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

% Date of decision: 30.04.2025

\+ CRL.M.C. 976/2024 & CRL.M.A. 3894/2024 STAY

SURESH PIPES PVT. LTD. & ORS. .....Petitioners

Through: Mr. Karan Nagpal and Mr. Arpit Marwah, Advocates.

versus

M/S. RATHI ENTERPRISES .....Respondent

Through: Mr. Rakesh Kumar, Adv. (through VC)

CORAM:
HON'BLE MR. JUSTICE RAVINDER DUDEJA

JUDGMENT (ORAL)

RAVINDER DUDEJA, J.

1. This is a petition filed under Section 482 of the Code of Criminal Procedure, 1973 [**"Code"**] on behalf of the petitioner for quashing of the Complaint Case bearing CC No. 14595/2018, titled "*Rathi Enterprises Vs. Suresh Pipes Pvt. Ltd. & Ors*.", which is stated to be pending before the court of learned MM, Patiala House Court, New Delhi along with quashing of summoning order dated 01.08.2018 and all the proceedings emanating therefrom.

2. Learned counsel for the petitioners submits that the subject cheque was returned vide Cheque Return Memo dated 31.05.2018,

where after, demand notice was issued on 08.06.2018 and served on 15.06.2018. In this regard, he has referred to the tracking report placed on record by the respondent before the trial court. He further submits that even respondent in its complaint filed before the learned trial court has stated in Para No. 15 that the date of service of notice is 15.06.2018. The complaint came to be filed on 27.06.2018 i.e. before the expiry of 15 days period, as provided in Section 138 of the Negotiable Instruments Act, 1881 **[“NI Act”]**.

3. It is argued that the complaint having been filed before the expiry of 15 days period is a premature complaint, and therefore, not maintainable. It is thus submitted that the impugned summoning order has been passed without appreciating that the complaint was pre maturely filed.

4. *Per contra*, learned counsel for the respondent submits that having realized that the complaint was filed three days prior to the statutory period of 15 days after delivery of the legal notice, respondent filed an application dated 07.07.2018 for withdrawal of the complaint, but the same was withdrawn on 17.07.2018. This, according to him, was done at the advice of the learned Magistrate that even though the complaint was filed prematurely, since 15 days had expired after the issuance of the notice, therefore, accused persons could be summoned.

5. It is not necessary to narrate the facts in detail. Suffice to state that petitioners and respondent were having business dealings.

Petitioners had been regularly purchasing goods from the respondent. Petitioners allegedly issued a post dated cheque No. 001053 dated 30.05.2018 for Rs. 1,50,000/-, drawn on HDFC Bank in favour of the respondent. However, on presentation, the said cheque was dishonoured and returned unpaid with the remarks "insufficient funds" vide Cheque Return Memo dated 31.05.2018. Respondent sent a legal notice dated 08.06.2018 to the petitioners, requesting them to make the payment within 15 days from the date of receipt of the legal notice, which was served upon the petitioners on 15.06.2018, but despite service of the notice, neither the petitioners gave any reply to the notice nor made any payment. Respondent ultimately filed a complaint case under Section 138 of the NI Act on 27.06.2018, wherein, the petitioners have been arrayed as accused.

6. Vide order dated 01.08.2018, learned Metropolitan Magistrate summoned the petitioners as accused.

7. Before considering the rival submissions, it would be apposite to refer to Sections 138 & 142 of the NI Act, which read as under:-

> "**138**. Dishonour of cheque for insufficiency, etc., of funds in the account. - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-
(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

"**142.** Cognizance of offences.-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:

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(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."

8. A plain reading of the aforesaid provisions make it clear that the drawer gets 15 days time to make the payment from the date of receipt of notice of dishonor of cheque. It is only thereafter that action under Section 138 of the NI Act can be initiated against the defaulting party. In the case of ***Yogendra Pratap Singh Vs. Savitri Pandey & Anr.***

Criminal Appeal No. 605/2020, the Hon'ble Supreme Court considered an identical issue. The relevant paragraphs of the judgment are extracted below:-

> "**31**. Section 138 of the NI Act comprises of the main provision which defines the ingredients of the offence and the punishment that would follow in the event of such an offence having been committed. Appended to this Section is also a proviso which has three clauses, viz., (a), (b) and (c). The offence under Section 138 is made effective only on fulfillment of the eventualities contained in clauses (a), (b) and (c) of the proviso. For completion of an offence under Section 138 of the NI Act not only the satisfaction of the ingredients of offence set out in the main part of the provision is necessary but it is also imperative that all the three eventualities mentioned in clauses (a), (b) and (c) of the proviso are satisfied. Mere issuance of a cheque and dishonour thereof would not constitute an offence by itself under Section 138.
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> **32**. Section 138 of the NI Act has been analysed by this Court in Kusum Ingots & Alloys Ltd.19 wherein this Court said that the following ingredients are required to be satisfied for making out a case under Section 138 of the NI Act:
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> > (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;
> > (ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
> > (iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;
> > (iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

