for the

opposite party No.2 that the addressee of the said registered letter was found absent from his residence and as such, the said letter was kept in deposit for seven days in the Post Office for collection by the addressee. Subsequently the complainant/opposite party No.2 filed a complaint under Section 138 of the NI Act in the court of the ld. Chief Judicial Magistrate at Darjeeling.

5. The petitioner was convicted on trial for an offence punishable under Section 138 of the NI Act and the ld. Magistrate sentenced him to suffer imprisonment for six months and to pay a fine of Rs.8,34,526/- in default to suffer further imprisonment for two months.

6. Being aggrieved, the petitioner preferred an appeal before the ld. Sessions Judge, Darjeeling assailing the judgment and order of conviction passed by the ld. Chief Judicial Magistrate at Darjeeling. The said appeal was registered as Criminal Appeal No.2 of 2001. The said appeal came up for hearing before the ld. Additional Sessions Judge, 3rd Court at Darjeeling when the ld. Judge by his judgment and order dated 22nd August, 2005 dismissed the criminal appeal and affirmed the judgment and order of conviction of sentence dated 30th July, 2001 passed by the ld. Chief Judicial Magistrate at Darjeeling.

7. It is contended on behalf of the petitioner that both the courts below failed to appreciate that there had been no service of notice as envisaged under Section 138(b) of the NI Act and therefore complaint under Section 138 of the NI Act was bad for want of notice. It is also contended on behalf of the petitioner that the notice under Section 138(b)

of the NI Act was attempted to be served upon the petitioner on 14th April, 1999, but the same could not be served due to his absence from his residence. In such circumstances, the date of service of notice has to be presumed as 14th April, 1999 and as such the complaint was required to be filed within 19th May, 1999. However, the said complaint was filed on 4th June, 1999, i.e beyond the prescribed period and as such the ld. Magistrate could not have taken cognizance in view of the bar under Section 142 of the NI Act.

8. Mr. Sandipan Ganguly, learned Senior Counsel on behalf of the petitioner submits that when a notice by registered post is sent to the drawer and the cheque is returned with postal endorsement “refused” or “not available in the house” or “house locked” or “shop closed” or “addressee not in station” due service has to be presumed. In support of his contention he refers to a decision of the Hon’ble Supreme Court in **N. Parameswaran Unni vs G. Kannan & Anr.** reported in **(2017) 5 SCC 737**. Mr. Ganguly also refers to another decision of this Court in the case of **Sri Moinuddin Munshi vs Sri Abhijit Pal & Anr.** reported in **2002 C Cr Lr (Cal) 861**. In the said decision the issue which was adjudicated by this Court is that what will be the starting point of limitation of in filing a complaint under Section 138 of the NI Act – and whether it should be within 15 days of the receipt of the said notice or within 15 days from the date of knowledge of the receipt of the said notice. This Court on due consideration of the relevant provisions and the decisions of the Hon’ble Apex Court as well as this Court was pleased to hold that cause of action

for filling complaint under Section 138 of the NI Act will be reckoned from the day immediately following the day on which period of 15 days from the date of the receipt of the notice by the drawer expires.

9. Coming to the instant case it is submitted by the learned Counsel for the petitioner that it appears from the evidence of PW3 that he went to the house of the petitioner for delivery of the notice on 12th May, 1999. However, the addressee, i.e the petitioner was not available and he left an intimation in the house of the addressee for collecting the letter from the Post Office. Subsequently PW3 waited for seven days so that the addressee may collect the said registered cover, but he did not collect it. Thereafter PW3 made this endorsement “not claimed” and it was returned to the learned Advocate for the complainant on 26th May, 1999. The petitioner lodged a complaint on 4th June, 1999. According to the ld. Advocate for the petitioner the registered cover containing the notice under Section 138(b) ought to have been presumed to be served on 14th April, 1999. When the Postman went to the house of the petitioner and he endorsed on the registered cover that the addressee was not found. In view of the decision of the Hon’ble Supreme Court in **N. Parameswaran Unni** (supra) the complaint ought to have been lodged by the petitioner within 19th May, 1999. Since the complaint was lodged beyond the statutory period of time, ld. Magistrate could not have taken cognizance in view of the bar under Section 142 of the NI Act.

