A YOGENDRA PRATAP SINGH

v.

SAVITRI PANDEY & ANR.

(Criminal Appeal No. 605 of 2012)

B SEPTEMBER 19, 2014

[R.M. LODHA, CJI, KURIAN JOSEPH AND R.F. NARIMAN, JJ.]

Negotiable Instruments Act, 1881 – ss. 138 and 142 – C *Dishonour of cheque – Complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served on the drawer of the cheque – Maintainability of – Held: Complaint is not maintainable – It is no complaint at all in the eyes of law – No cognizance of an offence can be* D *taken on basis of such complaint because there is no commission of an offence nor accrual of cause of action for filing of complaint u/s. 138 – Remedy is to file a fresh complaint within one month of the date on which cause of action arose and if not, the recourse is to seek the benefit of* E *the proviso to s. 142 (b), satisfying the court of sufficient cause.*

Answering the questions referred, the Court

HELD: 1.1 Section 2(d) of the Code of Criminal F **Procedure defines 'complaint', according to which complaint means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence. Commission of an offence is a *sine qua non* for filing a complaint and for** G **taking cognizance of such offence. A bare reading of the provision contained in clause (c) of the proviso to Section 138 of the Negotiable Instrument Act, 1881 makes it clear that no complaint can be filed for an offence u/s. 138 unless the period of 15 days has elapsed. Any complaint**

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before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eyes of law. No cognizance of an offence can be taken on the basis of such complaint. It is not the question of prematurity of the complaint where it is filed before expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law. Merely because at the time of taking cognizance by the Court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused, the Court is not clothed with the jurisdiction to take cognizance of an offence u/s. 138 on a complaint filed before the expiry of 15 days from the date of receipt of notice by the drawer of the cheque. [Para 36] [49-F-H; 50-A-E]

1.2. A complaint filed before 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. 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. There is no doubt that all the five essential features of Section 138 of the NI Act 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 u/s. 138 of the NI Act. [Para 37, 39] [50-F-H; 51-A-B, G-H; 52-A]

1.3. Section 142 prescribes the mode and so also the time within which a complaint for an offence u/s. 138 can be filed. A complaint made u/s. 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Since the complaint filed before the expiry of 15 days notice period is not maintainable, the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint would be treated as having been condoned under the proviso to clause (b) of Section 142 of the NI Act. [Para 42] [52-D-G]

Sarav Investment & Financial Consultancy Private Limited and Anr. v. Llyods Register of Shipping Indian Office

Staff Provident Fund and Anr. **2007 (10) SCR 1110 : (2007) 14 SCC 753 – approved.** A

Narsingh Das Tapadia v. Goverdhan Das Partani and Anr. **2000 (3) Suppl. SCR 171 :(2000) 7 SCC 183 – disapproved.** B

Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar and Anr. **1993 Cri.L.J. 680;** *Ashok Verma v. Ritesh Agro Pvt. Ltd. and Anr.* **(1995) 1 Bank CLR 103;** *N. Venkata Sivaram Prasad v. M/s Rajeswari Constructions* **1996 Cri. L.J. 3409;** *Ashok Hegde v. Jathin v. Attawan* **1997 Cril. L.J. 3691;** *Sri Niranjan Sahoo v. M/s Utkal Sanitary, BBSR* **1998 (3) Crimes 188;** *M/s Harpreet Hosiery Rehari v. Nitu Mahajan* **2000 Cri.L.J. 3625;** *Arun Hegde and Anr. v. M.J. Shetty* **ILR 2001 Kar. 3295;** *Smt. Hem Lata Gupta v. State of U.P. and Anr.* **2002 Cri. L.J. 1522;** *Mahendra Agarwal v. Gopi Ram Mahajan RLW* **2003 (1) Raj. 673;** *Bapulal B. Kacchi v. Krupachand Jain* **2004 Cri. L.J. 1140;** *Yunus Khan v. Mazhar Khan* **2004 (1) GLT 652;** *Zenith Fashion Makers (P) Ltd. v. Ultimate Fashion Makers Ltd. and Anr.* **121 (2005) DLT 297;** *Ganga Ram Singh v. State of U.P. and Ors.* **2005 Cri. L.J. 3681;** *S. Janak Singh v. Pritpal Singh* **2007 (2) JKJ 91;** *Sandip Guha v. Saktipada Ghosh and Anr.* **2008 (3) CHN 214;** *Rattan Chand v. Kanwar Ram Kripal and Anr.* **2010 Cri. L.J. 706;** *M/s. Kusum Ingots & Alloys Ltd. v. M/s. Pennar Peterson Securities Ltd. and ors. etc. etc.* **2000 (1) SCR 1120 : (2000) 2 SCC 745;** *K.R. Indira v. Dr. G. Adinarayana* **2003 (4) Suppl. SCR 535 : (2003) 8 SCC 300 – referred to.** C D E F

