

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

+ Crl.M.C.5538-39/2005 & CM No. 10951/2005

% Date of reserve : 16.02.2009
Date of decision: 04.03.2009

M/s Delhi Automobiles Ltd. & Anr. ...PETITIONERS
Through: Mr.Girdhar Govind with Mr.Avanish
Kumar and Ms.N.N.Firdausi, Advocates

Versus

Mohan Exports India Ltd. ...RESPONDENT
Through: Mr.Arjun Bhandari and Mr.Abhishek
Rai, Advocates

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 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 |

MOOL CHAND GARG, J.

1. The present petition arises out of an order passed by the Additional Sessions Judge dated 12.8.2005, whereby the learned Additional Sessions Judge set aside the order passed by the Metropolitan Magistrate, who was pleased to allow the application filed by the petitioners to dismiss the complaint on the ground that the same was time barred as it was based upon a second notice.
2. The Additional Sessions Judge allowed the revision petition

filed by the respondents relying upon the judgment delivered by the Apex Court in *Adalat Prasad Vs. Roop Lal Jindal*, 2004 Volume 113 DLT 356, wherein it had been held that the Magistrate did not have jurisdiction to recall/review his own order in having summoned the petitioners to face trial for an offence under Section 138 of the Negotiable Instruments Act (for short “NI Act”) on a complaint filed by the respondent for the prosecution of the petitioners on account of dishonor of a cheque for Rs. 25 lakhs, which it was stated had been issued by the first petitioner under the signatures of the second petitioner for repayment of corporate loan which was taken by the petitioners from the respondent.

3. It is thereafter the present petition under Section 482 Cr.P.C. had been filed by the petitioners seeking quashing of the proceedings in the Complaint Case bearing No. 105/1 dated 7.1.2004 titled as *M/s Mohan Exports India Ltd. Vs. M/s Delhi Automobiles Ltd. and Anr.* pending in the Court of MM Patiala House, New Delhi
4. It is the submission of the petitioners that in the present case the cheque in question was presented by the respondent firstly on 4.6.1996 and thereafter on 5.6.1996 then again on 10.7.1996, August, 1996 and finally on 15.10.1996. It is also their case that the cheque was returned unpaid every time with the remark “insufficient funds”. In fact, it is submitted that the respondent sent a legal notice dated 25.10.1996 calling upon the petitioners to pay the amount of the

dishonoured cheque within 15 days and thereafter, they have filed the present complaint.

5. It has been submitted that before filing of the complaint and issuance of notice dated 25.10.1996, the respondent had filed a complaint which was liable to be dismissed as time barred in view of the submissions made by the respondent in paragraphs 5, 6, 7 and 9 of the complaint, which are reproduced as under:

- "5. That on 23.5.1996, when the due date of the cheque came, the accused requested the Complainant Company to deposit the cheque on 4th June, 1996. However, the said cheque on presentation was returned unpaid with the remarks "Insufficient Funds". The accused was contacted and the Complainant Company was advised to represent the cheque on the next day i.e. on 5.6.1996 but the same was again returned unpaid with the remarks "Insufficient Funds". The accused was, accordingly, informed about the second dishonor. The accused informed the Complainant Company that they were having little problem with their finances, hence asked the Complainant Company to represent the cheque after about 4 weeks.
6. That on specific assurance, the cheque was again presented on 10.7.1996 for the third time in the Indian Bank. However, the same was again returned unpaid for insufficient funds. The Complainant Company sent a fax message to Respondent No.2 for making payment against the dishonoured cheque. The accused informed the Complainant Company that they would be making payment through Pay Order along with interest till date. However, nothing reached the complainant company and for the whole month of July, the accused kept on making false promises of making the payment but no payment came forth.
7. That in the second week of August, 1995 on specific request of the accused, the cheque was again presented in high value clearing in the Standard Chartered Bank. But again to the surprise of the Complainant, the same was returned unpaid for "Insufficient Funds" on 8th August, 1996. On 12.8.1996, a fax message was sent to Respondent No.2 asking him to send pay order along with interest immediately. The Respondent No.2 promised to give the Pay Order on 21st August, 1996.
8. xxx xxx xxx
9. That on 10.10.1996, the Respondent No.2 advised the Complainant Company to deposit the cheque on 13.10.1996. The said cheque was deposited for the fifth time on 15th October, 1996. But again the cheque was returned unpaid with the same remarks i.e. "Insufficient Funds"."

