



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 22.02.2024

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CRL.M.C. 1302/2023, CRL.M.A. 4999/2023

DEEPAK NAGAR

..... Petitioner

Through: Mr. Vipun Arora, Advocate.

versus

STATE AND ANR

..... Respondents

Through: Mr. Aashneet Singh, APP for State
with SI Rajiv Gautam, P.S. Badarpur.
Mr. Sonu Singh, Advocate for
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 482 Cr.P.C., the petitioner seeks setting aside of the order dated 24.11.2022 passed by learned M.M. (NI Act), Digital Court-03, South East District, Saket, vide which he has been summoned to face trial in Complaint Case NI Act 4900/2022, arising out of proceedings initiated under Sections 138 of the Negotiable Instruments Act, 1881 (hereafter, 'NI Act').
2. The only contention canvassed on behalf of the petitioner is that legal notice was not issued to him within the period of 30 days as prescribed in Section 138 proviso (b), NI Act. In support of his submissions that the said period is not extendable, learned counsel for the petitioner has referred to Section 138 of the NI Act as well as demand notice and the pre-summoning evidence placed on record.
3. Learned counsel for the respondent No.2 however, has contested the



petition by submitting that the issue as to whether the demand notice was issued within or beyond the period of 30 days is a matter of trial.

4. Briefly stated, the facts necessary for the consideration of the present petition are that in its complaint, complainant/respondent No. 2 has alleged that the petitioner alongwith his friend *Sunder* approached respondent No.2 for providing financial assistance to *Sunder* for the purchase of a vehicle. The petitioner introduced himself as a guarantor and on his request, respondent No.2 advanced loan to *Sunder* vide Loan-cum-Hypothecation Agreement dated 19.04.2016. However, *Sunder*, the borrower defaulted in repaying the loan amount and when respondent No.2 approached the petitioner and informed him of the said default, petitioner issued the subject cheque dated 10.03.2022 in favour of respondent No.2 towards discharge of partial liability of his friend/principal borrower. The said cheque, when presented for encashment, was dishonoured for the reason “*payment stopped by the drawer*” vide return memo dated 16.03.2022. Subsequently, a legal notice was issued through speed post on 16.04.2022 to the petitioner however, upon petitioner’s failure to pay the amount under the cheque, the said criminal complaint came to be filed.

5. Before proceeding further, this Court deems it apposite to refer proviso (b) of Section 138 of NI Act, which reads as under:-

“(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;”

6. A reading of the aforesaid provisions would show that on receipt of



information about the dishonour, complainant is mandatorily required to issue a demand notice within 30 days as stipulated. The period of 30 days is sacrosanct and unextendible. A complaint filed without complying with the three conditions stipulated under Section 138, is not maintainable. To appreciate the contention raised by the petitioner, the stand taken by respondent No.2 in its complaint, is extracted below:-

“7. That on the assurance of the accused, the complainant present the above said Cheque for encashment with his banker, AXIS BANK LTD. Branch Mahan Co-operative Industrial Estate, Mathura Road, New Delhi-110044 in A/c. No.919020037480449 on dated 15.03.2022 for encashment but the above said Cheque issued to the complainant has been returned back unpaid by accused banker with the reasons "PAYMENT STOPPED BY DRAWER". vide Bank return memo dated 16.03.2022.

8. That immediately on 16.03.2022, the complainant approach to the accused on telephonic call and inform him about the bouncing of Cheque issued by accused to the complainant and inform him that the reason for the return the above. said Cheque is "PAYMENT STOPPED BY THE DRAWER". The Complainant demand from the accused to pay the Cheque amount to the complainant client but the accused straight way refused to pay the said Cheque amount to the complainant. It seems that accused had intentionally issued the Cheque with dishonest intention.

9. That the complainant served a legal notice dated 16.04.2022 through rlis counsel Vide Speed post dated 16.04.2022, the accused also served through WhatsApp Number 9811144797 upon the accused on 21.04.2022 and same was seen by the accused on same day i.e 21.04.2022 the accused has been duly served with the legal notice and despite the service of legal notice the accused neither replied nor complied.”

