Tulsi Ram Naik vs State Of U.P. And Another on 15 March, 2019

Equivalent citations: AIRONLINE 2019 ALL 951

Author: Sanjay Kumar Singh

Bench: Sanjay Kumar Singh

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Judgment reserved on 20.12.2018

Judgment delivered on 15.03.2019

Court No. 70

Case :- CRIMINAL MISC. WRIT PETITION No. - 5871 of 2012

Petitioner :- Tulsi Ram Naik

Respondent :- State Of U.P. And Another

Counsel for Petitioner :- Gaurav Kakkar

Counsel for Respondent :- Govt. Advocate,Ankit Saran

Hon'ble Sanjay Kumar Singh,J.

1. Heard Sri Gaurav Kakkar, learned counsel for the petitioner, Sri Ankit Saran, learned counsel for the opposite party no.2 and learned Additional Government Advocate on behalf of the State and perused the record with the assistance of learned counsel for the parties.

2. This writ petition has been filed by the petitioner to quash the impugned order dated 28.07.2011 passed by A.C.J.M., Court No.2, Bulandshahar (Annexure No.8 to the writ petition) and the order

dated 04.05.2012 passed by Additional District & Session Judge, Court No.17, Bulandshahar (Annexure No.10 to the writ petition).

Basic facts

3. The facts of the case in nutshell are that as per case of the complainant, the respondent no.2 on persuasion of the petitioner started work of real-estate alongwith petitioner in his partnership. The petitioner taking the respondent no.2 in his confidence had taken an amount of rupees twenty five lacs from him. Later on, getting benefits in the said business, the petitioner ousted the respondent no.2 with dishonest intention from the aforesaid business of real-estate without giving amount to the share of the respondent no.2. Subsequently, on the intervention of well-wishers of the parties concerned, the petitioner readily agreed to settle the issue and accordingly, the petitioner agreed to pay an amount of rupees thirty lacs only to the respondent no.2 in six installments of rupees five lacs each. In the said background of fact, the petitioner gave a Cheque No.443977 dated 15.11.2009 of rupees five lacs only of ICICI Bank of his Account No.003101561164 to the respondent no.2. On presenting the aforesaid cheque before the concerned ICICI Bank Ltd., it was dishonoured and ICICI bank issued a memo dated 04.05.2010 stating the reason as "fund insufficient." The xerox copy of Cheque No.443977 dated 15.11.2009 and memo dated 04.05.2010 issued by ICICI bank appended as Annexure nos.2 and 3 to the writ petition. It is the case of the respondent no.2/complainant that he informed about the aforesaid dishonour of cheque to the petitioner on phone and also requested to make payment of aforesaid cheque amount, on which assurance was given by the petitioner to issue another cheque or draft to the respondent no.2 within two weeks but the petitioner did not fulfill his promise. Under the given circumstances, the complainant/respondent no.2 sent a notice dated 20.05.2010 through registered post to the petitioner requesting therein to pay total amount of rupees forty seven lacs and five thousand, out of which rupees three lacs towards physical loss, rupees ten lacs towards financial loss, rupees four lacs towards mental loss, rupees thirty lacs, which was due upon the petitioner and payable by the petitioner and rupees five thousand towards notice expenses within fifteen days. The said notice dated 20.05.2010 was served upon the petitioner on 25.05.2010 but petitioner did not pay the due amount to the respondent no.2.

4. It is also the case of the complainant that the petitioner after receiving the notice dated 25.05.2010 was in touch with the respondent no.2/complainant and false assurance was being given by the petitioner to pay the entire amount of the respondent no.2 adopting different modus operandi, but when the petitioner finally refused to pay the said amount, the respondent no.2/complainant having no option left filed a complaint alongwith affidavit on 22.09.2010 (though complaint and affidavit were prepared on 07.06.2010) under section 138 Negotiable Instrument Act against the petitioner registered as Complaint Case No.2856 of 2010 before IInd Additional Chief Judicial Magistrate, Bulandshahar on 22.09.2010. Since the complaint was barred by limitation, therefore, the complainant also filed an application under Section 5 (Paper No.11A) of the Limitation Act alongwith affidavit dated 22.09.2010 explaining the reason of delay in filing the complaint.

