

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.01.2020

+ **CRL.L.P. 223/2016**

APPAREL EXPORT PROMOTION COUNCILPetitioner

versus

COLLAGE CULTURE & ORSRespondent

Advocates who appeared in this case:

For the Petitioner : Mr Kuljeet Rawal, Advocate.
For the Respondent : Mr Atul Jain, Advocate for R-1 to 6
: along with R-5 in person.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present appeal is directed against the order dated 8th January, 2016 (hereafter 'the impugned order') passed by Learned Metropolitan Magistrate in CC No.3775/15 captioned as 'Apparel Export Promotion Council v. Collage Cultures & Others', whereby the complaint preferred by the appellant under Section 138 of the Negotiable Instruments Act, 1881 (hereafter the 'NI Act') was dismissed. The appellant had re-presented its complaint but the same was not entertained, as it was filed beyond the period as stipulated by the court where it was initially filed, while returning the complaint. The only question that arises for consideration is whether the appellant could maintain its complaint as re-presented.

2. Briefly stated, the controversy involved in the present petition arises in the following context. The appellant is a company incorporated under Section 25 of Companies Act, 1956 and is sponsored by the Government of India. It was formed, *inter alia*, with the object of promoting exports of readymade garments from India to various parts of the world. It is also assigned the task of administering the Garments Policy issued by the Government of India. As a part of its mandate, all persons exporting garments from India to the rest of the world are required to be registered with the appellant.

3. The respondent is a partnership firm registered with the appellant under Registration Certificate No.37114. The respondent issued seven cheques: cheque bearing number 566352 for a sum of ₹29,200/-; cheque bearing no. 566353 for ₹2,77,980/-; cheque bearing no. 566354 for ₹5,40,000/-; cheque bearing no. 566355 for ₹4,17,980/-; cheque bearing no. 566356 for ₹4,00,000/-; cheque bearing no. 566357 for ₹5,17,980/-; and cheque bearing no. 566358 for ₹1,86,060/- (all dated 1st June, 2003), for a total sum of ₹23,69,200/- for revalidation of its Past Performance Entitlement (PPE), which is permissible under the Garment Export Entitlement Policy. When the said cheques were presented for encashment, they were dishonoured. The return memo dated 27/28th November, 2003 indicated the reason for dishonour of the cheques as 'funds insufficient'.

4. The appellant caused a legal notice dated 4th December, 2003 to be sent to the respondents by speed post on 5th December, 2003 (Ex. C22). Since the respondents failed to make the payment within the

stipulated time, the appellant preferred a complaint dated 17th January, 2004 under Section 138 of the NI Act.

5. The appellant led pre-summoning evidence and tendered its evidence by way of affidavit (Ex.C-1/A). It relied upon the cheques (Ex.C-4 to Ex.C-10), return memos (Ex.C-11 and Ex.C-17), legal demand notice, registry receipts and proof of dispatch (Ex.C-18 to Ex.C-22). The respondent and its constituent partners were summoned by the learned MM by an order dated 21st January, 2004. Thereafter, bailable warrants were issued against the accused persons, as they failed to appear.

6. In/around December, 2004 the respondent preferred a Criminal Miscellaneous Main Petition (CMM no. 3011/2004) before this Court, *inter alia*, praying that the subject summoning order be recalled and the complaint under Section 138 of the NI Act be dismissed. The said petition (CMM No.3011/2014) was allowed on 11th October, 2007 and the summoning order dated 21st January, 2004 was quashed.

7. Being aggrieved by said order dated 11th October, 2007 passed by this Court, the appellant filed a Special Leave Petition under Article 136 of the Constitution of India [SLP (Crl.) 5796/2008] before the Hon'ble Supreme Court. The Apex Court allowed the same and the appeal was registered as Criminal Appeal No.1678/2012. The Supreme Court, by its order dated 17th October, 2012, directed the Ld. Trial Court to proceed with the trial, but not pass the final judgment without the leave of the Supreme Court. The parties were given liberty to adduce

oral or documentary evidence in support of their respective claims, which would be examined by the Trial Court. On the basis of this order, the appellant filed an application to revive its complaint.

