

**HIGH COURT OF MADHYA PRADESH AT JABALPUR**  
**BEFORE JUSTICE J.K. MAHESHWARI**

**Misc. Cr.Case No. 2964 of 2012**

**APPLICANT:** Mohd. Jahin

**Versus**

**RESPONDENT:** Nibbaji

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Shri Atul Choudhary, learned counsel for the applicant.

Shri Siddharth Sharma, learned counsel for the respondent.

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**(ORDER)**

(Passed on 03.02.2017)

Applicant has filed this petition invoking the jurisdiction under Section 482 of the Cr.P.C. against an order dated 21.07.2011 passed by Judicial Magistrate, First Class Multai framing the charge under Section 138 of Negotiable Instruments Act (hereinafter referred as 'NI Act') and also challenging the order dated 08.02.2012 passed in revision by the First Additional Sessions Judge, Multai, District Betul in Criminal Revision No.127/2011, dismissing the same maintaining the order of trial Court.

2. The facts not disputed in the present case are that a private complaint under Section 138 of N.I. Act was filed by the complainant on 19.08.2009 on account of dishonoring the two cheques bearing numbers 685907 and 685908 of the sum of Rs.1,50,000/- and 1,80,000/- respectively issued on 12.03.2009 and 12.4.2009. The first

cheque was submitted to the Bank on 09.04.2009 and the information of dishonoring was received on 25.04.2009. The notice was sent to drawer on 28.04.2009 which remained unserve, thereafter, second notice was sent on 31.07.2009 by publication. The Second cheque was submitted to the Bank on 22.04.2009 the intimation of dishonor was received on 11.05.2009. The notice was sent on 15.6.2009 which remained unserve, however a second notice was sent on 31.07.2009 by publication. However, the said private complaint was filed on 19.08.2009 within 30 days from the date of publication of notice.

3. The applicant *inter-alia* contends that in view of the provisions contained under Section 138 proviso (a)(b)(c) of N.I. Act, to maintain a private complaint, compliance of all the ingredients of the provisions is essential by the payee, in absence the cause of action to prosecute the complaint do not accrue to him. In the present case, notices either of the first cheque or of the second cheque were issued after a period of 30 days, therefore, in absence of compliance to the proviso (b) of Section 138 of the Act, the complaint is not maintainable and the charges as framed by the trial Court to adjudicate the complaint is beyond the jurisdiction and also not in accordance to law. To buttress his submissions, reliance has been placed on the judgment of the Apex Court in the Case of **Tameeshwar Vaishnav vs. Ramvishal Gupta reported in AIR 2010(2) SCC 329**, and also on the case of **Kamlesh Kumar vs. State of Bihar, reported in 2014(3) MPHT 512(SC)** . It is submitted, if the complaint is not maintainable, the question of framing of charge do not arise, however, the private complaint may be

dismissed as not maintainable and the order impugned may be set aside.

4. Per contra, learned counsel representing the respondent in counter to the said arguments, placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Dharampal and others vs. Ramshri (Smt.) and others** reported in **(1993) 1 SCC 435** to contend that the applicant remain unsuccessful before the Sessions Court by filing a first Revision against the order of framing of charge, however, the second Revision by way of this petition under Section 482 of the Cr.P.C. is not entertainable. Reliance has also been placed on the judgment of **State of A.P. vs. Golconda Linga Swamy and another**, reported in **(2004) 6 SCC 522**, and urged that inherent powers of the High Court though wide but it ought to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid in Section 482 of the Cr.P.C.. In absence thereto, such powers should not be exercised by the Court. It is further a contention that the applicant deliberately and conveniently avoided to receive the notice issued by the complainant even on having knowledge of dishonoring the cheques. However, as required by law, it was incumbent on the complainant to serve the notice by publication prior to file a complaint. Now, again to delay of hearing of private complaint this petition has been filed, in such circumstance maintaining the complaint, interference in the order framing charge may be declined.

5. After hearing learned counsel appearing for both the parties and to appreciate the rival contentions, it would be appropriate

to refer the relevant provisions of Section 138 of the Act, which are 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 provisions of this Act, be punished with imprisonment for [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 or other liability” means a legally enforceable debt or other liability.]

6. Section 142 of the Act specifies when the cognizance of offence cannot be taken by the Court. The aforesaid provision is also relevant, therefore, it is reproduced as under:-

**“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.”

7. On perusal of the aforesaid, it is apparent that if any cheque has been dishonored due to insufficiency of funds or other count, to take the recourse for penalizing the drawer of the cheque, it is incumbent on the payee to present the said cheque within a period of six months from the date on which it was drawn or within a period of its validity whichever is earlier. After dishonoring by the Bank, the

demand must be made to the drawer as per proviso (b) of Section 138 of N.I. Act by issuing notice within 30 days from the date of receipt of the information from the bank regarding return of the cheque as dishonoured. In case the drawer of the cheque fails to make the payment of the said amount within a period of fifteen days from the date of receipt of notice, the cause accrues to the complaint to file it within 30 days as per proviso (c) of Section 138 of N.I. Act for taking cognizance of offence. In case the complaint is not filed within the time so specified, as per Section 142(1)(b) proviso thereto, the Court may have discretion to satisfy that due to sufficient cause applicant was prevented to file it within the specified time and after recording satisfaction cognizance on such complaint may be taken even after the statutory period of thirty days.