5. On the aforesaid complaint of the complainant /respondent no.2, the Additional Chief Judicial Magistrate after recording the statement of the complainant under section 200 Cr.P.C. on

31.03.2011, statement of the witnesses under section 202 Cr.P.C. namely Jahirul Hasan on 23.04.2011 as P.W.-1, Pappu on 14.06.2011 as P.W.-2, summoned the petitioner by order dated 28.07.2011 under section 138 of the Negotiable Instrument Act to face trial, condoning the delay in filing complaint.

6. Aggrieved by the order dated 28.07.2011, the petitioner preferred Criminal Revision 402 of 2011 before the Additional District & Session Judge, Court No.17, Bulandshahar, which has been dismissed by the revisional court vide the judgment and order dated 04.05.2012.

Thereafter, the petitioner has preferred the present writ petition challenging the aforesaid impugned order dated 28.7.2011 and 4.5.2012 before this Court.

Submissions on behalf of the petitioner

7. Assailing the aforesaid impugned orders, the learned counsel for the petitioner submitted that:-

(i) Notice dated 20.05.2010 sent by the petitioner was defective, as by means of the said notice, the complainant demanded an amount of rupees forty seven lacs and five thousand (cheque amount with additional amount), though the cheque amount was rupees five lacs only.

(ii) The complainant filed complaint on 22.09.2010 after a lapse of almost four months from the date of sending notice to the petitioner, as such, complaint was barred by limitation.

(iii) Application of the complainant for condoning the delay was not maintainable.

(iv) The court of A.C.J.M, Court No.2, Bulandshahar committed legal error in allowing the application filed by the petitioner under section 5 of the Limitation Act (Paper No.11A).

(v) Complainant/respondent no.2 nowhere in his statement under section 200 Cr.P.C. has stated the date on which the notice was served upon the petitioner.

(vi) The impugned order dated 28.07.2011 passed by A.C.J.M., Bulandshahar and judgment and order dated 04.05.2012 passed by Additional District & Session Judge, Bulandshahar are not sustainable under the law.

(vii) The learned counsel for the petitioner has placed reliance on the following judgments:-

1. K.R.Indira vs. Dr.G.Adinarayana, 2003 Supp(4) SCR 535.

2. C.Kalegouda vs. K.Sadashivappa, 1998 Cril.J 3539 (Karnataka High Court)
Submissions on behalf of respondent no.2

8. Sri Ankit Saran, learned counsel for the respondent no.2 has filed counter affidavit dated 17.02.2013 denying the stand taken by the petitioner in the writ petition. Sri Ankit Saran, learned counsel appearing for the respondent no.2 refuting the aforesaid submissions advanced on behalf of the accused-petitioner submitted that:-

(i) the notice dated 20.05.2010 sent by the complainant is a perfect and valid notice and cannot be termed imperfect in any manner.

(ii) the notice dated 20.05.2010 was sent by registered post on the correct address of the accused.

(iii) the notice was sent in prescribed manner with demand of cheque amount alongwith additional demand of due amount etc.

(iv) after insertion of proviso to clause (b) of Section 142 of Negotiable Instrument Act, in 2002, it confers a jurisdiction upon the court to condone the delay.

(v) Under the facts of the case, the magistrate concerned has rightly and legally summoned the petitioner-accused to face trial condoning the delay, as the complainant has given valid and sufficient reason to condone the delay.

(vi) further submitted that there is no illegality or irregularity in the notice dated 25.05.2010 and complaint dated 22.09.2010 (prepared on 07.06.2010) as well as in the impugned orders dated 28.07.2011 passed by Additional Chief Judicial Magistrate, Bulandshahar and order dated 04.05.2012 passed by Additional Session Judge, Bulandshahar.

(vii) The petitioner has not filed rejoinder affidavit to the counter affidavit dated 17.2.2013 filed by the respondent no.2, therefore, contents of the counter affidavit are unrebutted..

