

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 2499 of 2019

Md. Sajiruddin

Vs.

The State of West Bengal & Anr.

For the petitioner : Mr. Sandipan Ganguly, Sr. Adv.
Mr. Arkadeb Bhattacharya.

For the Opposite Party No.2 : Mr. Partha Sarathi Das,
Mr. Ambu Bindu Chakraborty.

Heard on : 13.07.2023

Judgment on : 02.08.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding of complaint case No.177C/2013 under Section 138 of the Negotiable Instruments Act, pending before the learned Judicial Magistrate, 1st Court, Malda and setting aside of the order dated 29.06.2019 passed by the learned Additional Sessions Judge, 5th Court, Malda in Criminal Revision No.12 of 2018, thereby dismissing the revisional application filed by the petitioner and affirming the order dated 05.01.2018 passed by the learned Judicial Magistrate, 1st Court, Malda in complaint case No.177C of 2013 and Order dated 05.01.2018 passed by the learned Judicial

Magistrate, 1st Court, Malda in complaint case No.177C of 2013, rejecting thereby the prayer of the petitioner for discharge from the instant case.

2. The petitioner's case is that the petitioner is a teacher of Osmania High Madrasah and is an accused in the present complaint case no.177C/2013, under Section 138 of the Negotiable Instruments Act, pending before the learned Judicial Magistrate, 1st Court, Malda.

3. On 26.03.2013, a petition of complaint was filed by the opposite party no.2 before the court of the learned Chief Judicial Magistrate, Malda, alleging commission of an offence by the petitioner punishable under Section 138 of the Negotiable Instruments Act. The said case was registered as Complaint Case No.177C/2013.

4. The allegation leveled in the said complaint are to the effect that:-

a) On 23.06.2012, the petitioner took a loan from the Opposite party no.2 amounting to Rs.2,30,000/- for his personal requirement and on the same day, the petitioner simultaneously handed over to the opposite party no.2 two post dated cheques of State Bank of India, Rathbari Branch, Ramkrishnapally, Malda, bearing Cheque No.770906 of Rs.1,80,000/- and Cheque No.770907 of Rs.50,000/-, both dated 23.09.2012. The said cheques, issued in favour of opposite party no.2, were duly signed by the petitioner to repay the loan amount and the opposite party no.2 has received the said cheques in good faith.

b) That the opposite party no.2 presented the two cheques for encashment on 07.12.2012. On 08.12.2012, the said two cheques were returned by the Branch Manager, State Bank of India, Rathbari Branch, Malda by two separate cheques return memos with the remarks "Insufficient Fund". The opposite party no.2 received the cheque Memos through I.D.B.I., Malda Branch.

c) On 03.01.2013, a demand notice under Section 138 of the Negotiable Instruments Act was issued to the opposite party no.2 through his learned Advocate, Nilanjan Sarkar under registered post with acknowledgment due and the said notice has been sent to the correct address of the petitioner.

d) *On 18.02.2013, the learned advocate of the opposite party no.2, sent a letter to the Superintendent of Post Office, Malda Head Post Office as he had not received the Acknowledgment Due Card, duly received by the petitioner. In the said letter, the learned advocate requested the postal authority regarding confirmation of delivery of the said notice.*

e) *The Sub Post Master, Malda Court Post Office, Malda by his letter dated 05.03.2013 informed the learned advocate of the petitioner that the above noted registered notice has been delivered to the petitioner on 07.01.2013. In spite of receiving the demand notice on 07.01.2013, the petitioner failed to make payment of the sum of Rs.2,30,000/- within the statutory period of 15 days from the receipt of notice.*

f) *The accused/petitioner has thus committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (as amended till date).*

5. The learned Chief Judicial Magistrate, Malda, upon receipt of the said complaint, was pleased by his order dated 02.04.2013 to take cognizance of the offence.

6. The petitioner was examined under Section 251 of the Code of Criminal Procedure whereupon the substance of the accusation under Section 138 of the Negotiable Instruments Act was read over and explained to him to which he pleaded 'not guilty' and claimed to be tried.

7. That during the pendency of trial, since there had been delay in filing of the complaint under Section 138 of the Negotiable Instruments Act, beyond the period of limitation as envisaged under Section 142(b) of the Negotiable Instruments Act, the petitioner had filed a petition under Section 142 of Negotiable Instruments Act, 1881 read with Section 461(k) of the Code of Criminal Procedure, before the Court of Learned Judicial Magistrate, 1st Court, Malda, therein praying for discharge of the petitioner from the instant case, inter alia, on the ground that the cause of action for

the complaint arose on 23.01.2003, as it appears from the evidence of the opposite party no.2 as well as from the exhibit 5 series, i.e. the letter of the Sub-Post Master, Malda Court, which reflects the demand notice was delivered to the petitioner on 07.01.2013. Therefore, the complaint ought to have been filed within one month of the date on which the cause of action arose i.e. on or before 22.02.2013. However, as in the instant case, complaint under Section 138 of the Negotiable Instruments Act was filed beyond the period of limitation, i.e., on 26.03.2013, without praying for condonation of delay, in contravention of section 142(b) of the Negotiable Instruments Act, the order taking cognizance is bad in the eyes of law and the petitioner is liable to be discharged from the impugned proceeding.

