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YOGENDRA PRATAP SINGH

v.

SAVITRI PANDEY & ANR.

(Criminal Appeal No. 605 of 2012)

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APRIL 03, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

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Negotiable Instruments Act, 1881 - ss. 138(c) and 142(b) - Offence punishable u/s. 138 - Whether cognizance of an offence could be taken on the basis of a complaint filed before expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of s. 138(c) - If no, whether the complainant could be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated u/s. 142 (b) for the filing of such a complaint has expired - Conflict in the judicial pronouncements - Matter referred to the larger bench - Reference to larger bench.

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Respondent issued four cheques in the favour of appellant and the same were dishonoured when presented for encashment. The respondent was served with the notice on 23.009.2008 calling upon him to pay the amount. On 07.10.2008, which is before the expiry of the stipulated period of 15 days, the appellant filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 against the respondent in the court of Additional Civil Judge, Magistrate. The Magistrate took cognizance of the offence on 14.10.2008 and issued summons to the respondent. The respondent filed a petition u/s. 482 Cr.P.C, challenging the said order. The High Court quashed the order passed by the Magistrate taking cognizance of the offence punishable u/s. 138 of the Act since the complaint having been filed within 15

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days of the service of the notice, was premature and the order passed by the Magistrate taking cognizance of the offence on the basis of such a complaint is legally bad. Therefore, the appellant filed the instant appeal.

The questions which arose for consideration in the instant appeal were whether cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 could 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 and, if no, whether the complainant could 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?

Referring the matter to larger Bench, the Court

HELD: 1.1 Proviso to Section 138 of the Negotiable Instruments Act, 1881 is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have 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. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make 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. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the

A cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque. [Para 5] [200-F-H; 201-A-C]

1.2 Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non-obstante clause. It provides that 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 and 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. In terms of sub-section (c) to Section 142, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class is competent to try any offence punishable under Section 138. [Para 6] [201-C-E]

1.3 A conjoint reading of Sections 138 and 142 makes it abundantly clear that a complaint under Section 138 can be filed only after the cause of action to do so accrues to the complainant in terms of clause (c) of the proviso to Section 138 which as noticed earlier happens only when the drawer of the cheque in question fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) to the proviso to Section 138. [Para 7] [201-F-G]

1.4 A complaint filed in anticipation of the accrual of the cause of action under clause (c) of the proviso to Section 138 would be a premature complaint. The complainant would have no legal justification to file such a complaint for the cause of action to do so would not

accrue to him till such time the drawer of the cheque fails to pay the amount covered by the cheque within the stipulated period of 15 days from the date of the receipt of the notice. It follows that on the date such a premature complaint is presented to the Magistrate the same can and ought to be dismissed as premature and thus, not maintainable. [Para 8] [201-G-H; 202-A-B]

1.5 In the instant case, the Magistrate took cognizance of the offence on 14th October, 2008 by which time the stipulated period of 15 days had expired but no payment towards the cheque amount was made to the complainant even upto the date the cognizance was taken. The commission of the offence was thus, complete on the date cognizance was taken, but the complaint on the basis whereof the cognizance was taken remained premature. [Para 8] [202-B-C]

1.6 As regards the question whether the subsequent development namely completion of the third requirement for the commission of an offence under Section 138 could be taken note of for purposes of cognizance under Section 142 of the Act, the complaint filed by the appellant was plainly premature. The fact that subsequent to the filing of the complaint an offence under Section 138 had been committed was no reason for the court to ignore the fact that the complaint on the basis of which it was taking cognizance of the offence was not a valid complaint. It is said so because Section 142 of the Negotiable Instruments Act forbids taking of cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or the holder of the cheque in due course. Such a complaint in order to be treated as a complaint within the contemplation of Section 142 ought to be a valid complaint. This in turn means that such a complaint must have been filed after the complainant had the cause of action to do so under clause (c) of the proviso to Section 138. A complaint, that

A is, premature was no complaint in the eyes of law and no cognizance could be taken on the basis thereof. [Para 9] [202-D-H]

