
(2004) 12 AHC CK 0237

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 1895 of 2001

Harbhajan Singh and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 21-12-2004

Acts Referred:

Companies Act, 1956 — Section 141, 617

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 305, 482

Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 140, 141, 142

Citation : (2007) 1 BC 551 : (2005) CriLJ 3029 : (2005) 3 RCR(Criminal) 403

Hon'ble Judges : V.K. Chaturvedi, J

Bench : Single Bench

Advocate : Viresh Mishra, R.P. Singh, Arun Kumar and Amit Misra, for the Appellant; G.S. Chaturvedi, Shashank, Shekhar and Manoj Mishra and S.S. Giri, A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

V.K. Chaturvedi, J.—Harbhajan Singh and six others have filed the application u/s 482, Cr. P.C. on 13-4-2001 with the prayer to quash entire proceedings in Criminal Complaint No. 2263 of 1995 between Steel Authority of India (opposite party No. 2) v. Harbhajan Singh and Ors. (petitioners), under Sections 138-142 of Negotiable Instruments Act pending in the Court of Addl. Chief Judicial Magistrate, Ghaziabad. Further prayer made is that the proceedings in the above noted case be also stayed.

2. By an interim order dated 30-4-2001, the proceedings were stayed.

3. Heard Sri Viresh Mishra, senior counsel assisted by Sri R. P. Singh for the petitioners and Sri G. S. Chaturvedi, senior counsel assisted by Sri Shashank Shekhar for opposite party No. 2 and learned A.G.A.

4. Counter-affidavit and rejoinder-affidavit have been exchanged between the parties and I have perused the entire materials on record.

5. It is contended by Sri Misra, counsel for the petitioners that it was incumbent upon the opposite party No. 2 Steel Authority of India (hereinafter referred to as SAIL) to inform the petitioners before presentation of the cheque in bank for encashment. It is also contended that as per the provisions contained in Section 141, Companies Act, 142, Negotiable Instruments Act and Section 305, Cr. P.C., the persons who are the signatories, are to be prosecuted and not the other partners and directors. The Memorandum of Understanding provided arbitration clause in case of any dispute between the parties. It is next contended that the petitioners'-company under the pressure of officials of SAIL, had handed over certain blank cheques to the said officials of SAIL prior to 1-3-1995 purportedly as a manner pf security. These cheques were signed but no amount was written on them, as such this was not a bill of exchange. It is lastly contended that a civil suit is pending between the parties, hence criminal proceedings is not maintainable.

6. Learned counsel for the opposite party No. 2 and State contended that the allegations are to be rebutted and in the absence of any rebuttal, strong presumption is in favour of the complainant and the cheques were issued after November, 1994.

7. Brief facts of the case are as follows:--

Opposite party No. 2 SAIL is a Govt. of India Enterprise and a company registered u/s 617 of the Companies Act and its registered office is at Ispat Bhawan, Lodi Road, New Delhi having its branch sales office at 69.70, Navyug Market, Ghaziabad.

8. The opposite party No. 2 SAIL filed a criminal complaint being Complaint No. 2263 of 1995 before Additional Chief Judicial Magistrate, Ghaziabad against 1 Harbhajan Singh 2-Deepak Singh, 3-Mohinder Singh, 4-S. K. Bansal, 5. S. K. Agrawal, 6-Narendra Agarwal and 7-M/s. Atma Steels Ltd. a company registered under the Companies Act u/s 138 read with Section 142 of Negotiable Instruments Act, alleging that it supplied steel materials to M/s. Atma Steels Ltd. worth Rs. 16,68,71,100.00 (rupees sixteen crores sixty eight lacs seventy one thousand and one hundred only). Against this amount only a sum of Rs. 12,95,00,297.00 (Rupees twelve crores ninety five lacs two hundred ninety seven only) had been paid and despite repeated requests and reminders, accused No. 7 did not arrange the payment of the balance amount of Rs. 3,73,69,003.00 (Rupees three crores seventy three lacs sixty nine thousand and three only) to the complainant.

