

(2014) 04 BOM CK 0185

In the Bombay High Court

Case No : Criminal Writ Petition No. 196, 197 and 198 of 2014

M/s. Soft-touch Computer

APPELLANT

Vs

The State of Maharashtra and B.R. System

RESPONDENT

Date of Decision : 22-04-2014

Acts Referred:

Contract Act, 1872 — Section 59

Criminal Procedure Code, 1973 (CrPC) — Section 245

Negotiable Instruments Act, 1881 (NI) — Section 138, 147

Citation : (2014) 3 BomCR(Cri) 285

Hon'ble Judges : A.I.S. Cheema, J

Bench : Single Bench

Advocate : C.P. Patil, Advocate for the Appellant; S.G. Chincholkar, A.P.P. for Respondent No. 1/State, Advocate for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema, J.—These Criminal Writ Petitions have been taken up for final hearing on admission stage with consent of counsel for petitioner and learned A.P.P. for State.

(A) Criminal Writ Petition No. 196/2014 is arising out of order dated 23.12.2013, passed by Judicial Magistrate, First Class, 2nd Court, Jalgaon below Exhibits 66 and 68 in S.C.C. No. 1858/2006, which order has been maintained by Additional Sessions Judge, Jalgaon, vide judgment and order dated 9.1.2014, passed in Criminal Revision Application No. 13/2014.

(B) Criminal Writ Petition No. 197/2014 is arising out of order dated 23.12.2013, passed by Judicial Magistrate, First Class, 2nd Court, Jalgaon below Exhibits 67 and 69 in S.C.C. No. 1961/2006, which order has been maintained by Additional Sessions Judge, Jalgaon vide order dated 9.1.2014, in Criminal Revision Application No. 11/2014.

(C) Criminal Writ Petition No. 198/2014 is arising out of order dated 23.12.2013,

passed by Judicial Magistrate, First Class, 2nd Court, Jalgaon below Exhibits 78 and 80 in S.C.C. No. 1729/2006, which order has been maintained by Additional Sessions Judge, Jalgaon vide order dated 9.1.2014, in Criminal Revision Application No. 12/2014

In the trial Court, the summary criminal cases mentioned above are pending between the present petitioner and respondent No. 2-B.R. System, Jalgaon/B.R. Traders, Jalgaon. The complaints have been filed by B.R. System and B.R. Traders, and present petitioner is accused. Similar applications were moved in the three matters and similar facts relevant for present decision are involved and similar orders are there leading to the present Writ Petitions.

2. For the convenience of understanding the dispute, I am referring to the facts in detail from the record of Criminal Writ Petition No. 196/2014.

3. The petitioner-accused claims that, the respondent No. 2 has filed the complaint u/s 138 of the Negotiable Instruments Act, 1881, which is pending before the Judicial Magistrate, First Class. In the complaint, it is alleged that, due to business relationship, against goods sold on credit, petitioner-accused had issued cheque as mentioned in the complaint for the amount stated. The cheque was dishonoured and notice of demand was issued and as in spite of notice petitioners-accused failed to comply, the complaint came to be filed.

4. The petitioner claims that, there was oral compromise with complainant in 2008 and the petitioner deposited the amount of cheque by filing application Exh. 34 and the complainant accepted the amount. According to petitioner, on 21.1.2013, he filed application Exh. 66 u/s 245 of the Code of Criminal Procedure (Cr.P.C. for short), claiming that he has already paid the amount of cheque to complainant which has been accepted by the complainant and the whole amount of the cheque has been covered as per oral compromise with the complainant. It was claimed that, still the complainant is not withdrawing the complaint and so, the petitioner-accused should be discharged. The claim of the petitioner was resisted by the respondent No. 2-complainant. The Judicial Magistrate, First Class rejected the application. On 17.4.2013, the petitioner-accused filed another application vide Exh. 68 u/s 147 of the Negotiable Instruments Act, claiming that the complaint be disposed holding that there is compromise which took place between the petitioner and respondent No. 2 as he has repaid the amount of cheque which has been accepted by the complainant. In the present petition, it is claimed that the complainant resisted the application and Judicial Magistrate, First Class illegally dismissed the said application. Petitioner-accused then filed Revision Application against the rejection of applications Exh. 66 and 68. The petitioner contended that he is ready to pay amount of fine also, still the Additional Sessions Judge dismissed the revision application. Thus, the present Writ Petitions.

