

(2008) 01 DEL CK 0059

In the Delhi High Court

Case No : Criminal M.C. 639 of 2005 and 3895-96 of 2005 and Criminal M.A. 2130 of 2005 and 8139 of 2005

Desh Deepak Sharma and Others

APPELLANT

Vs

State of Delhi and Others

RESPONDENT

Date of Decision : 18-01-2008

Acts Referred:

Citation : (2008) 147 DLT 293

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : O.P. Khadaria and Deepak Khadaria, for the Appellant; C.L. Dhawan, for the Respondent

Judgement

S. Muralidhar, J.—Criminal MC No. 639/2005 is directed against the summoning order dated 18th July, 2001 passed by the learned Metropolitan Magistrate, New Delhi (?MM?) summoning the Petitioners u/s 138 of the Negotiable Instrument Act, 1881 (?NI Act?) in Complaint Case No. 639/1999 filed by the Respondent Nos. 2 and 3. By the impugned order, the learned MM after perusing the complaint, the cheques in question and the pre-summoning evidence concluded that there was sufficient material to summon the accused u/s 138 of NI Act and that "no other offence other than Section 138 of NI Act is made out."

2. To the extent that the learned MM declined to summon the accused u/s 420 and 406 IPC, the complainants Respondents 2 and 3 filed revision petitions before the learned Additional Sessions Judge (?ASJ?). Initially the revision petitions were dismissed on 10th April 2004 as being not maintainable. However, this Court by an order dated 17th August 2004 remanded the case to the Court of the learned ASJ for disposal of the revision petition on merits. The learned ASJ by an order dated 19th July 2005 allowed the revision petitions after coming to the conclusion that the Petitioners were required to be summoned to face trial u/s 420 read with Section 34 IPC. Aggrieved by the said order dated 19th July, 2005, the Petitioners filed Criminal MC Nos. 3895-96 of 2005.

3. Since both the petitions, i.e. Criminal MC No. 639/2005 and Criminal MC Nos. 3895-96 of 2005 arise out of the same facts they are being disposed of by this common judgment.

4. Mr. O.P. Khadaria, learned Counsel appearing for the Petitioners, first refers to the following order dated 25th February 2005 passed by this Court in Criminal MC No. 639/2005:

Crl. M.A. 2129/2005 in Crl. M.C. 639/2005

Allowed subject to all just exceptions.

Crl M C 639/2005 & Crl M A 2130/2005

There are two petitioners namely Mr. Desh Deepak Sharma, signatory of the cheque in question and Smt. Neelam Sharma who has not signed the cheque, the wife of the petitioner. So far as the petitioner No. 1 is concerned he having signed the cheque is responsible for the payment of the cheque amount. He expresses his defense for the offence u/s 138 of Negotiable Instruments Act which he can prove during trial. So far as provisions of Section 138 of Negotiable Instruments Act is concerned, the petitioner No. 2 Smt. Neelam Sharma may have a cause for quashing. To this extent, petition is admitted.

Notice to the respondents, returnable on 20th July, 2005.

It is submitted that no orders summoning the petitioners under provisions of Section 406/420 read with Section 120B IPC so far has been issued. Till the next date of hearing, personal appearance of the petitioner No. 2 before the trial court is exempted provided she is represented by a counsel subject to the condition that she will appear in person whenever required by the trial court for a specific purpose.

Trial court record be summoned two days prior to the next date of hearing. dusty.

5. Accordingly, Mr.Khadaria submits that he is confining the petition challenging the summoning order only in so far as it concerns Petitioner No. 2 Smt. Neelam Sharma. His submission is that the cheques in question were signed only by the Petitioner No. 1 Shri Desh Deepak Sharma acting on behalf of the firm of which he was a partner. Petitioner No. 2 who is the wife of the Petitioner No. 1 did not sign the cheques. She was not even the partner of the firm. She had no joint account with the Petitioner No. 1. Since she was not a signatory of the cheques in question on behalf of the firm, she could not be proceeded against u/s 138 of the NI Act.

6. Learned Counsel for the Respondent Nos. 2 and 3 complainants did not seriously contest the above submission in so far as Smt. Neelam Sharam is concerned. He did not dispute the facts that the cheques in question were not signed by the Petitioner No. 2 and she was also not a partner or in any way connected with the firm of which the Petitioner No. 1 was a partner.

