

Daya Shankar vs . Piyush Saini on 23 May, 2012

CR NO: 43/2012 CC NO: 6190/2011 PS RAJINDER NAGAR U/s 138 NI ACT

DATED: 2

IN THE COURT OF SHRI SURINDER S. RATHI:ASJ:02:

CENTRAL: ROOM NO.32:TIS HAZARI COURTS :DELHI

ID No: 0

CC
PS RAJIN

DAYA SHANKAR Vs. P

IN THE MATTER OF:-

DAYA SHANKER

S/o LATE SHRI LALLA RAM,

R/o 1404, H.I.G. SECTOR-1,

L.D.A COLONY, KANPUR ROAD SCHEME

LUCKNOW, (U.P.)

..... (REVISIONIST/COMPLAINANT)

VERSUS

PIYUSH SAINI,

M/s. EDUCATION WISE,

26/18, THIRD FLOOR,

OLD RAJINDER NAGAR,

NEW DELHI-110060 (RESPONDENT)

CRIMINAL REVISION FOR SETTING ASIDE THE IMPUGNED ORDER DATED 16.12.2011
PASSED BY LD. MM DATE OF INSTITUTION : 23.03.2012 DATE OF ARGUMENTS : 10.05.2012
DATE OF ORDER : 23.05.2012 ORDER ON REVISION

1. This revision has been preferred by complainant against order of Ld. MM dated 16.12.2011 whereby his complaint U/s 138 NI Act was dismissed .

2. I have heard arguments of Ld. Counsel for revisionist /complainant Sh. R.K. Mishra, Advocate and have perused the revision file as well as TCR.

3. Brief facts necessary for disposal of this revision ,as per complaint preferred before Ld. MM, are that acting on some commercial, complainant herein contacted with the CR NO: 43/2012 CC NO: 6190/2011 PS RAJINDER NAGAR U/s 138 NI ACT DATED: 23.05.2012 accused for arranging MD/MS Seat for his M.B.B.S. Son. Respondent accused demanded Rs. 30 lac for the job. Out of which Rs. 10 lac was paid in advance while Rs. 20 lac was to be paid after the job is done. When the respondent could not do the assigned job, he drew and delivered three cheques cumulatively valuing Rs. 10 lacs to complainant. These cheques on presentation got dishonoured for insufficiency of funds . When no payment was made by the respondent, two complaints U/s 138 NI Act were

preferred qua cheques worth Rs. 5 lacs each.

4. After perusal of the text of the complaint , by the impugned order Ld. MM dismissed the complaint on a plea that the contract between the parties for arranging MD/MS Seats for Rs. 30 lacs is a void contract U/s 23 of the Contract Act and as such the amount contained in the dishonoured cheques does not come under "legally recoverable debt" so as to make out a case of commission of offence punishable U/s 138 NI Act. Aggrieved by this order the revision in hand has been preferred.

5. At the onset it would be appropriate to have a glance as to what constitutes an offence U/s 138 NI Act. Section 138 NI Act is reproduced here under for ready reference: □Section 138 NI Act : 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 part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to credit of that 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 [a term which may be extended to two year], or with fine which CR NO: 43/2012 CC NO: 6190/2011 PS RAJINDER NAGAR U/s 138 NI ACT DATED: 23.05.2012 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, [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.

6. As per Section 2 (g) of the Indian Contract Act, 1872 an agreement which is not enforceable by Law is a void agreement and does not qualify to the term " as a contract" . Section 2 (g) of the Indian Contract Act,1872 is reproduced herein under: □Section 2 (g) of the Indian Contract Act, 1872: □An agreement not enforceable by law is said to be void;

7. As per Section 2 (h) of the Indian Contract Act , 1872 only those agreements which are enforceable by Law are termed as " Contract" . Under Chapter 2 of this Act it has further been explained as under : □Section 2 (h) of the Indian Contract Act, 1872: □An agreement enforceable by law is contract;

8. As far as the words " Lawful Consideration " is concerned the same has been explained in Section 23 of the Indian Contract Act ,1872 which runs as under:□Section 23 of the Indian Contract Act, 1872:□What consideration and objects are lawful, and what not:□CR NO: 43/2012 CC NO: 6190/2011 PS RAJINDER NAGAR U/s 138 NI ACT DATED: 23.05.2012 The consideration or object of an agreement is lawful, unless□it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law;

or is fraudulent;

or involves or implies, injury to the person or property of another;

or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations f & j :□(f) A promises to obtain for B an employment in the public service and B promises to pay 1,000 rupees to A. the agreement is void, as its object is unlawful.

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

9. In this scenario in an order for an agreement to become void it is not necessary that its consideration or its object has to be wholly void. Even if it is partially unlawful it still comes under " Void Agreement" as provided U/s 24 of the Contract Act which runs as under.

10. Section 24 of the Indian Contract Act :□Agreements void, if considerations and objects unlawful in part□If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

11. This legal issue of void agreements vis□□vis Section 138 NI Act has been dealt with by Hon'ble High Court in case titled, "Virender Singh Vs. Laxmi Narain " 2007 Cr.

