Kamlesh Kumar vs State Of Bihar & Anr on 11 December, 2013

Equivalent citations: AIR 2014 SUPREME COURT 660, 2014 AIR SCW 306, AIR 2014 SC (CRIMINAL) 427, 2014 ACD 465 (SC), (2014) 2 MADLW(CRI) 325, (2014) 57 OCR 363, (2014) 133 ALLINDCAS 42 (SC), (2014) 1 PAT LJR 299, (2014) 2 MH LJ (CRI) 1, (2014) 1 DLT(CRL) 742, 2014 (1) SCC (CRI) 839, (2014) 1 ORISSA LR 456, (2014) 3 RAJ LW 1880, (2014) 4 MAH LJ 30, (2014) 2 MPLJ 672, (2014) 1 NIJ 228, 2014 CRILR(SC&MP) 103, 2014 CALCRILR 2 18, (2014) 1 ALLCRIR 18, (2014) 2 CIVLJ 571, (2014) 2 KCCR 103, (2014) 118 CUT LT 47, (2014) 3 MPHT 512, (2014) 1 SIM LC 527, 2014 CRILR(SC MAH GUJ) 1 103, 2014 ALLMR(CRI) 348, 2014 (2) SCC 424, 2014 (133) ALLINDCAS 42, 2013 (15) SCALE 202, (2014) 2 PUN LR 701, (2014) 1 CURCRIR 108, (2014) 1 CRIMES 108, (2014) 1 CURCC 22, (2014) 1 CRILR(RAJ) 103, (2014) 2 CALLT 1, (2014) 1 UC 197, (2014) 1 CIVILCOURTC 343, (2014) 1 MAD LJ(CRI) 230, (2014) 1 RECCRIR 332, (2014) 1 RECCIVR 334, (2013) 15 SCALE 202, (2014) 1 JLJR 163, (2014) 84 ALLCRIC 311, (2014) 1 ALLCRILR 647

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Bench: A.K.Sikri, K.S.Radhakrishnan

[REPORTABLE]

IN THE SUPREME COURT O F INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2083/2013
(arising out of SLP(Criminal) No. 10056 of 2012)

Kamlesh Kumar ….Appellant

Vs.

State of Bihar & Anr. ….Respondents

J U D G M E N T

A.K.SIKRI,J.

1. Leave granted.

2. The appellant herein is facing trial in the complaint filed by respondent No.2 under Section 138 of the Negotiable Instruments Act (N.I. Act for short). According to the appellant, criminal complaint is not maintainable and no such proceedings could be launched against him. He, therefore, approached the High Court of Judicature at Patna in the form of a petition under Section 482 of the Cr.P.C. for quashing of the order dated 28.10.2009 whereby the Court of Magistrate had taken cognizance of the complaint filed by the respondent No.2 issued summons to the appellant. This petition, however, has been dismissed by the High Court vide impugned judgment dated 1.11.2012. The solitary reason given by the High Court while dismissing the petition is that trial has already commenced and two witnesses have already been examined and discharged. Hence, at this stage it would not be proper to interfere with the trial. Various contentions which were raised by the appellant questioning the very maintainability of the complaint under Section 138 of the N.I. Act are not gone into by the High Court with the observations that those contentions would be available to the appellant before the trial court, subject to the rebuttal of respondent No.2.

3. Mr. Mishra, learned senior counsel appearing for the appellant submitted that even on admitted facts the complaint was untenable as it was clearly time barred and not filed within the stipulated period prescribed in law and therefore the High Court could not have scuttled the issue raised by the appellant by merely relegating the appellant to the trial court when the issue could be decided on the admitted facts on records. He, further, submitted that the appellant had approached the High Court without loss of any time and if during the pendency of the petition filed by the appellant under Section 482, Cr.P.C., two witnesses had been examined in the meantime, that factor could not have weighed against the appellant.

4. In order to understand the controversy, we may give basic facts which are undisputed.

5. The complaint under Section 138 of the N.I. Act is filed by respondent No.2 on the basis of cheque bearing No.003285 drawn on Bank of India, Mahua Branch where the appellant holds Bank Account bearing No.23371. This cheque was for a sum of Rs.3,45,000/-. The complainant had presented this cheque on 25.10.2008 which was returned dishonoured by the Bank. The defence on merits set up by the appellant is that he is a doctor by profession who is having his private practice. He found that certain cheques, some signed and some unsigned, were missing from his clinic in December 2006 in respect to which he had even given information to the Sub- Divisional Officer, Mahua, on 30th December 2006. Cheque No. 003285 was also one of those stolen cheques. We have stated this defence of the appellant just for record and are not going into this explanation of the appellant or influenced by it. We only tend to examine as to whether on admitted events, complaint is not maintainable.

