

HIGH COURT OF JHARKHAND**Bench: Hon'ble Mrs. Justice Anubha Rawat Choudhary****Date of Decision: 17th May 2024**

CRIMINAL REVISION JURISDICTION

Criminal Revision No. 218 of 2019

Shatrughan Chiraniya ... Petitioner**Versus**

- 1. The State of Jharkhand**
- 2. Kudus Ansari ... Opp. Parties**

Legislation:

Section 420 of the Indian Penal Code (IPC)

Section 138 of the Negotiable Instruments Act, 1881 (NI Act)

Section 313 of the Code of Criminal Procedure (Cr.P.C.)

Subject: Criminal revision against the judgment affirming the conviction of the petitioner for cheating (Section 420 IPC) and dishonor of cheque (Section 138 of the NI Act). The main issue revolves around whether the basic ingredient of dishonest intention was present at the inception of the transaction.

Headnotes:

Criminal Law – Conviction under Section 420 IPC and Section 138 of the Negotiable Instruments Act, 1881 – High Court finds conviction under Section 420 IPC not sustainable due to lack of evidence of dishonest intention at the inception of transaction – Complaint under Section 138 of N.I. Act found to be premature – Convictions set aside with liberty to complainant to file fresh complaint under Section 138 of N.I. Act within two months [Paras 1-26, 31-38].

Evidence Evaluation – High Court observed that the lower courts failed to consider the necessary ingredients of Section 420 IPC, particularly the requirement of proving dishonest intention from the inception of the transaction – Statements under Section 313 Cr.P.C. did not include questions on intention to cheat – Conviction under Section 138 N.I. Act premature as complaint was filed before the cause of action arose – Based on Supreme Court ruling in *Yogendra Pratap Singh v. Savitri Pandey* [Paras 22-26, 31-36].

Decision – Revision allowed – Held – Conviction under Section 420 IPC and Section 138 N.I. Act set aside – Complainant permitted to file fresh complaint under Section 138 N.I. Act within two months – Both lower courts' judgments reversed due to procedural and evidentiary errors, emphasizing necessity of proving intent in criminal convictions [Para 39-40].

Referred Cases:

- Yogendra Pratap Singh vs. Savitri Pandey, (2014) 10 SCC 713
- Kusum Ingots & Alloys Ltd. Vs. Pennar Peterson Securities Ltd., (2000) 2 SCC 745
- Sarav Investment & Financial Consultancy vs. Llyods Register of Shipping Indian Office Staff Provident Fund, (2007) 14 SCC 753

Representing Advocates:

For Petitioner: Mr. Mahesh Tewari

For Opposite Party No. 2: Mr. Rajesh Kumar, Mr. Kumar Vimal

.....

11/17.05.2024

This criminal revision has been filed against the judgment of dismissal of Criminal Appeal No. 59 of 2017 dated 15.01.2019 passed by Additional Sessions Judge-I, Rajmahal.

2. The petitioner has been convicted vide judgment dated 18.11.2017 for the offence under section 420 of **Indian Penal Code (in short I.P.C.)** and section 138 of the **Negotiable Instruments Act, 1881 (in short N.I. Act)** in a complaint case being P.C.R. Case No. 673 of 2014 the Judicial Magistrate, 1st Class, Rajmahal.

3. The petitioner has been punished to undergo Rigorous imprisonment of 3 years and to pay fine of Rs. 5000/- and in default of payment of fine to further undergo simple imprisonment for two months under section 420 IPC. Further the learned Magistrate has been pleased to impose simple imprisonment for one year along with payment of compensation amount of Rs. 8,00,000/- to the **opposite party No. 2 (hereinafter referred to as the complainant)** and in default of payment of compensation further undergo simple imprisonment for one month under section 138 of the N.I. Act.

Arguments of the petitioner.

4. The learned counsel for the petitioner submits that the basic ingredient of offence under section 420 of the Indian Penal Code is completely missing in the present case. He has submitted that there were transactions of money in connection with sale and purchase of land and an oral agreement was entered into between the parties and when the sale deed was not registered, the complainant approached the petitioner to get back the money

and consequently a cheque was issued for the entire amount of Rs.4,85,000/- which bounced on account of the account being closed.

