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**A.F.R.**

**Court No. - 37**

**Case :-** APPLICATION U/S 482 No. - 14068 of 2020

**Applicant :-** Ravi Dixit

**Opposite Party :-** State of U.P. and Another

**Counsel for Applicant :-** Ajay Dubey

**Counsel for Opposite Party :-** G.A.

**Hon'ble Dr. Kaushal Jayendra Thaker,J.**

1. Heard Sri Ajay Dubey, learned learned counsel for the petitioner and learned A.G.A. for the State.

2. By way of this petition, the petitioner has challenged the summoning order dated 3.9.2019. He was supposed to present himself on 30.11.2019.

3. The brief facts as can be culled out from the petition are that a cheque of Rs.5,00,000/- issued on 1.3.2019 and one another cheque of Rs.5,98,000/- issued on 2.3.2019 were dishonoured on 28.5.2019. The complainant sent a notice on 11.6.2019. He did not received any money and, therefore, on 29.6.2019 he filed the compliant under Section 138 of Negotiable Instrument Act, 1881 which was numbered as Complaint Case No. 441 of 2019. The learned Judge after discussing the dates was satisfied that prima facie case is made out for issuance of notice and likewise on 3.9.2019 passed the summoning order.

4. Learned counsel for the petitioner was put to a question as to how the summoning order passed by the Court below is bad. According to his understanding, he conveys to this Court that there is some judgment of Damodar without citing the same. He states that as per the provisions of Section 138 of the Negotiable Instrument Act, 1881 (hereinafter referred to as 'Act, 1881') the petitioner cannot be asked to answer the summons as he had already filed reply and the

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complaint could have been filed only after 15 days of his reply and it was filed before the said date.

5. Learned counsel for the petitioner has submitted that the summoning order is without compliance of provisions of Section 138 of the Act, 1881; the application has been falsely implicated due to enmity and financial dispute with the complainant and that cheques were dishonoured as he had directed stop of payment. It is submitted that respondent No.2 sent notice to the applicant on 11.6.2019 but no date of service of notice have been mentioned in the complaint. The petitioner has submitted that on 25.6.2019 he had replied. The complainant, according to the petitioner, should have waited for a period of 15 days and should not have filed the complaint on 29.6.2019. The petitioner was not in know how of the summon issued. It is submitted that complaint is a premature complaint. If the notice was sent on 11.6.2019 and no date of service has been mentioned, as per general clause Act, 30 days time time would have been presumed for service of notice and 15 days thereafter for waiting period of payment and, then only the complaint should have been filed is the submission of the learned counsel for the petitioner.

6. Once the intention of the party is clear that he does not wish to make payment, should the complainant wait for 15 days is the question.

7. Section 138 read with Section 142 of the Act, 1881 reads 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<sup>19</sup> [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,<sup>20</sup>[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.]*

**142 Cognizance of offences.** —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:<sup>24</sup> [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.]

(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."

8. The provision of Section 138 of the Act, 1881 cannot be interpreted to mean that even if the accused refuses to make payment, the complainant cannot file a complaint. Proviso (c) of the said Act is to see the bona fide of the drawer of the cheque and is with a view to grant him a chance to make the payment.

9. In this case, the cheque was drawn by the accused on an account maintained by him with the bank. The period of 15 days is for making payment. In this case the accused did not make the payment and did not even appear before the Court below for a year. It is in the month of August, 2020 that he has approached this Court.

10. Proviso to Section 138 of the Act, 1881 does not constitute ingredients of offence punishable under Section 138. Proviso to Section 138 simply postpones the actual prosecution of the offender till such time he fails to pay the amount, then the statutory period prescribed begins for lodgement of complaint. The Parliament has

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granted just and proper time to give to the drawer the opportunity to pay the amount before he could be prosecuted. The offence is completed the moment the cheque is dishonoured. Refer to **Dashrath Rupsingh Rathod Vs. State of Maharashtra, (2014) 9 SCC 129.**

11. The judgment in **Shakti Travel and Tours Vs. State of Bihar, (2002) 9 SCC 415**, will not apply to the facts of this case as it is averred in the complaint that the notice was served which was replied by the accused and, therefore, it cannot be said that the issuance of summons is bad in the eye of law.

12. In the case in hand, the petitioner herein replied to the notice which goes to show that the intention of the drawer is clear that he did not wish to make the payment. Once this is clarified, should the complainant wait for the minimum period of 15 days, the answer would be 'no'.

13. In this case, judgment in **N. Parameswaram Unni Vs. G. Kannan, (2017) 5 SCC 737** can be relied upon as in this case it appears that notice was deemed to have been served to the petitioner and he was under an obligation to discharge his liability which he has not done. The only object of proviso (c) to Section 138 of the Act, 1881 is to avoid unnecessary hardship if the drawer wants to make payment. Hence, this Court does not find any reason to interfere with the well reasoned summoning order passed by the learned Magistrate.

14. Reason given by the learned Magistrate is very clear. It is well reasoned order which was passed on 30.11.2019. For a period of one year, the petitioner has chosen not to appear before the learned Magistrate and has moved this Court now.

15. In view of the above, this petition is dismissed with cost of Rs.15,000/- to be deposited before the Court below. The petitioner is

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aware that summons has already been issued against him and, therefore, he may choose to appear before the Court below on or before 15.10.2020 failing which the Court shall be free to take steps as provided by law.

**Order Date :- 23.9.2020**

DKS