
(2014) 10 DEL CK 0011

In the Delhi High Court

Case No : Crl. Rev. P. 656/2009, Crl. M. (B) No. 1487/2009 and Crl. M.A. Nos. 10669-71/2014, Crl. Rev. P. 546/2011 and Crl. M.A. Nos. 18867/2011 and 10646-48/2014, Crl. Rev. P. 617/2012 and Crl. M.A. Nos. 18477/2012 and 10640-42/2014, Crl. Rev. P. 618/2012 and Crl.

Haryana Petrochemicals Ltd.

APPELLANT

Vs

Indian Petrochemicals Ltd.

RESPONDENT

Date of Decision : 30-10-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357, 357(4), 386, 397
Negotiable Instruments Act, 1881 (NI) — Section 117, 118, 138, 142

Citation : (2015) 1 BC 603 : (2015) 1 CCR 219 : (2015) 1 JCC 11

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : R.N. Mittal, Sr. Adv., Tanvir Ahmed Mir and Dhruv Gupta, Advocate for the Appellant; Aman Lekhi, Sr. Advocate, Manoj Arora, Siddharth Shankar, Advocates and Ravi Nayak, APP, Advocate for the Respondent

Judgement

Indermeet Kaur, J.—By this common judgment four revision petitions shall be decided. Parties are common; Haryana Petrochemical Ltd. and its Managing Director Rajiv Aggarwal are revisionists before this Court; the respondent/complainant is Indian Petrochemicals Ltd.

A. Criminal Revision Petition No. 546/2011 has impugned the judgment and order of sentence dated 17.9.2011 and 27.9.2011 respectively passed by the Sessions Judge wherein he had endorsed the finding of the Magistrate qua the convictions of the petitioners under Section 138 of the Negotiable Instruments Act, 1881 (the Act). The sentence of fine of Rs. 5000/- in default of payment of fine to undergo SI for 7 days awarded by the Magistrate stood modified by the Sessions Judge. The Sessions Judge had awarded compensation of Rs. 50 lacs to the complainant company which amount had to be paid within one month failing which the complainant was at liberty to get the sentence executed. This Court notes that the cheque amount in this case was Rs. 1,19,80,800/-.

B. Criminal Revision Petition No. 656/2009 has impugned the judgment and order of sentence dated 17.11.2009 and 25.11.2009 respectively passed by the Sessions Judge sustaining the conviction of the petitioners under Section 138 of the Act. The Magistrate had awarded compensation of Rs. 50 lacs to the complainant; in default of payment of fine to undergo SI for a period of 6 months. This Court notes that the cheque amount in this case was Rs. 41,18,400/-.

C. Criminal Revision Petition No. 617/2012 has impugned the judgment and order of sentence dated 19.5.2012 which had endorsed the finding returned by the Magistrate sustaining the conviction of the petitioners under Section 138 of the Act. The sentence imposed upon the petitioners was fine of Rs. 25 lacs to be paid as compensation to the complainant; in default, to undergo SI for a period of 6 months. This Court notes that the cheque amount in this case was Rs. 22,46,400/-.

D. Criminal Revision Petition No. 618/2012 has impugned the judgment and order of sentence dated 19.5.2012 which had endorsed the finding returned by the Magistrate sustaining the conviction of the petitioners under Section 138 of the Act and upholding the payment of the compensation of Rs. 70 lacs failing which to undergo SI for a period of 6 months. This Court notes that the cheque amount in this case was Rs. 77,87,200/-.

2. The fact of these cases disclose that the complainant company i.e. Indian Petrochemicals Ltd. had business dealings with the petitioner company i.e. Haryana Petrochemicals Ltd. They were dealing in the sale and purchase of chemicals. Complainant company was manufacturing and supplying the chemicals DMT and MEG which the petitioner company was purchasing from the complainant company. The cheques given in lieu of these transactions had been dishonoured. The Magistrate on the basis of the evidence led before him had convicted the petitioners under Section 138 of the Negotiable Instruments Act. The Sessions Judge had endorsed this finding and the order of sentence in each of the individual cases as noted supra.

3. Detailed submissions have been made by the learned Senior Counsel for the petitioners. Counter submissions have also been made. Besides oral arguments written submissions have also been filed by the respective parties.

4. The last submission made by the learned counsel for the petitioners shall be answered first. This relates to the authorization given to Deepak Rai Srivastava (PW-3) to file the present complaint; submission being that this complaint was admittedly filed in September, 1995 on the basis of an authorization letter (dated 26.9.1995) given to Deepak Rai Srivastava by the company but there was no resolution accompanying this authorization; the power of attorney Ex. PW-3/B (dated 23.3.1999) exhibited in the testimony of PW-3 clearly shows that this document is of the year 1999 and as such the complaint filed in September, 1995 being without any valid authorization necessarily be treated as non est. This

submission has been refuted and rightly so.