5. I have heard learned counsel for the petitioner. It has been argued that, the various amounts of cheques involved in the three matters were deposited by the

petitioner in the Court of Judicial Magistrate, First Class and the amounts had been withdrawn by the complainant and so, continuing of the complaint even after depositing of the amounts of cheque was abuse of process and according to the learned counsel, the proceedings should have been stopped and petitioner-accused should have been discharged in the matter. Reliance has been placed on the case of Subhash Nagpal & anr. Vs. Neeraj Kakkar, reported in 2012(1) DCR 579. It has been submitted by the learned counsel that, in that matter, the proceedings were quashed when the petitioner before High Court had offered the amount of disputed cheque and also offered to pay amount of interest. Reliance is also placed in the case of Vikal Jalan Vs. M/s. Shreya Pet Private Limited & ors., reported in 2012 ALL SCR 1171, and request is made that the petitioner has already deposited the amount of cheque and so, the present petitions should be allowed and the concerned complaints should be quashed.

6. Learned A.P.P. submitted that, Section 138 of the Negotiable Instruments Act describes as to how the offence under the concerned provision takes place and according to learned A.P.P., u/s 147 of the Negotiable Instruments Act, offence can be compounded, but however, for compounding, it cannot be unilateral declaration of the petitioner that there is compromise. It will be necessary that both sides come and agree before the Court that there has been compromise and terms of compromise are got recorded before the Court. According to learned A.P.P., there is no substance in these writ petitions and they deserve to be rejected.

7. Coming to the matter of "Vikas Jalan" (supra), where Hon"ble Supreme Court passed judgment, the entire amount of compensation was deposited in the registry of the Supreme Court and the counsel for respondents submitted that if the respondents are permitted to withdraw the amount, in that event, they would not pursue the complaint u/s 138 of the Negotiable Instruments Act. In such situation, the Hon"ble Supreme Court directed the amount deposited to be given to the respondents, with interest, and quashed the complaint concerned.

8. In the present matter, there is no such situation as can be seen from the order of the trial Court and the Court in revision. In these matters, the complainant has disputed that there is compromise.

9. As regards the matter of "Subhash Nagpal" (supra), relied upon by the learned counsel for petitioner, in that matter, the Hon"ble Punjab & Haryana High Court found that the petitioner therein had submitted the disputed cheque amount before the Court in September 2010, but the respondent had refused to accept the same and wanted to pursue the matter. In that matter petitioner also offered to make payment of interest at the rate of 10% from the date when the cheque got dishonoured. The Punjab & Haryana High Court took the view that if the petitioner will deposit the consolidated amount of dishonoured cheque along with interest at the rate of 10% in the registry within 10 days, the proceeding before the Judicial Magistrate, First Class will stand quashed. The High Court was of the view that, continuation of such proceedings was misuse of the process of law.

With due respect, I have reservations. I find myself bound by clear provisions which I propose to discuss.

10. It would be appropriate to reproduce Section 138 of the Negotiable Instruments Act to appreciate the present dispute. Ignoring the explanation below the Section, Section 138 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 the 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.

(emphasis supplied)

11. It is clear from the reading of the above section that when the cheque gets dishonoured, the person who had drawn the cheque, is deemed to have committed the offence and the person becomes liable for punishment of imprisonment which may extend to two years or fine which may extend to twice the amount of cheque, or with both. If the proviso is appreciated, the person who has drawn the cheque is given one opportunity to pay within 15 days of receipt of the notice. If this opportunity given by the proviso is not taken, the rigour of main provision of Section 138 will get attracted and the person will then be treated as an accused, liable for punishment. Even if the amount of cheque is paid thereafter, the offence would still be there and unilateral payment of amount of cheque will not dilute the offence. After the complaint has been filed and process is issued, the accused will have to face the prosecution or the only way

out for the accused would be u/s 147, which provides that the offence punishable under the Negotiable Instruments Act is compoundable. In criminal offences, when it is stated that the offence is compoundable, necessarily there are two parties; one is the accused and other is the complainant/affected party, against whom the offence is committed.