5. He submits that so far as the transaction of money regarding sale and purchase of land is concerned, there is no allegation in the entire complaint that the same had any element of cheating. However, the learned courts while convicting the petitioner for the offence under Section 420 IPC have found the petitioner guilty of section 420 of the I.P.C. on the ground that the petitioner had issued cheque of a closed account and therefore at the time of issuance of the cheque amount, the petitioner had no intention to return the money. Learned counsel has placed section 420 IPC and has submitted that the intention to cheat should have been alleged to have existed right at the time when the money was taken by the petitioner from the complainant and the act of the petitioner to return the money through a cheque even if it was of a closed account does not constitute cheating.

6. He has further submitted that the petitioner has also been convicted under section 138 of the N.I. Act. The legal notice in the present case was issued on 27.9.2014 and the complaint was filed on 17.10.2014. He submits that there is no evidence on record in connection with service of legal notice and the legal presumption by way of deemed service of notice could be only upon expiry of 30 days and thereafter 15 more days were to be made available to the petitioner to return the cheque amount and then the cause of action to file the complaint could arise after 45 days from the date of issuance of legal notice (i.e 27.09.2014). The learned counsel for the petitioner has relied upon a judgment reported in ***AIR 2015 SC 157 (Yogendra Pratap Singh versus Savitri Pandey)***.

7. Accordingly, the conviction of the petitioner for offence under Section 138 of the N.I. Act and also under Section 420 IPC is perverse and calls for interference in revisional jurisdiction to secure the ends of justice.

Arguments of the Opposite Party no.2.

8. Learned counsel appearing on behalf of the opposite party no. 2 while opposing the prayer of the petitioner has submitted that in revisional jurisdiction there is no scope for re-appreciation of evidence. He has further submitted that even if at the time of initial transaction of money regarding sale and purchase of land, there was no intent to cheat, but at the time of issuance of cheque, the petitioner had cheated the complainant in as much as the cheque itself was issued from a closed account and the petitioner was very much aware that under no circumstances it could be encashed. He submits that on this ground, ingredients of Section 420 IPC is made out. He has relied

upon judgment passed by ***Hon'ble Kerela High Court dated 30th November 2023 passed in Crl.R.P. No. 441 of 2005.*** and has submitted that a view has been taken that issuance of a cheque with respect to closed account would amount to cheating.

9. So far as the offence under section 138 of the Negotiable Instrument Act is concerned, the learned counsel submits that even if the time line is not as per law, the right to file the complaint has to remain intact and it may be kept open to the complainant to file a fresh complaint with a petition for condonation of delay.

Findings of this Court.

10. The factual matrix of the complaint case filed by the complainant was that in the month of January 2014, the petitioner proposed the complainant to sell certain land and on different dates the complainant paid a total amount of Rs. 4,85,000/- as advance for the purchase of land as per the oral agreement regarding sale-purchase of land. It was alleged in the complaint that in-spite of repeated requests the petitioner did not execute the registered deed of sale in favour of the complainant and upon demand to refund the amount, the petitioner gave an account payee cheque of Rs. 4,85,000/- on 09.07.2014 which was deposited on 17.07.2014 but the cheque was dishonored on account of the account being closed. A legal notice dated 27.09.2014 was issued and despite receipt of legal notice the petitioner neither replied nor paid the amount.

11. The complaint case was filed on 17.10.2014 for the alleged offence under Section 420 IPC and 138 of the N.I. Act. The cognizance was taken and the charge was ultimately framed under section 420 IPC and 138 of the N.I. Act. The petitioner pleaded not guilty and claimed to be tried. After closure of evidence of the prosecution the statement of the petitioner was recorded under section 313 and the petitioner also adduced oral as well as documentary evidence in defence.

12. At the stage of trial, four witnesses were examined from the side of the complainant and five exhibits were also produced. The complainant was examined as P.W. 4 and the documentary evidences relating the issuance of cheque, its bouncing and legal notice were adduced and the signature of the complainant was also exhibited. Defence examined two defence witness namely 1. Uttam Kumar Charania D.W-1 and Manoj Jain D.W-2. Defence also adduced some documentary evidences relating to certain other criminal cases. It was the case of the defence that the cheque in question along with other cheques were issued to Manoj Jain and not to the complainant.

