
(2021) 01 JH CK 0130

Jharkhand High Court

Case No: Criminal Revision No. 194 Of 2013

Parmeshwar Das

APPELLANT

Vs

State Of Jharkhand And Ors

RESPONDENT

Date of Decision: Jan. 12, 2021

Acts Referred:

- Negotiable Instruments Act, 1881 - Section 138, 142, 142(b)
- Code Of Criminal Procedure, 1973 - Section 313, 357(3), 428

Hon'ble Judges: Anubha Rawat Choudhary, J

Bench: Single Bench

Advocate: Amit Kumar, Rakesh Kumar Sinha

Final Decision: Allowed

Judgement

1. Heard Mr. Amit Kumar, the learned counsel appearing on behalf of the petitioner.
2. Heard Mr. Rakesh Kumar Sinha, the learned counsel appearing on behalf of the Opposite Party No.2.
3. The present criminal revision petition is directed against the Judgment dated 16.04.2012 passed by the learned Principal Sessions Judge, East Singhbhum, Jamshedpur in Criminal Appeal No. 246 of 2009 whereby and whereunder the learned appellate court confirmed the Judgment of conviction and affirmed the order of sentence of the petitioner under Section 138 of the Negotiable Instruments Act, 1881 passed by the learned trial court and dismissed the appeal.
4. The petitioner had preferred the criminal appeal against the Judgment of conviction and the order of sentence dated 11.09.2009 passed by the

learned Judicial Magistrate, 1st Class, Jamshedpur in C/1 Case No. 605 of 2007 / T. R. No. 401/2009 whereby and whereunder the petitioner was

held guilty and convicted under Section 138 of the Negotiable Instruments Act, 1881 and was sentenced to undergo Rigorous Imprisonment for one

year and was directed to pay a sum of Rs. 1,10,000/- to the Complainant towards compensation in terms of Section 357(3) of the Cr.P.C.. It was

further directed that period of custody already undergone as an under-trial prisoner shall be set off in terms of Section 428 of the Cr. P. C.

Arguments on behalf of the petitioner

5. The learned counsel appearing on behalf of the petitioner submitted that two cheques, both dated 19.03.2007, are involved in this case, one for an

amount of Rs. 60,000/- and another for an amount of Rs. 50,000/-, total being Rs. 1,10,000/-. While giving the relevant dates, he submitted that both the

cheques were presented and dishonored on the same date for insufficient fund which was communicated vide two separate memos dated 21.03.2007.

The legal notice dated 26.03.2007 was sent through registered post on 26.03.2007, but it was returned back to the sender with an endorsement of

refusal of the postal man dated 10.04.2007. He further submitted that the Opposite Party No.2 instead of waiting for expiry of 15 days from

10.04.2007 filed the Complaint case on 17.04.2007.

6. The learned counsel for the petitioner further submitted that the point for consideration before this Court is that the Complaint itself was premature

and not maintainable, inasmuch as, the statutory period for filing the Complaint under Section 138 of the Negotiable Instruments Act, 1881 had not

expired. He relied upon the Judgment passed by the Hon'ble Supreme Court in the case of Yogendra Pratap Singh - vs- Savitri Pandey and Another

reported in (2014) 10 SCC 713, paragraphs - 36 and 37, and submitted that the learned trial court while appreciating the point of pre-mature Complaint

recorded that on the date of taking cognizance of the offence, the period of 15 days had expired and therefore, held that the Complaint was not pre-

matured. He submitted that the Hon'ble Supreme Court has specifically decided this point of law in para- 36 and 37. He further submitted that the date

of taking cognizance is immaterial and what is material is the date of filing the Complaint which was admittedly filed prior to expiry of the prescribed

period when calculated from the date of refusal i.e. 10.04.2007.

7. The learned counsel for the petitioner further submitted that the learned appellate court while considering the point of pre-mature Complaint has recorded that the envelope of notice shows that the postal man went to the house of the petitioner on 02.04.2007, 03.04.2007 and 09.04.2007 and ultimately, on 10.04.2007, notice was returned back to the Complainant mentioning 'refusal' and it appears that refusal for service of notice was taken by the postal man on 02.04.2007 itself and ultimately, it was returned on 10.04.2007 with endorsement of 'refusal' and his signature on 10.04.2007. On this basis, it was held by the appellate court that 10.04.2007 is not the date of refusal by the petitioner i.e. rather it is the date on which the notice was returned. He submitted that such finding of the learned appellate court is ex-facie perverse in view of the fact that the endorsement of refusal itself is dated 10.04.2007 and the postal peon has not been examined as a witness to indicate as to what happened on the previous dates of visits to the house of the petitioner on 02.04.2007, 03.04.2007, 09.04.2007.

