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

+ **Date of Decision: 20.09.2016**

% **CRL.L.P. 234/2015**

APPAREL EXPORT PROMOTION COUNCIL

..... Petitioner

Through: Mr. Kuljeet Rawal, Advocate

versus

M/S MAHAVIR INTERNATIONAL PVT LIMITED & ORS

..... Respondents

Through: Mr. Vishwa Bhushan Arya, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

CRL.L.P. 234/2015

1. Leave granted.

Crl. Appeal No. /2016 (to be numbered and registered)

2. Let the appeal be numbered and registered.

3. With the consent of parties, I have heard learned counsels and proceed to judgment.

4. The appellant has preferred the present appeal to assail the judgment dated 02.01.2015 passed by the learned MM-02, South, Saket Courts, New Delhi, whereby the appellant's complaint being CC No.642/1 under Section 138 of the Negotiable Instruments Act has been dismissed, and the respondent accused acquitted.

5. The case of the appellant was that the appellant is a company registered under Section 25 of the Companies Act, sponsored by the Government of India through the Ministry of Textiles. The appellant is looking after the matters relating to export of readymade garments from India to other countries. The appellant administers the Garment Export Policy issued by the Government of India from time to time. The further case of the appellant is that every exporter, who intends to export readymade garments from India, has to register with the complainant No.1 and a registration certificate is granted by complainant No.1 in favour of the exporter.

6. The case of the appellants/ complainants is that the accused No.1 company, whose Managing Director and Director are accused No.2 & 3, is registered with complainant No.1 vide registration certificate No.45836 issued by complainant No.1. Respondents/ accused No.2 & 3 were the Directors of the accused company responsible for the conduct and business of accused No.1 at the relevant time. They had issued the cheques in question for the amounts of Rs.1,10,016/-, Rs.10,00,000/- and Rs.40,660/-, all dated 01.06.2005 drawn on Bank of Rajasthan Limited, Naraina Branch, New Delhi in favour of the complainant for the purpose of allocation of export quota, revalidation and utilisation thereof. The said cheques were

dishonoured upon presentation due to the bank account being closed vide memo dated 30.11.2005. The appellant issued a legal demand notice dated 06.12.2005. The same was served on the accused by registered post on 13.12.2005. Despite lapse of stipulated period of 15 days, the demand was not met and, consequently, the complaint was preferred.

7. The defence of the accused persons was that the said cheques had been issued towards security, and that the accused was not liable to make payment of the dishonoured cheques. Complainant No.2, the Director of complainant No.1 was examined as the complainant's witness. During his cross-examination, he deposed that the cheques in question were taken with the stipulation of security - that if the accused company fulfils its export obligations, then the cheques will not be used, and in case the accused company fails to meet its export obligations, then the cheques will be encashed.

8. At this stage it is important to note that this witness admitted that on the date of issuance of the cheques in question, there was no determined liability of the accused persons. I may also observe that according to the appellant, this admission made by the complainant's witness was contrary to the record, as the determination of liability of the accused had been made by the Assistant Director Balwant Singh by a speaking order dated 01.10.2005, and the quantified liability was Rs.3,32,876/-. According to the appellant, the said order was carried in appeal by the accused company and the said appeal was also eventually dismissed on 08.03.2007 vide order No.14/17/2007-IT passed by the 2nd Appellate Committee of the Government of India, Ministry of Textiles. I may observe that these

documents were not led in evidence in the Trial Court and are not part of the Trial Court Record. However, they have been tendered by learned counsel for the appellant along with list of documents on 14.09.2016 and taken on record.

9. The Trial Court in its impugned judgment relied upon the decision of this Court in ***Rameshwar Dass Devi Dayal (P) Ltd. Vs. Consolidated Steels & Alloys Ltd. and Others***, Criminal Revision Petition No.426/2002, wherein the meaning of the term ‘debt’ had been explained by the Court to mean “*a sum of money which is payable at the present but also includes the sum of money which would become payable in future by reason of a present obligation*”. This Court observed that there must be a present obligation to pay the amount at the relevant point of time.

10. The Trial Court also placed reliance on ***M/s Collage Culture and Others Vs. Apparel Export Promotion Council & Others***, 2007 (4) JCC (NI) 388, decided by this Court, wherein this Court had observed that a post-dated cheque may be issued in two circumstances – it may either be issued in respect of a debt in *presenti* but payable in future, or it may be issued for a debt which may become payable in future upon the occurrence of a contingency event. The Trial Court in relation to the ***M/s Collage Culture & Others*** (supra) observed as follows:

“Also highlighting the difference between the above stated two circumstances, the Hon'ble High Court of Delhi has held that the word 'due' means 'outstanding at the relevant date' and further has held that the debt has to be in existence as a crystallized demand akin to liquidated damages and not a demand which may or may not come into existence; coming into

existence being contingent upon the happening of an event.”

