201 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-29677-2014
Date of decision : 09.05.2022

Balihar Singh **...Petitioner**

Vs.

Narain Dutt **...Respondent**

CORAM:- HON'BLE MR. JUSTICE MANOJ BAJAJ

Present: Mr. Jai Bhagwan Sharma, Advocate for the petitioner.
Mr. Abhishek Goel, Advocate for
Mr. Pritam Singh Saini, Advocate for the respondent.
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MANOJ BAJAJ, J.

Petitioner-Balihar Singh has approached this Court under Section 482 Cr.P.C. seeking quashing of complaint bearing No.171/2012 dated 22.03.2012 titled as “Narain Dutt Vs. Balihar Singh”under Section 138 read with Sections 141 and 142 Negotiable Instruments Act, 1881 (Annexure P-2), as well as the summoning order dated 30.03.2012 (Annexure P-3), passed by Special Judicial Magistrate, Kurukshetra.

The facts in brief leading to the petition are that the respondent/complainant filed the above mentioned complaint under Section 138 Negotiable Instruments Act, 1881 against accused/petitioner, wherein it was alleged that complainant had given a sum of Rs.5,00,000/- to the petitioner for purchase of property/plot and in order to discharge the said liability, a cheque bearing No.008123 dated 20.07.2011 was issued by accused/petitioner in favour of the complainant for a sum of Rs.5,00,000/- drawn at ICICI Bank Karnal. However, on 17.01.2012, upon presentation before the bank, it was dishonoured on account of 'insufficient funds'.

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Thereafter, the complainant issued the statutory demand notice dated 03.03.2012 (Annexure P-1), but the payment was not made by the accused, thereby compelling the complainant to institute the complaint seeking his prosecution for the offence punishable under Section 138 read with Sections 141 and 142 Negotiable Instruments Act, 1881.

In support of the complaint, the complainant tendered his affidavit as Exhibit CW-1/A and also adduced documentary evidence Exhibit C-1 to Exhibit C-7, such as cheque in question, return memo dated 17.01.2012 and statutory notice dated 03.03.2012 along with postal receipts etc. Upon considering the said material, Special Judicial Magistrate, Kurukshetra vide order dated 30.03.2012 issued process against the accused for alleged commission of offence punishable under Section 138 read with Section 141 and 142 Negotiable Instruments Act, 1881. Hence this petition.

This Court vide order dated 29.08.2014, had issued notice of motion to respondent/complainant, but despite various opportunities no reply has been filed on behalf of the respondent.

Learned counsel for the petitioner has argued that as per contents of the complaint itself, admittedly the cheque in question was returned by the bank on 17.01.2012 (Ex. C-2), but the legal notice dated 03.03.2012 (Ex.C-4) demanding the amount of the cheque from accused was sent much beyond the 30 days period provided under Section 138(b) Negotiable Instruments Act, 1881. According to learned counsel this crucial documentary material was brought on record through pre summoning evidence, despite that the trial Court proceeded to summon the accused in a mechanical manner without applying its judicial mind to the facts and evidence on record. He has argued

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that since one of the essential conditions required to maintain the complaint under Section 138 Negotiable Instruments Act, 1881 is missing, therefore, the continuation of the complaint and prosecution of the petitioner-accused is bad in law. He has further argued that the alleged legal notice (Annexure P-1) was never received by the petitioner, and also the cheque in question was dishonoured by ICICI Bank, Branch at Karnal, therefore, the trial Court at Kurukshetra has no jurisdiction to try the impugned complaint. He prays for quashing of complainant dated 22.03.2012 (Annexure P-2) as well as the summoning order dated 30.03.2012.

Learned counsel for the complainant has opposed the prayer, who has argued that the impugned order is revisable, but the petitioner has not availed the said remedy and has invoked the inherent powers under Section 482 Cr.P.C. He has argued that the trial Court has carefully examined the material on record, while summoning the accused and the issues raised in this petition can be effectively decided during the trial, therefore, the petition deserves to be dismissed.

Learned counsel for the parties have been heard and with his assistance, the case file has been perused carefully.

Before adverting to the merits of this case, this Court deems it appropriate to examine Section 138 Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act") and the same reads as under:

> *"**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*

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> *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 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."*

A careful reading of the above section makes it clear that this provision contemplates three pre conditions to be fulfilled by the complainant in order to maintain the complaint and the same are part of the proviso attached to the above section. *Firstly*, as per Clause (a), the cheque has to be presented by the payee before the concerned bank within its validity period, and in case, the cheque is returned unpaid then; *Secondly,* as per Clause (b) it is mandatory for the complainant to make a demand for the payment of the cheque amount by giving a notice in writing to the drawer of the cheque within a stipulated period of 30 days of the receipt of information from the bank relating to return of the cheque, and *thirdly,* as per Clause (c), if the drawer of the cheque fails to make the payment of the cheque amount to the drawee within a period of 15 days from the date of receipt of the said notice, the complainant would be competent to maintain the complaint. It may be noticed here that earlier the notice of demand was required to be issued within a period

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of 15 days, however, by virtue of amendment the said period was substituted with 30 days through amending Act No.55 of 2022 (w.e.f. 06.02.2003). Thus, the language and pre requisite conditions contained in the above section leave no room for any doubt that in the event of non-fulfillment of any of these conditions, the complaint would be without a valid cause of action.

