

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl.M.C. 2053/2004

% Reserved on : 29.01.2009
Date of decision : 09.02.2009

R.P.MATHUR PROP. RADHIKA LEATHER FASHIONS...
...PETITIONER
Through: Mr. Jagjit Singh, Adv.

Versus

S.R.P. INDUSTRIES LTD. ...RESPONDENTS
Through: Mr. Niraj Kr. Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be
reported in the Digest? | YES |

MOOL CHAND GARG, J.

1. By way of the present petition the petitioners have invoked the extraordinary jurisdiction of this Court vested in this Court under Section 482 of the Code of Criminal Procedure and have made the following prayers:

- a) quash criminal complaint under Section 138 of Negotiable Instruments Act against Petitioner pending before the Court of Ms Anuradha Shukla, MM, New Delhi entitled as "SRP Industries Ltd vs. R P Mathur, Prop. Radhika Leather Fashions".

- b) and/or alternatively quash warrant case emanating out of FIR No. RC, 50 (A)/95-DLI dated 23.6.1995 with Central Bureau of Investigation;
- c) and/or otherwise pass such further orders and grant relief that the Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

2. The petitioner is facing a complaint filed by the respondent under Section 138, 141 & 142 of the Negotiable Instruments Act, 1881 on the allegations that the petitioner issued a cheque of Rs. 60 lacs in favour of the respondent for valid consideration. The said cheque bearing no. 784074 dated 30.09.1994 was dishonored on presentation by the bankers of the petitioners with the remarks "funds insufficient". The complainant/ respondent then issued a legal notice to the petitioner dated 07.10.1994 informing the petitioner about the dishonor of the aforesaid cheque and calling upon him to pay the amount of cheque within a period of 15 days of the receipt of said legal notice. Since the petitioner failed to make the payment, the respondent after waiting for the statutory period of 30 days filed a complaint in the Court of Metropolitan Magistrate in which the petitioner was summoned to face the trial.

3. Before filing the aforesaid complaint the respondent also made a complaint to the CBI on 23.06.1995 against the petitioner & 3 others and on that basis an FIR was registered by the CBI

bearing No. RC 50 (A)/95-DLI. The said complaint reads as under:

“The Superintendent of Police, CBI, Anti Corruption Branch-I, Block 4, C.G.O. Complex, Lodhi Road, New Delhi-3. Sir, this is to bring to your notice on 21.3.1994 Shri Vijay Borar of Borar & Co., Chartered Accountant, New Delhi approached us for discounting a trade bill of exchange of Rs. 60 lacs drawn by Kay Bee & Co., on Radhika Leather Fashions, New Delhi with the proposal of Mr. Borar as looking to the amount of the bill we wanted to collateral security. Mr. Borar assured that this bill and the obligations there under would be met with on due date because he had arranged a confirmation from the Chief Manager, State Bank of Saurashtra, Lodhi Road affirming the commitment of meeting obligation by the Bank on due date also. The bill of exchange was accepted and co-accepted for payment by Mr. R.P.Mathur, Prop. Radhika Leather Fashions and the Chief Manager, State Bank of Saurashtra. State Bank of Saurashtra also issued a certificate dated 24.3.1994 confirming that Mr. R.P.Mathur, Prop. Radhika Leather Fashions has a running Credit limit of Rs. 2075 crores with the Bank and the amount will be paid on due date. Further, on 30.3.1994, the Chief Manager of Saurashtra conformed to us that the payment will be made on the due date i.e. 30.9.1994. On the basis of aforesaid representation and assurance by Mr. Vijay Borar, Mr. R.P.Mathur, the Chief Manager of State Bank of Saurashtra we discounted the aforesaid bill of exchange. ON 3.9.1994 the bill of exchange was due for payment but on presentation the cheque given to us for making repayment on the bill was dishonoured and when we tried to meet Mr. R.P.Mathur, of RADhika Leather Fashions we were told that he is out of India. Mr. Vijay Borar told us that State Bank of Saurashtra being the co-acceptor is bound for their commitment but despite our best efforts no payment was made by Bank of Saurashtra. Again we along with the Notary Public approached the Bank and requested for payment against the bill of exchange, but no payment was made and even Bank of Saurashtra refused to accept the legal notice. Thus, it is apparent that the gang of four viz. Mr. V.B.Borar of Borar & Co., and Chief Manager of State Bank of Saurashtra jointly conspired and connived to commit fraud on our company with an intention to cheat our Company and misappropriate the amount of Rs. 60 lacs amongst themselves and succeeded in their motives. We request you to kindly take immediate action against the culprits.”

