SUBODH S. SALASKAR

v.

JAYPRAKASH M. SHAH & ANR.

(Criminal Appeal No.1190 of 2008)

AUGUST 1, 2008

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Negotiable Instruments Act, 1881; Ss. 138 and 142 with proviso to clause (b) of s. 142 inserted by Amendment Act, 2002:

Dishonour of Cheque – Delay in filing complaint – Held: – Ex-facie complaint was barred by limitation – However, no application for condonation of delay was filed – Though power to condone the delay in filing complaint after expiry of period of limitation conferred upon the Court in terms of proviso to clause (b) of s. 142 but it could not have been given retrospective effect – Courts below erred in applying the proviso to the facts of the instant case – Direction to issue summons on the appellant, therefore, illegal and without jurisdiction, hence, nullity.

Code of Civil Procedure, 1908; O5. Rr.9 (5) – Notice – Presumption of service – Discussed – Evidence Act, 1872 – s.114.

General Clauses Act – Section 27 – Service of Notice – Ingredients of.

Penal Code, 1860; s. 420 IPC – Applicability of – Dishonor of Cheque – Complaint – Amendment in complaint adding s.420 IPC therein – Held: The Court had no jurisdiction to allow amendment of complaint petition at a later stage adding s. 420 IPC in the complaint – Post-dated Cheques were issued for repayment of loan amount issued in the year 1996 when accounts were operative, however, presented to

the Bank on January 10, 2007 – Even assuming that account was closed, subsequently, it cannot be said that appellant had an intention to cheat the complainant – Moreover, allegations made in the complaint petition, even if taken to be correct in its entirety, do not disclose commission of offence u/s. 420 IPC.

Appellant had taken a financial loan from respondent No.1, which was allegedly paid by him vide two post-dated Cheques. Respondent No.1 claimed that when the Cheques were presented, they were returned by the Bank with the remarks that the account was not in operation. However, the appellant paid the amount of loan in cash. Respondent No.1 sent a notice to the appellant on January 17, 2001 and then filed a Complaint Petition against him on April 20, 2001. The complaint was sought to be amended for adding s. 420 IPC, which was allowed by the Court. Appellant filed an application for discharge, which was dismissed by the trial Court. Revision Petition was dismissed by the Sessions Court. Appellant challenged the order by filing a writ petition, which was dismissed by the High Court holding that the question as to whether the complaint is barred by limitation is a mixed question of law and fact. Even otherwise as a result of amendment of Clause (b) of Section 142 of the Act even if delay has been caused in filing the complaint, the Magistrate has power to condone the delay; and that although the Magistrate could not have allowed amendment of the complaint petition but as it discloses sufficient averments in regard to commission of an offence under Section 420 of Indian Penal Code, the Trial Court was justified in issuing the process in respect of the said provision also. Hence the present appeal.

Appellant contended that the High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration that the complaint petition was barred by limitation, which would be evident

from the admitted facts; that the proviso appended to Clause (b) of Section 142 of the Negotiable Instruments Act being substantive in nature cannot be held to be retrospective in operation; that the allegations made in the complaint petition even if given face value and taken to be correct in their entirety, no case has been made out for taking cognizance under Section 420 of the Indian Penal Code; that in any event, as the principal complaint being for commission of an offence under Section 138 of the Act was not maintainable, the application for amendment to insert Section 420 of the Indian Penal Code was also not maintainable.

Respondent No. 1 submitted that the date of service of notice being not fixed and the complainant having asked the post office to disclose the date of actual service of notice, it cannot be said that the legal notice was served upon the accused; and that in any event, as the complaint petition disclosed commission of an offence on the part of the appellant under Section 420 of the Indian Penal Code, the High Court's judgment is unassailable.

Allowing the appeal, the Court

HELD: 1.1 Section 138 of the Negotiable Instruments Act provides a penal provision. The object of the Parliament in brining the same in the statute book is to create an atmosphere of faith and reliance in the banking system. (Para – 10) [690-D-E]

1.2 Unless the conditions precedent for taking cognizance of an offence under Section 138 of the Act are satisfied, the court will have no jurisdiction to pass an order in that behalf. The Act was amended in the year 2002 whereby additional powers have been conferred upon the court to take cognizance even after expiry of the period of limitation by conferring on it a discretion to waive the period of one month. (Paras – 15 & 11) [692-F; 690-E-F]

A *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another* (2007) 4 SCC 70; *Saroj Kumar Poddar v. State (NCT of Delhi) and Another* (2007) 3 SCC 693 and *DCM Financial Services Ltd. v. J.N. Sareen and Another* (2008) 8 SCALE 54 – referred to.