13. P.W. 1 stated before charge examination in chief that the occurrence took place on 15.01.2014 in the house of the petitioner. A land deal was done with the complainant and the petitioner proposed to the complainant to sell the land and the total amount of Rs. 4,85,000/- was paid on different dates. But after receiving the amount the petitioner did not register the land. The complainant received a cheque of Rs. 4,85,000/- of a closed account from the petitioner. He was cross examined and he stated during cross examination that the petitioner did not want to sell the proposed land and cheated the complainant. P.W. 2 also supported the case of the prosecution with regard to the place and the land deal between the parties and payment of Rs. 4,85,000/- on different dates and stated that the petitioner neither got the land registered nor sold the land nor return the money. P.W. 3 also supported the prosecution case to the extent that the petitioner had given a cheque of Rs. 4,85,000/- to the complainant and the complainant had told him that the petitioner had taken money for selling the land but had done fraud with him. The petitioner neither gave land nor returned the money. P.W. 4 is the complainant himself. He has stated in his before charge evidence that the petitioner had taken Rs. 4,85,000/- dishonestly for selling the land but neither returned the money nor sold the land and with dishonest intention had given cheque of a closed account. He has stated that after taking the money a date was fixed for registry of land but the petitioner did not come to the registry office and when the complainant demanded the money, he gave an account payee cheque of Rs. 4,85,000/-. The cheque was deposited on 17.07.2014 but returned on account of bank account closed and thereafter the complainant gave legal notice to the petitioner. In his cross examination he could not say the boundary of the land and no agreement was made with respect to the land.

14. The defence also examined two witnesses stating that petitioner had given ten blank cheques to Manoj Jain and not to the complainant. D.W. 2 stated that the petitioner was the younger brother of his father-in-law and his wife Chandni Jain had filed a case against the petitioner being PCR Case No. 191/15 and in cross examination he has stated that the case was filed way back in the year 2009 for offence under section 498-A of IPC.

15. After considering the materials on record the learned trial court recorded a finding that the petitioner had taken Rs. 4,85,000/- from the complainant for selling the land but did not register the same and upon demand of the complainant, he gave a cheque of Rs. 4,85,000/- of a closed account. The learned court recorded that it was corroborated with the

testimony of P.W. 2,3 and 4 that the petitioner had taken Rs. 4,85,000/- dishonestly for selling the land but neither returned the money nor sold the land. Thereafter he gave a cheque of a closed account with dishonest intention. The learned trial court did not record any finding with regard to service of legal notice regarding bouncing of cheque upon the petitioner and convicted the petitioner under section 138 of N.I. Act by referring to the fact that the cheque was issued by the petitioner and is bounced as the account was closed and the petitioner failed to discharge his burden with regard to the presumption in favour of the complainant that the cheque was issued against legally payable debt by referring to the provisions of Section 118 read with section 139 of N.I. Act . The learned trial court convicted the petitioner under section 420 of IPC and also under Section 138 of the N.I. Act.

16. However, the learned trial court did not consider the materials and questions put to the petitioner during his examination under section 313 of Cr.P.C. and simply recorded in paragraph 5 of the judgement that during recording of statement of the petitioner under section 313 of Cr.P.C. the petitioner was in complete denial from the occurrence and alleged false implication.

17. So far as the learned appellate court is concerned, this court finds that the appellate court has upheld the conviction under section 138 of N.I. Act without recording any finding with respect to service of legal notice upon the petitioner. The conviction under section 138 of N.I. Act has been upheld by recording a finding that the presumption under section 139 of the N.I. Act comes into operation and the petitioner had to prove the contrary and that the contention from the side of the prosecution side appeared to be reasonable.

The appellate court also discussed the statement of the petitioner under section 313 of Cr.P.C. while upholding the conviction under section 138 of the N.I. Act that the petitioner admitted his signature on the cheque and failed to rebut the presumption in law regarding legally enforceable debt.