(viii) Learned counsel for the respondent no.2 has placed reliance on the following judgments:-

1. Janardhan Mohapatra vs. Saroj Kumar Choudhury, 1993 Crl.J 1751 (High Court of Orissa).

2. Satish Kumar Goenka vs. S.R.K.Mohan, 2000 Law Suit (Cri) 188 (High Court of Orissa).

3. MSR Leathers vs. S.Palaniappan & another, 2013(1) SCC 177.

Discussion of decided judgments

9. Firstly, I shall deal with the judgments relied upon on behalf of the petitioner.

1. K.R.Indira vs. Dr.G.Adinarayana, 2003 Supp(4) SCR 535.

In the said case, the fact was that three separate complaints were filed alleging that loans were advanced by the appellants to the respondent for which he executed pronotes with a view to ensure repayment of loans with interest. Four cheques were issued, two in the name of the husband and two in the name of the wife. As the cheques bounced when presented for collection with an endorsement 'not arranged for', notices were issued calling upon the accused-respondent to pay the cheque amounts within 15 days from the receipt of notices. Though the accused-respondent received the notices, he did not choose to respond and after waiting for the stipulated period of 15 days, complaints were filed by the appellants.

The facts regarding notice in that case was that one common notice of demand was sent by both the appellants which was served on the respondent.

The High Court held that common notice was not in accordance with law and the essential ingredients to bring in application of Clause (b) of proviso to Section 138 of the Act were not there. It was held that when separate cheques were allegedly issued, complainants were different and related to allegedly different loan transactions, a common notice is not contemplated.

On the peculiar facts of the said case, the Apex Court observed that we have perused the contents of the notice. Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made not of the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount; nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. What is necessary is making of a demand for the amount covered by the bounced cheque which is conspicuoulsy absent in the notice issued in this case. The notice in question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which expose the drawer for being proceeded against under Section 138 of the Act. That being the position, the ultimate conclusion arrived at by the trial Court and the High Court do not call for interference in these appeals.

2. C.Kalegouda vs. K.Sadashivappa, 1998 Cril.J 3539, wherein the Karnataka High Court has held that as Section 29(2) of the Limitation Act does not refer to a 'complaint', but it only refers to an 'application' or 'petition', therefore, it appears that a criminal complaint cannot be termed as an 'application' or a 'petition' and that by no stretch of imagination, the complaint to a Criminal Court could be equated to that of an application or a petition. Therefore, the provisions of Section 29(2) of the Limitation Act will not apply. If the complainant does not file a complaint under Section 142 of the Act, then the time prescribed therein, the Court is precluded from taking the cognizance of an offence under Section 138 of the Act and that it has no jurisdiction to take cognizance of the offence

by condoning the delay in filing the complaint.

10. Secondly, I shall deal with the judgments relied upon on behalf of the respondent no.2/complainant.

1. Janardhan Mohapatra vs. Saroj Kumar Choudhury, 1993 Crl.J 1751 (High Court of Orissa). In the said case question under consideration was whether a complaint under Section 138 N.I. Act is an application and if complaint has not been filed within one month of cause of action as has been provided under Section 138 proviso (c) of the N.I. Act, whether the court can take cognizance or not.

The High Court held that complaint under Section 138 N.I. Act comes within the definition of 'application' as used in Section 29 (2) of the Limitation Act and therefore, Section 5 of the Limitation Act applies. Delay in making a complaint beyond the period of the limitation prescribed in Section 142 (b) of N.I. Act can be condoned and cognizance can be taken since. The relevant observations and findings recorded in para 13, 14, 15, 19 and 20 of the said judgments are reproduced herein-below:-

