



2024:DHC:7983



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

Date of decision: 08th OCTOBER, 2024

IN THE MATTER OF:

+ **CRL.M.C. 241/2022**

PANKAJ KUMAR MODI

.....Petitioner

Through: Mr. Shivendra Singh and Mr. Bikram
Dwivedi, Advocates.

versus

STATE NCT OF DELHI & ANR.

.....Respondents

Through: Mr. Shoaib Haider, APP for the State
Mr. Aman Usman, Advocate (*Amicus
Curiae*) for Respondent No.2

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner herein, who is the Complainant in CC No.2769/2020, filed before the Court of Chief Metropolitan Magistrate, Patiala House Courts, has approached this Court challenging the Order dated 20.11.2021, passed by the learned Metropolitan Magistrate dismissing the Complaint Case No.2769/2020, filed by the Petitioner herein under Section 138 of the NI Act, on the ground that the debt has become time barred.

2. The facts, in brief, as reflected in the Complaint filed by the Petitioner herein are as under:

- a) It is stated that the Accused herein/Respondent No.2 had taken money to the tune of Rs. 1,46,000/- (Rupees One Lakh Forty Six Thousand only) from the Complainant/Petitioner herein in



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2015 for purchasing a taxi.

- b) It is stated that after several instances of demand by the Complainant/Petitioner herein, the Accused/Respondent No.2 herein handed over a cheque bearing No. 000032 dated 20.11.2019, drawn on Andhra Bank, Mayur Vihar, 166-A, Pratap Nagar, New Delhi-110091, for a sum of Rs.24,000/- (Rupees Twenty Four Thousand only) to the Petitioner herein. It is stated that the Accused/Respondent No.2 herein also handed over another cheque bearing No. 000031 dated 25.11.2019, drawn on Andhra Bank, Mayur Vihar, 166-A, Pratap Nagar, New Delhi-110091, for a sum of Rs.82,500/- (Rupees Eighty Two Thousand Five Hundred only).
- c) It is stated that the Petitioner herein/Complainant presented both the cheques bearing No. 000031 & 000032 for clearing on 10.12.2019 and the cheques were dishonoured for the reason “funds insufficient”. It is stated that the Petitioner herein/Complainant informed the Respondent No.2 herein/Accused about the dishonour of the cheques and present the cheques once again on 24.12.2019 and the cheques were once again dishonoured for the reason “drawers signature differs”.
- d) It is stated that the Respondent No.2/Accused assured the Petitioner herein/Complainant that he will clear all the dues of the Complainant but the Accused never obliged to the assurances given by him. Accordingly, the Petitioner herein/Complainant sent legal notices to the Respondent No.2



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herein via two speed posts on 31.12.2019. Despite receiving the said legal notices, the amounts have not been paid by Respondent No.2. The Petitioner, thereafter, filed a complaint against the Respondent No.2 under Section 138 NI Act.

- e) Pre-summoning evidence was recorded and the Complaint was dismissed by the learned Metropolitan Magistrate vide the impugned Order on the ground that though the Complainant has stated that the loan was advanced in 2015, during the course of arguments it was stated by the Complainant, i.e. the Petitioner herein, that the loan was advanced in 2014. The learned Metropolitan Magistrate was of the opinion that since the loan was advanced in 2014-2015 and the cheques in question were presented in 2019, the debt had become time-barred. learned Metropolitan Magistrate has placed reliance on the Judgment dated 24.04.2009, passed by a coordinate Bench of this Court in **CRL. MC 1682/2008**, titled as “M/s. Vijay Polymers Pvt. Ltd. v. M/s. Vinnay Aggarwal”, wherein the coordinate Bench of this Court had placed reliance on Section 18 of the Limitation Act and had held that a cheque which has been issued and raised in respect of time barred debt does not attract the offence under Section 138 of the NI Act.
- f) It is this Order which has been challenged by the Petitioner in the present Petition.

3. Since there was no appearance on behalf of the Respondent No.2, this Court was pleased to appoint Mr. Aman Usman, learned Counsel, as *Amicus Curiae* to assist this Court in the present matter. Mr. Aman Usman has ably



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assisted this Court and has filed his written submissions.

