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Court : Allahabad

Decided On : May-27-2015

Judge : Pankaj Naqvi

Appeal No. : Criminal Misc. Writ Petition No. 12497 of 2015

Appellant : Pawan Kumar Mishra

Respondent : State

Advocate for Def. : Sri. Rajesh Tiwari

Advocate for Pet/Ap. : Sri. Rupak Chaubey

Judgement :

1. Heard Sri Rupak Chaubey, learned counsel for the petitioner, Sri Rajesh Tiwari, learned counsel for respondent no.2 and learned A.G.A.
2. This writ petition is directed against the orders of the courts below, whereby petitioner has been summoned for an offence under Section 138 of the Negotiable Instruments Act (in short "the Act") in Complaint Case no. 1409 of 2014 pending before the A.C.J.M (Court no.2), Varanasi.
3. A complaint under Section 138 of the Act was filed by respondent no.2 against the petitioner on 19.10.2010 alleging that a cheque dated 4.5.2010 for a sum of Rs.1,81,730/- was issued by petitioner in favour of respondent no.2, which he

deposited in his account at Varanasi on 24.7.2010, was reported to be unpaid /dishonoured on 26.7.2014, but at the request of the petitioner, the said cheque was again presented by respondent no.2 to his banker on 4.10.2010, and again the same was reported to be unpaid/ dishonoured on 5.10.2010. It is alleged that a registered notice dated 8.10.2010 was sent by respondent no.2 to the petitioner, but for want of complete address, a fresh registered notice of demand was sent to the petitioner on 12.10.2010, as the same was not complied with, the above complaint was filed on 19.10.2010. The English translation of the ordersheet dated 19.10.2010 reads as under:

"Complaint filed. Registered. Put up for recording the statement of the complainant under Section 200 Cr.P.C. on 3.11.2010."

4. Similarly English translation of the order-sheet dated 3.11.2000 reads as under:-

"Case called out. Complainant is present. Complainant has filed an affidavit/ evidence under Section 200 Cr.P.C. Learned counsel for complainant states that he does not want to lead any evidence under Section 202 Cr.P.C. Put up for arguments on 4.12.2010."

5. The trial court on 16.5.2011 after considering the complaint, the statement of complainant and other materials on record, prima facie, found a case for commission of an offence under Section 138 of the Act proceeded to summon the petitioner. The petitioner appeared before the Court concerned on 29.11.2011. On 1.10.2013, petitioner/ accused filed an application for the dismissal of the complaint on the ground that the complaint filed on the basis of the notice dated 12.10.2010 on 19.10.2010, was not maintainable, as on 19.10.2010, period of 15 days specified in Section 138(c) of the Act had not expired, consequently the Court below could not have taken cognizance on 19.10.2010. The court below vide order dated 6.5.2014 rejected the said application.

6. The bone of contention between the contesting parties is as to what is the date of cognizance, because if 19.10.2010 is the date of cognizance, then the contention of the petitioner is that cognizance taken on 19.10.2010 on a complaint, is premature as the period specified under Section 139(c) of the Act, i.e. 15 days

had not expired, from the date of service of notice, the complaint was liable to be dismissed as not maintainable, whereas the contention of respondent no.2 is that a complaint could be filed even before the expiry of 15 days period, but cognizance can be taken only after expiry of the 15 days notice period, which was taken on 3.11.2010, thus no illegality could be attributed to cognizance.

7. Both the learned counsels interpreted the judgment of the Apex Court in the case of ***Narsingh Das Tapadia v. Govardhan Das Partania, 2000(4) R.C.R.(Criminal) 39 : (2000) 7 SCC 183***, in their favour.

8. Having heard learned counsel for the parties, and after perusing the records, the Court is of the view that the fate of this case would not depend on the law propounded by the Apex Court in the case of Narsingh Das Tapadia (supra), as the said judgment came to be expressly overruled upon a reference by the Apex Court in the case of ***Yogendra Pratap Singh v. Savitri Pandey and another 2015(1) R.C.R.(Civil) 550 : 2014(4) R.C.R.(Criminal) 321 : 2014(4) Recent Apex Judgments (R.A.J.) 348 : AIR 2015 SC 157***.

The Apex Court in case of Tapadia (supra) was considering the meaning of the expression "taking cognizance of an offence", held that mere presentation of a complaint on 8.11.1994, when it was returned to the complainant on the ground that it had not been verified by the counsel, could not be termed to be an action of the Magistrate taking cognizance within the meaning of Section 142 of the N.I. Act. The Apex Court had held that mere presentation of the complaint in the court cannot be held to mean that its cognizance had been taken by the magistrate. If the complaint is found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed. Thus taking a cue from the decision of the Apex Court in the case of Tapadia (supra), various High Courts had been taking a view that even though a complaint under Section 138 of the N.I. Act was not maintainable as on the date on which it was filed on the ground that period of 15 days from the date of expiry of the notice as indicated in Section 138(c) of the Act had not expired, yet if cognizance is taken

