A BIRENDRA PRASAD SAH

v.

THE STATE OF BIHAR & ANR.

(Criminal Appeal No. 000868 of 2019)

B MAY 08, 2019

[DR. DHANANJAYA Y CHANDRACHUD AND HEMANT GUPTA, JJ.]

Code of Criminal Procedure, 1973: s.482 – Quashing of C *cognizance of offence taken under s.138 NI Act – Case of appellant was that on receipt of memo on 4.12.2015 from bank regarding dishonour of cheques issued in his favour by respondent, the appellant issued a legal notice on 31.12.2015 – According to appellant, between 14.2.2016 and 23.2.2016, he made queries with* D *the postal department but no proof of service was provided to him – Accordingly on 26.2.2016, he issued a second notice – This was replied by respondent on 2.3.2016 – Thereafter, on 11.5.2016, appellant filed complaint under s.138 – Magistrate condoned the delay in filing complaint and took cognizance of offence – High Court held that complaint was not filed within the statutory period* E *of thirty days and quashed the proceedings – On appeal, held: The appellant in the complaint had specifically narrated the circumstance that despite repeated requests to the postal department, no acknowledgment of the notice was furnished to him – In such circumstance, the appellant issued a second notice – The requirement* F *specified in proviso (b) to s.138 is that the notice must be issued within thirty days of the receipt of the memo of dishonour – It was first notice dated 31.12.2015 which constituted the cause of action for the complaint under s.138 – The complaint was instituted on 11.5.2016 – Under s.142(1), a complaint has to be instituted within one month of the date on which the cause of action has arisen* G *under clause (c) of the proviso to s.138 – The proviso, however, stipulates that cognizance of the complaint may be taken by the court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period – Delay in filing complaint was satisfactorily explained*

H

in the complaint – High Court had merely adverted to the presumption that the first notice was deemed to have been served if it was dispatched in the ordinary course – Even if that presumption was applicable, sufficient cause was shown by the appellant for condoning the delay in instituting the complaint – The order is High Court is, therefore, set aside and complaint is restored to the file of the trial court – Negotiable Instruments Act, 1881 – ss.138, proviso, clause (b), (c), s.142(1).

Allowing the appeal, the Court

HELD : The complaint was instituted on 11 May 2016. Under Section 142(1), a complaint has to be instituted within one month of the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The proviso however stipulates that cognizance of the complaint may be taken by the court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period. Both in paragraphs 7 and 8 of the complaint, the appellant indicated adequate and sufficient reasons for not being able to institute the complaint within the stipulated period. The CJM condoned the delay on the cause which was shown by the appellant for the period commencing from 6 April 2018. The High Court has merely adverted to the presumption that the first notice would be deemed to have been served if it was dispatched in the ordinary course. Even if that presumption applies, sufficient cause was shown by the appellant for condoning the delay in instituting the complaint taking the basis of the complaint as the issuance of the first legal notice dated 31 December 2015. The impugned judgment of the High Court is unsustainable. The order passed by the Single Judge is set aside. The complaint accordingly stood restored to the file of the trial court. [Paras 11, 12] [707-C-F; 708-A-B]

MSR Leathers v. S Palaniappan **(2013) 1 SCC 177 : [2012] 9 SCR 165 – referred to.**

Case Law Reference

[2012] 9 SCR 165	**referred to**	**Para 7**

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 868 of 2019.

From the Judgment and Order dated 10.05.2018 of the High Court of Judicature at Patna in Criminal Miscellaneous No. 27495 of 2017.

Nagendra Rai, Sr. Adv., Ms. Prerna Singh, Shantanu Sagar, Aakash
B and Ms. Priya Ranjan Advs. for the Appellant.

Jay Saula, Sr. Adv., Keshav Mohan, Rishi K. Awasthi, Santosh Kumar-I, Arvind Gupta and Sanjeev Kumar Verma, Advs. for the Respondents.

The Judgment of the Court was delivered by

C **DR. DHANANJAYA Y CHANDRACHUD, J.**

1. Delay condoned.

2. Leave granted.

3. This appeal arises from a judgment of a learned Single Judge of the High Court of Judicature at Patna dated 10 May 2018 by which
D an order taking cognizance of an offence under Section 138 of the Negotiable Instruments Act, 1881[1] has been quashed.

4. The facts, briefly stated, are thus:

5. The dispute arises over two cheques drawn on the State Bank of India in the amount of Rs 36,00,000 and Rs 13,00,000 which were
E returned unpaid under a memo issued by the UCO Bank, Begusarai on 20 November 2015. The appellant received the memo on 4 December 2015. Following this, a legal notice was issued on 31 December 2015 intimating the dishonour of the cheque. According to the appellant, between 14 February 2016 and 23 February 2016, he made queries with
F the postal department but no proof of service was provided. Accordingly, on 26 February 2016, a second legal notice was issued. This was replied to by the second respondent on 2 March 2016. Eventually, a complaint under Section 138 was instituted on 11 May 2016.