10. For effective adjudication of the instant revision the provisions of Section 138 and Section 142 of the NI Act prior to its amendment by Act 55 of 2022 is quoted below:

“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 provision of this Act, be punished with imprisonment for a term which may be extend 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 fifteen 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.

142. Cognizance of offences

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)....

(a) 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 the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138

(c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.”

11. Plain reading of the above provision goes to show that after the cheque being dishonoured, the payee or holder in due course of the cheque would make a demand for payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 15 days of receipt of information by him from the bank regarding the return of the cheque as unpaid and the drawer of such cheque fails to make the payment of the said amount of money to the payee or to the holder in due course of the cheque, within 15 days of the receipt of the said notice. Section 142 provides that a complaint under Section 138 of the NI Act shall be made within one month of the date on which the cause of action

arises under clause (c) of the proviso to Section 138. It is therefore clear that the cause of action to file such complaint under Section 138 of the NI Act arises when the drawer of the cheque in question fails to make payment of the amount of money to the payee within 15 days of the receipt of the notice.

12. It is contended on behalf of the petitioner that the notice demanding payment of the cheque amount ought to have been held to be served on 14th April, 1999 when the said notice was attempted to be served by the Postman but it could not be served as the addressee was not found in the address. Thus it is contended on behalf of the petitioner that on petitioner's failure to make payment of the said cheque amount by 29th April, 1999, the complaint ought to have been lodged by 29th May, 1999. But the complaint was filed on 4th June, 1999, that is beyond the statutory period of limitation and accordingly the ld. Chief Judicial Magistrate wrongly took cognizance of offence under Section 138 of the NI Act against the petitioner upon a petition of complaint which is barred by limitation.

13. Having heard the learned Advocate for the petitioner and on careful perusal of the materials on record specially the evidence of PW3, it appears that the registered envelope was attempted to be served by the Postman on 14th April, 1999 but the addressee was not found. Subsequently it was attempted to be served on 19th April, 1999 and finally on 12th May, 1999 by PW3. It is found from the evidence of PW3 that the addressee was not available and he left an intimation in the house of the

addressee to collect the said registered envelope containing notice from the Post Office. PW3 then waited for seven days and finally endorsed his comment as “not claimed” on 19th May, 1999. Thus the date of receipt of the notice might be presumed either on 12th May, 1999 or on 19th May, 1999 and not on 14th April, 1999 as submitted by the learned Senior Counsel on behalf of the petitioner. If the notice is presumed to have been served on 12th May, 1999, the drawer of the cheque could have made payment of the money within 27th May, 1999 and on his failure cause of action to file the complaint started from 28th May, 1999. If on the other hand the notice is presumed to have been served on 19th May, 1999 cause of action for filing the complaint ought to have held to commenced from 4th June, 1999.

14. The complaint was filed on 4th June, 1999. Thus looking into the case, from the above angle, the petitioner’s contention that the petition of complaint was time barred and does not hold any ground.

15. No other point was canvassed in the instant revision assailing the impugned judgment and affirmation passed by the learned Additional Sessions Judge, 3rd Court at Darjeeling in Criminal Appeal No.2 of 2001 vide order dated 22nd August, 2005.

16. In view of the above discussion, I do not find any merits in the instant revision and accordingly the revision is dismissed. The order dated 22nd August, 2005 passed by the learned Additional Sessions Judge, 3rd Court at Darjeeling in Criminal Appeal No.2 of 2001, thereby dismissing the appeal filed on behalf of the petitioner and affirming the judgment and

order dated 30th July, 2001 passed by the ld. Chief Judicial Magistrate, Darjeeling in C.R Case No.36 of 1999 is affirmed.

17. Let a copy of this judgment be sent to the lower court appellate below as well as to the court of the ld. Chief Judicial Magistrate, Darjeeling for information and necessary action compelling the petitioner to serve sentence.

(Bibek Chaudhuri, J.)