

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23rd DAY OF FEBRUARY, 2024

BEFORE

THE HON'BLE MR JUSTICE ANIL B KATTI

CRIMINAL APPEAL No.1010 OF 2014 (A)

BETWEEN:

SRI.M.V.LAKSHMINARAYANAPPA
S/O.LATE VENKATARAMANAPPA
AGED ABOUT 52 YEARS
R/O.MUDDANAPALYA
SOCIETY ROAD
BANGALORE-91

...APPELLANT

(BY SRI.S.B.HALLI, ADVOCATE)

AND:

SRI.HANUMANTHAPPA
S/O.THIMMAIAH
AGED ABOUT 50 YEARS
R/O 1ST MAIN ROAD, 4TH CROSS
BHALAGANGADHARANAGAR
YASHVANTAPUR HOBLI
BANGALORE-56

...RESPONDENT

(BY SRI.A.V.RAMAKRISHNA, ADVOCATE)

THIS APPEAL IS FILED UNDER SECTION 378(4) CR.P.C., PRAYING TO SET ASIDE THE ORDER DATED: 9.10.2014, PASSED BY THE CHIEF JUDICIAL MAGISTRATE, BANGALORE RURAL DISTRICT, BANGALORE, IN C.C.NO.2639/13- ACQUITTING THE RESPONDENT/ACCUSED FOR THE OFFENCE P/U/S/ 138 OF N.I.ACT.

THIS APPEAL HAVING BEEN HEARD AND RESERVED ON 19.02.2024, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

JUDGMENT

Appellant/complainant feeling aggrieved by judgment of Trial Court on the file of Chief Judicial Magistrate, Bengaluru Rural District, Bengaluru in C.C.No.2639/2013 dated 09.10.2014 preferred this appeal.

2. Parties to the appeal are referred with their ranks as assigned in the Trial Court for the sake of convenience.

3. Heard the arguments of both sides.

4. After hearing arguments of both sides and on perusal of Trial Court records, so also the impugned judgment under appeal, the following points arise for consideration:

- 1) *Whether the impugned judgment under appeal passed by Trial Court for the offence punishable under Section 138 of N.I.Act is perverse, capricious and legally not sustainable?*
- 2) *Whether interference of this Court is required?*

5. On careful perusal of oral and documentary evidence placed on record, it would go to show that complainant and accused are known to each other. Accused availed loan of Rs.50,000/- to meet his domestic necessities and assured to repay the same within one year. Accused for the lawful discharge of said debt issued cheque bearing No.515518 dated 10.01.2013 drawn State Bank of Mysore, Nagarabhavi Branch, Bengaluru for Rs.50,000/- Ex.P.1. Complainant presented the said cheque through his banker Corporation bank, Anjana Nagar branch, Bengaluru and the same was dishonoured as "Funds Insufficient" vide bank endorsement dated 18.01.2013 Ex.P.2. Complainant issued demand notice dated 28.01.2013 through RPAD and also by courier Ex.P.5. The demand notice issued through RPAD returned as "Not claimed" Ex.P.3 and the notice contained therein is marked as Ex.P.3(a). Accused neither replied to the demand notice issued by complainant nor paid the amount covered under the cheque. Complainant has filed complaint on 16.02.2013 in terms of Section 142(1)(b) of

Negotiable Instruments, Act, 1881 (hereinafter for brevity referred to as "N.I.Act").

6. Learned counsel for complainant has argued that issuance of cheque Ex.P.1 and signature of accused on the cheque is not disputed, therefore statutory presumption will have to be drawn in favour of complainant. Complaint filed by complainant is not pre matured and even if it is to be held that pre matured complaint is filed that cannot be a ground to acquit the accused. The Court could have postponed the taking of cognizance on pre matured complaint.

7. *Per contra*, learned counsel for accused has argued that complaint filed by complainant is pre matured one and in contravention of Section 138(c) of N.I.Act. Therefore, taking of cognizance for the offence under Section 138 of N.I.Act by the Trial Court vide order dated 16.02.2013 itself is bad in law and no proceedings for penal action in terms of Section 138 of N.I.Act can be proceeded against accused.