Case Law Reference:

			G
1993 Cri.L.J. 680	**Referred to**	**Para 10**	
(1995) 1 Bank CLR 103	**Referred to**	**Para 11**	
1996 Cri. L.J. 3409	**Referred to**	**Para 11**	
1997 Cril. L.J. 3691	**Referred to**	**Para 11**	H

A	1998 (3) Crimes 188	Referred to	Para 11
	2000 Cri.L.J. 3625	Referred to	Para 11
	ILR 2001 Kar. 3295	Referred to	Para 20
B	2002 Cri. L.J. 1522	Referred to	Para 21
	RLW 2003 (1) Raj. 673	Referred to	Para 22
	2004 Cri. L.J. 1140	Referred to	Para 23
	2004 (1) GLT 652	Referred to	Para 24
C	121 (2005) DLT 297	Referred to	Para 25
	2005 Cri. L.J. 3681	Referred to	Para 26
	2007 (2) JKJ 91	Referred to	Para 28
D	2008 (3) CHN 214	Referred to	Para 30
	2010 Cri. L.J. 706	Referred to	Para 30
	2000 (1) SCR 1120	Referred to	Para 32
E	2003 (4) Suppl. SCR 535	Referred to	Para 34
	2000 (3) Suppl. SCR 171	Disapproved	Para 38
	2007 (10) SCR 1110	Approved	Para 39

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 605 of 2012.

From the Judgment & Order dated 21.05.2010 of the High Court of Allahabad in Criminal Miscellaneous Application No. 773 of 2009.

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Criminal Appeal Nos. 1924 & 1925 of 2014.

Shakil Ahmed Syed, Mohd. Parvez Dabas, Uzmi Jameel

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Husain, Daanish Ahmad Syed, Sureshan P., Sanjay Singh, Ugra Shankar Prasad for the Appellant. A

J.N. Dubey, Anurag Dubey, Meenesh Dubey, S.R. Setia Subhasish Bhowmick, Nitin S. Tambwekar, B.S. Sai, K. Rajeev for the Respondents. B

The Judgment of the Court was delivered by

R.M. LODHA, CJI. 1. In the order of 03.04.2012, a two-Judge Bench of this Court granted leave in SLP (Crl.) No.5761 of 2010. The Court formulated the following two questions for consideration: C

> (i) Can cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act 1881 be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138 (c) of the Act aforementioned? And, D
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> (ii) If answer to question No.1 is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142 (b) for the filing of such a complaint has expired? E

2. The two-Judge Bench in that order noticed Section 138 and Section 142 of the Negotiable Instruments Act, 1881 ("NI Act") and also referred to the two decisions of this Court, namely, (1) *Narsingh Das Tapadia*[1] and (2) *Sarav Investment & Financial Consultancy*[2]. The Bench also noticed the judgments of High Courts of Calcutta, Orissa, Bombay, Punjab and Haryana, Andhra Pradesh, Allahabad, Gauhati, Rajasthan, Delhi, Madhya Pradesh, Himachal Pradesh, Madras, Jammu and Kashmir and Karnataka and observed that judicial opinion on the first question was split among the High Courts in the country and so also the two decisions of this Court in *Narsingh* F G H

A *Das Tapadia*[1] and *Sarav Investment & Financial Consultancy*[2]. Even amongst the two High Courts, namely, Jammu and Kashmir and Karnataka, the Bench noticed that the decisions on the first question were not uniform. It was felt by the two-Judge Bench that the conflict in the judicial
B pronouncements needed to be resolved authoritatively and, accordingly, referred the above two questions for consideration by a three-Judge Bench of this Court.

