

**(2006) 09 AP CK 0043**

**Andhra Pradesh High Court**

**Case No:** Criminal Appeal No. 715 of 2000

L.K. Prabhavathi

APPELLANT

Vs

K.V. Sree Rama Murthy and  
Another

RESPONDENT

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**Date of Decision:** Sept. 19, 2006

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 313
- Negotiable Instruments Act, 1881 (NI) - Section 138, 142

**Citation:** (2006) 2 ALD(Cri) 966 : (2006) 3 ALT(Cri) 432 : (2008) 1 KLJ 66

**Hon'ble Judges:** A. Gopal Reddy, J

**Bench:** Single Bench

**Advocate:** Mohd. Moin Ahmed Quadri, for the Appellant; M. Subba Rao, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

A. Gopal Reddy, J.

Whether a complaint made u/s 138 of the Negotiable Instruments Act (for short "the Act") prior to arising of the cause of action is liable to be dismissed as premature is the question that arises for consideration in this appeal.

2. The appeal by the de facto complainant is directed against the Judgment passed by the IX Metropolitan Magistrate, Hyderabad in C.C. No. 134 of 1997 dated 24-4-2000 upholding the preliminary objection taken by the 1st respondent-accused that the complaint filed u/s 138 of the Act is premature for non-compliance of Clause (c) of the proviso to Section 138 of the Act and hence not maintainable, and recording a finding on that basis that the 1st respondent-accused was not guilty of the offence and acquitting him of the same.

3. The brief facts leading to the filing of the appeal are that for dishonouring of cheque dated 3-2-1997 issued by the accused to the appellant-complainant in

discharge of amount borrowed from the appellant, the appellant, issued a notice as contemplated under Clause (b) of the proviso to Section 138 of the Act, which was received by the accused on 20-2-1997 under Ex.P-4 acknowledgment and the complaint was filed on 6-3-1997 i.e., on the 14th day before the expiry of the statutory period of 15 days. The complaint was taken cognizance and the trial was also concluded. At the time of arguments, however, a preliminary objection was taken by the accused as to the maintainability of the complainant on the ground that it has been filed before the expiry of fifteen days statutory period provided under Clause (c) of the proviso to Section 138 and, therefore, it is premature and no cause of action had arisen to the complainant to maintain the complaint. The lower Court without adverting to any of the facts and the date on which the complaint was taken cognizance and whether subsequent to the falling of the complaint cause of action had arisen to the complainant to maintain it, upheld the preliminary objection raised by the 1st respondent-accused with regard to the maintainability of the petition and accordingly held that the petition filed by the appellant is premature. The Court below further held that it would be unjust to consider the evidence on record and to ascertain the liability, if any, of the accused from the evidence available on record and accordingly found that the accused was not guilty of the offence and acquitted him of the offence.

4. When the case was taken up for hearing on 12-9-2006, learned Counsel for the 1st respondent was not present and, therefore, I have heard the learned Counsel for the appellant and the learned Additional Public Prosecutor and directed that the case be listed for Judgment today. Even today also when the matter was called, none appeared for the 1st respondent.

5. The learned Counsel for the appellant submitted that the Court below would be within its competence to take cognizance of the complaint before maturity period under the provisions of the Act and, therefore, the Court below erred in upholding the preliminary object that the complaint was premature on the ground that no cause of action had arisen to maintain the complaint as it was filed before expiry of fifteen days statutory period as provided under Clause (c) of the proviso to Section 138 of the Act, and in support of the same, he relied upon the judgment of the Apex Court in [Narsingh Das Tapadia Vs. Goverdhan Das Partani and Another](#), . Learned Counsel therefore, submitted that the order of the Court below in holding the 1st respondent as not guilty and acquitting him of the offence is not proper and liable to be set aside.

6. Learned Additional Public Prosecutor supported the case of the appellant and submitted that the Court below was not justified in upholding the preliminary objection and acquitting the accused of the offence.

7. The question that arises for consideration in this appeal is, whether the Court below was justified in upholding the preliminary objection that the complaint was premature and not maintainable for non compliance of Clause (c) of the proviso to

Section 138 of the Act.

