Rathish Babu Unnikrishnan vs The State Govt Of Nct Of Delhi on 26 April, 2022

Author: Hrishikesh Roy

Bench: Hrishikesh Roy, K.M. Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.694-695 OF 2022
(Arising out of SLP (Crl) Nos.5781-5782 OF 2020)

Rathish Babu Unnikrishnan Appellant(s)

VERSUS

The State (Govt. of NCT of Delhi) & Anr. Respondent(s)

J U D G M E N T

Hrishikesh Roy, J.

Leave granted.

2. The challenge in these appeals is to the judgment and order dated 02.08.2019 in the Crl. M.C. No.414/2019 and Crl.M.A.No.1754/2019 whereby the Delhi High Court dismissed the application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C") for quashing of the summoning order dated 1.6.2018 and the order framing notice dated 3.11.2018, issued against the appellant under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'N.I. Act'). On the criminal complaint instituted by one Satish Gupta (respondent no.2), the order under Section 251 of the Cr.P.C. was issued against the appellant by the Magistrate's Court. The High Court on considering the rival contention opined that the grounds agitated by the appellant are "factual defences" which should not be considered within the parameters of limited enquiry permissible in a petition under Section 482 Cr.P.C. Accordingly, the petition was dismissed but the accused's liberty to raise his defence in the competent Court was safeguarded in the impugned order.

3. For the appellant, Mr. Krishnamohan K., the learned counsel argues that without satisfying the essential ingredients for the offence under Section 138 of the N.I. Act to the effect that the

dishonoured cheque received by the complainant is against "legally enforceable debt or liability", the criminal process could not have been issued. Relying on few judgments, it is next argued that the ingredients necessary to constitute the offence under Section 138 of the N.I. Act is missing in the instant case and therefore the appellant cannot be prosecuted for the offence under the said provision. According to the appellant, the concerned post-dated cheques drawn by him in favour of the complainant were, contingent/security cheques for buyback of shares of AAT Academy (appellant's company), held by the complainant, and therefore the cheques could not have been prematurely presented to the bank and should have been presented for encashment only after transfer of the complainant's shareholding in the appellant's company. In other words, as the complainant was still holding the shares of the appellant's company when the cheques were presented, the complainant is not entitled to receive any payment at that stage, through encashment of the cheques, made available to him

4. The complainant per-contra contends that when the cheque are issued and the signatures thereon are admitted, the presumption of a legally enforceable debt will arise in favour of the holder of the cheque. In a situation such as this, it is for the accused to rebut the legal presumption by adducing necessary evidence before the trial Court. Reading the provisions of Section 118 of the N.I. Act, it is submitted by Mr. K.M. Nataraj, learned ASG and Ms. Rebecca M. John the learned Senior Counsel for the complainant, that it is obligatory for the Court to raise the legal presumption against the accused when his cheque is dishonoured on presentation. The learned Magistrate therefore correctly drew such presumption which of course is rebuttable by the appellant, by adducing evidence in course of trial. It is specifically contended by the complainant that in share purchase transactions, the consideration is first paid to the seller as per the customary practice and only thereafter the formalities with respect to the share transfer is completed. In support of such contention, the respondent relies on Section 56 (1) of the Companies Act, 2013 and also the Form SH-4 in the said Act, relating to transfer of securities.

5. The records would show that there were transactions between the parties under which the complainant invested a substantial sum in the appellant's company. At later stage, dispute arose amongst them but they resolved that the invested money would be returned to the complainant and the shares allotted to the complainant will be proportionately transferred to the appellant. With such understanding, the four cheques forming the part of the criminal complaint were handed over by the appellant. When the complainant presented one of those cheques, the same was dishonoured by the bank with the endorsement, "fund insufficient". Further, the complainant issued notice stating that the appellant had failed to make the due payment. Thereafter, he filed the complaint under Section 138 of the N.I. Act which led to the summons and process against the appellant.

6. As noted earlier, the appellant's basic contention is that the cheque in question was not issued in discharge of "legally recoverable debt". They also raised a contention on the obligation of the complainant to transfer the concerned shares. A defence plea is raised by the appellant to the effect that the cheques in question were issued as "security" and not in discharge of any "legally recoverable debt".

7. The learned Judge of the Delhi High Court while considering the petition under Section 482 Cr.P.C kept in mind the scope of limited enquiry in this jurisdiction by referring to the ratio in HMT Watches Limited vs. M.A. Abida & Anr1. and in Rajiv Thapar & Ors. vs. Madan Lal Kapoor2 and opined that the exercise of powers by the High Court under Section 482 Cr.P.C, would negate the complainant's case without allowing the complainant to lead evidence. Such a determination should necessarily not be rendered by a Court not conducting the trial. Therefore, unless the Court is fully satisfied that the material produced would irrefutably rule out the charges and such materials being of sterling and impeccable quality, the invocation of Section 482 Cr.P.C power to quash the criminal proceedings, would be unmerited. Proceeding on this basis, verdict was given against the appellant, who was facing the proceeding under Section 138 of the 1 (2015) 11 SCC 776 2 (2013) 3 SCC 330 N.I. Act. With all liberty given to the appellant to raise his defence in the trial court, his quashing petition came to be dismissed.

