



RAJASTHAN HIGH COURT
HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Criminal Appeal (Sb) No. 869/2023

Moolchand S/o Jagdish Narayan, R/o Near Pahadi Chungi Naka, Ward No. 8, Tehsil And Police Station Newai, Distt. Tonk (Raj)

-----Complainant/Appellant

Versus

Bhairulal S/o Ramsahay, R/o Opposite Khadi Bhandar, Tonk Road, Pahadi Chungi Naka, Ward No. 8, Newai, Tehsil And Police Station Newai, Distt. Tonk (Raj)

-----Accused/Respondent

For Appellant(s) : Mr. Sandeep Jain, Adv.
For Respondent(s) : Mr. Manvendra Singh, Adv.
Mr. Surya Pratap Singh, Adv.

HON'BLE MR. JUSTICE ANOOP KUMAR DHAND

Order

28/03/2024

Reportable

There is no wrong without a remedy. Where there is a legal right, there is a remedy. The law wills that in every case where a man is wronged and endamaged he must have a remedy. The principle of Ubi Jus Ibi Remedium is recognised as a fundamental principle of the theory of law and philosophy. It is the Court's responsibility to protect and preserve the right of parties and to support them, rather than refuse them relief.

The legal issue in this appeal is "Whether the complainant can be left remediless, if he/she has filed a

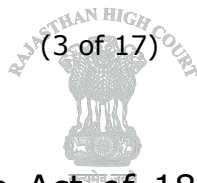


premature complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act of 1881')."

1. Aggrieved by the judgment dated 24.05.2022 passed by the learned Additional Sessions Judge, Newai, District Tonk (for short 'the Appellate Court') in criminal Appeal No. 72/2018, the instant criminal appeal has been filed by the appellant.

2. By way of passing the impugned judgment dated 24.05.2022, the Appellate Court has allowed the appeal filed by the accused-respondent against the judgment dated 27.02.2018 passed by the learned Additional Chief Judicial Magistrate, Newai, District Tonk in Criminal Case No. 27/2013 and acquitted the accused respondent from the charge under Section 138 of the Act of 1881 on a technical ground that a premature complaint was filed by the complainant-appellant.

3. The facts lie on a narrow compass that a cheque of Rs.3,50,000/- was issued by the accused-respondent in favour of the complainant-appellant and when the said cheque was presented in the Bank, the same was dishonoured on the ground of "no balance" in the bank account of the accused-respondent. Counsel submits that after receiving the aforesaid intimation, a legal notice under Section 138 of the Act of 1881 was given to the accused-respondent by the complainant-appellant on 28.08.2012 and the same was received by the accused-respondent on 01.09.2012 and thereafter, the accused-respondent submitted reply to the aforesaid legal notice on 06.09.2012 and denied the transaction and issuance of the cheque. Counsel submits that thereafter, a complaint



under Section 138 of the Act of 1881 was submitted by the appellant against the accused-respondent before the Court of learned Additional Chief Judicial Magistrate, Newai, District Tonk on 14.09.2012. Counsel submits that the accused-respondent faced trial for the offence punishable under Section 138 of the Act of 1881, thereafter, he was found guilty for the aforesaid offence by the learned trial Judge and he was convicted under Section 138 of the Act of 1881 vide judgment dated 27.02.2018. He was sentenced to undergo one year simple imprisonment with fine of Rs. 5,00,000/-.

4. Counsel submits that against the aforesaid judgment, the accused-respondent submitted a criminal appeal before the Appellate Court and submitted an argument that a premature complaint was filed by the appellant on 14.09.2012, while the notice was received by the accused-respondent on 01.09.2012. Counsel submits that a premature complaint was filed prior to expiry of 15 days in terms of Section 138(3) of the Act of 1881, hence, under these circumstances, the premature complaint filed by the appellant was not sustainable in the eye of law. Counsel submits that in support of his contention, the accused-respondent placed reliance upon the judgment passed by the Hon'ble Apex Court in the case of **Yagendra Pratap Singh Vs. Savitri Pandey** reported in **(2015) AIR (SC) 157**. Counsel submits that misinterpreting the legal proposition of law as held by the Hon'ble Apex Court in the case of **Yogendra Pratap Singh** (supra), the Appellate Court rejected the complaint filed by the complainant-appellant and acquitted the accused-respondent from the