> 13. After Chapter XXXVI, Criminal Procedure Code, came into force, the power of the court to take cognizance beyond the period fixed was restricted. For this, offences were classified depending upon the maximum sentence which can be imposed on an accused. In respect of some offences there is no such restriction. Even in respect of offences where the power of taking cognizance is restricted by fixing a period of limitation, the court has been authorised to extend time. Under the Code of Criminal Procedure, there is no period for filing a complaint or otherwise initiate to a proceeding for prosecuting an accused. Restriction has been imposed on taking cognizance. In given cases, the court has been vested with power to extend the period. Thus, in cases where the complaint had been filed on the date of offence was committed but cognizance was not taken within the period fixed, the court cannot take cognizance unless it extends the time in exercise of power under Section 473 of the Criminal Procedure Code. Apart from the fact that these provisions in the Criminal Procedure Code are not applicable to an offence under Section 138 of the Act, the language of Section 142 of the act does not fix the period within which cognizance is to be taken. It has only restricted the power of taking cognizance to complaints filed within one month of the cause of action. Thus, a period has been fixed to make a complaint by the payee and for taking cognizance.
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> 14. In case it is held that the complaint is an application made to the court, delay in making the complaint can be condoned by the court in exercise of power under Section 5 of the Limitation Act, 19634. In view of Section 29(2) thereof. It reads as follows:
>
> "29. Savings-...

> (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

15. Prior to the Limitation Act, 1963, Section 5 of the earlier Limitation Act, 1908, was not applicable. This question was under consideration of the Supreme court in Kaushalya Rani v. Gopal Singh, AIR 1964 SC 260, in the context of whether an application for special leave to appeal against an order of acquittal filed beyond the time fixed, can be entertained. It was held that Section 5 of the Limitation Act, 1908, not having been specifically made applicable, the court has no jurisdiction to entertain the same. The said question came up for consideration again in the decision in Mangu Ram v. Municipal Corporation of Delhi, AIR 1976 SC 105, where the decision in Kaushalya Rani v. Gopal Sinah, AIR 1964 SC 260, was distinguished in view of the change of law and it was held that sections of the Limitation Act, 1963, is applicable and the court has jurisdiction to entertain an application filed beyond the period of limitation prescribed by condoning delay since the same was not specifically excluded.

19. I am of the view that a complaint where a prayer has been made either to take cognizance or to convict an accused, is a petition which term comes within the definition of "application" as used in Section 29(2) of the Limitation Act, and, therefore, Section 5 of the Limitation Act applies. Delay in making a complaint beyond the period of limitation prescribed in Section 142(b) of the Act can be condoned and cognizance can be taken since. This interpretation given by me shall advance the cause of justice by satisfying the wish of Parliament that offenders do not escape trial on technical grounds. Where the interpretation serves society more than the prejudice, if any, to an individual, the requirement of the society should prevail.

20. Before me, there is no dispute that the complaint filed is beyond the period of limitation prescribed under Section 142 of the Act. The trial court has not taken into consideration whether there was sufficient cause for condoning the delay under Section 5 of the Limitation Act. Accordingly, cognizance taken cannot be supported, which is vacated. The trial court is directed to consider whether there is sufficient cause for the delay and if it is satisfied that there is sufficient cause, it shall condone the delay in filing the complaint within the period of limitation prescribed under Section 142 of the Act and take cognizance since it is not disputed before me that if the complaint had been made within the period of limitation, the court could have taken cognizance. However, I may make it clear that taking of cognizance by itself would not lead to an inference that the accused is guilty. Cognizance only enables a court to issue process to the accused for his trial.

2. Satish Kumar Goenka vs. S.R.K.Mohan, 2000 Law Suit (Cri) 188 (High Court of Orissa).

The question that raised for consideration in the said case " as to whether the provisions of section 5 of the Limitation Act is applicable to a complaint filed under section 138 of the N.I. Act beyond the

period of limitation of one month provided under sub-section (b) of section 142 of the N.I. Act and if the same is applicable whether there was sufficient cause for condoning the delay".

