

(2019) 01 DEL CK 0429

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 507 Of 2019

Vipin Kr. Gupta

APPELLANT

Vs

Sarvesh Mahajan

RESPONDENT

Date of Decision : 31-01-2019

Acts Referred:

Code of Criminal Procedure, 1973 — Section 251, 482
Negotiable Instrument Act, 1881 — Section 138, 141
Limited Liability Partnership Act, 2008 — Section 58(4)

Citation : (2019) 260 DLT 264

Hon'ble Judges : Chander Shekhar, J

Bench : Single Bench

Advocate : Amarjit Singh

Final Decision : Dismissed

Judgement

Chander Shekhar, J

CRL.M.A. 2171/2019

1. Allowed, subject to all just exceptions. The application is disposed of.

CRL.M.C.507/2019 & CRL.M.A. 2170/2019

1. This petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 ("Cr.PC", in short) for setting aside the proceedings arising out of the complaint filed by the respondent titled as "Sarvesh Mahajan v. M/s Lotus Floriculture L.L.P. & Ors." pending before the learned Metropolitan Magistrate (NI Act), Tis Hazari Court, Delhi (hereinafter, the "Trial Court"), as well as the orders dated 17.11.2014, 06.05.2017 and 01.06.2018 ("impugned orders", in short) passed by the Trial Court.

2. The alleged brief facts, which emerge from the material on record are that, sometime in May 2013, the respondent (complainant before the Trial Court), approached Lotus Floriculture Pvt. Ltd. for purchase of its flat bearing No. 55, 3rd

Floor, Sukhdev Vihar, New Delhi. After negotiation, Lotus Floriculture Pvt. Ltd. agreed to sell the above flat for a total consideration of Rs. 2,20,00,000/- and in consequence, the respondent paid a sum of Rs. 20,00,000/- in cash and Rs. 40,00,000/- through RTGS from the account of M/s Get Post Investment and Finance Service Ltd. and thereafter on 17.05.2013 an Agreement to sell and purchase was executed by the petitioner on behalf of Lotus Floriculture Pvt. Ltd.

The property under sell was lying mortgaged with HDFC as a collateral security for corporate guarantee given to M/s. Visa Koje Tradevision Pvt. Ltd. by Lotus Floriculture Pvt. Ltd. and was to be redeemed as soon as the respondent conveyed his readiness to pay the balance amount which the respondent agreed to pay. However, the respondent on the pretext that the company might fail to redeem the property in time due to non-payment by Visa Koje to the bank, demanded security for the earnest money paid. Therefore, Lotus Floriculture Pvt. Ltd. issued an undated cheque bearing No. 003858 drawn on Union Bank of India, Kailash Colony, New Delhi for Rs. 60,00,000/- without mentioning the name of the payee. The petitioner being the Authorised Signatory of the company in good faith had issued the cheque by filing the amount in words as well as in figures to the respondent with an assurance that the said cheque shall not be misused by the respondent and shall be returned after the property is redeemed.

In the meantime, Lotus Floriculture Pvt. Ltd. was converted into Limited Liability Partnership on 24.03.2014 and all the assets and liabilities of the company were taken over by the successor entity by operation of law and the respondent was accordingly informed that the new entity Lotus Floriculture LLP was ready to execute sale deed in his favour against the balance consideration.

3. Subsequently, the respondent did not come forward to pay the balance amount nor came forward to perform his part of the Agreement to sell dated 17.05.2013 however, the respondent unauthorizedly presented the aforesaid cheque bearing No. 003858 for encashment which got dishonoured and in consequence of which, the respondent firstly sent a legal notice dated 5.09.2014 and thereafter filed a complaint against the petitioner and the other co-accused in the case for the offence committed under Section 138 of the Negotiable Instrument Act, 1881 ("NI Act", in short) which got registered and the Trial Court vide order dated 17.11.2014 issued summons to the petitioner, and the other co-accused namely, Lotus Floriculture LLP. and the partners of the Lotus Floriculture LLP. Thereafter, vide order dated 3.10.2016 the names of the accused Nos. 2 & 3 (partners of Lotus Floriculture LLP) were deleted from the array of parties on the statement made by the respondent, that he does not want to prosecute them, leaving the petitioner and accused No. 1-Lotus Floriculture LLP to face the proceedings under Section 138 read with Section 141 of the NI Act.