8. In view of the foregoing, it is apparent that cause of action to file a complaint, accrues to the payee if the cheque is presented within a period of six months from the date of issuance of the cheque or within the period of validity of the said cheque. After receiving the information of dishonouring, a notice of demand must be given within a period of thirty days from the date of receiving the information from the bank and in case from the date of receipt of notice, the amount has not paid within a period of fifteen days, the cause of action to file a complaint accrues to the complainant and on filing the complaint, cognizance can be taken by the Court. In absence thereto, looking to the *non obstante* clause under Section 142(1)(b) of the Act, the cognizance cannot be taken and the complaint filed by the payee

against the drawer is not maintainable. The aforesaid issue has been considered by the Hon'ble Apex Court in the case of ***Tameeshwar Vaishvan (supra)***. The Supreme Court in the said judgment held as under:

"16. On careful scrutiny of the decision in S.L. Construction's case (supra), it would appear that the facts on the basis of which the said decision was rendered, were different from a case of mere presentation and dishonour of the cheque after issuance of notice under the proviso to Section 138 of the Act. While the decision in Sadanandan Bhadrans case (supra), clearly spells out that a cheque may be presented several times within the period of its validity, the cause of action for a complaint under Section 138 of the Act arises but once, with the issuance of notice after dishonour of the cheque and the receipt thereof by the drawer. The same view has been reiterated in Prem Chand Vijay Kumar's case (supra). The only distinguishing feature of the decision in S.L. Construction's case (supra) is that of the three notices issued, the first two never reached the addressee. It is only after the third notice was received that the cause of action arose for filing the complaint. In effect, the cause of action for filing the complaint in the said case did not arise with the issuance of the first two notices since the same were never received by the addressee.

17. The provisions of Section 138 and clauses (a), (b) and (c) to the proviso thereof indicate that a cheque has to be 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. Clause (b) indicates that the payee or the holder in due course of the cheque, has to make demand for the payment of the said amount of money by giving a notice in writing to

the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and clause (c) provides that if the drawer of the cheque fails to make the payment of the said amount of money to the payee or to the holder in due course of the cheque within 15 days of receipt of the said notice, the payee or the holder of the cheque may file a complaint under Section 142 of the Act in the manner prescribed.”

9. Recently in the case of ***Kamlesh Kumar (supra)***, the same issue came for consideration before the Apex Court, wherein, the Apex Court held as under:-

“11. It is thus clear that period of limitation is not to be counted from the date when the cheque in question was presented in the first instance on 25.10.2008 or the legal notice was issued on 27.10.2008, inasmuch as the cheque was presented again on 10.11.2008. For the purposes of limitation, in so far as legal notice is concerned, it is to be served within 30 days of the receipt of information by the drawyee from the bank regarding the return of the cheque as unpaid. Therefore, after the cheque is returned unpaid, notice has to be issued within 30 days of the receipt of information in this behalf. That is the period of limitation provided for issuance of legal notice calling upon the drawer of the cheque to make the payment. After the sending of this notice 15 days time is to be given to the noticee, from the date of receipt of the said notice to make the payment, if that is already not done. If noticee fails to make the payment, the offence can be said to have been committed and in that event cause of action for filing the complaint would accrue to the complainant and he is given one month time from the date of cause of action to file the complaint.”



10. In the said context, the facts of the present case require consideration. In the present case, looking to the facts narrated hereinabove, the relevant dates are given in a tabular form as under: -

S.No.	Cheques Nos.	Date of Issuance of Cheques	Dates of Submission to the Bank	Date of dishonour of Cheques	Date of issuance of First Notice	Date of issuance of Second Notice	Date of filing the private complaint
1	685907 for an amount of Rs.1,50,000/-	09.04.2009	25.04.2009	25.04.2009	28.04.2009	31.07.2009	19.08.2009
2	685908 for an amount of Rs.1,80,000/-	12.04.2009	22.04.2009	11.05.2009	15.06.2009	31.07.2009	

