(2013) 02 DEL CK 0034

In the Delhi High Court

Case No : Criminal M.C. 1191 of 2012 and Criminal M.A. No''s. 4258/12, 17651-52/12 and Criminal M.C. 4215 of 2012 and Criminal M.A. No. 19781/12

M/s. Surya Vinayaka Industries Ltd. and Others — APPELLANT

Vs

CVCIGP II Client Rose Hill Ltd. and Another
 Sanjay Jain and Others Vs CVCIGP II Employees Rose Hill Ltd. and Another — RESPONDENT

Date of Decision : 15-02-2013

Acts Referred:

Citation : (2013) 3 BC 236 : (2013) 3 RCR(Civil) 600

Hon'ble Judges : S.P. Garg, J

Bench : Single Bench

Advocate : Shaad Anwar with Mr. Manoj Agarwal, in Criminal M.C. No. 4356/2012, Mr. U.U. Lalit, with Mr. Vineet Malhotra, Mr. Vikas Arora and Mr. Aman Khan, in Criminal M.C. Nos. 1190/12, 1191/12, 1543/12, 1544/12, 1545/12, 1546/12, 4215/12, 4216/12, 4217/12, 4218/12, 4219/12 and 4220/12, for the Appellant; Sandeep Sethi with Mr. Neeraj Sharma, Ms. Roopali Singh and Ms. Anjali Aggarwala, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Garg, J.—The petitioners have preferred the above mentioned petitions u/s 482 Cr. P.C. for quashing of the orders passed by the learned Metropolitan Magistrate in complaint cases filed by the complainants/respondents u/s 138 of Negotiable Instruments Act by which they were summoned to face trial. The complainants alleged that the petitioners executed Restated Share Purchase Agreement (Restated SPA in short) dated 11.03.2011 with them whereby terms of agreement dated November, 12, 2010 were amended and modified and the petitioners agreed to buy shares of M/s. SVIL Mines Ltd. for a total amount of Rs. 149,39,46,574.22. The agreement provided sale consideration to be paid in five tranche as under:-

The said agreement clearly provided and stated that the payment towards first and second tranche was to be made by post-dated cheques. The petitioners issued post-dated cheques. The accused Nos. 1, 2 and 3 requested the complainants to extend the time for payment and not to deposit the post-dated cheques for encashment. Thereafter, after considerable delay, the accused paid the part purchase consideration for tranche Nos. 1 & 2 for the aggregate amount of Rs. 2,48,991,851.31/- by RTGS payment. This payment was made in partial discharge of their obligations under Restated SPA. It was further alleged that the accused in order to meet the remaining payment obligations issued following cheques to the complainants for the balance purchase consideration of Rs. 1,244,947,936/- :-

2. The said cheques were drawn on State Bank of Patiala, Kasturba Gandhi Marg, New Delhi by accused No. 1 with the consent, connivance and knowledge of other accused persons. On December 21, 2011 the complainants presented the post-dated cheques dated June 27 and July 07, 2011 for the aggregate amount of Rs. 19,95,03,849/- issued towards part payment and in discharge of its liability of the purchase consideration. However, the said cheques when presented were returned unpaid for the reasons ''funds insufficient''. Similarly, other post-dated cheques were presented and dishonoured on account of ''insufficient funds'' or ''payment stopped by drawer''. The complainants issued a notice dated 28.12.2011 (demand notice) and similar other notice to accused Nos. 1 to 9 calling them to pay the amount of dishonoured cheques within 15 days from the date of receipt of the notice. The demand notice was duly served to them. Despite receiving the demand notice, they neither paid the amount of dishonoured cheques as demanded nor replied the letter.

3. The complainants further alleged that the cheques were issued by the accused No. 1 in consideration of and in discharge of existing liability and were dishonoured. On account of the failure of the accused to make the payment of the dishonoured cheques as demanded through demand notice within a stipulated period, the accused persons were liable for committing offences punishable under Sections 138 and 141 of the Negotiable Instruments Act.

4. Pre-summoning evidence was tendered by the complainants. On perusal of the evidence the Trial Court was of the opinion that prima facie there was enough evidence to summon the accused for the offence u/s 138 of the Negotiable Instruments Act. Accordingly, vide order dated 16.02.2012 and 13.03.2012 the accused were summoned to appear for 13.04.2012 and 17.05.2012. Being aggrieved, the petitioners have preferred the petitions u/s 482 Cr. P.C. for quashing of the summoning orders.