18. The arguments of both the parties and finding with respect to conviction under section 420 IPC has been recorded in paragraph 15 and 16 respectively of the appellate court judgment which are quoted as under: -

15. *It is further argued by appellant's counsel that it is settled principle that to attract Section 420 IPC there should be intention to cheat from the very beginning of the agreement which is not proved in the given case hence Section 420 IPC is not attracted at all. Whereas other side says that the prosecution witnesses C.W.1 and C.W.4 have stated that accused himself approached the complainant and offered to sale land*

and after receiving a handsome amount he refused to execute the sale deed itself shows that there was some dishonest intention from very inception of the agreement. More so, the accused has issued a cheque of the account which was already closed also shows a mala fide intention on the part of the accused. This view also finds support from the decision of The Hon'ble Jharkhand High Court in Cr. Revision no. 591 of 2009 (Decided on 3rd January, 2013).

16. *On minute scrutiny of the entire material and evidences of both the sides available on the record and under the circumstances of this case this court has reached to the conclusion that prosecution has well proved the charge under Section 420 of the IPC and charge under Section 138 Negotiable Instrument Act. Accordingly, judgment of conviction and sentence passed by learned Court below hereby confirmed. In the result appeal is hereby dismissed. Let a copy of this order to be sent to the learned court below.”*

19. This court finds that the learned appellate court has not cared to discuss the arguments of the parties with regards to ingredients of the offence under section 420 of IPC. This court also findings that the learned appellate court did not refer much less consider the materials and questions put to the petitioner and also his reply to such questions under section 313 of Cr.P.C. while upholding the conviction under section 420 of I.P.C.

20. Thus, both the courts did not consider the materials and questions put to the petitioner under section 313 of Cr.P.C. with regard to the offence under section 420 of I.P.C. much less the answers to such questions.

21. This court has also gone through statement of the petitioner recorded under section 313 Cr.P.C.

The first point put to the petitioner while recording the statement under section 313 Cr.P.C. is -

As per the evidence of the witnesses the petitioner had entered into agreement for sale of land and received advance amount of Rs. 4,85,000/-. In response, the petitioner denied.

The second point put to the petitioner while recording the statement under section 313 Cr.P.C. is -

The witnesses have also stated that in order of return the advance amount of Rs. 4,85,000/- the petitioner had issued a cheque of Rs. 4,85,000/- which was returned by the bank as the bank account of the petitioner was closed. In response, the petitioner replied that there was a conspiracy against the

petitioner. While giving his clarification, the petitioner stated that the cheque was actually issued to Manoj Jain who is married to his niece Chandni Jain and not to the complainant and there was dispute going on between Manoj Jain and his niece.

22. From the perusal of the materials and questions put to the petitioner under section 313 of Cr. P.C, this court finds that no question was put to the petitioner with regard to any element of cheating or regarding his intention to cheat the complainant much less intention to cheat right from the inception of transactions between the parties of sale purchase of land. Rather there was no question that at the time of dealing with the landed property and taking advance money of Rs. 4,85,000/- for purchase of land, the petitioner had any intention to cheat. Further in connection with issuance of cheque also it was simply stated that the cheque was returned as the bank account of the petitioner was closed but no question was put with regard to any intention to cheat at the time of issuance of cheque. Thus, this court finds that no question whatsoever was put to the petitioner under section 313 with regard to basic ingredient of offence under section 420 IPC i.e. intention to cheat much less any intention to cheat at the very inception of the transaction regarding sale purchase of land or even at the stage of issuance of cheque.

23. This court finds that the specific case of the complainant as per the complaint was that there was an oral agreement between the parties that the petitioner would sell some land standing in the name of his wife to the complainant and the complainant gave advance amount of total of Rs. 4,85,000/- to the petitioner but the petitioner did not register the sale deed and upon demand to refund the money, the petitioner issued a cheque dated 09.07.2014 for an amount of Rs. 4,85,000/- in favour of the complainant which was presented on 17.07.2014 and then was sent to the concerned bank for collection of money but was returned as the cheque of a closed account was issued by the petitioner. The petitioner received the cheque return memo on 18.09.2014 and on 29.09.2014 a issued a legal notice was issued but the petitioner did not return the amount and threatened the complainant and ultimately the complaint case was filed under section 420/406 IPC and Section 138 of the N.I. Act. The averments in the complaint case clearly indicate that there was no averment regarding any intention on the part of the petitioner much less any such intention at the time when the money was paid by the complainant to the petitioner in connection with the sale purchase of land or even when the cheque was issued to return the money. Apparently, the transaction was purely on account of oral agreement of sale and purchase

of land which did not materialize and in order to return the money a cheque of a closed account was issued by the petitioner which ultimately bounced.