7. In that view of the matter, this Court has no hesitation in holding that the impugned summoning order dated 18th July, 2001 passed by the learned MM in Criminal Complaint No. 639/1999 Harsh Khosla v. SH. Desh Deepak Sharma and Anr. is unsustainable in law and the said order is hereby set aside as far as Petitioner No. 2 Smt. Neelam Sharma is concerned. Consequently, the Criminal Complaint No. 639/1999 against Petitioner No. 2 Smt. Neelam Sharma for the offence u/s 138 of the NI Act is hereby quashed. Criminal MC No. 639 of 2005 is accordingly allowed with no order as to costs. The pending application also stands disposed of.

Criminal MC Nos. 3895-96 of 2005

8. In regard to the connected petitions, Criminal MC Nos. 3895-96 of 2005, the submissions of Mr. O.P. Khadaria, learned Counsel for the Petitioners were as follows:

(a) The impugned order dated 19th July, 2005 passed by the learned Additional Sessions Judge (?ASJ?) is without jurisdiction since the summoning order dated 18th July, 2001 passed by the learned MM was an interlocutory order and, Therefore, in terms of Section 397(2) of the Code of Criminal Procedure, 1973 (? Cr.PC?) the revision petition was not maintainable. Learned counsel places reliance on the judgments in K.K. Patel v. State of Gujrat 5 (2000) SLT 27 and in Madhu Limaye Vs. The State of Maharashtra, .

(b) The essential ingredients of Section 420 IPC has not been made out vis-?-vis either of the Petitioners and in particular Petitioner No. 2 even upon reading of the complaint as a whole.

(c) The offence of cheating would require that there is a specific allegation of misrepresentation even at the time of entering into the transactions and this essential element is missing in the complaint.

(d) The narration in the complaint itself indicates that the Petitioner No. 2 was not involved in the business transactions in question.

(e) The four cheques were given to the complainant only as a security for certain transactions and these were not to be presented for payment at all.

(f) Petitioner No. 1 has not denied his liability, and has been making payments to the complainant without prejudice to his rights and contentions. In those circumstances, the offence u/s 420 IPC read with 34 IPC can hardly be said to be made out even against the Petitioner No. 1.

9. As regards the question of maintainability of the revision petitions before the learned ASJ, learned Counsel for the complainants submits that the judgment of the Supreme Court in Rajendra Kumar Sitaram Pande and Etc. Vs. Uttam and Another, supports the proposition that a revision petition u/s 397(2) CrPC would not be maintainable only if the order sought to be revised was a purely interlocutory one. Since the order of the learned MM declining to issue summons

u/s 420 IPC was a final as far as that the offence u/s 420 IPC is concerned, the revision petition was indeed maintainable. He also seeks reliance to the observations of the Supreme Court in K.K. Patel (supra).

10. Learned Counsel for the complainant drew attention to the fact that the Petitioners had, even before selling the property in question to the complainant, already entered into an agreement to sell with one Shri Ashok Kumar Sood and this fact was not revealed to the complainant. Therefore, the complainant was forced to part with valuable money on the misrepresentation of the Petitioners that they were the owners of the property in question.

Maintainability of the revision petition

11. The first question that arises is whether the revision petition was maintainable before the learned ASJ against the order dated 18th July 2001 passed by the learned MM declining to issue summons to the Petitioners u/s 420 IPC. The law in this regard has been explained in Madhu Limaye where it was held:

12. Ordinarily and generally the expression "interlocutory order" has been understood and taken to mean as a converse of the term final order". In volume 22 of the third edition of Halsbury's Laws of England at page 742, however, it has been stated in para 1606:

...a Judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to Article The meaning of two words must Therefore be considered separately in relation to the particular purpose for which it is required.

In para 1607 it is said:

In general a Judgment or order which determines the principal matter in question is termed "final".

In para 1608 at pages 744 and 745 we find the words:

An order which does not deal with the final rights of the parties, but either (1) is made before Judgment and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after Judgment and merely directs how the declarations of right already given in the final Judgment are to be worked out, is termed "interlocutory". An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

13. In S. Kuppuswami Rao v. The King [1947] F C R 180 Kania C. J., delivering the Judgment of the Court has referred to some English decisions at pages 185 and 186. Lord Esher M. R. said in Salaman v. Warner [1891] 1 Q.B. 734 "If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in

dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory." To the same effect are the observations quoted from the Judgments of Fry L. J. and Lopes L. J.

