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

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Judgment delivered on: 15.03.2019

+ CRL.REV.P. 244/2016

ATUL KUMAR SHARMA

..... Petitioner

versus

STATE (NCT OF DELHI) & ANR

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Mridul Jain, Advocate with petitioner in person.

For the Respondent : Ms. Kusum Dhalla, APP for the State.
Mr. Sunil Kumar, Advocate for respondent No.2.

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. Petitioner impugns judgment dated 27.01.2016, whereby, the Appellate Court set aside the order of conviction under Section 138 Negotiable Instrument Act on the ground that the complaint was not filed immediately after the first notice of default was given to the respondent.

2. Petitioner had filed a complaint under Section 138 Negotiable Instrument Act, 1881 *inter alia* contending that the cheque issued by the respondent had got dishonoured for insufficient funds.

3. The Trial Court, by order dated 05.01.2015, had convicted the respondent and by order dated 13.01.2015 had sentenced him to pay a fine

of Rs.1,50,000/-.

4. The Appellate Court, in the impugned judgment dated 27.01.2016, noticed the fact that the petitioner had issued a legal notice of demand dated 07.01.2013 consequent to dishonour of the cheque on 27.12.2012. It was contended in the complaint that the respondent thereafter approached the petitioner and asked him to represent the cheque, which was represented but was once again dishonoured on 31.01.2013. Thereafter, another notice dated 16.02.2013 was issued, which was also not complied with and thereafter subject complaint was filed on 23.03.2013.

5. The Appellate Court noticed that the complaint was not filed immediately after the first dishonour and service of the first notice of demand and was filed after the cheque was dishonoured the second time and second notice of default was issued and accordingly held the complainant to be not maintainable being time barred from the first notice.

6. Learned counsel for the petitioner relies on the judgment of the three Judge Bench of the Supreme Court in *MSR Leathers vs. S. Palaniappan And Anr.: (2013) 1 SCC 177*, whereby, on a reference to a larger Bench, the three Judge Bench has held as under:-

“21. There is, in our view, nothing either in Section 138 or Section 142 to curtail the said right of the payee, leave alone a forfeiture of the said right for no better reason than the failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do so had first arisen. Simply because the prosecution for an offence under Section 138 must on the language of Section 142 be instituted within one month from the date of the failure of the drawer to make the payment does not in our view militate against the

accrual of multiple causes of action to the holder of the cheque upon failure of the drawer to make the payment of the cheque amount. In the absence of any juristic principle on which such failure to prosecute on the basis of the first default in payment should result in forfeiture, we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138.

31. Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.

33. In the result, we overrule the decision in Sadanandan Bhadran's case (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements

stipulated in the proviso to Section 138 of the Negotiable Instruments Act. The reference is answered accordingly. The appeals shall now be listed before the regular Bench for hearing and disposal in light of the observations made above.”

7. The larger Bench of the Supreme Court has answered the reference of the question “*Whether payee or holder of cheque can initiate proceeding of prosecution under Section 138 of Negotiable Instrument Act, 1881 for the second time if he has not initiated any action on earlier cause of action?*” by holding that a prosecution based on a second or successive default in payment of the cheque amount would not be impermissible simply because no prosecution based on the first default, which was followed by a statutory notice and a failure to pay, had been launched.

8. In view of the law, as laid down by the larger Bench of the Supreme Court, the impugned order, allowing the appeal of the respondent and dismissing the complaint of the petitioner solely on the ground of limitation calculated from the first notice of default, is not sustainable.

9. A complainant is entitled to file a complaint under section 138 Negotiable Instruments Act, based on a second or successive default in payment of the cheque amount, even though he had not initiated prosecution based on the first default, provided that the requirements stipulated in the proviso to Section 138 are satisfied for the second or successive default based on which the prosecution is now launched.

10. Accordingly, the impugned order is set aside. Sequitur to the same is that the appeal filed by the respondent before the Appellate Court shall

stand restored. The matter is remitted to the Appellate Court for reconsideration of the appeal on merits.

11. It is clarified that this Court has neither considered nor returned any finding on the merits of the defence of the respondent or the claim of the petitioner.

12. Parties are directed to appear before the concerned Appellate Court for directions on 26.03.2019.

13. Petition is disposed of in the above terms.

14. Order *Dasti* under signatures of the Court Master.

MARCH 15, 2019
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SANJEEV SACHDEVA, J

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