11. By holding that the cheques in question had not been issued for an existing due; and that they had been issued by way of security, the Trial Court observed that the dishonour of such cheques would not attract Section 138 of the NI Act.

12. When the leave petition was heard on 23.08.2016, this Court passed the following order:

“ I have heard submissions of learned counsel for the parties on the leave petition.

*The learned Magistrate proceeded to dismiss the complaint primarily on the ground that the cheques in question were security cheques issued by the respondent and that they were not issued in respect of a debt or other liability existing on the date of issue of the cheques. The learned Magistrate placed reliance on the judgment of this Court in **M/s Collage Culture and Others Vs. Apparel Export Promotion Council & Others**, 2007 (4) JCC (NI) 388.*

*It has been pointed out by learned counsel for the petitioner that, firstly, the decision in **Collage Culture** (supra) has been set aside by the Supreme Court in **Apparel Export Promotion Council & Another Vs. M/s College Culture & Others**, Crl.Appeal No.1678/2012 decided on 29.07.2015.*

*Learned counsel for the petitioner has also placed reliance on the decision of this Court in **Credential Leasing & Credits Ltd. Vs. Shruti Investments & Another**, 223 (2015) DLT 343, wherein this Court has taken the view that even a security cheque could form basis of a complaint under Section 138 of the Negotiable Instruments Act, if on the date of deposit of the post-dated security cheque, the debt of the accused stood crystallised.*

Learned counsel for the respondent has tendered in

Court the cross-examination of the petitioner/ complainant's witness CW-1 G.P. Madhwal, Director, Apparel Export Promotion Council conducted on 18.03.2011. It is submitted that from the cross-examination of the said witness, it appears that the liability of the accused was quantified at Rs.3.5 Lakhs by the order of the "appropriate authority" in the year 2010, whereas the cheques in question had been deposited for encashment in the year 2005. Thus, it is submitted that even on the date of deposit of the said cheques, there was no liquidated debt ascertained and, consequently, the debt was not enforceable.

*Mr. Rawal seeks an adjournment by submitting that even in **Apparel Export Promotion Council** (supra), the Supreme Court remitted the matter back to ascertain as to whether, or not, on the date of deposit of the cheques, the liability had been quantified. He seeks to take instructions, whether the first tier ascertainment of liability had taken place under the scheme in question on the date of deposit of the cheques.*

At request of the petitioner, adjourned to 15.09.2016."

13. Thus, the submission of the appellant is that the impugned judgment is not sustainable, firstly, on the ground that it placed reliance on Collage Culture, which has been reversed by the Supreme Court in **Apparel Export Promotion Council & Another Vs. M/s College Culture & Others**, Criminal Appeal No.1678/2012 decided on 29.07.2015.

14. The second submission of the appellant is that in **Credential Leasing & Credits Ltd.** (supra), this Court has further elaborated by observing that the crucial and relevant date would be the date of presentation of the cheque. Thus, if the crystallised and ascertained debt or other liability exists on the date when the cheque is presented for payment, it would not be relevant whether, or not, such crystallised debt or other liability existed on the date when the cheque was issued. The observation made by this Court in

Credential Leasing & Credits Ltd. (supra) reads as follows:

“30. Thus, I am of the considered view that there is no merit in the legal submission of the respondent accused that only on account of the fact that the cheque in question was issued as security in respect of a contingent liability, the complaint under Section 138 of the NI Act would not be maintainable. At the same time, I may add that it would need examination on a case to case basis as to whether, on the date of presentation of the dishonoured cheque the ascertained and crystallised debt or other liability did not exist. The onus to raise a probable defence would lie on the accused, as the law raises a presumption in favour of the holder of the cheque that the dishonoured cheque was issued in respect of a debt or other liability. As settled by the Supreme Court, the said onus obliges the accused to raise a defence – either by picking holes in the case of the complainant and/ or by positively leading defence evidence which leads the Court to believe that there is a probable defence raised by the accused to the claim of the complainant with regard to the existence of the debt or other liability. The said onus does not cast as stringent an obligation on the accused, as it casts on the complainant, who has to prove beyond reasonable doubt the guilt of the accused.”

15. Mr. Rawal submits that the speaking order which determined and crystallised the liability of the accused was passed on 01.10.2005, whereas the cheques in question were presented and dishonoured subsequently, i.e. on 30.11.2005. Thus, on the date of presentation of the cheques, the liability of the accused had been ascertained and crystallised. Mr. Rawal submits that the said speaking order was passed in a case involving the accused, and the accused was aware of this order. The same is evident from the fact that accused had even preferred an appeal against the said speaking order dated 01.10.2005, which was dismissed on 08.03.2007 vide Order No.14/17/2007–IT. Mr. Rawal submits that in these circumstances, this Court should

exercise its jurisdiction under Section 311 read with Section 391 Cr.P.C. and permit the leading of the additional evidence in the form of the said speaking order dated 01.10.2005 and the appellate order dated 08.03.2007.

