

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 438 of 2020

Amal Kumar Shee @ Amal Shee

Vs

Baburam Naskar

For the Petitioner : Mr. Md. Zohaib Rauf.

For the Opposite Party : Mr. Satadru Lahiri,
Mr. Safdar Azam,
Mr. Syed Wasim Faruque.

Heard on : 19.04.2023

Judgment on : 12.05.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of proceedings of Case No. C-359 of 2017, under Section 138 of the Negotiable Instruments Act, 1881, pending before the Court of the Additional Chief Judicial Magistrate at Baruipur, South 24 Parganas, and the order dated 14.01.2019 passed therein.
2. The petitioner's case is that the opposite party no. 2, filed a complaint before the Court of the Learned Additional Chief Judicial Magistrate, Baruipur, South 24 Parganas, on March 23, 2017, against the Petitioner and his sole proprietorship concern, which in short is as follows:-
 - i. That in pursuance of an agreement between the Petitioner and the opposite party no. 2, the opposite party no. 2 had supplied dried flowers to the petitioner allegedly according to the specification previously agreed upon vide bills dated 04.09.2016, 23.09.2013, 03.10.2016 and 08.11.2016. Allegedly in discharge of his liabilities, the Petitioner had apparently issued a cheque being Cheque No. 000016 for a sum of Rs. 2,89,993/- drawn on HDFC Bank, Lenin Sarani Branch, in favour of Sri Mahalakshmi Dry Flowers, i.e. the sole proprietorship concern of the opposite party No. 2.

- ii. The opposite party no. 2 had first deposited the said cheque with his banker on 08.11.2019, which was dishonoured due to “insufficiency of funds”.
- iii. The opposite party No. 2 had thereafter, allegedly deposited the said cheque with his banker, i.e., Axis Bank, Joynagar Mazylpur Branch, on the Petitioner’s advice, on 07.12.2016 which was dishonoured on 17.12.2016 and was returned to the opposite party No. 2 allegedly on 05.01.2017 with the remarks “fund insufficient”.
- iv. Thereafter the opposite party no. 2 sent a Notice dated 18.01.2017 under Section 138 of the Negotiable Instruments Act, 1881, calling upon the Petitioner to pay the amount of Rs. 2,89,993/- to the opposite party no. 2 which was delivered to the petitioner on 20.01.2017 and the petitioner, through his learned Advocate, replied to the learned Advocate of the opposite party no. 2, vide a letter dated 31.01.2017 which was received on 02.02.2017, apparently calling upon the opposite party no. 2 for settlement.
- v. The opposite party No. 2 further alleged that he contacted the petitioner over phone several times but the Petitioner did not respond.
- vi. It has been also alleged that the Petitioner sent two other Notices dated 14.02.2017 and 23.02.2017 “by fabricating a false story”.

- vii. The opposite party No. 2 finally visited the petitioner at his Office on 06.03.2017 but the Petitioner did not pay the amount in question.
3. **Mr. Zohaib Rauf, learned counsel for the petitioner** submits that the instant proceeding so instituted by the opposite party herein is a malicious one and the same was instituted in order to spite the petitioner on account of personal grudge of the opposite party.
4. That it appears that along with the said petition of complaint, the petitioner also filed an Application for condonation of delay under Section 142 of the Negotiable Instruments Act, 1881, and the matter was fixed for hearing on the point of cognizance on 26.04.2017.
5. The matter was adjourned due to a resolution of the local bar and was thereafter fixed on 30.08.2017. Thereafter, the opposite party no. 2 remained absent on 30.08.2017 and 24.11.2017 without taking any steps and on 16.01.2018 and 29.03.2018, the opposite party no. 2 resorted to dilatory tactics and prayed for adjournments from the learned Court.
6. The opposite party no. 2, then filed an amendment application on 11.10.2018 which was allowed on the same day without affording an opportunity of hearing to the opposite party no. 2 and the learned Advocate for the opposite party no. 2 filed an amended petition, without even serving a copy of the same to the Petitioner.

7. On 14.01.2019, the opposite party no. 2 filed a Supplementary Affidavit. On the same day, the application under Section 142 of the Negotiable Instruments Act, 1881, was allowed by the learned Magistrate, without granting an opportunity of hearing to the petitioner and without even a copy being served upon him.
8. That it is humbly stated that while condoning delay the Court should not forget the opposite party altogether. That when courts condone the delay due to laches on the part of the applicant, it should at least grant an opportunity of hearing to the opposite party.
9. The petitioner submits that the aforesaid Order so passed by the Learned Trial Court is factually incorrect, procedurally untenable and legally unsustainable and the aforesaid Order passed by the Trial Court being not in accordance with law ought to be set aside by this Hon'ble Court for the ends of justice.
10. **The following judgments have been relied upon by the petitioner:-**
 - i. ***State of Maharashtra vs Sharadchandra Vinayak Dongre and Ors., (1995) 1 SCC 42, on October 7, 1994.***