9. Sri Abhijit Bose who filed the complaint on behalf of the complainant is the Branch Manager of SAIL's branch sales office at Ghaziabad and is a person duly authorised by the complainant by General Power of Attorney dated 19-7-1994 to institute, act, file and plead etc. on behalf of the complainant-company.

10. Accused No. 1-Harbhajan Singh is the Chairman-cum-Managing Director of M/s. Atma Steels Ltd. (accused No. 7 herein) having its registered office at C

138-142, Industrial Area No. 1. Bulandshahr Road, P. S. Kavinagar, Ghaziabad. Accused No. 2-Deepak Singh is the Executive Officer of accused No. 7, accused No. 3-Mohinder Singh is the General Manager of accused No. 7, accused No. 4-S. K. Bansal is the Deputy General Manager (Finance), accused No. 5-S. K. Agrawal is the authorised signatory on behalf of accused No. 7, accused No. 6-Narendra Agrawal is the Purchase Officer. All the accused persons No. 1 to 6 mentioned above were the persons in-charge of and responsible to the company i.e. accused No. 7 for the conduct of business of the company at the time when the offence was committed. Accused Nos. 1 and 2 are particularly responsible for the conduct of affairs of the business and management of the company in their capacity as Chairman-cum-Managing Director and Executive Director of accused No. 7.

11. Accused No. 7-Atma Steels Ltd. entering into a Memorandum of Understanding with the SAIL opposite party No. 2 on 2-2-1995 through accused Nos. 1 and 2 namely Harbhajan Singh and Deepak Singh for the purpose of purchasing iron and steel materials on interest free credit basis for a particular period and also agreed to pay interest at the rate of 18/19% for any such credit beyond the said credit period. Accused Nos. 1 and 2 induced the complainant (SAIL) by executing Personal Guarantee Bond on 1st April, 1994 having agreed to pay for the goods supplied on credit in case of default of accused No. 7. They also furnished post dated cheques signed by accused Nos. 4 and 5 namely S.K. Bansal and S.K. Agrawal for meeting outstanding balance arising out of the payment to be due as the price for the delivery of materials transacted to be sold and delivered.

12. The complainant opposite party No. 2 (SAIL) supplied steel materials from the month of January, 1995 to March, 1995 amounting to Rs. 16,68,71,100.00 (Rupees sixteen crores sixty eight lacs seventy one thousand and one hundred only). Against this amount, only a sum of Rs. 12,95,00,297.00 (Rupees twelve crores ninety five lacs two hundred ninety seven only) had been paid and despite repeated requests and reminders, accused No. 7 did not arrange the payment of the balance amount of Rs. 3,73,69,003.00 (Rupees three crores seventy three lacs sixty nine thousand and three only) to the complainant. Since accused No. 7 through other accused persons honour the commitment to pay the balance amount, the complainant was instructed to present cheque No. 412256 dated 1-3-1995 for Rs. 38708687/- to Bank of Baroda, Gandhi Nagar Branch, through complainant's-Banker State Bank of India but the said cheque was returned unpaid by the Banker of the accused vide memo dated 24-7-1995 with the remarks "payment stopped by drawer."

13. Consequently, the complainant-(SAIL) served legal notices on the accused persons on 27-7-1995 by registered post calling upon all of them to make payment of the said amount within 15 days as permissible under law from the date of receipt of the said notice. The said notices were received by all the accused on 31-7-1995 but all of them failed to respond to any of the notices

within the statutory period of 15 days of the receipt of the same.

14. Complainant's case is further that accused No. 7 issued the aforesaid cheque ostensibly for the discharge of their liability with the complainant-(SAIL) but the same was returned unpaid with the remarks "payments stopped by drawer." When the accused persons after service of the notice failed to make payment of the aforesaid amount within 15 days from the date of the notice as required by law, the impugned complaint was filed against the accused persons-petitioners in the present application.