6. The cheque in question was presented on 25.10.2008. After it was dishonoured, complainant issued notice dated 27.10.2008 to the appellant. The appellant did not accede to the demand contained in the said notice. Even the complainant chose not to file any complaint under Section 138 of the N. I. Act at that time. Instead, he presented same very cheque again for encashment through his banker on 10.11.2008. It bounced this time as well because of insufficient funds. Another legal

notice dated 17.12.2008 was sent to the appellant. As this legal notice also did not invoke any positive response from the appellant, this time the complainant filed the complaint dated 7.01.2009. The summary of the aforesaid events, accordingly, is as under:-

Date	Events
25.10.2008	Cheque presented
27.10.2008	Legal Notice
10.11.2008	2nd presentation
17.12.2008	Legal Notice
07.01.2009	Complaint filed

7. On the basis of the aforesaid facts, the submission of Mr. Mishra was that the complaint was not filed within the limitation prescribed under Section 138 read with Section 142 of the N. I. Act. To appreciate this contention, we first state the aforesaid provision which reads as under:

> "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 be extended to two years, 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, whoever 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 thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
>
> (c) the drawyer 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.

142. Cognizance of offences.- 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.]"

8. In the present case, the complainant had not filed the complaint on the dishonor of the cheque in the first instance, but presented the said cheque again for encashment. This right of the complainant in presenting the same very cheque for the second time is available to him under the aforesaid provision. This aspect is already authoritatively determined by this Court in MSR Leathers vs. S.Palaniappan & Anr. (2013) 1 SCC 177.

Specific question which was formulated for consideration by the Court and referred to three Judge Bench in that case, the following question for determination was as under:

"Whether the payee or holder of a cheque can initiate prosecution for an offence under Section 138 of the Negotiable Instruments Act, 1881 for its dishonor for the second time, if he had not initiated any action on the earlier cause of action?" This question was answered by the three Judge Bench in the aforesaid matter in the following manner:

"What is important is that neither Section 138 nor Section 142 or any other provision contained in the Act forbids the holder or payee of the cheque from presenting the cheque for encashment on any number of occasions within a period of six months of its issue or within the period of its validity, whichever is earlier. That such presentation will be perfectly legal and justified was not disputed before us even at the Bar by the learned counsel appearing for the parties and rightly so in the light of the judicial pronouncements on that question which are all unanimous. Even Sadanandan case, the correctness whereof we are examining, recognized that the holder or the payee of the cheque has the right to present the same any number of times for encashment during the period of six months or during the period of its validity, whichever is earlier."

9. To this extent, there cannot be any quarrel and the act of the complainant in presenting the cheque again cannot be questioned by the appellant. However, we find

that when the cheque was presented second time on 10.11.2008 and was returned unpaid, legal notice for demand was issued only on 17.12.2008 which was not within 30 days of the receipt of the information by him from the Bank regarding the return of the cheque as unpaid. Non-issuance of notice within the limitation prescribed has rendered the complaint as not maintainable.

10. In MSR Leathers (supra), this Court analyzed the provisions of Sections 138 and 142 of the N.I. Act in the following manner:

"The proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonor 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 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, 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.

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, by 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 clause (c) to Section 142, no count 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.

A careful reading of the above provisions makes it manifest that a complaint under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of the proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque 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) of the proviso to Section 138 of the Act.

The presentation of the cheque and dishonor thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes "cause