8. That the learned Judicial Magistrate, 1st Court, Malda upon perusing the discharge petition and materials on record and after hearing the learned Advocates appearing for the petitioner and the opposite party no.2 vide order dated 05.01.2018, was pleased to reject the prayer of the petitioner, inter alia, on the ground that the limitation period, if any, ought to have been considered by the Court taking cognizance and as the learned Chief Judicial Magistrate, Malda after taking cognizance has already transferred the case to the learned trial court, the learned Judicial Magistrate, 1st Court, Malda has no power to consider the limitation point at that stage.

9. Being aggrieved by and dissatisfied with the order dated 05.01.2018 passed by the learned Judicial Magistrate, 1st Court, Malda, the petitioner had filed a Criminal revisional application under Section 397 of the Code of Criminal Procedure, before the Court of learned Sessions Judge at Malda, therein assailing the order dated 05.01.2018 passed by the learned

Magistrate. The said revisional application was registered as Criminal Revision No.12 of 2018.

10. The learned Additional District & Sessions Judge, 5th Court, Malda upon hearing the learned advocates appearing for the petitioner and the opposite party no.2 and after perusing the materials on record was pleased by his Judgment and Order dated 29.06.2019 to dismiss the criminal revision application, thereby affirming the order dated 05.01.2018 passed by learned Judicial Magistrate, 1st Court, Malda in complaint case No.177C/2013 and by the self same order, the learned Judge further directed the learned trial court to conclude the trial within six months from the date of receipt of record.

11. In the instant case, it is submitted that it appears from the evidence of the opposite party no.2 and from exhibit-5 i.e. the Letter of the Sub-Post Master, Malda Court, that the petitioner received the demand notice on 7.1.2013 and the cause of action arose on 23.1.2013. Therefore, the complaint under Section 138 of the Negotiable Instruments Act ought to have been filed within one month i.e. on or before 22.2.2013. However, in the instant case, the complaint was filed on 26.03.2013 and same being barred by limitation under Section 142 of the said Act, deserves to be set aside and the impugned proceeding is liable to be quashed.

12. Mr. Sandipan Ganguly, learned senior counsel for the petitioner has submitted that from the evidence of the opposite party no.2 and exhibits appended in the instant application it transpires that the demand notice under Section 138 of the Negotiable Instruments Act, issued through the learned Advocate of the opposite party no.2 was sent to the petitioner, at

his correct address on 03.01.2013 under registered post with acknowledgment due card. As the learned advocate of the opposite party no.2 did not receive any acknowledgment due card, the opposite party no.2 slept over his remedy for an unreasonably long period and decided to make enquires with postal authority only on 18.02.2013, i.e. 46 days after the demand notice was sent to the petitioner. After the opposite party no.2, received the information/knowledge from the postal authority vide letter dated 5.3.2013 that the demand notice has been delivered to the petitioner on 7.1.2013, he preferred to file a complaint under Section 138 of Negotiable Instruments Act only on 26.3.2013. The fallacy of accepting such argument would mean that there would be no starting date of the period of 15 days as envisaged under clause (c) of Section 138 of the Negotiable Instruments Act as the complainant may take any length of time, as per his will to make requisite enquiries with postal authority. Therefore, such contention besides being impractical also frustrates the very intention and spirit of the law laid down under clause (c) of Section 138 of the Negotiable Instruments Act.

13. Mr. Ganguly has further submitted that the orders passed by the learned Magistrate as also by the learned Judge are arbitrary, unreasonable and as such cannot be sustained in the eye of law.

14. It is expedient in the interest of justice, to uphold the dignity of law that the impugned proceeding is quashed forthwith and the impugned order is set aside and that, continuance of the impugned proceeding and order is otherwise bad in law and as such the same is liable to be quashed.

15. Mr. Partha Sarathi Das, learned counsel for the opposite party

no.2 has submitted that cause of action would count from the date he had received the knowledge of the receipt of demand notice by the petitioner through Acknowledgment Card and since in the instant case, the opposite party no.2 received such information at a later date, precisely on 5.3.2013 and the complaint was filed within one month from receiving such intimation of postal authority, the complaint was not barred by limitation.