B 1.3 The legal notice admittedly was issued on 17th January, 2001. It was sent by speed post. It was supposed to be served within a couple of days. A bare perusal of the statements made in paragraph 10 of the complaint petition clearly demonstrate that although the actual date of C service of notice was allegedly not known, the complainant proceeded on the basis that the same was served within a reasonable period; otherwise in absence of service of notice or deemed service thereof, the question of non-compliance of clause (c) of the proviso appended to D Section 138 of the Act would not arise and consequently the complaint petition would not be maintainable. (Para – 19) [695-G-H; 696-A-B]

Jindal Steel and Power Ltd. and Another v. Ashoka Alloy Steel Ltd. and Others (2006) 9 SCC 340 – referred to.

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1.4 In terms of the provisions of the General Clauses Act, a notice must be deemed to have been served in the ordinary course subject to the fulfillment of the conditions laid down therein. Thirty days' time ordinarily must be held F to be sufficient for service of notice. In fact when the service of notice is sought to be effected by Speed Post, ordinarily the service takes place within a few days. Even under Order V, Rule 9(5) of the Code of Civil Procedure, 1908, summons is presumed to be served if it does not G come back within thirty days. In a situation of this nature, there was no occasion for the Court to hold that service of notice could not be effected within a period of thirty days. (Para – 21) [697-A,D,E]

1.5 Presumption of service, under the statute, would H arise not only when it is sent by registered post in terms

of Section 27 of the General Clauses Act but such a presumption may be raised also under Section 114 of the Evidence Act. Even when a notice is received back with an endorsement that the party has refused to accept, still then a presumption can be raised as regards the valid service of notice. (Para – 22) [697-F-G]

C.C. Alavi Haji v. Palapetty Muhammed and Another (2007) 6 SCC 555 – relied on.

1.6 The complaint petition admittedly was filed on 20.04.2001. The notice having been sent on 17.01.2001, if the presumption of service of notice within a reasonable time is raised, it should be deemed to have been served at best within a period of thirty days from the date of issuance thereof, i.e., 16.02.2001. The accused was required to make payment in terms of the said notice within fifteen days thereafter, i.e., on or about 2.03.2001. The complaint petition, therefore, should have been filed by 2.04.2001. Ex facie, it was barred by limitation. No application for condonation of delay was filed. No application for condonation of delay was otherwise maintainable. The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not a procedural one. (Paras – 23 & 24) [698-F-G; 699-A-D]

1.7 If the proviso appended to Clause (b) of Section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well-settled, in absence of an express provision, cannot be given a ret-

A rospective effect or retroactive operation. (Para – 24) [699-F]

1.8 There cannot be any doubt whatsoever that the courts below committed a manifest error in applying the proviso to the fact of the instant case. If the complaint petition was barred by limitation, the Magistrate had no B jurisdiction to take cognizance under Section 138 of the Act. The direction to issue summons on the appellant, therefore, being illegal and without jurisdiction was a nullity. (Para – 26)

C *Madishetti Bala Ramul (Dead) By LRs. v. Land Acquisition Officer* (2007) 9 SCC 650 and *Anil Kumar Goel v. Kishan Chand Kaura* (2008) AIR SCW 295 – relied on.

2.1 Section 415 of the Indian Penal Code defines "cheating". The said provision requires: (*i*) deception of D any person, (*ii*) whereby fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property, or (*iii*) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not E so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. Deception of any person is common to the second and third requirements of the provision. (Para – 27) [700-G-H; 701-A-B]

F *Devender Kumar Singla v. Baldev Krishan Singla* (2005) 9 SCC 15 – relied on.