CR NO: 43/2012 CC NO: 6190/2011 PS RAJINDER NAGAR U/s 138 NI ACT DATED: 23.05.2012 L.J. 2262 at great length & depth . In this matter Hon'ble High Court dealt with a Section 138 NI Act Matter where the appellant was convicted by Ld. MM and the conviction was upheld by the Sessions. The cheque in that case was worth Rs.

80,000/□and it pertained to a payment under an agreement wherein appellant/convict was assigned the job to secure an appointment Job in Haryana Police in lieu of money when he could not secure the job he drew a cheque for return of Rs. 80,000/□which was dishonoured. He was convicted for dishonour of this cheque . While allowing the appeal Hon'ble Delhi High Court observed, "In J. Danier Vs. State, 2006 (1) LRC408 : 2005 Cri LJ 4095 it was observed that the execution of the cheque is not sufficient to constitute an offence punishable U/s 138 of the Act,

unless it is proved that the debt or other liability is a legally enforceable one. The Kerala High Court also held as under :

" A reading of the above would show that any agreement opposed to law or forbidden by law is not enforceable. Every debt or liability upon which a cheque is issued is not enforceable. For example, if any officer of defence force receives a cheque for consideration on the basis of an agreement to pass on military secrets, such a cheque is not enforceable under Section 138 of the Act, it can be interpreted that any debt or liability arising out of a contract or promise, which is unlawful or not legally enforceable, would not constitute an offence under Section 138 of the Act.

In Words and Phrases Vol. 14 A, the term "enforceable" is defined as " not invalid" as contrary to public policy because bargaining contrary to the law as venue, word "enforceable"

not necessarily implying actual force or coercion but meaning to be executed and to cause to take effect." Explanation to Section 138 clearly says that for the purpose of the section "

debt or other liability" means a legally enforceable debt or other liability. Hence, only a claim arising out of an CR NO: 43/2012 CC NO: 6190/2011 PS RAJINDER NAGAR U/s 138 NI ACT DATED: 23.05.2012 enforceable debt or other liability will constitute an offence U/s 138 of the Act."

.....An agreement which is void is not enforceable by law . The question, therefore, is □ Was the agreement between the petitioner and the complainant for securing a job for the complainant's nephew in the Haryana Police, legally enforceable? Fortunately, the answer is provided straightaway by illustration (f) to Section 23 of the Indian Contract Act, 1872. The said illustration (f) reads as under :□

(f) A promises to obtain for B an employment in the public service and B promises to pay 1,000 rupees to A. the agreement is void, as its object is unlawful.

..... Apparently, these questions are answered by Section 65 of the Indian Contract ,1872 which reads as under :□"65. When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

..... This aspect and the provisions of the said Section 65 were discussed in detail and analysed by the Supreme Court in *Kuju Collieries Ltd. Vs. Jharkhand Mines Ltd.* (1974) 2 SCC 533: (AIR 1974 SC 1892) in the following manner:

" We are of the view that Section 65 of the contract Act cannot help the plaintiff of the facts and circumstances of this case. Section 65 reads as follows:

" When an agreement is discovered be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

In *Tarsem Singh v. Sukhminder Singh*, (1998) 3 SCC 471 : (AIR 1998 SC 1400) the Supreme Court distinguished cases falling CR NO: 43/2012 CC NO: 6190/2011 PS RAJINDER NAGAR U/s 138 NI ACT DATED: 23.05.2012 under Section 20 and those falling under Sections 23 and 24 of the Indian Contract Act, 1872. It held :□"37. We may point out that there are many facets of this question, as for example (and there are many more examples) the agreement being void for any of the reasons set out in Section 23 and 24, in which case even the refund of the amount already paid under that agreement may not be ordered. But, as pointed out above, we are dealing only with a matter in which one party had received an advantage under an agreement which was "discovered to be void" on account of Section 20 of the Act. It is to this limited extent that we say that, on the principle contained in Section 65 of the Act, the petitioner having received Rs. 77,000/□as earnest money from the respondent in pursuance of that agreement, is bound to refund the said amount to the respondent. A decree for refund of this amount was, therefore, rightly passed by the lower appellate Court."

Clearly, a review of the legal position with regard to the scope and ambit of the said Section 65 indicates that it would not apply to cases falling under Section 23. In other words, agreements which are void ab initio and their illegality is known to the parties at the time of execution would not fall within the purview of Section 65. An agreement of the kind mentioned in illustration (f) to Section 23 and the one at hand being void ab initio and to the knowledge of the parties would not benefit from the equitable principle of restitution embedded in Section 65. So, neither the sum of Rs. 1,000 mentioned in the said illustration (f) nor the sum of Rs. 80,000/□paid in the present case is recoverable in law.