charge under Section 138 of the Act of 1881. Counsel submits that as per the judgment passed by the Hon'ble Apex Court in the case of **Yogendra Pratap Singh** (supra), the Appellate Court was supposed to return the complaint to the appellant to file afresh within the period of limitation as prescribed under Section 138(3) of the Act of 1881. Counsel submits that instead of returning the complaint to the appellant to file a fresh, the complaint itself has been rejected and the accused-respondent has been acquitted from the charges. Counsel submits that subsequently the Hon'ble Apex Court in the case of **Gajanand Burange Vs. Laxmi Chand Goyal** while deciding **Criminal Appeal No.1229/2022** on 12.08.2022 has issued directions to the trial Courts for granting liberty to the complainant to file a fresh complaint if any premature complaint is filed by him. Counsel submits that this fact has been overlooked by the learned Appellate Court and the impugned judgment has been passed which is not tenable in the eye of law and the matter is required to be remitted to the trial Court to decide the issue afresh in terms of the judgment passed by the Hon'ble Apex Court in the case of **Yogendra Pratap Singh** (supra).

5. Counsel for the accused-respondent has opposed the arguments raised by the counsel for the appellant and submitted that a premature complaint was filed by the complainant-appellant which has been rightly rejected by the Appellate Court and the Appellate Court has not committed any error in rejecting the complaint filed by the complainant-appellant and in acquitting the respondent from the charge



under Section 138 of the Act of 1881. Counsel submits that under these circumstances, interference of this Court is not warranted.

6. Heard and considered the submissions made at Bar and perused the material available on record.

7. This fact is not in dispute that after dishonouring of the cheque issued by the accused-respondent, the appellant filed a criminal complaint against him under Section 138 of the Act of 1881 before the Court of Additional Chief Judicial Magistrate, Newai, District Tonk on 14.09.2012. This fact is also not in dispute that after dishonouring of the cheque issued by the accused-respondent, the appellant sent a legal notice to the accused-respondent on 28.08.2012 asking him to return the cheque amount within a period of 15 days. The record indicates that the accused-respondent has received the aforesaid legal notice on 01.09.2012 and he has denied his liability to make the payment to the appellant by sending reply on 06.09.2012. After receipt of the aforesaid reply, the appellant filed a complaint under Section 138 of the Act of 1881 against the accused-respondent before the Court of Additional Chief Judicial Magistrate, Newai, District Tonk on 14.09.2012. This fact is also not in dispute that the respondent faced trial for the above offence and finally he was found guilty for the aforesaid offence by the trial Court vide judgment dated 27.02.2018 wherein the accused-respondent was convicted and sentenced to undergo one year simple imprisonment with fine of Rs.5,00,000/-. This fact is also not in dispute that aggrieved by the aforesaid judgment, an



appeal was submitted by the accused-respondent before the Appellate Court and the Appellate Court has rejected the complaint by treating it as a premature complaint which it was filed by the complainant-appellant without waiting for expiry of the statutory period of 15 days and accordingly, the accused/respondent has been acquitted.

8. Before deciding the issue in question, it would be gainful to quote the provisions contained under Sections 138 and 142 of the Act of 1881. For ready reference, Sections 138 and 142 of the Act of 1881 are reproduced as under:-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for 4 [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, 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 thirty 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 section, “debt of other liability” means a legally enforceable debt or other liability.

142. Cognizance of offences.— [(1)] 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.].

(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.”

Perusal of Section 138 (c) indicates that offence under Section 138 is made only if the drawer of the cheque fails to make the payment of the cheque amount of money to the payee or to the holder in due course of the cheque within fifteen days of the receipt of the notice. If the payment is not



made by the drawer of the cheque within fifteen days of receipt of notice, then as per Section 142 (b) of the Act of 1881, a complaint can be filed within a period of one month on the date on which the cause of action arises under clause (c) of Section 138. The cognizance can only be taken upon a complaint submitted in writing.

