

HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

CRM(M) No. 865/2022

c/w

CRM(M) No. 866/2022

CRM(M) No. 867/2022

CRM(M) No. 869/2022

CRM(M) No. 870/2022

Kulbhushan Gupta

.....Appellant(s)/Petitioner(s)

Through: Mr. Rakesh Chargetra, Adv.

vs

Bishambar Ram

..... Respondent(s)

Through: Mr. Gagan Oswal, Adv.

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
30.12.2024

ORAL:

1. The issues involved in the instant petitions are akin and analogous to each other, as such, the petitions have been clubbed together for consideration and consequently are taken up for disposal at this stage with the consent of the appearing counsel for the parties and are, accordingly, disposed of hereunder.

Facts:

2. The complainant respondent herein is stated to have instituted multiple complaints before the trial court under section 138 of the Negotiable Instruments Act, 1881 (for short "the Act") against the accused petitioner herein *qua* bouncing of cheques bearing No. 1819192 dated 25.02.2021 amounting to Rs. 9,50,000, cheque bearing No. 1819191 dated 05.03.2021

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amounting to Rs. 9,00,000/-, cheque bearing No. 1819194 dated 05.01.2021 amounting to Rs. 9,00,000/-, cheque bearing No. 1819195 dated 05.02.2021 amounting to Rs. 9,00,000/- and cheque No. 1819197 dated 20.02.2021 amounting to Rs. 7,00,000/- claimed to have been issued by the petitioner herein in favour of the respondent herein for repayment of a loan stated to have been advanced by the respondent herein to the petitioner herein

The respondent herein in the said complaints, had alleged that the cheque(s) were presented before the bank being Citizen Cooperative Bank Limited Branch Jammu, however, same came to be returned back to the complainant respondent herein unpaid vide Memo dated 07.04.2021 with the remarks “**accounts closed**”, whereupon the complainant respondent herein is stated to have served a demand notice upon the accused petitioner herein on 22.05.2021 sent through registered post on 24.05.2021 and after expiry of period of 15 days stipulated therein in the said demand notice by the complainant respondent herein to pay the amount covered under the cheque(s) to him, the accused petitioner failed, whereupon the complainant respondent herein filed the complaints on 27.08.2021.

The said complaint upon being entertained by the trial court, were proceeded with after recording the preliminary statement of the complainant respondent herein and one of his witnesses and upon being satisfied thereof, cognizance of the offence alleged to have been

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committed by the accused petitioner herein came to be taken and consequently the accused petitioner herein came to be summoned in terms of impugned order dated 27.08.2021 passed by the trial court.

3. The petitioner herein has challenged the impugned complaints, proceedings initiated thereon as also impugned order dated 27.08.2021 in the instant petition(s) on the following grounds:

- (i) That the order impugned dated 27.08.2021 passed by the learned Judicial Magistrate Akhnoor under Section 138 Negotiable Instrument Act is misuse of process of law, therefore, the same is liable to be quashed.
- (ii) That the cheque in question bearing No. 1819192 dated 25.02.2021 was allegedly issued by the petitioner which was presented by the respondent to his Bank and the Bank vide memo dated 07.04.2021 had returned the cheque unpaid with the endorsement that the 'account closed', therefore, it is apparent from the memo that the respondent has received memo containing the reason of non- payment as 'account closed' on 07.04.2021 because Bank of the complainant and the accused is same but the respondent had served the notice of demand on 24.05.2021 i.e., after the expiry of period of one month and the aforesaid legal notice of demand which is dated 22.05.2021 was posted on 24.05.2021, that too, after the expiry of period of one month from 07.04.2021 i.e., the day when the memo was received by the respondent, as such, the present complaint was not maintainable because as per the provisions contained under Section 138 Negotiable Instrument Act, the respondent was under duty to serve the notice of demand within a period of one month from the date of receipt of the memo but in the instant case, memo was received on 07.04.2021 and legal notice of demand dated 22.05.2021 was posted on 24.05.2021 to the petitioner i.e., after the expiry of more than 30 days, therefore, the proceedings were in violation of law/statute, thus, in view of the violation of Section 138 of Negotiable Instrument Act, the same cannot give rise to valid proceedings, therefore, the impugned complaint and proceedings initiated thereon including the order impugned are liable to be quashed.
- (iii) That in view of the judgment of Hon'ble Apex Court, the cause of action to file the complaint under section 138 of

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Negotiable Instrument Act accrues to a complainant/payee/holder of a cheque in due course if:-

(a) The dishonored cheque is present to the drawee bank within a period of six months from the date of its issue

(b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the Bank regarding the dishonor of the cheque and ;

(c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

It is not out of place to mention here that in the instant case, the cheque was presented by the respondent to his bank within six months and the same was returned unpaid on 07.04.2021 with memo containing endorsement that the 'account closed' and notice of demand was sent on 24.05.2021 after expiry of period of 30 days, therefore, the responden/complainant has got no cause of action to file the impugned complaint but despite that the same was filed by the respondent and entertained by the learned trial Court by virtue of impugned order, thus, the impugned complaint and proceedings initiated thereon including the order impugned are liable to be quashed.