after the expiry of the aforesaid period, no illegality / impropriety could be said to have been committed by the Magistrate in taking cognizance upon such complaint. However, the Apex Court in ***Sarav Investment and Financial Consultants Pvt. Ltd. and Anr. v. Llyods Register of Shipping Indian Office Staff Provident Fund and Anr., 2007(4) R.C.R.(Civil) 538 : 2007(4) R.C.R.(Criminal) 575 : 2007(5) Recent Apex Judgments (R.A.J.) 483 : (2007) 14 SCC 753***, held that Section 138 of the Act contains a penal provision. It is a special statute. It creates a vicarious liability. Even the burden of proof to some extent is on the accused. Having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrants a strict construction. Proviso appended to Section 138 contains a non obstante clause. It provides that nothing contained in the main provision shall apply unless the requirements prescribed therein are complied with. Service of notice is one of the statutory requirements for initiation of a criminal proceeding. Such notice is required to be given within 30 days of the criminal proceeding. Such notice is required to be given within 30 days of the receipt of the information by the complainant from the bank regarding the cheque as unpaid. Clause (c) provides that the holder of the cheque must be given an opportunity to pay the amount in question within 15 days of the receipt of the said notice. Complaint petition, thus, can be filed for commission of an offence by a drawee of a cheque only 15 days after service of the notice.

9. Thus against the aforesaid chronology, the following two issues were referred in the case of Yogendra Pratap Singh (supra):

"(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?"

The reference came to be answered in the following paragraphs:

"32. Section 138 of the NI Act has been analysed by this Court in ***Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd. and Ors. etc., 2000(2) R.C.R.(Criminal) 275 : (2000) 2 SCC 745***] wherein this Court said that the following ingredients are required to be satisfied for making out a case Under Section 138 of the NI Act:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

33. We are in agreement with the above analysis.

34. In ***K.R. Indira v. Dr. G. Adinarayana, 2003(4) R.C.R.(Criminal) 966 : AIR 2003 SC 4689 : (2003) 8 SCC 300***], a two-Judge Bench of this Court observed that the offence Under Section 138 of the NI Act could be completed if all the above components are satisfied.

35. Insofar as the present reference is concerned, the debate broadly centers around Clause (c) of the proviso to Section 138 of the NI Act. The requirement of

Clause (c) of the proviso is that the drawer of the cheque must have failed to make the payment of the cheque amount to the payee within 15 days of the receipt of the notice. Clause (c) of the proviso offers a total period of 15 days to the drawer from the date of receipt of the notice to make payment of the cheque amount on its dishonour.

36. 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 before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of law. It is not the question of prematurity of the complaint where it is filed before 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 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.

37. A complaint filed before 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 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 and Alloys Ltd. v. Pennar Peterson Securities Ltd. and Ors. etc.: AIR 2000 SC 954 : (2000) 2 SCC 745*** 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.

38. We, therefore, do not approve the view taken by this Court in ***Narsingh Das Tapadia v. Goverdhan Das Partani and Anr.: (2000) 7 SCC 183*** and so also the judgments of various High Courts following Narsingh Das Narsingh Das Tapadia Goverdhan Das Partani and Anr.: (2000) 7 SCC 183] that if the complaint Under Section 138 is filed before 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.

39. Rather, the view taken by this Court in ***Sarav Investment and Financial Consultancy Private Limited and Anr. v. Llyods Register of Shipping Indian Office Staff Provident Fund and Anr.: (2007) 14 SCC 753*** 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 and Financial Consultancy Private Limited and Anr. v. Llyods Register of Shipping Indian Office Staff Provident Fund and Anr. : (2007) 14 SCC 753*** 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 law and criminal proceedings initiated on such complaint are liable to be quashed.

40. Our answer to question (i) is, therefore, in the negative.

41. The other question is that if the answer to question (i) 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.

42. 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 . 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 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. Thus the position, which now emerges is that a complaint cannot be entertained against the drawer of the cheque before expiry of 15 days from the date of the receipt of notice under Section 138(c) of the Act because the drawer/accused cannot be said to have committed any offence till then, Tapadia (supra) was expressly overruled and it further held that if a complaint is being dismissed as premature the payee or the holder in due course of the cheque is at liberty to file a fresh complaint within one month from the date of decision in criminal case and the delay shall be deemed to have been condoned under Section 142(b) of the Act. The Apex Court further made it clear that the complainant cannot be permitted to present the same complaint at a later stage and that a remedy is to file a fresh complaint.

11. A complaint under Section 138 of the Act filed on 19.10.2010 on the basis of notice dated 12.10.2010 was not maintainable as the period of 15 days after service of notice of demand under Section 138(c) of the Act, which was an essential part of the cause of action had not expired. Thus it is absolutely redundant for this Court to decide as to whether 19.10.2010 or 3.11.2010 was a date on which cognizance of an offence was taken or not, once the Apex Court settled the issue that such a complaint itself was not maintainable as on the date, on which it was filed, i.e. 19.10.2010 as the period of 15 days specified under Section 138(c) of the Act had not expired.

12. Consequently, orders dated 19.1.2013 and 17.3.2015 cannot be sustained and the proceedings are liable to be quashed.

13. The writ petition succeeds and is allowed. The proceedings of Complaint Case no. 1409 of 2014 under Section 138 N.I. Act, P.S. Kotwali, Varanasi are quashed. It would be open for respondent no.2 to file a fresh complaint in accordance with law.

14. The office is directed to hand over the original documents, if any, to the learned counsel for respondent no.2/ complainant after retaining a xerox copy thereof. It is made clear that the Court has not adjudicated the claim on merits.

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