B 1.7 The view taken in the two decisions by this Court - Narsingh Das Tapadia's case and Sarav Investment & Financial Consultancy Private Limited and Anr.'s case are at variance with each other. That apart, the decision in Narsingh Das Tapadia's case does not, correctly state the legal position and may require a fresh look by a larger Bench of this Court. The cleavage in the judicial opinion on the question does not appear to be confined to the judgments of this Court alone. Judicial opinion on the question is split even among the High Courts in the country. The conflict in the judicial pronouncements, therefore, needs to be resolved authoritatively. [Paras 10, C D 11, 12, 13 and 15] [203-A-G; 204-H; 205-B; 206-C]

E *Narsingh Das Tapadia v. Goverdhan Das Partani and Anr. (2000) 7 SCC 183; 2000 (3) Suppl. SCR 171; **Sarav Investment & Financial Consultancy Private Limited and Anr. v. Llyod Register of Shipping Indian Office Staff Provident Fund and Anr. (2007) 14 SCC 753; 2007 (10) SCR 1110; Sandip Guha v. Saktipada Ghosh 2008 (3) CHN 214; Niranjana Sahoo v. Utkal Sanitary, BBSR, (Cri. Misc. Case No. 889 of 1996, decided on 13th February, 1998); Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar and Anr. F 1994 (3) Bom CR 355; Ashok Verma v. Ritesh Agro Pvt. Ltd. 1995 (1) Bank CLR 103; N. Venkata Sivaram Prasad v. Rajeswari Constructions 1996 Cri.L.J. 3409 (A.P.); Smt. Hem Lata Gupta v. State of U.P and Anr. 2002 Cri.L.J. 1522 (All); Ganga Ram Singh v. State of U.P. & Ors. 2005 Cri.L.J. 3681 G (All); Yunus Khan v. Mazhar Khan 2004 (1) GLT 652; Mahendra Agarwal v. Gopi Ram Mahajan (RLW 2003 (1) Raj 673); Zenith Fashions Makers (P) Ltd. v. Ultimate Fashion Makers Ltd. and Anr. 121 (2005) DLT 297; Bapulal v. Krapachand Jain 2004 Cri.L.J. 1140; Rattan Chand v. H Kanwar Ram Kripal and Anr. 2010 Cri.L.J. 706; I.S.P.

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Solutions India (P) Ltd. and Ors. v. Kuppuraj 2006 Cri.L.J. 3711; *Harpreet Hosiery Rehari v. Nitu Mahajan* 2000 Cri.L.J. 3625; *S. Janak Singh v. Pritpal Singh* 2007 (2) J.K. 91; *Ashok Hegde v. Jathin Attawan* 1997 Cri.L.J. 3691; *Arun Hegde and Anr. v. M.J. Shetty* ILR 2001 Kar 3295 - referred to.

1.8 The second question formulated may arise only in case the answer to the first question is in the negative. If no cognizance could be taken on the basis of a complaint filed prematurely, the question would be whether such a complaint could be presented again after the expiry of 15 days and beyond the period of one month under the clause (b) of Section 142 of the Act. Whether or not the complainant can in a situation like the one in the case at hand invoke the proviso to clause (b) and whether or not this Court can and ought to invoke its power under Section 142 to permit the complainant to file a complaint even after the expiry of period of one month stipulated under Section 142 are incidental questions that may fall for determination while answering question no.2. [Para 16] [206-D-F]

1.9 The two questions formulated are referred to a three-Judge Bench of this Court. [Para 17] [206-G]

Case Law Reference:

2000 (3) Suppl. SCR 171	Referred to	Para 10
2007 (10) SCR 1110	Referred to	Para 11
2008 (3) CHN 214	Referred to	Para 13
1994 (3) Bom CR 355	Referred to	Para 13
1995 (1) Bank CLR 103	Referred to	Para 13
1996 Cri.L.J. 3409 (A.P.)	Referred to	Para 13
2002 Cri.L.J. 1522 (All)	Referred to	Para 14