7. The averments in the legal notice as well as pre-summoning evidence



are verbatim as above. From the above, it is evident that respondent No.2 became aware of the dishonour on 16.03.2022 itself when the cheque was dishonoured. The return memo is also of the same date. The legal position on the aspect that three conditions, as laid down in Section 138 NI Act, are to be mandatorily followed, is well settled. In Kamlesh Kumar v. State of Bihar and Anr.¹, Supreme Court held as under:-

“15. It is, thus, apparent that he received the information about the dishonor 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 the case of MSR Leathers, extracted above.”

8. In Sivakumar v. Natrajan², the Supreme Court re-affirmed the observations made in Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd.³:-

“xxx

9. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act

¹ (2014) 2 SCC 424

² (2009) 13 SCC 623

³ (2009) 1 SCC 720



intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.

xxx”

9. In Sivakumar (Supra), it was further held as under:-

“xxx

10. We may, however, at the outset notice that both clauses (a) and (b) of the proviso appended to Section 138 of the Act employed the term “within a period”. Whereas clause (a) refers to presentation of the cheque to the bank within a period of six months from the date on which it is drawn, clause (b) provides for issuance of notice “to the drawer of the cheque, within thirty days of the receipt of information”. The words “within thirty days of the receipt of information” are significant. Indisputably, intimation was received by the respondent from the bank on 3-12-2003.

11. Parliament advisedly did not use the words “from the date of receipt of information” in Section 138 of the Act. It is also of some significance to notice that in terms of Section 9 of the General Clauses Act, 1897, whereupon reliance has been placed by the High Court, the statute is required 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”. The departure made from the provisions of Section 9 of the General Clauses Act by Parliament, therefore, deserves serious consideration.

12. Indisputably, the notice was issued on the 31st day and not within a period of thirty days from the date of receipt of intimation from the bank. If Section 9 of the General Clauses Act is not applicable, clause (b) of the proviso appended to



Section 138 of the Act was required to be complied with by the respondent for the purpose of maintaining a complaint petition against the appellant.

13. In Munoth Investments Ltd. v. Puttukola Properties Ltd, (2001) 6 SCC 582 construing clause (a) of the proviso appended to Section 138 of the Act, this Court held: (SCC pp. 583-84, para 5)

“5. In our view, the High Court committed material irregularity in not referring to the aforesaid evidence which was recorded by the Metropolitan Magistrate. Section 138(b) of the Act inter alia provides that the payee has to make demand for the payment of money by giving a notice „to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid’. So fifteen days are to be counted from the receipt of information regarding the return of the cheque as unpaid. In the present case, it is the say of the complainant that the cheque was presented for encashment on 12th; it was returned to the Bank on 13th and information was given to the complainant only on 17th, as 14th, 15th and 16th were Pongal holidays. The learned counsel fairly pointed out that in the complaint it has been stated that the complainant had received intimation with regard to the return of the said cheque from his banker on 13-1-1994. However, he submitted that this is an apparent mistake and for explaining that mistake the appellant has led the evidence before the trial court. Undisputedly, he pointed out that in the State of Tamil Nadu, 14-1- 1994 to 16-1-1994 there were Pongal holidays and, therefore, the appellant came to learn about the dishonour of his cheque on 17-1-1994.”

We, with respect, agree with the approach of the learned Judges.

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10. A Co-ordinate Bench of this Court in Dheeraj Jain v. State and Anr.⁴, held as under:-

“xxx

8. A perusal of the Clause (b) to proviso to the Section clearly states that nothing contained in the section shall apply unless the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the amount of cheque by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding return of the cheque as unpaid. It may be noted that in the present case admittedly, as per the complaint, affidavit and legal notice, Respondent No. 2 came to know about the dishonor of the cheque on the 10th July, 2010. The demand made by Respondent No. 2 was beyond the period of 30 days and now Respondent No. 2 cannot agitate that he be permitted to lead evidence to show that he received the knowledge of dishonor of the cheque on 12th July, 2012, which was not the case even before the learned Trial Court.

xxx”

11. Even this Court in Amit Kumar Mishra v. The State (Govt. of NCT of Delhi) & Anr.⁵ held that in case legal notice is issued beyond the period of 30 days, the complaint is not maintainable.

