
(2009) 06 SHI CK 0015
In the High Court Of Himachal Pradesh

Anant Ram	Vs	APPELLANT
Ram Krishan and Others		RESPONDENT

Date of Decision : 15-06-2009

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2010) 1 Crimes 424 : (2009) 2 ShimLC 275

Hon'ble Judges : Surinder Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Surinder Singh, J.—The above titled criminal revision petitions involve a common question of law and facts, hence taken up together for its decision.

2. In these revision petitions, the petitioner herein, is an accused convicted and sentenced to undergo simple imprisonment for a period of one year and to pay compensation (different amount) in default to undergo further imprisonment, in each of the case u/s 138 of the Negotiable Instruments Act, 1881, in short the "Act", by the learned trial Court which were unsuccessfully challenged by him before the court of Sessions.

3. The factual matrix depicts that the petitioner was running a business under the head and style of "M/s Onkar Enterprises" at Mandi. He deputed some agents including the private respondents in these revision petitions to make members and to collect money and promised them to supply the electronic items like Refrigerator, T.V. and Washing Machines etc. to such customers/ at the end of the scheme in the month of April, 2003, private respondents were also assured to pay them, their commission on the money collected by each of them.

4. It is alleged that the petitioner after receiving the money failed to supply the electronics appliances to some customers and the commission amount of respondent-agents also not paid, as such, he compounded the matter with the Private-respondent (agents) in the month of April, 2004. The terms and

conditions of the compromise were reduced into writing by executing an agreement in the presence of the witnesses for the discharge of his liability, with the promise to make the payment of the due amount to them on or before 30.4.2004 including their commission amount and issued the following cheques drawn at Punjab National Bank, Moti Bazar, Mandi against his Accounts No. 235, 2569:

Sl. No.

Complaint Number/Criminal Case No.

Name of the Complainant

Cheque Number and Date

Amount

1.

128-III/2004

Ram Krishan

350018 dated 27.11.2003

Rs. 3,50,000.00

2.

129-III/2004

Tara Chand

300733 dated 30.04.2004

Rs. 1,35,000.00

3.

130-III/2004

Raj Kumar

300732 dated 30.04.2004

Rs. 59,000.00

4.

133-III/2004

Churamani

300729 dated 30.04.2004

Rs. 3,24,000.00

5.

131-III/2004

L.R. Kaundal

300730 dated 30.04.2004

Rs. 72,000.00

6.

127-III/2004

Prakash Chand

300731 dated 30.04.2004

Rs. 45,000.00

5. The petitioner failed to discharge his liability as promised. Thereafter, the private respondents presented the aforesaid cheques for its encashment in the Bank of the petitioner, the same were dishonored by the banker, which fact was brought to the notice of the petitioner, but again he assured to make the payment to them. However, ultimately he failed to discharge his liability.

6. The private-respondents issued the statutory notice(s), which was/were sent through the registered post as well as under postal certificate. Despite the service of notice(s) upon him in accordance with law, the petitioner failed to make the payment, therefore, the private respondents in each of the petition, referred above filed separate complaints against the accused-petitioner u/s 138 of the Act.

7. After recording the preliminary evidence, learned trial Magistrate found reasonable grounds to summon the petitioner as an accused. He made his presence in the Court and notice of accusation u/s 138 of the Act was put to him, to which he pleaded not guilty and claimed trial.

8. The respondents (complainant), beside examining themselves in each case also produced the other evidence.

9. The accused-petitioner was also examined u/s 313 of the Code of Criminal Procedure. The accused- petitioner admitted having launched the Customer-Home Appliances Scheme under the head and style of M/s Onkar Enterprises. He tacitly admitted that the private respondents were part and parcel of his Scheme, which ended on 20th April, 2003, as alleged. According to him, the electronic appliances worth Rs. 9,000/- to each of the its customers were required to be supplied by the petitioner and his case was that he had supplied these articles to those persons, who had deposited the amount with him, through their agents and not to them whose amount was not received. He admitted his bank account in the Punjab National Bank, Mandi Bazar, in the name of M/s Onkar Enterprises

and he also admitted having issued the cheques in question to the respondent-complainants and admitted the execution of the agreement but he alleged that the said agreement as well as the cheques were got executed, signed and issued to the private respondents by them forcibly. The accused-petitioner further admitted having received the statutory notices issued by the respondents.

10. The petitioner examined himself as his own witness in his defence and at the end of the trial, his plea of innocence as alleged was dis-believed by the learned trial Court. Thus the petitioner was convicted and sentenced as under:

Cr. Revision No.

Criminal Complaint Case No.

Period of Sentence

Compensation awarded

Sentenced in default.