The High Court of Orissa reiterating the view taken in case of "Janardhan Mohapatra (supra) held that period of limitation can be extended and delay in filing a complaint can be condoned. Finding recorded in para 10 of the said judgment is reproduced herein-below:-

> 10. In view of the analysis earlier I am in respectful agreement with the view expressed in the case of Janardhan Mohapatra (supra). In that view of the matter, I am of the considered opinion that section 5 of the Limitation Act applies to a complaint filed under section 138 of the N.I. Act and if the court is satisfied that there was sufficient cause for not filing the complaint within the time prescribed under sub-section (b) of section 142, the period of limitation can be extended and the delay in filing a complaint can be condoned.

3. MSR Leathers vs. S.Palaniappan & another, 2013(1)SCC 177. In the said case, following questions formulated for determination:-

> "Whether payee or holder of cheque can initiate proceeding of prosecution under Section 138 of Negotiable Instrument Act, 1881 for the second time if he has not initiated any action on earlier cause of action ?"

Apex Court has decided the aforesaid issue holding that prosecution based upon second or successive dishonour of the cheque is also admissible so long as the same satisfies the requirements stipulated in the proviso of section 138 of the Negotiable Instrument Act.

The relevant paras 23, 24, 25, 26 , 27, 31 and 32 of the above judgment are reproduced herein-below:-

> 23. Coming then to the question whether there is anything in Section 142(b) to suggest that prosecution based on subsequent or successive dishonour is impermissible, we need only mention that the limitation which Sadanandan Bhadran's case (supra) reads into that provision does not appear to us to arise. We say so because while a complaint based on a default and notice to pay must be filed within a period of one month from the date the cause of action accrues, which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires, there is nothing in Section 142 to suggest that expiry of any such limitation would absolve him of his criminal liability should the cheque continue to get dishonoured by the bank on subsequent presentations. So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holder's right to prosecute the drawer for the default committed by him remains valid and exercisable. The argument that the holder takes advantage by not filing a prosecution against the drawer has not impressed us. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of Section 138, proviso (b), the drawer gets an extended

period to make the payment and thereby benefits in terms of further opportunity to pay to avoid prosecution. Such fresh opportunity cannot help the defaulter on any juristic principle, to get a complete absolution from prosecution.

24. Absolution is, at any rate, a theological concept which implies an act of forgiving the sinner of his sins upon confession. The expression has no doubt been used in some judicial pronouncements, but the same stop short of recognizing absolution as a juristic concept. It has always been used or understood in common parlance to convey "setting free from guilt" or "release from a penalty". The use of the expression "absolution" in Sadanandan Bhadran's case at any rate came at a time when proviso to Section 142(b) had not found a place on the statute book. That proviso was added by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 which read as under:

"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."

25. The Statement of Objects and Reasons appended to the Amendment Bill, 2002 suggests that the introduction of this proviso was recommended by the Standing Committee on Finance and other respectives so as to provide discretion to the Court to waive the period of one month, which has been prescribed for taking cognizance of a case under the Act. This was so recognized judically also by this Court in Subodh S.Salaskar v. Jayprakash M.Shah & Anr., 2008 13 SCC 689 where this Court observed:

"11. The (Negotiable Instruments) Act was amended in the year 2002 whereby additional powers has been conferred upon the court to take cognizance even after expiry of the period of limitation by conferring on it a discretion to waive the period of one month.

xx xx xx xx

24...The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay..."

26. The proviso referred to above now permits the payee to institute prosecution proceedings against a defaulting drawer even after the expiry of the period of one month. If a failure of the payee to file a complaint within a period of one month from the date of expiry of the period of 15 days allowed for this purpose was to result in 'absolution'., the proviso would not have been added to negate that consequence. The statute as it exists today, therefore, does not provide for 'absolution'

simply because the period of 30 days has expired or the payee has for some other reasons deferred the filing of the complaint against the defaulter.