8. The learned counsel further submitted that the reason to reject the plea of pre-mature Complaint has been dealt with differently by the learned trial court and the learned appellate court and therefore, it cannot be said that there is concurrent finding on this point. He also submitted that there is specific and clear evidence on record that the refusal was recorded by the postal peon with a date i.e. 10.04.2007 and therefore, the date of refusal is 10.04.2007 and accordingly, the Complaint was pre-mature having been filed on 17.04.2007.

Arguments on behalf of the Opposite Party No.2

9. The learned counsel appearing on behalf of the Opposite Party No.2 opposed the prayer made on behalf of the petitioner and submitted that both the learned courts below have held that the Complaint was not pre-mature and accordingly, there is no scope for interference in revisional jurisdiction.

Without prejudice to the aforesaid contention, he further submitted that in view of the observations made by the Hon'ble Supreme Court in the judgment passed in the case of Yogendra Pratap Singh (supra), the right of the Opposite Party No.2 to file a fresh Complaint may be reserved and

appropriate observation may be given to that effect in case this Court ultimately finds that the Complaint filed on 17.04.2007 was a pre-mature Complaint.

Findings of this Court

10. After hearing the learned counsel for the parties and going through the impugned judgments as well as the lower court records of the case, this

Court finds that on 17.04.2007, the Complainant presented a Complaint before the court of the learned Chief Judicial Magistrate at Jamshedpur

alleging inter- alia that the Complainant and the petitioner were well known to each other and they had good friendly relationship. The petitioner was in

urgent need of money and he had taken friendly loan of Rs.1,10,000/- from Complainant and the petitioner had assured to repay/refund the loan within

a period of six months. On 19.03.2007, the petitioner issued two account payee cheques vide Cheque No. 092489 of Rs. 50,000/- and Cheque No.

092490 of Rs. 60,000/-, total amounting to Rs. 1,10,000/-, drawn on IDBI Bank, Bishtupur Branch in favour of the Complainant for repayment of the

friendly loan amount. It was further alleged that when the Complainant presented the cheques in his account, both were dishonored due to

Insufficient Fund"" and was intimated by the bank to him. Thereafter, the Complainant sent legal/demand notice dated 26.03.2007 to the petitioner by

registered post with A/D which was returned back with the endorsement ""Refused"" dated 10.04.2007.

11. On 21.07.2007, the Complainant was examined on S.A. and vide order dated 14.08.2007, it was found that a prima facie case under Section 138

of the Negotiable Instruments Act, 1881 is made out against the petitioner.

12. On 28.08.2008, the substance of accusation for the offence under Section 138 of the Negotiable Instruments Act was read over and explained to

the petitioner in Hindi to which he pleaded not guilty and claimed to be tried.

13. The Complainant filed his examination-in-chief on affidavit and examined himself as C.W.-1 in support his case. He is the sole witness examined

on his behalf. He exhibited both the cheques dated 19.03.2007 as Exhibits-1 and 1/1 respectively, Cheque Return Bank Memos dated 21.03.2007 as

Exhibits-2 and 2/1 respectively, Legal Notice dated 26.03.2007 as Exhibit-3, Postal Receipt dated 26.03.2007 as Exhibit-4, Envelope containing the

endorsement of the postal peon to the effect of refusal as Exhibit-5, A/D without service as Exhibit-6 and two Carbon copies of Bank Memos as

Exhibits- 7 and 7/1 respectively.

14. On 23.05.2009, the statements of the petitioner were recorded under Section 313 Cr.P.C. wherein he said that he had not issued the cheques and

he is innocent. The petitioner did not adduce any oral or documentary evidence in his defence.

15. This Court finds that the learned trial court considered the oral and documentary evidences adduced on behalf of the Complainant and recorded its

findings in Para-10, as under:

10. I have carefully scrutinized the entire evidence on record. So far the prosecution case is concerned, both the cheques are dated 19.3.07 which

were presented for encashment within the period of its validity which is evident from both the bank memos, Ext. 2 and 2/1 and both the cheques were

bounced owing to insufficiency of fund which came to the notice of the complainant by the bank memo dt. 21.3.07. Legal notice has been sent to the

accused on 26.3.07 which was refused by the accused on 10.4.07 and the case has been filed on 17.4.07 and in view of several decisions of the

Hon'ble Supreme Court and High Courts, refusal by the accused to receive notice amount to service of notice and so far the factor of filing of the

case as pre- mature is concerned, the accused no doubt refused to receive the legal notice on 10.4.07 and the case has been filed on 17.4.07, but

summon has been issued against the accused on 12.9.07 which is much after the lapse of 15 days and apart from these facts, the undertaking given by

the accused to the effect of making payment of the cheque amount to the complainant in installment is also instrumental in establishing guilt of the

accused and ongoing through the entire evidence, oral and documentary, I am of the view that the plea of the defence is not at all tenable in the eye of

law and the prosecution has been able to substantiate the charge levelled against the accused beyond all reasonable doubt and as such, I hold the

accused guilty for the offence punishable under Section 138 of the N.I. Act.