24. Before this court the learned counsel for the complainant has tried to defend the impugned orders of conviction of the petitioner under section 420 I.P.C. by submitting that the act of issuance of cheque from a closed account constitutes an offence of cheating as it reflects the intention not to return the money. The argument suffers from a fundamental flaw when seen in the light of the basic ingredients of an offence under section 420 of I.P.C. This court of the view that the act of issuance of cheque is an act to return money and when the cheque is of a closed account it could or could not be coupled with an intention not to return money but under both the circumstances, the basic ingredient of offence under section 420 I.P.C. that is, *cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to consent that any person shall retain any property, is completely missing.* The *Basic ingredient of offence under section 420 IPC are-*

Whoever cheats and thereby dishonestly induces the person deceived-

- (a) to deliver any property to any person, or*
 - (b) to consent that any person shall retain any property, or*
 - (c) to make, alter or destroy the whole or any part of a valuable security, or*
 - (d) to make, alter or destroy anything which is signed or sealed and which is capable of being converted into a valuable security.*
- shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.*

25. Thus the required ingredient to constitute an offence under section 420 of I.P.C, that is, dishonest intention prior to entering into monetary transaction is completely missing when the act to return money by issuing cheque of a closed account is seen in isolation. However, such a fact can certainly be a relevant when seen in the light of the nature of money transaction involved in a particular case. In a case where the initial money transaction is coupled with an allegation of a dishonest intention right at its inception, the act of refund of money by issuance of cheque of a closed account would be a circumstance to be taken into account to come to a finding of dishonest intention since inception to induce the complainant to deliver money and not to return the same to convict a person under section 420 I.P.C.

26. In the present case, this court finds that there is no allegation of dishonest intention of the petitioner right at the inception of money transaction regarding sale and purchase of land and thus the basic allegation /ingredients of dishonest intention to cheat right at the time of the money transaction between the parties in connection with sale and purchase of land is totally absent. In such circumstances, the act of refusal to execute the registered

deed was mere violation of oral agreement of sale purchase of land. Under such circumstances, this court is of the considered view that the act of issuance of cheque of a closed account by itself does not satisfy the basic ingredient of section 420 I.P.C. that is, dishonest intention of the petitioner right at the inception of money transaction. This is coupled with the fact at the time of recording the statement of the petitioner under section 313 of Cr.P.C. no question was put to the petitioner regarding his dishonest intention much less dishonest intention at the inception of money transaction. This court is of the considered view that conviction of the petitioner for offence under section 420 IPC cannot be sustained even on the alleged ground of issuance of cheque to refund the amount from a closed account.

27. This court is of the considered view that the learned courts have not considered the aforesaid aspects of the matter while convicting the petitioner for offence under section 420 of I.P.C. and have recorded perverse findings to convict the petitioner under section 420 IPC which has caused serious miscarriage of justice and calls for interference under revisional jurisdiction.

Consideration of the judgement passed by Hon'ble Kerala High Court relied upon by the complainant.

28. This court finds that the present case stands on a different set of fact altogether as compared to that of the judgement relied upon by the petitioner passed by Hon'ble Kerala High Court.

29. So far as the judgement passed by Hon'ble Kerala High Court relied upon by the learned counsel for the complainant is concerned, in the said case the accused had taken money from the complainant to secure a job for his son but upon failure to do so he returned the money by issuing a cheque drawn on a closed account and a FIR was instituted for offence under section 420 I.P.C. The magistrate held the accused guilty and the appellate court acquitted him of the charges and the de-facto complainant was the petitioner before the high court challenging the order of acquittal. In the said background an issue was framed for consideration-

'whether the offence of cheating punishable under 417 or under section 420 IPC is attracted if a person, after voluntarily closing the account, issues a cheque towards discharge of pecuniary liability, leading to the inevitable consequence of its dishonor on the ground 'account closed'?