4. In the above said case FIR and also a challan has been filed and the matter is pending investigation and trial before the Court after the filing of the Complaint under Section 138 of the N.I. ACT.”

5. After the receipt of the summons in the complaint subject matter of this petition the petitioner filed an application before the Metropolitan Magistrate for recalling of the summoning order in the said complaint bearing No. 865/01 which as stated above is

the Complaint under Section 138 of the Negotiable Instruments Act, which has been dismissed vide order dated 15.03.2004. It has been held that the proceedings taken out by the respondents under Section 138 of the N.I. Act and the complaint registered by the CBI makes out two independent set of offences which are distinct and as such there was no occasion to recall of the summons under Section 138 of the N.I. Act. Relevant observations made in the aforesaid order are reproduced hereunder:

12. In the instant matter admittedly although a FIR has been registered the accused under Section 420/477A/120B IPC, the trial in the said case is still going on and accused has neither been convicted or acquitted as yet and as such the applicability of double jeopardy cannot be pleaded in the facts of the instant case. Even if this aspect is not considered at this stage, in view of the categorical judgment of the Apex Court in the judgments cited by the Ld. Counsel for the complainant, it has been specifically held that where the ingredients of two offences are different, the prosecution in the two cases can be held separately in spite of the fact that the two offences emanate from the same transaction

13. In the case in hand, the applicant is asserting that in view of FIR registered against him under Section 420/477A/120B IPC, the complaint under Section 138 of the N.I. Act is not maintainable. However, a bare perusal of the provisions of Section 138 of the N.I. Act would indicate that it has very specific ingredients as specified herein above being issuance of cheque, dishonor thereof, issuance of legal notice and filing of complaint within the period of limitation. However, section 420/477A/120B IPC requires the element of dishonesty, inducement, falsification, fraud etc.

14. Thus a bare perusal of the provisions of Section 138 of the N.I. Act and Section 420/477/120B would reveal that the accused ingredients of the two offences are distinct and as such in view of the judgments of Hon'ble Supreme Court cited hereinabove, the prosecution of the accused under Section 138 of N.I. Act cannot be considered to be barred by the prosecution under section 420/477/120B IPC in State cases as regards the arguments of Ld. Counsel regarding cheque having not been issued for valid consideration, Section 139 of the N.I. Act is very clear when it lays down that there shall be presumption in favour of complainant if the cheque is issued in his favour that the same was issued for valid consideration. The accused if he alleges that there was no valid consideration can rebut the allegation at the stage of trial. However, this cannot be considered as this stage a ground for recalling the summons.

6. The Petitioner has submitted that while filing the complaint

under Section 138 of the N.I. Act the respondent has not brought to the notice of the Court that he has also filed a complaint with the CBI and, thus, concealed material facts. It is also submitted that on comparative study of the complaint made by Respondent to CBI, and the averments made in complaint under Section 138 of Negotiable Instruments Act, it is clear that cheque in question is the foundation of both the cases emanating and originating out of series of same acts and transaction which are also subject matter of above referred CBI case and is not a case simplicitor of payment/discharge of liability of debt. It is submitted that continuation of the complaint despite filing of a challan by the CBI on the basis of FIR on the complaint of the respondent under Section 138 of the N.I. Act tantamount to prosecuting the petitioner at two places for the same cause of action and amounts to double jeopardy. It is also submitted that the Magistrate wrongly dismissed his application for recalling the summons. It has been submitted that for the same cause of action two different Courts cannot proceed with the trial. Reliance has been made on the judgment delivered in the case of G. Sagar Suri & Anr. Vs. State of U.P and Others, 2001 (1) JCC (SC) 158.