3. This is how the matter has been placed before us.

C 4. It is not necessary to narrate the facts in detail. Suffice it to refer to factual matrix noted in the referral order which is as follows:

> The appellant filed a complaint under Section 138 of the
> D Negotiable Instruments Act against respondent No.1 Smt. Savitri Pandey in the Court of Additional Civil Judge (J.D.)/ Magistrate, Sonbhadra in the State of Uttar Pradesh. The respondent's case was that four cheques issued by the accused-respondent in his favour were dishonoured, when
> E presented for encashment. A notice calling upon the respondent-drawer of the cheque to pay the amount covered by the cheques was issued and duly served upon the respondent as required under Section 138 (c) of The Negotiable Instruments Act, 1881. No payment was,
> F however, made by the accused till 7th October, 2008 when a complaint under Section 138 of the Act aforementioned was filed before the Magistrate. Significantly enough the notice in question having been served on 23rd September, 2008, the complaint presented on 7th October, 2008 was

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1. Narsingh Das Tapadia v. Goverdhan Das Partani and Anr.; [(2000) 7 SCC 183].

2. Sarav Investment & Financial Consultancy Private Limited and Anr. v. Llyods Register of Shipping Indian Office Staff Provident Fund and Anr.; [(2007) 14 SCC 753].

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filed before expiry of the stipulated period of 15 days. The Magistrate all the same took cognizance of the offence on 14th October, 2008 and issued summons to the accused, who then assailed the said order in a petition under Section 482 of the Cr.P.C. before the High Court of Judicature at Allahabad. The High Court took the view that since the complaint had been filed within 15 days of the service of the notice the same was clearly premature and the order passed by the Magistrate taking cognizance of the offence on the basis of such a complaint is legally bad. The High Court accordingly quashed the complaint and the entire proceedings relating thereto in terms of its order impugned in the present appeal.

5. Before we advert to the two decisions of this Court in *Narsingh Das Tapadia*[1] and *Sarav Investment & Financial Consultancy*[2], and few decisions of the High Courts, we think it proper to refer to Sections 138 and 142 of the NI Act. Section 138 of the NI Act, as it stands today after amendment by Act 55 of 2002, defines the ingredients of the offence and the punishment that would follow in the event of such an offence having been committed and the proviso appended thereto makes certain eventualities/conditions precedent for the commission of offence. It 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 honor 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

A 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
B 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;

C (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
D 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.
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Explanation: For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

6. Section 142 deals with cognizance of offences. The said
F provision, after amendment by Act 55 of 2002, is as under:

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

G (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;

H (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) 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.

7. It may not be out of place to mention here that entire Chapter XVII of the NI Act was brought in the statute by Act 66 of 1988 w.e.f. 01.04.1989. This Chapter comprises of Sections 138 to 147.

8. The other two provisions which deserve mention are Sections 2(d) and 190 of the Code of Criminal Procedure, 1973 ("Code"). Section 2(d) defines complaint in the context of the Code as follows:

2(d)"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

9. Chapter XIV of the Code bears the title 'Conditions Requisite for Initiation of Proceedings'. This chapter has only one provision namely, Section 190. Section 190 makes provision for cognizance of offences by Magistrates. It reads as under:

190. Cognizance of offences by Magistrates. – (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—

A (a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other B than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under C sub-section (1) of such offences as are within his competence to inquire into or try.

10. Before the decision of this Court in *Narsingh Das Tapadia*[1], six High Courts had occasion to consider the question whether the complaint under Section 138 of the NI Act D was maintainable when the stipulated period of 15 days of the receipt of the notice as provided in clause (c) of the proviso appended to Section 138 had not expired. The first of such decisions, decided as early as on 29.07.1992 is of the Bombay High Court in *Rakesh Nemkumar Porwal*[3]. The Division Bench E of the Bombay High Court held that as the complaint was presented within the period of 15 days of the service of notice effected on the accused, the complaint was not maintainable for commission of offence under Section 138 of the NI Act as no offence can be said to have been committed on the date of F lodgment of the complaint. Reading Section 138(c) and Section 142 (b) together, the Division Bench of the Bombay High Court held that no offence can be said to have been committed until and unless the period of 15 days as prescribed under clause 138(c) has in fact elapsed.