(iv) That it is apparent from the complaint that the petitioner had failed to mention the date and year in which the alleged loan was taken by the petitioner from the respondent and the respondent had filed the suit against the petitioner in the month of October,2016 and thereafter, the petitioner and the respondent are contesting the suit and thereafter & prior to it, no financial transaction has been taken place in between the petitioner and the respondent, thus, the so called loan which was never taken by the petitioner is not a legally enforceable debts against which no cheque was issued by the petitioner and moreover, there is a contradictory stand in the complaint because the complainant/respondent on one hand has alleged that the loan has been taken and on the other hand, a cheque has been issued to settle the civil litigation, thus, the criminal complaint does not constitute an offence and is a misuse of process of law, as such, the impugned complaint and proceedings initiated thereon including the order impugned are liable to be quashed.

(v) That the respondent had presented the cheque in the Bank and thereafter obtained the memo dated 07.04.2021 and also sent a legal notice but despite serving the notice upon the petitioner, he had not filed the complaint within the time and filed the same along with an application for

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condonation of delay without giving any reasonable explanation for condoning the delay but despite that the trial Court had passed the order condoning the delay in a casual & mechanical manner, therefore, the criminal complaint and proceedings initiated thereon including the order *arc per se* illegal and being misuse of process of law, are liable to be quashed.

- (vi) That while serving the legal notice upon the petitioner, the respondent has alleged one story but while filing the complaint, respondent has changed his version and no date, month & year of taking the alleged loan has been mentioned in the complaint and the respondent has used the cheque after forging the signatures of the petitioner in his bank account which was closed way back in 2013 so if the cheque is of 2013, the same cannot be presented for encashment after the period of three months/six months, in view of the provisions contained under the Negotiable Instrument Act and legal notice was duly replied and the learned trial court has not considered the criminal complaint and the material filed in support thereof including the legal notice of demand and its reply and has passed the order impugned in a casual & mechanical manner which suffers from material illegality and cannot give rise to the valid proceedings. On this score also, the impugned complaint and proceedings initiated thereon including the order impugned are liable to be quashed.
- (vii) That there is a civil litigation pending inter se the petitioner and the respondent qua one property and the petitioner has no talking terms with beach other and there was no question of financial transaction inter se the petitioner and the respondent and the respondent had used outdated cheque which apparently stolen by the respondent after forging the signature of the petitioner on the aforesaid cheque only to falsely implicate the petitioner in the criminal complaint for wreck vengeance, irrespective of the fact that neither the petitioner has taken any loan nor any amount is payable by the petitioner and the cheque in question belongs to the Cheque Book of the petitioner of the account which was never operated by the petitioner after 2013, therefore, the criminal complaint and order impugned order as well as proceedings initiated on the complaint are misuse of process of law, as such, the same are liable to be quashed.

Heard learned counsel for the parties and perused the record.

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4. According to Mr. Rakesh Chagotra, appearing counsel for the accused petitioner the trial court grossly erred, while not only entertaining the impugned complaints, but also initiating proceedings thereon, inasmuch as, in passing the impugned order, in that, the impugned complaint, were not *per se* maintainable as the demand notice sent by the complainant respondent herein to the accused petitioner herein was sent beyond the period prescribed in Section 138 proviso (b) of the Act.
5. On the contrary Mr. Gagan Oswal appearing counsel for the complainant respondent herein would submit that the plea of the counsel for the petitioner is grossly misconceived and could not be adjudicated upon in the instant petitions, in that the plea raised by the counsel for the petitioner could only be addressed during the course of trial by leading evidence thereof.
6. Before proceedings further in the matter, a reference to the provisions of section 138 of the Act being relevant and germane to the controversy become imperative hereunder and same reads 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—

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(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, 5 [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.”

7. As is evident from the aforesaid proviso (b) appended to section 138, payee or holder in due course of the cheque has to make a demand for the payment of said amount of money covered by the cheque by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding the return of the cheque as unpaid.
8. The aforesaid proviso stands adverted and interpreted by the Apex Court in case tilted as **Sivakumar vs. Natrajan** reported in (2009) 13 SCC 623 wherein the Apex Court at paras 9, 10 and 11 has observed and held as under:

9. The core question which arises for consideration is as to whether the notice dated 2.01.2004 was issued within the stipulated period of thirty days from the date of receipt of intimation of the dishonour of cheque.