15. After recording statements u/s 200, Cr. P.C. of the complainant-Abhijit Bose and u/s 202, Cr. P.C. of V. P. Gupta, the Addl. Chief Judicial Magistrate, Ghaziabad by his order dated 13-10-1995 summoned only accused Nos. 4 and 5 namely S.K. Bansal and S.K. Agrawal and dropped proceedings against remaining five accused persons. Feeling aggrieved against dropping of proceedings against other accused persons. SAIL-complainant preferred Criminal Revision No. 1513 of 1995 before this Court. By order dated 19-5-1999 of this Court, the said revision was allowed and the impugned order of the learned Magistrate dropping proceedings against five accused persons, was set aside.

16. Before touching merits of the case, it appears useful to quote observations of the Apex Court in *Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza*, .

"Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a larger number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Cheques were issued for payment of admitted liability but the drawer used to dishonour the said liability by issuing instructions to the bank for stop payment. Undoubtedly, dishonour of a cheque by the banks causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. To avoid the aforesaid and to create an element of credibility and dependability. Sections 138 and 139 were enacted which provide a criminal remedy of penalty if the ingredients of the sections are satisfied. The remedy available in a Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee."

17. Before I advert to the respective contentions of the learned counsel appearing on either side, it would be beneficial to quote Sections 138 and 139 of Negotiable Instruments 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 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 extend to one year 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 fifteen 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."

"139. Presumption in favour of holder.--It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 of the discharge, in whole or in part, of any debt or other liability."

18. To fulfil the objective, the legislature while amending the Act has made the following procedure :

"(i) u/s 138, a deeming offence is created.

(ii) In Section 139, a presumption is ingrained that the holder of cheque received it in discharge of liability.

(iii) Disallowing a defence in Section 140 that the drawer has no reason to believe that cheque would be dishonoured.

(iv) An explanation is provided to Section 138 to define the words "debt or other liability" to mean a legally enforceable debt or other liability."

19. There is no dispute according to pleadings of the parties that the cheque was issued by the petitioner-company in favour of the opposite party. Whether the cheque was issued under guarantee or with understanding with the parties that as soon as the cheque would be presented in the bank, the same will be encashed, has to be examined by the trial Court after evidence of the parties. At

present, while exercising powers u/s 482, only on the basis of pleadings of the parties, it cannot be held that the blank cheque was given as security.

20. Sections 138 and 139 of Negotiable Instruments Act were enacted in view of the fact that cheques were issued for payment of admitted liability but the drawer used to dishonour the said liability by issuing instructions to the bank for stop payment. To avoid the aforesaid and to create an element of credibility and dependability, the aforesaid sections were enacted which provide a criminal remedy of penalty if the ingredients of the sections are satisfied.

21. When the notice was sent by the complainant-(SAIL) to the petitioners to make payment of the cheque, after receipt of the notice as contemplated u/s 138 of the Act, it was the duty cast upon the petitioners to have given a reply to the notice stating therein that the cheque was given as security and that is why the payment of the cheque was stopped by them. It is essential that to issue stop payment instructions, there must be funds in the accounts in the first place.

22. As far as contention raised by learned counsel for petitioners that it was incumbent upon the opposite party to inform before presenting the cheque, is concerned, the same is not in consonance with the provisions of the Act as there is no such requirement of the Act to inform the party. According to Section 138 of the Act, the cheque must be presented within six months from the date on which it is drawn or within the period of its validity whichever is earlier and 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and 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 cheque, within fifteen days of the receipt of the said notice. This section further explains "debt or other liability" to mean a legal, enforceable debt or other liability.

23. When the cheque was returned unpaid by the bank vide Memo dated 24-7-1995 with the remarks "payment stopped by drawer," then the complainant-opposite party (SAIL) served legal notices on the accused persons (petitioners) on 27-7-1995 by registered post calling upon all of them to make payment of the said amount of money within fifteen days as permissible under law. The said notices were received by the petitioners on 31-7-1995 but all of them have failed to respond to any of the notices within the said statutory period of 15 days of receipt of the same. Under these circumstances, the complainant-opposite party (SAIL) was left with no other option but to file a complaint against the petitioners after fully complying with the provisions contained in Section 138 of the Act. Consequently, there is no force in the submission so advanced.

