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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-M-19357-2019 (O&M)
Date of Decision:05.05.2022**

Mukund Ronad

.. Petitioner

Vs.

State of Haryana and another

..Respondents

CORAM: HON'BLE MR. JUSTICE MANOJ BAJAJ

Present: Mr. Vinish Singla, Advocate for the petitioner.

Mr. Bhupender Singh, DAG, Haryana.

...

Manoj Bajaj, J. (Oral)

Petitioner has filed this petition under Section 482 Cr.P.C. for quashing of criminal complaint bearing No.COMA/171/2018 dated 04.01.2019 titled as "*Amit Kumar Vs. Mukund Ronad*" under Section 138 Negotiable Instruments Act 1881 (Annexure P-2) as well as the summoning order dated 31.07.2018 (wrongly mentioned as 11.03.2019) passed by Judicial Magistrare 1st Class, Ganaur.

The facts in brief leading to the petition are that the respondent/complainant filed the above mentioned complaint against the petitioner/accused, wherein it was alleged that he being friend of the accused accepted his request for advancing friendly loan of Rs.6 lacs as accused had promised to return the same within six months. Initially the accused transferred a sum of Rs.50,000/- in the account of the complainant, followed by another transfer of Rs.2,69,000/- on 11.05.2018, who at the same time had also issued cheque bearing No.063309 for a sum of Rs. 2,69,000/- in favour of complainant, drawn at ICICI Bank Branch Hubli, Karnataka, but upon presentation of the cheque before the banker of the complainant, namely HDFC Bank, the same was returned with a remark "*kindly contact drawer drawee bank*" vide memo dated 16.05.2018 (Ex.C-2). Upon assurance of the accused that cheque would be cleared, the complainant again presented it for encashment, but the cheque was again returned by HDFC Bank vide memo dated 31.05.2018 (Ex. C-3), and reiterated previous remark. As per allegations in complaint, the balance amount of Rs.12,000/- was paid to complainant in cash by accused, however the cheque amount was not paid by the accused, therefore, on 12.07.2018, the complainant served a legal notice (Ex. C-4) through his advocate, demanding payment of cheque amount along with 18% interest from accused, but he did not respond. As the accused committed the offence punishable under Section 138 Negotiable Instruments Act, 1881 as well as Section 420 IPC, so the complainant by instituting the complaint dated 31.07.2018 prayed for his prosecution.

In support of his complaint, the complainant appeared in the witness box as CW-1 and tendered his affidavit Ex. CW-1/A, who also proved documents from Ex.CW-1 to CW-5 and Mark-A i.e. cheque in question, return memo, copies of letter, legal notice and postal receipt etc. Upon considering the allegations in the complaint as well as the evidence on record, Judicial Magistrate 1st Class, Ganaur vide order dated 31.07.2018 proceeded to summon the accused for the offence punishable under Section 138 Negotiable Instruments Act, 1881. Hence this petition.

This Court vide order dated 30.04.2019, had issued notice of motion to respondent/complainant, but despite service of summons, no one has put in appearance on behalf of the complainant.

Learned counsel for the petitioner has argued that as per averments in the complaint itself, the cheque in question was returned by the bank on 31.05.2018 (Ex. C-3), but the legal notice demanding the amount of the cheque from accused was sent on 12.07.2018 i.e. much beyond the 30 days period provided under Section 138(b) Negotiable Instruments Act, 1881. Learned counsel has further argued that this important documentary material was brought on record by complainant himself while adducing 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 that since one of the requisite 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 unjustified. Learned counsel has further argued that the complainant has concealed the material facts in the complaint and the same is based upon distorted facts, as according to him, the complainant was having work contract with the petitioner and since on his request, the sum of Rs.2,69,000/- was credited in his account through electronic transfer, he misused the cheque in question by presenting the same also. In this regard, he has drawn the attention of the Court to the bank account statement of the petitioner (Annexure P-1). He prays for quashing of complainant dated 04.01.2019 as well as the summoning order dated 31.07.2018.

During the course of hearing, when learned counsel for the petitioner was confronted with the maintainability of the petition, as the summoning order dated 11.03.2019 is not attached with the petition, the learned counsel produces the copy of the summoning order dated

31.07.2018 and prays for taking the said order on record, as inadvertently, the petitioner appended the copy of the summons issued pursuant to the said summoning order. The prayer is accepted and the order dated 31.07.2018 is taken on record.

Learned counsel for the petitioner has 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 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 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.

The sole issue raised in this petition was also 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 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."*

This 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 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 31.05.2018 (Ex. C-3), whereas the statutory notice dated 12.07.2018 (Ex. C-4) sent through Advocate Sanjay Panchal and the postal receipts (Ex. C-5) 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 31.05.2018 i.e. the date when the return memo was sent by the bank was alive till 30.06.2018, and the same ceased to exist w.e.f. 01.07.2018.

At this stage, 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 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.

Time and again, various high Courts as well as the Hon'ble Supreme Court of India have reminded that the Magistrate should pass the summoning order carefully and judiciously after examining the material on record and not in a mechanical manner. Here, it will be useful to refer the judgment passed by the Hon'ble Supreme Court in "***S.W. Palanitkar Vs. State of Bihar", reported in 2001 (4) R.C.R. (Criminal) 572***. The relevant observations are extracted below:-

> **"23.** *Many a times, complaints are filed under Section 200 Cr.P.C. by the parties with an oblique motive or for collateral purposes to harass, to wreck vengeance, pressurize the accused to bring them to their own terms or to enforce the obligations arising out of breach of contract touching commercial transactions instead of approaching civil courts with a view to realize money at the earliest. It is also to be kept in mind that when parties commit a wrongful act constituting a criminal offence satisfying necessary ingredients of an offence, they cannot be allowed to walk away with an impression that no action could be taken against them on criminal side. A wrongful or illegal act such as criminal breach of trust, misappropriation, cheating or defamation may give rise to action both on civil as well as on criminal side when it is clear from the complaint and sworn statements that necessary ingredients of constituting an offence are made out. May be parties are entitled to proceed on civil side only in a given situation in the absence of an act constituting an offence but not to proceed against the accused in a criminal prosecution. Hence before issuing a process a Magistrate has to essentially keep in mind the scheme contained in the provisions of Sections 200-203 of Cr.P.C. keeping in mind the position of law stated above and pass an order judiciously and not mechanically or in routine manner."*

Apparently, the record of the case shows that the complainant 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.

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 31.07.2018 are hereby quashed.

(MANOJ BAJAJ)
JUDGE

05.05.2022
Jasmine Kaur

Whether speaking/reasoned	Yes	No
Whether reportable	Yes	No