

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR
JUSTICE SUJOY PAUL.

Misc. Criminal Case No. 1354/2012

Manav Sharma
Vs.
Umashankar Tiwari

Shri Rajesh Shukla, Advocate for the petitioner.
Shri H.K. Shukla, Advocate for the
respondent/complainant.

ORDER
(08/09/2015)

This petition filed under Section 482 Cr.P.C. is directed against the order dated 24.01.2012, whereby the criminal revision of the petitioner against the order dated 19.07.2011 is dismissed.

2. The respondent filed a complaint under Section 138 of Negotiable Instruments Act against the petitioner. The said complaint was filed on 18.07.2005, whereas the last date of limitation was 17.07.2005. The court below took cognizance on the said complaint and issued notices to the other side. Shri Rajesh Shukla, learned counsel for the petitioner submits that complainant filed similar complaints which were barred by time. His similar complaint registered as Criminal Case No.2784/2011 was dismissed by court below on 25.4.2011. On dismissal of similar complaint, the complainant became vigilant and filed an application under Section 142 of Negotiable Instruments Act. The said application was allowed by the court below and delay of one day was condoned by order dated 19.07.2011. This order was called in question in

Criminal Revision No.336/2011 which was decided on 24.01.2012. Shri Rajesh Shukla advanced singular contention by placing reliance on Section 142 of Negotiable Instruments Act, that complaint could have been entertained and cognizance could have been taken provided complainant satisfied the court at that stage that he had sufficient cause for not making a complaint within the prescribed time. It is urged that when complaint was preferred and cognizance was taken, there was no application for condonation of delay. Hence, cognizance could not have been taken. The said application cannot be entertained at the fag end of trial. The revisional court has erred in not considering the aforesaid statutory provision.

3. Shri H.K. Shukla, learned counsel for the complainant, on the other hand submits that the order by which cognizance was taken was not challenged. Thus, the said order has attained finality. The Court below has not committed any error which warrants interference by this Court. He submits that the first revision of the petitioner has already been dismissed. This is another revision by the petitioner under the garb of the petition under Section 482 Cr.P.C. Hence, it is not maintainable. Shri H.K. Shukla, relied on *2006 CRLJ 193 (R.K. Chawla and another Vs. M/s Goa Antibiotics and Pharmaceuticals Ltd. and another)*.

4. No other point is pressed by learned counsel for the parties.

5. I have heard learned counsel for the parties at length and perused the record.

6. Before dealing with rival contentions, it is apt to quote Section 142 of NI Act.

“142. Cognizance of offence.-- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) –

(a) no court shall take cognizance of any offence

punishable 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.

(Emphasis Supplied)

6. Admittedly, when the court below took cognizance on the complaint and issued notices to the other side, the application for condonation of delay under Section 142 was not filed. It was filed almost at the stage of final hearing. A simple reading of proviso to Section 142 (b) shows that the court can take cognizance of a complaint provided the complainant satisfies the court that he had sufficient cause for not making a complaint within such period. Thus, the complainant needs to satisfy the court by explaining the delay before cognizance is taken. Showing of sufficient cause for not making a complaint within prescribed period is pre-condition of taking cognizance of a complaint. I find support in my view from the judgment of Madras High Court in the case of S.Janaki vs. R.Thiagarajan (Cri.OP No.12167/2005 and Cr.MP. No.4089/2005, decided on 20.7.2009). In the said case, it is held that Section 142 is a substantive provision and complaint being filed beyond the period of limitation, cannot be entertained by allowing the respondent to file an application after cognizance has been taken by the Magistrate. That being the position, cognizance taken by Judicial Magistrate is without any sanction of law and, therefore, same must be quashed and set aside.

7. I respectfully agree with the said judgment of Madras High Court to the extent it is held that the application under Section 142 of NI Act cannot be

entertained after taking cognizance of the complaint. However, the ancillary question is whether in such cases the entire complaint should be set aside or the said defect can be permitted to be cured. In my view, if application for condonation of delay is filed after taking cognizance of the complaint, the proceedings up to the stage of taking cognizance are bad in law and can be interfered with to that extent. The entire complaint should not be dismissed on that ground. The complainant can be given liberty to file application under Section 142 of NI Act from that stage. Putting it differently, if cognizance is taken without there being any application under section 142 of NI Act, the proceedings up to that stage when cognizance was taken must be set aside.

8. The Apex Court in *(1987) 3 SCC 684 (U.P.Pollution Control Board vs. M/s Modi Distilleries and others)*, opined that infirmity which could easily be removed by having the matter remitted back to the Magistrate to call upon the appellant to make a formal application, the permission to this extent can be granted, otherwise it would be a travesty of justice to defeat the prosecution on technical grounds.

9. In *(2014) 4 SCC 704 (Haryana State Cooperative Supply and Marketing Federation Ltd.)*, the Apex Court considered various provisions of NI Act and opined that procedural defects and irregularities which are curable should not be allowed to defeat substantive right or to cause injustice. The procedure, a handmaid to justice, should never be made a tool to deny justice or perpetuate injustice.

10. In view of aforesaid, in my view, the entire complaint cannot be dismissed. Liberty needs to be given to the complainant to file application under Section 142 of NI Act and satisfy the court.

11. Resultantly, the proceedings of court below up to the stage of taking cognizance of complaint is set aside. Respondent is given liberty to file application under section 142 of NI Act. The court below may decide that application in accordance with law. It is made clear that this Court has not expressed any view on merits.

12. Petition is partly allowed.

(yog)

(Sujoy Paul)
Judge