A	2005 Cri.L.J. 3681 (All)	Referred to	Para 14
	2004 (1) GLT 652	Referred to	Para 14
	RLW 2003 (1) Raj 673	Referred to	Para 14
B	121 (2005) DLT 297	Referred to	Para 14
	2004 Cri.L.J. 1140	Referred to	Para 14
	2010 Cri.L.J. 706	Referred to	Para 14
	2006 Cri.L.J. 3711	Referred to	Para 14
C	2000 Cri.L.J. 3625	Referred to	Para 15
	2007 (2) J.K. 91	Referred to	Para 15
	1997 Cri.L.J. 3691	Referred to	Para 15
D	ILR 2001 Kar 3295	Referred to	Para 15

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E From the Judgment & Order dated 21.05.2010 of the High Court of Allahabad in Criminal Miscellaneous Application No. 773 of 2009.

Shakil Ahmed, Syed Mohd. Moonis Abbas for the Appellant.

F JN Dubey, Anurag Dubey, Anu Sawhney, Meenesh Dubey, S.R. Setia for the Respondents.

The Judgment of the Court was delivered

G **J U D G M E N T**

1. Leave granted.

H 2. This appeal assails an order passed by the High Court whereby it has allowed a petition under Section 482 of the Cr.P.C. and quashed the order passed by the Magistrate taking

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cognizance of an offence punishable under Section 138 of The Negotiable Instruments Act, 1881. The following two questions arise for consideration: A

(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, B

(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? C

3. The questions arise in the following factual backdrop: D

The appellant filed a complaint under Section 138 of the Negotiable Instruments Act against respondent No.1 Smt. Savitri Pandey in the Court of Additional Civil Judge (J.D.)/ Magistrate, Sonbhadra in the State of Uttar Pradesh. The respondent's case was that four cheques issued by the accused-respondent in his favour were dishonoured, when presented for encashment. A notice calling upon the respondent-drawer of the cheque to pay the amount covered by the cheques was issued and duly served upon the respondent as required under Section 138 (c) of The Negotiable Instruments Act, 1881. No payment was, however, made by the accused till 7th October, 2008 when a complaint under Section 138 of the Act aforementioned was filed before the Magistrate. Significantly enough the notice in question having been served on 23rd September, 2008, the complaint presented on 7th October, 2008 was filed before expiry of the stipulated period of 15 days. The Magistrate all the same took cognizance of the offence on 14th October, 2008 and issued summons to the accused, who then assailed the said order in E
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A a petition under Section 482 of the Cr.P.C. before the High Court of Judicature at Allahabad. The High court took the view that since the complaint had been filed within 15 days of the service of the notice the same was clearly premature and the order passed by the Magistrate taking cognizance of the
 B offence on the basis of such a complaint is legally bad. The High Court accordingly quashed the complaint and the entire proceedings relating thereto in terms of its order impugned in the present appeal.

C 4. We have heard learned counsel for the parties at some length. Section 138 of the Negotiable Instrument Act, inter alia, provides:

"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 provisions of this Act, be punished with imprisonment for a term which may extend to two year,
 D or with fine which may extend to twice the amount of the cheque, or with both."
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5. Proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have 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. The second condition is that the payee or the holder in due course of the
 G cheque, as the case may be, ought to make a demand for the
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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. The third condition is that the drawer of such a cheque should have failed to make 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. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.

6. Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non-obstante clause. It provides that 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 and 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. In terms of sub-section (c) to Section 142, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class is competent to try any offence punishable under Section 138.

7. A conjoint reading of Sections 138 and 142 makes it abundantly clear that a complaint under Section 138 can be filed only after the cause of action to do so accrues to the complainant in terms of clause (c) of the proviso to Section 138 which as noticed earlier happens only when the drawer of the cheque in question fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) to the proviso to Section 138.