10. By reason of the provisions of the Act, a legal presumption in regard to commission of a crime has been raised. The proviso appended thereto, however, states that nothing contained in the main provision would apply unless conditions specified in clauses (a), (b) and (c) thereof are complied with. Clauses (a), (b) and (c) of the proviso, therefore, lay down conditions precedent for applicability of the main provision. Section 138 of the Act being penal in nature, indisputably, warrants strict construction.

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In M/s. Harman Electronics (P) Ltd. & Anr. v. M/s. National Panasonic India Ltd. [2008 (16) SCALE 317], this Court held:

“8. The proviso appended thereto imposes certain conditions before a complaint petition can be entertained.

9. Reliance has been placed by both the learned Additional Sessions Judge as also the High Court on a decision of this Court in K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr.. This Court opined that the offence under Section 138 of the Act can be completed only with the concatenation of a number of acts, namely, (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It was opined that if five different acts were done in five different localities, any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act and the complainant would be at liberty to file a complaint petition at any of those places. As regards the requirements of giving a notice as also receipt thereof by the accused, it was stated:

‘18. 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.’

14. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may

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refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.”

Keeping in view the aforementioned legal principle, interpretation of clause (b) of the proviso appended to Section 138 of the Act has to be considered.

11. We may, however, at the outset notice that both clauses (a) and (b) of the proviso appended to Section 138 of the Act employed the term “within a period”. Whereas clause (a) refers to presentation of the cheque to the bank within a period of six months from the date on which it is drawn, clause (b) provides for issuance of notice “to the drawer of the cheque within thirty days of the receipt of information”. The words “within thirty days of the receipt of information” are significant. Indisputably, intimation was received by the respondent from the bank on 3.12.2003.”

A bare perusal of the aforesaid judgment of the Apex Court tends to show that by the reasons of the provisions of the Act, a presumption in regard to the commission of a crime has been raised, however, the proviso appended thereto provides that nothing contained in the main provision would apply unless the conditions specified in clauses in (a), (b) and (c) thereof are complied with, suggesting thus, the said clauses (a), (b) and (c) of the proviso therefore, lay down conditions precedent for applicability of the main provision of Section 138 of the Act and further that the provisions of section 138 of the Act being penal in nature, indisputably, warrants strict construction.

9. Keeping in mind the aforesaid position of law and reverting back to the case in hand, it is specifically pleaded by the complainant respondent herein at para 7 of the impugned complaint that upon presentation of the cheque(s) for encashment by him before the bank in question, the

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cheque(s) got dishonored and came to be rejected by the bank unpaid with returning Memo dated 07.04.2021 with the remark “account closed” and that upon receipt of the said Memo, he-the complainant respondent herein served the legal notice dated 22.05.2021 upon the accused petitioner herein by way of registered post vide receipt dated 24.05.2021. It is nowhere pleaded by the complainant respondent herein in the complaints that the Memo was not received by him on the date it was issued being 07.04.2021 and going by the said position of the date of the Memo dated 07.04.2021, it was obligatory and incumbent up the complainant respondent herein to have made a demand for payment of the amount covered under the cheque(s) from the accused petitioner herein within 30 days of the receipt of the information by him from the bank. Indisputably, the demand for making payment by the complainant respondent herein from the accused petitioner herein while issuing/serving notice of demand by the complainant respondent herein is issued beyond the period of 30 days prescribed in proviso (b) appended to section 138 of the Act.

Risking repetition, as has been noticed in the preceding paras, the Apex Court in the case of **Shivkumar(supra)** at para 11 has specifically provided that both the clauses (a) and (b) of the proviso appended to section 138 have employed the term “within a period”, while clause (a) refers to presentation of cheque to the bank “within a period” of six weeks from the date on which it is drawn, clause (b) provides for issuance of notice to the drawer of the cheque within 30 days of the receipt of the

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information from the Bank and that word “within 30 days of the receipt of the information” are significant and the parliament advisably did not use the words “from the date of receipt of the information” in section 138 of the Act.

10. In view of the aforesaid position obtaining in the mater, inasmuch as, the law laid by the Apex Court in the judgment (supra) as also the language employed in the proviso (b) appended to section 138 of the Act, the impugned complaints could not have been entertained by the trial court or else proceeded with against the accused petitioner herein. The trial court, however, having done so has grossly erred.

11. For the aforesaid reasons, the instant petitions deserve to be allowed and the same are accordingly allowed, as a consequence whereof, the impugned complaints are quashed along with impugned orders.

(JAVED IQBAL WANI)
JUDGE

Jammu
30.12.2024
Rakesh

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No