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

Date of decision: 06.02.2024

+ CRL.M.C. 2935/2022 & CRL.M.A. 12416/2022

DEV VART

..... Petitioner

Through: Ms.Suneha Jain, Adv.

versus

BANK OF BARODA

..... Respondent

Through: Mr.D.K. Mehta, Mr.Rishabh
Mehta, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 482 of the Code of Criminal Procedure (in short, 'Cr.P.C.') praying for quashing of the summoning order dated 09.05.2019 passed by the learned Metropolitan Magistrate-04 (NI Act), Central, Tis Hazari Courts, Delhi in CC No.15240/2018, titled ***Bank of Baroda v. Dev Vart***, as also the abovesaid Criminal Complaint itself.

2. The learned counsel for the petitioner submits that in the present case, pursuant to the return of the cheque issued by the petitioner from the bank, the respondent had issued a demand notice dated 25.07.2018 to the petitioner. The said notice, though posted on 25.07.2018, was received by the petitioner on 27.07.2018. She submits that in terms of the Proviso (c) to Section 138 of the Negotiable Instruments Act, 1881



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(in short, 'NI Act'), the cause of action for filing of the complaint would arise only after 15 days from the receipt of the notice by the petitioner, that is, on or after 11.08.2018.

3. In the present case, however, the respondent filed the subject complaint on 10.08.2018, that is, before of the cause of action for filing the same had arisen. Placing reliance on the judgment of the Supreme Court in *Yogendra Pratap Singh v. Savitri Pandey*, (2014) 10 SCC 713, she submits that in similar circumstances, the Supreme Court has held that a complaint filed before the expiry of 15 days of service of notice cannot be treated as a complaint in the eyes of law and criminal proceedings initiated on such complaint are liable to be quashed.

4. The learned counsel for the respondent does not join issue with the petitioner on the above. He, however, submits that the respondent would be entitled to file a fresh complaint on the basis of the same cause of action, seeking extension of time prescribed by Section 142(b) of the NI Act. He places reliance on the judgment of the Supreme Court in *Gajanand Burange v. Laxmi Chand Goyal*, (2022) SCC OnLine SC 1711, to submit that as the complaint has been pending for a long time, a direction be issued that in case the respondent files a complaint, the same be disposed of expeditiously.

5. I have considered the submissions made by the learned counsels for the parties.

6. It is not denied that 15 days' period from the receipt of the notice as prescribed in Proviso (c) to Section 138 of the NI Act would have expired on 11.08.2018, and the complaint has been filed by the



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respondent on 10.08.2018, that is, prior to the cause of action arising for filing of the Complaint in terms of Section 142(b) of the NI Act.

7. The Supreme Court in ***Yogendra Pratap Singh*** (supra), framed the following questions:

“...The Court formulated the following two questions for consideration:

(i) Can cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act 1881 be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138 (c) of the Act aforementioned? And,

(ii) If answer to question No.1 is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142 (b) for the filing of such a complaint has expired?”

8. Answering the first question, the Supreme Court has held as under:

“35. Can an offence under Section 138 of the NI Act be said to have been committed when the period provided in clause (c) of the proviso has not expired? Section 2(d) of the Code defines “complaint”. According to this definition, complaint means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence. Commission of an offence is a sine qua non for filing a complaint and for taking cognizance of such offence. A bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the NI Act unless the period of 15 days has elapsed. Any complaint filed before the expiry of 15 days



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from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of the law. It is not the question of prematurity of the complaint where it is filed before the expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law. As a matter of fact, Section 142 of the NI Act, inter alia, creates a legal bar on the court from taking cognizance of an offence under Section 138 except upon a written complaint. Since a complaint filed under Section 138 of the NI Act before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint in the eye of the law, obviously, no cognizance of an offence can be taken on the basis of such complaint. Merely because at the time of taking cognizance by the court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused, the court is not clothed with the jurisdiction to take cognizance of an offence under Section 138 on a complaint filed before the expiry of 15 days from the date of receipt of notice by the drawer of the cheque.

