Neutral Citation No. - 2023:AHC:197971

AFR

Court No. - 92

Case :- APPLICATION U/S 482 No. - 2969 of 2016

Applicant :- Neeraj Jain
Opposite Party :- State of U.P. and Another
Counsel for Applicant :- Raj Kumar Kesari
Counsel for Opposite Party :- G.A.,Birendra Kumar Mishra

Hon'ble Anish Kumar Gupta,J.

1. Heard Sri Raj Kumar Kesari, learned counsel for the applicant, Sri Abhyuday Mehrotra, Advocate holding brief of Sri Birendra Kumar Mishra, learned counsel for the opposite party no.2 and Sri Sandeep Choudhary, learned A.G.A. for the State.

2. The instant application u/s 482 Cr.P.C. (hereinafter referred as '*the Code*') has been filed seeking quashing of the summoning order dated 24.09.2015 in complaint case no. 5972 of 2015 (Motor Oil Lubricants Pvt. Ltd. Vs Neeraj Jain) u/S 138 of Negotiable Instrument Act (hereinafter referred as *"the Act'*), passed by Additional Civil Judge (Junior Division)/Judicial Magistrate, Court No. 4, Agra, .

3. Learned counsel for the applicant submits that in the instant case, the impugned cheque was issued by the applicant herein as a security for the commercial transactions between the parties in the year, 2013, which has been misused by the opposite party no.2 and the instant complaint case has been filed by presenting the said cheque by filling up the amount as per his own convenience. Therefore, learned counsel applicant has submitted that on the basis of the said cheque, which was issued as a security for the

commercial transactions between the parties, no offence u/S 138 of the Act, can be said to have been made out. In support of his arguments, learned counsel for the applicant has relied upon the judgement of the Co-ordinate Bench of this Court in ***Vijay Kumar Upadhyay vs. State of U.P. & Anr. : 2013 (1) ALL LJ 577*** and submitted that in that case also, the cheque was given as a security amount, which was not covered u/S 138 of the Act. Therefore, the Co-ordinate Bench of this Court has quashed the entire proceedings of the said complaint case u/S 138 of the Act, holding that the security cheques are not covered u/S 138 of the Act. Therefore, he has prayed for similar order, quashing the entire proceedings of the said complaint case against the applicant herein.

4. Per contra, learned counsel for the opposite party no.2 has submitted that in the instant case, challenge has been made by the applicant only to the summoning order dated 24.09.2015 and while taking the cognizance in the matter, the learned Magistrate is required to consider the materials available before him at the time of the summoning the accused persons for the offences u/S 138 of the Act and the Magistrate is required to satisfy himself whether from the materials available before him, an offence u/S 138 of the Act, prima facie constituted or not. After recording his satisfaction, it will be the duty of the learned Magistrate to issue summons against the accused persons so that he may contest the case in accordance with law.

5. In the instant case, the complaint filed by the opposite party no.2, categorically makes out a case that the opposite party no.2 had sold the oil to the applicant/complainant for which an amount of Rs. 48,40,783/- were due to be paid by the applicant to the opposite party no.2 and out of the said amount, the applicant had paid the sum of Rs. 36,10,821/- including the Cash Discount, Credit Note etc., and for the remaining amount, in discharge of the

legal debt, the applicant has issued a cheque of Rs. 12,29,962/- on 16.06.2015, in favour of the opposite party no.2, which was presented for encashment by the opposite party no.2 in his bank and the same cheque was dishonoured on 20.06.2015 and after the said dishonour of cheque, on 10.07.2015, the legal notice was issued by the opposite party no.2, which was received by the applicant herein on 14.07.2015. Despite that, the applicant herein had failed to make payment of the said cheque amount to the opposite party no.2, within the period of notice. Therefore, after the expiry of 15 days from the receipt of the said notice, the offence u/S 138 of the Act, is constituted and the opposite party no.2 had filed the complaint case within the period of limitation i.e, on 05.08.2015. Therefore, the impugned cheque, the dishonour memo and the legal notice was placed alongwith the complaint before the learned Magistrate, on the basis of which the learned Magistrate has taken cognizance with the matter, after having satisfied himself that a prima facie offence u/S 138 of the Act, is constituted against the applicant herein. Therefore, the applicant was summoned vide order dated 24.09.2015.

