

(2012) 07 DEL CK 0687

In the Delhi High Court

Case No : Criminal Rev. P. No. 150 of 2001

R.P.G. Transmissions Ltd. (Now Known As KEC International Limited)

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Companies Act, 1956 — Section 536(2)
Criminal Procedure Code, 1973 (CrPC) — Section 145, 378(4), 397, 397(3), 399(3)
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2012) 6 ILR Delhi 545

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Siddharth Luthra with Mr. Yashpreet Singh, Mr. Rajiv Bhatnagar, Mr. Nitin Mishra and Ms. Smriti Sinha, for the Appellant; Navin Sharma, APP for State/R1, Mr. R.K. Bharti and Mr. Mahipal Khanagwal, for R-2, for the Respondent

Final Decision : Dismissed

Judgement

Suresh Kait, J.—Instant petition is filed being aggrieved by the order dated 18.01.2001 passed by learned Additional Sessions Judge, Delhi while setting aside the order dated 20.10.2000 passed by learned Metropolitan Magistrate. The brief facts of the case are that the petitioner No. 1 company had entered into an lease agreement with the company named "Sakura Seimitsu India Limited" (hereinafter referred to as SAKURA) on 27.09.1995 tilted as Lease Agreement for equipment.

2. In compliance of the said lease agreement, respondent No. 2 being the managing director and acting on behalf of Sakura issued and delivered post dated cheques for the payment of rental amount and other charges as agreed between the parties, in the said agreement.

3. The complainant/petitioner present two of the cheques issued by the respondent No. 2 bearing No. 805261 and 805317 dated 27.06.1993 drawn on

Punjab National Bank, New Delhi towards lease rentals for an amount of Rs. 6,37,812/- and Rs. 31,891/- respectively to its banker Vijaya Bank, R.K. Puram New Delhi. Both the above mentioned cheques were dishonoured on the grounds of "insufficient funds" and intimation thereof was sent by the petitioner.

4. The petitioner, thereafter, did all statutory requirements finally in the absence of any response from the other side, filed the criminal case u/s 138/141 Negotiable Instrument Act, 1881 (hereinafter referred as NI Act) bearing No. 769/1998 against the company Sakura and its director including respondent No. 2.

5. During the pendency of the aforesaid complaint, an application was filed by the respondent No. 2 seeking recalling of the summoning order in the complaint case mentioned above, which was dismissed by learned Magistrate vide order dated 20.10.2000.

6. Being aggrieved, respondent No. 2 challenged the same in a revision and same was allowed vide impugned order dated 18.01.2001 and respondent No. 2 was discharged.

7. The petitioner who is aggrieved by the above referred order of Sessions Court has invoked the revisional jurisdiction of this Court for seeking set aside of the order dated 18.01.2001 on the grounds amongst others i.e. the impugned order dated 18.01.2001 is bad in law and deserves to be set aside because of the fact that learned Sessions Court failed to appreciate that if all extent of the legal disability created by the orders of the Allahabad High Court on 01.04.1997 and 07.05.1997 and that the accused company Sakura was directed not to transfer, alienate or otherwise part with the possession of any equipment, immovable assets or creating any further charge over its assets.

8. In the present case, the petitioner company owed actual certain liquidated financial liability, towards the respondent and discharge of its financial liability can it no way be staid to be prohibited by the orders of Allahabad High Court.

9. Furthermore, the contention of the respondent which has been erroneously been accepted that the respondents were precluded from disposing of their immovable assets to fulfil this claim by the aforementioned order has no relevance at this stage as the offence u/s 138 NI Act provides for strict liability and such contentions/defence has no relevance at this stage or even at a later stage.

10. Learned Counsel for petitioner submits that the application of Section 22A of the BIFR could not even be attracted nor the judgment reported on Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, has any application to the present case, wherein the averment of the accused, though disputed is that orders have been passed u/s 536 (2) of the Companies Act and not u/s 22A SICA. That even otherwise, in the above mentioned case would not act as bar to the prosecution in every case and the facts of each case

have to be seen in much as SICA exists to protect the companies which have become sick, whereas the provision of the Companies Act are regarding winding up and to close down the functioning of a company and the two statutes act in a totally separate realms and no benefit can be drawn by the accused company from the judgment in above case.