27. It is trite that the object underlying Section 138 of the Act is to promote and inculcate faith in the efficacy of banking system and its operations, giving credibility to Negotiable Instruments in business transactions and to create an atmosphere of faith and reliance by discouraging people from dishonouring their commitments which are implicit when they pay their dues through cheques. The provision was intended to punish those unscrupulous persons who issued cheques for discharging their liabilities without really intending to honour the promise that goes with the drawing up of such a negotiable instrument. It was intended to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case the cheque was dishonoured and to safeguard and prevent harassment of honest drawers. (See Mosaraf Hossain Khan V. Bhagheeratha Engg. Ltd. (2006) 3 SCC 658, C.C. Alavi Haji V. Palapetty Muhammed & Anr. (2007) 6 SCC 555 and Damodar S. Prabhu V. Sayed Babulal H. (2010) 5 SCC 663). Having said that, we must add that one of the salutary principles of interpretation of statutes is to adopt an interpretation which promotes and advances the object sought to be achieved by the legislation, in preference to an interpretation which defeats such object. This Court has in a long line of decisions recognized purposive interpretation as a sound principle for the Courts to adopt while interpreting statutory provisions. We may only refer to the decisions of this Court in New India Sugar Mills Ltd. V. Commissioner of Sales Tax, Bihar (AIR 1963 SC 1207), where this Court observed:

> "It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid."

31. Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.

32. The controversy, in our opinion, can be seen from another angle also. If the decision in Sadanandan Bhadran's case (supra) is correct, there is no option for the holder to defer institution of judicial proceedings even when he may like to do so for so simple and innocuous a reason as to extend certain accommodation to the drawer to arrange the payment of the amount. Apart from the fact that an interpretation which curtails the right of the parties to negotiate a possible settlement without prejudice to the right of holder to institute proceedings within the outer period of limitation stipulated by law should be avoided we see no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The magistracy in this country is over-burdened by an avalanche of cases under Section 138 of Negotiable Instruments Act. If the first default itself must in terms of the decision in Sadanandan Bhadran's case (supra) result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing parties to resort to proceedings in the courts of law. While there is no empirical data to suggest that the problems of overburdened magistracy and judicial system at the district level is entirely because of the compulsions arising out of the decisions in Sadanandan Bhadran's case (supra), it is difficult to say that the law declared in that decision has not added to court congestion.

11. Apart from the aforesaid judgments cited on behalf of the petitioner and respondent no.2, it is also relevant to consider some other judgments also, which cover the field:-

> (i) The Apex Court in the case of Suman Sethi Vs. Ajay K Churiwal 2000(2) SCC has dealt with the issue relating to statutory notice under Negotiable Instruments Act and held that it is a well settled principle of law that the notice has to be read as a whole. The relevant extract of said judgment is reproduced herein below:-
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> " It is well-settled principle of law that the notice has to be read as a whole. In the notice demand has to be made for the "said amount" i.e. the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the said amount threre is also a claim by way of interest, cost etc., whether the notice is bad would depend on the language of the notice. If in a notice while giving the break-up of the claim the cheque amount, interest, damages etc., are separately specified. Other such claims for interest, cost etc., would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad."

(ii) The Apex Court in case of V Raja Kumari Vs. R Subbarama Naidu 2004 (8) SCC 774 has held that even non-service of notice cannot be a ground for rejecting the complaint. Relevant extract of the above judgment is reproduced herein below:-

"On the part of the payee he has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice. It is, therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.

In Black's Law Dictionary "giving of notice" is distinguished from receiving of the notice " a person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it. " A person "receives" as notice when it is duly delivered to him or at the place of his business.

If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader, and clips an honest payee as that would defeat the very legislative measure.

In Maxwell's Interpretation of Statutes, the learned author has emphasized that "provisions relating, to giving of notice often receive liberal interpretation". The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to "make a demand" by giving notice. The thrust in the clause is on the need to "make a demand". It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once, it is dispatched his part is over and the next depends on what the sendee does."

(iii) The Madhya Pradesh High Court in case of Vinod Chaurasiya vs. R.S.Bhadoriya in M.Cr.C. No.7437 of 2016, has also decided the issue whether the delay in filing complaint under 138 Negotiable Instrument Act can be condoned or not.