6. Learned counsel for the opposite party no.2 further submits that the arguments on behalf of the applicant that the cheque was issued as a security or not, that is his defence, which is to be taken by the applicant during the trial of the said case. Whether there was a legal liability on the date of issuance of cheque that has to be decided during the trial. By the Magistrate, on the basis of the evidence led by the applicant. If a prima facie case is made out from the complaint, the proceedings u/S 138 of the Act, cannot be quashed while exercising the jurisdiction u/S 482 of the Code. In support of his arguments, learned counsel for the opposite party no.2 has relied upon a recent judgement of the Apex Court in ***Rathish Babu Unnikrishnan vs. The State (Govt. of NCT of Delhi) and Another : [2022] 4 S.C.R. 989***, wherein it has been

held by the Apex Court that the burden to prove whether there was any legally existing debt or liability against the accused in the case u/S 138 of the Act, is to be discharged during the trial. In the said judgement the Apex Court relying upon the judgement in the case of ***Rajeshbhai Muljibhai Patel vs State of Gujarat (2020) 3 SCC 494***, the Apex Court has held that a disputed question of fact cannot be adjudicated while exercising the jurisdiction u/S 482 of the Code. It is further submitted by learned counsel for the opposite party no.2 that Apex Court has further held that at the stage of summoning order, when the factual controversy is yet to be contested and considered by the Trial Court, it will not be judicious and based upon a prima facie impression, element of criminality cannot be ruled out.

7. Learned counsel for the State has also supported the arguments of learned counsel for the opposite party no.2 and submitted that at the time of issuing summons in the complaint case u/S 138 of the Act, the duty of the Magistrate is to consider the materials available before him and record his prima facie satisfaction whether all the ingredients of Section 138 of the Act, are fulfilled and constitute the offence under the said section. If such a prima facie satisfaction as recorded by the Magistrate, the Magistrate has no option but to issue summons against the accused persons in the said proceedings.

8. Having heard the rival submissions made by learned counsels for the parties, this court has carefully perused the records of the case.

9. Before adverting to the rival contentions raised by the learned counsels for the parties, it will be relevant to consider the provisions of Sections 138 & 139 of the Act and Section 190 of the Code, which are reproduced below:

Section 138 in The Negotiable Instruments Act, 1881

"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 that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [19] [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, [20] [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.*

Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

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.*

Section 190 in The Code Of Criminal Procedure, 1973

190. Cognizance of offences by Magistrates.
(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

> *(a) upon receiving a complaint of facts which constitute such offence;*
> *(b) upon a police report of such facts;*
> *(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.*

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."

10. To constitute the offences u/S 138 of the Act, what is required is that the cheque is presented to the Bank within a period of 6 months or within its validity period, whichever is earlier and the said cheque has been dishonoured by the Bank and within 30 days of said dishonour of the cheque, the holder of the cheque had issued a demand notice, informing about the said dishonour of cheque to the issuer of the cheque calling upon him to make the payment within 15 days from the receipt of the said notice, then the offence u/S 138 of the Act, is completed if the issuer fails to make the payment of cheque amount. Section 139 of the Act, creates a presumption in favour of the holder of the cheque that the said cheque was issued in discharge of a debt or other liability. Therefore, once the cheque is in a possession of a person, it will be presumed that the said cheque issued by the issuer of the cheque in discharge of his legal debt or liability. The burden to prove that the said cheque was not issued in discharge of any debt or liability, is on the issuer of the cheque during the trial of the case. So far as constituting a prima facie offence, the presumption shall be in favour of the holder of the cheque that the said cheque issued in discharge of the legal liability.

11. Section 190 of the Code provides that the Magistrate shall take cognizance of the offence upon receiving a complaint of fact, which constituted such offence. Therefore, before taking cognizance on issuing summons, the Magistrate is only required to look into the complaint and the relevant materials to form his opinion whether the prima facie case is constituted as alleged or not. If he is satisfied that a prima facie case is made out under the relevant provisions then he has no option but to issue summons against the accused persons after recording his prima facie satisfaction.

12. To summarize the principles of law with regard to quashing of the entire proceedings u/S 138 of the Act, it will be relevant to take note of few judgement of Apex Court. In ***M.M.T.C. Ltd. & Anr. vs. Medchl Chemicals and Pharma (P) Ltd. & Anr : (2002) 1 SCC 234***, the Apex Court has held as under:

> *"17. There is therefore 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."*

13. In the case of ***Rangappa vs. Sri Mohan : (2010) 11 SCC 441***, the opinion of Justice K.G.Balakrishnan for a three judges Bench is relevant to be noted as under:

> *"26. ... we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."*

14. In the case of ***Rajeshbhai Muljibhai Patel vs. State of Gujarat : (2020) 3 SCC 794***, it has been held by the Apex Court that whenever the facts are disputed, the truth should be allowed to emerge by weighing the evidence. The Apex Court has opined as under:

