

(2022) 11 DEL CK 0050

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 5572 Of 2022, Criminal Miscellaneous Application No. 22087 Of 2022

M/S Whitefields Overseas Ltd. & Anr.

APPELLANT

Vs

M/S DIAT Agro Holdings Pvt. Ltd.

RESPONDENT

Date of Decision : 10-11-2022

Acts Referred:

Constitution Of India, 1950 — Article 20(2)

Code Of Criminal Procedure, 1973 — Section 482

Negotiable Instruments Act, 1881 — Section 138, 139, 141

Citation : (2022) 11 DEL CK 0050

Hon'ble Judges : Amit Sharma, J

Bench : Single Bench

Advocate : Anoop Prakash Awasthi

Final Decision : Dismissed

Judgement

Amit Sharma, J

1. The present petition has been instituted under Section 482 of the Code of Criminal Procedure, 1973 seeking setting aside of the impugned judgment dated 07.07.2022, passed by Sh. Sanjay Sharma – II Additional Sessions Judge – 03, (Central), Tis Hazari Courts, Delhi in Criminal Revision No. 286/2022, titled M/s Whitefields Overseas Ltd. & Ors v. M/s DIAT Agro Holding Pvt. Ltd.; dismissing the said revision petition qua the present petitioners. Vide the said revision petition, the petitioners had sought setting aside of summoning order dated 28.01.2022, passed by Ms. Akansha Gautam, Metropolitan Magistrate (NI Act), Digital Court – 02, Central, Tis Hazari Courts, Delhi; in C.C. No. 2352/2021, whereby the petitioners, along with others, were summoned for the offence punishable under Section 138 Negotiable Instruments Act, 1881 (hereinafter referred to as 'NI Act').

2. The relevant facts for the purpose of adjudication of present petition are as follows:-

A) The respondent herein supplied consignments to petitioner no. 1 between 26.06.2020 and 03.10.2020 and raised invoices with respect to the same. Thereafter, petitioner no. 1 issued eleven cheques in the sum of Rs. 85,26,50.39/-, drawn on 'Woori Bank, 1st Floor, A-Block, Salcon Platina Building, DLF, Phase-1, Sikanderpur, M.G. Road, Sector – 28, Haryana – 122001; in favor of the respondent. On presentation, the said cheques returned unpaid. The respondent sent demand notice dated 06.01.2021 to the petitioners. The petitioners denied their liability vide letters dated 04.01.2021 and 15.01.2021. The petitioners disputed supply as well as the quality thereof. The respondent, thereafter, instituted a complaint under Section 138 of the NI Act being C.C. No. 2352/2021, the learned Metropolitan Magistrate vide order dated 28.01.2022 issued summons to the petitioners and others for offence punishable under Section 138 NI Act. The said complaint case was instituted with respect to the aforementioned eleven cheques, of which four were outdated, and hence, the case did not lie with respect to those cheques. The learned Metropolitan Magistrate, recorded as under:

"The present case has been filed against 11 cheques, however, on perusal of complaint online, cheques no. i.e. 22671, 22673, 22674, 23603 are outdated and present case does not lie against these cheques and is limited to 7 other cheques against accused No. 1 is a company and accused No. 2, 3 and 4 are Directors of the company. The Court shall not proceed with the summons against remaining accused persons.

Record of the file perused. All the statutory requirements under NI Act are complied with. The present complaint case is filed within limitation. After perusal of the entire record, this Court is of the considered opinion that prima facie case punishable u/s 138 of NI Act is made out against the accused.

I take cognizance of the said offence.

Arguments heard on the point of summoning. Following the law laid down in A.C. Narayanan vs. State of Maharashtra & Anr., (2014) 11 SCC 790, complaint, affidavit of evidence and documents considered. In view of complaint, documents produced and verification in the form of affidavit of evidence, there are sufficient grounds for proceeding further against the accused persons for offence punishable under Section 138 NI Act.

Let summons be issued to the accused for being the drawer of the cheque on filing of PF/RC/AD/speed post as well as through all permissible modes returnable on 01.04.2022. Summons be issued to the accused No. 1, 2, 3 & 4 as per the address mentioned in the complaint. Service is directed to be effected on the physical address as well as virtual address of the accused No. 1, 2, 3 & 4."

B) Aggrieved by the above summoning order, the petitioners herein (M/s Whitefields Overseas Ltd. and Mr. Sumeet Saluja), Mr. Vijay Kumar Saluja and Smt. Rupa Saluja filed a revision petition being CrI. Rev. No. 286/2022 before the learned Additional Sessions Judge – 03, Central, Tis Hazari Courts. The learned

ASJ, in the impugned order, recorded that admittedly, Mr. Sumeet Saluja (petitioner no.2) is the Managing Director and the authorized signatory of M/s Whitefields Overseas Ltd (petitioner no. 1); Mr. Vijay Kumar Saluja and Smt. Rupa Saluja (not arrayed as parties in the present petition) are directors. It was further recorded as under:

"11. There must be averment that the person accused was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company. This is basic requirement under Section 141 NI Act.

