

M.Cr.C.No.12777/2013

Manish Maseih S/o Late
Shri S.E. Maseih.

Petitioner

VERSUS

Babulal Sen S/o Pancham
Lal Sen.

Respondent

19/12/2016

Shri Amit Jain, learned counsel for the petitioner.

Shri Aseem Dixit, learned counsel for the respondent.

With the consent of learned counsel for the parties, the matter is heard finally at the motion stage.

ORDER

The petitioner has filed this petition under Section 482 of the Cr.P.C. for quashing the entire proceedings of Criminal Complaint Case No.1618/2011 titled Babulal Vs. Manish Maseih, pending on the file of Judicial Magistrate First Class Khurai, District Sagar.

2. Be it noted that the petitioner and the respondent herein are the accused and the complainant of the said case respectively.

3. The facts leading to filing this petition are summarized as follows:-

3.1 On 30.09.2011, the respondent has filed a criminal complaint under Sections 200(2) Cr.P.C. and

138 of the Negotiable Instruments Act, 1881 (for short "NI Act") for the prosecution of the petitioner under Sections 415 and 420 of the IPC and 138 NI Act. The substratum of the compliant is that the respondent has friendly relations with the petitioner. The petitioner asked him for a loan of seven lakh (seven hundred thousand) rupees for fulfilling his personal obligations. On 09.10.2009, he gave him seven lakh rupees in cash. On the same day, the petitioner handed over a written acknowledgment to him regarding the receiving of the amount, and he also gave him a post-dated cheque bearing date 10.11.2010, cheque No.795891 (for short "the cheque"), which is drawn by him on the UCO Bank Branch Sagar with which he is maintaining his bank account. He presented the cheque for encashment to the State Bank of India Branch Khurai with which he is maintaining his bank account. On 13.12.2010, the bank informed him that the petitioner's bank has dishonoured the cheque on account of insufficient fund in his bank account. On 27.12.2010, he sent him a demand notice at his residential address thus; Bibil Bhawan, Tili Road, Sagar by registered post with acknowledgment due. He unscrupulously managed the postman of the area. On account of which, he received the notice unserved with a postal

endorsement that the addressee, the petitioner herein, is out of station. Thereafter, he sent him the demand notices at the said address on 5.2.2011, 7.3.2011, 26.3.2011, 27.4.2011, 15.12.2011, 6.6.2011, 19.7.2011 and 23.8.2011. He received all the notices unserved with postal endorsements that "the addressee is out of station." He also sent one demand notice to him at his office address at Bhopal. The said notice was returned unserved to him with a postal endorsement that the address is incomplete. On 06.09.2011, he sent him the last demand notice which he received back on 14.09.2011 with a postal endorsement that the addressee was intimated regarding the arrival of a registered post of his name but he had not turned up to receive the same at the area post office.

3.2 Along with the complaint, the respondent filed a condonation application under the proviso of sub-clause (b) of clause (1) of Section 142 NI Act. In the application, the respondent has made averments that he had given repeated notices to the petitioner with the sole object of personal service of any notice upon him but the petitioner got the notices returned unserved having manipulated the postman. However, the last notice dated 06.09.2011 was returned on 14.09.2011 with a postal endorsement

that the addressee had been intimated regarding the arrival of a registered mail of his name but the petitioner did not come to receive the same to the concerned post office. Hence, the demand notice dated 06.09.2011 has been duly served upon him. Thereafter, he has filed the complaint within the statutory period as provided for in Section 142(1)(b) NI Act. He submits that in the fact situation of case, if there is a delay in filing the complaint, it be condoned.

3.3 As per the material available on record, the learned JMFC took the cognizance of the complaint on 28.12.2011 under Section 138 NI Act and ordered the registration of it in the aforesaid Section. The learned JMFC also ordered to secure the presence of the petitioner in the case by issuing a bailable warrant of arrest against him. On 30.08.2012 the petitioner entered his appearance first time before the learned JMFC, and he is released on bail. On 27.2.2013, the learned JMFC has framed the charge against him under Section 138 NI Act. He denied the guilt. Thereafter, he has fixed the case for the complainant-respondent's evidence. In the meantime, the petitioner has filed this petition.

