

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

Reserved on: 9th December, 2014
Date of Decision: 12th January, 2015

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+ CRL. M.C. 4688/2014

NEW DELHI TELE TECH PVT. LTD. Petitioner
Through: Mr. Sunil Choudhary with Mr. Raghu
Vashisht, Advocates.
versus

M/S. CISCO SYSTEMS CAPITAL
(INDIA) PVT. LTD. Respondents
Through: Mr. Punit Kumar Bhalla with Ms.
Chetna Bhalla and Ms. Isha Abrol,
Advocates.

+ CRL. M.C. 4690/2014

NEW DELHI TELE TECH PVT. LTD. Petitioner
Through: Mr. Sunil Choudhary with Mr. Raghu
Vashisht, Advocates.

versus

M/S. CISCO SYSTEMS CAPITAL
(INDIA) PVT. LTD. Respondents
Through: Mr. Punit Kumar Bhalla with Ms.
Chetna Bhalla and Ms. Isha Abrol,
Advocates.

+ CRL. M.C. 4692/2014

NEW DELHI TELE TECH PVT. LTD. Petitioner
Through: Mr. Sunil Choudhary with Mr. Raghu
Vashisht, Advocates.

versus

M/S. CISCO SYSTEMS CAPITAL

(INDIA) PVT. LTD.

.....Respondents

Through: Mr. Punit Kumar Bhalla with Ms.
Chetna Bhalla and Ms. Isha Abrol,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By way of these petitions filed under Section 482 of Code of Criminal Procedure, 1973 (hereinafter after referred to as 'Cr.P.C.'), the petitioner has assailed orders dated 06.08.2014 and 01.09.2014 passed by learned Metropolitan Magistrate, Dwarka Courts, New Delhi whereby the request of the petitioner herein for return of complaint for filing the same in the Court of appropriate territorial jurisdiction was declined.

2. Since all the petitions involve an identical question of law, therefore they are being disposed of by this common order.

3. The factual matrix of the case is that the petitioner filed complaint(s) under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') against respondents for the offence under Section 138 of the Act. Crl. M.C. No.4688/2014 pertains to cheque No.548896 dated 20.05.2012 for Rs.1,74,04,331/- (Rupees One crore seventy four lakhs four thousand three hundred and thirty one); Crl. M.C. No.4690/2014 relates to cheque No.548897 dated 20.06.2012 for Rs.1,72,43,950/- (Rupees One crore seventy two lakhs forty three thousand and nine hundred fifty); Crl. M.C. No.4692/2014

pertains to cheque No.548898 dated 20.07.2012 for Rs.1,70,83,569/- (Rupees One crore seventy lakhs eighty three thousand five hundred sixty nine). All these cheques are drawn on Bank of India, Andheri (West) Branch, Mumbai, Maharashtra.

4. In order to have a better understanding of facts of the cases, it would be appropriate to refer to facts of one case. The facts are extracted from Crl. M.C. No.4688/2014. The respondent herein (complainant) filed a complaint under Section 138 of the Act on the allegations, *inter alia*, that the petitioner company is a private company and the lessee, the accused No.2 to 5 are its Directors. Accused No.2 is the Chairman and Managing Director of accused No.1 company and accused No.2 to 5 are responsible for affairs and in-charge of and day-to-day conduct of accused No.1 company. The company granted loan facility under the master lease and finance agreement to the accused No.1 company on the terms and conditions contained in the loan agreement executed on 25.05.2008 for the purpose of financing capital expenditure. Pursuant to the loan facility disbursed to the accused, accused defaulted in repayment, and the complainant was forced to initiate proceedings under Section 138 of the Act and proceedings under Order XXXVII of the Code of Civil Procedure. The proceedings were compromised before the Mediation Centre at Tis Hazari Courts, Delhi on 06.09.2011 and the proceedings under Section 138 of the Act were withdrawn and the suit was disposed of as compromised. In compliance of the said order, the accused issued a post dated cheque bearing No.548896 dated 20.05.2012 for Rs.1,74,04,331/- (Rupees One crore seventy four lakhs four thousand three hundred thirty one)

drawn on Bank of India, Andheri (West), Mumbai, Maharashtra. On presentation the said cheque was dishonoured with the returning memo dated 21.07.2012 on account of 'funds insufficient'. Despite statutory notice dated 06.08.2012, the petitioner failed to make payment of the amount of cheque.