2.2 The cheques were post dated ones. Admittedly they were issued in the year 1996. They were presented G before the bank on a much later date. They were in fact presented only on 10.01.2001. When the cheques were issued, the accounts were operative. Even assuming that the account was closed subsequently the same would not mean that the appellant had an intention to cheat when the post dated cheques were issued. Even otherwise the H

allegations made in the complaint petition, even if given face value and taken to be correct in its entirety do not disclose commission of an offence under Section 420 of the Indian Penal Code. They do not satisfy the ingredients of the suit provision. It is, therefore, in the fact situation obtaining in the instant case that the provisions of Section 420 of the Indian Penal Code were not attracted. (Para – 29) [702-D-F]

Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors., **JT 2008 (1) SC 340 – referred to.**

3. The Court had no jurisdiction to allow the amendment of the complaint petition at a later stage. (Para – 30) [702-G]

Case Law Reference

(2007) 4 SCC 70	**Referred to**	**Para - 14**
(2007) 3 SCC 693	**Referred to**	**Para - 14**
(2008) 8 SCALE 54	**Referred to**	**Para - 14**
(2006) 9 SCC 340	**Referred to**	**Para - 20**
(2007) 6 SCC 555	**Relied on**	**Para - 22**
(2007) 9 SCC 650	**Relied on**	**Para - 25**
(2008) AIR SCW 295	**Relied on**	**Para - 25**
(2005) 9 SCC 15	**Relied on**	**Para – 27**
JT 2008 (1) SC 340	**Referred to**	**Para – 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1190 of 2008

From the Final Judgment and Order dated 19.10.2007 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 330 of 2007

Manish Mohan, Anita Mohan and Ugra Shankar Prasad for the Appellant.

Santosh Paul, M.J. Paul, Arvind Gupta, Aanchal Jain,

A Manish Pitalc and Ravindra Keshavrao Adsure for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J : 1. Leave granted.

B 2. Whether the proviso appended to Section 142 of the Negotiable Instruments Act, 1881 (for short "the Act") inserted by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, is retrospective in operation is the question involved in this appeal which arises out of a judgment and C order dated 19.10.2007 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 330 of 2007.

3. The relationship between the parties hereto was that of a borrower and creditor. A financial loan of Rs. 1,70,000/- was obD tained by the appellant in 1996 from the respondent No. 1, which according to him has been paid off. Two post dated cheques, one bearing No. 460157 dated 6.12.1996 for a sum of Rs. 26,900/- and the other bearing No. 460158 dated 28.09.2000 for a sum of Rs. 1,70,000/-, however, were handed over to him.

E 4. Appellant contends that the amount of loan was repaid in cash. Admittedly, the cheques were presented before the bank on 10.01.2001. They were returned to the respondent No. 1 by the bank alleging that no such account, in the name of the appellant was in operation. A legal notice dated 17.01.2001 was F sent by speed post asking the appellant to pay the said amount of Rs. 1,70,000/- failing which legal action including criminal action would be taken against him.

5. A complaint petition alleging commission of an offence under Section 138 of the Act, however, was filed only on G 20.04.2001.

6. Indisputably, the complaint petition was sought to be amended for adding Section 420 of the Indian Penal Code in the complaint petition. The said application was allowed by an order dated 14.08.2001.

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7. Appellant filed an application for discharge on 16.12.2003 inter alia on the premise that the said complaint petition was barred by limitation. It was dismissed by an order dated 14.11.2006. The revision application filed by the appellant before the learned Additional Sessions Judge was also dismissed. A criminal writ petition filed by the appellant marked as Criminal Writ Petition No. 330 of 2007 before the High Court of Bombay has been dismissed by reason of the impugned judgment holding:

(i) The question as to whether the complaint is barred by limitation is a mixed question of law and fact. Even otherwise as a result of amendment of Clause (b) of Section 142 of the Act even if delay has been caused in filing the complaint, the Magistrate has power to condone the delay;

(ii) Although the Magistrate could not have allowed amendment of the complaint petition but as it discloses sufficient averments in regard to commission of an offence under Section 420 of Indian Penal Code, the Trial Court was justified in issuing the process in respect of the said provision also.