16. This Court further finds that the learned appellate court also considered the arguments advanced on behalf of the parties, discussed the evidences

and materials on record and summarized its findings as under:

Evidence of the complainant shows that he has supported his contention which he has said in his complaint petition and has brought on record cheque, cheque return memo, legal notice sent to the appellant, etc.. The material on record brought by complainant in this case shows that on 19.3.07 cheque bearing 092489 of Rs. 50,000/- and 092490 of Rs. 60,000/- was issued by the appellant in favour of the complainant. On its presentation, it was dishonoured by the bank and in this regard, cheque return memo was given by the bank to the complainant. Legal notices were sent. The complainant has supported his contention in his evidence and has said that amount of Rs. 1,10,000/- was given to the appellant by him in cash from earning of his shop which was not returned by the appellant and in lieu of that, cheque was issued by appellant in favour of complainant which was dishonoured.

During the course of hearing, it has been submitted on behalf of appellant that within 15 days from the date of refusal of notice, the complaint case was filed and this is not maintainable. Considering the submission made on behalf of appellant, it appears that notice was sent to appellant by complainant on 26.3.07. The envelope of notice shows that postal man went to the house of appellant on 2.4.07, 3.4.07 and 9.4.07 and ultimately, on 10.4.07, notice was returned back to the complainant mentioning refusal. It appears that several attempts were taken by postal man for service of the notice from 2.4.07 itself and ultimately, it was returned on 10.4.07.

Endorsement of refusal has been made by the postal man mentioning his signature on 10.4.07. It is not the date of refusal by appellant, rather it is the date on which notice was returned.

17. The question raised in the present case by the learned counsel appearing on behalf of the petitioner is as under:

a. Whether the finding of the learned lower appellate court that the date of refusal of the notice was 2.4.07 itself is perverse as the endorsement of refusal by the postal peon was dated 10.04.07?

b. If the date of refusal of notice is held to be 10.04.2007 and not 02.04.2007 then, Whether the Complaint filed on 17.04.2007 was premature due non-fulfillment of condition prescribed under Clause (c) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 and therefore, the Complaint was not legally maintainable?

18. This Court finds that the Complainant sent the legal notice dated 26.03.2007 with A/D by registered post to the petitioner on 26.03.2007 which was returned back to the Complainant with the endorsement of ""Refusal"" dated 10.04.2007 of the postal peon on the envelope. Point no a.

19. This Court finds that the learned appellate court has held the Complaint maintainable on the basis that the envelope of notice shows that postal

man went to the house of petitioner on 02.04.2007, 03.04.2007 and 09.04.2007 and ultimately, on 10.4.2007, notice was returned back to the

complainant mentioning refusal. The learned appellate court presumed that several attempts were taken by postal man for service of the notice from

02.04.2007 itself and ultimately, it was returned on 10.4.2007 mentioning endorsement of refusal and held that 10.04.2007 is not the date of refusal by

petitioner, rather it is the date on which notice was returned. Thus, the date of refusal was taken as 02.04.2007 by the learned lower appellate court.

This court finds that there is nothing on record, neither documentary or oral evidence, as to what happened on 02.04.2007 when the postal peon went

to deliver the notice and as to whether he met the accused and whether on the same day the accused refused to accept the notice. Admittedly, the

postal peon has not been examined as a witness and the postal envelope has a specific endorsement of refusal with a date as 10.04.2007. Thus,

finding of the learned lower appellate court that the date of refusal is to be taken as 02.04.2007 is based on no evidence and perverse and is

accordingly set-aside. The finding of the learned trial court that the date of service of notice is the date of endorsement of refusal 10.04.2007 is well

reasoned order on the point of date of refusal of notice. Accordingly, the finding of the learned lower appellate court that the date of refusal of the

notice was 2.4.07 is perverse and is set-aside and it is held that the date of refusal of the notice by the accused is 10.04.2007 and not 02.04.2007. The

point no. a is decided accordingly.

Point no b.

