

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.R.P.377/2007 & CRL.M.A.6248-49/2007

% Date of decision: 05.03.2008

RIGA SUGAR CO. LTD. ...PETITIONER
Through: Mr. Jayant Bhushan, Sr.Adv. With
Mr.Ajay Bhargava & Ms.Vanita
Bhargava, Advocates

Versus

KESSELS ENGG. WORKS PVT. LTD. ...RESPONDENT

Through: Mr. Chetan Sharma, Sr.Adv. With
Mr.Sanjeev K. Tiwari, Advocates

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

SANJAY KISHAN KAUL, J. (ORAL)

Crl. M.A. No.6249/2007

Allowed subject to just exceptions.

Crl. REV. P. 377/2007

1. The petitioner placed an offer on the respondent vide its letter dated 23.3.2005 for supply of Back Pressure Turbo Generating Sets. There is stated to be a subsequent amendment dated 17.5.2005 whereby it was agreed that the erection and commissioning of the equipment was to be

completed latest by first week of November, 2005. The petitioner had given two post-dated cheques to the respondent in May, 2005; dated 8.11.2005 for Rs.5,75,000/- and dated 26.12.2005 for Rs.11,50,000/-. There are disputes which have arisen in respect of implementation of the purchase order. It is not necessary to go into that issue. Suffice to say that the petitioner did not want the respondent to present the cheques. However, the respondent presented the cheque for Rs.11,50,000/-, which was not honored in view of the stop payment instructions of the petitioner.

2. The respondent sent a letter dated 1.3.2006 to the petitioner in the following terms:

“We regret to inform you that your cheque No.000510 dtd. 26.12.05 for Rs.11,50,000.00 towards commissioning of the TG Set when presented to our bankers has returned unpaid due to your stop payment instructions (copy enclosed)

We have been requesting you to release the above payment though various letters including our last letter to you dated 21.2.06. But, it is regretted that you have not done so. Under these circumstances we will be compelled to refer the matter to our legal department for suitable steps if the above payment of Rs.11,50,000.00 is not received by us within 72 hours of receipt of this letter at your end by D.D. payable at Delhi.

We still hope that you will make arrangements to release the above payment without recourse to other steps.”

3. In response to the said letter, the petitioner sent a reply

dated 10.3.2006 disputing the liability and raising issues about performance by the respondent. The petitioner addressed another letter dated 20.3.2006 through advocate to the respondent whereafter a complaint was filed u/s 138 of the Negotiable Instrument Act, 1821 (hereinafter referred to as the said Act).

4. It may be relevant to note that the legal notice was also replied to by the petitioner and the petitioner has filed a suit for recovery of Rs.1.77 crores at Kolkatta on account of breach of the obligation of the respondent and both these instances happened in April, 2006. The complaint filed was on 3.6.2006 along with an application for condonation of delay in filing the complaint of 28 days. This 28 days delay has been reckoned on the basis of the legal notice dated 20.3.2006.
5. The trial court in terms of the order dated 13.9.2006 condoned the delay in filing the complaint without issuing any notice to the petitioner and thereafter summoning order was passed against the petitioner with notice returnable on 20.3.2007. The petitioner entered appearance on 20.3.2007 whereafter the impugned notice u/s 251 Cr.P.C. has been framed.
6. Learned senior counsel for the petitioner contends that the application filed by the petitioner for condonation of delay could not have been allowed without notice to the petitioner

and in that behalf has referred to the judgment of the learned single Judge of this Court in Prashant Goel Vs. State and Another, 134 (2006) DLT 221 wherein it has been held that the principles of *audi alteram partem* applied to even administrative proceedings, leave aside judicial proceedings. The rules of natural justice was held to be important parameters of fairness of procedure and, thus, when a complaint was time-barred, the other side got valuable rights inasmuch as time-barred complaint could not be considered on merits unless the delay is condoned. Thus, the accused had a right to argue that in given circumstances delay be not condoned. The accused, thus, could not be deprived of such a valuable right and it was held that this principle would be applicable whether the case originates on the lodging of the FIR as a State case or it is on the basis of the complaint filed by the complainant. These observations were also made in view of the pronouncement of the Apex Court in State of Maharashtra Vs. Sharadchandra Vinayak Dongre, (1995) 1 SCC 42.

7. A reading of the aforesaid judgment makes the issue no more *res integra* and, thus, the order of the trial court condoning the delay in issuing summoning and passing the summoning order cannot be sustained. The petitioner ought to have been granted an opportunity first while issuing the notice on the application for condonation of

delay before proceeding to the next stage, which did not happen.