8. Mr. Manish Mohan, learned counsel appearing on behalf of the appellant would submit that the High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration that :

(i) the complaint petition was barred by limitation, which would be evident from the admitted facts;

(ii) the proviso appended to Clause (b) of Section 142 being substantive in nature cannot be held to be retrospective in operation;

(iii) allegations made in the complaint petition even if given face value and taken to be correct in their entirety, no case has been made out for taking cognizance under Section 420 of the Indian Penal Code;

A (iv) in any event, as the principal complaint being for commission of an offence under Section 138 of the Act was not maintainable, the application for amendment to insert Section 420 of the Indian Penal Code was also not maintainable.

B 9. Mr. Santosh Paul, learned counsel appearing on behalf of the respondent No. 1, submitted that from a perusal of the complaint petition it would appear that the date of service of notice being not fixed and the complainant having asked the post office to disclose the date of actual service of notice, it C cannot be said that the legal notice was served upon the accused immediately after issuance thereof.

In any event, as the complaint petition disclosed commission of an offence on the part of the appellant under Section D 420 of the Indian Penal Code, the High Court's judgment is unassailable.

10. Section 138 of the Act provides a penal provision. The object of the Parliament in brining the same in the statute book is well-known, viz., to create an atmosphere of faith and reliE ance in the banking system.

11. The Act was amended in the year 2002 whereby additional powers have been conferred upon the court to take cognizance even after expiry of the period of limitation by conferring on it a discretion to waive the period of one month.

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12. Before embarking on the questions raised, we may notice that the proviso appended to Section 138 of the Act limits the applicability of the main provision stating:

"138 - Dishonour of cheque for insufficiency, etc., of funds G in the account

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*** Provided that nothing contained in this section shall apply unless—

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(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; A

(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 B

(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." C

Section 142 of the Act also puts a limitation in the power of the court to take cognizance of the offences, which reads as under: D

"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; E

(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 : F

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. G

(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." H

A 13. As noticed hereinbefore, the proviso appended to Clause (b) of Section 142 of the Act was inserted by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002.

B 14. A complaint petition alleging commission of an offence under Section 138 of the Act must demonstrate that the following ingredients exist, i.e.:

(a) a cheque was issued;

(b) the same was presented;

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(c) but, it was dishonoured;

(d) a notice in terms of the said provision was served on the person sought to be made liable; and

D (e) despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.

[See *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and* E *Another* (2007) 4 SCC 70, *Saroj Kumar Poddar v. State (NCT of Delhi) and Another* (2007) 3 SCC 693 and *DCM Financial Services Ltd. v. J.N. Sareen and Another* 2008 (8) SCALE 54]

15. Indisputably, therefore, unless the conditions precedent for taking cognizance of an offence under Section 138 of F the Act are satisfied, the court will have no jurisdiction to pass an order in that behalf.

16. We will have to examine the contentions raised by the leaned counsel for the parties hereto keeping in view the aforeG mentioned legal principles in mind. Before, however, we advert thereto, we may place on record that the averments made in the complaint petition in regard to service of notice are in the following terms:

"8. I say that the said Bank of the Accused, returned / H dishonoured Cheque No. 460158 dated 28.09.2000 of

Rs. 1,70,000/- drawn on Bank of India, Maheshwari Udyan Branch, Mumbai, under Bank remark "NO SUCH ACCOUNT WITH US". The said remark was given in handwriting by the Branch Manager of the Bank of India, Maheshwari Udyan Branch, Mumbai in its Bank Memo dated 10.01.2001, though in the said Bank Memo at Sr. No. 11, it is printed at 11(b) Account closed and at 11(c) no account. This Bank Memo was received by me on 17.01.2001. Attached herewith is Xerox copy of the said Cheque No. 460158 dated 28.09.2000 of Bank of India, 10.01.2001 and marked thereto as Exhibit "A" thereto which are very clear and self-explanatory. I am also attaching herewith Xerox copy of dishonoured Cheque No. 460157 dated 06.12.1996 of Rs. 26,900/- of the Accused drawn on Bank of India, Maheshwari Udyan Branch, Mumbai and marked it as Exhibit "B" thereto which speak much more about the Bank account No. 1365 of the Accused lying with his said Bank.