24. As regards the contention that every partner cannot be prosecuted and only signatory of the cheque can be prosecuted in view of provisions contained in

Section 141. Companies Act, Section 142, Negotiable Instruments Act and Section 305, Cr. P.C., the complainant in paragraph No. 12 of the complaint has averred that accused Nos. 1 to 6 being the persons incharge of and responsible to the company for the conduct of business of the company at the time the offence was committed as also the accused No. 7-Company, are liable to be proceeded against and punished for the offence u/s 138 of Negotiable Instrument Act read with Section 141 of the said Act. In paragraph No. 6 of the complaint, it has also been averred that the petitioners furnished a post-dated cheque signed by accused Nos. 4 and 5 namely S. K. Bansal and S.K. Agarwal for meeting the outstanding balance on behalf of the company as other partners were also incharge of looking after the business of the company, as such they all are liable to be prosecuted.

25. According to Section 141, Negotiable Instruments Act, if the person committing an offence u/s 138 is a company, every person who, at the time the offence was committed, was in-charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly, with the proviso that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

26. Section 305, Cr. P.C. provided the procedure when Corporation or registered society is an accused.

27. When it has come in the complaint that all the partners (accused Nos. 1 to 6) were in-charge or and responsible to the company for the conduct of business of the company at the time the offence was committed, there is no substance in the contention raised by learned counsel for the petitioners as they have not rebutted the allegations made in the complaint or in the statements recorded under Sections 200, 202, Cr. P.C. by adducing evidence before the Court.

28. The next contention is regarding Memorandum of Understanding between the parties which is Annexure-4. The Memo of Understanding between the parties provides for order quantity, special commercial terms, annual turnover discount price, quality complaints etc. It contains arbitration clause at 7.0. Under Clause 7.1, it is provided that all disputes or difference whatsoever arising between the parties out of or relating to the MOU, meaning and operation or effect of this MOU or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties. This MOU nowhere provides that if any dispute arises between the parties about bouncing of cheque or accounts, that may also be referred for arbitration. Suffice it to say that this MOU will not supersede the provisions of Negotiable Instruments Act.

28A. Next submission advanced on behalf of the petitioners is that a civil suit is

pending between the parties as such parallel criminal proceedings is not permissible under law. In this regard, the opposite party No. 2 (SAIL) filed a Civil Suit No. 618 of 1996 under Order XXXVII of CPC for recovery of Rs. 4,58,24,154.00 with interest with the pleadings that present suit is being filed under Order XXXVII and no relief which does not fall within the ambit of this order, has been claimed therein. Copy of the plaint is Annexure-1 to the petition and in paragraph 9 thereof, it has been written that after the credit period expired, the plaintiff-opposite party No. 2 presented the Cheque No, 112256 dated 1-3-1995 for Rs. 3,87,08,687/- on 21-7-1995 through its banker-State Bank of India. Navyug Market, Ghaziabad Branch for encashment with their Banker, Bank of Baroda, Gandhi Nagar, Ghaziabad. The plaintiff-(SAIL) was shocked and surprised to receive intimation memo dated 24-7-1995 from its bank that the payment of the aforesaid cheque has been stopped by the drawer. Notice was accordingly sent on 27-7-1995 u/s 138 of the Negotiable Instruments Act to pay the aforesaid amount within 15 days of the receipt of notice failing which proceedings under Sections 138/142 of the Act would be initiated. On 24-8-1995 opposite party (SAIL) also lodged a report with Station House Officer P.W. Kotwali, Ghaziabad about the fraud and cheating committed by the petitioners"-company in view of the decision of the Apex Court in M/s. Medchl Chemicals and Pharma P. Ltd. Vs. M/s. Biological E. Ltd. and Others, holding that breach of contract does not merely attract civil remedy. Both can be pursued, this submission is also not sustainable.