8. The issue to be answered here is whether summons and trial notice should have been quashed on the basis of factual defences. The corollary therefrom is what should be the responsibility of the quashing Court and whether it must weigh the evidence presented by the parties, at a pre-trial stage.

9. The transactional arrangement between the complainant and the accused reveals the nature of obligations that both had undertaken. The cheques in question were accepted by the complainant for an agreed price consideration, for the shares in the appellant's company. According to the complainant, the appellant is to first pay and then as per the usual practice in the trade, the shares would be transferred to the appellant in due course within the time permitted by law. A bare perusal of Section 56(1) of the Companies Act, 2013 indicates that a transfer of securities of a company can take place only when a proper instrument of transfer is effectuated. The operation of legally transferring shares involves several distinct steps. At first, a contract of sale needs to be entered upon. The nature of transaction in this contract logically then requires payment of the price by the prospective transferee to fulfil their promise first. In exchange, transferor would move to fill Form SH-4 and thus, effectuate a valid instrument. Depending on the nature of the company and its Articles of Association, then upon the presentation of the instrument of transfer to the board of the company and its acceptance by the board, the entry of the transferee in the register of the company in place of the transferor, takes place. Thus, the transfer of share is complete. To say it in another way, in shares transactions, there is a time lag between money going out from the buyer and shares reaching to the seller. In earlier days the time gap was longer. It has now become speedier but the gap still remains. The share transactions in India generally follows this pattern.

10. It is also relevant to bear in mind that the burden of proving that there is no existing debt or liability, is to be discharged in the trial. For a two judges Bench in M.M.T.C. Ltd. & Anr. vs. Medchl Chemicals and Pharma (P) Ltd. & Anr.3, Justice S.N. Variava made the following pertinent observation on this aspect: -

> "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."

11. The legal presumption of the cheque having been issued in the discharge of liability must also receive due weightage. In a situation where the accused moves Court for quashing even before trial has commenced, the Court's approach should be careful enough to not to prematurely extinguish the case by disregarding the legal presumption which supports the complaint. The opinion of Justice K.G. Balakrishnan for a three judges 3 (2002) 1 SCC 234 Bench in Rangappa vs. Sri Mohan4 would at this stage, deserve our attention: -

> "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."
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> 12. At any rate, whenever facts are disputed the truth should be allowed to emerge by weighing the evidence.

On this aspect, we may benefit by referring to the ratio in Rajeshbhai Muljibhai Patel vs. State of Gujarat5 where the following pertinent opinion was given by Justice R. Banumathi: -

> "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

4 (2010) 11 SCC 441 5 (2020) 3 SCC 794 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."

13. Bearing in mind the principles for exercise of jurisdiction in a proceeding for quashing, let us now turn to the materials in this case. On careful reading of the complaint and the order passed by the Magistrate, what is discernible is that a possible view is taken that the cheques drawn were, in discharge of a debt for purchase of shares. In any case, when there is legal presumption, it would not be judicious for the quashing Court to carry out a detailed enquiry on the facts alleged, without first permitting the trial Court to evaluate the evidence of the parties. The quashing Court should not

take upon itself, the burden of separating the wheat from the chaff where facts are contested. To say it differently, the quashing proceedings must not become an expedition into the merits of factual dispute, so as to conclusively vindicate either the complainant or the defence.

14. The parameters for invoking the inherent jurisdiction of the Court to quash the criminal proceedings under S.482 CrPC, have been spelled out by Justice S. Ratnavel Pandian for the two judges' bench in State of Haryana v. Bhajan Lal6, and the suggested precautionary principles serve as good law even today, for invocation of power under Section 482 of the Cr.P.C.

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

15. In the impugned judgment, the learned Judge had rightly relied upon the opinion of Justice J.S.Khehar for a Division Bench in Rajiv Thapar (supra), which succinctly express the following relevant parameters to be considered by the quashing Court, at the stage of issuing process, committal, or framing of charges, 6 AIR 1992 SC 604 "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."

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.

19. In our assessment, the impugned judgment is rendered by applying the correct legal principles and the High Court rightly declined relief to the accused, in the quashing proceeding. Having said this, to rebut the legal presumption against him, the appellant must also get a fair opportunity to adduce his evidence in an open trial by an impartial judge who can dispassionately weigh the material to reach the truth of the matter. At this point, one might benefit by recalling the words of Harry Brown, the American author and investment advisor who so aptly said - “A fair trial is one in which the rules of evidence are honored, the accused has competent counsel, and the judge enforce the proper court room procedure – a trial in which every assumption can be challenged.” We expect no less and no more for the appellant.

20. We might add before parting that the observation made in this judgment is only for the limited purpose of this order and those should not stand in the way of the trial Court to decide the case on merit. The appeals are accordingly dismissed leaving the parties to bear their own cost.

.....J. [K.M. JOSEPH] .....J. [HRISHIKESH ROY] NEW DELHI APRIL 26, 2022