On perusal of the said, it is apparent that the first cheque was dishonoured and its information was received on 25.04.2009 for which the first notice of demand was issued on 28.04.2009 which was returned back as unclaimed, and the second notice was issued on 31.07.2009 after about three months, not within statutory period of 30 days. The second cheque was dishonoured and its information was received on 11.05.2009 and the first notice was issued on 15.06.2009 after more than thirty days, and the second notice on 31.07.2009 which was also sent after thirty days. Therefore, the compliance of the proviso (b) of Section 138 of the Act has not been made. After going through the provisions of Section 138, proviso (b) & (c) makes it clear that on receiving the information regarding dishonoring, a notice must be given within 30 days to demand the amount specified in the cheque and if the said demand has not been fulfilled from the date of receipt of the notice within 15 days, cause of action accrues. Proviso (b) of Section 138 is the first compliance and proviso (c) is the later compliance, therefore, after proviso (b) word "and" has been suffixed, and it is prefixed to

proviso (c). However, non-compliance of any of the provisos either (b) or (c) would lead to same conclusion as specified in Section 142(1)(b) of the Act and the cognizance must be refused by the Court on a private complaint filed under Section 138 of the Act. Therefore, in the facts of the case at hand, due to non-compliance of proviso (b) of Section 138 of the Act within the time specified, the irresistible conclusion which can be arrived that complaint is not maintainable.

11. Reverting back to the arguments as advanced by learned counsel for the respondent on the point of non-maintainability of second Revision by way of petition under Section 482 of the Cr.P.C. may be dealt here. The Hon'ble Apex Court in the case of ***Dharampal and others(supra)*** referring the provisions of Section 397(3) held the second revision in the shape of the petition under Section 482 of the Code is barred. However, inherent powers under Section 482 of the Code cannot be utilized exercising powers which were expressly barred by the Code. The judgment of ***Dharampal and others (supra)*** was referred to three Judges' Bench in the case of **Krishnan and another vs. Krishnaveni and another** reported in **AIR 1997 SC 987**. In this case, Hon'ble the Apex Court considering the other three judges Bench's judgment in the case of **Madhu Limaye va. State of Maharashtra** reported in **AIR 1978 Sc 47** with majority concluded as under:-

"14. In view of the above discussion, we hold that through the revision before the High Court under sub-section (1) of Section 397 is prohibited by sub-section (3) thereof, but inherent power of the High Court is still available under Section 482 of the Code and as it is paramount power of continuous superintendence of

the High Court under Section 483, the High Court is justified in interfering with the order leading to miscarriage of justice and in setting aside the order of the courts below. It remitted the case to the Magistrate for decision on merits after consideration of the evidence. We make it clear that we have not gone into the merits of the case. Since the High Court has left the matter to be considered by the Magistrate, it would be inappropriate at this stage to go into that question. We have only considered the issue of power and jurisdiction of the High Court in the in the context of the revisional power under Section 397 (1) read with Section 397(3) and the inherent powers.”

In view of the foregoing, the objection raised by the complainant that this petition under Section 482 of the Code by way of second revision is not tenable is hereby repelled. It is held that inherent power of the High Court is available under Sections 482 of the Code and also the paramount power of continuous superintendence of the High Court under Section 483 of the Cr.P.C. Therefore, looking to the facts of the present case, whereby the cognizance of the case itself barred under the provisions of the special enactment, interference under Section 482 of Cr.P.C. in this case cannot be denied due to the said objection.

12. It is further to be noted here this Court arrived at a conclusion that the order passed by trial Court is not justified and it is the case of abuse of process of Court, in the said context, the judgment of **Golconda Linga Swamy (supra)** relied upon by the respondent also requires consideration. The Apex Court in this case has held that inherent jurisdiction though wide but it has to be exercised sparingly,

carefully and with caution and only when such exercise is justified by the tests specifically laid down in Section 482. As discussed above and looking to the facts of the case, it is a case wherein inherent powers of the High Court must be exercised, otherwise it would amounting to abuse of process of the Court. Therefore, the respondent cannot take help of the aforesaid judgment and in fact the said judgment is of great help to the petitioner.

13. In the context of foregoing, it is apparent that due to non-compliance of proviso (b) of Section 138 of the Act, the complaint was found to be not maintainable, because the said non-compliance would lead to a conclusion that the Court cannot take cognizance in view of the provisions contained under Section 142(1)(b) of the Act. It is further held under Section 482 of the Cr.P.C., inherent powers of the High Code can be exercised if it is necessary to give effect to any order under this Court or to prevent abuse of process of any Court or otherwise to secure the ends of justice. In addition, it is the duty of the High Court to exercise the continuous superintendence over the Courts of judicial magistrates under Section 483 of Cr.P.C. as the present case is triable by the judicial magistrate First Class, who has exceeded from his jurisdiction which is not conferred on him under the law. However, it is a fit case wherein maintaining the petition under Section 482 of the Code, abuse of the process of the Court must be checked. In my considered opinion, if the complaint itself is not maintainable, framing of the charge and to compel the accused to saddle with trial would amount to abuse of process of the Court.

14. Accordingly, this petition succeeds and is hereby allowed. The order framing charge against the applicant stands set aside. It is to observe here that the complaint filed by the complainant is not maintainable due to non-compliance of proviso (b) of Section 138 of N.I. Act within the specified time, hence, it is dismissed and consign to the record of the trial Court. In the facts and circumstances of the case, parties are directed to bear their own costs.

**(J.K. MAHESHWARI)**  
**JUDGE**