From the perusal of the judgment, it is apparent that the case was instituted under section 420 IPC and was sent for investigation and thereafter the accused was tried under section 420 of IPC. In the said case, the money was sought to be returned by issuance of cheque of a closed account and the

Hon'ble High court convicted the petitioner under section 417 of IPC and not under section 420 IPC. The Hon'ble High court considered the act of the accused who received an amount of Rs.50,000/- from the petitioner upon the unfulfilled promise of arranging job for the petitioner's son and thereafter issuing a cheque drawn on an account which he had voluntarily closed three months earlier and it was shown that the cheque was issued only as a ploy to deceive the petitioner and it was held that the element of cheating as envisaged under section 415 IPC was clearly brought out in the said case. It was held that the above conduct of the respondent would definitely amount to deception in so far as it relates to the fraudulent and dishonest inducement made by the respondent to believe that the petitioner would be able to get back the amount of Rs.50,000/- which the respondent had obtained from him by presenting and encashing the cheque.

30. The said judgement does not apply to the facts of the present case. In the present case, the conviction is under section 420 IPC and not under section 417 IPC. Further, in the aforesaid case the accused was ultimately convicted under section 417 IPC by virtue of attending evidences on record demonstrating the presence of the element of deception, right at the time of issuance of cheque from a closed account which was voluntarily closed by the accused three months prior to issuance of the cheque. There is no such attending evidence on record in this case and this court is of the considered view that merely because the cheque is drawn on a closed account by itself does not constitute an offence of cheating. Moreover, no question was put to the petitioner under section 313 of Cr.P.C. about his criminal intent to cheat while issuing the cheque.

31. As a cumulative effect of the aforesaid findings, the conviction of the petitioner for offence under section 420 I.P.C. is set-aside.

Conviction under section 138 of N.I.Act.

32. It is the specific case of the petitioner before this court that the case so far as it relates to section 138 of N.I. Act is pre-mature. On the other hand, it has been argued by the complainant that even if the complaint for offence under section 138 of N.I. Act is held to be premature, liberty be reserved to file a fresh complaint.

33. The records reveal that the cheque was dated 09.07.2014, presented on 17.07.2014 dishonored on 18.09.2014, legal notice was sent on 27.09.2014 and the complaint case was filed on 17.10.2014. There is no evidence regarding service of legal notice. Even if deemed service of legal notice is considered then also the notice can be said to have been served

only upon expiry of 30 days and thereafter 15 days is also available to pay the cheque amount and then only the cause of action to file the complaint case could arise. Accordingly, the complaint, so far as it relates to offence under section 138 of N.I. Act is concerned, is premature.

34. In the judgment passed by the Hon'ble Supreme Court reported in **(2014) 10 SCC 713 (Yogendra Pratap Singh vs. Savitri Pandey and Another)** it has been held by the Hon'ble Supreme Court at Paragraphs- 30, 31, 36, 37 to 38 which reads as under:

"30. Section 138 of the NI Act comprises of the main provision which defines the ingredients of the offence and the punishment that would follow in the event of such an offence having been committed. Appended to this section is also a proviso which has three clauses viz. (a), (b) and (c). The offence under Section 138 is made effective only on fulfilment of the eventualities contained in clauses (a), (b) and (c) of the proviso. For completion of an offence under Section 138 of the NI Act not only the satisfaction of the ingredients of offence set out in the main part of the provision is necessary but it is also imperative that all the three eventualities mentioned in clauses (a), (b) and (c) of the proviso are satisfied. Mere issuance of a cheque and dishonour thereof would not constitute an offence by itself under Section 138.

31. Section 138 of the NI Act has been analysed by this Court in Kusum Ingots & Alloys Ltd. wherein this Court said that the following ingredients are required to be satisfied for making out a case under Section 138 of the NI Act: (SCC p. 753, para 10)

"(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that 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 earlier;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."