6. The Chief Judicial Magistrate, Begusarai by an order dated 14 July 2016, condoned the delay in filing the complaint. While taking
G cognizance, the CJM issued summons to the second respondent. The second respondent instituted revisional proceedings before the Sessions Judge which were rejected on 8 March 2017. In a further recourse to the High Court under Section 482 CrPC, the learned Single Judge held that the complaint under Section 138 was not filed within the statutory

H [1] "Act"

period of thirty days prescribed under Section 138 as a result of which the proceedings were quashed.

7. Assailing the judgment of the High Court, Mr Nagendra Rai, learned Senior Counsel submitted that in **MSR Leathers** v. **S Palaniappan**[2] a three judge Bench of this Court has taken the view that the issuance of successive notices is permissible under the provisions of Section 138 having regard to the object of the legislation. Moreover, the learned Senior Counsel submitted that the delay in the institution of the complaint was condoned by the CJM under Section 142. Hence, there was an error on the part of the High Court in quashing the proceedings.

8. On the other hand, Mr Jay Savla, learned Senior Counsel appearing on behalf of the second respondent submitted that:

(i) The second legal notice dated 26 February 2016 was sent beyond a period of thirty days of the receipt of the memo of dishonour on 4 December 2015 and hence cannot be the basis of a valid institution of a criminal complaint;

(ii) If at all, the complaint could have only been instituted on the basis of the first legal notice dated 31 December 2015 which was within thirty days of the receipt of the memo of dishonour;

(iii) The complaint which was lodged on 11 May 2016 was beyond the stipulated period from the date of issuance of the first notice;

(iv) The CJM had condoned the delay which had occurred in the institution of the complaint only for the period after 6 April 2016 after the issuance of the second notice; and

(v) In the decision of the three judge Bench in **MSR Leathers** (supra), there was a re-presentation of the cheque as a result of which, a fresh notice was held to be within the ambit of the law.

9. Section 138 provides thus:

> "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

[2] (2013) 1 SCC 177

A 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[3] [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

B Provided that nothing contained in this section shall apply unless—

C (a) the cheque has been presented to the bank within a period of six months[4] from the date on which it is drawn or within the period of its validity, whichever is earlier;

D (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,[5] [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

E (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."

10. In the present case, the facts narrated above indicate that the appellant issued a legal notice on 31 December 2015. This was within a period of thirty days of the receipt of the memo of dishonour on 4 December 2015. Consequently, the requirement stipulated in proviso (b) to Section 138 was fulfilled. Proviso (c) spells out a requirement that the drawer of the cheque has failed to make payment to the holder in due course or payee within fifteen days of the receipt of the notice. The second respondent does not as a matter of fact, admit that the legal notice dated 31 December 2015 was served on him. The appellant has in the complaint specifically narrated the circumstance that despite

F

G

[3] Sub. by Act 55 of 2002, sec. 7, for a "term which may be extended to one year" (w.e.f. 6-2-2003).

[4] The period has been reduced from six months to three months *vide* R.B.I Notification No. RBI/2011-12/251, DBOD.AML BC. No. 47/14.01.001/2011-2012, dated 4th November, 2011 (w.e.f. 1-4-2012).

H [5] Subs. by Act 55 of 2002, sec. 7, for "within fifteen days" (w.e.f. 6-2-2003).

repeated requests to the postal department, no acknowledgment of the notice was furnished. It was in these circumstances that the appellant issued a second notice dated 26 February 2016. Cognizant as we are of the requirement specified in proviso (b) to Section 138, that the notice must be issued within thirty days of the receipt of the memo of dishonour, we have proceeded on the basis that it is the first notice dated 31 December 2015 which constitutes the cause of action for the complaint under Section 138.

11. The complaint was instituted on 11 May 2016. Under Section 142(1), a complaint has to be instituted within one month of the date on which the cause of action has arisen under clause (c) of the proviso to Section 138[6]. The proviso however stipulates that cognizance of the complaint may be taken by the court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period. Both in paragraphs 7 and 8 of the complaint, the appellant indicated adequate and sufficient reasons for not being able to institute the complaint within the stipulated period. These have been adverted to above. The CJM condoned the delay on the cause which was shown by the appellant for the period commencing from 6 April 2018. However, if paragraphs 7 and 8 of the complaint are read together, it is evident that the appellant had indicated sufficient cause for seeking condonation of the delay in the institution of the complaint. The High Court has merely adverted to the presumption that the first notice would be deemed to have been served if it was dispatched in the ordinary course. Even if that presumption applies, we are of the view that sufficient cause was shown by the appellant for condoning the delay in instituting the complaint taking the basis of the complaint as the issuance of the first legal notice dated 31 December 2015.

---

[6] 142 (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:
[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period];
(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..

A 12. In the view which we have taken, we have come to the conclusion that the impugned judgment of the High Court is unsustainable. The appeal is accordingly allowed and the order passed by the learned Single Judge is set aside. The complaint shall accordingly stand restored to the file of the trial court.

B 13. We have not expressed any opinion on the merits of the rival contentions which will be adjudicated upon during the trial.

Devika Gujral Appeal allowed.