**A.F.R.**

Neutral Citation No. - 2024:AHC:78078

**Court No. - 92**

**Case :-** APPLICATION U/S 482 No. - 14197 of 2024

**Applicant :-** Rakesh Upadhyay
**Opposite Party :-** State of U.P. and Another
**Counsel for Applicant :-** Dilip Kumar Dubey,Prabhat Kumar Tiwari
**Counsel for Opposite Party :-** G.A.

**Hon'ble Arun Kumar Singh Deshwal,J.**

1. Heard learned counsel for the applicant and Sri Arbind Kumar, learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed for quashing of entire proceeding as well as summoning order dated 22.11.2023 passed by learned Additional Chief Judicial Magistrate, Second, Jaunpur in Complaint Case No.13185 of 2023 (Jay Prakash Upadhyay Vs. Rakesh Upadhyay), under Section 138 of N.I. Act, Police Station Sujanganj, District Jaunpur, pending in the Court of Additional Chief Judicial Magistrate, Second, Jaunpur.

3. Facts giving rise to the present case are that the opposite party no.2 had filed a complaint under Section 138 N.I. Act against the applicant with the allegation that the complainant and the present applicant were good friends and the applicant was involved in property dealing. He assured the complainant to provide him with land. For that purpose, Rs.20,00,000/- (Rupees Twenty Lac) was taken by the opposite party no.2 as advance, but subsequently, the applicant did not execute the sale deed of the land despite repeated requests of the complainant. The applicant issued two cheques for each Rs.10,00,000/- (Ten Lac) on 02.03.2023. When the complainant presented those cheques in his account maintaining in Baroda U.P. Gramin Bank, the same was returned because of insufficiency of fund in the applicant's account.

After that, despite repeated request applicant has not paid the cheque amount. After that, the complainant sent demand notice through registered post on 29.03.2023 to the present applicant, but despite receiving the same cheque, the amount was not paid by the applicant. In support of his complaint, opposite party no.2 had also filed a receipt of registered post dated 29.03.2023 as well as the account ledger report issued by Baroda U.P. Gramin Bank regarding the account of opposite party no.2 showing the bouncing of cheque on 02.03.2023. Learned Magistrate, after that, had issued a summons to the applicant by order dated 22.11.2023, which is impugned in the present application.

4. Contention of learned counsel for the applicant is that the impugned summoning order is bad in the eyes of the law because the cognizance for the offence under Section 138 of N.I. Act can be taken only after satisfying the condition mentioned under Section 142 N.I. Act, which requires a complaint should be made within one month from the date of arising of the cause of action, and 15 days' notice of demand should also be made within 30 days after receiving information from the bank regarding dishonour of cheque, but in the present case learned Magistrate had not discussed anything.

5. Per contra, learned A.G.A. has submitted that the issue raised by learned counsel for the applicant is his defence and disputed question of fact that can be decided during trial.

6. Considering the submission above of learned counsel for the parties and from the perusal of the record, the sole legal question arises: which condition authorizes the concerned Court to take cognizance of the offence under Section 138 N.I. Act. Section 138 N.I. Act prescribed when the offence under Section 138 N.I. Act deemed to be committed. For reference, under Section 138 N.I. Act is being quoted as under:-

> ***"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—***

*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 provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*

*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 earlier;*

*(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 thirty 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.*

*Explanation.—*

*For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."*

7. From the perusal of Section 138 N.I. Act, it is clear that for the maintainability of a complaint under Section 138 N.I. Act after dishonour of cheque following conditions must be satisfied:-

(I) The cheque has been presented within a period of its validity.

(II) After receiving the information from the bank regarding the return of the cheque, the payee or holder, in due course of the cheque, makes a demand of the cheque amount in writing within a period of 30 days.

(III) The cheque Drawer failed to pay the cheque amount to the cheque drawee within 15 days from the date of receiving the above notice.

8. Similarly, Section 142 N.I. Act prescribes the condition which authorizes a Court to take cognizance under Section 138 N.I. Act. For reference, Section 142 of N.I. Act is quoted as under:-

> *"Section 142 Cognizance of offences.*
>
> *(1) 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.*
>
> *(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,--*
>
> *(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated;*
>
> *(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated."*

9. From the perusal of Section 142 N.I. Act, it is clear that certain conditions must be fulfilled despite anything contained in Cr.P.C.. Only then can the Court take cognizance of the offence under Section 138 N.I. Act. These conditions are as follows:-

(I) A complaint must be filed in writing by a payee or holder in due course of the cheque.

(II) Such complaint must be made within one month from the expiry of 15 days after receiving the notice for demand by the drawer of the cheque, and only the Judicial Magistrate of Ist Class to try the offence under Section 138 N.I. Act.

(III) Only that Court will have jurisdiction to entertain a complaint

where the payee or holder in due course maintains his account when the cheque in question was delivered for collection through his account.

10. It is also clear from Section 142 N.I. Act that the procedure under this section will prevail over the procedure in the criminal procedure code. In the ordinary course, when any complaint is filed under Section 200 Cr.P.C., the Magistrate, after perusal of the complaint and statement recorded under Section 200 and 202 Cr.P.C., makes his opinion that *prima facie* case regarding a particular offence is made out, but in the case of an offence under Section 138 N.I. Act summons cannot be issued by taking cognizance unless certain conditions are fulfilled, as mentioned in Section 142 N.I. Act as well as in the proviso of Section 138 N.I. Act.