16. From the materials on record it is seen that:-

On 7.12.2012	O.P 2 presented two cheques Rs.1,80,000/- and Rs.50,000/- for encashment.
On 8.12.2012	Said cheques were returned with remarks "insufficient fund".
On 3.1.2013	Demand Notice was issued to petitioner by complainant through learned Advocate.
On 7.1.2013	Demand Notice was received by petitioner/drawer of cheque. (As stated by Sub Post Master, Malda P.O vide letter dated 5.3.2013).
On 18.2.2013	O.P.2 through his learned Advocate sent a letter to Superintendent of Post Office, Malda Post Office as he had not received the Acknowledgement Due Card of the demand notice.
On 5.3.2013	Sub Post Master, Malda P.O informed the learned advocate of O.P 2 that the demand notice has been sent and received by petitioner on 7.1.2013.
On 26.3.2013	Complaint u/s 138 NI Act was filed without praying for condonation of delay.

As such it is seen that the demand notice was admittedly received on 7.1.2023, so the proceedings/complaint was to be filed by 22.02.2013 as January has 31 days.

17. The opposite party no.2 has taken the defence that he got knowledge of the service only on 05.03.2013, as informed by the post office on a written query by the opposite party no.2 dated 18.02.2013. Parties both reside at Malda.

18. The petitioner has relied on the Judgment in:-

- (i) ***Sadanandan Bhadran v. Madhavan Sunil Kumar***, reported in **(1998) 6 SCC 514.**

19. The opposite party has relied on the judgment in:-

- (i) ***Bhabani Shankar Agarwal vs. State of West Bengal & Anr.***, reported in **(2007) BC 81, 2006(4) CHN 724.**
- (ii) ***A. K. Maheshwary v. State of West Bengal***, reported in **2011 SCC OnLine Cal 5466 : (2012) 115 AIC 753.**

20. Section 142(b) of the N.I. Act-

“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: ²⁴ [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.]”

21. In the present case the complaint was filed on 26.03.2013, with a delay of 32 days without an application for condonation of delay on the

ground that the complaint is within time from the date of knowledge. It is found that the complainant/opposite party no.2 in order to avoid the period of limitation has tried to extend the same by sending a letter to the post office and awaiting its reply. Being in the same town, no effort was made by the opposite party no.2 to make an enquiry as to the service at the earliest. The said conduct is clearly an abuse of the process of court/law.

22. In ***Subodh S. Salaskar vs. Jayprakash M. Shah & Anr., Criminal Appeal No. 1190 of 2008, on 01.08.2008***, the Supreme Court held that:-

21. *In terms of the provisions of the General Clauses Act, a notice must be deemed to have been served in the ordinary course subject to the fulfillment of the conditions laid down therein. Section 27 of the General Clauses Act reads as under:*

"27. Meaning of service by post.--Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Thirty days' time ordinarily must be held to be sufficient for service of notice. In fact when the service of notice is sought to be effected by Speed Post, ordinarily the service takes place within a few days. Even under Order V, Rule 9(5) of the Code of Civil Procedure, 1908, summons is presumed to be served if it does not come back within thirty days. In a situation of this nature, there was no occasion for the Court to hold that service of notice could not be effected within a period of thirty days.

22. *Presumption of service, under the statute, would arise not only when it is sent by registered post in terms of Section 27 of the General Clauses Act but such a presumption may be raised also under Section 114 of the*

Evidence Act. Even when a notice is received back with an endorsement that the party has refused to accept, still then a presumption can be raised as regards the valid service of notice. Such a notice, as has been held by a Three-Judge Bench of this Court in C.C. Alavi Haji v. Palapetty Muhammed and Another [(2007) 6 SCC 555] should be construed liberally, stating :

"17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the GC Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

[Emphasis supplied]

23. The complaint petition admittedly was filed on 20.04.2001. The notice having been sent on 17.01.2001, if the presumption of service of notice within a reasonable time is raised, it should be deemed to have been served at best within a period of thirty days from the date of issuance thereof, i.e., 16.02.2001. The accused was required to make payment in terms of the said notice within fifteen days thereafter, i.e., on or about 2.03.2001. The complaint petition, therefore, should have been filed by 2.04.2001.

24. *Ex facie*, it was barred by limitation. No application for condonation of delay was filed. No application for condonation of delay was otherwise maintainable. The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act, 1963 or Section 473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are not applicable. In any event, no such application for condonation of delay was filed. If the proviso appended to Clause (b) of Section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well-settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation.

25. In *Madishetti Bala Ramul (Dead) By LRs. v. Land Acquisition Officer* [(2007) 9 SCC 650], this Court held as under:

"18. It is not the case of the appellants that the total amount of compensation stands reduced. If it had not been, we fail to understand as to how Section 25 will have any application in the instant case. Furthermore, Section 25 being a substantive provision will have no retrospective effect. The original award was passed on 8-2-1981: Section 25, as it stands now, may, therefore, not have any application in the instant case."