The fact of the above case before the Madhya Pradesh High Court was that the complaint was filed on 03.06.2014 along with an application under Section 5 of Limitation Act for condonation of delay. It was pleaded in the application that the complainant is the legal heir of holder of Cheque, who died on 28.04.2014 and as the complainant was busy in performing last rites of the cheque holder

therefore, the complaint could not be filed within a period of limitation.

The Magistrate after considering the applications filed under section 5 of the Indian Limitation Act as well as under Section 142 of N.I. Act, 1881, and considering the fact that the holder of the cheque had expired on 28.04.2014 and by holding that the delay of 17 days in filing the complaint appears to be bona fide, accordingly condoned the delay and fixed the case for hearing.

Being aggrieved by the order of the Magistrate, the accused filed a Criminal Revision No.600205/2016 before the Revisional Court, which too has suffered dismissal by order dated 14.06.2016. Therefore, petition under section 482 Cr.P.C. was filed by the accused. The High Court finally held that:-

> (i) Merely because the lawyer instead of filing the application under Section 142 of NI Act, 1881, chose to file application under Section 5 of Limitation Act, therefore, the complaint cannot be dismissed as barred by limitation.
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> (ii) It is also a well established principle of law that a party should not suffer for the mistake committed by the Lawyer.
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> (iii) Merely because the application under Section 5 of Limitation Act was filed instead of filing the same under Section 142 of NI Act, 1881, the complaint cannot be dismissed as barred by limitation.
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> (iv) The magistrate did not commit any mistake in condoning the delay of 17 days in filing the complaint under Section 138 of NI Act, 1881, and further no mistake was committed by the Revisional Court by dismissing the revision.

Discussion of relevant provisions of N.I.Act.

12. Before delving into the issue, it would be appropriate to reproduce Section 138 & 142 of the N.I. Act.

> "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 extend 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, whichever 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(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.

Explanation. For the purposes of this sectin "debt or other liability" means a legally enforceable debt or other liability.

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.]

13. A bare reading of Section 138 of the N.I. Act indicates that the purport of Section 138 is to prevent and punish the dishonest drawers of cheques who evade and avoid their liability. As explained in clause (b) of the proviso, the payee or the holder of the cheque in due course is necessarily required to serve a written notice on the drawer of the cheque within fifteen days from the date of intimation received from the bank about dishonor.

14. It is explicitly made clear under clause (C) of Section 138 of the NI Act, that this gives an opportunity to a drawer of the cheque to make payment within fifteen days of receipt of such notice sent by the drawee. It is manifest that the object of providing clause (C) is to avoid unnecessary hardship. Even if the drawer has failed to make payment within fifteen days of receipt of such notice as provided under clause (c), the drawer shall be deemed to have committed an offence under the Act and thereafter the drawee would be competent to file complaint against the drawer by following

the procedure prescribed under Section 142 of the Act.

15. It is clear from Section 27 of the General Clauses Act, 1897 and Section 114 of the Evidence Act,1872 that once notice has been sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected. Then requirements under proviso (b) of Section 138 stand complied, if notice is sent in the prescribed manner. However, the drawer is at liberty to rebut this presumption.

16. Considering the relevant provisions of N.I. Act, it is clear that the offence under Section 138 N.I. Act are completed in following steps:

> "(1) Drawing of the cheque by a person on an account maintained by him with a banker, for payment to another person from out of that account for discharge in while/part any debt or liability.
>
> (2) Presentation of the cheque by the payee or the holder in due course to the bank.
>
> (3) Returning the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque.
>
> (4) Giving notice in writing to the drawer of the cheque within 15 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount, and (5) Failure to the drawer to make payment to the payee or the holder in due course of the cheque of the amount covered by the cheque within 15 days of the receipt of the notice."

17. In the aforesaid backdrop the question also arises "whether a complaint is an application". The word "complaint" has been defined in Section 2(d) of the Criminal Procedure Code. It reads as follows :

> "2. Definitions.--In this Code, unless the context otherwise requires :--
>
> (d) 'complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

18. The word "application" has been defined in Section 2(b) of the Limitation Act, 1963, to include a petition. An inclusive definition is wide in its nature. The New Webster Encyclopedia dictionary gives the meaning of the word "application", amongst others, as "the act of making a request or soliciting" and the word "petition" means, amongst others, "prayer, a formal written request, a document containing such a request, usually signed by persons supporting the request".