36. *A complaint filed before the expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint which does not disclose the cause of action the court is not competent to take cognizance. A conjoint reading of Section 138, which defines as to when and under what circumstances an offence can be said to have been committed, with Section 142(b) of the NI Act, that reiterates the position of the point of time when the cause of action has arisen, leaves no manner of doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed under clause (c) of the proviso to Section 138, has, in fact, elapsed. Therefore, a court is barred in law from taking cognizance of such*



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complaint. It is not open to the court to take cognizance of such a complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date on which the notice has been served on the drawer/accused has elapsed. We have no doubt that all the five essential features of Section 138 of the NI Act, as noted in the judgment of this Court in Kusum Ingots & Alloys Ltd. and which we have approved, must be satisfied for a complaint to be filed under Section 138. If the period prescribed in clause (c) of the proviso to Section 138 has not expired, there is no commission of an offence nor accrual of cause of action for filing of complaint under Section 138 of the NI Act.

37. We, therefore, do not approve the view taken by this Court in Narsingh Das Tapadia and so also the judgments of various High Courts following Narsingh Das Tapadia that if the complaint under Section 138 is filed before the expiry of 15 days from the date on which notice has been served on the drawer/accused the same is premature and if on the date of taking cognizance a period of 15 days from the date of service of notice on the drawer/accused has expired, such complaint was legally maintainable and, hence, the same is overruled.

38. Rather, the view taken by this Court in Sarav Investment & Financial wherein this Court held that service of notice in terms of Section 138 proviso (b) of the NI Act was a part of the cause of action for lodging the complaint and communication to the accused about the fact of dishonouring of the cheque and calling upon to pay the amount within 15 days was imperative in character, commends itself to us. As noticed by us earlier, no complaint can be maintained against the drawer of the cheque before the expiry of 15 days from the date of receipt of notice because the drawer/accused cannot be said to have committed any offence until then. We approve the decision of this Court in Sarav Investment



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& Financial Consultancy and also the judgments of the High Courts which have taken the view following this judgment that the complaint under Section 138 of the NI Act filed before the expiry of 15 days of service of notice could not be treated as a complaint in the eye of the law and criminal proceedings initiated on such complaint are liable to be quashed.

39. Our answer to Question (i) is, therefore, in the negative.”

9. Having held the above, as far the question no.2, the Supreme Court further held that the remedy of the complainant now would be to file a fresh complaint, and if the same could not be filed within the time prescribed under Section 142(b) of the NI Act, recourse of the complainant is to seek the benefit of the proviso upon satisfying the Court of sufficient cause for not filing the complaint within the time prescribed. I may quote the from the judgment, as under:

“41. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the NI Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the court after the prescribed period. Now, since our answer to Question (i) is in the negative, we observe that the payee or the holder in due



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course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to Question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the court of sufficient cause. Question (ii) is answered accordingly..”

10. In **Gajender Burange** (supra), while reiterating the above principles, the Supreme Court passed the following directions:

“10. Hence, the following order:

(i) The impugned judgment and order of the Single Judge of the High Court of Chhattisgarh dated 28 November 2018 shall stand set aside; and

(ii) The respondent would be at liberty to institute a fresh complaint and since the earlier complaint could not be presented within the time prescribed by Section 142(b) of the NI Act, the respondent would be at liberty to seek the benefit of the proviso by satisfying the trial court of sufficient cause for the delay in instituting the complaint.

11. In the event that the second complaint is filed within a period of two months from the date of this order, we request the trial court to dispose of the complaint within a period of six



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months.”

11. In view the above, it is held that the complaint filed by the respondent was pre-mature. Accordingly, the summoning order dated 09.05.2019 is set aside. The complaint filed by the respondent, that is, CC No.15240/2018, titled **Bank of Baroda v. Dev Vart** is dismissed.

12. It is noticed that the complaint case was filed on 10.08.2018; the summoning order was passed on 09.05.2019; while the present petition challenging the same was filed by the petitioner only on or around 24.05.2022. Keeping in view the above circumstances, the respondent is granted liberty to institute fresh complaint and to seek benefit of the Proviso to Section 142(b) of the NI Act for not filing the same within the time prescribed.

13. In the event, the fresh complaint is filed by the respondent within a period of two months from the date of this order, a request is made to the learned Trial Court to expedite the adjudication of the same and try to dispose of the same preferably within a period of one year from the date of this order.

14. The petition along with the pending application is disposed of in the above terms.

NAVIN CHAWLA, J

FEBRUARY 6, 2024/Arya/am

Click here to check corrigendum, if any