20. The Complainant filed the Complaint against the petitioner on 17.04.2007 i.e. before expiry of the statutory period of 15 days in terms of Clause

(c) of the proviso to Section 138 of the N. I. Act, 1881. The statutory period enables the drawer of the cheque to make payment of the amount of

money to the payee or to the holder of the cheque, as the case may be, within 15 days of the receipt of the demand notice.

21. The Hon'ble Supreme Court in Paragraph Nos. 30 to 38 of the Judgment passed in the case of Yogendra Pratap Singh (*supra*) has held as under:

30. Section 138 of the NI Act comprises of the main provision which defines the ingredients of the offence and the punishment that would follow in

the event of such an offence having been committed. Appended to this Section is also a proviso which has three clauses viz. (a), (b) and (c). The

offence under Section 138 is made effective only on fulfilment of the eventualities contained in clauses (a), (b) and (c) of the proviso. For completion

of an offence under Section 138 of the NI Act, not only the satisfaction of the ingredients of offence set out in the main part of the provision is

necessary, but it is also imperative that all the three eventualities mentioned in clauses (a), (b) and (c) of the proviso are satisfied. Mere issuance of a

cheque and dishonour thereof would not constitute an offence by itself under Section 138.

31. Section 138 of the NI Act has been analysed by this Court in *Kusum Ingots & Alloys Ltd.* 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: (SCC p. 753, para 10) ""(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.

32. We are in agreement with the above analysis.

33. In K.R. Indira, 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.

34. Insofar as the present reference is concerned, the debate broadly centres 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.

35. 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 filed 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 the law. It is not the question of prematurity of the complaint where it is filed before the 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 the 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.

36. A complaint filed before the 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 & Alloys Ltd.* 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.

37. We, therefore, do not approve the view taken by this Court in *Narsingh Das Tapadia* and so also the judgments of various High Courts following *Narsingh Das Tapadia* 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.

38. Rather, the view taken by this Court in Sarav Investment & Financial Consultancy 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 & Financial

Consultancy 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.

22. This Court finds that the law has been well settled by the Hon'ble Supreme Court in the aforesaid judgment that the cause of action for filing a

Complaint under Section 138 of the Negotiable Instruments Act would not arise before expiry of 15 days from the date of service of notice on the

accused.

23. This Court further finds that there is no provision under the Negotiable Instruments Act, 1881 enabling curtailment of the statutory period of 15

days provided for making payment in the case of refusal to pay before expiry of 15 days from service of the notice of cheque dishonour.

24. This Court is of the considered view that in the case of refusal to receive the demand notice also, the cause of action to file the Complaint would

not arise unless the statutory period of 15 days from the date of refusal to receive the demand notice has expired.

25. This Court finds that the learned trial court has held the Complaint maintainable on the basis that after refusal to receive the legal notice on

10.04.2007, the Complaint was filed on 17.04.2007, but summon was issued against the petitioner on 12.09.2007 which is much after the lapse of 15

days. This view of the learned trial court is in conflict with the law settled by the Hon'ble Supreme Court in the case of Yogendra Pratap Singh

(supra) whose relevant portion has already been quoted above whereby the earlier view has been over-ruled.

26. This Court is not in agreement with the view taken by the learned trial court which has already been overruled by the Hon'ble Supreme Court in

the Judgment passed in the case of Yogendra Pratap Singh (supra). This Court also cannot approve the presumption and view taken by the learned

appellate court as the process server has not been examined on behalf of the Complainant who could have ascertained the date of refusal to receive

the notice by the petitioner.

27. This Court is of the considered view that learned courts below have erred in holding that the Complaint was maintainable. Accordingly, this Court

holds that the Complaint filed before expiry of the statutory period 15 days from the date of refusal to receive the legal/demand notice regarding the

dishonour of the cheques was premature in view of the fact that the cause of action for filing the Complaint had not arisen on 17.04.2007 and

therefore, the Complaint itself was not legally maintainable.

The point no. b is decided accordingly.

28. In view of the aforesaid findings, both the impugned judgments passed by the learned courts below are hereby set aside and the petitioner is

acquitted from the accusation thereunder and he is discharged from the liability of his bail bond.

29. So far as the right of the Opposite Party No.2 to file a fresh Complaint is concerned, the Complainant is at liberty to avail his remedy in

accordance with law in the light of the observations made by the Hon'ble Supreme Court in Paragraph No. 41 of the Judgment passed in the case of

Yogendra Pratap Singh (supra).

30. Accordingly, with the aforesaid findings and observations, the present criminal revision petition is hereby allowed.

31. Pending interlocutory application, if any, is dismissed as not pressed.

32. Let the lower court records be sent back to the court concerned.

33. Let this order be communicated to the learned court below through 'FAX'.