

HIGH COURT OF TRIPURA
AGARTALA
CRL. A. NO.09 OF 2020

Sri Sumit Deb,
S/O Harish Chandra Deb,
of Math Chowmuhuni, opposite to Iskon Mandir,
P.S. – East Agartala, West Tripura.

---- Appellant

Versus

1. Sri Joy Deb,
S/O Late Samir Chandra Deb,
Prop. of Joy Deb Enterprise,
of Chakra Sangha, Joynagar, Road No.6,
P.S. West Agartala,
West Tripura, 799001.

2. The State of Tripura,

(As per Hon'ble Court's order dated 20.08.2020 the name of the respondent no.2 is impleaded as 'The State of Tripura')

---- Respondents

For Appellant(s)	:	Mr. H.K Bhowmik, Advocate.
For Respondent(s)	:	Mr. Sumit Debnath, Addl. PP, Mr. Biplab Debnath, Advocate.
Date of hearing	:	06.04.2022
Date of delivery of Judgment and order	:	30.05.2022
Whether fit for reporting	:	Yes

HON'BLE MR JUSTICE ARINDAM LODH

Judgment & Order

Heard Mr. Bhowmik, learned counsel appearing for the appellant as well as Mr. Sumit Debnath, learned Addl. P.P. appearing for the State-respondent No.2 and Mr. Biplab Debnath, learned counsel appearing for the respondent No.1.

2. The instant appeal arises from the judgment dated 29.01.2020 passed by learned Chief Judicial Magistrate, Agartala, West

Tripura, in connection with case No.NI 83 of 2015 wherein the accused-respondent had been acquitted from the charges levelled against him under Section 138 of the Negotiable Instrument Act, 1881 (here-in-after referred to as 'the NI Act') and dismissed the application filed by the complainant-appellant.

3. A brief recapitulation of the facts of the instant case is necessary. The complainant-appellant was a professional contractor, whereas, the accused-respondent No.1 was the owner of one mixture plant situated at Bodhjungnagar. According to the complainant, both the complainant-appellant and the accused-respondent no.1 were known to each other for their business transactions. In the month of November, 2014, the complainant supplied stone chips to the accused amounting to Rs.5,00,000/-(Rupees five lakhs) only on credit with the assurance of repayment of the same. Thereafter, the accused issued one cheque bearing No.001738 dated 01.01.2015 for an amount of Rs.5,00,000/-(Rupees five lakhs) of the Union Bank of India, Ganaraj Chowmuhani, Agartala Branch. The complainant-appellant presented the cheque bearing No.001738 dated 01.01.2015 amounting to Rs.5,00,000/- with the banker, and the same was returned back through a memorandum dated 01.01.2015 as "*payment stopped by drawer*". Accordingly, the cheque dated 01.01.2015 issued by the accused became dishonoured. Thereafter, the complainant issued a demand notice dated 20.01.2015 to

the accused-respondent No.1 for payment of the said amount of money, but, despite service of the legal notice, the accused failed to make the payment of the said amount to the complainant within 15 days of the receipt of the said notice, resulting to filing of the present complaint case under Section 138 of the NI Act against the accused-respondent no-1 herein.

4. The learned trial Court has examined the accused under Section 251 of the CrPC and the substance of the accusation as framed by the learned trial Court reads as follows:

“ I, Sri R Bhattacharjee, Additional Chief Judicial Magistrate, West Tripura, Agartala, do hereby state the substance to you namely, Joy Deb as follows:-

Allegation of the complainant is that you issued a cheque amounting to Rs.5 lakh to the cokplainant being No.001738 drawn on UBI, Ganaraj Chowmuni Branch, on 1.1.2015 and the complainant deposited the said cheque for encashment but the cheque was returned with memo dated 2.1.2015 and the complainant deposited the said cheque for encashment but the cheque was returned memo dated 2.1.2015 due to payment stopped by the drawer.

Subsequently, the complainant issued a demand notice to you on 20.1.2015 and you received the notice but you did not pay the amount to the complainant within 15 days of receipt of the notice. It appears that you have committed an offence punishable under section 138 of the NI Act, and within my cognizance”.

5. After perusal of the records, it is found that the complainant-appellant submitted his examination-in-chief and he was accordingly cross-examined.

6. On closure of the evidence of the complainant side, the accused-respondent was examined under Section 313(1)(b) of Cr.P.C., to which he declined the evidence of the complainant, as adduced against him.