8. On 1st August, 2014 the Supreme Court of India, in the matter of ***Dashrath Rupsingh Rathod v. State of Maharashtra: (2014) 9 SCC 129***, held that Section 177 of the Cr.P.C was required to be complied with and only the court exercising territorial jurisdiction where the offence was committed – that is, where the cheque was dishonoured – could entertain a complaint under Section 138 of the NI Act. Thus, the Court of the Metropolitan Magistrate, within whose limits the bank on which the cheque is drawn is situated, would have the jurisdiction to adjudicate the complaint. The court clarified that *‘regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, whether by affidavit or oral statement, the Complaint will be maintainable only at the place the cheque stands dishonoured’*.

9. Accordingly, the Ld. MM, Patiala House Courts, New Delhi vide order dated 25th August, 2014 directed return of complaint in original along with all documents in original after taking their certified copies. The appellant physically collected the complaint on 13th October, 2015. Thereafter, the appellant re-filed the complaint before the court having jurisdiction, Ld.MM (NI Act)-01, South East, Saket, on 4th November, 2015. On 9th November, 2015, the appellant/complainant was granted an opportunity to file an appropriate application to explain the delay however, the Ld. Counsel for the complainant contended that there was no delay in filing the case.

10. The Ld. MM, by the impugned order dated 8th January, 2016, dismissed the complaint on the ground that it was barred by limitation. A reading of the impugned order indicates that the reasons for dismissal of the complaint are, essentially, threefold. First, Ld. MM held that in terms of the directions issued in ***Dashrath Rupsingh Rathod*** (*supra*), the complaint was to be returned and could be re-filed within thirty days. That is, thirty days from the date of the order returning the complaint dated 25th August, 2014. The present case was re-filed on 04th November, 2015, that is, after expiry of approximately one year and two months of the order returning the complaint. Second, the learned MM also held that in view of Sub-clause (1) and Sub-clause (2) of Section 142A of the NI Act, as inserted by the Negotiable Instruments (Amendment) Ordinance, 2015 all pending cases were to be transferred to the court having competent jurisdiction. However, the present case was neither pending in the Court of MM, Saket nor in the Court of MM, Patiala House Court and there was no provision in the Ordinance to restore the case. Third, that the Hon'ble Supreme Court has not stayed the proceedings before the Trial Court. Therefore, the contention that the appellant was awaiting the final decision in its appeal pending before the Supreme Court, could not be accepted as a ground for not re-filing the complaint within the stipulated period.

11. Mr Rawal, the learned counsel for the appellant assailed the impugned order on several grounds. First, he submitted that since the complaint was returned on 13th October, 2015 and was re-filed on 4th November, 2015, it was within the period as stipulated by the

Supreme Court in ***Dashrath Rupsingh Rathod*** (*supra*).

12. Second, he contended that by 8th October, 2016, the Negotiable Instruments (Amendment) Ordinance, 2015 was not in force and was replaced by the Negotiable Instruments (Amendment) Second Ordinance, 2015. And, the amended Section 142A of the NI Act did not specify any time limit for re-filing/transfer of the complaint.

13. Third, he submitted that as per the order dated 29th July, 2015, the Hon'ble Apex Court directed that opportunity be afforded to the appellant to adduce oral or documentary evidence but not pronounce its judgment without the leave of the Apex Court. He submitted that dismissal of the complaint was without considering the order dated 29th July, 2015 passed by the Supreme Court.

14. The learned counsel for the respondents submitted that the said cheques were not issued as consideration but as security cheques for due performance and the same could be encashed only on the happening of certain events, that is, non-utilisation of quota. He submitted that there was no enforceable liability when the cheques were presented and therefore, the respondent had not committed any offence under Section 138 of the NI Act. The learned counsel also countered the contentions advanced on behalf of the appellant. He submitted that by an order dated 25th August, 2014, the Court directed that the complaint be returned and it gave an opportunity to the appellant to re-file the same within a period of thirty days. Therefore, the appellant had no discretion when to seek physical return of the complaint and re-file the same. The appellant

could not defer re-filing of the complaint awaiting the disposal of its SLP by the Supreme Court, as the court had expressly indicated that the trial was not stayed.

Reasons and Conclusion

15. At the outset, it is relevant to observe that there is no dispute that the complaint filed by the appellant before the learned Metropolitan Magistrate, Patiala House Courts was not maintainable at the material time, as the said Court did not have the jurisdiction to entertain the said complaint when it was instituted. The cheques in question were drawn on Vijaya Bank, Defence Colony Branch, New Delhi. The appellant had presented the cheques through its banker – IDBI Bank, Nehru Palace Branch. The complaint was filed before the learned M.M. Patiala House as the cause of action was stated to have arisen within the jurisdiction of Police Station Kalkaji New Delhi, that is, where the complainant's bank (IDBI Nehru Palace) – where the cheques in question were deposited – is located.