5. At the outset, this Court notes that this argument was not taken either before the Magistrate or before the Sessions Judge. Although in written ground (H) in the grounds of appeal filed before the Sessions Judge this ground finds mention yet the Sessions Judge has not answered; this is for the reason that this was not argued before the Sessions Court at that stage. Be that as it may, this Court notes that PW-3 in his deposition on oath in Court had stated that he was authorized by the company to file the present complaint. The authorization is dated 26.9.1995. This letter of authorization clearly mentioned the resolution passed by the company authorizing him to file the present complaint. The power of attorney executed in March, 1999 has also been exhibited as Ex. PW-3/B in the version of PW-3. This power of attorney gave authority to PW-3 to institute and continue the present proceedings. A bald suggestion was given to this witness that he was in fact not authorized to file the present complaint. However, these submissions do not detract from the veracity of the document which is the authorization dated 26.9.1995 (Ex. PW-3/A) which specifically states that PW-3 namely Deepak Rai Srivastava was authorized by the company through resolution circulated in the 136th Board Meeting held on 09.06.1992 (as referred in Ex PW3/B) to file the present complaint. The power of attorney Ex. PW-3/B executed by the company in March, 1999 authorized him to institute and pursue all cases on behalf of the complainant company. There is no attack on these documents; they are authentic and valid. The authorization letter (Ex. PW-3/A) validly authorized PW-3 to institute and pursue the complaint.

6. Section 142 of the Act provides that a complaint under Section 138 of the Act can be made by the payee or the holder in due course. This complaint has admittedly been filed in the name of, and on behalf of the company. In the case of Associated Cement Co. Ltd. Vs. Keshvanand, , the Court had held that the complainant has to be a corporeal person who is capable of making a physical appearance in the Court. There may also be occasions that different persons would represent the company. It is open to the de jure complainant to seek permission of the Court for sending any other person to represent the company in the Court. In that case the Court had held that even presuming that initially there was no authority, still the company can at any stage rectify that defect. In the case of M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, the Supreme Court in this context had noted as under:

"Thus, even presuming, that initially there was no authority, still the Company can at any stage rectify that defect. At a subsequent stage the Company can send a person who is competent to represent the company. The complaints could thus not have been quashed on this ground."

7. There is no merit in this argument. It is rejected.

8. The second but last argument of the learned Senior Counsel for the petitioners was on the validity of the legal notice. Submission being that the case of the

complainant is based on a legal notice dated 16.8.1995. No postal receipt has been placed on record to show that such notice was served upon the petitioners. Purported reply given by the petitioners dated 29.8.1995 being treated as reply to the notice of demand is a misinterpretation of fact as this reply clearly stated that this was a response to the notice dated 12.8.1995; the case of the petitioners is that the notice was dated 16.8.1995, in the absence of the complainant company having discharged the initial burden of the demand notice having been served upon the petitioner company the subsequent proceedings in the complaint are clearly questionable.

9. While refuting this statement the learned counsel for the respondent has drawn attention of this Court to Ex. PW-3/C which was the notice served upon the petitioners and had been proved in the version of PW-3. Submission being that no suggestion was even given to PW-3 that no such demand notice was received by him.

10. Testimony of PW-3 substantiates this submission of the learned counsel for the respondent. PW-3 on oath deposed that a legal notice was sent to the petitioner company (Ex. PW-3/C) through registered post. The AD Card was proved as Ex. PW-3/D. Further deposition of PW-3 being that reply to this legal notice had been sent by the petitioners vide their reply Ex. PW-3/E and along with this reply a cheque of Rs. 5 lacs had been appended as part payment of the total outstanding amount which at that time was almost Rs. 5 crores. No suggestion had been given to this witness that the notice had not been received by the company or that they had not filed their reply Ex. PW-3/E. It was only in the statement of the petitioners under Section 313 Cr.P.C. that under legal advice a false defence has been sought to be set up that no such legal notice had been received by this Court. If this was the position, this fact should have been disputed by the petitioners right from the inception i.e. during the course of cross-examination of PW-3. No such defence having been propagated, it is a clear case where the defence has now been set up as an afterthought.

11. The complaint discloses the date of legal notice as 12.8.1996. The fact finding of the Court below i.e. the Court of the Magistrate has rightly noted that this can only be a typographical error as the date in Ex. PW-3/C is 16.8.1995. Reply to this legal notice Ex. PW-3/E had acknowledged the liability qua the complainant company and in part payment, sum of Rs. 5,00,000/- had been sent vide their communication dated 29.8.1995. This letter has also not been challenged in the cross-examination of PW-3 when he had proved this document. This Court also notes that it is an admitted fact that as per the complainant a common legal notice had been sent qua all the transactions between the parties; there were seven transactions and in the reply by the petitioner company on 29.8.1995 it had enclosed a cheque of a part payment of Rs. 5 lac. This argument has also dealt with by both the fact finding Courts below and had been answered in favour of the complainant.