12. In the case at hand, the complainant has not averred that the petitioner No. 2 and 4 were in charge of, and responsible to the petitioner No. 1 for conduct of its business.

13. In that regard, relevant para of the complaint is as under:

"3. Accused No. 1 is a company registered under the Companies Act, 1956 which deals in sale, purchase, import and export of rice and other goods. Accused No. 3 i.e. Mr. Sumeet Saluja is the Managing Director of accused No. 1 company, and the complainant affirms that to the best of the complainant's knowledge, accused No. 3 is in charge and responsible for the day-to-day affairs, management and financial decision making of accused No. 1 company at the relevant time as well as at present and therefore have been impleaded in the present complaint. Accused No. 2 i.e. Mr. Vijay Kumar Saluja and accused No. 4 i.e. Mrs. Rupa Saluja are the promoters and directors of accused No. 1 company and therefore have been impleaded in the present complaint....."

14. On holistic reading of the complaint, it is evident that the petitioner No. 3 placed orders for consignments of rice. He made assurance for timely payment of invoiced amount. The complainant contacted him regarding payment of outstanding amount. The complainant sent demand notice to the petitioner No. 1 through the petitioner No. 3. The petitioner No. 2 and 4 were not in charge of, and responsible to the company for the conduct of its business. They are not vicariously liable for nonpayment of the said cheques issued by the petitioner No. 3 towards discharge of liability of the petitioner No. 1. Summoning order qua the petitioner No. 2 and 4 deserves to be set-aside.

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17. As regards contention that the complainant has already filed a complaint case under Section 138 NI Act, vide CC No. 3553/2021, on same invoices in respect of same liability against the petitioners and the present complaint under Section 138 NI Act is not maintainable, it can be stated that cause of action for filing of a complaint case under Section 138 NI Act arises when cheque amount is not paid within 15 days from the date of receipt of demand notice. In MSR Leathers vs. S. Palaniappan and Another, (2013) 1 SCC 177, Hon'ble Supreme Court of India held, as under:

"14. A careful reading of the above provisions makes it manifest that a complaint

under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of the proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) of the proviso to Section 138 of the Act.”

18. In the present case, the complainant filed the complaint case after non-payment of cheque amount within 15 days from the date of receipt of demand notice. Therefore, the complainant had a valid cause of action to institute the complaint case in respect of 7 cheques, as noted in the impugned order. Accordingly, criminal revision petition filed by the petitioners is partly allowed. Criminal revision petition in respect of the petitioner No. 1 and 3 is dismissed. Criminal revision petition in respect of the petitioner No. 2 and 4 is allowed and summoning order against them is set-aside. A copy of judgment alongwith trial Court record be sent back. The revision file be consigned to record room.”

C) Aggreived with the aforesaid order dated 07.07.2022, passed by the learned Additional Sessions Judge, the petitioners have preferred the present petition under Section 482 of the Cr.P.C.

3. Learned counsel for the petitioners raised the solitary ground of double jeopardy and submitted that the learned Additional Sessions Judge has committed an error in law by not appreciating the important question of law with respect to the maintainability of a second complaint on the same cause of action and therefore, the order passed by the learned Additional Sessions Judge ought to be set aside. It was submitted on behalf of the petitioners that the respondent had already filed a complaint for offence punishable under Section 138 of the NI Act being C.C. No. 3553/2021, on same cause of action, in so far as the invoices, raised by the respondent, in both the complaints are the same. By way of illustration, the petitioners have compiled a table in Para 4 of the petition, whereby it was sought to be demonstrated that the cheques issued in the present complaint i.e. C.C. No. 2352/2021 and the other complaint being C.C. No. 3553/2021 were with respect to same invoices. In support of the submission, learned counsel appearing on behalf of the petitioners relied upon a judgment of the Hon’ble Supreme Court in M/S Gimpex Private Limited v. Manoj Goel, 2021 (12) SCALE 269.

3. It was further submitted on behalf of the learned counsel, that the petitioners cannot be prosecuted twice for the same offence and the pendency of the subject complaint violates their fundamental right guaranteed under Article 20(2) of the Constitution of India.

4. The reliance placed by the learned counsel appearing on behalf of the petitioners on Gimpex Private Limited (supra) is misplaced. The Hon’ble Supreme Court in the said case was dealing with a proposition whether once a settlement has been entered into and pursuance of the said settlement, fresh cheques had

been issued, could the complainant be allowed to pursue the original complaint in which the compromise had taken place? In this backdrop, the Hon'ble Supreme Court in Gimpex Private Limited (supra) held as under:

"38... The settlement agreement subsumes the original complaint. Non-compliance of the terms of the settlement agreement or dishonor of cheques issued subsequent to it, would then given rise to a fresh cause of action attracting liability under Section 138 of the NI Act and other remedies under civil law and criminal law.