29. The last contention that the cheques were given as security, it may be stated that there are allegations and counter allegations in the form of affidavits before this Court. As the allegations are factual in nature, the same cannot be adjudicated upon by this Court while exercising powers u/s 482, Cr. P.C. and the same has to be examined and decided by the trial Court after taking evidence of both the parties.

30. Once cheque is issued by the drawer, a presumption u/s 139, must follow and merely because the drawer issues instructions to the bank for stoppage of payment, it will not preclude an action u/s 138 of the Act by the drawee or the holder of the cheque in due course. The object of Chapter XVII, with regard to penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts, which contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. There being presumption in favour of holder of cheque in view of Section 139 of the Act, it shall be presumed unless contrary is proved that the holder of the cheque received the cheque of the nature referred to in Section 138 of the discharge, in whole or in part, of any debt or other liability. The petitioners without rebutting the facts by leading evidence before the trial Court, have come up before this Court for quashing of the proceedings. Sections 138 and 139 of the Act were enacted to create an element of credibility and dependability which provide a criminal remedy of penalty if the ingredients of the sections are satisfied. At this stage, it would be appropriate to quote paragraph No. 10 of Goa

Plast (P) Ltd."s case (2004 Cri LJ 664) (supra), in which commentary by Author Dr. P. W. Rege has been given as follows :

"It is true that the Negotiable Instruments Act has not failed to provide a remedy for the aggrieved party, but the foregoing provisions of the Act lay down a procedure which is in the first place very elaborate and sine the remedy would be merely of a civil nature, the process to seek civil justice, in the second place becomes notoriously dilatory. To ensure promptitude in remedy against defaulters, therefore, was the only way in which the element of credibility and dependability could be reintroduced in the practice of issuing negotiable instruments in the form of cheques. The best way to do this was to provide a criminal remedy of penalty, which is just the thing that is sought to be done by the amending Act.

31. It is noteworthy that when the proceedings were dropped against petitioners No. 1, 2, 3, 6 and 7 by the Magistrate concerned, that order was challenged before this Court in Criminal Revision No. 1513 of 1995. This Court while discussing the evidence and arguments advanced by the parties, held that for passing an order for issuing of process, the law is that the Magistrate is to exercise his judicial mind to determine if there is ground for proceeding keeping in mind that whether the allegations in the complaint and the materials in its support, discloses the commission of an offence, then the matter should proceed i.e. the accused ought to be summoned. At this stage, the Magistrate has to determine not the correctness of the probability or improbability of individual items of evidence on disputable grounds but the existence or otherwise of a prima facie case on the assumption that what has been stated can be true unless the prosecution allegations are so fantastic that they cannot reasonably be held to be true and came to the conclusion that it is clear from the materials which are on record before the Magistrate at the time of passing the impugned order, that there was sufficient material to proceed against the accused opposite parties No. 1 to 3, 6 and 7 before this Court. The revision was accordingly dismissed and order of the learned Magistrate by which proceedings were dropped against five accused, was set aside on 19-4-1999. Copy of the said judgment is Annexure-15 to this application.

32. The order dated 19-4-1999 of this Court became final against the petitioners except petitioner Nos. 4 and 5 namely S. K. Bansal and S.K. Agrawal (who according to the complaint are signatories of the cheque) as this order was never challenged before the Apex Court and no order of the Apex Court has been filed to that effect.

33. Once controversy having been decided on the point whether there is a prima facie case against the petitioners vide order of this Court dated 19-4-1999 referred to above, this petition u/s 482, Cr. P.C. by those petitioners is not maintainable as it amounts to a second petition by the party.

34. Thus, it has to be presumed that the cheque in question is issued in

discharge of any debt or any other liability. The said presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption, as the allegations against the petitioners prima facie makes out a case under Sections 138, 142 of Negotiable Instruments Act.

35. In view of above discussion, there is no force in this petition. The petition is therefore dismissed. Interim order dated 30-4-2001 stands discharge.