9. I say that immediately, vide my letter Ref. No. JMS/ SSS/CRIM/01/2001 dated 17.01.2001, I sent demand notice to the Accused through Speed Post Acknowledgment due postal services. Attached herewith is Xerox copy of the said Demand Notice along with copy of postal speed post A.D. receipt No. 000271184 – SSPNL 650 dated 19.01.2001 and marked it as Exhibit "C" Colly thereto which is very clear and self-explanatory. I say that I have not yet received Speed Post Acknowledgement Slip with due acknowledgement thereon from the Accused as to the receipt of the said Demand notice.

10. I say that with abundant and due precautions with a view to avoid technicalities, through my advocate, Mr. Sunil Bagwe's letter Ref. No. SSB/JMS/BOI/01/2001 dated 05.03.2001 asked for detailed information as to the reasons given by the Branch Manager, in his Bank memo dated 10.01.2001. The Branch Manager of the said Bank Branch of the Accused, after various my approaches, finally

A given acknowledgement of the receipt of the aforesaid letter of my advocate on 14.03.2001, attached herewith is Xerox copy of the said letter and marked it as Exhibit "D" thereto which is very clear and self-explanatory. The Branch Manager of Bank of India, Maheshwari Udyan Branch, B Mumbai vide his letter Ref. No. MU/ADV/MNI/39/853 dated 14.03.2001, given vague, non-cooperative, unwilling, ill-wishes reply to my advocate's letter by courier services on 26.03.2001. Attached herewith is Xerox copy of the said letter of the Bank of India and marked it as C Exhibit "E" thereto which is very clear and self-explanatory."

17. As regards purported commission of an offence under Section 420 of the Indian Penal Code, on the part of the petitioner, it was alleged:

D "16. I say that the aforesaid Cheque which was issued by the Accused in discharge of his debts and liability to me in full, which were dishonoured by the Bank of the accused with reason "No such account with us". I say that the Accused failed and neglected to make payments as per my demand notice dated 17.01.2001. The Accused has failed and E neglected to make good attempts for payment of his dishonoured cheques on receipt of my demand notice, within the stipulated period as provided under Section 138(c) of the N.I. Act, 1988, therefore, the Accused has committed an offence punishable under section 138 read F with section 141 and section 142 of the N.I. Act 1881 (as amended) and Section 420 of the I.P.C."

18. The cause of action of filing the said complaint was stated in the following terms:

G "17. I say that the aforesaid cheque of the drawer, the Accused herein was returned by the Complainant's banker i.e. the Deccan Merchant Co-op. Bank Ltd. Ghatkopar (E) Branch, Mumbai 400 077, which is situated within the jurisdiction of this Hon'ble Court and, therefore, this Hon'ble H Court is competent to take cognizances of this present

complaint and try the same. The demand notice to the Accused was issued within the stipulated period and the present complaint has been filed within the prescribed period as provided under Section 142 (b) of the Negotiable Instruments Act, 1881 (as amended) and, therefore, the Accused has committed an offence punishable under Section 138 read with section 141 and section 142 of the N.I. Act 1881 (as amended) and Section 420 of the I.P.C.

18. I say that the Accused has drawn Cheque of post dated in Mumbai with intention to cheat me. Hence, the accused must have closed his Bank Account No. 1365 of Bank of India, Maheshwari Udyan Branch, Mumbai subsequently and now, after the receipt of my demand notice, the accused has refused to make the payment of his dishonoured cheques as above in Mumbai. Hence, this Hon'ble Court has jurisdiction to entertain, try and decide this present complaint. I say that the Accused has committed criminal offences under the Negotiable Instruments Act, 1881 (as Amended) and section 420 of the I.P.C., within the jurisdiction to take cognizances of the same and try and decide the said offences."

19. A complaint petition in view of Clause (b) of Section 142 of the Act was required to be filed within one month from the date on which the cause of action arose in terms of clause (c) of the proviso to Section 138 of the Act which stipulates that "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".

The legal notice admittedly was issued on 17th January, 2001. It was sent by speed post. It was supposed to be served within a couple of days. A bare perusal of the statements made in paragraph 10 of the complaint petition, as quoted hereinbefore, clearly demonstrate that although the actual date of service of notice was allegedly not known, the complainant proceeded on the basis that the same was served within a reason-

able period; otherwise in absence of service of notice or deemed service thereof, the question of non-compliance of clause (c) of the proviso appended to Section 138 of the Act would not arise and consequently the complaint petition would not be maintainable.

