

CRLLP No. 29 of 2022

Krishna Chandra Patra Petitioner

-Versus-

Jambeswar Patra Opposite Party

For Petitioner:  Mr. B.B. Champatiray
Advocate

For Opposite Party: - None

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Order: 13.09.2022

S.K. SAHOO, J. The petitioner Krishna Chandra Patra, who is the complainant in 1.C.C. No.2489 of 2012, has filed this CRLLP petition under section 378(4) of Cr.P.C. for grant of leave to file appeal against the impugned judgment and order dated 24.06.2022 passed by learned Special Judge (C.B.I.), Court No.1

-cum- Additional Sessions Judge, Bhubaneswar in CrI. Appeal No.98 of 2019 in acquitting the opposite party Jambeswar Patra of the offence under section 138 of the Negotiable Instruments Act, 1881 (hereafter 'N.I. Act'). The opposite party faced trial in the Court of learned S.D.J.M., Bhubaneswar in 1.C.C. Case No.2489 of 2012 for the offence under section 138 of the N.I. Act and vide judgment and order dated 03.12.2019 found guilty of such offence and sentenced to undergo S.I. for a period of one year and to pay a compensation of Rs.20,00,000/- (rupees twenty lakh) only to the petitioner under section 357(3) of Cr.P.C., in default, to undergo S.I. for a further period of four months.

2. The case of the complainant-petitioner, in short, is that the petitioner was a special class contractor and permanently resides at Plot No.6/107, IRC Village, P.S. Nayapalli, Bhubaneswar in the district of Khurda and the opposite party is also a permanent resident of Plot No.4387/4986, Tankapani Road, Pandab Nagar, Lane-4, P.S. Badagada, Bhubaneswar-18 in the district of Khurda. The opposite party had two numbers of plots under Khata No.224, Plot No.1203 comprising of area Ac.0.250 decimals and Plot No.1203/1440 having an area Ac.0.50 decimals in Mouza

Patharagadia within the city of Bhubaneswar. The opposite party in order to sell the aforesaid properties contacted to the petitioner and the petitioner agreed to purchase the same. On 08.09.2010, the opposite party received an amount of Rs.15,00,000/- (rupees fifteen lakh) from the petitioner and to that effect an agreement was executed before Sri B.N. Biswal, Notary Public, Bhubaneswar. The total consideration was fixed at Rs.25,00,000/- (rupees twenty five lakh) and the rest Rs.10,00,000/- (rupees ten lakh) was to be paid by the petitioner at the time of registration of sale deeds. The petitioner requested the opposite party for executing the registered sale deed but the opposite party kept avoiding him, even though, it was specifically agreed by the opposite party in the agreement that the execution of the registered sale deed would be completed within two months from the date of agreement. The opposite party after receiving Rs.15,00,000/- (rupees fifteen lakh) from the petitioner neither executed the registered sale deed nor returned the amount of Rs.15,00,000/- (rupees fifteen lakh) to the petitioner. Later the petitioner came to know that the opposite party had already alienated these properties to Susanta Pradhan and Digambar Malla for which he obtained certified copies of those sale deeds and contacted the opposite

party to return his money. In order to repay the amount, the opposite party issued a cheque bearing No.755993 dated 27.07.2012 amounting to Rs.15,00,000/- (rupees fifteen lakh) drawn on State Bank of India, IDCO Tower Branch, Bhubaneswar. The petitioner deposited the cheque in his bank i.e. State Bank of India, Main Branch, Bhubaneswar for encashment on 02.08.2012 but the cheque was dishonoured on 03.08.2012 due to 'insufficient of funds'. On getting intimation from the bank regarding dishonor of cheque, the petitioner on 14.08.2012 issued a legal notice to the opposite party through registered post with A.D. through his Advocate demanding refund of his money. But the postal peon made two endorsements on the back side of the registered letter mentioning 'addressee absent'. After a long time, the original notice along with the registered envelope and A.D. was returned back to the petitioner's Advocate. Finding no other alternative, the petitioner filed complaint case against the opposite party and accordingly, cognizance of offence under section 138 of the N.I. Act was taken.

3. The defence plea was one of denial and it was further pleaded that they had no transaction regarding purchase of properties and he had given blank cheques containing his

signature to the petitioner in good faith but the petitioner has filed complaint case to misuse these cheques only to harass him.