5. I have heard the learned senior counsel for the petitioners and the respondents and have examined the record. Counsel for the petitioners vehemently urged that the summoning orders dated 16.02.2012 and 13.03.2012 cannot be sustained as cheques in question were not issued in the discharge of any debt or liability. As per the SPA, it was clearly provided that the payment for tranches Nos. 3, 4 and 5 was to be made before particular dates by way of wire

transfer/demand draft. It did not provide any payment by way of post-dated cheques. Every transaction in respect of each tranche was an independent one. Specific dates were mentioned when each tranche shall be implemented. No payment/cheque was required to be issued before the date when the payments of the third and fourth tranche became payable under the agreement. It was absolutely clear that no sale of share took place for these three tranches. The petitioner thus had no debt or liability to make payment to the complainants. As per the agreement, the petitioners had an option to buy the shares at any time before 30th June, 2011 against payment whereas there was no clause which permitted or authorized any sale of shares after the said date. The agreement was determinable in nature and the petitioner expressed its desire and intention not to buy the shares. The complainants in terms of clause 9.3 were free to deal with the shares in such manner as they deemed fit in their absolute discretion. The agreement provided consequence of termination of the agreement where clause 9.3 prescribed that no party would have any claim against any other party upon the termination of the agreement. No criminal liability was attracted due to termination of the agreement. If there was any damages to the complainants, they could have initiated civil proceedings. Learned senior counsel further urged that the petitioners had no obligation to issue post-dated cheques without consideration of any sale of shares. The postdated cheques were issued only as security and were not towards payment in discharge of any existing debt or other liability. The payment was to be made to the complainant only on transfer of shares which never took place. Counsel referred to various clauses of the agreement to interpret that the post-dated cheques were not issued in consideration of any debt or other liability. It is further argued that the arbitration proceedings have already been resorted to by the complainants. Since no consideration exchanged and the post-dated cheques were issued without consideration, Section 138 of the Negotiable Instrument Act was not attracted to raise presumption u/s 139 of the Negotiable Instruments Act. It was contended that it was a fit case to exercise extraordinary jurisdiction u/s 482 Cr. P.C. Even if averments in the complaint case are taken on its face value and believed, no offence u/s 138 Negotiable Instruments Act was made out. Explanation to 138 Negotiable Instruments Act makes it clear that the debt or other liability has to be a legally enforceable debt or liability to raise presumption u/s 139 of the Negotiable Instruments Act. Reliance has been placed on Collage Culture and Others Vs. Apparel Export Promotion Council, ; Shanku Concretes Pvt. Ltd. Vs. State of Gujarat, ; Swastik Coaters Pvt. Ltd. Vs. Deepak Brothers and Others, ; Kumar Exports Vs. Sharma Carpets 2009 (1) SCC (Crl.) 823; M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, ; M/s. Balaji Seafoods Exports (India) Ltd. and another Vs. Mac Industries Ltd., ; Jyoti Build Tech Pvt. Ltd. and Others Vs. Mideast Pipeline Products,

6. Learned senior counsel for the respondents strenuously urged that the petitions u/s 482 Cr. P.C. for quashing of the summoning order are not maintainable. Post-dated cheques were issued in the discharge of debt/liability

for the purchase of shares in accordance with the terms and conditions of the agreement. On presentation, the cheques were dishonoured. u/s 118 and 139 of Negotiable Instruments Act a legal presumption arises that the holder of a cheque received the cheque for discharge in whole or in part of a debt or a liability unless contrary is proved. The complaint avers that the dishonoured cheques were issued in partial discharge of the debt under the agreement. Contents of the complaint prima facie disclose commission of offence u/s 138 of the Negotiable Instrument Act. Counsel referred to various clauses of the agreement to emphasise that the post-dated cheques were issued in consideration of purchase of shares. Scope of Section 482 Cr. P.C. is limited and defence of the petitioners cannot be looked into. At this stage, the court cannot go behind the cheque in view of presumption u/s 139 of Negotiable Instruments Act. Reliance has been placed on Magnum Aviation (Pvt.) Ltd. Vs. State and Others, , M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, , Hiten P. Dalal Vs. Bratindranath Banerjee, , John Thomas Vs. Dr. K. Jagadeesan, . Rajesh Agarwal Vs. State & Anr. Sachin Sangal Vs. Pieco Call Tech Pvt. Ltd., Sardar Manjeet Singh Kohli Vs. State of NCT of Delhi and Anr. and Rajesh Agarwal Vs. State and Another, .

7. Admitted position is that Restated SPA dated 11.03.2011 was executed between the parties by which the petitioners were to purchase 659,926 equity shares for a consideration of 149,39,46,574.23/- as per the terms and conditions incorporated therein in five tranches. It is not disputed that post-dated cheques were issued towards payment for first and second tranche. On presentation, the said cheques were honoured and no controversy arose between the parties. It is alleged that for purchase of shares in respect of 3, 4 and 5 tranches, post-dated cheques were issued by the petitioners which on presentation were dishonoured. The petitioners have not denied issuance of the post-dated cheques to the complainants. It is also not in controversy that the said post-dated cheques were dishonoured on the grounds of ''insufficient funds'' and ''payment stopped by drawer''. The petitioners did not deny receipt of demand notice by the complainants. Admittedly, no payment was made to the complainants pursuant to the issuance of the demand notice. Demand notice clearly mentions that the post-dated cheques were issued by the petitioners under the SPA towards partial discharge of the debt. In the complaint case u/s 138 of Negotiable Instruments Act, there is specific averment that the post-dated cheques were paid in partial discharge of their obligations under Restated SPA. Para (6) of the complaint mentions that in order to meet the remaining payment obligations under the Restated SPA, the accused issued the cheques for the balance purchase consideration of Rs. 1,244,947,936. Again in Para No. (7), it is stated that on December, 21, 2011 the complainant presented post-dated cheques issued by the accused amounting to 19,95,03,849/- towards part-payment in discharge of its liability of the purchase consideration. Para (11) is again specific that cheques were issued by accused No. 1 with the consent, connivance and knowledge of other accused persons in consideration and in discharge of the existing liability.