16. The further submission of Mr. Rawal is that even in *Apparel Export Promotion Council & Another* (supra), while upsetting the judgment of this Court in *M/s Collage Culture and Others* (supra), the Supreme Court remanded the case to the Trial Court and the parties were granted liberty to adduce oral and documentary evidence in support of their respective claim and counter-claim.

17. On the other hand, learned counsel for the respondent accused has argued that, firstly, this Court should not interfere with the impugned judgment. The parameters for interference with the impugned judgment are well-recognised. In this regard, he has placed reliance on the decisions of the Supreme Court in *C. Antony Vs. K.G. Raghavan Nair*, AIR 2003 SC 182; and *Ramanand Yadav Vs. Prabhu Nath Jha & Others*, AIR 2004 SC 1053.

18. Learned counsel further submits that the complainant's witness during his cross-examination had admitted that the liability had been ascertained/ crystallised only in the year 2010. The said testimony was before the Trial Court when it passed the impugned judgment. He submits that the appellant cannot be permitted to lead additional evidence since the same was available with the appellant and was to the knowledge of the appellant/ complainant even before the complaint was preferred. He further submits that CW-1 had admitted that the demand was made only after filing of the complaint.

19. In **C. Antony** (supra), the Supreme Court laid down the criteria that the appellate court should adopt for interfering with a judgment of acquittal. The Supreme Court held that the appellate court should first come to the conclusion that the conclusions arrived at by the Trial Court- for good reasons, are either unreasonable or contrary to the material on record. In the absence of any such finding, the High Court cannot take a contra view merely because another view was possible on the material on record.

20. Similarly, in **Ramanand Yadav** (supra), the Supreme Court observed that generally, the order of acquittal should not be interfered with by the appellate court, because the presumption of innocence of the accused is further strengthened by acquittal. If two views are possible on the evidence adduced in the case – one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Supreme Court observed that “*the paramount consideration of the court is to ensure that miscarriage of justice is prevented*”. The appellate court should follow the principle- while dealing with a judgment of acquittal, to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, and relevant and convincing materials have been unjustifiably eliminated in the process, it is compelling reason for interference.

21. Whether or not interfere with the impugned judgment in the present case would, therefore, have to be tested on the basis of the aforesaid guidelines. The impugned judgment is premised on the decision of this court in **Collage Culture** (supra), which has been overruled by the Supreme Court in **Apparel Export Promotion Council & Anr.** (supra). Secondly, the

impugned judgment proceeds on the basis that there was no crystallised liability of the accused ascertained on the date when the cheques were issued. Therefore, the test adopted by the Trial Court was whether: the crystallised liability and debt of the accused existed on the date of issuance of the cheque. This test applied by the Trial Court is contrary to the decision of this court in ***Credential Leasing & Credits Ltd.*** (supra). In the said decision, after analysing several decisions including those of the Supreme Court, this Court observed that:

“28. the scope of Section 138 NI Act would cover cases where the ascertained and crystallised debt or other liability exists on the date that the cheque is presented, and not only to case where the debt or other liability exists on the date on which it was delivered to the seller as a post-dated cheque, or as a current cheque with credit period. The liability, though, should be in relation to the transaction in respect whereof the cheque is given, and cannot relate to some other independent liability. If, on the date that the cheque is presented, the ascertained and crystallised debt or other liability relatable to the dishonoured cheque exists, the dishonour of the cheque would invite action under Section 138 NI Act. There could be situations where, for example, an issue may be raised with regard to the quality, quantity, deficiency, specifications, etc. of the goods/services supplied, or accounting. It would have to be examined on a case to case basis, whether an ascertained or crystallised debt or other liability exists, which could be enforced by resort to Section 138 NI Act, or not”.

22. Thus, the Trial Court appears to have applied legal principles which have either been expressly disapproved by the Supreme Court, or which have been expounded upon by this Court, and the application of the legal principles by the Trial Court is contrary to the decision of this Court. These, by themselves, are good, compelling and substantial reasons to interfere

with the impugned judgment in appeal. As noticed by the Supreme Court in ***Ramanand Yadav*** (supra), the paramount consideration of the court is to ensure that miscarriage of justice is prevented. Thus, the present is a fit case for interference with the impugned judgment.