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11. The above view taken by the Division Bench of the Bombay High Court is echoed by the High Courts of Punjab

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3. Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar and Anr.; [1993 H Cri.L.J. 680].

and Haryana (*Ashok Verma*)[4], Andhra Pradesh (*N. Venkata Sivaram Prasad)*[5], Karnataka (*Ashok Hegde*)[6], Orissa (*Sri Niranjan Sahoo*)[7] and Jammu and Kashmir (*M/s Harpreet Hosiery Rehari*)[8]. A

12. In the case of *Ashok Verma*[4], the argument of the petitioner accused before the Punjab and Haryana High Court was that Section 138 of the NI Act envisaged a clear 15 days notice to the drawer of the cheque and the time was to be computed from the date of the receipt of the notice, but the impugned complaint had been filed before the expiry of 15 days and the complaint was liable to be quashed on this ground. Dealing with the argument, the Punjab and Haryana High Court referred to the decision of the Bombay High Court in *Rakesh Nemkumar Porwal*[5] and on going through the provisions of Section 138 held as under: B C D

> A perusal of the above section shows that while the section defines the necessary ingredients of the offence and punishment that can be awarded for the commission of the offence, the proviso to the section lays down the conditions precedent for the commission of the offence. According to this proviso the necessary ingredients of the offence are that the cheque was presented to the bank within a period of six months from the date on which it was drawn or the period of its validity, that the cheque is returned unpaid because of insufficiency of funds or that the amount of the cheque exceeded the amount arranged to be paid from the bank and the payee gave a notice to the drawer claiming the amount within 15 days of the E F

4. Ashok Verma v. Ritesh Agro Pvt. Ltd. and Anr.; [(1995) 1 Bank CLR 103]. G
5. N. Venkata Sivaram Prasad v. M/s Rajeswari Constructions; [1996 Cri. L.J. 3409].
6. Ashok Hegde v. Jathin v. Attawan; [1997 Cril. L.J. 3691].
7. Sri Niranjan Sahoo v. M/s Utkal Sanitary, BBSR; [1998 (3) Crimes 188].
8. M/s Harpreet Hosiery Rehari v. Nitu Mahajan; [2000 Cri.L.J. 3625]. H

A receipt of the information from the bank regarding the return of the cheque and the drawer failed to make payment within 15 days of the receipt of the notice. Under Sub-clause (c) of the proviso a 15 days time is granted to the drawer of the cheque to make payment and unless this B period elapsed and no payment was made, the drawer was not liable for any offence under Section 138 of the Act.

13. The Division Bench of the Andhra Pradesh High Court in *N. Venkata Sivaram Prasad*[5] was confronted with the question as to whether the Magistrate can take cognizance of C the complaint given in the case under consideration and proceed with the trial of the complaint after the expiry of 15 days as prescribed under Section 138(c) of the NI Act. The question that fell for consideration before the Andhra Pradesh High Court involved the aspect whether the offence under D Section 138 can be said to be complete only if the drawer fails to pay the amount within 15 days of the receipt of the notice as contemplated in proviso (c) to Section 138. The Division Bench took into consideration the provisions contained in Section 138 and Section 142 of the NI Act and so also Section E 2(d), Section 2(n) and Section 190 of the Code and held that until and unless the criteria laid down in Section 138 are complied with, it would not constitute an offence. The Division Bench of the Andhra Pradesh High Court held:

F Proviso (c) clearly stipulates that the Section does not apply unless the drawer of the cheques fails to make the payment to the payee within 15 days of the receipt of the said notice. Thus, the payee has been given liberty to make the payment within 15 days of the receipt of the notice even though the cheque was returned by the Bank G unpaid. Hence, the reading of Proviso (c) to Section 138 clearly denotes that it would not be an offence if the drawer pays the amount within a period of 15 days as a specified therein. In such circumstances, there could not have been any complaint alleging the violation of H Section 138. The pre-offence period granted to the payee

should be construed strictly, otherwise the very purpose of Section 138(c) of the Negotiable Instruments Act would be frustrated. The complainant should be able to point out to the offence under Section 138 when the complaint was filed. When the complaint is filed even before the offence is completed, it cannot be said that the offence is made out and, therefore, such complaint is invalid in the eye of law. As already noticed, under Section 142 of the Act, no Court shall take cognizance of any offence punishable under Section 138, except upon a complaint in writing made by the payee. Therefore, the necessary ingredient enabling the Magistrate to take cognizance of the offence is that there should be a complaint in writing by the payee and the said complaint should disclose an offence under Section 138. In the complaint made by the respondent before the Magistrate, no offence could have been disclosed as the time prescribed under Section 138, Proviso (c) was not exhausted by the time the complaint was presented to the Magistrate. Even by the date of service of summons, there was no further complaint in writing to the effect that even after the expiry of 15 days period as mentioned in proviso (c), the drawer failed to pay the amount.