8. For proper understanding of the issue involved, the relevant provisions of the Act may be noticed. Section 142 of the Act, which deals with "cognizance of offences", reads as follows:

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 u/s 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 in made within one month of the date of 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 Judicial Magistrate of the First Class shall try any offence punishable u/s 138.

9. Section 138 of the Act deals with dishonouring of cheque for insufficiency of funds etc., in the account. Clause (b) and (c) of the proviso to Section 138 which makes the dishonour of cheque an offence provides that nothing contained in the Section shall apply unless:

(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 the said notice.

10. From the above provisions of the Act, it is clear that the offence u/s 138 of the Act can be taken cognizance if the same has been filed within one month of the date of which the cause of the action arose under Clause (c) of the proviso to Section 138. Clause (b) and (c) of the proviso to Section 138 says that the provisions of Section 138 will be applicable only (i) when a notice in writing has been issued by the payee or the holder in due course of the cheque, as the case may be, 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, duly making a demand for the payment of the money and (ii) when the drawer of the cheque has failed to make payment of the amount of money to the payee or to the holder in due course of the cheque, as the case may be, within fifteen days of the receipt of statutory notice issued under Clause (b) of the proviso to Section 138 by the payee or the holder in due course, as the case may be, for dishonouring of the cheque for insufficient funds. Therefore, cause of action to file complaint will arise only when the drawer of the cheque failed to pay the amount within fifteen days of the receipt of the statutory notice required to be issued under Clause (b) of the proviso to Section 138.

11. Admittedly, in the instant case the notice issued by the appellant under Clause (b) of the proviso to Section 138 demanding for payment of the amount was

received by the 1st respondent on 20-2-1997 and the complaint was filed on 6-3-1997 i.e., on the 14th day after the receipt of the notice. The Court below took cognizance of the complaint and the case underwent trial. Oral and documentary evidence was adduced on behalf of the appellant-complainant. The complainant got himself examined as P.W. 1 and marked Exs.P-1, P-4 and the accused was also examined u/s 313 Cr.P.C. as regards the incriminating material appearing against him. It may be noted that no objection as to the maintainability of the complaint on the ground it has been filed before the expiry of the statutory period provided under Clause (c) of the proviso to Section 138 of the Act and therefore no cause of action had arisen to maintain the complaint was taken on appearance of the accused or before commencement of the trial and it is only after the evidence was concluded and at the time of arguments, such an objection was taken on behalf of the 1st respondent. The Court below held that since the complaint was filed before the expiry of fifteen days statutory period as provided under Clause (c) of the proviso to Section 138 of the Act, no cause of action had arisen to maintain the complaint and, therefore, the complaint is premature and the accused had not committed any offence and it would be unjust to consider the evidence on record and to ascertain the liability, if any, of the accused from the evidence available on record. Indirectly, the essence of the judgment is that the complaint ought not to have been taken cognizance.

12. In almost similar circumstances, the Supreme Court in *Narsingh Das Tapadia v. Goverdhan Das Partani and Anr.* (supra) has an occasion to deal with the question. This case arose against the judgment and order dated 16-2-1990 of the Court in Cri.R.C. No. 389 of 1997. The facts in the said case are that the notice demanding payment of the amount was received by the accused therein on 26-10-1994 and complaint was filed on 8-11-1994, which was initially returned and on resubmission, cognizance was taken on 17-11-1994. The case underwent trial and the accused was also examined u/s 313 Cr.P.C. and the trial Court found the accused guilty of the offence punishable u/s 138 of the Act and the same was confirmed by the Appellate Court. On Appeal, the High Court held that the original complaint having been filed on 8-11-1994 was premature and liable to be dismissed.

13. The Supreme Court after considering the provisions of Section 142 and Clause (c) of the proviso to Section 138 of the Act, observed that the compliance of Clause (c) of proviso to Section 138 enables the Court to entertain a complaint and Clause (b) of Section 142 prescribed a period within which the complaint can be filed from the date of the cause of action arising Clause (c) and proviso to Section 138 and since no period is prescribed before which the complaint cannot be filed, and if filed not disclosing the cause of action in terms of Clause (c) of the proviso to Section 138, the Court may not take cognizance till the time the cause of action arises to the complainant.