8. In the present case, the demand notice dated 28.01.2013 Ex.P.3(a) was sent to accused through RPAD and the same was returned as "Not claimed" on 01.02.2013 as per the postal seal appearing on the envelop. The period of limitation starts from 02.02.2013 and in terms of Section 138(c) of N.I.Act clear 15 days time has to be given which will come to an end on 17.02.2013. Thereafter, within a period of one month complaint has to be filed in terms of Section 142(1)(b) of N.I.Act. Whereas, the complaint is filed on 16.02.2013 even before completing the period of 15 days in terms of Section 138(c) of N.I.Act. Learned counsel for accused has contended that the order of Trial Court in taking cognizance on 16.02.2013 on pre matured complaint in contravention of Section 138(c) of N.I.Act and as such no any proceedings can be continued against accused for the offence punishable under Section 138 of N.I.Act.

9. Learned counsel for complainant relied on the judgment of Hon'ble Apex Court in ***Narsingh Das Tapadia Vs. Goverdhan Das Partani and Another***

reported in (2000) 7 SCC 183, wherein it has been observed and held as under:

“Section 142 (b) and 138 of Negotiable Instruments Act, 1881- Where the complaint was filed before the arising of cause of action in terms of Section 138 proviso (c), held, instead of dismissing the complaint, taking of cognizance could be postponed till the arising of cause of action-In the instant case although the complaint was filed before the expiry of the statutory period prescribed in proviso (c) to Section 138, trial court had taken cognizance after the expiry of that period- Hence, conviction by the trial and appellate courts upheld- High Court erred in reversing the said decisions on the ground that complaint was premature.”

In the said case before the Hon'ble Apex Court, though premature complaint was filed, but cognizance was taken after the expiry of the statutory period. In the present case the Trial Court has taken cognizance of the offence on 16.02.2013 itself, the day on which the complaint was prematurely filed. Therefore, in view of taking cognizance prior to the completion of statutory period in terms of Section 138(c) of N.I.Act, the aforementioned judgment of

Hon'ble Apex Court has no application to the facts of the present case.

10. Both the learned counsel for complainant and accused placed reliance on the judgment of Hon'ble Apex Court in ***Yogendra Pratap Singh Vs. Savitri Pandey and Another reported in (2015) 1 SCC (Cri) 226***, wherein two Bench of Hon'ble Supreme Court sought reference on the two question formulated for consideration of larger Bench as under:

- 1.1 (i) Can cognizance of an offence punishable under Section 138 of the Negotiable Instrument Act, 1881 be taken on the basis of a complaint filed before the expiry 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,
- 1.2 (ii) If answer to Question 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 under Section 142(b) for filing of such complaint as expired?

The Hon'ble Apex Court in para 35 of the said judgment has observed and held as under:

"35. Can an offence under Section 138 of the N.I.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 provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of N.I.Act unless the period of 15 days has elapsed. Any complaint filed 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 the law. It is not the question of prematurity of the complaint where it is filed before the 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 N.I.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 on 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 the notice has been serve 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”.

The Hon'ble Apex Court answered the reference on the question referred as above in para 39 and 40 of it's judgment as under:

"39. Our answer to Question (i) is, therefore, in the negative.

40. 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.”

The aforementioned judgment in *Yogendra Pratap Singh* has been followed in the latest judgment of Hon'ble Apex Court in ***Gajanand Burange Vs. Laxmi Chand Goyal in Crl.A.No.1229/2022 (Arising out of SLP (Crl.) No***

1415 of 2019), wherein it has been observed and held in para 7 as under:

" In the present case, while the notice was received by 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 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."

The Hon'ble Apex Court having so observed set aside the judgment of High Court in reversing the judgment of acquittal passed by the Trial Court. The liberty was given to the complainant to institute fresh complaint.

11. The question now remains is as to what is the procedure that is required to be followed when taking of cognizance before expiry of 15 days in terms of Section 138(c) of N.I.Act is no longer res integra in view of the judgment of Hon'ble Apex Court in *Gajanand Burange* case

referred supra which has followed by three Bench judgment of Hon'ble Apex Court in *Yogendra Pratap Singh*. The only remedy now available to the complainant is to file fresh complaint in terms of the judgment of Hon'ble Apex Court in *Gajanand Burange* case referred above. Consequently, proceed to pass the following:

ORDER

Appeal filed by appellant/complainant is hereby allowed.

The judgment of Trial Court on the file of Chief Judicial Magistrate, Bengaluru Rural District, Bengaluru in C.C.No.2639/2013 dated 09.10.2014 is hereby set aside.

Appellant/complainant 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 N.I.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.

In the event that second complaint is filed within a period of one month from the date of this judgment, the Trial Court is directed to dispose of the complaint as expeditiously as possible on giving top priority since it is a matter of 2013.

Registry to send back the records to Trial Court with a copy of this order.

**SD/-
JUDGE**

GSR