7. After hearing the learned counsels appearing for the parties and on appreciation of evidences, the learned trial Court came to the finding that:-

“Prima facie, it is barred by limitation. Delay was condoned without giving an opportunity to the accused. The provision of the Section 142 (b) of the NI Act is a special procedure in law and it cannot be bypassed. The process of the Court to take cognizance of an offence under Section 138 of the NI Act is limited only to a period of 30 days in terms of proviso appended thereto. It is a substantive provision not a procedural one as reported in the Criminal Appeal No. 1190 of 2008 (Subodh S. Salaskar Vs. Joyprakash M. Shah and another).

12. Considering the decision arrived at in point No.(i), it is held that essential requirements to constitute an offence under Section 138 of the NI Act has not been fulfilled as envisaged under Section 142 (b) the NI Act. I, therefore, find that, complainant has not been able to prove its case against the accused under Section 138 of the NI Act and accused is acquitted of the offence under Section 138 of the NI Act.”

8. Arguing the case before this Court, Mr. Bhowmik, learned counsel appearing on behalf of the complainant, contended that the learned trial Court dismissed the case of the appellant-complainant (here-in-after referred to as “ the complainant”) with the observation that in filing the complaint there was a delay of 10 (ten) days and the matter was proceeded without condoning the delay as apparent on the face of the record. Consequently, the respondent no.1 was acquitted. According to the learned counsel, the learned trial Court took cognizance of the offence and proceeded with the trial. Learned counsel further pointed out

that in the complaint at para-1, the complainant clearly stated that there was a delay of 10 (ten) days in filing the complaint. Learned counsel further contended that *proviso* to Section 142 (b) of the NI Act would not suggest that there should be a separate petition for condoning the delay. To reinforce his contention, learned counsel tried to persuade this court that since the court proceeded with the trial, the matter of condonation of delay would be deemed to have been condoned.

9. Mr. Bhowmik, learned counsel for the complainant in support of his submission had placed reliance upon the following judgments:

- (i) *Subodh S.Salaskar Vs. Jayprakash M. Shah and another, (2009) 3 SCC (Cri) 834* (para 24),
- (ii) *Sankar Choudhury Vs. State of Tripura and Another, (2019) 2 TLR 134* (para20).

10. On the other hand, Mr. Sumit Debnath, learned additional PP appearing on behalf of the State-respondent mainly focused on the fact that the complaint under Section 138 of the NI Act was filed beyond the prescribed period of limitation.

11. I have gone through the examination-in-chief submitted by the complainant as well as the relevant documents, the complainant had relied upon to substantiate his claim, which are as follows:-

“1. Cheque bearing No.799026003 sic 001738 dated 01.01.2015 amounting to Rs.5,00,000/- which is marked as Exbt.1.

2. *Deposit slip dated 01.01.2015 for the amount of Rs.5,00,000/- which is marked as Exbt.2.*

3. *Cheque return memo for an amount of Rs.5,00,000/- marked as Exbt.3.*

4. *Advocate's notice dated 20.01.2015 dated 20.01.2015 which is marked as Exbt.4.*

5. *Postal receipt dated 20.01.2015 which is marked as Exbt.5.*

6. *Letter of advocates addressed in favour of the Post Master, Head Post Office, Agartala dated 13.03.2015 which is marked as Exbt.6.*

7. *Letter of Postmaster dated 14.03.2015 which is marked as Exbt.7."*

12. Before I delve into the merits of the issues raised by the learned counsels appearing for the parties to the *lis*, it would be apposite to reproduce Section 142(b) along with the relevant *proviso* of the NI Act:

“142. Cognizance of offences.—*Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—*

xxx

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xxx

(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.]”

13. On bare perusal of the aforesaid provisions, it is clear that if a complaint is filed beyond the statutory period, as prescribed

under Section 138 of the NI Act, then, the complainant must satisfy the court that he had sufficient cause for not making the complaint within such prescribed period, i.e. within one month of the date the cause of action arises under the *proviso* (c) of Section 138 of the NI Act.

14. In the instant case, the cause of action arose to make the complaint to the court when the drawer of the cheque i.e. the respondent no.1 failed to make the payment of the amount mentioned in the cheque to the complainant within 15 (fifteen) days of the receipt of the demand notice served upon the respondent no.1 by the complainant. The cause of action of making the complaint to the court arose after expiry of 15 (fifteen) days and the complaint ought to have filed within next 30 (thirty) days as embodied under clause (b) of sub-section (1) of Section 142 of the NI Act, but, the complainant made the complaint to the court after 10 days of the expiry of such one month. In other words, there was a delay of 10 days in filing the complaint by the complainant. In that situation, in terms of the *proviso* of clause (b) of sub-section (1) of Section 142 of the NI Act, the court would take cognizance only when the complainant would be able to satisfy the court that he had sufficient cause for not making the complaint within such one month.