14. The Andhra Pradesh High Court in *N. Venkata Sivaram Prasad*[5] also considered the question in light of Section 190 of the Code and held as under:

> The matter may also be viewed from the provisions of Section 190, Cr.P.C., where the Magistrate is empowered to take cognizance of any offence upon receiving a complaint of facts which constitute such an offence. We have already referred to the definition of the 'complaint' in Cr.P.C. Therefore, for taking cognizance of the offence, there should have been a complaint containing the facts which constitute an offence. Unless the offence is ex facie disclosed in the complaint, the Magistrate cannot have any competence to take cognizance of the offence and

A proceed further. In the present case, on the facts stated in the complaint, there could not be any offence. As the complaint on the basis of which the Magistrate proceeded to take cognizance is not a complaint at all in the eye of law, the question of proceeding with the case on the basis
B of such complaint does not arise. In the instant case, the Magistrate had no means of knowing whether the offence was completed subsequent to the date of the complaint because, as already stated, there was no further written complaint as required by Section 142(a). The subsequent
C events on completion of the offence can only come to the knowledge of the Court by way of complaint in writing. Apart from the original complaint which does not disclose any offence, there is no further complaint. As rightly pointed out by the learned Additional Public Prosecutor, when the
D special law specifies not only the ingredients of the offence but also the procedure, the requirements have to be strictly complied with. Hence, we are of the opinion that the Court cannot proceed with the case even after the lapse of time as prescribed by Section 138(c) of Negotiate Instruments Act.
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It was, thus, held by the Andhra Pradesh High Court that the Magistrate should not have acted upon a premature complaint which was not a complaint at all in the eye of law.

F 15. In *Ashok Hegde*[6], the single Judge of the Karnataka High Court while dealing with the contention raised by the petitioner therein that the complainant has not given 15 days' time to the petitioner as contemplated under Section 138(b) of the NI Act and the complaint was premature and should not
G have been entertained, the single Judge held, "..... from the above, it is clear that he received the notice back on 21.09.1989. Even accepting that the petitioner refused the notice on 20.09.1989, the respondent ought to have filed this complaint after the expiry of 15 days from the date of receipt of the notice. The date of issuance of notice cannot be taken
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into account..... Therefore, the cause of action had not arisen to file the complaint against the petitioner and the complaint was premature....."

16. The Orissa High Court in *Sri Niranjan Sahoo*[7] also took the view that if the complaint case is filed before expiry of 15 days as provided in clause (c) to the proviso of Section 138, then cognizance of the offence cannot be taken in view of the provision in clause (b) of Section 142 and consequentially the complaint was liable to be quashed.

17. The view of Jammu and Kashmir High Court in *M/s. Harpreet Hosiery Rehari*[8] is to the effect that under the law drawer has got 15 days to make the payment from the receipt of notice of dishonour of the cheque. It is only thereafter that an action under Section 138 of the NI Act can be initiated against the defaulting party.

18. It was after the above decisions of the various High Courts that the decision of this Court in *Narsingh Das Tapadia*[1] came. In *Narsingh Das Tapadia*[1], which was decided on 06.09.2000, the two-Judge Bench of this Court noted the facts as follows:

> ..... that the respondent borrowed a sum of Rs.2,30,000 from the appellant and issued a post-dated cheque in his favour. When the cheque was presented for demand on 3-10-1994, the same was dishonoured by the bank on 6-10-1994 due to "insufficient funds". The appellant demanded the accused to repay the amount vide his telegrams sent on 7-10-1994 and 17-10-1994. A notice was also issued to the respondent on 19-10-1994 demanding to repay the amount. Despite receipt of the notice on 26-10-1994 the respondent neither paid the amount nor gave any reply. To prove his case, the appellant-complainant examined three witnesses and proved documents, Exhibits P-1 to P-6. In his statement under Section 313 CrPC the respondent denied the

A allegations but refused to lead any defence evidence. On analysis of the evidence and after hearing the counsel for the parties, the trial court concluded as under:

> "The complainant established that the accused borrowed Rs.2,30,000 from him and the accused issued Ext. P-3, cheque and the cheque was returned due to insufficiency of funds and the accused did not repay the amount in spite of receipt of notice from the complainant and hence the accused is liable for punishment under Section 138 of the NI Act."