The question is now covered by a judgment of this Court in *Anil Kumar Goel v. Kishan Chand Kaura* [2008 AIR SCW 295] holding:

"8. All laws that affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations, unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is

intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision is question in accordance with its tenor. If the language is not clear then the court has to decide whether, in the light of the surrounding circumstances, retrospective effect should be given to it or not. (See: Punjab Tin Supply Co., Chandigarh etc. etc. v. Central Government and Ors., AIR 1984 SC 87).

9. There is nothing in the amendment made to Section 142(b) by the Act 55 of 2002 that the same was intended to operate retrospectively. In fact that was not even the stand of the respondent. Obviously, when the complaint was filed on 28.11.1998, the respondent could not have foreseen that in future any amendment providing for extending the period of limitation on sufficient cause being shown would be enacted."

23. In *M/s Saketh India Limited & Ors. vs M/s. India Securities Limited, Criminal Appeal Nos. 288-289 of 1999 (@ SLP (Cri.) Nos. 262-263 of 1998), on 10 March, 1999*, the Supreme Court held that:-

".....In the present case, cheques dated 15th and 16th March, 1995 issued by the appellants bounced when presented for encashment as per the bank endorsement. Notices were served on the accused on 29th September, 1995. As per section 138 (c) accused were required to make payment of the said amount of money within 15 days. The accused failed to pay the said amount, hence the cause of action for filing the complaint arose from 15th October, 1995. Complaints were filed on 15th November, 1995. Therefore, it is contended that complaints were filed beyond time. Accused petitioners approached the High Court by filing petition under Section 482 of the Criminal Procedure Code for quashing and setting aside the process issued by the XI Additional Chief Metropolitan Magistrate, Bangalore. Those petitions were rejected by the High Court by common order and Judgment dated 25th September, 1997. Hence, these appeals.

The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12 (1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

Similar provision is made in sub- section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of General Clauses Act, 1897 which, inter-alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from', and, for the purpose of including the last in a series of days or any other period of time, to use the word 'to'. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last.. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer, expires. Period of 15 days, in the present case, expired on 14th October, 1995. So cause of action for filing complaint would arise from 15th October, 1995. That day(15th October) is to be excluded for counting the period of one month. Complaint is filed on 15th November, 1995. The result would be that the complaint filed on 15th November is within time.....”

24. Thus, even if the calculation of the period of limitation is done in accordance to the view in **Subodh S. Salaskar vs. Jayprakash M. Shah & Anr.(Supra) and M/s Saketh India Limited & Ors. vs M/s. India Securities Limited (Supra)** the complaint is barred by limitation.

25. Admittedly, the Demand Notice was issued on 3.1.2013 and received on 7.1.2013, which was allegedly not within the knowledge of the complainant, and thus the case is made out, that the complaint is not barred by limitation. So even if it is taken that the date of receipt was not within the knowledge of the complainant, the service is deemed to be made/effectuated within 30 days of sending it. So in this case the period of 30 days from 3.1.2013 would end on 2nd February, 2013. 03.01.2013 being excluded. The payment within 15 days would commence on 3rd February,

2013 and end on 18.02.2013. Thirty days thereafter would end on 20th March, 2013. From 19.02.2013 to 28.02.2013 (10 days) and March 20 days. The present complaint was filed on **26.03.2013**. There is clearly a delay of 5 days even if the complainant is given the benefit as prescribed.

(i) Thus the Magistrate was wrong in taking cognizance without compliance of Section 142(b) of the N.I. Act.

(ii) In view of the judgment in ***Subodh S. Salaskar vs. Jayprakash M. Shah & Anr. (Supra) and M/s Saketh India Limited & Ors. vs M/s. India Securities Limited (Supra)*** the petition of complaint is clearly barred by limitation.

26. Accordingly, the order under revision dated 29.06.2019 the order dated 05.01.2018 of the Judicial Magistrate, 1st Court, Malda in 177C/2013 and the Magistrate taking cognizance on 02.04.2013 are all set aside being bad in law.

27. The revisional application being CRR 2499 of 2019 is allowed.

28. The order dated 29.06.2019 passed by the learned Additional Sessions Judge, 5th Court, Malda in Criminal Revision No.12 of 2018, thereby dismissing the revisional application filed by the petitioner and affirming the order dated 05.01.2018 passed by the learned Judicial Magistrate, 1st Court, Malda in complaint case No.177C of 2013 is hereby set aside.

29. The opposite party/complainant is at liberty to avail of the provision under Section 142(b) of the N. I. Act within one month from the date of this order, which the Magistrate being the Judicial Magistrate, 1st Court, Malda in this case, where the case is pending,

shall hear and dispose of the same in accordance with law within one month thereafter on hearing both sides.

30. All connected applications stand disposed of.

31. Interim order, if any, stands vacated.

32. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

33. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)