12. So far as aspect of computation of statutory period is concerned, reference may be made to the decisions of the Supreme Court in Econ Antri Ltd. v. Rom Industries Ltd. & Anr.⁶ and Rameshchandra Ambalal Joshi v. State of Gujarat⁷ as well as this Court in M/s Texco v. M/s Bats Apparels Ltd. & Anr.⁸, Rayapati Power Generation Pvt. Ltd. & Anr. v. Indian

⁴ 2012 SCC OnLine Del 1687

⁵ 2020 SCC OnLine Del 2199

⁶ (2014) 11 SCC 769

⁷ (2014) 11 SCC 759

⁸ 2018 SCC OnLine Del 7724



Renewable Energy Agency Ltd. (IREDA)⁹ and Simranpal Singh Suri v. State & Anr.¹⁰ In all these cases while dealing with the various provisions of Section 138 and 142 NI Act, it has been held that the date on which the cause of action arises, would be excluded while computing the statutory period mentioned in the various clauses of Section 138 NI and for Section 142.

13. Concededly, as per the allegations in the complaint, respondent No.2 had received information about the dishonour of cheque on 16.03.2022 whereafter, he had telephonically informed the petitioner about the said dishonour. It is also not disputed that the legal notice was issued on 16.04.2022, and upon failure to repay, the present complaint came to be filed.

14. In M/s Texco (Supra), this Court observed:-

“xxx

8. The questions that arise for consideration in this case are; whether Section 9 of the General Clauses Act, 1897, is applicable to the statutory notice under section 138 of the Act? & whether the day on which the information is received by the complainant from the bank that the cheque has been dishonoured is to be included or excluded while computing the 30-day period prescribed for issuing the statutory notice?

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12. Seen from that perspective, the date on which the petitioner received the information of the dishonour of the cheque (i.e. 23.12.2006) is to be excluded for the purposes of computing the period of 30 days available under the Act for issuance of notice. On excluding the date 23.12.2006, from considering, it is seen

⁹ 2022 SCC OnLine Del 295

¹⁰ 2021 SCC OnLine Del 236



that the notice issued on 22.01.2007 has been issued on the 30th day, which would bring the said notice within the period prescribed.

xxx”

15. Further, this Court in Rayapati Power Generation Pvt. Ltd. (Supra) observed:-

“xxx

14. In the present case, the primary issue raised by learned counsel for the petitioners during the course of submissions is that the legal demand notices were not issued by the complainant Company within 30 days of the receipt of information regarding dishonor of the cheques, i.e., from the date of the return memos, and thus the complaints are not maintainable. On the other hand, the complainant Company maintains that it was intimated of the dishonor of the cheques in question only when its Bank sent the aforesaid return statements, and the legal demand notices were issued within 30 days thereafter.

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21. The legal position, as culled out from the judicial dicta referred to hereinabove, is that while computing the limitation period of 30 days prescribed under Section 138(b) N.I. Act for issuance of a valid legal notice, the day on which intimation is received by the complainant from the bank that the cheque in question has been returned unpaid has to be excluded.

xxx”

16. Applying the abovementioned legal position to the present matter, it can be seen that admittedly while the information was received on 16.03.2022, the legal notice came to be issued on 16.04.2022. Even if the first day i.e. 16.03.2022 is excluded in computing the statutory period, the legal notice came to be issued on the 31st day i.e. beyond the statutory period



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provided under Section 138(b) of the NI Act.

17. In view of the same, the petition is allowed and the complaint case alongwith the summoning order dated 24.11.2022 are hereby set aside and quashed. Pending application is disposed of as infructuous.

MANOJ KUMAR OHRI
(JUDGE)

FEBRUARY 22, 2024

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