23. So far as the aspect as to whether, or not, the appellant should be permitted to lead additional evidence under section 311 Cr PC is concerned, it is evident from a perusal of the speaking order dated 01.10.2005 that the debt and liability of the accused had been quantified by the said order to the tune of Rs.3,32,876.00. This liability existed on the date when the cheques in question were presented. Even subsequently, the said liability was affirmed in appeal by the second appellate committee vide its order dated 08.03.2007. It is evident that the statement of CW-1 Sh. G.P. Madhwal, which he made during his cross examination, to the effect that:

“It is correct that the day we deposited the cheques Ex. CW 1/4 to Ex CW 1/6 of Rs.11,50,676/- the company did not have the liability of the like amount It is correct that the orders of appropriate authority qua the demand are not on record as it was passed after the filing of the complaint. We had made the demand from the company of approximately Rs.3.5 lacs in writing. It is correct that the demand so made in writing is not on the record. The demand was made after the order of the appropriate authority which was approximately in the year 2010.”

would stand belied, and would be of no avail to the accused, if the additional evidence/ documents sought to be led in evidence, namely, the speaking order dated 01.10.2005 and the orders of the first and second appellate committee are led in evidence, as oral evidence contrary to documentary evidence would be of no avail and it is the documentary

evidence which would prevail.

24. The parameters applicable to the grant of permission for leading additional evidence have been enumerated by the Supreme Court in *Jamatraj Kewalji Govani Vs. State of Maharashtra* AIR 1968 SC 178, which has been followed in *Rajendra Prasad Vs. Narcotic Cell through its Officer-in-charge, Delhi* 1999 CrL.L.J. 3529, and also in *Rama Paswan & Ors. Vs. State of Jharkhand* 2007 CrL.L.J. 2750.

25. In *Jamatraj Kewalji Govani* (supra), the Supreme Court considered the scope of Section 540 of Cr PC, 1898, which reads as follows:

“S. 540 : Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witnesses, or recall and re-examine any parson already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it essential to the just decision of the case.”

26. The same is paramateria with Section 311 of Cr PC, 1973. The Supreme Court observed that the said section confers wide discretion on the Court to act as the exigencies of the justice require. The Supreme Court also took note of Section 165 of the Evidence Act and observed that Section 540 of Cr PC, 1898 and Section 165 of the Evidence Act confer jurisdiction on the Judge to act in the aid of justice. It was argued before the Supreme Court that the power conferred by Section 540 on the Court could not be invoked since the trial had gone through various stages.

27. The Supreme Court rejected the said submission and other submissions while observing that Section 540 is intended to be wide in its scope. It was held that there was no limitation on the power of the Court arising from the stage at which the trial may be reached, provided the Court is bonafide of the opinion that for the just decision of the case, step must be taken. The Supreme Court in para 14 of this decision observed as follows:

“14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and, obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction.”

28. Thus, it is the duty and obligation of the Court to invoke section 311 of the Cr. PC in case it is so considered necessary to arrive at a just decision of the case. **Jamatraj Kewalji Govani** (supra) was followed by the Supreme Court in **Rajender Prasad** (supra), which was a case under Section 311 Cr PC, 1973.

29. The Supreme Court in **Rama Paswan** (supra) observed that the object underlying section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing valuable evidence on record or leaving ambiguity in the statement of witnesses examined from

either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused. The said section applies to all proceedings, inquiries and trial under the Code and empowers the Magistrate to issue summons to any witness at any stage of proceedings, trial or inquiry. The discretion conferred on the Court is to be exercised judiciously considering the wide power that it vests with the Court.

30. In view of the nature of the additional documents sought to be led in evidence by the appellant, namely, the speaking order dated 01.10.2005, the order of the first appellate committee dated 02.05.2006 and the order of the second appellate committee dated 08.03.2007, there can be absolutely no doubt with regard to their relevance for a just decision of the case. If these documents are proved and are to be read in evidence, one of the fundamental premise on which the acquittal of the accused is founded – namely, that no ascertained or definitive liability of the accused existed on the date of presentation of the cheques in question, would stand negated.

31. Pertinently, in *Apparel Export Promotion Council & Another* (supra), the Supreme Court reversed the decision of this Court in *College Culture* (supra); remanded the case, and; granted liberty to the parties to adduce oral and documentary evidence in support of their claim and counter claim before the Trial Court. I propose to follow the same path.

32. Consequently, for the aforesaid reasons, the appeal is allowed and the impugned judgment dated 02.01.2015 is set aside. The complaint is remanded to the Trial Court for its re-determination after granting

opportunity to the appellant/ complainant to lead in evidence the additional documents, namely, the speaking order dated 01.10.2005, the order of the first appellate committee dated 02.05.2006 and the order of the second appellate committee dated 08.03.2007. The respondent/ accused shall be entitled to cross examine the complainants witness on the aforesaid aspects and lead rebuttal evidence, if the respondent so chooses.

33. The Trial Court shall, after recording the additional evidence, decide the complaint afresh in the light of the above state legal principles. The Trial Court record be send back to it with a copy of this order forthwith. The Trial Court shall proceed after notice to the parties.

VIPIN SANGHI, J

SEPTEMBER 20, 2016

bsr/sr