Applying the said test, almost on facts similar to the ones in the instant case, it was held that the order in revision passed by the High Court (at that time there was no bar like Section 397(2) was not a "final order" within the meaning of Section 205(1) of the Government of India Act, 1935. It is to be noticed that the test laid down therein was that if the objection of the accused succeeded, the proceeding could have ended but not vice versa. The order can be said to be a final order only if, in either event, the action will be determined. In our opinion if this strict test were to be applied in interpreting the words "interlocutory order" occurring in Section 397(2), then the order taking cognizance of an offence by a Court, whether it is so done illegally or without jurisdiction, will not be a final order and hence will be an interlocutory one. Even so, as we have said above, the inherent power of the High Court can be invoked for quashing such a criminal proceeding. But in our Judgment such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by Section 397(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the intention of the Legislature when it retained the revisional power of the High Court in terms identical to the one in the 1898 Code. In what cases then the High Court will examine the legality or the propriety of an order or the legality of any proceeding of an inferior Criminal court? Is it circumscribed to examine only such proceeding which is brought for its examination after the final determination and wherein no appeal lies? Such cases will be very few and far between. It has been pointed out repeatedly, vide, for example, *The River Wear Commissioners versus Adamson* (1) and *R.M.D. Chamarbaugwalla Vs. The Union of India* (UOI), that although the word occurring in a particular statute are plain and unambiguous, they have to be interpreted in a manner which would fit in the context of the other provisions of the statute and bring about the real intention of the legislature. On the one hand, the legislature kept intact the revisional power of the High Court and, on the other, it put a bar on the exercise of that power in relation to any interlocutory order. In such a situation it appears to us that the real intention of the legislature was not to equate the expression "interlocutory order" as invariably being converse of the words "final order". There may be an order passed during the course of a proceeding which may not be final in the sense noticed in *Kuppuswami's case* (supra), but, yet it may not be an interlocutory order-pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, we think that the bar in Sub-section (2) of Section 397 is not meant to be attracted to such kinds of intermediate orders. They may not be final orders for the purposes of Article 134

of the Constitution, yet it would not be correct to characterise them as merely interlocutory orders within the meaning of Section 397(2). It is neither advisable, nor possible, to make a catalogue of orders to demonstrate which kinds of orders would be merely, purely or simply interlocutory and which kinds of orders would be filial and then to prepare an exhaustive list of those types of orders which will fall in between the two. The first two kinds are well-known and can be culled out from many decided cases. We may, however, indicate that the type of order with which we are concerned in this case, even though it may not be final in one sense, is surely not interlocutory so as to attract the bar of Sub-section (2) of Section 397. In our opinion it must be taken to be an order of the type falling in the middle course.

12. Thereafter in *Rajendra Kumar Sitaram Pande* the Supreme Court, after noticing the judgment in *Madhu Limaye* concluded as under (para 6 page 1030):

6. xxx xxx xxx

This being the position of law, it would not be appropriate to hold that an order directing issuance of process is purely interlocutory and, Therefore, the bar under Sub-section (2) of Section 397 would apply. On the other hand, it must be held to be intermediate on quasi final and, Therefore, the revisional jurisdiction u/s 397 could be exercised against the same. The High Court, Therefore, was not justified in coming to the conclusion that the Sessions Judge had no jurisdiction to interfere with the order in view of the bar under Sub-section (2) of Section 397 of the Code.

13. In *K.K. Patel* the Supreme Court reiterated this principle as can be seen from para 10 of the said judgment which reads as under:

10. That apart, the view of the learned Single Judge of the High Court that no revision was maintainable on account of the bar contained in Section 397(2) of the Code, is clearly erroneous. It is now well neigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage. vide *Amar Nath and Others Vs. State of Haryana and Another*, ; *Madhu Limaye Vs. The State of Maharashtra*, ; *V.C. Shukla Vs. State through C.B.I.*, ; and *Rajendra Kumar Sitaram Pande and Etc. Vs. Uttam and Another*, . The feasible test is whether by upholding the objections raised by a party, would it result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable.