> *"22. ....When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the NI Act ought not to have been quashed by the High Court by taking recourse to Section 482 CrPC. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the NI Act on the legal issues like limitation, etc. criminal complaint filed under Section 138 of the NI Act against Yogeshbhai ought not to have been quashed merely on the ground that there are inter se disputes between Appellant 3 and Respondent 2. Without keeping in view the statutory presumption raised under Section 139 of the NI Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in CC No. 367 of 2016 filed under Section 138 of the NI Act."*

15. So far as quashing of the criminal proceedings in exercise of powers u/S 482 of the Code is concerned, the judgements of the Apex Court in ***State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426], Zandu Pharmaceutical Works Ltd. vs. Mohd. Saraful Haque : (2005) 1 SCC 122*** and ***Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Others : 2021 SCC OnLine SC 315***, are the guiding factors and limbs of such powers, were the prima facie on the facts and materials available before the Court, it is found that no case as alleged is made out then such proceedings can be quashed in exercise of the powers. The other is the case where the High Court case comes to the conclusion that the entire proceeding is an abuse of the process of law then such powers can be exercised and proceedings can be quashed.

16. In the case of ***Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330***, the Apex Court has held as under:

> *"28. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the 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 are. 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."*

17. In the case of ***Rathish Babu Unnikrishnan (Supra)***, which has been vehemently relied upon by the opposite party no.2, the Apex Court has held as under:

> ***"16.*** *The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be*

of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

17. *The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable.Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.*

18. *Situated thus, to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the trial court will not in our opinion be judicious. Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore,when the proceedings are at a nascent stage, scuttling of the criminal process is not merited."*

18. From the above judgements, it is crystal clear that at the stage of summoning whether there is a legally subsisting liability or not, is not to be considered by the Magistrate. It is to be looked into during the trial and the burden to prove that there was no existing debt or liability, is on the accused/respondents, which is to be discharged during the trial. Section 139 of the Act, raises presumption that the cheque was issued for a legally existing debt and such presumption can be rebutted by the respondent/accused, during the course of the trial. At the time of exercise of jurisdiction u/S 482 of the Act, the Court is not required to evaluate the truthfulness or otherwise the allegations levelled by the complainant against the accused whatever may be the defences of the accused, those defences can be examined only during the trial. Even if the accused is successful in showing some suspicion or doubt in the allegations levelled by the complainant, it would be impermissible to discharge the accused before trial. If the Magistrate is satisfied that prima facie case is made out, fulfilling all the ingredients of Section 138 of the Act. In view of the

presumptions u/S 139 of the Act, such complaints cannot be quashed on the basis of the averments made by the accused with regard to his defences.

19. In the light of the aforesaid judgements of the Apex Court, if we test the judgement of the Co-ordinate Bench of this Court in ***Vijay Kumar Upadhyay(Supra),*** which has been heavily relied upon by the learned counsel for the applicant herein, the said judgement is prima facie appears to be *per incuriam* as the same has not considered the aforesaid settled propositions of law. While exercising the powers u/S 482 of the Code, the Co-ordinate Bench of this Court has totally ignored the provisions of Section 139 of the Act, which makes out a presumption in favour of the holder of the cheque, which is a rebuttable presumption and which can be rebuttted during the trial of the accused persons. Therefore, in considered opinion of this Court, the judgement in ***Vijay Kumar Upadhyay(Supra)*** is not a good law and is not applicable in the facts of the instant case. In the light of the aforesaid judgments, if we test the facts of the instant case, in the instant case the opposite party no.2 was in possession of the cheque, which was issued by the applicant herein, which was presented by him within its validity period in the Bank, which was dishonoured. Notice for dishonour and demand notice informing the dishonour of the cheque given by the opposite party no.2 herein to the applicant. Despite receipt of the said notice, the applicant has failed to make the payment of the said cheque amount. Therefore, the instant complaint has been filed within a period of limitation, as provided under the Act. Section 139 of the Act, raises a presumption in favour of the opposite party no.2, that the said cheque was issued by the applicant in discharge of its legal liability, which can be rebutted by the applicant only during the trial. Disputed defence raised by the applicant, that the said cheque was issued earlier in point of time as a security, which has been denied by the opposite

party no.2, cannot be adjudicated while exercising the powers u/S 482 of the Code. This is a disputed question of fact that has to be decided by the Trial Court after the evidence is led by the parties.

20. Therefore, in the considered opinion of this Court, the instant application has no merits and is accordingly **dismissed.**

Order Date :- 12.10.2023
Shubham Arya