19. Prior to 2002, proviso to Section 142(b) of N.I. Act had not found place in the N.I. Act. On the basis of statement of objects and reasons appended to the Amendment Bill, 2002, proviso to Section 142 (b) of N.I. Act was inserted by Act No. 55 of 2002 w.e.f. 6.2.2003, whereby additional power has been conferred upon the court to take cognizance even after expiry of period of limitation by conferring on it a discretion to waive the period of one month.

Conclusion

20. Considering the definition of word "complaint as defined under Section 2(d) of Cr.P.C., the word "application' as defined under Section 2(b) of the Limitation Act, as well as proviso to sectin 142(b) of the N.I. Act, as discussed above, I am of the view that a complaint, where a prayer has been made either to take cognizance or to convict an accused, is a petition which term comes within the definition of "application" as used in Section 29(2) of the Limitation Act, and, therefore, Section 5 of the Limitation Act applies to a complaint filed under section 138 of the N.I. Act prior to coming into force of Amendment act No 55 of 2002 and delay could be condoned, if the court is satisfied that there was sufficient cause for not filing the complaint within the time prescribed under sub-section (b) of section 142.

After amendment in the Negotiable Instrument Act, by Act No. 55 of 2002 w.e.f. 6.2.2003, the period of limitation can be extended and the delay in filing a complaint can be condoned by the Court concerned in view of proviso to Section 142 (b) of the N.I. Act.

21. It is also well settled that where the interpretation serves society more than the prejudice, if any, to an individual, the requirement of society should prevail, so that offender does not escape trial on technical grounds. In view of the matter, I am also of the considered opinion that merely filing an application under Section 5 of the Limitation Act instead of filing an application in view of proviso to Section 142(b) of the N.I. Act, the complaint cannot be dismissed as barred by limitation.

22. The judgment of Karnataka High Court in case of C.Kalegouda vs. K.Sadashivappa, 1998 Cril.J 3539 relied upon by the learned counsel for the petitioner is not helpful for the petitioner in view of amendment in Negotiable Instrument Act, by Act No. 55 of 2002 w.e.f. 6.2.2003 by adding proviso to Section 142 (b) of the N.I. Act. In the present case notice was sent on 25.5.2010 and complaint was filed on 22.9.2010 after amendment as mentioned above.

23. The judgment of K.R.Indira vs. Dr.G.Adinarayana, 2003 Supp(4) SCR 535 relief upon by the learned counsel for the petitioner is also not helpful to the petitioner because the fact of the said case was entirely on different footing, as discussed in preceding paragraph no.9(i) and distinguishable from the facts of the present case.

24. So far as another issue raised on behalf of the petitioner that the impugned notice is invalid on account of the reason that it contain demand of some additional amount other than cheque amount is concerned, considering the law as settled by the Apex Court in case of Suman Sethi (supra), that if in the notice, claim/demand of cheque amount as well as other amount for interest, etc. have been made specifying the same separately, the same will not invalidate the notice. In view of aforesaid

discussion, this Court is of the considered opinion that the notice dated 20.5.2010 of the present case cannot be said to be invalid notice.

25. It is also well settled that once the notice is sent by the registered by correctly addressing to the drawer of the cheque, the requirement under proviso (b) of Section 138 stand complied. As such there is no illegality in this case in sending notice by the respondent no.2/complainant to the petitioner/accused.

Result

26. In view of above, I do not find any manifest error of law or perversity in the impugned orders dated 28.07.2011 passed by A.C.J.M., Court No.2, Bulandshahar and the order dated 04.05.2012 passed by Additional District & Session Judge, Court No.17, Bulandshahar, as the same are impeccable.

27. The writ petition sans merit and is, accordingly, dismissed.

Order Date :- 15.3. 2019 SKD