

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

% Decided on: February 15, 2017

+ **CRL.M.C. 2827/2011 and Crl. M.A. No. 10067/2011 (Stay)**

JITESH KALRA AUTHORIZED REPRESENTATIVE

UNICON REAL ESTATES P.LTD.

..... Petitioner

Represented by: Mr. Abhik Kumar, Advocate.

versus

GOPAL DASS & ANR.

..... Respondents

Represented by: Mr. Madhurendra Kumar,
Advocate for respondent No.1
with respondent No.1 in person.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. By the present petition the petitioner M/s Unicon Real Estates Pvt. Ltd. (in short 'Unicon') seeks quashing of Criminal Complaint Case No.3967/1 titled as 'Shri Gopal Dass vs. Unicon Real Estates Pvt. Ltd. & Anr.' pending in the Court learned Metropolitan Magistrate, Patiala House Courts, New Delhi under Sections 138 and 142 of the Negotiable Instruments Act, 1881 (in short 'NI Act') qua the petitioner and also quashing of the summoning order dated 24th June, 2011.

2. A brief exposition of facts leading to filing of complaint is that the respondent No.1 Gopal Dass and six other persons namely Mahesh Kumar, Santosh, Vinod Kumar Bhardwaj, Ashok Das, Ankur Singhal and Tilak Raj Ahuja issued a legal notice through the counsel to Unicon under Section 138 NI Act on 26th February, 2011 stating that Unicon had received an amount of ₹5,98,600/- individually for booking of an apartment in Today Homes and

Infrastructure Pvt. Ltd. (in short 'Today Homes') and a Memorandum of Understanding in this regard was signed and executed by Shri Nikhil Nigam, Regional Head, Gurgaon of Today Homes. Unicon promised to repay the principal amount with appreciation totalling to a sum of ₹9,78,600/- and had issued cheque No. 445803 for a sum of ₹78,28,800/- drawn on Standard Chartered Bank, Sansad Marg dated 28th January, 2011 to Gopal Dass, representative of all the noticee.

3. On 29th January, 2011 on presentation, the said cheque was returned unpaid with the remarks 'funds insufficient'. The complainant tried to contact telephonically and thereafter a meeting was held with Jitesh Kalra and Tomar who promised necessary payments on 19th February, 2011 however, the promise was not fulfilled. Thus Unicon was called upon to pay a sum of ₹78,28,800/- along with an interest of 18% per annum from the date of dishonor of cheque, that is, 29th January, 2011 till payment and a further sum of ₹15,000/- as cost and expenses for sending the legal notice within 15 days of receipt of the legal notice. A reply to the legal notice was sent by Unicon to Gopal Dass and others on 10th March, 2011. It was stated that Unicon was only a consultant and Gopal Dass had booked two apartments with Today Homes by depositing the cheques mentioned and Unicon was in no way responsible for payment.

4. Gopal Dass re-presented the cheque which was again dishonored vide return memo dated 7th April, 2011 with the remarks 'funds insufficient'. Hence a fresh notice was issued by the counsel on behalf of Gopal Dass to Unicon and Nikhil Nigam, authorized signatory of Unicon on 5th May, 2011. Again a reply was sent by Unicon to the counsel on 18th May, 2011 stating that no cause of action arose against Unicon.

5. Hence Gopal Dass filed a criminal complaint being Complaint Case No.3967/1 titled as ‘Shri Gopal Dass vs. Unicon Real Estates Pvt. Ltd. & Anr.’ in the Court learned Metropolitan Magistrate, Patiala House Courts, New Delhi under Sections 138 and 142 of NI Act whereon summons were issued to both Unicon and Nikhil Nigam vide order dated 24th June, 2011.

6. Contention of learned counsel for the petitioner Unicon is twofold. Firstly, that the cheque was signed by Nikhil Nigam not as authorized signatory of Unicon but in his individual capacity and thus Unicon could not be made liable for non-payment. Secondly, it is urged that the complaint was barred by limitation as the cause of action accrued to the petitioner for filing of the complaint when payment was not made after a lapse of 15 days from the receipt of the first notice dated 26th February, 2011. Reliance is placed on the decision of the Supreme Court reported as 1998 (6) SCC 514 Sadanandan Bhadran vs. Madhavan Sunil Kumar and 2005 (4) SCC 417 Prem Chand Vijay Kumar vs. Yashpal Singh & Anr.