14. Learned Counsel for the complainant has rightly contended that the order dated 18th July, 2001 passed by the learned MM declining to issue summon against the accused Petitioners u/s 420 IPC partakes the character of a final order. Further as explained by the Supreme Court in *Rajendra Kumar Sitaram*

Pande it would not be correct to characterise such an order as a purely interlocutory order in respect of which no revision petition can be filed u/s 397(2) CrPC. In that view of the matter, no fault can be found with the order dated 19th July, 2005 passed by the learned ASJ rejecting the preliminary objection as to the maintainability of the revision petition.

15. That brings us to the merits of the present petition seeking the quashing of the order of the learned ASJ as well as the criminal complaint insofar as relates to Section 420 IPC.

16. The scope of the power of this Court to interfere in exercise of its power u/s 482 CrPC is fairly well settled in a number of judgments. A reference may be made to *State of Haryana v. Bhajan Lal* 1992 Supp. (1) SCC 3356 and *Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others*, . Ultimately, it is for the Petitioners seeking quashing of the criminal proceedings to demonstrate that the complaint even if read as a whole does not make out a prima facie for the trial of the offences with which the Petitioners are charged or for which they have been summoned.

17. In the instant case, an attempt was made by the learned Counsel for the Petitioners to show that the Petitioners and in particular the Petitioner No. 2 cannot be proceeded for the offence under Sections 420 read with 34 IPC. He referred to several paragraphs of the complaint filed by the Respondent No. 2 and certain documents placed on record in support of his submissions.

18. In the first place, it must be noticed that the complaint itself which was filed on 18th November, 1999 is required to read as a whole. The relevant statements in the complaint read as under:

2. That the owner of the said Batra properties did call the complainant in the first week of July 1999 at his office where the accused No. 1 and 2 were also present and represented before the complainant that they are the owners of the second floor with terrace rights of property bearing No. 443, Guru Harkrishan Nagar, Paschim Vihar, New Delhi and also assured the complainant about the clear title in respect of the said property and the complainant though asked the accused No. 1 to show the documents of title in respect of the property in question which the complainant desired to purchase from the accused persons.

3. That since the complainant was inclined to purchase the property and as such, the accused No. 1 in the presence of the accused No. 2 showed the title deeds executed in their favor on 13th July, 1999 registered in the office of Sub-Registrar, Janakpuri, New Delhi and both the accused further persuaded the complaint to enter into the deal and further represented and made assurances before the complainant that the property being purchased by the complainant and sold by the accused persons is free from all sorts of encumbrances and was having no charge of any nature whatsoever and made every efforts to trap the complainant in the said deal and finally, the complainant agreed to purchase the second floor with terrace rights of the property bearing No. 443, Guru Harkrishan

Nagar, Paschim Vihar, New Delhi for a total sale consideration of Rs. 32 lakhs.

4. That on 14.7.1999 an Agreement to sell was executed by the accused No. 1 with the complainant on which the accused No. 2 signed as a witness and assurance was given by the accused persons to the complainant that the property in question had got no charge and the accused No. 2 being the wife of the accused No. 1 also signed a witness to the said Agreement to Sell and the complainant paid a sum of Rs. 9,00,000/- (Rupees nine lacs only) as an earnest money and the balance amount of Rs. 23 lacs was agreed to be paid on or before 8.10.1999. The accused No. 2 while signing the receipt in token of having received the amount of Rs. 9,00,000/- from the complainant by her husband i.e., the accused No. 1 also assured along with the accused No. 1 that the property in question is situated in a nice area and stressed the complainant that the complainant would feel pleasure to purchase the said property and as such, the amount of Rs. 9,00,000/- was received by the accused No. 1 on 14.7.1999 and acknowledged the same in writing.

6. That since the deal was to finalize on or before 8.10.1999 and as such, the complainant further made the payment of Rs.13 lakhs in cash on 8.8.1999 in view of the terms and conditions of the Agreement to Sell dated 14.7.1999 duly executed between the complainant and the accused No. 1 in which the accused No. 2 signed as a witness and the receipt of Rs. 13,00,000/- (Rupees thirteen lacs only) was duly received and acknowledged by the accused No. 1 from the complainant in the presence of the accused No. 2 who also signed as a witness to the receipt of the said amount of Rs. 13,00,000/- by the accused No. 1 and as such, the balance amount of Rs. 10,00,000/- was to be paid by the complainant on or before 8.10.1999 as per the terms and conditions stipulated in the Agreement to Sell.