7. The petitioner has also alleged that even otherwise the complaint filed under Section 138 of the N.I. Act is liable to be quashed, because in the complaint filed in the aforementioned

complaint the respondent has not disclosed the true facts and that facts narrated in complaint under Section 420 IPC which render the averments made in complaint as false. Moreover, the subject cheque is without consideration and is stated to have been issued to back up the bill of exchange which was co-accepted by State Bank of Saurashtra who certified the cheque as good for payment and therefore it was the said bank who was the accused and not the Petitioner. Resultantly ingredients of Section 138 of Negotiable Instruments Act are not made out and as such, complaint under Section 138 is neither competent nor maintainable.

8. In the counter affidavit filed by the respondent/complainant it has been submitted that the petition filed by the petitioner is mala-fide and without any merits. It is stated that the inherent powers of this Court can only be exercised in circumstances which are rarest for the purpose of meeting the ends of justice, and it is not a case where such interference is called for. Relying upon the judgment of the Apex Court, delivered in the case of Dhariwal Tobacco Products Ltd. and Ors. Vs. State Of Maharashtra & Anr 2008 (16) SCALE 240, it has been submitted that the powers under Section 482 Cr.P.C can only be exercised in a deserving case within parameters of law whereas in the present case nothing has been shown by the respondent that there is any reason to exercise such powers and therefore it has been prayed

that the petition be dismissed with costs. . It has also been submitted that while exercising powers under Section 482 Cr.P.C. this Court cannot act as a Court of Appeal inasmuch as by the present petition the petitioner only wants to assail the order passed by the Learned Metropolitan Magistrate in complaint case no. 865/2001 dated 15.03.2004.

9. Dealing with the submissions made by the petitioner relying upon the Article 20(2) of the Constitution of India alleging double jeopardy just because he is called upon to face the prosecution based upon the FIR registered by the CBI and to meet the allegation made in the complaint it has been averred that it is not a case where the petitioner is being tried for the same offence in two different forums. It is submitted that the charges against the petitioner as recited in the FIR are distinct and different from the offence said to have been committed by the petitioner on account of the cheque having been issued by him getting dishonored on presentation. Admittedly, the petitioner has been charged under Section 420, 477A read with Section 120 B of I.P.C. in the FIR registered against him whereas he has been prosecuted under Section 138 of N.I. Act before the Trial Court on the same set of facts. Moreover, it is further submitted that the petitioner at no point of time had denied the issuance of cheque, the dishonoring of the Cheque which triggered the criminal

prosecution before the Trial Court. It is also stated that in view of the issuance of cheque by the petitioner, the presumption under Section 139 of N.I. Act comes into operation which can only be rebutted during the course of the Trial and cannot be decided in a proceedings under Section 482 of Cr.P.C. It is also submitted that the second prosecution on similar set of facts are not barred if the ingredients of the two offences are distinct. Respondent also stated that the rule against double jeopardy is manifested in Section 26 of the General Clauses Act, 1897, Section 300 of Cr.P.C. and Section 71 of the IPC which unequivocally held initiation of prosecution on the same set of facts provided these fulfill the ingredients of offences distinct and different. It is submitted that both the complaints against the petitioner though are emanating from the same set of facts but they do fulfill the vital and mandatory requirement for the purpose of launching prosecution against the petitioner for two distinct offences. Moreover the prayer sought by the petitioner is not borne out from the facts recited in the petition as the prayer in terms of clause B is not a subject matter before this Court and it unambiguously manifests the ulterior objective of the petitioner to resort to dilatory tactics by raising objections extraneous and frivolous in nature.

10. The respondent has also referred to the Judgment delivered by the Apex Court in the case of State of Bihar Vs. Murad Ali Khan (1998) 4 SCC 655 wherein an exactly similar situation arose and in that case it was held that on the same set of facts in conceivable cases can constitute offences under two different laws an act or omission can amount to constitute an offence under the Indian Penal Code and may also constitute at the same time under any other law. The provision of fine cannot be equated or put on the same pedestal as allowing the respondent/complainant to receive the double of the amount of the cheque as in default of fine person can always be sent to imprisonment. Fine cannot be equated with the recovery suit filed under the provisions of Order 37, CPC.