14. The Supreme Court held that "taking cognizance of an offence" by the Court has to be distinguished from the filing of the complaint by the complainant and taking cognizance would mean the action taken by the Court for initiating judicial proceedings against the offender in respect of the offence regarding which the complaint is filed. It was further held that if the Magistrate or the Court is shown to have applied the mind nor for the purpose of taking action upon the complaint but-for taking some other kind of action contemplated under the Code of Criminal Procedure such as ordering investigation u/s 156(3) or issuing a search warrant, then the Court cannot be said to have taken cognizance of the offence. After referring to the decisions of the Supreme Court in [Nirmaljit Singh Hoon Vs. The State of West Bengal and Another](#), ; [Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others](#), the Apex Court held that 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 of the offence committed. Holding so, the Supreme Court set aside the Judgment of the High Court dismissing the complaint as premature and upholding the order of conviction and sentence passed by the trial Court for the offence punishable u/s 138 of the Act.

15. Therefore, from the judgment of the Supreme Court, it is clear that where the" complaint is filed prior to arising of cause of action as provided in Clause (c) of the proviso to Section 138 of the Act, the complaint shall not be dismissed as premature, but it can await maturity or be returned to the complainant for filing it later. The mere presentation of a complaint at an earlier date i.e., prior to arising of cause of action as provided under Clause (c) of the proviso to Section 138 of the Act, need not necessarily render the complaint as premature or confer any right upon the accused to absolve himself from the criminal liability of the offence committed. It can be kept pending for taking cognizance by the Court till the cause of action arises to the complainant or it may be returned to the complainant for filing it immediately after cause of action arises to the complainant.

16. In the instant case, as already noticed, the complaint was presented on 14th day after the receipt of notice of the 1st respondent. The court has taken cognizance of the complaint and the case underwent trial and it is only at the time of arguments preliminary objection as to the maintainability of the complaint for non-compliance of Clause (c) of the proviso to Section 138 of the Act was taken which was upheld by the Court below. No doubt, as on the date the complaint was filed cause of action had not arisen to the complainant. But, as per the decision of the Supreme Court in *Narasingh Das Tapadia v. Goverdhan Das Partani and Anr.* (supra), even if the complaint is found to be premature, it can await maturity or it has to be returned to the complainant for filing it later and its presentation on an earlier date will not

render the complaint liable to be dismissed or confer any right upon to the accused to above himself from the criminal liability. Further, there is nothing in the Act to show that if a complaint has been filed prior to arising of the cause of action, the payee or the holder in due course for the cheque, as the case may be, will forfeit his right to file the complaint even subsequent to the arising of cause of action or forfeit such right forever and the accused will have an automatic right to be absolved from the criminal liability of the offence committed. In the absence of any such provision, the payee or the holder in due course of the cheque, as the case may be, is not precluded from maintaining the complaint filed prior to the arising of the cause of action either praying the court to keep the complaint pending the Court to keep the complaint pending on its file or seeking return of the complaint for presenting it immediately after the cause of action arises to the complainant. Therefore, if a complaint is filed before arising of cause of action, it only means that the Court will not take cognizance of the complaint till the time cause of action arises to the complainant.

17. For the reasons aforesaid, I am of the considered view that the learned Magistrate, without advertent to the fact that the complaint was already taken cognizance and trial was concluded, is not justified in dismissing the complaint as premature and holding that the liability of the accused need not be ascertained from the evidence available on record and, therefore, he is not guilty of the offence. Further, the Court below also erred in not enquiring whether subsequent to the filing of the complaint, cause of action arose to the complainant to maintain the complaint and it can be proceeded with. Without examining this aspect, the Court below erroneously recorded a finding that the complaint is premature and that the accused was not guilty of the offence. Therefore, the order of the Court below acquitting the 1st respondent-accused of the offence cannot be sustained and is liable to be set aside.

18. In the result, the appeal is allowed. The Judgment of the Court below is set aside and the matter is remitted back to the Court below to dispose of the Calendar Case afresh on merits and in accordance with law.

Appeal allowed.