11. Vide order dated 16.02.2012, this Court observed as under:-

On maintainability of the instant petition, the Learned Counsel for the petitioner referred the order passed by this Court in CrI. Revision Petition No. 40/2012 whereby this Court has held that the revision petition against the revisional order is maintainable. The copy of the above said order has been supplied to the counsel for the respondents.

Learned Counsel for the respondents seek adjournment as he has to go through the same.

12. Thereafter, instant petition was listed on 15.03.2012, Learned Counsel for respondent No. 2 has raised the objection to the instant petition differently on the maintainability.

13. Learned Counsel submitted that by the impugned orders the respondent has been acquitted, therefore, against the acquittal petitioner was supposed to file an appeal and not the revision, as per provisions enumerated u/s 378(4)Cr. P.C. and therefore, instant petition is not maintainable.

14. Though, the order dated 16.02.2012 was dictated in the open Court and that too in the presence of Learned Counsel for respondent No. 2, however, this Court will independently deal with the objection raised on behalf respondent No. 2, if required.

15. Learned Counsel for respondent No. 2 has argued that respondent No. 2 was in fact acquitted by learned Additional Sessions Judge by the impugned order, therefore, against acquittal the petitioner should have filed an appeal against said order and instant petition in its form is not maintainable.

16. Learned Counsel for petitioner has argued that impugned order of learned Additional Sessions Judge allowed the Criminal Revision filed by respondent. However, the present petition is filed by the petitioner invoking revisional jurisdiction of this Court to correct the illegality and propriety of the order passed by learned Additional Sessions Judge.

17. He further submitted that as per sub-section (3) of Section 397Cr. P.C. if an application u/s has been made by the same person, shall be entertained by "either of them". Sub section 3 specifically bars entertainment of application to the High Court from any person who has already applied to the Sessions Court in the revision and vice-a-versa. But, if Sessions Court allowed the revision filed by one of the parties, the other part can go to High Court in revision.

18. Learned Counsel for petitioner further submitted that as per settled law, the

bar of revision in sub section (3) is only confined to second revision application filed by the same person. He has also relied upon judgment delivered by the Full Bench of Andhra Pradesh High Court in *Re Puritipatti Jagga Reddy*: AIR 1979 AP 146 has held as under:-

9. The language of sub-sec. (3) of S. 397 contains no ambiguity. If any person has already chosen to file a revision before the High Court or to the Sessions Court under sub-sec. (1), the same person cannot prefer a further application to the other Court. To put it in other words. Sub-secs. (1) and (3) make it clear that person, aggrieved by any order or proceeding can seek remedy by way of a revision either before the High Court or the Sessions Court. Once he has availed himself of that remedy. he is precluded from approaching the other forum. It is equally manifest from the provisions that Sub- Sec (3) that this bar is limited to the same person who has already chosen to get either to the High Court or to the Sessions Court seeking a remedy and that it does not apply to the other parties or persons. Further the bar contained in sub-sec.(3) is only against that person who has ready chosen the remedy either before the High Court or before the Sessions Judge. It is not permissible to extent the bar contained under a statute to other Persons or to other fields. It is well established that the bar against seeking a remedy in a Court of Law or against a Court of law rendering justice should be strictly construed. It is noteworthy that Sub-sec. (1) of Sec, 397 empowers the High Court or the Sessions Court to call for and examine the record of any proceeding before any inferior Court. That is to say, it can exercise this power of calling for and examining the record suo-motto also. The language of Sub-sec. (3). strictly limited as it is to a person who has chosen to seek the remedy from one of the two courts, cannot be extended to the High Court exercising its powers conferred on it under the provision of the Code. It is patent that the bar contained in sub-sec. (3) is only against the person who has already chosen his remedy before one of the two forums.