16. It is relevant to refer to the decision of the Supreme Court in ***Dashrath Rupsingh Rathod*** (*supra*), whereby the court had held as under:-

“18. ...The proviso to Section 138 of the NI Act features three factors which are additionally required for prosecution to be successful. In this aspect Section 142 correctly employs the term “cause of actin” as compliance with the three factors contained in the proviso are essential for the cognizance of the offence, even through they are not part of the action constituting

the crime. To this extent we respectfully concur with *Bhaskaran* in that the concatenation of all these concomitants, constituents or ingredients of Section 138 of the NI Act, is essential for the successful initiation or launch of the prosecution. We, however, are of the view that so far as the offence itself the proviso has no role to play. Accordingly a reading of Section 138 of the NI Act in conjunction with Section 177 CrPC leaves no manner of doubt that the return of the cheque by the drawee bank alone constitutes the commission of the offence and indicates the place where the offence is committed.

19. In this analysis we hold that the place, situs or venue of judicial inquiry and trial of the offence must logically be restricted to where the drawee bank is located. ...

21. ...We clarify that the complainant is statutorily bound to comply with Section 177, etc. of CrPC and therefore the place or situs where the Section 138 complaint is to be filed is not of his choosing. The territorial jurisdiction is restricted to the court within whose local jurisdiction the offence was committed, which in the present context is where the cheque is dishonoured by the bank on which it is drawn.”

17. In view of the above, it was not open for the appellant to file its complaint before the learned M.M., Patiala House Courts, who did not have territorial jurisdiction over the place where the respondent’s bank was located (that is, Defence Colony, New Delhi).

18. However, the Supreme Court, in order to obviate and avoid any legal complications, directed that all complaint cases where proceedings had reached the stage of Section 145 (2) of the NI Act or beyond – that is, cases where persons giving evidence had been

summoned and examined – would be deemed to be transferred from the court ordinarily possessing territorial jurisdiction to the court where the complaint had been filed. Thus, in such cases, notwithstanding that the complaint had been filed before a Court which did not have the territorial jurisdiction, the proceedings would not be impeded. This is so, because the said Court would now possess the jurisdiction to adjudicate the complaint by virtue of the same being transferred to it in terms of the decision of the Supreme Court.

19. Admittedly, in this case, the complaint had not reached the stage of Section 145(2) of the NI Act and thus, at the material time, the learned M.M., Patiala House Courts did not have the jurisdiction to try the said complaint. The Supreme Court further directed that all other cases (cases other than those that had reached the stage of Section 145(2) of the NI Act and beyond) would be returned for filing it in the proper court. The Court further directed that if such complaints are refiled within a period of thirty days of its return, it shall be deemed to have been filed within the time prescribed by law unless the initial or prior filing was itself time barred.

20. In compliance with the directions issued by the Supreme Court in ***Dashrath Rupsingh Rathore*** (*supra*), the learned M.M. by an order dated 25th August, 2014, directed as under:-

“Accordingly the present complaint is returned in original to the complainant to file the same before the appropriate court. Documents be returned in original after taking certified copy of the same and thereafter file be consigned to record room after due

compliance.”

21. The appellant was thereafter required to re-file the complaint within the stipulated period of thirty days. Admittedly, the appellant chose not to re-file the complaint within the prescribed period. Mr Rawal contended that the appellant did not refile as it thought fit to await the decision of the Supreme Court in Crl. Appeal No. 1678/2012. He submitted that the said decision was rendered on 29th July, 2015 and the appellant could not be faulted for not re-filing the complaint within a period of thirty days of the order dated 25th August, 2014 passed by the learned M.M., returning the complaint for re-filing the same before the appropriate court.

22. Plainly, the above contention is unmerited. By the order dated 17th October, 2012, passed by the Supreme Court in SLP (Crl.) 5796/2008, the Trial Court was directed to proceed with the complaint but refrain from passing any final judgment. It is relevant to note that this order was passed at the instance of the appellant. More importantly, the appellant had taken steps for reviving the complaint and pursuant to the said order, it had filed an application requesting the Trial Court to proceed with the complaint. And, in terms of the order dated 17th October, 2012, the Trial Court had revived the proceedings. In view of the above, it is not open for the appellant to now urge that it was awaiting any further orders from the Supreme Court. Clearly, once the proceedings before the Trial Court stood revived, the appellant was bound to follow the orders passed in those proceedings, unless the same were stayed.