4. In order to prove its case, the petitioner has examined two witnesses, out of whom the petitioner examined himself as P.W.1 and one Debasish Mishra has examined as P.W.2 and proved certain documents like the cheque bearing no.755993 dated 27.07.2012 amounting to Rs.15,00,000/- (rupees fifteen lakh) marked as Ext.1, cheque deposit slip marked as Ext.2, cheque return memo dated 03.08.2012 marked as Ext.3, the office copy of demand notice marked as Ext.4, the envelope along with A.D. containing the demand notice which returned unserved marked as Ext.5, two endorsements dated 16.08.2012 and 21.08.2012 marked as Exts.5/1 and 5/2 respectively, postal receipt marked as Ext.6, agreement dated 28.08.2010 marked as Ext.7 and certificate of encumbrance on property marked as Ext.8.

The opposite party has neither adduced any oral nor any documentary evidence on his behalf.

5. The learned trial Court while assessing the evidence on record has been pleased to hold that the opposite party had issued the cheque in favour of the petitioner in order to be discharged from a legally enforceable debt. It was further held

that the petitioner has complied with the mandatory provision of serving notice on the opposite party within the stipulated period. It was further held that the cheque was deposited on 02.08.2012 and it was returned with endorsement of dishonoured on 03.08.2012 because of insufficient funds in the account of the opposite party. Learned trial Court further held that the oral as well as the documentary evidence relied upon by the petitioner, it is found that the opposite party has failed to prove non-existence of a legally enforceable debt against him and the petitioner has satisfied all the ingredients to constitute an offence under section 138 of the N.I. Act. Accordingly, the opposite party was found guilty of the offence under section 138 of the N.I. Act.

6. The opposite party preferred an appeal in the Court of Session and the learned Special Judge, C.B.I. Court No.1 -cum- Additional Sessions Judge, Bhubaneswar in CrI. Appeal No.98 of 2019 as per judgment and order dated 24.06.2022 allowed the appeal and set aside the judgment and order of conviction of the opposite party. The learned Appellate Court has been pleased to hold relying on the ratio laid down by the Hon'ble Supreme Court in the case of **Yogendra Pratap Singh -Vrs.- Savitri Pandey and another reported in (2014) 59**

Orissa Criminal Reports (SC) 577 wherein it has been held if a complaint petition is filed before expiry of fifteen days from the date of which notice has been served or treated to be served on the accused and on the basis of such complaint, cognizance of offence has been taken, then said cognizance is not cognizance in the eye of law. The learned Appellate Court further held that since the complaint petition was filed prior to the completion of statutory period of fifteen days, the order of cognizance is not only bad but also the entire trial is vitiated.

7. Learned counsel for the petitioner submitted that the date of last endorsement of the postal authority on the envelope containing demand notice was 21.08.2012 and the complaint petition was filed on 03.09.2012, which is obviously within fifteen days.

In case of **Yogendra Pratap Singh** (supra), the questions were formulated as follows:-

- (i) Can cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138 (c) of the Act aforementioned?
- And,

(ii) If answer to question No.1 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?

The Hon'ble Supreme Court answered the questions as follows:-

"36. Can an offence under Section 138 of the N.I. Act be said to have been committed when the period provided in clause (c) of the proviso has not expired? Section 2(d) of the Code defines 'complaint'. According to this definition, complaint means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence. Commission of an offence is a sine qua non for filing a complaint and for taking cognizance of such offence. A bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the N.I. Act unless the period of 15 days has elapsed. Any complaint before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of law. It is not the question of prematurity of the complaint where it is filed before expiry of 15 days from the date on which notice has been

served on him, it is no complaint at all under law. As a matter of fact, Section 142 of the N.I. Act, inter alia, creates a legal bar on the Court from taking cognizance of an offence under Section 138 except upon a written complaint. Since a complaint filed under Section 138 of the N.I. Act before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint in the eye of law, obviously, no cognizance of an offence can be taken on the basis of such complaint. Merely because at the time of taking cognizance by the Court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused, the Court is not clothed with the jurisdiction to take cognizance of an offence under Section 138 on a complaint filed before the expiry of 15 days from the date of receipt of notice by the drawer of the cheque.

37. A complaint filed before 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 N.I. 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 N.I. Act, as noted in the judgment of this Court in **Kusum Ingots & Alloys Ltd.; AIR 2000 SC 954** 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 N.I. Act.

38. We, therefore, do not approve the view taken by this Court in **Narsingh Das Tapadia; (2000) 7 SCC 183** and so also the judgments of various High Courts following **Narsingh Das Tapadia** that if the complaint under Section 138 is filed

before expiry of 15 days from the date on which notice has been served on the drawer/accused, the same is premature and if on the date of taking cognizance a period of 15 days from the date of service of notice on the drawer/accused has expired, such complaint was legally maintainable and, hence, the same is overruled.