This material issue contained in this case, already stands dealt with by Hon'ble the Supreme Court in "***MSR Leathers v. S.Palaniappan" (2013) 1 SCC 177***, wherein the Apex Court made following observations:-

> *"12. The proviso to Section 138, however, is allimportant 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."*

The above Judgment was subsequently followed in ***Kamlesh Kumar v. State of Bihar and Another, (2014) 2 SCC 424*** , 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*

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> *para 12 of the judgment in [**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, 1973 is also allowed and the complaint of the complainant is dismissed."*

Now, reverting to the facts of this case and analyzing the same, this Court finds that the complainant had specifically mentioned in the complaint that the cheque was returned unpaid by his banker through memo dated 17.01.2012 (Ex. C-2), whereas the statutory notice dated 03.03.2012 (Ex. C-4) sent through Advocate Sohan Lal and the postal receipts (Ex. C-3) of the same date show that the complainant failed to adhere to the time frame contemplated by proviso (b) of Section 138 of the Act. As a result of that, it is apparent that the statutory notice sent much beyond the period of limitation would not offer a valid cause of action in favour of the complainant to seek prosecution of accused for dishonour of the cheque, as the cause of action, which accrued on 17.01.2012 i.e. the date when the return memo was sent by the bank was alive till 16.02.2012, and the same ceased to exist w.e.f. 18.02.2012.

Here, it also becomes necessary to examine the provision relating to cognizance of offence punishable under Section 138 of the Act contained in Section 142 Act and the same reads as under:

> *"142. **Cognizance of offences.** 1 [(1)] 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 138:2 [Provided that the 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;] (c) no court inferior to that*

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> *of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.].*
> *3 [(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,--*
> *(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or*
> *(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.*
> *Explanation.-- For the purposes of clause (a),where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]"*

The analysis of the above section shows that once the complainant satisfies the pre requisite conditions under Section 138 of the Act then the complainant has 30 days period to institute the complaint in terms of the cause of action accrued to him under clause (c) of proviso to Section 138 of the Act i.e. if, the drawer fails to make payment of amount of money to complainant within 15 days of the receipt of the legal notice. However, the proviso attached to Section 142(1)(b) adds relaxation to the limitation period provided for filing the complaint, by injecting power with the Court to condone the same if, the complainant explains sufficient reasons to the satisfaction of the Court for not filing it within the stipulated period, but no such elasticity with respect to the limitation period contained in clause (b) of Section 138 of the Act is provided, either in Section 138 or Section 142 of the Act, to enable the complainant to issue the demand notice after expiry of limitation period. In other words, the clauses (b) and (c) of Section 138 of the Act collectively provide cause of action for complainant, and the same is in two parts, therefore, if, the period of limitation relating to clause (b) is not availed in time, the complainant has no occasion to press into action clause (c), to seek prosecution of the accused.

Apparently, the record of the case shows that the complainant

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failed to raise the demand in time, therefore, this Court has no doubt in holding that the complaint is not founded upon a valid cause of action, and the complaint, therefore, could not have been entertained, whereas the Magistrate while considering the pre summoning evidence proceeded to issue process against the accused through the impugned order in a cryptic manner without even noticing the facts correctly, much less the material date of intimation by the banker regarding return of the cheque as unpaid, to ascertain the validity of cause of action in the complaint. Thus in view of the decision of ***Hon'ble Supreme Court in "S.W.Palanitkar Vs. State of Bihar", 2001 (4) R.C.R. (Criminal) 572***, summoning order has not been passed in accordance with law and, therefore, is not sustainable. Consequently, the other argument relating to the jurisdiction of the Court, where the complaint has been filed need not to be gone into and the said issue is left open to be decided in an appropriate case.

Resultantly, in view of the above discussion, this Court has no hesitation in holding that the prosecution of the petitioner through the impugned complaint is unjustified, therefore, the impugned complaint (Annexure P-2) as well as the summoning order dated 30.03.2012 are hereby quashed.

(MANOJ BAJAJ)
JUDGE

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Whether speaking/reasoned : Yes No
Whether Reportable : Yes No

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