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40. Thus, in our view, a complainant cannot pursue two parallel prosecutions for the same underlying transaction. Once a settlement agreement has been entered into by the parties, the proceedings in the original complaint cannot be sustained and a fresh cause of action accrues to the complainant under the terms of the settlement deed."

5. Turning over to the facts of the present case, admittedly no compromise had been arrived at between the parties to the subject complaint. The submission of the learned counsel appearing on behalf of the petitioners that the cheques had been issued for the same invoices and therefore would give rise to the same cause of action is not tenable, in view of the fact that the cheques in both the complaints had allegedly been issued for discharge of liability, in part, arising out of the invoices relied upon by the respondent. It is pertinent to note that C.C. No. 3553/2021 was filed subsequent to the subject complaint (C.C. No. 2352/2021) and in Para 21 of C.C. No. 3553/2021, annexed as Annexure P-5 (colly) to the present petition it has been stated as under;

"21 . That the complainant has already initiated one complaint case under section 138 of NI Act, for the cheques amounting to Rs. 85,26,520/- which is pending disposal before the Ld.MM Central Tis Hazari Court Delhi. The calculation shown above are based on the detail of cheques but as on date the complainant is entitled to Rs.1,94,53,509.00/- besides continuous interest accruing upon the unpaid amount @ 18 percent P.A."

6. Perusal of the aforesaid paragraph reflects that the said C.C. No. 3553/2021 disclosed the filing of the subject complaint case by the respondent with respect to the cheques which are subject matter of the present petition and further clearly stated that besides the aforesaid cheque, the liability of the petitioners towards the respondent remained to the tune of Rs.1,94,53,509.00/-, besides continuous interest accruing upon the unpaid amount @ 18% per annum. Moreover, even the table relied upon by the petitioners in Para 4 of the petition demonstrates that the total amount of the invoices mentioned therein, which are common to the complaints, is Rs. 1,63,46,844.00/-. It is pertinent to note that the cheque amount in the present case is Rs. 85,26,520.39/-. So, admittedly, the cheques in the subject complaint do not correspond to the total value of invoices detailed in the said table and therefore cheques were issued towards discharge of

the alleged liability in part.

7. It is settled law that bouncing of every cheque would give rise to a separate cause of action. In fact, in the judgment relied upon by the learned counsel appearing on behalf of the petitioners, i.e., Gimpex Private Limited (supra) in Para 25 and Para 26, while analyzing the cause of action under NI Act, the Hon'ble Apex Court has held as under;

"25. The ingredients of the offence under Section 138 are:

- (i) The drawing of a cheque by person on an account maintained by him with the banker for the payment of any amount of money to another from that account;
- (ii) The cheque being drawn for the discharge in whole or in part of any debt or other liability;
- (iii) Presentation of the cheque to the bank;
- (iv) The return of the cheque by the drawee bank as unpaid either because 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;
- (v) A notice by the payee or the holder in due course making a demand for the payment of the amount to the drawer of the cheque within 30 days of the receipt of information from the bank in regard to the return of the cheque; and
- (vi) The drawer of the cheque failing to make payment of the amount of money to the payee or the holder in due course within 15 days of the receipt of the notice.

26. The ingredients of the offence were summarized in fairly similar terms in a judgment of a two judge Bench of this Court in K Bhaskaran v. Sankaran Vaidhyan Balan. Justice K T Thomas observed:

"14. The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque. (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice." "

8. Even otherwise, Section 139 of the NI Act provides as under;

"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 for the discharge, in whole or in part, of any debt or other liability."

In view of the aforesaid presumption, it is for the petitioner to prove that the said cheques were not issued towards discharge, in whole or part, of any debt or

liability. This court cannot go into factual issues which are not admitted between the parties. Moreover, it is settled law that the scope of enquiry in exercise of jurisdiction under Section 482 CrPC is limited. The court should be slow to grant relief at a pre-trial stage, before parties have had an opportunity to adduce evidence. This inherent jurisdiction must be exercised sparingly and with great circumspection.

9. In view of the above, this Court finds no reason to interfere with the impugned judgment dated 07.07.2022, passed by Sh. Sanjay Sharma – II Additional Sessions Judge – 03, (Central), Tis Hazari Courts, Delhi in Criminal Revision No. 286/2022, titled M/s Whitefields Overseas Ltd. & Ors v. M/s DIAT Agro Holding Pvt. Ltd.

10. In view thereof, the present petition is dismissed and disposed of accordingly.

11. Needless to state, this Court has not expressed any opinion on the merits of the case of the petitioners pending before the learned trial Court.

12. Pending application(s), if any, also stand disposed of.