84/208

128-III/2004

Simple Imprisonment for a period of one year

Rs. 3,90,000/-

Simple Imprisonment for a period of three months

86/208

129-III/2004

Simple Imprisonment for a period of one year

Rs. 1,50,000/-

Simple Imprisonment for a period of three months

87/2008

130-III/2004

Simple Imprisonment for a period of one year

Rs. 70,000/-

Simple Imprisonment for a period of three months

88/208

133-III/2004

Simple Imprisonment for a period of one year

Rs .3,60,000/-

Simple Imprisonment for a period of three months

88/208

131-III/2004

Simple Imprisonment for a period of one year

Rs. 80,000/-

Simple Imprisonment for a period of three months

91/208

127-III/2004

Simple Imprisonment for a period of one year

Rs. 55,000/-

Simple Imprisonment for a period of three months

11. The petitioner assailed his conviction and sentence before the court of Sessions in separate appeals, which were dismissed by the learned Additional Sessions Judge on 17.11.2007. Hence these revision petitions.

12. Shri Ashwani Pathak, learned Counsel for the petitioner has argued with vehemence that the claim of the respondents-complainants is not legally enforceable debt because the money was being recovered from the different members, who deposited their money through their agents. Though it is admitted that the commission was required to be paid by the petitioner to respondent-agents, but according to him, the cheques in question issued by the petitioner were issued as a security, pursuant to the agreement executed on 23rd February, 2004 and there was no debt liability of the petitioner against the private respondents the statutory presumption in their favour stands rebutted. Thus, the courts below had wrongly passed the judgments of conviction and sentence against the petitioner.

13. Shri Tarlok Chauhan and Shri G.R. Palsra, learned Counsel for the private respondents have supported the impugned judgments and argued that the cheques in question were issued to discharge the liability for the amount deposited by them with the petitioner. The statutory notice was issued and the petitioner chose not to send its reply nor paid the amount. Further argued that the case of the respondent-complainants fairly and squarely falls within the ambit of Section 138 of the Act. Therefore, no interference is called for and the criminal revision petitions deserve to be dismissed.

14. I have given my thoughtful consideration to the rival contentions of the parties and have carefully gone through the record of each of the petitions.

15. Section 138 of the Act reads 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 honour 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 provision 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.

16. In para 10, the Supreme Court while examining the scope of above section in I.C.D.S. Ltd. Vs. Beena Shabeer and Another, observed and held that the words "where any cheque" and "other liability" occurring in Section 138 are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. These expressions leave no manner of doubt that for whatever reason it may be, the liability u/s 138 cannot be avoided in the event the cheque stands returned by the banker unpaid. Any contra-interpretation would defeat the intent of the legislature.

17. Thus, in the factual context of all the cases in hand the private respondents are the holders of the cheques, which were dishonored and statutory presumption is in their favour. Pare-2 of agreement dated 23rd February, 2004 refers to the petitioner to discharge the liability of its members, represented/ nominated by the respondents upto 30.4.2004 and issued the cheques as guarantee as indicated in para 3 of the agreement aforesaid. It also stands proved on record that the petitioner failed to discharge his liability on or before

the said date, therefore the guarantee cheques were presented for its encashment which bounced back due to "insufficient funds".

18. In *Kumar Exports Vs. Sharma Carpets*, it was held by the Supreme Court that Section 118 of the Act provides certain presumptions to be raised. The reason for these presumptions is that, negotiable instrument passes from hand to hand on endorsement and it would make trading very difficult and negotiability of the instrument impossible, unless certain presumptions are made. The presumption, therefore, is a matter of principle to facilitate negotiability as well as trade. The law with respect to the presumption under the Act as well as Evidence Act has been expounded in detail in this judgment passed by the Supreme Court and it was observed and held as under:

20. The accused in a trial u/s 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the

preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.

19. In all the above cases, petitioner has failed to establish by preponderance of probabilities that there was no debt or liability to be discharged by him. Significantly, he has admitted all these facts in his statement u/s 313 of the Code of Criminal Procedure and as DW-1 in clear and unambiguous words, the reference of forcible execution of agreements and issuance of cheques could not be probablised by him.

20. Therefore, against the aforesaid factual background of the cases in hand and in view of the exposition of law propounded by the apex court, In my opinion, the petitioner could not rebut the statutory presumption under the Act. The cheque(s) in question was/were issued to the private respondents to discharge the liability on or before 30.4.2004, as agreed, which is covered under "any other liability" mentioned u/s 138 of the Act.

21. Since he failed to pay the cheque(s) amount despite notice(s), the Courts below rightly held him guilty and convicted for the offence charged.

22. The next contention of the learned Counsel for the petitioner is that the courts below could not have imposed the sentence in default of payment of compensation, which could have otherwise been recovered as provided under Sections 421 and 431 of the Code of Criminal Procedure. To support his argument, he relied upon the judgment of Kerala High Court passed in Rajendran Vs. Jose,

23. I have considered and examined the above contention raised by the learned Counsel for the petitioner. Section 357(2) is an important provision in the Code of Criminal Procedure. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim, who has suffered by the action of accused.