As noticed earlier, the appeal filed by the respondent was dismissed on 19-4-1997. The High Court found that as the notice intimating the dishonourment of cheque was served upon the accused on 26-10-1994, the appellant-complainant could not file the complaint unless the expiry of 15 days' period. It was found on facts that the complaint filed on 8-11-1994 was returned after finding some defect in it. However, when refiled, the Court took the cognizance on 17-11-1994. The High Court held that the original complaint having been filed on 8-11-1994 was premature and liable to be dismissed.

19. This Court in *Narsingh Das Tapadia*[1] considered the provisions contained in clause (c) of the proviso to Section 138 and Section 142 of the NI Act and also considered the expression "taking cognizance of an offence" and held that mere presentation of the complaint on 08.11.1994 when it was returned to the complainant on the ground that the verification was not signed by the counsel, could not be termed to be an action of the Magistrate taking cognizance within the meaning of Section 142 of the NI Act. The two-Judge Bench did not approve the view of the High Court and held that the High Court erroneously held the complaint as premature. Consequently, the judgment of the High Court was set aside and the conviction of the respondent under Section 138 of the NI Act was upheld.

20. After the decision of this Court in *Narsingh Das Tapadia*[1], the Karnataka High Court in *Arun Hegde*[9] did not accept the contention of the accused that the complaint filed under Section 138 on 15th day of service of notice of demand was premature and as such not maintainable. Relying upon *Narsingh Das Tapadia*[1], the single Judge of the Karnataka High Court in *Arun Hegde*[9] held that if the complaint was found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed.

21. In *Hem Lata Gupta*[10], the Allahabad High Court while dealing with the complaint filed before expiry of 15 days, after relying upon the decision of this Court in *Narsingh Das Tapadia*[1] held that the bar of expiry of 15 days from the date of service of notice is for taking cognizance and not for filing complaint.

22. In *Mahendra Agarwal*[11], the Rajasthan High Court adopted the reasoning that was made by this Court in *Narsingh Das Tapadia*[1] and held that mere presentation of the complaint in the court cannot be held to mean, that its cognizance had been taken by the Magistrate. If the complaint is found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed.

23. In *Bapulal B. Kacchi*[12], the Madhya Pradesh High

9. Arun Hegde and Anr. v. M.J. Shetty; [ILR 2001 Kar. 3295].

10. Smt. Hem Lata Gupta v. State of U.P. and Anr.; [2002 Cri. L.J. 1522].

11. Mahendra Agarwal v. Gopi Ram Mahajan; [RLW 2003 (1) Raj. 673].

12. Bapulal B. Kacchi v. Krupachand Jain; [2004 Cri. L.J. 1140].

A Court considered the matter against the order passed by the Sessions Judge setting aside the order passed by the Chief Judicial Magistrate, Shajapur whereby he refused to register the complaint under Section 138 of the NI Act against the accused as it was found to be premature since 15 days from
B the date of receipt of the notice by the accused had not elapsed. The Sessions Judge set aside the order of the Chief Judicial Magistrate dealing with criminal revision filed by the accused. Madhya Pradesh High Court followed the decision of this Court in *Narsingh Das Tapadia*[1] and held that the order of the Chief
C Judicial Magistrate in dismissing the complaint was wrong and that order was rightly set aside by the revisional court.

24. The Gauhati High Court in *Yunus Khan*[13] relying upon *Narsingh Das Tapadia*[1] took the view that mere presentation of a complaint in the Court of Judicial Magistrate does not
D mean that Magistrate has taken cognizance of the same. Though the complaint was filed under Section 138 of the NI Act in the Court of Judicial Magistrate when only 13 days had elapsed from the date of receipt of the notice and the requisite period of 15 days was not yet completed but when the
E Magistrate took cognizance, 15 days had elapsed from the date of the receipt of the notice and thus the complaint already stood validly instituted and the prosecution launched against the accused on the basis of such a complaint could not be held bad in law.