> (v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

36. Can an offence under Section 138 of the NI Act be said to have been committed when the period provided in clause (c) of the proviso has not expired? Section 2(d) of the Code defines 'complaint'. According to this definition, complaint means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence. Commission of an offence is a sine qua non for filing a complaint and for taking cognizance of such offence. A bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the NI Act unless the period of 15 days has elapsed. Any complaint before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of law. It is not the question of prematurity of the complaint where it is filed before expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law. As a matter of fact, Section 142 of the NI Act, inter alia, creates a legal bar on the Court from taking cognizance of an offence under Section 138 except upon a written complaint. Since a complaint filed under Section 138 of the NI Act before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint in the eye of law, obviously, no cognizance of an offence can be taken on the basis of such complaint. Merely because at the time of taking cognizance by the Court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused, the Court is not clothed with the jurisdiction to take cognizance of an offence under Section 138 on a complaint filed before the expiry of 15 days from the date of receipt of notice by the drawer of the cheque.

37. A complaint filed before expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint which does not disclose the cause of action the Court is not competent to take cognizance. A conjoint reading of Section 138, which defines as to when and under what circumstances an offence can be said to have been committed, with Section 142(b) of the NI Act, that reiterates the

> position of the point of time when the cause of action has arisen, leaves no manner of doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed under clause (c) of the proviso to Section 138, has, in fact, elapsed. Therefore, a Court is barred in law from taking cognizance of such complaint. It is not open to the Court to take cognizance of such a complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date on which the notice has been served on the drawer/accused has elapsed. We have no doubt that all the five essential features of Section 138 of the NI Act, as noted in the judgment of this Court in Kusum Ingots & Alloys Ltd.19 and which we have approved, must be satisfied for a complaint to be filed under Section 138. If the period prescribed in clause (c) of the proviso to Section 138 has not expired, there is no commission of an offence nor accrual of cause of action for filing of complaint under Section 138 of the NI Act.
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> **38**. We, therefore, do not approve the view taken by this Court in Narsingh Das Tapadia and so also the judgments of various High Courts following Narsingh Das Tapadia that if the complaint under Section 138 is filed before expiry of 15 days from the date on which notice has been served on the drawer/accused the same is premature and if on the date of taking cognizance a period of 15 days from the date of service of notice on the drawer/accused has expired, such complaint was legally maintainable and, hence, the same is overruled."

9. Undisputedly, in the present case, notice of demand was served to the petitioners on 15.06.2015 while the complaint was filed on 27.06.2018 i.e. before the completion of 15 days. Realizing the mistake, respondent itself filed an application seeking permission to withdraw the complaint, which was later withdrawn. It is not borne out from the record that the application was withdrawn at the advice of the learned Magistrate. Be that as it may, the complaint filed before expiry of 15 days from the date on which notice was served on the drawer cannot be said to disclose the cause of action in terms of

Clause (c) of the proviso to Section 138 NI Act and cannot be even regarded as a complaint and in view of the legal bar imposed by Section 142 of the NI Act, the Court was barred from taking cognizance of offence under Section 138 NI Act. Merely because by the time the cognizance was taken and summons were issued to the accused, the period of 15 days had expired from the date on which notice had been served on the petitioners, the same would not confer jurisdiction on the Court to take cognizance of offence under Section 138 NI Act. Since the complaint was filed prior to such expiry of 15 days of demand notice, the order taking cognizance of the offence is bad and consequently the complaint is liable to be quashed.

10. Petition is accordingly allowed. Complaint Case bearing CC No. 14595/2018, titled "*Rathi Enterprises Vs. Suresh Pipes Pvt. Ltd. & Ors*.", filed by the respondent under Section 138 read with Section 142 of the NI Act qua the petitioners which is stated to be pending before the court of learned Metropolitan Magistrate, Patiala House Court, New Delhi and all the proceedings emanating therefrom including the impugned summoning order dated 01.08.2018 passed by the learned Metropolitan Magistrate are quashed.

RAVINDER DUDEJA, J.

APRIL 30, 2025/*RM*