

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Case No. :- CRM(M) No. 241/2024
CM No. 549/2024

M/S Narani Films Th. Kunja LalPetitioner(s)/Appellant(s)

Through: Mr. Rajnesh Singh Parihar, Advocate.
Mr. Ravinder Parihar, Advocate.
Mr. Kulbhushan Kumar, Advocate.

Vs

Sunil Kumar Gupta Respondent(s)

Through:

Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

ORDER

12.04.2024

1. The petitioner through the medium of instant petition is calling in question order dated 01.06.2023 passed by the Court of learned Principal Sessions Judge, Jammu in revision petition, by virtue of which the revision petition filed by the petitioner against the order dated 13.09.2021 passed by the learned Forest Magistrate, Jammu has been dismissed. Both the orders mentioned supra have been challenged in the instant petition.

2. Learned counsel for the petitioner has vehemently argued that the learned trial Court has not appreciated the inherent defect in the complaint, which was being hit by proviso contained under Section 138 of the Negotiable Instruments Act (*hereinafter referred to as the "Act"*) while issuing the process against the petitioner and which falls with the realm of abuse of process of law and, accordingly, is liable to be set aside. The specific case of the petitioner is that no notice with

respect to dishonour of the cheque was ever served to the petitioner within stipulated period and, thus, the impugned complaint was not maintainable, as the same has been filed against the statutory provisions/procedure, as envisaged under Section 138 (b) of the Act. It was the specific objection of the petitioner before both the Courts below that no notice whatsoever has been served to the petitioner and even if it is presumed to be so, the same is beyond the statutory period.

3. According to the learned counsel, there was a specific averment in the complaint itself that notice dated 14.08.2021 has been served on 18.08.2021 and no postal receipt was ever accompanied to substantiate the said fact. According to the learned counsel, the limitation period to send the demand notice stood expired on 16.08.2021 and, thus, the very cognizance of the said complaint was palpably bad in the eyes of law, as there was inherent defect in the said complaint and the Court below without looking into the admitted facts in the complaint has issued the process.

4. It is the specific case of the petitioner that the process had been issued by the Court below and the cognizance taken is not in accordance with the mandate of Section 138 of the Act and the law laid down by the Hon'ble Supreme Court in catena of judgments. The learned counsel with a view to fortify his claim has placed reliance upon the judgment delivered by the Hon'ble Supreme Court in Criminal Appeal No. 2083 of 2013 [Arising out of SLP (Criminal) No. 10056 of 2012] on 11.12.2013 in case titled, "**Kamlesh Kumar Vs.**

State of Bihar and Another". The relevant extract of the said judgment is reproduced hereunder:-

".....

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 of the cheque on 10.11.2008 but the cheque was not honoured due to the unavailability of the balance in the account."

5. To buttress his claim, learned counsel for the petitioner has further placed reliance upon the judgment passed by a Co-ordinate Bench of this Court in case titled, "***Fayaz Ahmad Kishtwari Vs. Ghulam Hassan Bhat***". For facility of reference, the relevant extracts of the said judgment are reproduced hereunder:-

".....

12. While going through this provision, the complaint is to be made within one month from the date when cause of action accrues in terms of the proviso to sub-clause (b) of Section 142 of the Negotiable Instruments Act. The Court can condone the delay in filing a complaint. However, this proviso nowhere prescribes that Court can condone the delay in making the demand notice.

.....

13. Viewed thus, **Section 142** provides within which period the complaint is to be presented. The proviso to Sub-section (b) only gives the power to the Court to condone the delay crept in filing the complaint and not in making a demand notice in terms of **Section 138(b)**. The proviso also does not extend time for making payment in terms of proviso (e) to **Section 138** of Negotiable Instruments Act. My this view is fortified by judgment of Bombay High Court in case **Rakesh Porwal v. Narayan Joglekar** reported in 1993 Cr.LJ 680.

The Calcutta High Court in case **Ancon Engg. Co. (P) Ltd. v. Amitava Goswami** reported in 1994 Cr.LJ 351 has held as under:-

4...It is thus clear that the cause of action for prosecution does not arise by mere presentation of the cheque in bank and by its dishonour. Whenever any complaint is filed by any person under **Section**

142 N.I. Act it will have to be seen whether it has been filed within one month of the date on which the cause of action arose under Clause (e) of the proviso to **Section 138**.

