

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

% *Judgment Reserved on: 06th October, 2009*
Judgment Delivered on: 13th October, 2009

+ **CRL.M.C.1660/2007**

PRASHANT GOEL Petitioner
Through: Mr.Mohit Mathur with Mr.
Shishir Mathur, Advts.

versus

STATE AND ANR.

..... Respondents
Through: Ms.Fizani Hussain, APP
Mr.Harish Malhotra, Senior
Advocate with Mr.Rajinder and
Mr.Brij Bhushan, Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. This revision petition has impugned the order dated 15.2.2007 vide which the learned Metropolitan Magistrate had summoned the petitioner herein on a complaint under Section 138 of Negotiable Instruments Act.

2. The back ground has been detailed in the petition. Petitioner is the son of the younger brother of respondent no.2 namely late Sh. Ramesh Goel. Petitioner's father and respondent no.2 had joint business. Respondent no.2 had

taken over control of the business while inducting the petitioner as a partner in some of the businesses. Thereafter there was a fall out between the parties. These facts are undisputed.

3. Cheque bearing no.363712 dated 12.8.2003 drawn on the Central Bank of India, Janpath, New Delhi for Rs.15 lacs had admittedly been signed by Prashant Goel in favour of his complainant uncle Suresh Goel. This cheque was presented to the bank but was returned back on 6.08.2009 with a return memo with the remarks 'account closed'. Legal notice dated 11.8.2003 had been issued to the petitioner herein. After the expiry of the statutory period, payment having been not received, complaint under Section 138 of Negotiable Instruments Act had been filed.

4. The complaint was filed after a delay of five days. Vide order dated 8.10.2004, the delay was condoned without notice to the non-applicant and cognizance was taken of the said complaint. A revision petition was preferred against the said order. Vide order dated 02.8.2006 the said order was set aside by the High Court with a direction to the learned Metropolitan Magistrate to decide the application for condonation of delay in the first instance after giving an opportunity to the non-applicant herein and thereafter to proceed with the complaint on its merits.

5. On 15.2.2007, after hearing the respective parties, the Trial Judge condoned the delay which order is the subject matter of this revision petition.

6. On behalf of the petitioner, it is submitted that the summoning order is bad in law and the condonation of delay by the impugned order suffers from infirmity as there is no explanation much less a plausible explanation for the delay to be condoned; 'sufficient cause' not having been explained, impugned order is liable to be set aside. It is submitted that the provisions of Section 200 of the Cr. P.C. have not been complied with and after the delay had been condoned no fresh pre-summoning evidence had been led. The cheque had been returned unpaid for the reason that the account stood closed; this had been replied to by the petitioner in his reply to the legal notice dated 25.8.2003 but this has been deliberately suppressed and concealed from the court. Learned defence counsel has placed reliance upon a judgment of the Hon'ble Apex Court report in 2009 [3] JCC [NI] 210 Jugesh Sehgal vs. Shamsher Singh Gogi to support his submission that where a cheque is issued from an account which was non-existent on the day it was issued, having been closed, ingredients of Section 138 of Negotiable Instruments Act are not met and the complaint is liable to be quashed. Reliance has been placed upon a judgment

reported as 137 (2007) DLT 193 Exports India & Anr. vs. State & Anr. to support his next submission that where the reply to the notice had been concealed by the complainant, it was a ground for quashing of the summoning order.

7. These submissions have been rebutted by the learned counsel for the non-applicant.

8. Record has been perused.

9. On 15.02.2007 while condoning the delay the learned Metropolitan Magistrate had considered the prayer made by the complainant wherein it has been averred that he is an old man aged 58 years suffering from hypertension and thyroid problem and was under treatment with advice for bed rest up to 25.9.2003; this was the reason which had prevented him in filing the complaint within the statutory period. The counter submissions of the non-applicant had also been considered and after due deliberation the trial Court had exercised its discretion and condoned the delay. This discretion has been exercised fairly and justly; there are no malafides; discretion has not been exercised capriciously. This order condoning the delay calls for no interference.

10. In the complaint under Section 138 of Negotiable Instruments Act, the documents annexed along with the complaint comprise of the affidavit in evidence of the complainant. It was on the basis of this material on record

that the summons had been issued. In these circumstances there was no occasion of recording any further pre-summoning evidence; it was not an oral deposition but the documents which had been tendered along with the complaint on which the cognizance has been taken. There is a requisite compliance of section 200 of the Cr. P.C.

11. The complaint has been perused. It specifically states that Prashant Goel had issued the cheque in discharge of his liability towards the loan taken by him from the complainant. This cheque had been returned unpaid on 06.08.2003 vide return memo with the remarks "account closed". The judgment relied upon by the learned counsel for the petitioner has no application to the facts of the present case; in the said judgment titled as Jugesh Sehgal (supra), while detailing the ingredients of Section 138 of the Negotiable Instruments Act, the Apex Court had held that the first ingredient necessarily entails that the cheque must have been drawn on an account maintained by the accused in a bank. In that case the cheque had been issued from an account which had not been maintained by accused no.1; the said account being in the name of another person by the name of Ms. Shilpa Chaudhary. The account pertaining to someone else; the Court had held that it was a non-existent account and the basic ingredient of Section 138 of Negotiable

Instruments Act being missing the said complaint had been quashed.

12. This is not so in the instant case. The cheque had admittedly been issued from an account which was maintained by Prashant Goel; cheque had been returned unpaid for the reason that the account stood closed; it is not the case of the petitioner that this account is not his account.

13. The judgment reported in Exports India (supra) is distinct in its facts. In that case, the transactions between the parties related to undated blank cheques. This had been specifically replied to in the reply to legal notice but had been concealed. It was in these circumstances that a co-ordinate Bench of this court had held that a complaint based on an undated cheque given at the time of execution of the agreement made out no debt or liability and as such the complaint was held not maintainable. These facts are clearly distinguishable from the instant case.

14. In construing a complaint under Section 138 of the Negotiable Instrument Act, a hyper technical approach should not be adopted. Provisions of Section 482 of the Cr. P.C. may be resorted to in those cases where the ingredients of the offence complained of are altogether lacking. They should not be resorted to mechanically or routinely but with care and caution and only when failure to interfere would lead to a

miscarriage of justice. The present case does not fall in this category.

15. Summoning order calls for no interference. Revision petition is without any merit. It is dismissed.

**(INDERMEET KAUR)
JUDGE**

13th October, 2009
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