“5. In our view, the High Court was perfectly justified in holding that the delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for condonation of the delay. However, having come to that conclusion, it would have been appropriate for the High Court, without going into the merits of the case to have remitted the case to the trial court, with a direction to decide the application for condonation of delay afresh after hearing both sides. The High Court however, did

not adopt that course and proceeded further to hold that the trial court could not have taken cognizance of the offence in view of the application filed by the prosecution seeking permission of the Court to file a “supplementary charge-sheet” on the basis of an “incomplete charge-sheet” and quashed the order of the CJM dated 21-11-1986 on this ground also. This view of the High Court, in the facts and circumstances of the case is patently erroneous.”

ii. *Gautam Kumar De and Anr. vs Prime Movers Auto Associates (P) Ltd. and Anr., CRR No. 3772 of 2008, on March 25, 2009 of Calcutta High Court.*

“6. Now the question is whether the proposed accused persons have right of audience in the matter of condonation of delay in making the complaint under section 138 of the NI Act. The proviso to clause (b) to section 142 of the Act giving power to the Magistrate to condone the delay if sufficient causes are shown was not originally there in the said section 142 but has been introduced by amendment of the Act with effect from 6th February, 2003. However, when the petition of complaint was filed, the amendment has come into force, as such the prayer for condonation of delay was entertainable. Now a Division Bench of this Court way back in 1981 in Asiatic Oxygen and Acetylene Co. Ltd v. Registrar of Companies, West Bengal reported in 1981 (11) CHN 412 held at paragraph 7 as follows:—

“From the discussion of the rulings of the different High Courts it appears to us that the proper and legitimate course for taking cognizance of an offence after extension of the period of limitation as contemplated under section 473 Cr.PC is to give prior notice to the proposed accused of the petition of complaint and the reasons put forward in a petition under section 473 Cr.PC for extending the period of limitation so that the accused can be heard before the offence is taken cognizance of and the Court taking cognizance of the offence can avoid the necessity of

reviewing its own tentative decision. That procedure was not followed in the case before us while the learned Chief Metropolitan Magistrate recorded orders dated 18.8.78 and 6.3.80. The aforesaid orders were passed in violation of rules of natural justice. We, therefore, set aside the orders dated 18.8.78 and 6.3.80 passed by the Chief Metropolitan Magistrate in case No. C/1147 of 1978. The learned Chief Metropolitan Magistrate will, however, be at liberty to give notice to the accused named in the petition of complaint of the petition for condonation of delay filed by the complainant under section 473 Cr.PC and hear the proposed accused and thereafter to pass appropriate orders on the said petition”.

11. **Mr. Satadru Lahiri, learned counsel for the opposite party** has submitted that the delay was only of 9 days and if the matter is remitted for hearing the matter afresh, there will be further delay, which will cause miscarriage of justice.
12. **The relevant order in this case dated 14.01.2019 is as follows:-**

“.....

*Today is fixed for SA. **Complainant is present** and files affidavit in chief. Complainant produced the original documents and files the Xerox copies of those originals and original documents are returned to the complainant as prayed for by separate petition after perusal.*

Examined the complainant under Section 200 Cr.P.C. and perused the petition of the complaint under Section 142 NI Act for condonation of delay dated 23.03.2017.

Delay is condoned and cause of delay is satisfactorily explained.....”

Sd/-

**Additional Chief Judicial Magistrate,
Baruipur, South 24 Parganas,**

13. It is seen that it's on record that the petition under Section 142 of N.I. Act was allowed without hearing and also without even a notice being issued to the petitioner, which is clearly against the interest of justice.

14. **Section 142(b) of the Negotiable Instruments Act, lays down:-**

“142 Cognizance of offences. —Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a)

(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:

[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.]”

15. Accordingly in view of the judgment of the Supreme Court in ***State of Maharashtra (Supra)*** the petitioner is entitled to get a right of hearing in respect of the petition under Section 142 N.I. Act in the interest of justice.

16. The order dated 14.01.2019 passed in C-359 of 2017, under Section 138 of the Negotiable Instruments Act, 1881, pending before the Court of the Additional Chief Judicial Magistrate at Baruipur, South 24 Parganas, is hereby set aside.

17. **CRR 438 of 2020 is allowed.**

18. The learned Magistrate shall hear the application under Section 142(b) N.I. Act on due notice to the opposite party/accused therein and dispose of the same **expeditiously** in accordance with law.
19. There will be no order as to costs.
20. All connected Applications stand disposed of.
21. Interim order if any stands vacated.
22. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.
23. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)