The Delhi High Court in case **S.V. Muthye v. State** reported in 2002 Cr.LJ 3219 has held that the demand notice issued beyond period of 15 days is illegal and such a delay cannot be legally condoned. It is profitable to reproduce para-8 of **the said judgment** herein:-

8.Sub-section (2) of **Section 142** provides that a complaint for the offence under **Section 138** has to be made within one month of the date on which cause of action arises under Clause (e) of the proviso to **Section 138**. To be noted that aforementioned decisions pertain to condoning the delay in filing the complaint and not the delay in serving the demand notice under Clause (b) of said **Section 138**. Serving of notice within 15 days of the receipt of intimation regarding dishonour of cheque by the payee and failure to make payment within 15 days of receipt of notice issued under Clause (b) of **Section 138** by the drawer are to precede the filing of complaint under **Section 138**. In the matter of condoning delay in issuing demand notice beyond the statutory period of 15 days neither **Section 473**, Cr.P.C. or **Section 5** of Limitation Act, 1963 would apply nor such a delay can be legally condoned. Obviously, based on said notice dated 24th September, 1994, the respondent No. 2 did not have cause of action for launching the prosecution of petitioner under **Section 138**. Thus being abuse of process of court the complaint deserves to be quashed under **Section 482**, Cr.P.C.

The Bombay High Court in case Prashant Prabhakar Rao Gite v. S.K. Sarkar reported in 2002 Cr.LJ 3001 has held that the limitation for filing the complaint under **Section 138** of Negotiable Instruments Act is provided in **Section 142** of the Negotiable Instruments Act and the limitation starts to run from the 16th day from the date of receipt of notice of demand by drawer in terms of proviso (e) to **Section 138** of Negotiable Instruments Act. It is profitable to reproduce para-18 of the said judgment herein:

18.The cause of action contemplated under the provisions of Clause (e) would accrue immediately on completion of fifteen days in case the drawer fails to make the payment to the payee and one month limitation for filing complaint under Clause (b) of **Section 142** of the Act would commence from the 16th day. The payee has to file complaint within one month from said date. If the payee fails to file complaint within one month from the date cause of action has accrued to him then such complaint cannot be entertained by the Court since same would

be barred by limitation as contemplated under provision of **Section 142** of the Act. It will be appropriate to consider the facts and circumstances of the present case of the above referred legal position vis-'vis the provisions of **Sections 138** as well as 142 of the Act.

Applying the test to the instant case, it appears that the complainant has alleged in the complaint that accused had issued cheque on 20th November, 2001 for Rs. 1 lakh and the said cheque was returned dishonored because of insufficiency of funds and complainant issued notice of demand on 10th January 2003. It appears that cheque has been presented on 21st December, 2001 before the bank and the same was returned with the remark 'present again'. Then payee presented the cheque again on 8th January, 2002 and the same was returned with the remark 'present again' then again the cheque was presented on 19th January, 2002 and the same was returned back unpaid for the reasons 'refer to drawer'. This means that the cheque was dishonoured on 19th January, 2002 and the complainant was under legal obligation to serve a demand notice upon the drawer within thirty days from 19th January, 2002. The complainant has chosen to remain in deep slumber till 10th January, 2003 and has issued demand notice on 10th January, 2003. This means that payee has not issued notice within one month from the date of receiving information in terms of mandate of **Section 138** of the Negotiable Instruments Act.

Viewed thus, it can be safely held that delay in serving demand notice in terms of Clause (b) of **Section 138** of the Negotiable Instruments Act, cannot be condoned.

In the given circumstances, I am of the considered view that cognizance taken, process drawn and impugned order passed on 22nd June, 2004, are abuse of the process of law.

Accordingly, the petition is allowed and the entire proceedings are quashed.

Registry is directed to send down the record."

6. Heard learned counsel for the petitioner at length and perused the record. Prima-facie case for indulgence is made out.
7. Issue notice to the respondent, returnable within three weeks. Requisites to be furnished within one week.
8. List again on **20.05.2024**.
9. Meanwhile, subject to objections from the other side and till next date of hearing before the Bench, it is provided that the

proceedings in complaint/File No. 1581/2021 titled, **“Sunil Kumar Vs. M/S Narani Films Prop. Kunj Lal”** pending before the Court of learned Forest Magistrate, Jammu shall remain stayed.

10. Alteration/modification/vacation on motion.

(Wasim Sadiq Nargal)
Judge

JAMMU
12.04.2024
Ram Krishan