..... So, if the maxim in pari delicto etc., were to apply, the complainant/respondent no.1 could not have a claim for recovering the Rs.80,000/□paid by way of illegal gratification for securing a job for his nephew in the Haryana Police. It is here that the learned counsel for respondent no.1 pressed into service the observations of the Supreme Court in para 11 of the decision of *Sita Ram Vs. Radha Bai* (AIR 1968 SC 534) (Supra), to submit that there are three exceptional circumstances to which the maxim does not apply and that the present case falls in one of those. The three classes of CR NO: 43/2012 CC NO: 6190/2011 PS RAJINDER NAGAR U/s 138 NI ACT DATED: 23.05.2012 cases being:□

(a) Where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it;

(b) Where the plaintiff is not in pari delicto with the defendant:

(c) Where the plaintiff does not have to rely on the illegality to make out his claim.

If the facts of the present case are examined, it would be immediately clear that it does not fall in any of these three classes of cases. The first class of cases deals with situations or agreements where the object is unlawful. In the present case " Securing a job in the Haryana Police for the nephew" is not an unlawful object. What is unlawful is the consideration paid for it. The consideration having already been paid, the illegality stood completed on the part of the respondent No.1. And, since the respondent No.1 would have to reply upon this illegality to make out his claim or enforce the same, this case does not also fall within the third class of cases mentioned above. This leaves us with the second class of cases where the parties are not in part delicto. In *Sita Ram Vs. Radha Bal* (supra) the Supreme Court was dealing with a case where the parties were not " in equal fault. " And, in that backdrop, The Supreme Court observed that it is settled law that whether the parties are not in part delicto, the money paid or property transferred, under the contract. It was further held that such a possibility could arise in these situations: □(1) The contract may be of kind which has been made illegal by statute in the interest of a particular class of persons of whom the plaintiff is one;

(2) The plaintiff must have been induced to enter into the contract by fraud by strong pressure:

(3) The defendant is under a fiduciary duty of the plaintiff and it is in connection with this fiduciary relationship that moneys have come into his hands as proceeds of a transaction albeit illegal.

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None of these three situations arise in the present case. In any event, the parties in the present where *pari delicto* so, no investigation into whether in any of these three situations arise is called for . The Supreme Court decision in *Sita Ram Vs. Radha Bal* (supra) is on a different footing. there the parties were not in *pari delicto* and the case fell under the third situation of the fiduciary relationship referred to above.

..... In the present case neither party is a victim of exploitation. Both had voluntarily and by their free will joined hands to flout the law. Therefore, in terms of Supreme Court decisions in *Sita Ram Vs. Radha Bai* (AIR 1968 SC 534) (supra) and *Mohd. Salimuddin* (AIR 1986 SC 1019) (supra) themselves, the parties being in *pari delicto*, the doctrine would apply and the sum of Rs. 80,000/□ could not be recovered in a Court of law. Meaning thereby that there did not exist any legally enforceable debt or liability for the discharge of which it could be said that the cheque in question was issued. Subsequently, S. 138 of the Said Act would not be attracted. This legal position was not appreciated by the Courts below and it is for this reason that they fell into error. That being the case, the conviction of the petitioner is set aside."

12. This judgment makes it clear that no cheque pertaining to an illegal transaction which is not enforceable by Law can be made the basis of filing of a Section 138 NI Act complainant and the facts of the cited case law are squarely applicable on the case in hand as well.

13. In the matter in hand absolutely no figment of evidence is place on record to show as to what kind of services were agreed to be provided by respondent herein to the complainant. Neither the claimed commercial has been placed on record nor any such agreement entered between the parties qua the job of securing MD/MS Seat appears to have been penned or placed on record. In this backdrop reliance sought to be CR NO: 43/2012 CC NO: 6190/2011 PS RAJINDER NAGAR U/s 138 NI ACT DATED: 23.05.2012 placed on AIR 2002 SC 463 & AIR 2005 SC 3226 qua capitation fees are of no avail to the complainant in so far as there is nothing on record to show that respondent herein was part of Management of any Educational Institution or that the claimed payment of Rs. 10 lac was made directly to any Medical College against due receipt as per Rules framed by the concerned State.

14. Usage of the word " Management Quota " in the complaint by complainant squarely indicates that it was the discretion of some official of some medical college which was sought to be purchased by the complainant through the respondent herein. This per se trickles down to be a case of failed attempt to bribe a Medical College Official through a per se Middlemen/ Tout like the respondent herein.

15. Such like activities are not only blatantly illegal but are also immoral. The pure stream of justice cannot be allowed to be made impure or clog by such like frivolous litigation initiated to recover bribe money or enforce a totally illegal or immoral contract.

16. I see absolutely no legal or factual infirmity in the impugned order of Ld. MM. Revision accordingly stands dismissed. File be consigned to RR. Copy of this order be sent to Trial Court for information.

ANNOUNCED AND DICTATED IN OPEN COURT ON : 23.05.2012 (SURINDER S. RATHI) Addl. Sessions Judge□2 Central : Delhi