39. Rather, the view taken by this Court in **Sarav Investment & Financial Consultancy; (2007) 14 SCC 753** wherein this Court held that service of notice in terms of Section 138 proviso (b) of the N.I. Act was a part of the cause of action for lodging the complaint and communication to the accused about the fact of dishonouring of the cheque and calling upon to pay the amount within 15 days was imperative in character, commends itself to us. As noticed by us earlier, no complaint can be maintained against the drawer of the cheque before the expiry of 15 days from the date of receipt of notice because the drawer/accused cannot be said to have committed any offence until then. We approve the decision of this Court in **Sarav Investment & Financial Consultancy** and also the judgments of the High Courts which have taken the view following this judgment that the complaint under Section 138 of the N.I. Act filed before the expiry of 15 days of service of notice could not be treated as a complaint in the eye of

law and criminal proceedings initiated on such complaint are liable to be quashed.

40. Our answer to question (i) is, therefore, in the negative.

41. 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.

42. Section 142 of the N.I. Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the N.I. 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 N.I. 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.”

Thus, in view of the decision of the Hon'ble Supreme Court in the case of **Yogendra Prasad Singh** (supra), it is very clear that the complaint petition was filed on 03.09.2012 by the petitioner is a premature complaint. An opportunity has been given by the legislature itself by providing a notice to the drawer and for payment of the amount within fifteen days of the receipt

of the said notice and if he fails to comply with clause (c) of section 138 of the N.I. Act, filing of a complaint within one month from the date of cause of action is also provided under sub-section (b) of section 142 of the N.I. Act. The drawer of the cheque has got an opportunity to know in advance before filing the complaint that the cheque was dishonoured for a particular reason upon receipt of the notice from the payee or the holder of the cheque and thereby making payment of the cheque amount to the payee so as to prevent initiation of any complaint case proceeding against him. The penal provisions have to be construed strictly and not liberally. A pre-mature complaint cannot be the foundation of a valid prosecution.

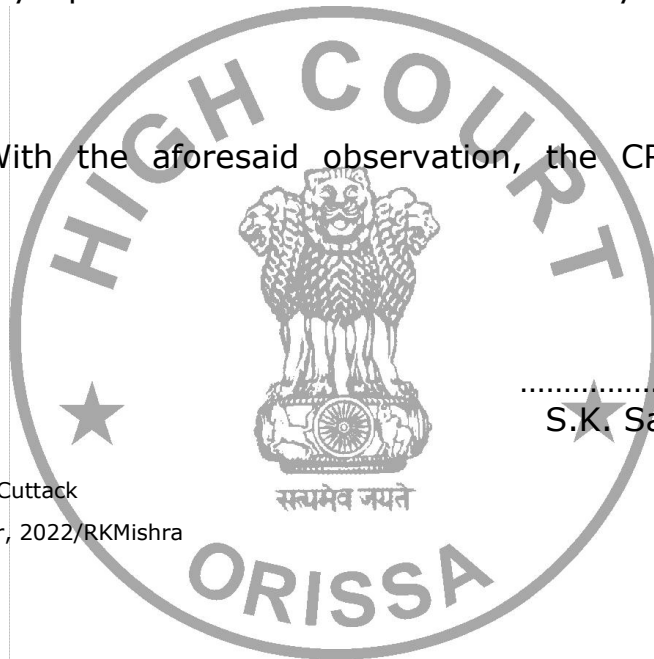
Therefore, I am of the view that the complaint petition filed by the petitioner was not legally maintainable and the order of cognizance taken by the learned Magistrate under section 138 of the N.I. Act as well as the impugned judgment and order of conviction passed by the learned trial Court is not sustainable in the eye of law and the learned Appellate Court has rightly set aside the order of conviction and acquitted the opposite party of the charge under section 138 of the N.I. Act.

However, in view of the judgment of the Hon'ble Supreme Court in the case of **Yogendra Pratap Singh** (supra),

liberty is granted to the petitioner to file a fresh complaint before the competent Court within one month from today and file an application for condonation of delay under the proviso to section 142(1)(b) of the N.I. Act and the concerned Court shall take into account the ratio decided in the aforesaid case and first decide about the delay condonation aspect after giving opportunity of hearing to the opposite party and then proceed accordingly in accordance with law. It is made clear that this Court has not expressed any opinion on the merits of the delay condonation application.

With the aforesaid observation, the CRLLP stands disposed of.

Orissa High Court, Cuttack
The 13th September, 2022/RKMishra



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S.K. Sahoo, J.