F

25. A single Judge of Delhi High Court in *Zenith Fashion Makers*[14] was concerned with the case arising from the following facts:

G The complaint under Section 138 of Negotiable Instrument Act was filed by the respondent for dishonour of two cheques No. 615385 dated 20.7.2003 of Rs. 8,00,000/-

13. Yunus Khan v. Mazhar Khan; [2004 (1) GLT 652].

14. Zenith Fashion Makers (P) Ltd. v. Ultimate Fashion Makers Ltd. and Anr.;
H [121 (2005) DLT 297].

and No.615387 dated 20.9.2003 of Rs.3,00,000/-. Both the cheques were dishonoured on account of insufficiency of funds. The return memo of the bank is dated 20.9.2003. The legal notice under Section 138 of Negotiable Instruments Act was issued on 15.10.2003 through Regd. Post as well as through speed post. The postal acknowledgment card shows service on 18.10.2003. The complainant pleaded that the notices were duly received but no payment in respect of the dishonoured cheques was made within 15 days of the notice as was required by the law as well as by the notice. The complaint is presented on 31.10.2003. The Magistrate took cognizance on 31.10.2003 itself and directed issue of process on the same day. What is contended in this petition under Section 482 Cr.P.C. is that the notice of demand being of 15.10.2003, dispatched on 17.10.2003 and received on 18.10.2003, the complaint was filed within 15 days after service of notice and hence was pre-mature as the cause of action could accrue only after 15 days of the notice, i.e., on 3.11.2003.

Despite the fact that the complaint was presented before the expiry of 15 days of service of notice and the Magistrate took cognizance also before the expiry of 15 days, the High Court strangely held that a premature complaint under Section 138 of the NI Act cannot be quashed on the ground of pre-maturity since there was no plea on the side of the accused that he would have paid the cheque amount had the complainant given it the required time. The Delhi High Court while doing so relied upon the decision of this Court in *Narsingh Das Tapadia*[1] and also invoked the maxim '*Actus curiae neminem gravabit*', an act of the Court shall prejudice no man.

26. The Allahabad High Court in *Ganga Ram Singh*[15] took the view that if the complaint was filed under Section 138 of

15. Ganga Ram Singh v. State of U.P. and Ors.; [2005 Cri. L.J. 3681].

A the NI Act before expiry of 15 days of statutory notice, the concerned court should have waited and allowed the complainant to establish its case or cognizance should have been taken after the expiry of the stipulated period instead of dismissing the complaint outright as premature.

B

27. A single Judge of the Madras High Court, following *Narsingh Das Tapadia*[1] held that though the complaint was preferred three days short of the time to be availed by the accused to settle the dues but since the Magistrate had taken cognizance of the complaint presented by the complainant after C the 15 days time granted under the statutory notice to settle the amount due to complainant, the complaint cannot be quashed on the ground that it was filed prematurely.

28. In *S. Janak Singh*[16], the Jammu and Kashmir High D Court took the view with regard to presentation of complaint before the accrual of cause of action that though the complaint under Section 138 of the NI Act having been filed before the accrual of cause of action, the same could not be legally entertained by the trial court. Relying upon *Narsingh Das* E *Tapadia*[1], it was held that if the complaint was found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon accused to absolve F himself from the criminal liability for the offence committed. The view of the single Judge of the Jammu and Kashmir High Court is founded on the decision of this Court in *Narsingh Das Tapadia*[1].

29. For about 7 years since the decision was given by this G Court in *Narsingh Das Tapadia*[1], *the* various High Courts, as indicated above, continued to take the view that presentation of a complaint under Section 138 of the NI Act before the accrual of the cause of action does not render it not

H 16. S. Janak Singh v. Pritpal Singh; [2007 (2) JKJ 91] .

maintainable if cognizance had been taken by the Magistrate after expiry of 15 days of the period of notice. In such matters, no illegality or impropriety found to have been committed by the Magistrate in taking cognizance upon such complaint. This legal position, however, was not accepted by a two-Judge Bench decision of this Court in *Sarav Investment & Financial Consultancy*[2]. Dealing with the provision under Section 138 of the NI Act, this Court held that Section 138 contained a penal provision; it was a special statute. Having regard to the purport of the said provision as also in view of the fact that it provides for a severe penalty, the provision warrant a strict construction. This Court emphasized that clause (c) of the proviso to Section 138 provides that the holder of the cheque must be given an opportunity to pay the amount within 15 days of the receipt of the notice. Complaint, thus, can be filed for commission of an offence by drawee of the cheque only 15 days after service of the notice. In *Sarav Investment & Financial Consultancy*[2], this Court, thus, held that service of notice in terms of Section 138 proviso (b) of the NI Act was a part of cause of action for lodging the complaint and communication to the accused about the fact of dishonouring of the cheques and calling upon him to pay the amount within 15 days was imperative in character. It is true that in *Sarav Investment & Financial Consultancy*[2], there is no reference of the decision of this Court in *Narsingh Das Tapadia*[1].

