Before M.M. Kumar, J

YASH PAL SINGH & ANOTHER,—*Petitioners*

versus

M/S PREM CHAND VIJAY KUMAR,—*Respondent*

Crl. M. No. 10748/M OF 2002

1st December, 2003

Negotiable Instruments act, 1881—Ss. 138 & 142—Dishonour of cheque—Notice u/s 138 sent—On the assurance by accused to make the payment complainant not filing the complaint—Presentation of the cheque second time—Again dishonour of cheque—Complaint filed within the period of limitation after the dishonour of cheque second time—Whether time barred—Held, yes—Cause of action on dishonour of cheque arises only once—Subsequent dishonour of cheque would not give rise to a fresh cause of action—Petition allowed while quashing the complaint as well as proceedings initiated by the Magistrate.

Held, that there was a complete cause of action which has arisen to the complainant after issuing notice on 17th February, 1995 u/s 138 of the Act. The notice was duly received and the complaint could have been filed upto 3rd April, 1995, which they failed to file. The promise of the drawer to present the cheque again and its subsequent dishonour would not make any difference as it would not give rise to fresh cause of action. The provisions of Section 142(b) would intervene as no Court is to take cognizance if a complaint is not made within one month of the arising of cause of action under clause (c) of the proviso to Section 138 of the Act. Therefore, this petition deserves to be allowed.

(Para 11)

P.S. Hundal, Advocate, for the petitioners.

Shailendra Jain, Advocate for the respondents.

JUDGMENT

M.M. Kumar, J

(1) This petition filed udner Section 482 of the Code of Criminal Procedure, 1973 prays for quashing of complaint dated 28th August, 1995 complaining violationof Section 138 of the Negotiable Instruments Act, 1881 (for brevity the Act). A further prayer has been made for quashing the order dated 29th January, 2002 passed by the Judicial Magistrate, 1st Class, Karnal, dismissing the application of the petitioners for their discharge in which they have set up the plea of limitation (order Annexure P-8).

(2) Brief facts of the case necessary for disposal of the instant petition are that a complaint under Section 138 of the Act has been filed on 28th August, 1995, alleging that the complainant-respondent M/s Prem Chand Vijay Kumar, Commission Agent and Rice Dealers, Taraori are dealing in paddy and rice. They had sent paddy to the accused firm which the accused—petitioners No. 1 and 2 are the partners. The total value of the paddy claims to be Rs. 49,21,482,72. It has further been asserted that the accused—petitioners had paid Rs. 44,06,429 and the balance amount of Rs. 5,15,053.72 is outstanding against the accused—petitioners. It is further alleged that a cheque for a sum of Rs. 5,15,053.72,—*vide* cheque No. LR 882128 dated 27th January, 1995 was issued by the accused—petitioners in favour of the complainant—respondent drawn on Oriental Bank of Commerce, Ladwa branch,—*vide* account No. 954. The cheque was duly signed by accused-petitioner No. 1 and accused-petitioner No. 2 is the partner of the firm namely Sat Guru Rice Traders, New Delhi. the afore-mentioned cheque was dishonoured on 3rd February, 1995 and the same was returned by the Oriental Bank of Commerce, Taraori on 6th February, 1995 with the endorsement insufficient funds. The complainant-respondent sent a notice under Section 138 of the Act on 17th February, 1995 alongwith UPC and requested the accused—petitioenrs to make the payment alongwith interest @ 24% p.a. within a period of 15 days. It is alleged that on the assurance given by the accused-petitioners No. 1 and 2 that they would make the payment, the complainant-respondent did not file the complaint. It is claimed that a promise was held out to the complainant-respondent that the payment would be make in June, 1995. However, when the payment was not made, the complainant-respondent again contacted the

accused-petitioners. This time, they assured that the cheque be presented again and then it would be encashed. Accordingly on the assurance given by the accused-petitioners, the cheque was again presented on 6th July, 1995 but the same was returned on 10th July, 1995 by the Oriental Bank of Commerce, Taraori withthe remarks exceeds arrangement, which in other words means insufficient funds. Thereafter, the complainant served a notice through his counsel under Section 138 of the Act and called upon the accused-petitioners to make payment within a period of 15 days from the date of receipt of notice. The accused-petitionres sent a reply through their counsel, which was received by the counsel for the complainant-respondent on 16th August, 1995 suggesting that the period of 15 days had lapsed from the receipt of notice.

(3) In an application filed by the accused-petitioners, a prayer was made for their discharge. It has been asserted in the application that after the issuance of first notice on 17th February, 1995, the limitation period was available upto 3rd April, 1995 and the complaint having been filed on 28th August, 1995, it was barred by time. In reply to the application filed for discharge, the complainant-respondent took the stand that the charge against the accused-petitioners had already been framed and it was a matter of evidence whether the complaint was time barred or within the period of limitation. It was further asserted that the accused-petitioners had given assurance to the complainant that they would deposit the amount in question and if the cheque was presented again, it would be encashed. Thererfore, the limitation period is required to be counted from the date of dishonour of the cheque, when it was presented second time. The learned Magistrate dismissed the application for discharge filed by the accused-petitioners by observing as under :—

> "As has already been discussed above, the cheque indispute in the present case was agian presentd and returned on 10th July, 1995 and complainant issued a notice to the accused within fifteen days on 24th July, 1995 which was replied by the accused within fifteen days on 24th July, 1995 which was replied by the accused on 10th August, 1995 and received by the counsel for the complainant on 16th August, 1995 and present complaint was filed on 28th August, 1995. It means

that the present complaint has been filed within one month of the reply dated 10th August, 1995 filed by the accused through their counsel. Further, the charge has already been framed against the accused and this is not stage for filing the application for discharging the accused."