5. Vide order dated 13.09.2012, learned trial court took cognizance of the offence under Section 138 of the Act and summoned the accused persons. The accused persons entered appearance. The name of accused No.3 namely Mr. Gaurav Puri was dropped by the trial court on 19.03.2013.

6. Notice under Section 251 of Cr.P.C. in the original complaint was served on the petitioner (accused No.1) on 19.03.2014, to accused Nos.2 and 4 on 25.01.2014 and to accused No.5 on 21.12.2013. The application under Section 145(2) of Cr.P.C. filed on behalf of the accused persons was allowed on 25.03.2014. Examination-in-chief of authorized representative of the complainant, Mr. Sudeep Sarkar (CW-1) was recorded on 06.08.2014 and cross-examination was deferred at the request of learned counsel for the accused persons.

7. On 01.09.2014, it was submitted on behalf of petitioner (accused No.1 in original complaint) that recording of evidence has not commenced and, therefore, the complaint be returned to the complainant for filing the same in appropriate Court in terms of judgment in '**Dashrath Rupsingh Rathod vs. State of Maharashtra and Another**', 2014 (9) SCC 129. The said request was declined by learned trial court vide impugned order dated 01.09.2014.

8. Feeling aggrieved by the said orders the petitioner has filed the present petitions.

9. Learned counsel for the petitioner contended that the cheque in question is drawn on Bank of India, Andheri (West) Branch, Mumbai, Maharashtra and Delhi Courts have no jurisdiction to entertain and try the complaint in view of the law laid down in '**Dashrath Rupsingh Rathod's** case (supra). According to him the trial had not commenced before learned Metropolitan Magistrate and the trial court was bound to return the complaint for want of jurisdiction as per the renowned judgment passed by Hon'ble Supreme Court of India in '**Dashrath Rupsingh Rathod's** case (supra).

10. Learned counsel for the petitioner has also referred to the directions issued by Hon'ble Supreme Court of India in the said judgment in support of his submissions.

11. *Per contra*, learned counsel for respondent urged that notice under Section 251 of Cr.P.C. was served on the petitioner on 19.03.2014, to accused Nos.2 and 4 on 25.01.2014. The application under section 145(2) of the Act was allowed on 25.03.2014. Thus, the judgment in '**Dashrath Rupsingh Rathod's** case (supra) is not fully applicable and the complaint cannot be returned.

12. I have bestowed my thoughtful consideration to the submissions made by learned counsel for both the parties and have also perused the material on record.

13. In order to appreciate the submissions made by learned counsel

for the petitioner, it would be appropriate to discuss in brief the relevant provision of Section 145 of the Act, the said provision reads as under: -

“145. Evidence on affidavit. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974.) the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.”

14. On a careful reading of the aforesaid provision, it is manifestly clear that the legislature has allowed complainant to give his evidence by way of an affidavit during the course of trial in respect of offence punishable under Section 138 of the Act by virtue of sub-section (1) of Section 145 of the Act. Sub-section (2) of Section 145 of the Act provides that the Magistrate may on the application moved by the accused, summon the complainant for his cross-examination as to the effect contained therein.

15. Section 145 of the Act, which seeks to attend a constructive purpose, should be read rationally. The Statement of objects and reasons of the Act are for the purpose of a fast and expeditious trial which is even otherwise a requisite condition for a criminal trial. It is needless to mention here that the Negotiable Instruments Act is a special legislation and the provisions contained in a special statute

have overriding effect over the provisions contained in a general statute. This makes it possible for the evidence of the complainant to be taken without presence of an accused being an essential prerequisite condition. Sections 143 to 147 were introduced in the Act by virtue of Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 which came into force w.e.f. 06.02.2003. According to Section 143, the offence under Section 138 of the Act is to be tried summarily which envisages fast and expeditious conclusion of a trial by the trial court. It is important to consider here that the nature of examination in each case is a different matter which has to be considered differently by the court in different circumstances. However, such a consideration has to be made keeping the provision of Section 145(1) and having regard to the object and purpose of the entire scheme of Sections 143 to 146 of the Act.

