IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.1157 of 2011

AFR

Sri Gadadhar Barik .... Petitioner

Mr. A. Pattanaik, Advocate

-Versus-

Sri Pradeep Kumar Jena and another .... Opposite Parties

Mr. D.R. Parida, ASC

CORAM:
JUSTICE R.K.PATTANAIK

DATE OF JUDGMENT : 07.04.2022

R.K. Pattanaik, J

1. The petitioner has approached this Court by invoking jurisdiction under Section 482 Cr.P.C. assailing legality and judicial propriety of order of cognizance dated 2nd February 2011 (Annexure-3) passed in I.C.C. No.427 of 2010 by the learned S.D.J.M., Khurda on the grounds *inter alia* that it is not sustainable in law and therefore, liable to be quashed.

2. The petitioner pleaded that unless the impugned order under Annexure-3 is quashed, there would be miscarriage of justice and hence, inherent jurisdiction of this Court under Section 482 Cr.P.C. should be exercised. The petitioner happens to be the accused in a complaint case pending before the court below for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (here-in-after referred to as 'the NI Act') which has been filed by OP No.1 alleging therein that the former had taken a hand loan of Rs.40,000/- to meet his personal needs and when it could be paid back, on 15th May, 2010, some henchmen of OP No.1 forcibly entered inside his residence and managed to obtain a

cheque for an amount of Rs.40,000/- drawn in the UCO Bank, Khurda Branch, Khurda and thereafter, presented it before the bank for encashment but it could not be honoured for insufficient funds in the account and again after five months, it was again submitted and yet dishonoured with a similar endorsement dated 18th October, 2010.

3. According to the petitioner, on account of dishonour of cheque due to insufficiency of funds in the account, the learned court below could not have taken cognizance of the offence under Section 138 of the N.I. Act after it was presented for encashment once again after about five months which is not permitted under law. In fact, the only point which has been raised by the learned counsel for the petitioner is about the maintainability of the complaint for a cause of action dated 18th October, 2010 when the cheque could not be honoured for insufficient funds on an earlier occasion.

4. Learned Standing Counsel for OP No.2, however, submits that there is no wrong or illegality in the impugned order under Annexure-3 because OP No.1 could have presented cheques for more than once and in that regard, no prohibition lies. No steps so far been taken for service of notice vis-à-vis OP No.1 and hence, he is not before this Court to defend.

5. When a cheque is presented for encashment and stands dishonoured, the payee is required to issue a notice to the drawer demanding payment of the amount and in case, such request is not obliged, complaint under Section 138 of the N.I. Act is filed for the drawer having committed the offence. The question is, whether on the basis of a statutory notice issued by OP No.1 subsequent to

dishonour of cheque about five months before, the learned court below could have entertained the complaint and taken cognizance of offence under Section 138 of the N.I. Act as against the petitioner?

6. More or less a similar question was before the Supreme Court in **M/s. Sicagen India Ltd. Vrs. Mahindra Vadideni and Others** (Criminal Appeal Nos.26-27 of 2019) decided on 8th January, 2019, wherein, it has been held that even a second statutory notice after re-representation of cheque is maintainable in law. In fact, the issue before the Supreme Court was, whether, a criminal complaint based on a subsequent or successive statutory notice filed under Section 138 of the N.I. Act is maintainable. In the decision (supra), the Supreme Court observed that such an issue is no longer *res integra* and referred to one of its earlier judgment in **Sadanandan Bhadran Vrs. Madhavan Sunil Kumar** (decided on 28th August, 1998), where it was held to the extent that second and successive presentation of a cheque is legally permissible as long as it is within six months or validity of the cheque, whichever is earlier. In **M/s. Sicagen India Ltd.** (supra), it has been observed that the correctness of the above mentioned case in **Sadanandan** was doubted and referred by the Supreme Court to a larger Bench in **Leathers Vrs. S. Palaniappan and Another** reported in (2013) 1 SCC 177, wherein, it was reiterated that no prohibition exists against subsequent presentation of cheque and institution of a criminal complaint based on the dishonour of the same. In **Leathers** case, the Supreme Court noted that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by statutory notice and a failure to pay

had not been launched. It was further held therein that no real or qualitative difference exists between a case where default is committed and prosecution immediately launched and another, where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time. The purport and object of the N.I. Act has been discussed by the Supreme Court in **M/s. Sicagen India Ltd.** referring to **Leathers** case observing that if the entire purpose underlined Section 138 of the N.I. Act is to compel the drawers to honour their commitments made in course of business or other transactions, there is no reason why a person who has issued a cheque which is dishonoured and who failed to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque had not rushed to the court with a complaint based on such default or for the reason that the drawer has made the holder defer prosecution promising to make arrangements for funds or on account of any other similar situation. The Supreme Court, apart from the above decisions, referred to the cases in **Mosaraf Hossain Khan Vrs. Bhagheeratha Engineering Ltd**: (2006) 3 SCC 658 ; **C.C. Alavi Haji Vrs. Palapetty Muhammed**: (2007) 6 SCC 555; **Damodar S. Prabhu Vrs. Sayed Babalall H**: (2010) 5 SCC 663; and **New India Sugar Mills Ltd. Vrs. CST**: 1963 AIR SC 1207 and concluded that such a criminal action on a subsequent statutory notice or a notice sent for the first time after dishonour of cheque previously for which prosecution was not launched on the promise of the accused to make arrangement for funds, a complaint cannot be held as not maintainable. Being conscious of the above settled position of law, the Court in the present case finds that OP No.1 did not send any statutory notice after the cheque was dishonoured in the month of

May, 2010 but once again presented it within the validity period of the cheque and thereafter, issued the statutory notice as required under law and under such circumstances, it cannot be said that the complaint is invalid. With the above conclusion, the Court holds that the contention of the petitioner vis-à-vis maintainability of the complaint on the ground raised is misconceived and therefore, cannot be sustained. The other grounds which have been raised challenging the filing of criminal complaint need no discussion which may be agitated by the petitioner during and in course of trial as a means of defence before the learned court below.

7. Accordingly, it is ordered.

8. In the result, application under Section 482 Cr.P.C stands dismissed.

(R.K.Pattanaik)
Judge

K.C.Bisoi