4. Subsequently, an application was filed by the petitioner to discharge the petitioner from the case. However, the Trial Court vide order dated 06.05.2017 observed that no ground was made out to discharge the petitioner from the case

since sufficient material is on record to frame notice against the petitioner.

5. Thereafter, vide the impugned order dated 1.06.2018 the Trial Court framed notice under Section 251 of the Cr.PC, to which the petitioner pleaded not guilty and claimed trial.

6. The petitioner has challenged the afore-mentioned orders dated 17.11.2014 06.05.2017 and 01.06.2018 and also the proceedings which are pending before the Trial Court.

7. Learned counsel for the petitioner, on the query of the Court, admitted that the cheque bears the signatures of the petitioner but however, submitted that the petitioner was not a Director at the time of issuance/ signing of the cheque and the same was without consideration, therefore, he is not liable to make the payment or even to be summoned in the matter.

8. Now, this Court would like to deal with firstly, the order dated 17.11.2014. The order dated 17.11.2014 has been assailed now, after more than four years of the passing of the said impugned order. There is neither any plausible explanation nor any sufficient cause in the petition to approach this Court after such an inordinate delay. I have no hesitation to hold that if the Court fails to take into consideration delay and laches, while invoking the powers of the High Court under Section 482 of the Cr. PC, without any reasonable ground, there would be no end to the litigation, as a consequence whereof, neither any trial would be proceeded nor any trial would be concluded before the Trial Court. The impugned order dated 17.11.2014 is barred by the principle of delay and laches, to invoke the powers of the High Court under Section 482 of the Cr. PC, hence, challenge to the impugned order dated 17.11.2014 cannot be entertained at this stage after such a long, inordinate delay and laches, hence is not liable to be set aside on this ground alone. In this regard, see *Rajesh Chetwal v. State*, in *Crl.M.C.1656/2011*, decided by this Court on 24.8.2011, *Inder Mohan & Ors. vs. The State*, 1972 *Crl. LJ 1569*, *Gopal Chauhan v. Smt. Satya & Anr.*, 1979 *Crl.LJ 446* and *Bata & Ors. v. Anama Behera*, 1990 *Crl.LJ 1110*.

9. Even otherwise, let me examine the question, whether the Trial Court was justified or not in issuing summons to the petitioner vide the impugned order dated 17.11.2014.

10. It is a well settled law that the Trial Court is only expected to consider the *prima facie* case at this stage to proceed against the accused and not whether the case would result in conviction.

11. It needs no elaboration that at this stage the Court is required to evaluate the material and documents which have been placed on record by the petitioner and taken at the face value thereof, whether existence of the ingredients constituting the alleged offence or offences are *prima-facie* disclosed or not.

12. In *Rajiv Thapar & Ors. v. Madan Lal Kapoor*, (2013) 3 SCC 330, it has been held by the Supreme Court as under:

"28. The High Court, in exercise of its jurisdiction under Section 482 of the Cr.P.C., must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused is. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so, because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed, by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position, that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.

29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings,

for that would prevent abuse of process of the court, and secure the ends of justice."

