A K.S. JOSEPH

v.

PHILIPS CARBON BLACK LTD. & ANR.

(Criminal Appeal No.247 of 2016)

B APRIL 11, 2016

**[DIPAK MISRA AND SHIVA KIRTI SINGH, JJ.]**

*Negotiable Instruments Act, 1881 – s. 138 – Code of Criminal Procedure, 1973 – ss. 145, 200, 202 – Complaint u/s. 138 against the appellant – Appellant sought quashing of order of cognizance* C *and issuance of summons – Appellant's case that there was delay of 62/63 days in filing the complaint and summons were issued without applying the mind to the issue of delay; that cognizance could not have been taken without examining the complainant on solemn affirmation; and that the appellant being an accused and a resident* D *of an area outside the territorial jurisdiction of the Magistrate who has issued summons, the enquiry u/s. 202 Cr.P.C. was not done – Rejection by High Court – On appeal, held: Non-obstante clause in sub-section (1) of s. 145 is self-explanatory and over-rules the requirement of examination of the complainant on solemn affirmation* E *u/s. 200 Cr.P.C. – Complainant entitled to give his evidence on affidavit and subject to all just exceptions, the same has to be read in evidence in any enquiry, trial or other proceeding under Cr.P.C., thus, plea based on s. 200 untenable – Court can take cognizance even after the prescribed period but only if the complainant satisfies* F *the court that he had sufficient cause for not making complaint within the prescribed period – Magistrate did not apply mind either to the issue of delay or to the requirement of s.202 Cr.P.C. – As such, the correctness of submission based upon s. 202 Cr.P.C. and as to whether such requirement of enquiry or investigation is attracted* G *even to a case under the Act, is left open – However, on the ground of non-application of mind to the issue of delay and since the High Court passed a summary order, the order of the High Court and the Magistrate, set aside – Magistrate to re-consider the issue of delay, its condonation, as well as requirement of enquiry u/s. 202 Cr.PC.*

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*Mandavi Cooperative Bank Ltd. v. Nimesh B. Thakore* **2010 (1) SCR 219:(2010) 3 SCC 83** – relied on. A

*P.K. Choudhury v. Commander, **48 BRTF (GREF)*** **2008 (4) SCR 976:(2008) 13 SCC 229;** *Vijay Dhanuka v. Najima Mamtaj* **2014 (4) SCR 171:(2014) 14 SCC 638 – referred to.** B

**Case Law Reference**

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|---|---|---|
| **2010 (1) SCR 219** | **relied on** | **Para 4** |
| **2008 (4) SCR 976** | **referred to** | **Para 8** |
| **2014 (4) SCR 171** | **referred to** | **Para 9** C |

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 247 of 2016.

WITH

Criminal Appeal No. 248 of 2016 D

From the Judgment and Order dated 04.09.2012 of the High Court of Kerala at Ernakulam in Crl. M. C. No. 2902 of 2012.

K. Radhakrishnan, Sr. Adv., Navin Prakash, Adv., with him for the Appellant.

E. M. S. Anam, Ms. Liz Mathew, M. F. Philip, Advs., for the Respondents. E

The Judgment of the Court was delivered by

**SHIVA KIRTI SINGH, J.** 1. By the common impugned order dated 04.09.2012 passed in Crl.M.C. Nos.2902 and 2903 of 2012 by the F High Court of Kerala at Ernakulam under Section 482 of the Code of Criminal Procedure (for short, 'Cr. P.C.') prayer of the appellant to quash order of cognizance and issuance of summons in a case under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') has been rejected by a very short and summary order to G the effect that submissions were not impressive and if the appellant has any sustainable ground of defence, he can canvass the same before the Magistrate.

2. The appellant is an accused in two cases of similar nature wherein cheques issued by the accused person in favour of the H

A complainant have not been honoured. On behalf of appellant it was highlighted that the cheques bounced on 24.01.2006 because of a direction to stop payment issued by the appellant because he had allegedly already made all the required payments. His defence that five blank cheques had been given to the complainant by way of security cannot be considered B at the present stage but he has raised three other legal grounds. Firstly, the complaint suffered from delay of 62/63 days and the same had to be condoned after notice but that was not done. The second grievance of the appellant is that cognizance could not have been taken without complying with the mandate of Section 200 of the Cr.P.C. and examining C the complainant on solemn affirmation. The last submission of learned senior counsel for the complainant, Mr. K. Radhakrishnan is that the appellant being an accused and a resident of an area outside the territorial jurisdiction of the Magistrate who has issued summons, an enquiry within the meaning of Section 202 of the Cr.P.C. was mandatory and since that was not done, the order of cognizance and issuance of summons is bad D in law.