23. It is also relevant to note that the appellant did not refile the complaint within the period of thirty days of the final decision of the Supreme Court in its appeal (Crl. Appeal No. 1678/2012). The said appeal was allowed by an order dated 29th July, 2015; however, the appellant had re-filed the complaint on 04th November, 2015, that is, about a hundred days after the decision of the Supreme Court. Although, the appellant states that it had taken steps for collecting the original file immediately after the Supreme Court had delivered its decision on 29th July, 2015, there is no material on record to indicate the date on which the application for receiving the original complaint was made.

24. The contention that since the original complaint was received on 13th October, 2015, the same was within the period of thirty days as stipulated by the Supreme Court in ***Dashrath Rupsingh Rathore*** (*supra*), is bereft of any merit. The complaint was returned by the order dated 25th August, 2015 passed by the learned M.M. The fact that the appellant had not physically collected the said complaint would not extend the period, during which it was required to re-file the same.

25. Mr Rawal also contended that in view of the Negotiable Instruments (Amendment) Ordinance 2015, the complaint filed by the complainant is required to be transferred to a Court having proper jurisdiction. Thus, even if the appellant had not accepted return of its complaint, the same was required to be entertained as the Learned MM, Patiala House Courts could exercise the jurisdiction in the matter. He relied upon Sections 3 and 4 of the said Ordinance.

26. The Negotiable Instrument (Amendment) Ordinance, 2015 was notified on 15th June, 2015 and came into effect immediately. Sections 3 and 4 of the said Ordinance, are set out below:-

“3. In the principal Act, section 142 shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely:-

“(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction. –

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.”

4. In the principal Act, after section 142, the following section shall be inserted, namely:-

“142A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or directions of any court, all cases arising out of section 138 which were pending in any court, whether filed before it, or transferred to it, before the commencement of the

Negotiable Instruments (Amendment) Ordinance, 2015 shall be transferred to the court having jurisdiction under sub-section (2) of section 142 as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1), and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Ordinance, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different court, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142 before which the first case was filed and is pending, as if that sub-section had been in force at all material times.”

27. In terms of Section 142 (A) (1) of the NI Act as inserted by virtue of Section 4 of the said Ordinance, all cases arising out of Section 138 of the NI Act that were pending in any Court were directed to be

transferred to court having jurisdiction under Section 142(2) of the NI Act, as if the said provision was in force at all material times. Thus, if a complaint under Section 138 of the NI Act was pending in a Court that otherwise did not have jurisdiction, it would be transferred to the Court having jurisdiction in terms of Section 142 (2) of the NI Act.

28. It is also relevant to note that in terms of Section 142 (A) of the NI Act, as amended by the Negotiable Instrument (Amendment) Act, 2015 – which was enacted with retrospective effect from 15.06.2015 – all cases transferred under the Negotiable Instruments (Amendment) Ordinance, 2015 were deemed to have been transferred under the NI Act. There is no dispute that if the appellant's complaint was pending before the learned M.M. (Patiala House Courts) or had been re-filed before the Learned MM, South East, Saket Courts the appellant could have the benefit of Section 142(A) (1) of the NI Act as inserted by the Negotiable Instruments (Amendment) Ordinance 2015. However, the said ordinance is of little assistance to the appellant since the said case was neither pending before the learned M.M. Patiala House Court nor before the court of learned MM, South East Distt. as on 15th June, 2015, that is, the date on which the said ordinance came into force. The appellant's complaint (CC 204/2004) stood returned to the appellant by virtue of the order dated 25th August, 2018 passed by the learned M.M.

29. Mr Rawal's contention that the appellant is entitled to the benefit of Section 142(A)(1) of the NI Act, as inserted by the said ordinance, is also inconsistent with the action of the appellant, inasmuch as, the appellant had, after the said ordinance came into force, sought return of

the physical copy of the complaint and had accepted the same for being re-filed before the learned M.M. (South East) District, Saket. Thus, the appellant's contention is an afterthought.

30. This Court is also of the view that the aforesaid contention is without merit. The logical *sequitur* of accepting the above contention would be that even if the appellant had not re-filed the said complaint, its complaint would, nonetheless, be required to be adjudicated as a pending case.

31. In view of the above, this Court finds no infirmity with the impugned decision. The present petition seeking leave to appeal against the impugned judgment is, accordingly, dismissed.

JANUARY 06, 2020

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VIBHU BAKHRU, J