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**Court :** Allahabad

**Decided On :** Mar-07-1991

**Reported in :** [1993]78CompCas507(All); 1991CriLJ3010

**Judge :** N.L. Ganguly, J.

**Acts :** [Negotiable Instruments Act, 1881](#) - Sections 138 and 142

**Appeal No. :** C.M.A. No. 3463 of 1991

**Appellant :** Rajiv Kumar

**Respondent :** State of U.P.

**Advocate for Pet/Ap. :** D.K. Dewan, Adv.

**Disposition :** Petition dismissed

**Judgement :**

**N.L. Ganguly, J.**

1. This petition under Section 482 of the Criminal Procedure Code, 1973, has been filed against the order passed by the Magistrate affirmed by the learned Sessions Judge in revision refusing to summon the accused person in a case under Section 420 of the Indian Penal Code, read with Section 138 of the [Negotiable Instruments Act, 1881](#), as amended by Amendment Act No. 66 of the

1988.

2. The dispute arises out of a business transaction. A post-dated cheque for November 25, 1989, was issued by the accused/opposite party on October 15, 1989, which was to be presented in the bank on November 25, 1989. The said cheque was presented for encashment on February 19, 1990, in the bank : It was returned by the bank with letter dated February 27, 1990, with the slip 'refer to drawer' as there was insufficient amount in the account of the accused/opposite party. The cheque was dishonoured and not encashed. Being aggrieved by such dishonouring of the cheque, the criminal complaint aforementioned was filed. The complainant before filing the criminal complaint sent a notice dated March 8, 1990, through his counsel, Sri Maheshwari, advocate, for making payment of the amount of cheque.

3. The present petition under Section 482 of the Criminal Procedure Code is thus filed by the complainant. The specific finding about the nature of case as of a civil nature is supported by the admitted fact stated in the complaint that there had been a business transaction between the parties. Further, the fact was that the post-dated cheque in question was dated November 25, 1989, issued on October 15, 1989. The cheque was not presented on November 25, 1989, or on a near date. It was presented on February 19, 1990, when it was found that full amount was not there in the account of the accused. Since the cheque was presented after about 7 weeks of the due date for encashment of cheque, it cannot be conclusively said that on November 25, 1989, or near about that date there was no money in the bank account. Further, it also cannot be assumed that on the date of issuing of the cheque there was no intention of the accused to pay at all. In view of the admitted fact of having business transactions between the parties, the learned Sessions Judge was correct in saying that it was a case of civil nature and no offence under Section 420 of the Indian Penal Code was made out against the accused/opposite party.

4. The other argument which has been addressed by counsel for the petitioner is that the case under Section 138 of the [Negotiable Instruments Act, 1881](#), was fully made out and the courts below have not considered the said aspect of the matter

and illegally refused to summon the accused for the said offence. The provisions of Section 138 of the [Negotiable Instruments Act, 1881](#), are produced as under to appreciate the argument:

'138. Dishonour of cheque for insufficiency, etc., of funds in the account.--Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that 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 that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of the cheque, or with both :

Provided that nothing contained in this section shall apply unless--

(a) the 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 :

(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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid ; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.'

5. There is one provision about the taking of the cognizance of offences under the said Act provided in Section 142. The provision of Section 142 of the said Act is quoted as under :

'142. Cognizance of offences,--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque ;

(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 ;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.'

6. On an analysis of the aforesaid two Sections for making out a case under Section 138 of the Negotiable Instruments Act, the ingredients are (1) the payee of the cheque in case of non-payment of the cheque is required to send notice within fifteen days in writing to the drawer of the cheque from the date of receipt of information about the non-payment demanding the amount of cheque, (ii) the drawer fails to make payment of the amount within fifteen days from the date of receipt of the notice, there would be a case under Section 138 of the Negotiable Instruments Act provided the action is taken for cognizance of the offence as provided under Section 142 of the said Act.

7. In the present case, the information about the non-payment of cheque was received by the applicant on February 27, 1990. It is said that a notice to the accused was sent by a registered post on March 8, 1990. There is no evidence or acknowledgment receipt of the post office that the notice dated March 8, 1990, was ever served personally on the accused/opposite party. Thus, it was necessary to prima facie show that even after 15 days of the receipt of notice as contemplated under Section 138(b) of the Act, the accused/opposite party failed to pay the amount. In order to fasten criminal liability on a person, the requirement of law has to be fully complied with. In the present case, it has not been shown that the notice of demand as required under Section 138(b) of the Act was served on the opposite party. The postal acknowledgment, annexure 2-E, shows that it was delivered to one Guddu not to the opposite party. The said acknowledgment does

not show that it was addressed in the name of the accused/ opposite party. In the absence of service of notice under Section 138(b) of Act, no prosecution and cognizance of offence is permitted.

8. The petitioner has filed a true copy of the complaint dated March 22, 1990, which was dismissed by the learned Chief Judicial Magistrate on June 8, 1990. The petitioner after dismissal of the complaint on June 8, 1990, again filed a fresh complaint on June 13, 1990, before the Judicial Magistrate which too was dismissed under Section 203 of the Criminal Procedure Code on July 23, 1990. The petitioner appears to have filed the revision before the Sessions Judge against the order dated June 8, 1990, without disclosing that fresh complaint filed on June 13, 1990, was also dismissed under Section 203 of the Criminal Procedure Code on July 23, 1990. The petitioner nowhere in the affidavit disclosed that the original complaint dated March 22, 1990, was dismissed on June 8, 1990, and the second complaint case was filed on June 13, 1990, which was also dismissed on July 23, 1990. The proceedings under Section 482 of the Criminal Procedure Code are akin to the proceedings under Article 226 of the Constitution. The petitioner in case files a petition under Section 482, it is expected that true and correct facts have been stated in the affidavit. Any attempt to conceal material facts which may mislead the court is always fatal to such petitions. A perusal of the judgment of the learned sessions judge shows that the complaint case was dismissed on June 8, 1990, by the Chief Judicial Magistrate. The complainant/applicant again filed a fresh complaint on June 13, 1990, which too was dismissed on July 23, 1990, by the learned Judicial Magistrate I. The revision was filed by the petitioner against the judgment dated June 8, 1990, passed by the Chief Judicial Magistrate. No revision against the dismissal of the complaint case under Section 203 of the Criminal Procedure Code on July 23, 1990, appears to have been filed. Thus, the said order dated July 23, 1990, passed by the Judicial Magistrate I, became final. The petitioner came to the High Court by concealing material facts. In such circumstances, no extraordinary powers are to be invoked by this court.

9. In the absence of any proof that the notice under Section 138(b) of the Act was served on the accused/opposite party, there was no justification in prosecuting the

accused/opposite party for offence under Section 138(c) of the Negotiable Instruments Act. Since the petitioner admitted having business relations with the opposite party and the provisions of Section 138(c) of the Act are not complied with and the order dated July 23, 1990, dismissing the second complaint also under Section 203 of the Criminal Procedure Code, which became final. I do not find any circumstance to interfere under Section 482 of the Criminal Procedure Code.

10. The petition is dismissed.

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