8. Averments in the complaint case and demand notice prima facie incorporate the necessary ingredients of Section 138 Negotiable Instrument Act. u/s 139 of the Negotiable Instruments Act, the Court has to draw a presumption that the holder of the cheque received the cheque for discharge of a debt or liability unless the contrary is proved. At this initial stage of proceedings, the plea, that there was no debt or liability cannot be entertained and accepted. In M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, the Supreme Court went to the extent of saying that there was no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them, the High Court could not have concluded that there was no existing debt or liability.

9. In Hiten P. Dalal Vs. Bratindranath Banerjee, the Supreme Court held:-

That the four cheques were executed by the appellant in favour of the Standard Chartered Bank (hereafter referred to as the Bank), has not been denied nor was it in dispute that the cheques were dishonoured because of insufficient funds in the Appellants'' account with the drawee, viz. Andhra Bank. Because of the admitted execution of the four cheques by the appellant, the Bank was entitled to and did in fact rely upon three presumptions in support of its case, namely, u/s 118 138 and 139 of the Negotiable Instruments Act. Section 118 provides, inter-alia, that until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration. The presumption which arises u/s 138 provides more specifically that where any cheque drawn by a person on an account for payment of any amount of money for the discharge in whole or in part of any debt or other liability, is returned by the drawee bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque, such persons shall be deemed to have committed an offence and shall be punished with imprisonment for a term which may extend to twice the amount of the cheque, or with both. The nature of the presumption u/s 138 is subject to the three conditions specified relating to presentation, giving of the notice and the non payment after receipt of notice by the drawer of the cheque. All three conditions have not been denied in this case.

21. The appellant''s submission that the cheques were not drawn for the ''discharge in whole or in part of any debt or other liability'' is answered by the third presumption available to the Bank u/s 139 of the Negotiable Instruments Act. This section provides that "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 for the discharge, in whole or in part, of any debt or other liability". The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards

the discharge of any liability.

22. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in The State of Madras Vs. A. Vaidyanatha Iyer, , it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the ''prudent man''.

10. In the present case, an exhaustive Restated SPA was executed between the parties. It was partly implemented and executed. Post-dated cheques issued by the purchasers for first and second tranche were honoured. However, post-dated cheques issued for 3rd, 4th and 5th tranche were dishonoured. Specific question was put to the learned counsel for the petitioners as to why the post-dated cheques issued were got dishonored. The petitioners had no answer. Without any apparent cause, the petitioners by their unilateral act had no authority under the agreement to terminate the transaction and to say that the complainants were at liberty to deal with the shares. It cannot be the proper and justifiable answer. Sanctity has been attached u/s 118 and 139 of the Negotiable Instruments Act where unless the contrary is proved, it is to be presumed that every negotiable instrument including a cheque was made or drawn for consideration. u/s 139, the courts are to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part of any debt or liability. This presumption is rebuttable. The presumption can be rebutted by

adducing evidence and the burden of prove is on the person who wants to rebut it and that can only be done in the course of trial. In the proceedings u/s 482 Cr. P.C. these complicated questions interpreting the clauses of the Restated SPA in one way or the other as per one''s convenience cannot be undertaken. Prima facie, it reveals that the post-dated cheques were issued in consideration of the purchase price of the shares under the Agreement. Clause 3.3 specifically mentions that any dishonour of the post-dated cheques shall constitute breach of the agreement without prejudice to the other rights of the venders and notwithstanding that the venders shall not have any obligation to deliver any of the shares to the purchasers in the event of such dishonour.

11. It is well settled that the power of quashing criminal proceedings should be exercised very stringently and without circumspection. It is settled law that at this stage the court is not justifiable in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. At this stage, the court could not have gone into the merits and/or come to the conclusion that there was no existing debt or liability M.M.T.C. Ltd. and Anr. Vs. Medchl Chemicals and Pharma (P) Ltd., (supra). In the light of the above discussion, I find no illegality or irregularity in the impugned orders. The petitions filed by the petitioners are dismissed. All pending applications also stand disposed of. It is, however, made clear that observations in the order are not on the merit of the case. The parties are directed to appear before the Trial Court on the date fixed i.e. on 21st March, 2013. Non bailable warrants (if any) issued against the petitioner(s) would not be executed.