24. In Hari Kishan Vs. Sukhbir Singh and Others, the Supreme Court observed and held:

This power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the

nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The Court may enforce the order by imposing sentence in default.

25. In Rajenderan's case supra cited by the learned Counsel for the petitioner, the learned Single Judge of Kerala High Court, although noticed the above judgment of the apex Court but observed that it appears the attention of the apex Court was not drawn to the provisions of Section 431 of the Code of Criminal Procedure. Thus relying upon Balraj Vs. State of U.P., which even did not remotely doubted the correctness of the legal proposition adopted in Hari Singh's case, set aside the imprisonment in default as it could be recovered under Revenue Recovery Act.

26. But in Suganthi Suresh Kumar Vs. Jagdeeshan, while analyzing Rajendran's case (supra) of Kerala High Court with reference to Hari Kishan's case above, decided by the apex Court, the Supreme Court observed that it was impermissible for the High Court to overrule the decision of the Apex Court on the ground that the Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India; it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It was pointed out by Supreme Court in Anil Kumar Neotia and Others Vs. Union of India (UOI) and Others, that the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court. That apart Section 431 of the Code has only prescribed that any money (other than fine) payable by virtue of an order made under the Code shall be recoverable "as if it were a fine". Two modes of recovery of the fine have been indicated in Section 421(1) of the Code. What the Supreme Court pronounced in Hari Singh's case is open to all courts in India to follow the said course. The said legal position would continue to hold good until it is overruled by a larger Bench of the Supreme Court. Hence the Single Judge of the High Court of Kerala was held to have committed an impropriety by expressing that the said legal direction of the Supreme Court should not be followed by the subordinate courts in Kerala. The course adopted by the said Judge in Rajendran case was disapproved.

27. Therefore, in view of the above position of law, more specifically when the counsel for the petitioner did not bring in my notice that the apex Court has overruled the ratio of decision rendered in Hari Singh's case (supra) there appears to be no illegality committed by the Courts below by imposing the sentence on the petitioner in default to make the payment of compensation by the petitioner.

28. The next contention of the learned Counsel for the petitioner is that in the

instant cases, separate complaints were filed against the petitioner, relating to the different cheques issued by him. In all the cases, he was convicted and sentenced as mentioned above, by the trial court and his conviction was upheld in appeal, therefore, the sentence as imposed, in each of the case may be directed to run concurrently, which submission is objected to by the learned Counsel for the respondents and also learned Assistant Advocate General.

29. I have examined this submission, of the learned Counsel. In all these cases, the petitioners stands convicted and sentenced u/s 138 of the Act, as detailed above.

30. Section 428 of the Code of Criminal Procedure reads as under:

428. Period of detention undergone by the accused to be set off against the sentence of imprisonment: Where an accused person has, on conviction, been sentenced to imprisonment for a term, [not being imprisonment in default of payment of fine,] the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the terms of imprisonment imposed on him.

31. The perusal of this Section postulates two requisites:

(i) during the stage of investigation, inquiry or trial of a particular case the accused should have been in jail at least for a certain period; and

(ii) he should have been sentenced to a term of imprisonment in that case.

32. If the above two conditions are satisfied then the operative part of the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of investigation, inquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded. The words "if any" in the Section amplifies that if there is no balance period left after such deduction the convict will be entitled to be set free from jail, unless he is required in any other case. In other words, if the convict was in prison, for whatever reason, during the stages of investigation, inquiry or trial of a particular case and was later convicted and sentenced to any term of imprisonment in that case the earlier period of detention undergone by him should be counted as part of the sentence imposed on him.

33. In the background of the above provision, in the instant case this benefit cannot be given to the petitioner for the reasons that in all the aforesaid cases the petitioner never remained in custody during the investigation/inquiry or trial of any case. But he was convicted and sentenced by the learned trial court in all the complaints filed by the private respondents on 29/30.9.2004, his sentence

was suspended in appeal by the first appellate Court on his furnishing the personal bonds in the sum of Rs. 10,000/- in each of the cases with one surety of the like amount to the satisfaction of the trial Court and also to deposit different amount of compensation in each of the cases above but he failed to furnish the personal/surety bonds and deposit the amount as directed by the Additional Sessions Judge, Mandi as such he was sent to jail by the warrant of the commitment on a sentence of imprisonment in all the cases on 11.10.2006. Therefore in these circumstances the contention of learned Counsel for the petitioner is rejected, thus the sentence imposed by the learned trial Court in each case cannot be ordered to run concurrently as it does not fall within the purview of Section 428 *ibid*.

34. No other points urged.

35. All the revision petitions are devoid of any merit as such dismissed.

Send down the records.

Cr. M.P.(M). No. 319/2008.

Infructuous.

Cr. M.P.(M). No. 320/2008.

Exempted.

The application stands disposed of.

Cr. M.P. No. 299/2008

In Cr. Rev. No. 85/2008.

Infructuous.