9. The issue involved in this appeal is no more res integra as this issue came before the Hon'ble Apex Court in the case of **Yogendra Pratap Singh** (supra) where the Apex Court formulated the following two questions for consideration:

"(i) Can cognizance of an offence punishable u/s 138 of the Negotiable Instruments Act 1881 be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138(c) of the Act aforementioned? And,

(ii) If answer to question No.1 is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated u/s 142(b) for the filing of such a complaint has expired?"

10. The Apex Court in the case of **Yogendra Pratap Singh** (supra) while interpreting the provisions contained under Sections 138 and 142 of the Act of 1881, answered the above two questions in para 35 to 42, which read as under:-

"35. Insofar as the present reference is concerned, the debate broadly centers 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.



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

37. A complaint filed before 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.¹⁹ 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.

38. We, therefore, do not approve the view taken by this Court in Narsingh Das Tapadia¹ and so also the judgments of various High Courts following Narsingh Das Tapadia¹ 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.

39. 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.

40. Our answer to question (i) is, therefore, in the negative.

41. The other question is that if the answer to question (i) is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142(b) for the filing of such a complaint has expired.

42. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the NI Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Now, since our answer to question (i) is in the negative, we observe that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause. Question (ii) is answered accordingly."

11. The question number (i) was answered by the Hon'ble Apex Court by holding that the complaint under Section 138 of



the Act of 1881 filed before expiry of fifteen days of service of notice cannot be treated as a complaint in the eye of law and the criminal proceedings initiated on such complaint are liable to be quashed.

12. Thereafter, the second question was answered by the Apex Court that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and in that event, delay in filing the complaint will be treated as having been condoned under proviso to clause (b) of Section 142 of the Act of 1881.

It is worthy to note here that this decision was made applicable to all such pending cases where a complaint was submitted prior to the expiry of fifteen days from receipt of the notice.

13. Ignoring the directions issued in the judgment passed by the Hon'ble Apex Court in the case of **Yogendra Pratap Singh** (supra), the complaint filed by the appellant was rejected by the Appellate Court and the accused-respondent has been acquitted from the charges. The Appellate Court has erred in rejecting the complaint filed by the complainant-appellant, acquitting the accused-respondent. As per the judgment passed by the Hon'ble Apex Court in the case of **Yogendra Pratap Singh** (supra), Appellate Court was supposed to grant liberty to the appellant to file a fresh complaint as per the mandate contained under Section 138(c) and Section 142(b) of the Act of 1881 and in accordance to the direction of the Hon'ble Apex Court in the case of **Yogendra Pratap Singh** in which the Apex Court has allowed



filing of fresh complaint in case a premature complaint is made. The aforesaid view taken by the Hon'ble Apex Court in the case of **Yogendra Pratap Singh** (supra) has been followed by the Hon'ble Apex Court in the case of **Gajanand Burange** (supra) and it has been held in para 7 to 11 as under:-

"7. In the present case, while the notice was received by the appellant on 8 November 2005, the complaint was filed before the period of fifteen days was complete. The complaint could have been filed only after 23 November 2005, but was filed on 22 November 2005. In view of the legal bar which is created by Section 142 of the NI Act, as explained in the three-Judge Bench decision of this Court, taking of cognizance by the Court was contrary to the law and the complaint was not maintainable before the expiry of the period of fifteen days from the date of its receipt by the appellant.

8 However, on behalf of the respondent, it has been urged that the second issue which was raised before the three-Judge Bench has been dealt with in the following terms:

"41... Now, since our answer to Question (i) is in the negative, we observe that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to Question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the court of sufficient cause. Question (ii) is answered accordingly."



9 We are of the view that the respondent would be entitled to the benefit of the determination on the second issue, as extracted above.

10 Hence, the following order:

(i) The impugned judgment and order of the Single Judge of the High Court of Chhattisgarh dated 28 November 2018 shall stand set aside; and

(ii) The respondent would be at liberty to institute a fresh complaint and since the earlier complaint could not be presented within the time prescribed by Section 142(b) of the NI Act, the respondent would be at liberty to seek the benefit of the proviso by satisfying the trial court of sufficient cause for the delay in instituting the complaint.