of action" within the meaning of Sections 138 and 142 (b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For a dishonor to culminate into the commission of an offence of which a court may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque, and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonor of the cheque that the holder/payee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him. Therefore, there is, nothing in the proviso to Section 138 or Section 142 for that matter, to oblige the holder/payee of a dishonoured cheque to necessarily file a complaint even when he has acquired an indefeasible right to do so. The fact that an offence is complete need not necessarily lead to launch of prosecution especially when the offence is not a cognizable one. It follows that the complainant may, even when he has the immediate right to institute criminal proceedings against the drawer of the cheque, either at the request of the holder/payee of the cheque or on his own volition, refrain from instituting the proceedings based on the cause of action that has accrued to him. Such a decision to defer prosecution may be impelled by several considerations but more importantly it may be induced by an assurance which the drawer extends to the holder of the cheque that given some time the payment covered by the cheques would be arranged, in the process rendering a time- consuming and generally expensive legal recourse unnecessary. It may also be induced by a belief that a fresh presentation of the cheque may result in encashment for a variety of reasons including the vicissitudes of trade and business dealings where financial accommodation given by the parties to each other is not an unknown phenomenon. Suffice it to say that there is nothing in the provisions of the Act that forbids the holder/payee of the cheque to demand by service of a fresh notice under clause (b) of the proviso to Section 138 of the Act, the amount covered by the cheque, should there be a second or a successive dishonor of the cheque on its presentation."

11. It is thus clear that period of limitation is not to be counted from the date when the cheque in question was presented in the first instance on 25.10.2008 or the legal notice was issued on 27.10.2008, inasmuch as the cheque was presented again on 10.11.2008. For the purposes of limitation, in so far as legal notice is concerned, it is to be served within 30 days of the receipt of information by the drawyee from the bank regarding the return of the cheque as unpaid. Therefore, after the cheque is returned unpaid, notice has to be issued within 30 days of the receipt of information in this behalf. That is the period of limitation provided for issuance of legal notice calling upon the drawer of the cheque to make the payment. After the sending of this notice 15 days time is to be given to the noticee, from the date of receipt of the said notice to make the payment, if that is already not done. If noticee fails to make the payment, the offence can be said to have been committed and in that event cause of

action for filing the complaint would accrue to the complainant and he is given one month time from the date of cause of action to file the complaint.

12. Applying the aforesaid principles, in the present case, we find that cheque was presented, second time, on 10.11.2008. The complainant, however, sent the legal notice on 17.12.2008 i.e. much after the expiry of the 30 days. It is clear from the complaint filed by the complainant himself that he had gone to the bank for encashment the cheque on 10.11.2008 but the cheque was not honoured due to the unavailability of the balance in the account. 13. The crucial question is as to on which date the complainant received the information about the dishonour of the cheque. As per the appellant the complainant received the information about the dishonour of the cheque on 10.11.2008. However, the respondent has disputed the same. However, we would like to add that at the time of arguments the aforesaid submission of the appellant was not refuted. After the judgment was reserved, the complainant has filed the affidavit alleging therein that he received the bank memo of the bouncing of cheque on 17.11.2008 and therefore legal notice sent on 17.12.2008 is within the period 30 days from the date of information. Normally, we would have called upon the parties to prove their respective versions before the trial court by leading their evidence. However, in the present case, as rightly pointed out by the learned senior counsel for the appellant, the complainant has accepted in the complaint itself that he had gone to the bank for encashment of cheque on 10.11.2008 and the cheque was not honoured due to insufficient of funds, thereby admitting that he came to know about the dishonor of the cheque on 10.11.2008 itself. It is for this reason that appellant has filed reply affidavit stating that this is an after thought plea as no material has been filed before the court below to show that the bank had issued memo about the return of cheque which was received by the complainant on 17.11.2008. The specific averment made in the complaint in this behalf is as under:

“Subsequently the complainant again went to encash the cheque given by the accused on 10.11.2008 which again bounced due to unavailability of balance in the accused account.” It is, thus, clear from the aforesaid averment made by the complainant himself that he had gone to the bank for encashing the cheque on 10.11.2008 and found that because of unavailability of sufficient balance in the account, the cheque was bounced. Therefore, it becomes obvious that he had come to know about the same on 10.11.2008 itself. In view of this admission in the complaint about the information having been received by the complainant about the bouncing of the cheque on 10.11.2008 itself, no further enquiry is needed on this aspect.

14. It is, thus, apparent that he received the information about the dishonor of the cheque on 10.11.2008 itself. However, he did not send the legal notice within 30 days therefrom. We, thus, find that the complaint filed by him was not maintainable as it was filed without satisfying all the three conditions laid down in Section 138 of the N. I. Act as explained in para 12 of the judgment in the case of MSR Leathers, extracted above.

15. We have, thus, no hesitation in allowing this appeal and setting aside the impugned order of the High Court. As a consequence, petition filed by the petitioner under Section 482, Cr.P.C. is also allowed and the complaint of the complainant is dismissed.

……J. (K.S.Radhakrishnan) ……J. (A.K.Sikri) New Delhi, December 11, 2013