4. It is stated by the learned Counsel for the Petitioner that the learned Metropolitan Magistrate has failed to appreciate Section 25(3) of the Contract Act, 1872 which stipulates that an agreement without consideration is void unless it is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. He, therefore, states that the cheques given by Respondent No.2 were in recognition of the debt and a cheque being a negotiable instrument is in respect of a contract which might have been entered into between the parties during the interregnum. He states that this fact can only be proved by leading evidence in Court and, therefore, the complaint ought not to have been dismissed by the learned Metropolitan Magistrate.

5. Learned *Amicus Curiae* places reliance on the Judgment passed by the Apex Court in K. Hymavathi v. State of Andhra Pradesh and Another, **2023 SCC OnLine SC 1128**, which has held that the cheque amounts to a promise governed by Section 25 (3) of the Indian Contract Act, 1872 and such promise which is an agreement is an exception to the general rule that an agreement without consideration is void and that the debt which is promised to be paid, even if is time-barred is a legally recoverable one and in view of Section 25 (3) of the Indian Contract Act, the promise/agreement is valid and therefore the same is enforceable. Learned *Amicus Curiae* states that Section 25 (3) of the Contract Act read with Section 118 and 138 of the NI Act, which raises presumption under the NI Act would make the complaint maintainable and the Complaint could not have been dismissed at



the initial stage itself.

6. Heard the Counsels and perused the material on record.

7. It is pertinent to reproduce Section 25 (3) of the Contract Act at this juncture and the same reads as under:

“Section 25. Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law.

.....

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

.....”

8. In the concerned opinion of this Court, the issue raised in the present Petition is no longer *res integra* as the same has already been dealt with by the Apex Court in K. Hymavath (supra), wherein the Apex Court has observed as under:

“10. From a perusal of the legal position enunciated, it is crystal clear that this Court keeping in perspective the nature of the proceedings arising under the NI Act and also keeping in view that the cheque itself is a promise to pay even if the debt is barred by time has in that circumstance kept in view the provision contained in Section 25(3) of the Contract Act and has indicated that if the question as to whether the debt or liability being barred by limitation was an issue to be considered in such proceedings, the same is to be decided based on the evidence to be adduced by the parties since the question of limitation is a mixed question of law and fact. It is only in cases wherein an



amount which is out and out non-recoverable, towards which a cheque is issued, dishonoured and for recovery of which a criminal action is initiated, the question of threshold jurisdiction will arise. In such cases, the Court exercising jurisdiction under Section 482 CrPC will be justified in interfering but not otherwise. In that light, this Court was of the view that entertaining a petition under Section 482 CrPC to quash the proceedings at the stage earlier to the evidence would not be justified.

11. Notwithstanding the above, the learned Amicus Curiae would submit that the decisions referred to hereinabove would have to be viewed differently keeping in view the subsequent decision of a Constitution Bench of this Court in the case of the Expeditious trial of Cases under Section 138 of NI Act, 2021 SCC OnLine SC 325 to contend that in the said decision the power of the Magistrate under Section 322 of CrPC being an aspect to be taken into consideration was considered. In a case where the Trial Court is informed that it lacks jurisdiction to issue process for complaints under Section 138 of the Act the proceedings will have to be stayed in such cases. Hence, it is contended that the power of the Trial Court to decide with regard to its jurisdiction is not taken away and in that circumstance exercise of power under Section 482 CrPC by the High Court would be justified. It is further contended by the learned Amicus Curiae that even the position under Section 25(3) of the Contract Act being applicable to criminal proceedings for dishonour of cheque will have to be examined in the background of the provision contained in the Explanation to Section 138 of NI Act which specifies that the debt or other liability enforceable would be only a legally enforceable debt or other liability. In such circumstances if the cheque is issued in respect of the debt which is not enforceable or a



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liability which cannot be recovered, in such event, the presumption under Section 139 of NI Act would not be available.”

9. It is pertinent to mention that the Judgment of the co-ordinate Bench of this Court in M/s. Vijay Polymers Pvt. Ltd. (supra) does not take into account Section 25(3) of the of the Indian Contract Act and, therefore, it has been impliedly over-ruled by the Apex Court in K. Hymavath (supra).

10. In view of the above, the Order dated 20.11.2021, passed by the learned Metropolitan Magistrate dismissing the Complaint Case No.2769/2020, cannot be sustained and is, therefore, set aside. The complaint is restored to its original number

11. This Court accords its appreciation to the efforts put in by Mr. Aman Usman, learned Counsel, in assisting this Court in the present case.

12. The Petition is disposed of, along with the pending applications, if any.

SUBRAMONIUM PRASAD, J

OCTOBER 08, 2024

Rahul