6. It is also submitted that even though the Metropolitan Magistrate ought not to have issued the summons but after

issuing the summons, the order was recalled vide detailed order dated 24.2.2004 but the said order has been reversed by the Additional Sessions Judge.

7. Primarily, it is the submission of the petitioners that the notice dated 25.10.1996 which is the basis of filing the present complaint by the respondent is a second notice inasmuch as a notice by fax was sent by the respondent on 12.8.1996 calling upon the second petitioner to pay the amount of cheque which was dishonoured. The said fax for the sake of reference is reproduced hereunder:-

“KIND ATTENTION

THIS IS WITH REGARD TO REPAYMENT OF THE CORPORATE LOAN OF RS. 25.00 LAKHS. YOUR CHEQUE HAS AGAIN BEEN RETURNED UNPAID FOR WANT OF UNSUFFICIENT FUNDS. THIS WAS PRESENTED ONLY AFTER CONFIRMATION FROM YOU. THIS IS THE FORTH TIME THAT THE CHEQUE HAS BEEN RETURNED UNPAID. YOU WOULD KINDLY ACCEPT THAT THIS IS ABSOLUTELY NON BUSINESS LIKE & IS AFFECTING OUR PERSONAL RELATIONS. I, THEREFORE, REQUEST YOU TO PERSONALLY LOOK INTO IT & SEND A PAY ORDER FOR THE LOAN OF RS. 25.00 LAKHS AS ALSO INTEREST THEREON.

REGARD
(A.K.PURI)
CHAIRMAN & MANAGING DIRECTOR”

8. It is submitted that this fax had all the ingredients which makes it a ‘notice’ as required to have been sent under Section 138 of the NI Act giving a cause of action to the respondent to file a complaint within the limitation prescribed once the petitioner fail to make the payment of the dishonoured cheque.
9. In these circumstances, it is submitted that the case of the petitioners is squarely covered by the judgment delivered by the Apex Court in *Central Bank of India and Anr. Vs. Saxons Farms & Ors.*, 1998(8) SCC 221. In the aforesaid judgment,

the Apex Court in paragraphs 10 and 11 made the following observations:-

“10. Regarding demand for payment, the High Court was of the opinion that "the intention in the notice was that cheque was being presented again and the applicant/petitioner should arrange the payment on representation of the cheque". The High Court overlooked the last line of notice as indicated above and, therefore, erred in holding that there was no demand of payment.

11. A cheque can be presented any number of times to the bank within the period of its validity. In view of the above, appellant-bank had a legal right to represent the cheques to the bank as indicated in the notices and, therefore, respondents could have arranged payment either through bank or directly to the appellant bank. By not doing so the provision of Section [138](#) is clearly attracted.”

10. It is thus submitted that while there can be no objection about deposit of cheque by the respondent on more than one occasion till such time the cheque was within limitation, the fact that the respondent issued a fax notice on 12.8.1996 as aforesaid, it allowed the limitation to expire by not filing the complaint within the time prescribed and therefore, the notice issued by the respondent on 25.10.1996 after again representing the cheque relying upon a fresh cause of action amounts to issuing of second notice, which is not permitted.
11. Some other observations made by the Apex Court in the judgment delivered in *Central Bank of India's case (supra)* and which explains as to how the communication issued by the beneficiary of a cheque which has been dishonoured can be considered as notice and what is limitation are as under:-

“4. We have heard the learned Counsel for the parties and the-short question to be decided is whether there were valid notices as required under Clause (b) of the proviso to Section [138](#) of the Act.