20. Further, Learned Counsel for petitioner relied upon the decision of Full Bench of Mumbai High Court in *Inayatullah Rizvi v. Rahimtuallah & Ors* : 1981 Cri L. J. 1398 as under:-

In Section 397(3) the crucial words are "no further application by the same person shall be entertained by the other of them". Similarly, the material clause in Section 399(3) is "no further proceeding by way of revision at the instance of such person shall be entertained." "It is thus clear that the bar of a second revision was only confined to cases where the criminal revision was dismissed by the Session Judge. At the instance of the person who lost the criminal revision before the Sessions Judge no revision to the High Court lies. An illustration would make the position clear. A proceeding u/s 145. Criminal P.C. between X and Y terminated before the Magistrate in favour of X. The criminal revision of Y before the Sessions Judge was dismissed. A criminal revision before the High Court at the instance of Y shall not be entertained. In the same illustration if Y's criminal revision before the Sessions Judge was allowed, a criminal revision to the High

Court against the order of the Sessions Judge at the instance of X is maintainable. This is for the simple reason that the second criminal revision before the High Court is not at the instance of such person who filed the criminal revision before the Sessions Judge. On the language of Section 397(3) and Section 399(3) conclusion is irresistible that a second revision at the instance of a successful party before the Magistrate who lost the revision before the Sessions Judge lies.

20. He further submitted that the words are significant in sub section (3) of Section 397 are "any person" and "same person". Second revision before the High Court by the "same person" who approached the Sessions Court in revision is barred. But this does not preclude another person who did not move the Sessions court to apply in revision before the High Court. Therefore, the prohibition under sub-Section (3) of Section 397 on revisional power given to the High Court is not attracted in the present petition.

21. After considering the submission of Learned Counsel for parties, on the similar issue, I have already recorded my view in CrI.Revision No. 40/2012 titled O.P.Dawar v. State & Anr vide order dated 25.01.2012, therefore, instant petition is maintainable.

22. I have heard Learned Counsels for parties.

23. On perusal of the impugned judgment, it is transpired that learned Additional Sessions Judge has opined while relying upon the case of Pankaj Mehra & Ors v. State of Maharashtra: 2000 SCC (2) 756, wherein main question involved was, whether a filing of a winding up petition simpliciter is sufficient to discharge the accused u/s 138NI Act. The whole case revolved around the interpretation of Section 536(2) of the Companies Act which states that any disposition of property (including actionable claims) of the company and any transfer of the shares in the company or alteration in the statute of its member may after the commencement of the winding up, shall, unless the Court otherwise directs be void.

24. Learned Additional Sessions Judge further recorded that merely filing of petition for winding up does not debar the complainant to proceed with his complaint u/s 138NI Act. If the payments are not void ab-initio, the company cannot contend that it is legally forbidden from making payment of the cheque amount when notice was issued by the payee regarding dishonour of the cheque.

25. On the issue whether the company or a director can be prosecuted against for being having committed the offence punishable u/s 138NI Act after the company has been declared sick under the provisions of SICA, learned Additional Sessions Judge has recorded that though it was held in Pankaj Mehra (supra) by the Apex Court that Section 22 of SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of offence u/s 138NI Act against the company or its directors; the only creates an embargo against the disposal of assets of the company for recovery of its debts and the

purpose of such embargo is to preserve the assets of the company for being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its director to any person for satisfaction of their legally enforceable dues.

26. Admittedly, the cheques issued on dated 27.06.1997 (though the petitioner contends that the same were given at the time of initial agreement) and demand notice was sent on 15.07.1997 wherein 15 days time was given to the accused company to make the payment; however, because of the legal disability created by the orders dated 01.04.1997 and 07.05.1997 passed by the High Court of Allahabad wherein the accused company was directed not to transfer, alienate or otherwise part with the possession of any equipment, immovable assets or creating any further charge over its assets, the company found itself in a situation, as is visualised in para 19 of the judgment reported as Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others,

27. In view of above discussion, I find no discrepancy in the impugned order passed by learned Additional Sessions Judge. Therefore, I am not inclined to interfere with. I concur with the same.

28. Since the instant petition has not been allowed, therefore, there is no requirement of recording my opinion on the issue raised in para No. 15 above of this order.

29. Instant petition is dismissed with no order as to costs. Trial Court Record be remitted back henceforth.