20. In *Jindal Steel and Power Ltd. and Another v. Ashoka Alloy Steel Ltd. and Others* [(2006) 9 SCC 340], this Court held:

> "**2.** By the impugned order, the High Court has quashed the prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for short "the Act") and Section 420 of the Penal Code, on the sole ground that the complaint was filed two days after the expiry of limitation. In the present case, notice was sent under Section 138 of the Act on 4-1-1997, which was served on the accused on 10-1-1997, giving him 15 days' time for making payment, which expired on 25-1-1997. Cause of action to file the complaint accrued on 26-1-1997, which day has to be excluded in computing the period of limitation, as required under Section 12(1) of the Limitation Act, 1963. Therefore, the limitation would be counted from 27-1-1997 and the complaint was filed on 26-2-1997, within a period of one month from that date, as such, the same was filed well within time. We find that the point is concluded by a judgment of this Court in *Saketh India Ltd.* v. *India Securities Ltd.* in which case taking into consideration the provisions of Section 12(1) of the Limitation Act, it was laid down that the day on which cause of action had accrued has to be excluded for reckoning the period of limitation for filing a complaint under Section 138 of the Act. In the present case, after excluding the day when cause of action accrued, the complaint was filed well within time; as such the High Court was not justified in holding that there was two days' delay in filing the complaint. For the foregoing reasons, we are of the view that the High Court was not justified in quashing prosecution of the respondents."

21. In terms of the provisions of the General Clauses Act, a notice must be deemed to have been served in the ordinary course subject to the fulfillment of the conditions laid down therein. Section 27 of the General Clauses Act reads as under:

> "27. *Meaning of service by post.*—Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Thirty days' time ordinarily must be held to be sufficient for service of notice. In fact when the service of notice is sought to be effected by Speed Post, ordinarily the service takes place within a few days. Even under Order V, Rule 9(5) of the Code of Civil Procedure, 1908, summons is presumed to be served if it does not come back within thirty days. In a situation of this nature, there was no occasion for the Court to hold that service of notice could not be effected within a period of thirty days.

22. Presumption of service, under the statute, would arise not only when it is sent by registered post in terms of Section 27 of the General Clauses Act but such a presumption may be raised also under Section 114 of the Evidence Act. Even when a notice is received back with an endorsement that the party has refused to accept, still then a presumption can be raised as regards the valid service of notice. Such a notice, as has been held by a Three-Judge Bench of this Court in *C.C. Alavi Haji v. Palapetty Muhammed and Another* [(2007) 6 SCC 555] should be construed liberally, stating :

> "17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal

A law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of
B the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons
C from the court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the GC Act and Section 114 of the Evidence
D Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. *As observed in Bhaskaran case if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting*
E *different strategies and escape from legal consequences of Section 138 of the Act."*

[Emphasis supplied]

23. The complaint petition admittedly was filed on
F 20.04.2001. The notice having been sent on 17.01.2001, if the presumption of service of notice within a reasonable time is raised, it should be deemed to have been served at best within a period of thirty days from the date of issuance thereof, i.e., 16.02.2001. The accused was required to make payment in
G terms of the said notice within fifteen days thereafter, i.e., on or about 2.03.2001. The complaint petition, therefore, should have been filed by 2.04.2001.

24. Ex facie, it was barred by limitation. No application for condonation of delay was filed. No application for condonation
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of delay was otherwise maintainable. The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act, 1963 or Section 473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are not applicable. In any event, no such application for condonation of delay was filed. If the proviso appended to Clause (b) of Section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well-settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation.

25. In *Madishetti Bala Ramul (Dead) By LRs. v. Land Acquisition Officer* [(2007) 9 SCC 650], this Court held as under:

> **"18.** It is not the case of the appellants that the total amount of compensation stands reduced. If it had not been, we fail to understand as to how Section 25 will have any application in the instant case. Furthermore, Section 25 being a substantive provision will have no retrospective effect. The original award was passed on 8-2-1981: Section 25, as it stands now, may, therefore, not have any application in the instant case."