12. This argument also holds no water.

13. The third submission of the learned senior counsel for the petitioner is that the cheques in question were security cheques and it was their regular trade practice that after the goods had been received by the petitioner company fresh cheques in lieu of the security cheques were to be issued by the petitioners; the security cheques by themselves would not constitute a legal debt or liability by the petitioner to the complainant; the petitioner company used to place a purchase order upon the complainant alongwith the security cheque; after the goods had been dispatched and received by the petitioner company, the petitioner company would issue a fresh cheque for the payment of the goods and the security cheque used to be returned. Attention has been drawn to the testimony of PW-3 to advance this argument; submission being that the receipt of the goods were disputed and this had been proved in the cross-examination of PW-3 wherein Marks DA and DB which is a letter and a fax message exchange respectively, between the parties evidencing the fact that the goods had not been supplied in time; this was also the reason why no invoices and sale receipts had been proved by the complainant. Submission being reiterated that in the light of this evidence, the presumption as contained in Section 118 of the Act and relied upon by the Courts below is illegal as preponderance of probabilities clearly show that a doubt had been created on the veracity of the transactions and there was no legally payable debt by the petitioner company to the complainant. In this background, the conviction of the petitioners is wholly illegal.

14. Record shows that in terms of the complaint and the other evidence which includes the testimony of PW-3, on placing of the purchase order by the petitioners, the complainant company would send the goods along with invoices as per the value of the goods. There was an agreed period and after the expiry of that period, the petitioners would make the payment in regard to the goods and the security cheques would thereafter be returned. In case the payment was not forthcoming the security cheques were considered as consideration towards supply of goods and the respondent would bank these cheques. In the instant case, since the payment was not made against all the supplied goods, the security cheques got converted into normal cheques against consideration of the goods supplied and therefore they were not to be considered as security cheques. This was explained in the complaint. PW-3 on oath has also reiterated this position. He deposed that after the supply of the goods, the accused had not given a separate cheque. The cheque in question was presented to the bank which was returned along with the returning memo after having been dishonoured for the reason "Exceeds Arrangement". Marks DA and DB which is a letter and fax message exchanged between the parties only sought expedition of the dispatch of the goods. Neither of these communications state that the goods had not been supplied by the complainant company and as such the payment was not due to the complainant company. The fact finding courts after the scrutiny of these documents had also noted that these documents had not been proved and could not really be read in evidence as they were only photocopies of the original; even otherwise they did not advance the version of the petitioners

that the goods had not been supplied by the complainant company. The petitioner in his statement under Section 313 of the Cr.P.C. had set up a contrary stand. At that stage he stated that no supply was made by the complainant company and as such no money was payable to the company. If this was factually correct, nothing prevented the petitioners from leading evidence in defence; Marks DA and DB which were only photocopies of the documents could well have been proved through independent evidence. None of this was resorted to.

15. In this context the Supreme Court the case of I.C.D.S. Ltd. Vs. Beena Shabeer and Another, had negatived the submission advanced by the accused that a security cheque would not be covered within the ambit of Section 138 of the Act. Emphasis was laid on the word "where any cheque". In this context the observations of the Apex Court are relevant and read herein as under:

"The above noted three words are of extreme significance, in particular, by reason of the use of the word "any"--the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well.

.....

"Any cheque" and "other liability" are the two key expressions which stands as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of grantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act."

16. This argument is thus also without any merit. The presumption under Section 118 of the N.I. Act did not stand rebutted. The cheque had been issued for valid legal consideration.

17. The last submission of the learned counsel for the petitioners borders on Section 357 of the Cr.P.C. For this purpose attention has been drawn to Section 138 of the said Act. It is pointed out that the sentence which could be imposed by the Magistrate for a conviction under this provisions of law is imprisonment which may extend to 2 years or fine which may be twice the amount of the cheque. Submission being that it is a fine above which could be ordered as a part of the sentence as the word "fine" as appearing in Section 138 of the said Act is not interchangeable with the word "compensation" contained in Section 357 of the Cr.P.C.