12. If Exhibit 34 filed by the petitioner before the Court of Judicial Magistrate, First Class (Exhibit B) in Criminal Writ Petition No. 196/2014) is perused, on 11.4.2008, Advocate for petitioner-accused applied to the Court saying that the matter is fixed for evidence and on behalf of accused, the amount of cheque involved in dispute by way of Demand Draft from Centurial Bank of Punjab was being given to the complainant. It was mentioned that the Demand Draft is drawn in favour of the complainant and is payable at Jalgaon. The application gave particulars of the Demand Draft and requested that the Demand Draft may be given to the complainant and further orders may be passed. Although now it is claimed that the amount was paid due to oral compromise, Exhibit 34 filed before the Judicial Magistrate, First Class did not claim that there was a compromise and because of that the amount was being deposited. In subsequent application (Exhibit 66) filed after about four years, for the first time it was claimed that there was oral compromise and because of that the amount was deposited. Discharge was sought u/s 245 of the Cr.P.C. which did not apply to the proceedings as it was not trial of warrant case. The application was resisted by the respondent No. 2-complainant and the application came to be rejected on 23.12.2013. Yet another application appears to have been filed in April 2013 vide Exhibit 68. This time reference was made to Section 147 of the Negotiable Instruments Act and claim was made that the amount of cheque has already been paid and the complainant has withdrawn the same and that the complainant is not withdrawing the complaint as he has to recover further amounts from the accused and thus, there was abuse of process and it should be declared that there is compromise and orders be passed accordingly. The petitioner claimed that he was ready to pay the amount of interest and expenses. The application was again opposed by the counsel for respondent No. 2-complainant and the Magistrate rejected the application.

13. In the revision, the Additional Sessions Judge found that the payment of amount of cheque subsequent to the period provided u/s 138 will not exonerate the accused from the criminal liability although the depositing of amount may affect the sentence which will be passed.

14. I have already discussed above that once the period of 15 days as provided in clause (c) of proviso of Section 138, the offence would stand committed and unilaterally the accused cannot say that he is depositing the amount and he has right to walk away. The element of compounding requires two parties and only because the petitioner is declaring that there is an oral compromise, is not sufficient. For compounding, it is necessary that both the sides come before the Court and accept the terms of compounding which are required to be placed

before the Court and which are required to be accepted by the Court after verifying that the compounding is legal as well as voluntary. I do not find that there is any substance in these Writ Petitions.

15. At the time of arguments, learned counsel for the petitioner referred to the endorsement below Exhibit 34 made for the complainant that the complainant received payment of the amount out of total amount receivable from accused and that the said amount is not amount of the cheque of the present matter. Learned counsel submitted that the complainant is trying to adjust the amount not towards the amount involved in the complaint concerned but towards other dues. According to learned counsel, the complainant cannot be allowed to do so in view of Section 59 of the Contract Act, 1872 which lays down that where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

16. The learned counsel submitted that the complainant cannot be allowed to divert the adjustment of the amount to any other dues other than towards cheques involved in the complaints concerned. I find that, this apprehension raised before this Court does not appear to have been raised in the Court of Judicial Magistrate, First Class or the Sessions Court. I have no reason to doubt that at appropriate stage the Court of Judicial Magistrate, First Class would refer to the application Exh. 34 as was filed by the Advocate for accused and would properly read the same with Section 59 of the Contract Act, 1872. As specific, dispute on that count has not been raised in Courts below and I refrain from giving any directions.

17. Observations in this judgment based on documents from Criminal Writ Petition No. 196/2014 be read suitably with reference to the other two Writ Petitions. For reasons mentioned above, these Criminal Writ petitions do not have any substance and the same are dismissed.