11. I have given my thoughtful consideration to the rival submissions. A bare perusal of the complaint on the basis of which an FIR has been registered by the CBI goes to show that the offences for which the petitioner and others have been put in that case are not on account of dishonouring of cheque of Rs. 60 lacs but for cheating the complainant in seeking discounting of a trade bill for exchange of Rs. 60 lacs drawn by Kay Bee & Co., on Radhika Leather Fashions, New Delhi for which a collateral security was arranged from the Chief Manager State Bank of Saurashtra. It is on the basis of the aforesaid commitment the

bill of exchange was accepted and co-accepted for payment by Mr. R.P.Mathur, Prop. Radhika Leather Fashions and the Chief Manager State Bank of Saurashtra for which a certificate was also issued on 24.03.2005 confirming that the R.P.Mathur, Proprietor Radhika Fashion had a running credit limit of Rs. 2.75 crores and as such the amount will be paid on due date and an assurance was given that when the Bills will be presented they will be honoured. However, on 03.09.1994 when the bill of exchange was due for payment and a cheque was given to the complainant for making repayment that bill was dishonoured. Thus, the complaint is based upon a false assurance that the bill of exchange would be accepted on presentation which was not done. The assurance that petitioner was having a credit limit for State Bank of Saurashtra as confirmed by the said bank was also found to be false. The fact of dishonour of the cheque constitute a separate offence in view of the provisions contained under Section 138 of the N.I. Act which provides for a separate/additional remedy in respect of dishonouring of the cheque so as to save the commercial transactions and to grant some kind of protection to the people who relies upon payment made by way of cheques.

12. I have also gone through the judgment relied upon by the petitioner in the case of G. Sagar Suri & Anr. Vs. State of U.P and Others (supra) but find that the judgment is not of any help to the

petitioner on the facts of this case. Rather this case helps the respondent. In the said case it was held that:

“10. the inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice and that statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases. ””

13. Thus, in the facts of this case two sets of offence have been disclosed categorically and clearly, that is offence of cheating in relation to the complaint subject matter of the CBI investigation and commission of offence under Section 138 of N.I. Act on account of non-payment of the cheque amount within the time prescribed for which the notice was issued to the petitioner by the complainant in accordance with the scheme of the provisions under Section 138 of the N.I. Act. It is not a case of double jeopardy inasmuch as separate punishments are provided for the two set of offences, that is for dishonouring of the cheque under Section 138 of the N.I. Act which cannot exonerate the petitioner for having committed other offences under Section 420/477A/120B IPC to have cheated the complainant on the basis of false assurance given by him supported by the bankers etc.

14. Even otherwise the plea of Double Jeopardy is pre-mature because in this case, the petitioner has not yet been convicted in either of the cases. The plea of double jeopardy can be only be invoked when a person is convicted for the same offence twice. For the aforesaid purpose, I may make a reference of Section 300 Cr.P.C. and Article 20 Sub-clause(2) of the Constitution of India,

1950 which provides as under:

300. Person once convicted or acquitted not to be tried for same offence.

(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221, or for which he might have been convicted under subsection (2) thereof.

(2) A person acquitted or convicted of any offence afterwards tried with the consent of or State Government for any distinct offence for which a separate charges have been made against him at the former trial under sub-section (1) of section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened or were not known to the court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the court by which he was discharged or of any other court to which the first-mentioned court is subordinate.

(6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (10 of 1897) or of section 188 of this Code.

Explanation. The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.

Article 20 (Constitution of India, 1950). Protection in respect of conviction for offences.

(2) No person shall be prosecuted and punished for the same offence more than once.

15. Having perused the order passed by the Metropolitan Magistrate which has also been challenged in this petition I find that there is absolutely no infirmity in the said order because the learned trial Court has brought the distinction between the two set of offences and has rightly dealt with the issue raised of double jeopardy which in this case is not applicable.