18. Record discloses that except for Criminal Revision Petition No. 546/2011, in the other Criminal Revision Petitions No. 656/2009, 617/2012 and 618/2012 the Sessions Judge had confirmed the order both on conviction and sentence as imposed by the Magistrate. In Criminal Revision Petition No. 546/2011 the conviction had been sustained by the Sessions Judge but the Magistrate having imposed a fine of Rs. 5000/- only and the Sessions Judge noting the fact that the cheque amount involved in this case was Rs. 1,19,80,800/- had modified the sentence and had granted compensation of Rs. 50 lacs to the complainant, in default, to undergo SI for 7 days. The submission of the learned senior counsel for the petitioners being that the compensation can be paid only out of the fine; there is an outer limit of Rs. 5000/- which could be imposed as a fine under Section 138 of the Act. Where a fine has been specifically engrafted in the statute book of the Act, compensation could not have been ordered under the provisions of Section 357 of the Cr.P.C. Further submission in this context being that under Section 117 of the said Act a procedure for awarding compensation is contained and thus procedure has also been illegally ignored. The sentence of "compensation" of Rs. 50 lac in this background, has necessarily to be set aside.

19. Record shows that in Criminal Revision Petition No. 546/2011 an application had been filed by the complainant company against the order of sentence passed by the Magistrate. This application of the complainant was to the effect that the sentence of Rs. 5000/- imposed by the Magistrate for a conviction in which the disputed cheque amount was Rs. 1,19,80,800/- was on the lesser side and accordingly the sentence was sought to be enhanced. This was a revision petition preferred under Section 397 of the Cr.P.C. seeking invocation of the powers of the Revisional Court under Section 401 of the Cr.P.C. It was on this application that the order for the enhancement of sentence (as noted supra) has been passed. Both the parties had been heard and were present at the time when the order was passed.

20. Learned senior counsel for the petitioners at this stage submits that he has no quarrel on this proposition that orders could have been passed on this application by the Sessions Judge and even otherwise under the provisions of Section 386 of the Cr.P.C. the powers of the appellate Court are wide and the appellate Court may also not only alter, modify or set aside the conviction but can also pass any appropriate order on the sentence as well. Submission of the learned senior counsel for the petitioners only being bordered on the interchangeable nature of the terms "fine" and "compensation"; submission being reiterated that sentence of compensation could not have been awarded under Section 138 of the said Act.

21. Sections 357 of the Cr.P.C. reads herein as under:

357. Order to pay compensation.

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment,

order the whole or any part of the fine recovered to be applied-

- (a) in defraying the expenses properly incurred in the prosecution;
- (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
- (c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
- (d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

22. Under sub-section 3, where a fine has not been imposed, the Court may order the payment of compensation. A reading of Section 357(4) Cr.P.C. makes it clear that under this sub-section an order of compensation can be passed by the appellate Court; the High Court or by the Court of Sessions in revision. The power of the Court to award compensation is not ancillary to other sentences but is in addition thereto. This power under this Section has a message i.e. a measure of responding properly to the crime as also reconciling the victim with the offender. There does exist a distinction between "fine" and "compensation" but the purpose which both seek to achieve is similar. An amount of "compensation" can be directed to be recovered as a fine but a legal fiction is raised in relation to recovery of "fine" and in that sense a "fine" stands on a

higher footing than the "compensation" awarded by the Court. Although, after the amendment in the said Act (by the Amendment Act, 2002) a Magistrate of the first class can also impose a sentence of fine exceeding Rs. 5000/-.

23. In the case i.e. Criminal Revision Petition No. 546/2011 the sentence of fine imposed by the Magistrate was Rs. 5000/-. It was modified by the Sessions Judge under its revisional power under Section 357(4) of the Cr.P.C. As noted supra, the object of "fine" and "compensation" is the same i.e. to compensate the victim. The purpose of fine and compensation being the same; i.e. to assuage the grievance of the complainant, the sentence imposed by the Sessions Judge of a compensation of Rs. 50 lac (noting the cheque was to the tune of Rs. 1,19,80,800/-) suffers from no infirmity.

24. This Court also notes that this Court is sitting as a Revisional Court. Unless and until there is a patent illegality or a perversity which is apparent on the face of the record, interference in the concurrent finding of fact of the two Courts below is not warranted. The Apex Court in Jagannath Choudhary and Others Vs. Ramayan Singh and Another, had held as follows:

"The main question which the High Court has to consider in an application in revision is whether substantial justice has been done. If, however, the same has been an appeal, the application would be entitled to demand an adjudication upon all questions of fact or law which he wishes to raise, but in revision the only question is whether the court should interfere in the interest of justice. Where the court concerned does not appear to have been committed any illegality or material irregularity or impropriety in passing the impugned judgment and order, the revision cannot succeed. If the impugned order apparently is presentable, without any such infirmity which may render it completely perverse or unacceptable and when there is no failure of justice, interference cannot be held in exercise of revisional jurisdiction."

25. There is no merit in the revision petitions. Dismissed.