3. So far as the issue of examination of complainant on solemn affirmation under Section 200 of the Cr.P.C. is concerned, the submissions are misconceived on account of Section 145 of the Act which was inserted along with some other Sections through an amendment in the year 2002 E w.e.f. 06.02.2003. Section 145 of the Act is as follows :

> "**145. Evidence on affidavit.**-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any F enquiry, trial or other proceeding under the said Code.
>
> (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

G 4. The *non obstante* clause in sub-section (1) of Section 145 is self-explanatory and over-rules the requirement of examination of the complainant on solemn affirmation under Section 200 of the Cr.P.C. Now the complainant is entitled to give his evidence on affidavit and subject to all just exceptions, the same has to be read in evidence in any H enquiry, trial or other proceeding under the Cr.P.C. This view is also

supported by the judgment of this Court in the case of **Mandavi Cooperative Bank Ltd.** v. **Nimesh B. Thakore**[1]. No doubt this judgment was in a different factual scenario but this Court went into details of the amendment of 2002 including Section 145 and in paragraph 18 it also noted the Statement of Objects and Reasons appended to the Amendment Bill. *Inter alia*, the objects included "to prescribe procedure for dispensing with preliminary evidence of the complainant". A B

5. In view of discussion made above, the plea based on Section 200 of the Cr.P.C. is rejected as untenable. The other plea relating to delay of 62 days and taking of cognizance without issuing notice to dispense with such delay is however found to have substance. The relevant provision under Section 142 of the Act requires making of the complaint within one month of cause of action arising on account of non-compliance with the demand in the notice to make payment within 15 days. According to appellant the notice was dated 03.02.2006 alleging non-payment of two cheques each for Rs.1,80,000/-. Allegedly the appellant had sent a reply denying his liability through a reply dated 20.02.2006. The complaint was filed on 24.05.2006. *Prima facie*, in view of aforesaid dates the complaint was beyond the permissible period. No doubt the court has been empowered to take cognizance even after the prescribed period but only if the complainant satisfies the court that he had sufficient cause for not making complaint within the prescribed period. C D E

6. On the basis of Order Sheet of the court of Magistrate it has been shown that initially summons were ordered to be issued to the accused on 05.12.2006 after recording a single sentence that the complainant was represented. Since proper steps were not taken summons appear to have been re-issued at the correct address on 22.10.2011. The orders of the Magistrate do not show any application of mind to the issue of delay nor has delay been condoned before issuance of summons. The Order Sheet does not show any application of mind to the fact that the accused was shown to be residing at a place beyond his jurisdiction and therefore an enquiry or investigation may be required on account of amendment in Section 202 of the Cr.P.C. inserted by the Act 25 of 2005, effective from 23.06.2006. The relevant part of Section 202 is reproduced hereinbelow : F G

[1] (2010) 3 SCC 83 H

A "**202. Postponement of issue of process.**-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises
B his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

C Provided ..... ..... ..... ....."

(Emphasis supplied)

7. The amendment has a purpose in requiring the concerned Magistrate to postpone the issue of process against the accused if he is residing at a place beyond the area of his jurisdiction and to hold an
D enquiry or direct an investigation by a police officer or any other person for the purpose of deciding whether or not there is sufficient ground for proceeding. It is to avoid unnecessary harassment to the proposed accused. In such an enquiry, the Magistrate may take evidence of witness on oath but in view of Section 145 of the Act, complainant's evidence on
E affidavit will also be permissible for the purpose of such enquiry.

8. Learned senior counsel for the appellant has relied upon judgment of this Court in the case of **P.K. Choudhury** v. **Commander, 48 BRTF (GREF)**[2] to support his submission that for condoning delay in filing complaint beyond the period of limitation, natural justice warrants
F notice to the accused so as to grant him an opportunity to show that the delay should not be condoned.

9. Learned senior counsel for the appellant has also placed reliance upon a judgment of this Court in the case of **Vijay Dhanuka** v. **Najima Mamtaj**[3] to support his submission based upon requirement of Section
G 202 of the Cr.P.C. warranting an enquiry or investigation where the accused is found to be residing outside the jurisdiction of the Magistrate.

10. Learned counsel for the respondent-complainant could not place any material to counter the two submissions noted above. We

[2] (2008) 13 SCC 229
H [3] (2014) 14 SCC 638

have already noted earlier that the Order Sheet does not disclose any application of mind either to the issue of delay or to the requirement of Section 202, Cr.P.C. Since the order of the Magistrate issuing summons is clearly without due application of mind to the issue of delay, we have not gone into the detailed consideration of the correctness of submission based upon Section 202 of the Cr.P.C. and as to whether such requirement of enquiry or investigation is attracted even for offences under the Act. This question of law is therefore left open. But on the ground of non application of mind to the issue of delay and considering that the High Court has passed a summary order without even noticing the contentions advanced on behalf of the appellant, we set aside the impugned order of the High Court as well as the order of cognizance summoning the accused passed by the learned Magistrate. The Magistrate is directed to re-consider the relevant facts of the Complaint Case including the issue of delay and its condonation in accordance with law as well as the requirement of enquiry etc. under Section 202 of the Cr.P.C. and pass fresh orders in accordance with law. The appeals stand allowed to the aforesaid extent.

A B C D

Nidhi Jain

Appeals allowed.