8. The upshot of the above discussion is that a complaint filed in anticipation of the accrual of the cause of action under clause (c) of the proviso to Section 138 would be a premature complaint. The complainant will have no legal justification to file

A such a complaint for the cause of action to do so would not
accrue to him till such time the drawer of the cheque fails to
pay the amount covered by the cheque within the stipulated
period of 15 days from the date of the receipt of the notice. It
follows that on the date such a premature complaint is
B presented to the Magistrate the same can and ought to be
dismissed as premature and hence not maintainable. That is,
however, not what happened in the case at hand. In the present
case, the Magistrate took cognizance of the offence on 14th
October, 2008 by which time the stipulated period of 15 days
C had expired but no payment towards the cheque amount was
made to the complainant even upto the date the cognizance
was taken. The commission of the offence was thus complete
on the date cognizance was taken, but the complaint on the
basis whereof the cognizance was taken remained premature.

D 9. The question in the above backdrop is whether the
subsequent development namely completion of the third
requirement for the commission of an offence under Section
138 could be taken note of for purposes of cognizance under
Section 142 of the Act. The complaint filed by the appellant was
E in our view plainly premature. The fact that subsequent to the
filing of the complaint an offence under Section 138 had been
committed was no reason for the court to ignore the fact that
the complaint on the basis of which it was taking cognizance
of the offence was not a valid complaint. We say so because
F Section 142 of the Negotiable Instruments Act forbids taking
of cognizance of any offence punishable under Section 138
except upon a complaint, in writing, made by the payee or the
holder of the cheque in due course. Such a complaint in order
to be treated as a complaint within the contemplation of Section
142 ought to be a valid complaint. This in turn means that such
G a complaint must have been filed after the complainant had the
cause of action to do so under clause (c) of the proviso to
Section 138. A complaint, that is, premature was no complaint
in the eyes of law and no cognizance could be taken on the
basis thereof.

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10. Having said that, we must refer to two decisions of this Court that were cited at the Bar by learned counsel for the parties in support of their respective submissions. In *Narsingh Das Tapadia v. Goverdhan Das Partani and Anr.* (2000) 7 SCC 183, a similar question arose before a two-Judge Bench of this Court. That was also a case where on the date the complaint was filed the complainant had no cause of action but by the time cognizance of the offence was taken by the Magistrate, the stipulated period of 15 days had expired and the commission of the offence was complete. This Court drew a distinction between "taking cognizance of an offence" and "the filing of a complaint by the complainant". This Court held that while there was a bar to the taking of a cognizance by the Magistrate, there was no bar to the filing of a complaint and that a complaint filed even before the expiry of the period of 15 days could be made a basis for taking cognizance of the offence provided cognizance was taken after the expiry of the said period. This Court observed:

"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."

11. The other decision pressed into service before us was also delivered by a two Judge Bench of this Court in *Sarav Investment & Financial Consultancy Private Limited and Another v. Llyod Register of Shipping Indian Office Staff Provident Fund and Anr.* (2007) 14 SCC 753. There this Court held that Section 138 of the Negotiable Instruments Act contains a penal provision and 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 and the severe penalty

- A sanctioned by it, the same warrants a strict construction. The Court further held that service of a notice in terms of Section 138 proviso (b) of the Act is a part of the cause of action for lodging the complaint under Section 138 and that service of a notice under clause (b) of the proviso to Section 138 was an essential requirement to be complied with before a complaint could be filed.

The Court observed:

- C "16. 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 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. What are the requirements of service of a notice is no longer *res integra* in view of the recent decision of this Court in *C.C. Alavi Haji v. Palapetty Muhammed*"

- G 12. It follows that a complaint filed before the expiry of the stipulated period of 15 days was not a valid complaint for purposes of Section 142 of the Act. To that extent, therefore, the view taken in the two decisions referred to above are at variance with each other. That apart, the decision in *Narsingh*

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Das Tapadia (supra) does not, in our opinion, correctly state the legal position and may require a fresh look by a larger Bench of this Court. The cleavage in the judicial opinion on the question does not appear to be confined to the judgments of this Court alone.

