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

+ CRL.REV.P. 603/2008

Date of decision: 19th April, 2010

RAJWINDER KAUR

..... Petitioner

Through Mr. Sanjay, Advocate.

versus

YOGINDER SINGH SAGAR & ANR.

..... Respondents

Through Mr. K.K. Sharma, Advocate for the
respondent No. 1.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

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

ORDER

1. The present revision petition is directed against the order dated 10th September, 2008 passed by the learned Metropolitan Magistrate dismissing the complaint filed by the petitioner-Ms. Rajwinder Kaur under Section 138/142 of the Negotiable Instruments Act, 1881 (hereafter referred to as the Act, for short).

2. The impugned order dated 10th September, 2008 reads as under:-

“Present: Complainant with counsel.

Arguments on the maintainability heard.

In this case, the cheque was presented by the complainant for encashment which was returned back on 13.6.08 with remarks "Insufficiency of Funds". Thereafter a notice was issued dated 17.6.08. After issuance of the said notice, the cheque was again presented on 7.7.08 which was again returned back with remarks Insufficiency of funds but no notice was issued to the accused thereafter as required by Section 138 of the N.I.Act and the complaint was filed.

It is evident from the aforesaid that the provision of Section 138 and 142 of the N.I. Act have not been complied with in true spirit and the procedure adopted is contrary to the law. Hence, the complaint is not maintainable and is accordingly dismissed under Section 203 Cr.P.C.

File be consigned to record room."

3. In the complaint it is stated that the petitioner had deposited a cheque of Rs.3 lacs issued by the respondent No. 1 in discharge of his debt and the same was presented for payment by the petitioner to his bankers but was returned back unpaid on account of insufficient funds in the account of the respondent No. 1 vide memo dated 13th June, 2008. Thereafter, notice dated 17th June, 2008 was issued by registered post with acknowledgement card but the respondent No. 1 did not make payment within fifteen days and has committed an offence under Section 138 of the Act. The complaint also states that the said cheque was presented for payment on 7th July, 2008 and was returned back unpaid vide memo dated 9th July, 2008.

4. The question raised is what is the effect of re-presentation of the cheque by the petitioner on 7th July, 2008 after the complainant had issued legal notice dated 17th June, 2008 on dishonour of the cheque for the first

time and whether re-presentation of the cheque on 7th July, 2008 had the effect of erasing or wiping out the offence/right, which had accrued to the petitioner.

5. Sections 138 and 142 of the Act read 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 extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(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;

(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

(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.

Explanation.- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

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;

(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;

[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;]

(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.]”

6. For successfully prosecuting the drawer for an offence under Section 138 of the Act, the following four requirements are required to be established:

(1) A cheque was drawn for payment in discharge of liability/debt.

(2) The cheque was presented for payment within its validity period.

(3) The cheque was dishonoured and payment was not made due to “insufficiency of funds”.

(4) That the complainant had issued notice to the drawer but the drawer had failed to make payment of the cheque amount within fifteen days of the receipt of the notice.

7. It is not unknown and common that cheques are re-presented for payment after dishonour, during the validity period of the said cheque. Sections 138 and 142 of the Act nowhere bars or prohibits such re-presentation. In *Prem Chand Vijay Kumar versus Yash Pal Singh & Another*, 2005 (2) C.C. Cases (SC) 142 the Supreme Court examined the provisions of Section 138/142 of the Act and observed that on each presentation of a cheque and dishonour a fresh right but no cause of action accrues in favour of the payee. The payee may, therefore, without taking pre-emptory action in form of notice under Section 138(b) of the Act, re-present the cheque during the validity period. However, once notice under Section 138(b) of the Act is issued, the complainant/payee forfeits his right to file a complaint on the basis of second subsequent dishonour of a cheque on re-presentation. It is observed that cause of action for filing of the complaint under Section 142(c) of the Act arises only once, i.e., when a cheque is presented and dishonoured and notice is issued under Section 138(b) of the Act. After the cause of action has arisen, it is not permissible to the payee/complainant to create another cause of action by re-presenting the dishonoured cheque again. The Supreme Court, however, clarified that in case notice is not issued under Section 138(b), then the complainant/payee is entitled to re-present the cheque and on dishonour, issue notice and thereafter file a complaint.

8. The aforesaid ratio does not in any manner help the cause or the stand of the respondent No. 1. In the present case, the petitioner-complainant has filed the complaint on the basis of first dishonour of cheque, which as per the complainant happened when memo was issued to him on 13th June, 2008 and thereafter the complainant had issued notice dated 17th June, 2008. The complaint is not based upon dishonour of the cheque upon re-presentation on 7th July, 2008 and any cause of action accruing on the basis of the said dishonour. The complaint is based upon dishonour or non-payment of the cheque on the first presentation and the default of the respondent No. 1 to make payment inspite of legal notice. The complainant-petitioner has mentioned details and actual fact that he had re-presented the cheque but that does not form basis of his cause of action and the offence alleged in the complaint when the cheque was dishonoured on the first presentation and payment was not made inspite of notice. Re-presentation of the cheque on 7th July, 2008 as per the decision of the Supreme Court in ***Prem Chand Vijay Kumar*** (supra), cannot furnish fresh cause of action and constitute a default under Section 138/142 of the Act. However, re-presentation does not obliterate or wash away the alleged offence when the cheque was presented for the first time, and was dishonoured and notice was issued to the respondent No. 1 to make payment.

9. In view of the aforesaid, the impugned order passed by the learned Metropolitan Magistrate dated 10th September, 2008 cannot be sustained and is set aside.

10. At this stage, learned counsel for the respondent No. 1 states that the complaint was filed belatedly and not within the prescribed period of limitation. Learned counsel for the petitioner disputes the said fact. The

date on which the complaint was filed is not mentioned in the revision petition. I need not go into these issues and these are aspects for the learned Metropolitan Magistrate to examine and go into. The revision petition is disposed of.

11. The petitioner will appear before the learned Metropolitan Magistrate on 20th May, 2010, when a date of hearing in the matter will be given.

12. It is clarified that this Court has not expressed any opinion on merits and the findings given above are for the purpose of disposal of the present revision petition. All other aspects are left open. In the facts and circumstances of the case, there will be no order as to costs.

DASTI.

SANJIV KHANNA, J.

APRIL 19, 2010
VKR