11 In the event that the second complaint is filed within a period of two months from the date of this order, we request the trial court to dispose of the complaint within a period of six months."

14. From the aforesaid law laid down by the Apex Court in the case of **Yogendra Pratap Singh** (supra) and **Gajanand Burange** (supra), it is apparent that in a case where the complaint was filed before the expiry of a period of fifteen days stipulated in the notice which is required to be served upon the drawer of the cheque, the Court cannot take cognizance thereof. However, the second complaint on the same cause of action has been held to be maintainable and the delay in filing such complaint shall be deemed to have been condoned.

15. In the considered opinion of this Court, the very object of laying down of law aforesaid was to curtail the practice of filing the pre-mature complaints. However, by grating liberty to file fresh complaint in cases where the complaints have already been filed before the expiry of the mandatory period of fifteen days in terms of Section 138 (c) of the Act, a balance has been struck so as to not make the complainant remediless. If



under such circumstances, a second complaint is submitted on the basis of same facts, such complaint would not amount to double jeopardy to the accused.

16. The appellant cannot be left remediless just because he has filed a premature complaint before expiry of the statutory period of fifteen days. It is settled position of law that no person shall be left remedy less and whatever grievance the person have raised before the Court of law, the same has to be examined on its own merits.

17. The appellant cannot be punished for doing some act which was premature and there was a legal impediment in his way. Therefore, the appellant cannot be rendered remediless and should not be made to suffer due to that legal impediment which was the reason for it and not doing the act within the prescribed time.

18. "Ubi Jus Ibi Remedium" is an established principle of law and it provides that there is no wrong without a remedy and where there is a legal right, there has to be a remedy. The appellant has sustained legal injury when the cheque issued by the respondent was dishonoured. He approached the Court of law for redressal of his grievance at premature stage without waiting for completion of the statutory period prescribed by law. By dismissing his premature complaint, he cannot be left remediless. He has every right to submit second complaint on the same facts for redressal of his grievance.

19. In the leading case of **Ashby Vs. White reported in (1703) 92 ER 126, (1703) 2 Ld Raym 938, (1703) 1 Sm LC (13th Edn) 253** decided on 01.01.1703, the Court of



Kings Bench in United Kingdom observed that when law cloths a man with a right he must have means to vindicate and maintain it and remedy it if he is injured in the exercise and enjoyment of it and it is a vain thing to imagine a right without a remedy for want of right and want of remedy a reciprocal.

20. The drawer of the cheque cannot be allowed to escape from prosecution merely on a technical count that a premature complaint was filed against him before expiry of the statutory period of fifteen days as per the mandate of Section 138 (c) of the Act of 1881. Such drawer of the cheque is liable to be prosecuted in a second successive complaint filed on the same facts by the holder of the cheque. The drawer of the cheque would not be absolved from a penal consequences of dishonouring of cheque issued by him/her.

21. Following judgments passed by the Honble Apex Court in the case of **Yogendra Pratap Singh** (supra) and **Gajanand Burange** (supra), it can be safely held that the impugned judgment passed by the Appellate Court is not sustainable in the eye of law and the same is liable to be quashed and set aside and hereby set aside. The judgment passed by the Additional Chief Judicial Magistrate, Newai, District Tonk stands modified granting liberty to the appellant to file a fresh criminal complaint against the accused-respondent within a period of one month from today. In case such complaint is filed by the appellant within a period of one month, the delay in filing the complaint would be treated as having been condoned under proviso to Section 142 of the Act of 1881. It is expected from the trial Court to decide the said complaint



after affording due opportunity of hearing to the accused-respondent expeditiously as early as possible, preferably within a period of one year thereafter.

22. The trial Court is further directed to return all the original certified documents to the complainant-appellant after retaining the certified copies of the same on the record.

23. Accordingly, the instant criminal appeal stands disposed of. Stay application and all application(s) (pending, if any) also stand disposed of.

24. Needless to observe that the trial Judge would decide the matter on the merits of the case and after considering the evidence led by both sides. The trial Court would not be influenced by any of the observations made hereinabove while deciding the complaint.

(ANOOP KUMAR DHAND),J

MR/59