4. The learned counsel for the petitioner submits that since

the respondent has filed the complaint with an application for condonation of delay, it is mandatory for the learned JMFC to give him an opportunity to oppose the condonation application. But the learned JMFC has registered the complaint against the petitioner straight way leaving the condonation application undecided. He submits that the respondent in the condonation application has not averred as to when the period of one month of filing the complaint expires as per provisions of 142(1)(b) NI Act. He submits that the respondent has also not averred in the condonation application how many days of delay the complaint suffers. Thus, the condonation application is very vague from the aforesaid aspect. He submits that the respondent has averred in the complaint and the condonation application that he had sent the last demand notice to the petitioner on 06.9.2011 and that he received the same with postal endorsement on 14.09.2011. He submits that the respondent has filed the complaint before the court on 30.09.2011. If these two material dates are taken into consideration, then the complaint is within limitation as per the provisions of 142(1)(b) NI Act. Under the circumstance, there was no need of filing the condonation application. He submits that the respondent has not filed the complaint in the court concerned after the return of successive demand notices unserved as per law laid down by the Supreme Court in MSR Leather Versus S. Palaniappan and another (2013) 1 S.C.C. 177 and that he had sent all the demand notices at the same home address of the petitioner,

therefore, the period of limitation would start from the date of return of the first demand notice unserved. However, neither in the complaint nor in the condonation application it is stated the date of receipt of the first demand notice unserved. From this aspect, the complaint is barred as per provisions of Section 142(1)(b) NI Act over nine months. Consequently, a valuable right has been accrued to the petitioner to defend his case on the basis of said law of limitation. In the aforesaid backdrop, the registration of the complaint and the framing of charge against the petitioner are against the provisions of Sections 138 and 142(1)(b) NI Act. Hence, the proceedings of the case are liable to be quashed by this court in exercise of power under Section 482 Cr.P.C.

5. The learned counsel for the respondent makes a concession that the complaint is registered against the petitioner by the learned JMFC without deciding the condonation application. He frankly admits that the learned JMFC ought to have decided the condonation application before the registration of the complaint. But it was not obligatory for the learned JMFC to hear first the petitioner on the condonation application.

6. I have given my anxious consideration to the said submissions and perused the material on record.

7. Section 138 NI Act would deal with bad cheques. Section 142 NI Act would deal with taking of cognizance of the offence. Section 142(1)(b) NI Act would specify the time limit within

which a complaint is required to be filed for the offence under Section 138 NI Act. Under Section 142(1)(b) NI Act a complaint is required to be filed within one month from the date of which the cause of action has arisen as per clause (c) of the proviso to Section 138 NI Act. The proviso under sub-clause (b) of clause (1) of Section 142 was added by Act No.55/2 with effect from 6.2.2013 enabling the complainant to file the complaint after the prescribed period of limitation if he satisfies the Court that he had sufficient cause in not making the complaint within time prescribed. On a bare reading of the said proviso, it becomes abundantly clear that a time-barred complaint could also be entertained if the complainant satisfies the trial court that he had a cause. Admittedly, in the case on hand, the learned JMFC has registered the complaint without deciding the condonation application. Under the circumstances, a valuable right has accrued to the petitioner to defend his case on the ground of delay. The provisions of Section 142(1)(b) NI Act will have to be read in tandem with Section 142(1)(a) NI Act which starts with a non-obstante clause that no court shall take cognizance of any offence punishable under Section 138 NI Act except upon a complaint in writing made by the payee or as the case may be the holder in due course of the cheque. Section 142(1)(b) specifies that such complaint shall be made within one month of the date on which cause of action arises under clause (c) of the proviso to Section 138 NI Act. For the aforesaid reasons, when there is a delay in filing the

complaint, it is mandatory for the complainant to file an application for condonation of delay. When such application is filed, a notice will have to be issued to the accused before the order is passed either allowing the condonation application or declining the same.

8. In the light of above discussion, the learned JMFC ought to have decided the condonation application after hearing the petitioner and the respondent. However, the learned JMFC has registered the complaint without deciding the condonation application. His said act is certainly contrary to the principles of natural justice and provisions to sub-clause (b) of clause (1) of Section 142 NI Act. The aforesaid view of mine is fortified by a decision rendered by the Karnataka High Court in the case of Sajjan Kumar Jhunhunwala Vs. M/S Eastern Roadways Pvt. Ltd. (2007, Cr.L.J. 482). In that case, the complaint under Section 138 NI Act was filed with a condonation application seeking condonation of delay of only three days. The learned JMFC allowed the condonation application without hearing the accused. It is held that it was mandatory for the learned JMFC to provide an opportunity to the accused to argue on the merits of the condonation application. Thereupon, the Karnataka High Court quashed the proceedings against the accused and directed the trial court to decide the condonation application affording an opportunity to the accused to oppose the same.

9. Consequently, the petition is partly allowed and the order of registration of complaint and the framing of charge under

Section 138 NI Act against the petitioner are quashed. The matter stands remitted to the learned JMFC with directions to adjudicate the condonation application with a speaking and reasoned order after hearing the parties thereon. The interim stay order dated 05.08.2016 shall stand vacated.

10. A copy of this order be sent to the concerned court.

11. Accordingly, this petition is finally disposed of.

Certified copy as per rules.

(Rajendra Mahajan)
Judge

haider*