16. In '**Indian Bank Association and Ors. vs. UOI & Ors.**', (2014) 5 SCC 590, Hon'ble Supreme Court has laid down the procedure to be followed by subordinate courts dealing with the cases under sections 138 of the Act. The said directions are contained in para 23 of the Judgment which reads as under:-

Directions

"23. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the criminal courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given: -

23.1. The Metropolitan Magistrate/ Judicial Magistrate (MM/JM), on the day when the complaint under Section

138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

23.2. The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The court, in appropriate cases, may take the assistance of the police or the nearby court to serve notice on the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow up action be taken.

23.3. The court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, the court may pass appropriate orders at the earliest.

23.4 The court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for re-calling witness for cross-examination.

23.5 The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses, instead of examining them in court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the court.”

17. In view of the aforesaid directions in **Indian Bank Association’s** case (supra), there is no scope of doubt that after serving

notice in terms of Section 251 of Cr.P.C. upon an accused, the Magistrate shall fix the case for defence evidence, unless an application is made by an accused under Section 145(2) of the Act for recalling a witness for cross-examination. At the same time, it has been further directed that the concerned Magistrate must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case.

18. There may be three situations when notice in terms of Section 251 of Cr.P.C. is served upon an accused;

- (i) After framing of notice in terms of Section 251 of Cr.P.C. the matter is fixed for DE as no application as envisaged in Section 145(2) of the Act is moved by the accused;
- (ii) After framing of notice in terms of Section 251 of Cr.P.C., an application under Section 145(2) of the Act is moved by an accused but it is yet to be allowed by a Magistrate; and
- (iii) After serving notice under Section 251 Cr.P.C., the application moved under Section 145(2) of the Act by an accused for cross-examination of the complainant, has been allowed by the Magistrate.

19. The question arises as to whether trial would be said to have commenced in all the aforesaid three situations or not. The answer has to be in negative in first two situations. It is only in the third situation

when the application under Section 145(2) of the Act has been allowed by the Magistrate only then trial would be said to have commenced within the meaning of Section 145(2) of the Act.

20. The Apex Court in '**Dashrath Rupsingh Rathod**'s case (supra) observed in para 22 that the category of complaint cases where proceedings have gone to the stage of Section 145(2) of the Act or beyond shall be deemed to have been transferred from the Court ordinarily possessing territorial jurisdiction, as clarified therein, to the Court where it is presently pending. Thus, it is only when the stage of proceedings in cases filed under Section 138 of the Act has reached the stage of Section 145(2) of the Act or beyond thereof, such case shall continue to be dealt with by the Court where it is pending trial.

21. In the instant case, it is an undisputed fact that request to cross examine the complainant in terms of Section 145(2) of the Act made by the petitioner (who is accused No.1 in the original complaint) had already been allowed by the trial court vide order dated 25.03.2014. The examination-in-chief of Mr. Sudeep Sarkar (CW-1), authorized representative of the complainant was recorded on 06.08.2014 and cross-examination was deferred at the request of accused persons. That being so, it is clear that the trial has reached beyond the stage of Section 145(2) of the Act. Thus, I do not find any illegality or infirmity in the approach adopted by the learned trial court.

22. In the light of the aforesaid discussion, the petitions are devoid of merit. Accordingly, the petitions deserve to be dismissed and the same are hereby dismissed.

23. The trial court record be sent back forthwith.

Crl. M.A. No.15950/2014 in Crl. M.C. No.4688/2014

Crl. M.A. No.15958/2014 in Crl. M.C. No.4690/2014

Crl. M.A. No.15962/2014 in Crl. M.C. No.4692/2014

The applications are dismissed as infructuous.

**(VED PRAKASH VAISH)
JUDGE**

JANUARY 12th, 2015

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