

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA**

Criminal Petition No.13740 of 2013

Between:

K.C.M.Kumar

.. Petitioner

AND

Ch.Bujji and another

.. Respondents

Date of Judgment Pronounced: **24.08.2022**

SUBMITTED FOR APPROVAL:

HONOURABLE SRI JUSTICE A.SANTHOSH REDDY

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|---|--------|
| 1. Whether Reporters of Local newspapers may be allowed to see the Judgments? | YES/NO |
| 2. Whether the copies of judgment may be marked to Law Reports/Journals? | YES/NO |
| 3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? | YES/NO |

A.SANTHOSH REDDY, J

*** HONOURABLE SRI JUSTICE A.SANTHOSH REDDY**

+ CRIMINAL PETITION No.13740 of 2013

% Dated 24-08-2022

K.C.M.Kumar

Petitioner

VERSUS

\$ Ch.Bujji and another

Respondent

! Counsel for Petitioner : Mr. Ramchander Goud

^Counsel for respondent No.1 : None appears

<GIST:

> HEAD NOTE:

? Cases referred

(2008) 13 SCC 229

(2016) 11 SCC 105

HONOURABLE SRI JUSTICE A.SANTHOSH REDDY**CRL.P.No.13740 OF 2013****ORDER:**

This criminal petition is filed under Section 482 Cr.P.C to quash the proceedings against the petitioner/A-2 in C.C.No.1045 of 2013, on the file of the learned X-Metropolitan Magistrate, Cyberabad at Malkajgiri, Ranga Reddy District.

2. Heard learned counsel for the petitioner-A-2. None appears for the first respondent-complainant. Perused the material on record.

3. The first respondent filed a complaint before the learned X-Metropolitan Magistrate, Cyberabad, at Malkajgiri, Ranga Reddy District against petitioner-A-2 and another (A-1) for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') stating that A-1 is a company and A-2 is its Managing Director. The complainant worked as Assistant Manager in A-1 company for a period of 8 years on a monthly salary of Rs.20,000/-. A-2 has not paid the salary to the complainant properly and fell due an amount of

Rs.1,42,834/- and as a result, he was forced to leave the company. After several request and demands, A-2 has settled the account of the complainant and issued a cheque bearing No.080070 for Rs.99,520/- dated 16.01.2012 drawn on ICICI Bank, Khairatabad, Hyderabad towards part payment of salary. When the complainant presented the said cheque number of times in the bank for encashment, as per the instructions of A-2, but all the time it was returned dishonoured. Finally, the said cheque was returned with a cheque return memo dated 28.05.2012 with an endorsement 'funds insufficient'. The complainant got issued legal notice dated 15.06.2012 to the accused, who, having received the same, neither replied to the notice nor paid the amount. Later, the complainant filed complaint under Section 138 of the Act along with a petition to condone the delay of 140 days in filing the complaint after dismissal of the private complaint filed against the accused for the offences punishable under Section 406, 420 and 409 IPC.

4. The learned Magistrate by order dated 19.03.2013 condoned the delay of 242 days on payment of costs of Rs.2,500/-. Later, the learned Magistrate had taken cognizance of the complaint for

the offence under Section 138 of the NI Act and issued summons to the accused. Being aggrieved, the present criminal petition is filed.

5. Learned counsel for the petitioner submits that the learned Magistrate, without issuing notice to the petitioner, had condoned the delay of 242 days in filing the complaint by imposing costs and, accordingly, took cognizance of the same. The same is illegal and amounts to abuse of process of law. He, therefore, prayed for quashing the proceedings. In support of his submissions, the learned counsel relied on the decisions of the Apex Court in **P.K.CHOUDHURY v. COMMANDER, 48 BRTF (GREF)**¹ and **K.S.JOSEPH v. PHILIPS CARBON BLACK LIMITED AND ANOTHER**².

6. Before entering into the merits of the issue raised by learned counsel for the petitioner, it is apposite to reproduce Section 142(b) of the Act and proviso thereof:

¹ (2008) 13 SCC 229

² (2016) 11 SCC 105

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -

- (a) xxxxxxx
- (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.

- (c) xxxxxx

7. In **P.K.CHOUDHARY**'s case (1 supra), the Hon'ble Apex Court at para 10 of the judgment held as under:

"The learned Judicial Magistrate did not apply his mind on the said averments. It did not issue any notice upon the appellant to show cause as to why the delay shall not be condoned. Before condoning the delay the appellant was not heard. In State of Maharashtra Vs. Sharadchandra Vinayak Dongre and Others [(1995) 1 SCC 42] this Court held;

"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."

8. A bare perusal of the aforesaid provision and the decision of the Apex Court makes it clear that if a complaint is filed beyond the statutory period prescribed under Section 138, then the complainant must satisfy the court that he has sufficient cause for not making the complaint within the prescribed period i.e., within one month of the date when the cause of action arises under proviso (c) to Section 138 of the Act. In the instant case, the petitioner received the legal notice on 22.06.2012. The cause of action for making the complaint arises after expiry of 15 days and the complaint ought to have been filed within next 30 days i.e., on or before 06.08.2012. But the same was filed along a condone delay petition under Section 5 of the Limitation Act, instead of filing under Section 142(b) of the Act. There was delay of total 242 days in filing the complaint and the same was condoned by the

learned Magistrate on 19.03.2013 on payment of costs, without giving any notice to the petitioner herein-A-2.

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

10. So, to avail the benefit of proviso to Section 142(b), 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 procedural. On receipt of such delay condonation application, the learned Magistrate has to issue notice by enclosing a copy of the complaint and dispose of the same after giving the accused reasonable opportunity of hearing and the learned Magistrate would pass appropriate orders on merits on the application seeking

condonation of delay at his discretion and without passing through this stage, cognizance shall not be taken.

11. In the instant case, the learned Magistrate has passed order in the condone delay application against the petitioner-accused without giving notice to him and without giving any reasonable opportunity, allowed the same and took cognizance of the offence wrongly and further proceeded with the trial and on such cognizance caused serious prejudice to both the complainant and the accused, thereby rendering equitable justice to both of them. In the peculiar facts and circumstances of the case, it would be appropriate to set aside the order of the learned Magistrate taking cognizance and the learned Magistrate shall decide the delay condonation petition afresh by giving reasonable opportunity to the petitioner-A-2 and later take cognizance depending on the result of the condone delay application.

12. Resultantly, the criminal petition is allowed and the order of the learned Magistrate taking cognizance for the offence under Section 138 of the Act against the petitioner-accused is hereby quashed. The learned Magistrate is directed to proceed afresh to

the issue of delay and its condonation in accordance with law.

The petitioner and the complainant shall appear before the trial court on the date so fixed positively, for taking appropriate steps.

13. Pending miscellaneous petitions, if any, stand closed.

A.SANTHOSH REDDY, J

24.08.2022

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