13. Judicial opinion on the question is split even among the High Courts in the country. For instance, the High Court of Calcutta in *Sandip Guha v. Saktipada Ghosh* 2008 (3) CHN 214, High Court of Orissa in *Niranjan Sahoo v. Utkal Sanitary, BBSR*, [Crl. Misc. Case No.889 of 1996, decided on 13th February, 1998], High Court of Bombay in *Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar and Anr.* 1994 (3) Bom CR 355, High Court of Punjab and Haryana in *Ashok Verma v. Ritesh Agro Pvt. Ltd.* 1995 (1) Bank CLR 103 and the High Court of Andhra Pradesh in *N. Venkata Sivaram Prasad v. Rajeswari Constructions* 1996 Cri.L.J. 3409 (A.P.) have taken the view that a complaint filed within 15 days of the notice period was premature and hence liable to be quashed.

14. The High Court of Allahabad on the other hand has taken a contrary view in *Smt. Hem Lata Gupta v. State of U.P & Anr.* 2002 Cri.L.J. 1522 (All) and held that cognizance taken on the basis of a complaint filed within 15 days of the notice period was perfectly in order if such cognizance was taken after the expiry of the said period. To the same effect are the decisions of High Court of Allahabad in *Ganga Ram Singh v. State of U.P. & Ors.* 2005 Cri.L.J. 3681 (All), High Court of Gauhati in *Yunus Khan v. Mazhar Khan*, [2004 (1) GLT 652], High Court of Rajasthan (Jaipur Bench) in *Mahendra Agarwal v. Gopi Ram Mahajan*, [RLW 2003 (1) Raj 673], High Court of Delhi in *Zenith Fashions Makers (P) Ltd. v. Ultimate Fashion Makers Ltd. and Anr.*, [121 (2005) DLT 297], High Court of Madhya Pradesh, Indore Bench in *Bapulal v. Krapachand Jain*, 2004 Cri.L.J. 1140, High Court of Himachal Pradesh in *Rattan Chand v. Kanwar Ram Kripal and Anr.* 2010 Cri.L.J. 706 and High Court of Madras in *I.S.P. Solutions India (P) Ltd. and Ors. v. Kuppuraj*, 2006 Cri.L.J. 3711.

A 15. It is noteworthy that the same High Court has in certain cases taken different views on the subject. For instance the High Court of Jammu and Kashmir has in *Harpreet Hosiery Rehari v. Nitu Mahajan*, 2000 Cri.L.J. 3625 held that dismissal of complaint on ground of that the same is premature is valid; while in *S. Janak Singh v. Pritpal Singh*, 2007 (2) J.K. 91, it has held that cognizance taken on a complaint filed before expiry of 15 days of the notice, after the expiry of the said period is permissible. A similar difference of opinion can also be seen in two decisions of the Karnataka High Court in *Ashok Hegde v. Jathin Attawan*, 1997 Cri.L.J. 3691 and *Arun Hegde and Anr. v. M.J. Shetty*, ILR 2001 Kar 3295. The conflict in the judicial pronouncements referred to above, therefore, needs to be resolved authoritatively.

D 16. The second question formulated earlier may arise only in case the answer to the first question is in the negative. If no cognizance could be taken on the basis of a complaint filed prematurely, the question would be whether such a complaint could be presented again after the expiry of 15 days and beyond the period of one month under the clause (b) of Section E 142 of the Act. Whether or not the complainant can in a situation like the one in the case at hand invoke the proviso to clause (b) and whether or not this Court can and ought to invoke its power under Section 142 to permit the complainant to file a complaint even after the expiry of period of one month stipulated F under Section 142 are incidental questions that may fall for determination while answering question no.2.

G 17. In the light of the above, we deem it fit to refer the two questions formulated in the beginning of the judgment to a three-Judge Bench of this Court. The Registry shall place the file before the Chief Justice for constitution of an appropriate Bench.

N.J.

Matter referred to larger bench.

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