(4) Mr. P.S. Hundal, learned counsel for the accused-petitioners has argued that cause of action to file a complaint on the dishonour of the cheque arises only once and no fresh cause of action would arise on any subsequent presentation of the cheque and of its dishonour. The learned counsel has further argued that once notice has been issued on the first dishonour of the cheque and payment is not received within 15 days of the receipt of the notice, the payee has to avail that very cause of action and file the complaint. For the afore-mentioned proposition, the learned counsel has placed reliance on a judgement of the Supreme Court in the case of **Sadanandan Bhadran versus Madhavan Sunil Kumar, (1).** The learned counsel has argued that the categorical view taken by the Supreme Court is that the cause of action would arise only once as has been provided by Section 142 of the act read with clause (b) of proviso to Section 138 of the Act. According to the learned counsel, once payment is not received after the receipt of notice under Section 138 of the Act by the drawer, then within a period of one month, the payee could launch prosecution against the drawer and accordingly the complaint in the present case could have been filed upto 3rd April, 1995, which was within the period of 30 days from the date of receipt of notice under Section 138 of the Act issued by the complainant-respondent. A subsequent presentation of cheque would not give rise to a fresh cause of action and, therefore, the complaint as well as the subsequent proceedings are liable to be quashed.

(5) Mr. Shailendra Jain, learned counsel for the complainant-respondent has argued that firstly against the impugned order dated 29th January, 2002, only a revision petition is competent and no petition under Section 482 of the Code of Criminal Procedure could have been filed. On the merit of the case, the learned counsel has contended that the rationale of subsequent presentation of the cheque was the honest belief shown by the complainant-respondent in the statement made by the accused-petitioners that the cheque could be

(1) 1998 S.C.C. (Criminal) 1471

presented again and it would be encashed. According to the learned counsel on the basis of the afore-mentioned statement made by the accused-petitioners, the cheque was presented subsequently, which was dishonoured again on 6th July, 1995 and the communication with regard to dishonour of cheque was received on 10th July, 1995. Thereafter, notice was issued on 24th July, 1995 and no payment was made within 15 days of the notice and as a consequence on the expiry of 15 days, the period of limitation of 30 days is to be counted and the complaint was filed on 28th August, 1995, which is within the period of limitation. In support of his submission, the learned counsel has placed reliance on a judgement of the Supreme Court in **M/s Dalmia Cement (Bharat) Limited *versus* M/s Galaxy Traders and Agencies Limited (2).**

(6) After hearing the learned counsel for the parties, I am of the considered view that the case of the accused-petitioners is fully covered by the judgement of the Supreme Court in Sadanandan's case (supra), where in similar circumstances, the Supreme Court has refused to permit a complainant to prosecute his complaint because there also on the request made by an accused, the cheque was again presented and the complaint filed within the period of limitation after the dishonour of cheque second time was held to be time barred. It would be appropriate to notice Section 138 and Section 142 of the Act, which read as under:—

> "138. 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 a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both :

(2) AIR 2001 S.C. 676

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 earilier.

(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 fifteen 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."

142. 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:

(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) The provision of Section 138 has been interpreted by their Lordships in Sadanandan's case (supra), which reads as under :—

"On a careful analysis of the above section, it is seen that its main part creates an offence when a cheque is returned by the bank unpaid for any of the reasons mentioned therein. The significant fact, however, is that the proviso lays down three conditions precedent

to the applicability of the above section and for that matter, creation of such offence and the conditions are: (i)'the cheque should have been presented to the bank within six months of its issue or within the preiod of its validity, whichever is earlier, (ii) the payee should have made a demand for payment by registered notice after the cheque is returned unpaid: and (iii) that hte drawer should have failed to pay the amount within 15 days of the receipt of the notice. It is only when all the above three conditions are satisfied that a prosecution can be launched for the offence under Section 138. So far as the first condition is concerned, clause (a) of the proviso to Section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after sometime. On his own volition or at the request of the drawer, inexpectation that it would be encashed. Needless to say, the primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, if taken out of compulsion and not choice. For the above reasons it must be held that a cheque can be presented any number of times during the period of its validity. Indeed that is also the consistent view of all the High Courts except that of the Division Bench of the Kerala High Court in Kumaresan (1991) Ker LT 893 which struck a discordant note with the observation that for the first dishonour of the cheque, only a prosecution can be launched for there cannot be more than one cause of action for prosecution."