15. The question, which is required to be responded to, is whether before passing the order of condonation, the respondent No.1 had the right to be heard or not. The answer to the said question has

already been settled by this Court in Sankar Choudhury (supra), where it is held that under Section 138 of the NI Act, if original complaint is filed after expiry of statutory period, then, in such cases, before condoning the delay, according to the *proviso* to Section 142 (b) of the NI Act, the accused shall be given a notice along with a copy of the application for condonation of delay. Upon hearing the parties (the complainant and the accused) the learned Magistrate shall decide whether the delay is to be condoned or not. If the Court is satisfied with the cause as assigned, in such application for condonation of delay, due cognizance may be taken or an appropriate order in the event of not condoning the delay may be passed by the learned Magistrate.

16. Again, in the case of **State of Maharashtra v. Sharadchandra Vinayak Dongre, (1995) 1 SCC 42**, the Apex Court held as under:

‘5. In our view, the High Court was perfectly justified in holding that the delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for condonation of the delay. However, having come to that conclusion, it would have been appropriate for the High Court, without going into the merits of the case to have remitted the case to the trial court, with a direction to decide the application for condonation of delay afresh after hearing both sides. The High Court however, did not adopt that course and proceeded further to hold that the trial court could not have taken cognizance of the offence in view of the application filed by the prosecution seeking permission of the Court to file a “supplementary charge-sheet” on the basis of an “incomplete charge-sheet” and quashed the order

of the CJM dated 21-11-1986 on this ground also. This view of the High Court, in the facts and circumstances of the case is patently erroneous.'

17. On bare perusal of Section 138 of the NI Act, it becomes aptly clear that before asking the court to take cognizance of offence under the said provision, the complainant has to satisfy the Court that the complaint has been filed within the statutory period of 30 (thirty) days in terms of *proviso* to Section 142(b) appended thereto. It is settled proposition of law that the essential requirements as embodied in Section 138 of the NI Act are not mere procedural, but, substantive.

18. I am unable to agree with the submission of learned counsel appearing on behalf of the complainant that since cognizance of the complaint was taken by the learned trial Court, and culminated with trial, the matter of condonation of delay would be deemed to have been condoned, particularly, for the reason that the Court must have taken into consideration the statements made in the complaint itself regarding the delay caused in filing the complaint by the complainant.

19. I am afraid of accepting such proposition made by learned counsel appearing on behalf of the complainant. In the opinion of this Court, in this situation, the complainant must take recourse to Section 142(b) of the NI Act, which is a safeguard given by the legislature to those honest and legitimate holders of the cheque who could not, for cogent reasons, file the complaint within 30 (thirty) days. So, to avail the benefit of *proviso* to Section 142(b) of the NI Act the complainant is mandated to file an application for condonation of delay explaining

sufficient and satisfactory reasons for such delay since the said *proviso* appended therein is substantive and not only procedural. On receipt of such condonation application, the Court has to issue notice on it along with a copy of the complaint and dispose of the same after giving the accused a reasonable opportunity of being heard. The Court would pass an appropriate order to the merits of the application of condonation of delay at its discretion. Without exhausting this stage, cognizance shall not be taken.

20. In the instant case, learned trial Court acquitted the accused person, namely, Joy Deb on the ground that the complainant did not comply with the essential requirements of the provision as contemplated under Section 142(b) of the NI Act since the complaint was filed by the complainant after expiry of statutory period of limitation (thirty days) in terms of *proviso* appended to Section 138 of the NI Act. To reiterate, in the case in hand, the complaint was filed before the court after 10 days of statutory period of 30 days without filing an application for condonation of delay, and no specific order was passed condoning the said delay. In the light of enunciation of law stated supra, in the instant case, the Court took the cognizance wrongly, and further proceeding with the trial caused serious prejudice to both the complainant and the accused from rendering equitable justice to them. In this situation, in the

opinion of this Court, it would be appropriate to remit the matter to the learned trial Court.

21. In the result, the impugned judgment of acquittal dated 29.01.2020, delivered in case No. NI 83 of 2015 by learned Chief Judicial Magistrate, Agartala, West Tripura is liable to be set aside and accordingly, the same is set aside and quashed. The matter is remitted to the court of the learned Chief Judicial Magistrate, Agartala, West Tripura to proceed afresh keeping in mind the legal positions as encapsulated here-in-above. For this purpose, the learned trial Court shall fix a date invariably within 2(two) weeks from the date of receipt of the copy of this order along with the records. The complainant shall appear before the trial court on the date so fixed positively to take appropriate steps, failing which the learned Court will be at liberty to pass necessary order in accordance with law.

22. The instant appeal accordingly stands disposed and allowed in the above terms.

Send down the LCRs forthwith.

JUDGE

Snigdha/Puspita