The question is now covered by a judgment of this Court in *Anil Kumar Goel v. Kishan Chand Kaura* [2008 AIR SCW 295] holding:

> "8. All laws that affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations,

A unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory B provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision is question in accordance with its tenor. If the language is not clear then the court has to decide whether, C in the light of the surrounding circumstances, retrospective effect should be given to it or not. (See: *Punjab Tin Supply Co., Chandigarh etc. etc. v. Central Government and Ors., AIR 1984 SC 87).*

9. There is nothing in the amendment made to Section D 142(b) by the Act 55 of 2002 that the same was intended to operate retrospectively. In fact that was not even the stand of the respondent. Obviously, when the complaint was filed on 28.11.1998, the respondent could not have foreseen that in future any amendment providing for E extending the period of limitation on sufficient cause being shown would be enacted."

26. Therefore, there cannot be any doubt whatsoever that the courts below committed a manifest error in applying the proviso to the fact of the instant case. If the complaint petition was F barred by limitation, the learned Magistrate had no jurisdiction to take cognizance under Section 138 of the Act. The direction to issue summons on the appellant, therefore, being illegal and without jurisdiction was a nullity.

G 27. Section 415 of the Indian Penal Code defines "cheating". The said provision requires: (*i*) deception of any person, (*ii*) whereby fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property, or (*iii*) intentionally inducing that person to do or omit to do anything which he would not do or omit if H

he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. Deception of any person is common to the second and third requirements of the provision. [See *Devender Kumar Singla v. Baldev Krishan Singla* (2005) 9 SCC 15]

28. Noticing the ingredients of cheating, this Court in *Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors.,* [JT 2008 (1) SC 340], held :

> "A bare perusal of Section 415 read with Section 420 of the Indian Penal Code would clearly lead to the conclusion that fraudulent or dishonest inducement on the part of the accused must be at the inception and not at a subsequent stage.

22. For the said purpose, we may only notice that blank cheques were handed over to the accused during the period 2000-2004 for use thereof for business purposes but the dispute between the parties admittedly arose much thereafter i.e. in 2005.

In B. Suresh Yadav v. Sharifa Bee 2007 (12) SCALE 364, it was held;

> 13. For the purpose of establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. In a case of this nature, it is permissible in law to consider the stand taken by a party in a pending civil litigation. We do not, however, mean to lay down a law that the liability of a person cannot be both civil and criminal at the same time. But when a stand has been taken in a complaint petition which is contrary to or inconsistent with the stand taken by him in a civil suit, it assumes significance. Had the fact as purported to have been represented before us that the appellant herein got the said two rooms demolished and concealed the said fact at the time of execution of the deed of sale, the matter might have been different. As the deed of sale was executed on 30.9.2005 and the purported demolition took place on 29.9.2005, it was expected that the complainant/

A first respondent would come out with her real grievance in the written statement filed by her in the aforementioned suit. She, for reasons best known to her, did not choose to do so.

No case for proceeding against the respondent under Section 420 of the Indian Penal Code is therefore, made out.

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23. Filling up of the blanks in a cheque by itself would not amount to forgery. Whereas in the complaint petition, allegations have been made that it was respondent Nos. 2 and 3 who had entered into a conspiracy to commit the C said offence as indicated hereinbefore, in the counter affidavit, it has been alleged that the employees of the Respondent Company did so."

29. The cheques were post dated ones. Admittedly they were issued in the year 1996. They were presented before the D bank on a much later date. They were in fact presented only on 10.01.2001. When the cheques were issued, the accounts were operative. Even assuming that the account was closed subsequently the same would not mean that the appellant had an intention to cheat when the post dated cheques were issued. Even E otherwise the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety do not disclose commission of an offence under Section 420 of the Indian Penal Code. They do not satisfy the ingredients of the suit provision. It is, therefore, in the fact situation obtaining in F the instant case, difficult to hold that the provisions of Section 420 of the Indian Penal Code were attracted.

30. The court had no jurisdiction to allow the amendment of the complaint petition at a later stage. Therefore, the High court was not correct in taking the aforementioned view in the G facts and circumstances of the present case.

31. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed.

H S.K.S. Appeal allowed.