11. From the above analysis, it is clear that while taking cognizance under Section 142 N.I. Act regarding offence under Section 138 N.I. Act, Courts must satisfy the fulfillment of primary conditions before issuing summons and fulfillment of these conditions must be mentioned in the summoning order itself. These necessary conditions are being summarised as follows:-

**(I) Cheque must be presented to the bank during its validity.**

**(II) The payee or holder, in due course, must give a written notice within 30 days to the cheque drawer after receiving information from the bank regarding the return of the cheque.**

**(III) The drawer of the cheque fails to make payment of the cheque amount despite the expiration of 15 days from the date of receiving the written notice sent by the payee or holder in due course.**

**(IV) The complaint must be filed within one month after the expiry of 15 days from receiving the written notice from the payee or holder in due course of cheque.**

**(V) If the complaint is filed beyond one month from the date of cause of action (the expiry of 15 days from receiving the notice by the cheque drawer) and the Court condones the delay. This order must be reflected in the summoning order itself.**

**(VI) If no date of service of demand notice is mentioned in the complaint, the Court can presume service as per the law laid down by this Court in the case of Rajendra vs. State of U.P. and another in Application U/S 482 No.45953 of 2023.**

**(VII) Apart from the above conditions, the cheque number and date, date of sending the notice and mode of sending the notice must also be mentioned in the summoning order.**

12. The above-mentioned guidelines are being issued, considering the facts that taking advantage of technical lacuna in the summoning orders, dishonest drawers of cheques get interim order from High Court and thereafter proceedings under the N.I. Act remain kept pending for number of years though the Hon'ble Apex Court specifically directed in the case of *In Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881* in *Suo Motu Writ Petition (Crl.) No.2 of 2020,* that trial under Section 138 N.I. Act should be concluded expeditiously.

13. Hon'ble Apex Court, in the case of ***Kusum Ingots and Alloys Ltd. Vs. Pennar Peterson Securities Ltd. and others****,* reported in ***2000 (2) SCC 745*** had also observed that before taking cognizance under Section 138 N.I. Act, conditions mentioned in paragraph No. 10 must be satisfied. Paragraph no.10 of the above judgment is being quoted as under:-

> "*10. On a reading of the provisions of Section 138 of the NI Act, it is clear that the ingredients which are to be satisfied for making out a case under the provision are :*
>
> *1. 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;*

*2. 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;*

*3. that cheque is returned by the bank unpaid, either because of 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;*

*4. 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;*

*5. 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;"*

14. It would be appropriate to mention here that this Court, in the case of ***Rajendra Vs. State of U.P. and another in Application U/S 482 No.45953 of 2023*** by judgment dated 25.01.2024 has already held that written notice mentioned under Section 138 N.I. Act includes notice through e-mail or Whatsapp. Paragraph Nos.10 & 18 of judgment mentioned above is quoted as under:-

*"10. The above judgement of the Hon'ble Supreme Court was delivered in the year 2008 considering the efficiency of service of the post office at that time. Even Hon'ble Apex Court has not presumed that 30 days will always be counted for service of notice if the same is sent through registered post and is not returned. Now, almost 15 years have passed, much water has flown under the bridge and delivery of letters through the postal department has become so fast that presuming 30 days for service delivery for the registered post does not appear correct. Even the Order 5 Rule 9(5) of C.P.C. provides presumption for delivery of service of summons through registered post, if not received back within 30 days from the date of issuance of summons cannot be equated with the present service of notice under N.I. Act because giving of notice cannot be equated with the service of notice under N.I. Act, and if such pleas are allowed, then dishonest drawer of the cheque may get an unnecessary advantage, especially when drawer of the cheque did not denied the receiving of statutory notice.*

*18. In the present time of digitalization and computerisation, delivery of post has become so fast that the Court can presume that a correctly addressed registered post has been served upon the*

> *addressee within a maximum period of 10 days if the date of service is not mentioned in the complaint. After the initiation of the online post tracking system, it is too easy to know the date of delivery of the registered post. In the ordinary course of business, the registered letter is delivered within 3 to 10 days if correctly addressed.* ***Therefore, this Court holds that if no date of service has been mentioned in the complaint, then the Court can presume under Section 114 of the Evidence Act and Section 27 of the General Clause Act that notice would have been served within ten days from the date of its dispatch.*** *Though it is always open to the drawer of the cheque to take the plea during trial, the notice was never served upon him."*

15. In the present case, from the perusal of the summoning order dated 22.11.2023, it is explicit that the conditions mentioned above were not discussed as the cheque number, date of the notice, mode of service of notice, and fulfilment of the necessary conditions were not mentioned.

16. Impugned order *ex-facie* suffers from infirmity and, therefore, deserves to be set aside.

17. In view of the above, the order dated 22.11.2023 passed by learned Additional Chief Judicial Magistrate-II, Jaunpur, is hereby set aside. The learned Magistrate is directed to pass a fresh order in light of the observation made above within one month from the date of receiving a copy of this order.

18. With the observation mentioned above, the present application is **allowed**.

19. Registrar (Compliance) is directed to circulate a copy of this order to all District Judges of the State of Uttar Pradesh; they will further apprise their subordinate Judicial Officers that the essential ingredients that must be reflected in the summoning order passed for the offence under Section 138 N.I. Act.

**Order Date :-** 1.5.2024/Atul

Digitally signed by :-
ATUL KUMAR SRIVASTAVA
High Court of Judicature at Allahabad