13. In *D.K. Pandey v. State*, [2010 (VII) AD (Delhi 881)], it has been held by this Court that before passing summoning order, it is obligatory on the part of the Metropolitan Magistrate to consider material and evidence placed on record in the light of the offences committed and analyze it so as to come to the conclusion whether commission of offence(s) in terms of the provisions of law was/were prima facie disclosed or not (See: *State of Bihar v. Ramesh Singh*, AIR 1977 SC 2018, *State of M.P. v. S.B. Johari and Ors.*, 2000 CrL. L.J. 944 (SC), *P. Vijayan v. State of Kerala*, 2010 CrL. L.J. 1427, *Union of India v. Prafulla Kumar Samal* 1979 CrL. LJ 154, *Ram Kishore v. State and Ors.*, RLW 2008 (3) Raj. 2440, *Yashwinder Malik and Ors. v. State and Ors.*, 2017 (1) JCC 573 and *State of Maharashtra v. Salman Khan*, AIR 2004 SC 1189.)

14. The cheque clearly bears the signature of the petitioner. The contentions raised by the learned counsel for the petitioner that the petitioner was not a Director at the time of signing of the cheque or the same is without consideration cannot be evaluated, appreciated or decided at this stage which requires recording of the oral and documentary evidence which can be recorded only in accordance with law at the appropriate stage.

15. A perusal of the said impugned order demonstrates that the Trial Court had perused the material on record, applied its judicial mind and prima facie found that offence under Section 138 of the NI Act appears to have been committed and further took cognizance of the offence under Section 138 and issued summons to the accused Nos.1 to 4. It also stands borne-out from the said impugned order that the Trial Court applied its judicial mind in holding that no case is made out against accused Nos.5 and 6 and they were not summoned and for that reason, the complaint against the accused Nos.5 and 6 was dismissed. I also concur with the aforesaid findings in view of the material on record moreso in view of the fact that the impugned cheque admittedly bears the signature of the petitioner. Hence, even on merits, this Court finds no infirmity or flaw in the impugned order dated 17.11.2014.

16. The petitioner has also challenged the order dated 6.5.2017. So far as the said impugned order is concerned, it is rightly held by the Trial Court that the submission of the learned counsel for the petitioner that the petitioner cannot be prosecuted further is not tenable as the petitioner is the signatory of the cheque in question. Also at the time of transaction between the parties he was one of the Directors of the accused company Lotus Floriculture LLP. Moreover, as per the provisions of Limited Liability Partnership Act also the respondent cannot be absolved of his liability as all the liability of the Lotus Floriculture Pvt. Ltd. got transferred to the Lotus Floriculture LLP. Further, Section 58(4) of The Limited Liability Partnership Act, 2008 reads as under:

"Registration and effect of conversion -

(4) Notwithstanding anything contained in any other law for the time being in force, on and from the date of registration specified in the certificate of registration issued under the Second Schedule, the Third Schedule or the Fourth Schedule, as the case may be,-

(a) there shall be a limited liability partnership by the name specified in the certificate of registration registered under this Act;

(b) all tangible (movable or immovable) and intangible property vested in the firm or the company, as the case may be, all assets, interests, rights, privileges, liabilities, obligations relating to the firm or the company, as the case may be, and the whole of the undertaking of the firm or the company, as the case may be, shall be transferred to and shall vest in the limited liability partnership without further assurance, act or deed; and

(c) the firm or the company, as the case may be, shall be deemed to be dissolved and removed from the records of the Registrar of Firms or Registrar of Companies, as the case may be.

17. A perusal of the aforesaid provision makes it clear that there was no ground made out for the Trial Court to discharge the petitioner from the present case at that stage and the Trial Court was right in holding that sufficient material is on record to frame notice against the petitioner.

18. The petitioner has also challenged the order dated 1.6.2018. A perusal of the said impugned order clearly demonstrates that the Trial Court has applied its judicial mind and found that prima facie case is made out to proceed against the petitioner. Further perusal of the said impugned order shows that the learned counsel for the petitioner prayed for some time for filing proper application seeking permission to cross-examine the respondent. Learned counsel for the petitioner has not given any reason why such permission was sought.

19. Accordingly, I find no flaw or infirmity in the impugned orders. This Court does not deem it appropriate to issue notice to the respondent. The petition is dismissed, however, with no orders as to costs.