5. We extract below the relevant portion of the notices which is same in both the notices:

“The bouncing of the two cheques is a most serious matter. The said act of issuance of cheques knowing fully

well that the same shall not be paid statutes (constitutes) an offence under Section [138](#) of the Negotiable Instruments Act. As per the provisions of this Act my client through this notice informs you that my client shall represent the two cheques again and if the same are returned unpaid, my client shall report the matter to the Police for initiating appropriate criminal action against you all. My client further reserves the right to file criminal case against all of you for the non-payment of the cheques in question and details given above. Kindly arrange to make the payment of the cheques if you intend to avoid the unpleasant action of my client."

6. Section [138](#) of the Act, inter alia, provides that 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 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, such person shall be deemed to have committed an offence under the above section. According to the proviso to the said section unless the three clauses mentioned therein are fulfilled the provisions of the section shall not apply. In these appeals we are concerned with Clause (b) which is quoted below:

"138(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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and"

7. Though, no form of notice is prescribed in the above Clause (b) the requirement is that notice shall be given in writing within fifteen days of receipt of information from the bank regarding return of the cheques as unpaid and in the notice a demand for payment of the amount of the cheque has to be made.

8. The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect honest drawer. Service of notice of demand in Clause (b) of the proviso to Section [138](#) is a condition precedent for filing a complaint under Section [138](#) of the Act. In the present appeals there is no dispute that notices were in writing and these were sent within fifteen days of receipt of information by the appellant-bank regarding return of cheques as unpaid. Therefore, only question to be examined whether in the notice there was a demand for payment.

9. The last line to the portion of notice extracted above reads as under:

"Kindly arrange to make the payment to avoid the unpleasant action of my client."

In our opinion it is a clear demand as required under Clause (b) of Section [138](#)."

12. After taking into consideration the last line as incorporated in paragraph 9 of the aforesaid judgment, the Apex Court took then communication sent by the complainant in that case as a notice within the meaning of Section 138 of the NI Act and considered the communication as delivered in that case as a

valid notice.

13. It is also a matter of record that in another judgment delivered by this Court in *Padmini Polymers Ltd. Vs. Unit Trust of India 101 (2002) Delhi Law Times 376*, which has also been upheld by the Apex Court inasmuch as the special leave petition filed against this judgment has been dismissed. It has been held that notice to have an effect under Section 138 of the Act must specify that the payment of the dishonoured cheque has to be made within 15 days of the receipt of the notice and if it is not so mentioned, it cannot be termed as notice under Section 138 of the NI Act.
14. During the course of arguments, the learned counsel for the petitioners has strongly relied upon the judgment of *Central Bank of India (supra)* to contend that in the present case taking into consideration the fax sent on 12.8.1996 the limitation to file the complaint expired on 27.9.1996 and therefore, the complaint filed by the respondent in this case on 11.12.1996 was barred by limitation.
15. Having gone through the contents of the fax dated 12.8.1996 as has been recorded by the Metropolitan Magistrate in his order dated 24.2.2004 which is available at page 19 of the paper book it can be observed: firstly, that the said fax has not been sent to the company, namely, M/s Delhi Automobiles Ltd; secondly, the said notice does not say that the petitioners must make the payment of the dishonoured cheque within a period of 15 days of the receipt of the said fax; thirdly, it also

does not say that in case of non-payment of the amount of the cheque, the petitioners would face undesirable consequences as was the case in *Central Bank of India's case (supra)*.

16. In these circumstances, it will not be appropriate at this stage prima facie to say that the said fax constituted a notice to furnish a cause of action in favour of the petitioners to file a complaint under Section 138 of the Negotiable Instruments Act or that in the present case the notice which is the basis of the filing of the complaint is a second notice. All these questions can be gone into by the learned Metropolitan Magistrate after the evidence of the parties are recorded where the petitioners will have a right to cross-examination and to seek proper explanation.
17. Thus, I do not find any merit in the petition filed by the petitioners and the same is accordingly dismissed. Parties are directed to appear before the trial court on 31.03.2009. The trial Court record be sent back forthwith.

Crl.M.A.10951/2005 (Stay)

In view of the orders passed above, the interim order stands vacated.

Application stands disposed of.

MOOL CHAND GARG, J.

March 04, 2009
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