(8) It is further pertinent to mention that section 142 makes it evident that a Court of competent jurisdiction can take congnizance of a written complaint of an offence under Section 138 of the Act if the complaint is made within one month of the date on which the cause of action arises under cluase (c) of the proviso to Section 138 of the Act. It has further been held by the Supreme Court in Sadanandan's

case (supra) that the cause of action would mean every fact which it is necessary to establish to support a right or obtain a judgement and accordingly a complainant is required to prove in order to successfully prosecute the drawer for an offence under Section 138 of the Act and those facts are as under :—

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured ;

(b) that the cheque was presented within the prescribed period ;

(c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period ; and

(d) that the drawer failed to make the payment within 15 days of the receipt of the notice."

(9) However, the Supreme Court has observed that in the context of clause (b) of Section 142 of the Act, generic meaning of the term cause of action cannot be taken and it has to be given a restrictive meaning because clause (b) of Section 142 refers to only one fact. In this respect, the views of the Supreme Court read as under :—

"If we were to proceed on the basis of the generic meaning of the term cause of action, certainly each of the above facts would constitute a part of the cause of action but then it is significant to note that clause (b) of Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. The reason behind giving such a restrictive meaning is not far to seek. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause (c) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under Section 142

is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142(c) arises and can arise only once."

(10) There are further reasons given for prosecution of the drawer on the arising of first cause of action alone in paras 7 and 8 of the judgement, which reads as under :—

"7. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them is that for dishonour of one cheque, there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour, the drawer cannot be liable for any offence nor can the first offence be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

8. The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under clause (c) of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes, the court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every

part should have effect, the above conclusion cannot be drawn for that will make the provision for limiting the period of making the complaint nugatory."

(11) When the facts of the present case are examined in the light of the principles laid down by the Supreme Court in Sadanandan's case (*supra*), it becomes evident that there was a complete cause of action. Which has arisen to the complainant-respondent after issuing notice on 17th February, 1995 under Section 138 of the Act. The notice was duly received and the complaint could have been filed upto 3rd April, 1995, which they failed to file. The promise of the drawer to present the cheque again and its subsequent dishonour would not make any difference as it would not give rise to fresh cause of action. The provisions of Section 142 (b) would intervene as no Court is to take cognizance if a complaint is not made within one month of the arising of cause of action under clause (c) of the proviso to Section 138 of the Act. Therefore, this petition deserves to be allowed.

(12) In so far as the judgment in the case of Dalmia Cement's case (*supra*) as relied upon by the counsel for the complainant-respondent is concerned, it deserves to be mentioned that Sadanandan's case (*supra*) was distinguished on the ground that notice sent by payee was disputed by the drawer by sending an intimation to the payee that he had received an empty envelop and, therefore, no cause of action had arisen to the payee to initiate prosecution against the drawer. Emphasising this aspect, their Lordships of the Supreme Court in Dalmia Cement's case (*supra*) have observed as under :—

"7. In **Sadanandan Bhadran** *versus* **Madhavan Sunil Kumar,** (1998) 6 SCC 514: (1998 AIR SCW 2902: AIR 1998 SC 3043: 1998 Crl. LJ 4066), this Court held that clause (a) of the proviso to Section 138 did not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. On each presentation of the cheque and its dishonour a fresh right and not cause of action accrues. The payee or holder of the cheque may, therefore, without taking pre-emptory action in exercise of his right under clause (b) of Section 138 of the Act, go on presenting the cheque so as to enable him to exercise such right or at

any point of time during the validity of the cheque. But once a notice under clause (b) of Section 138 of the Act is received by the drawer of the cheque, the payee or the holder of the cheque forfeits his right to again present the cheque as cause of action has accrued when there was failure to pay the amount within the prescribed period and the period of limitation starts to run which cannot be stopped on any account. This Court emphasised that "needless to say the period of one month from filing the complaint will be reckoned from the date immediately falling the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires.' (Emphasis Supplied)

(13) In view of the observations made by their Lordships, a clear distinction is evident between the case of **Sadanandan Bhadran** *versus* **Madhavan Sunil Kumar and Dalmia Cement (Bharat) Ltd.** *versus* **Galaxy Traders and Agencies Ltd.** (*supra*). It is further clear that the consistent view taken by the Supreme Court is that it is only first cause of action alone, which would result into arming a drawer to launch prosecution on the expiry of the period of 15 days of the receipt of notice under Section 138 proviso (b) of the Act. Reference may be made to the judgements of the Supreme Court in the cases of **Uniplas India Ltd.** *versus* **State (3) K. Bhaskeran versus Sankaran Vaidhyan Balan (4) and SIL Import, USA versus Exim Aides Silk Exporters (5).** Therefore, no benefit could be given to the complainant-respondent of the judgement of the Supreme Court in M/s Dalmia Cemenus case (*supra*).

(14) For the reasons recorded above, this petition succeeds. The complaint as well as the impugned order dated 29th January, 2002 passed by the Judicial Magistrate. 1st Class, Karnal and any other subsequent proceedings are quashed.

R.N.R.

(3) (2001) 6 S.C.C. 8
(4) (1999) 7 S.C.C. 510
(5) (1999) 4 S.C.C. 567

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