16. I also agree with the submissions made by the respondents that it is not a case where provisions under Section 482 Cr.P.C can be invoked. In this regard I take note of the pronouncement of the Apex Court in another judgment in the case of State of Bihar Vs. Murad Ali Khan & Ors (1988) 4 SCC 655 where the Apex Court held:

“15. It is trite to say that jurisdiction under Section 482 Cr.P.C, which saves the inherent power of the High Court, to make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising that jurisdiction the High Court should not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. That is the function of the trial Magistrate when the evidence comes before him. Though it is neither possible nor advisable to lay down any inflexible rules to regulate that jurisdiction, one thing, however, appears clear and it is that when the High Court is called upon to exercise this jurisdiction to quash a proceeding at the stage of the Magistrate taking cognizance of an offence the High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet, do not in law constitute or spell out any offence and that resort to criminal proceedings would, in the circumstances, amount to an abuse of the process of the court or not.”

17. In the aforesaid judgment the issue of double jeopardy has also been examined & it has been observed:

24. We are unable to accept the contention of Shri R.F. Nariman that the specific allegation in the present case concerns the specific act of killing of an elephant, and that such an offence, at all events, falls within the overlapping areas between of Section 429 IPC on the one hand and Section 9(1) read with Section 50(1) of the Act on the other and therefore constitutes the same offence. Apart from the fact that this argument does not serve to support the order of the High Court in the present case, this argument is, even on its theoretical possibilities, more attractive than sound. The expression “any act or omission which constitutes any offence under this Act” in Section 56 of the Act, merely imports the idea that the same act or omission might constitute an offence under another law and could be tried under such other law or laws also.

25. The proviso to Section 56 has also a familiar ring and is a facet of the fundamental and salutary principles that permeate penology and reflected in analogous provisions of Section 26 of General Clauses Act, 1897; Section 71 IPC; Section 300 CrPC 1973, and constitutionally guaranteed under Article 20(2) of the Constitution.

This extract is taken from *State of Bihar v. Murad Ali Khan, (1988) 4 SCC 655*, at page 666 :

Section 26 of the General Clauses Act, 1897 provides:

"26. *Provision as to offences punishable under two or more enactments.*—Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

26. Broadly speaking, a protection against a second or multiple punishment for the same offence, technical complexities aside, includes a protection against re-prosecution after acquittal, a protection against re-prosecution after conviction and a protection against double or multiple punishment for the same offence. These protections have since received constitutional guarantee under Article 20(2). But difficulties arise in the application of the principle in the context of what is meant by "same offence". The principle in American law is stated thus:

"The proliferation of technically different offences encompassed in a single instance of crime behaviour has increased the importance of defining the scope of the offence that controls for purposes of the double jeopardy guarantee.

Distinct statutory provisions will be treated as involving separate offences for double jeopardy purposes only if 'each provision requires proof of an additional fact which the other does not'. Where the same evidence suffices to prove both crimes, they are the same for double jeopardy purposes, and the clause forbids successive trials and cumulative punishments for the two crimes. The offences must be joined in one indictment and tried together unless the defendant requests that they be tried separately.

27. The expression "the same offence", "substantially the same offence" "in effect the same offence" or "practically the same", have not done much to lessen the difficulty in applying the tests to identify the legal common denominators of "same offence". Friedland in *Double Jeopardy* (Oxford 1969) says at p. 108:

"The trouble with this approach is that it is vague and hazy and conceals the thought processes of the court. Such an inexact test must depend upon the individual impressions of the judges and can give little guidance for future decisions. A more serious consequence is the fact that a decision in one case that two offences are 'substantially the same' may compel the same result in another case involving the same two offences where the circumstances may be such that a second prosecution should be permissible...."

28. In order that the prohibition is attracted the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred. In *Leo Roy Frey v. Superintendent, District Jail*⁷, the question arose whether a crime and the offence of conspiracy to commit it are different offences. This Court said: (SCR p. 827)

"The offence of conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences."

18. In the same judgment the Apex Court also relied upon another judgment delivered in the case of *Municipal Corporation of Delhi Vs. R.K. Rohtagi* (1983) 1 SCC 1 where it was said:

16. It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 of the present code.

19. In view of the aforesaid being satisfied that the present petition is an abuse of the process of Court is dismissed with cost of Rs. 10,000/-. Interim orders are vacated forthwith. The record of the case be sent to the trial Judge where the parties may cause their appearance on 06.03.2009. Nothing stated herein will cause any reflection on the merits of either of the cases.

MOOL CHAND GARG, J.

FEBRUARY 09, 2009
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