8. The matter does not rest at this since if this was the only issue, the impugned order condoning the delay dated 13.9.2006 could have been set aside giving an opportunity to the petitioner to argue the case before the trial court.
9. An important aspect which arises in the facts of the present case is on account of the respondent having relied only on the notice sent through a counsel on 20.3.2006 even for seeking condonation of delay. Surprisingly there is not even a mention in the complaint and the earlier notice dated 1.3.2006. It is this notice which is material since if the notice issued on 1.3.2006 can be said to be a notice within the meaning of Section 138 of the said Act, then it would not be permissible to issue a second notice on 20.3.2006 and claim the right to file a complaint within the stipulated period of the said date.
10. In Krishna Exports Vs. Raju Das, (2004) 13 SC 498, the Apex Court reiterated the observation made in Sadanandan Bhandran Vs. Madhvan Sunil Kumar, (1998) 6 SCC 514 where it was held that the two apparent conflicting provisions of the N.I. Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour have to be harmoniously read with the interpretation that

on each presentation of the cheque and its dishonour, a fresh right and not cause of action accrues in his favour. Where on failure of drawer of cheque to make payment within 15 days of receipt of the first notice the complaint was filed beyond the period of one month thereafter, the same was barred by limitation. The contention that the period of one month should be reckoned with reference to the expiry of the period of 15 days after the second notice was issued, is not sustainable. The complaint has to be filed within one month from the day immediately following the day on which the period of 15 days from the date of receipt of the first notice by the drawer expires.

11. Learned senior counsel for the petitioner relied upon the judgment of the Apex Court in Central Bank of India & Anr. Vs. Saxons Farms and Ors., (1999) 8 SCC 221 to contend that there is no form of notice prescribed in clause (b) of the proviso to Section 138 of the said Act and the requirement is only that the notice shall be given in writing within 15 days of the receipt of information from the bank regarding return of the cheque as unpaid and in the notice there should be a demand for payment of the amount of the cheque. The factual matrix is also similar in terms of the nature of the notice sent and the notice ended with the words “kindly arrange to make the payment to avoid the unpleasant action of my client”. This notice was held to be

a notice within the meaning of clause (b) of Section 138 of the said Act.

12. There is no specific time period prescribed for the payment of the amount by the drawer in pursuance to the notice u/s 138 of the said Act but what is required is an intimation of dishonour to be given to the drawer of the cheque and the payee or holder in due course of the cheque becomes entitled to file a complaint in case drawer of the cheque fails to make the payment within 15 days of the receipt of the notice. This legal position is made abundantly clear in view of the judgment of this Court in Puri International (P) Ltd. & Anr. Vs. Ram Lal Bansiwala & Sons, 135 (2006) DLT 103.
13. Learned senior counsel for the respondent sought to rely on the judgment of the Apex Court in D. Vinod Shivappa Vs. Nanda Belliappa, AIR 2006 SC 2179 to advance the proposition that a discretion is given to the Court to take cognizance of a complaint even after prescribed period if the complainant satisfies the Court that he has sufficient cause for not making the complaint within such period. The object of the proviso to Section 138 of the said Act was held to provide an opportunity to an honest drawer of the cheque to make the payments but not to protect unscrupulous drawers who never intended to honour the cheques issued by them.
14. In my considered view, the said judgment would have no

application to the facts of the present case since the two aspects which have arisen for consideration is whether such an application for condonation of delay could have been allowed without notice to the accused and the factum of the earlier notice dated 1.3.2006 issued by the respondent which meets the parameters of Section 138 of the said Act and, thus, dis-entitles the complaint from being based on a subsequent notice dated 20.3.2007.

15. If the notice issued on 1.3.2006 is perused (which is reproduced above), it refers to the intimation received from the bankers of the respondent about the cheque not being honored. Thereafter it proceeds to refer to the request made by the respondent for release of the payment which had not been so made and makes a demand for payment of the amount of Rs.11,50,000/- within 72 hours failing which the matter would be referred to the legal department of the respondent for suitable steps. Thus, all the ingredients of a notice under sub-clause (b) of Section 138 of the said Act are satisfied, which reads as under:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the account. __

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid

from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless_

(a).....

(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.”

16. It is not possible to accept the contention of learned senior counsel for the respondent that the said notice was only informal having been sent by the respondent without legal assistance. It is not relevant as to whether it is a notice through counsel or is sent by the party but what is relevant is that the essential ingredients of a notice u/s 138 of the said Act are satisfied. The notice dated 1.3.2006 meets the said requirement and ignorance of law can be no defence.
17. Learned senior counsel for the respondent tried to canvass the proposition that the respondent should be given an opportunity to move another application for condonation of delay assuming that the relevant notice is dated 1.3.2006. Such a prayer cannot be allowed for the reason that there is

no such application filed along with the complaint and the complainant has not even cared to refer to the notice in the complaint and, thus, has made out no cause of action on the basis of the notice dated 1.3.2006. There is, in fact, concealment of this material notice in the complaint.

18. Learned senior counsel for the petitioner contends that there are serious disputes between the parties in respect of their rights and obligations to supply the machinery and the petitioner has even filed a civil suit in which not even a counter claim has been filed by the respondent. The said fact would, in my considered view, be not material at this stage of the proceeding to return a finding whether the complaint is maintainable.
19. The result of the aforesaid is that the impugned order dated 20.3.2007 framing notice against the petitioner and the criminal complaint filed by the petitioner is quashed, the petitioner is discharged and the petition is allowed, leaving the parties to bear their own costs.

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20. The application has become infructuous and is disposed of.

MARCH 05, 2008
'sp'

SANJAY KISHAN KAUL, J.