19. Reference is also made to the role played by the Petitioner No. 2 in the earlier transaction with one Shri Ashok Kumar Sood with whom an Agreement to Sell had already been entered into.

20. It is seen that a receipt for a sum of Rs. 13 lakhs was signed not only by the Petitioner No. 1 but by Petitioner No. 2 as well. Learned Counsel for the accused Petitioners sought to explain the signature of the Petitioner No. 2 on the receipt as being that of a witness. However, that is not evident from a plain copy of such receipt. On the contrary, the documents like the joint power of attorney executed by the Petitioner No. 2 Smt. Neelam Sharma on 19th April, 1999 show that she was claiming at that time that she was already the owner of the property in question. The defense is that the Petitioner No. 2 did not have any role and was a mere spectator. The precise role of the Petitioner No. 2 can be determined only at the end of trial since the evidence has yet to be examined. Obviously such an exercise cannot be undertaken by this Court u/s 482 Cr.P.C.

21. It is not possible to say, on reading of the complaint as a whole, that no case is made out for issuance of summons to the Petitioner No. 1 Desh Deepak

Sharma and Petitioner No. 2 Smt. Neelam Sharma for the offence u/s 420 IPC. It might be a different matter as regards the Section 138 of the NI Act is concerned, since that provision requires the drawer of the cheque whether acting in the individual capacity, or a representative of the company to be arrayed. As far as the Petitioner No. 2 is concerned, no case is made out u/s 138 of the NI Act but the same cannot be said for the offence u/s 420 IPC.

22. The net result is that there is no merit in these petitions which challenge the impugned order of the learned ASJ which appears to be a well reasoned one.

23. These petitions are dismissed. In other words, the criminal complaint will proceed even against the Petitioner No. 2 for the offence u/s 420 IPC.

Summary of the conclusions

24. To summarise the conclusions in this judgment:

(i) The impugned summoning order dated 18th July, 2001 passed by the learned MM in Criminal Complaint No. 639/1999 Harsh Khosla v. SH. Desh Deepak Sharma more unsustainable in law and the said order is hereby set aside as far as Petitioner No. 2 Smt. Neelam Sharma is concerned. Consequently, the Criminal Complaint No. 639/1999 against Petitioner No. 2 Smt. Neelam Sharma for the offence u/s 138 of the NI Act is hereby quashed.

(ii) No fault can be found with the order dated 19th July 2005 passed by the learned ASJ rejecting the preliminary objection as to the maintainability of the revision petition.

(ii) The order dated 18th July, 2001 passed by the learned MM is in the nature of a final order in so far as it declines to issue summons for the offence u/s 420/34 IPC is concerned. Therefore, the revision petition u/s 397 Cr.PC could have been filed by the complainant in the Court of the learned ASJ against such order.

(iii) No case is made out by the Petitioners for interference with the order of the learned ASJ directing issuance of summons against the Petitioners for the offence u/s 420/34 IPC.

Operative Order

25. For the above reasons, these petitions are disposed of as under:

(i) The impugned summoning order dated 18th July, 2001 passed by the learned MM in Criminal Complaint No. 631/1999 Harsh Khosla v. SH. Desh Deepak Sharma and Anr. is set aside as far as Petitioner No. 2 Smt. Neelam Sharma is concerned. Consequently, the Criminal Complaint No. 631/1999 against Petitioner No. 2 Smt. Neelam Sharma for the offence u/s 138 of the NI Act is hereby quashed. In other words the said criminal complaint No. 631/1999 will proceed in accordance with law in so far as Petitioner No. 1 Desh Deepak Sharma is concerned. Criminal MC No. 639 of 2005 is accordingly allowed as regards Petitioner No. 2 with no order as to costs. The interim order dated 25th February

2005 passed by this Court is made absolute as regards Smt. Neelam Sharma and the pending application stands disposed of.

(ii) CrI M C 3895-96/2005 is dismissed, the interim order dated 16th August 2005 passed by this Court stands vacated and the pending application is dismissed. The criminal case against the petitioners will proceed u/s 420/34 IPC.

26. A copy of this order be sent to the learned MM in whose court the Complaint Case No. 639 of 1999 titled Harsh Khosla v. Desh Deepak Sharma and Anr. is pending within ten days from today.