7. It is not disputed by learned counsel for Gopal Dass, respondent No.1 that the cheque was signed by Nikhil Nigam and there is no endorsement that it was on or behalf of Unicon.

8. Section 141 NI Act provides that if the person committing an offence under Section 138 NI Act is a company, every person who, at the time when the offence was committed, was in-charge of and responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence. Thus besides the company, the person in-charge and responsible to the company for the conduct of the business of the company are also vicariously held liable. However, it has not been provided in the Act that a person though in-charge of the affairs of the

company, if signs the cheque in his individual capacity, the company will be vicariously liable. Thus if the cheque is issued by an individual not acting on behalf of the company, the vicarious liability on the company cannot be fastened in the absence of any specific provision permitting the same.

9. As regards the second contention, Supreme Court in Sadanandan (supra) laid down that the cause of action to file complaint on non-payment despite issue of notice arises but once and no fresh cause of action would arise on repeated dishonor on re-presentation. Describing the phrase ‘cause of action’ it was held:

5. The next question that falls for our determination is whether dishonour of the cheque on each occasion of its presentation gives rise to a fresh cause of action within the meaning of Section 142(b) of the Act. Section 142 reads as under:

“142. 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;

(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.”

From a plain reading of the above section, it is manifest that a competent court can take cognizance of a written complaint of an offence under Section 138 if it is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138.

(emphasis supplied)

6. *In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908) “cause of action” means every fact which it is necessary to establish to support a right or obtain a judgment. Viewed in that context, the following facts are required to be proved to successfully prosecute the drawer for an offence under Section 138 of the Act:*

- (a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;*
- (b) that the cheque was presented within the prescribed period;*
- (c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and*
- (d) that the drawer failed to make the payment within 15 days of the receipt of the notice.*

If we were to proceed on the basis of the generic meaning of the term “cause of action”, certainly each of the above facts would constitute a part of the cause of action but then it is significant to note that clause (b) of Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. The reason behind giving such a restrictive meaning is not far to seek. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause (c) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under Section 142 is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142(c) arises — and can arise — only once.

7. *Besides the language of Sections 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them is that for dishonour of one cheque, there can be only one offence and such offence*

is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour, the drawer cannot be liable for any offence nor can the first offence be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

8. *The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under clause (c) of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes, the court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part should have effect, the above conclusion cannot be drawn for that will make the provision for limiting the period of making the complaint nugatory.*

9. *Now, the question is how the apparently conflicting provisions of the Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour, and that too, within one month from the date the cause of action arises, can be reconciled. Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonised, with the interpretation that on each presentation of the cheque and its dishonour, a fresh right — and not cause of action — accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any*

point of time during the validity of the cheque. But once he gives a notice under clause (b) of Section 138, he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires.

10. The decision in Sadanandan (supra) was followed in Prem Chand (supra) wherein it was reiterated that it is well settled that if dishonor of a cheque has once snowballed into a cause of action it is not permissible for a payee to create another cause of action with the same cheque.

11. As noted above, the cheque in question was re-presented and on each occasion of dishonor, notice was issued by the complainant. Thus the cause of action to file the complaint under Section 138 read with Section 142 NI Act arose but once when no payment was made despite fifteen days of the receipt of notice elapsing. In view of the discussion aforesaid, the proceedings in Complaint Case No.3967/1 titled as ‘Shri Gopal Dass vs. Unicon Real Estates Pvt. Ltd. & Anr.’ pending in the Court learned Metropolitan Magistrate, Patiala House Courts, New Delhi under Sections 138 and 142 of the Negotiable Instruments Act, 1881 and the summoning order dated 24th June, 2011 qua the petitioner Unicon are set aside.

12. Petition and application are disposed of.

(MUKTA GUPTA)
JUDGE

FEBRUARY 15, 2017
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