36. *A complaint filed before the expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to*

*disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint which does not disclose the cause of action the court is not competent to take cognizance. A conjoint reading of Section 138, which defines as to when and under what circumstances an offence can be said to have been committed, with Section 142(b) of the NI Act, that reiterates the position of the point of time when the cause of action has arisen, leaves no manner of doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed under clause (c) of the proviso to Section 138, has, in fact, elapsed. Therefore, a court is barred in law from taking cognizance of such complaint. It is not open to the court to take cognizance of such a complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date on which the notice has been served on the drawer/accused has elapsed. We have no doubt that all the five essential features of Section 138 of the NI Act, as noted in the judgment of this Court in *Kusum Ingots & Alloys Ltd.* and which we have approved, must be satisfied for a complaint to be filed under Section 138. If the period prescribed in clause (c) of the proviso to Section 138 has not expired, there is no commission of an offence nor accrual of cause of action for filing of complaint under Section 138 of the NI Act.*

37. *We, therefore, do not approve the view taken by this Court in *Narsingh Das Tapadia* and so also the judgments of various High Courts following *Narsingh Das Tapadia* that if the complaint under Section 138 is filed before expiry of 15 days from the date on which notice has been served on the drawer/accused, the same is premature and if on the date of taking cognizance, a period of 15 days from the date of service of notice on the drawer/accused has expired, such complaint was legally maintainable and, hence, the same is overruled.*

38. *Rather, the view taken by this Court in *Sarav Investment & Financial Consultancy* wherein this Court held that service of notice in terms of Section 138 proviso (b) of the NI Act was a part of the cause of action for lodging the complaint and communication to the accused about the fact of dishonouring of the cheque and calling upon to pay the amount within 15 days was imperative in character, commends itself to us. As noticed by us earlier, no complaint can be maintained against the drawer of the cheque before the expiry of 15 days from the date of receipt of notice because the drawer/accused cannot be said to have committed any offence until then. We approve the decision of this Court in *Sarav Investment & Financial Consultancy* and also the judgments of the High Courts which have taken the view following this judgment that the complaint under Section 138 of the NI Act filed before the expiry of 15 days of service of notice could not be treated as a complaint in the eye of law and criminal proceedings initiated on such complaint are liable to be quashed."*

35. This Court finds that the law has been well settled by the aforesaid judgement that the cause of action for filing a complaint case under Section 138 of the N.I. Act could not arise prior to expiry of 15 days from the date of

service of legal notice on the accused. **36.** This Court finds that in the light of the judgment passed by the

Hon'ble Supreme Court reported in **(2014) 10 SCC 713 (Yogendra Pratap Singh –versus- Savitri Pandey and another)**, the complaint filed by the complainant is pre-mature as the cause of action for filing the complaint case under Section 138 of the N.I. Act had not crystalized on the date of filing of the complaint and accordingly, the complaint itself was pre-mature and hence not maintainable and accordingly, the petitioners could not have been convicted under the said Section. Accordingly, the impugned judgements and sentence so far as it relates to conviction under section 138 of N.I. Act passed by the learned courts below are hereby set aside.

37. This court also finds that in the aforesaid judgement reported in **(2014) 10 SCC 713 (supra)**, the Hon'ble supreme court while holding that the complaint as pre-mature also observed in Para-41 of the said judgement itself that the remedy for the Complainant was to file a fresh complaint and satisfy the court regarding sufficient cause for delay.

- 38.** Accordingly, since the complaint to the extent it relates to offence under section 138 of N.I. Act has been held to be pre-mature, the complainant may still file a fresh complaint and satisfy the court regarding sufficient cause for delay. The complainant may file the fresh case under section 138 of N.I. Act within a period of 2 months from today.
- 39.** Thus, the conviction and sentence under section 420 IPC is set aside the conviction and sentence under section 138 of N.I. Act is also set-aside with the aforesaid liberty to file a fresh complaint under section 138 of N.I. Act.
- 40.** The present revision is disposed in the aforesaid terms. The judgement of the learned appellate court as well as the judgement passed by the learned trial court are set aside with the aforesaid liberty to the complainant.
- 41.** Pending interlocutory applications, if any, are closed.
- 42.** Let this order be communicated to the learned court below through FAX / e-mail.

© All Rights Reserved @ LAWYER E NEWS

*Disclaimer: Always compare with the original copy of judgment from the official website.