30. *Sarav Investment & Financial Consultancy*[2] led to the view being taken by the High Courts that a complaint under Section 138 of the NI Act filed before expiry of 15 days of service of notice was premature and such complaint could not be treated as complaint in the eye of law and criminal proceedings initiated are liable to be quashed. This is seen from the view of the Calcutta High Court in *Sandip Guha*[17] and the judgment of the Himachal Pradesh High Court in *Rattan Chand*[18].

17. Sandip Guha v. Saktipada Ghosh and Anr.; [2008 (3) CHN 214].

18. Rattan Chand v. Kanwar Ram Kripal and Anr.; [2010 Cri. L.J. 706].

A 31. 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 B offence under Section 138 is made effective only on fulfillment 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 C 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.

32. Section 138 of the NI Act has been analysed by this D Court in *Kusum Ingots & Alloys Ltd.*[19] 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:

(i) a person must have drawn a cheque on an account E 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 F 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 G 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

19. M/s. Kusum Ingots & Alloys Ltd. v. M/s. Pennar Peterson Securities Ltd. H and ors. etc. etc.; [AIR 2000 SC 954 : (2000) 2 SCC 745].

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.

33. We are in agreement with the above analysis.

34. In *K.R. Indira*,[20] a two-Judge Bench of this Court observed that the offence under Section 138 of the NI Act could be completed if all the above components are satisfied.

35. Insofar as the present reference is concerned, the debate broadly centers around clause (c) of the proviso to Section 138 of the NI Act. The requirement of clause (c) of the proviso is that the drawer of the cheque must have failed to make the payment of the cheque amount to the payee within 15 days of the receipt of the notice. Clause (c) of the proviso offers a total period of 15 days to the drawer from the date of receipt of the notice to make payment of the cheque amount on its dishonour.

36. Can an offence under Section 138 of the NI Act be said to have been committed when the period provided in clause (c) of the proviso has not expired? Section 2(d) of the Code defines 'complaint'. According to this definition, complaint means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence. Commission of an offence is a *sine qua non* for filing a complaint and for taking cognizance of such offence. A bare reading of the provision contained in

20. K.R. Indira v. Dr. G. Adinarayana; [AIR 2003 SC 4789 : (2003) 8 SCC 300)].

A clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the NI Act unless the period of 15 days has elapsed. Any complaint before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye B of law. It is not the question of prematurity of the complaint where it is filed before expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law. As a matter of fact, Section 142 of the NI Act, *inter alia,* creates a legal bar on the Court from taking cognizance of an C offence under Section 138 except upon a written complaint. Since a complaint filed under Section 138 of the NI Act before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint in the eye of law, obviously, no cognizance of an offence can be taken on the basis of such complaint. Merely because at the time of taking D cognizance by the Court, the period of 15 days has expired from the date on which notice has been served on the drawer/ accused, the Court is not clothed with the jurisdiction to take cognizance of an offence under Section 138 on a complaint filed before the expiry of 15 days from the date of receipt of E notice by the drawer of the cheque.

37. A complaint filed before 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) F 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 G 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. H 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.*[19] 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.

38. We, therefore, do not approve the view taken by this Court in *Narsingh Das Tapadia*[1] and so also the judgments of various High Courts following *Narsingh Das Tapadia*[1] 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.

39. Rather, the view taken by this Court in *Sarav Investment & Financial Consultancy*[2] 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*[2] and also the judgments of the High Courts which have taken the view following this

A 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.

B

40. Our answer to question (i) is, therefore, in the negative.

41. The other question is that if the answer to question (i) is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of C one month stipulated under Section 142(b) for the filing of such a complaint has expired.

42. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under D Section 138 of the NI Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of E one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Now, since our answer F to question (i) is in the negative, we observe that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to G clause (b) of Section 142 of the NI Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice H issued under clause (c) of the proviso to Section 138 is not

maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause. Question (ii) is answered accordingly. A B

43. Criminal appeals may now be listed for consideration by the regular Bench.

Nidhi Jain Appeals to be listed before the Regular Bench.