

IN THE HIGH COURT OF DELHI AT NEW DELHI

CrL. M.C. No. 1543/2007

Judgment reserved on: 12th November, 2008

Judgment delivered on: 23.03.2009

M/s. Asian Fans & Appliances Co.Pvt.Ltd. & Ors.

.....Petitioners

Through: Mr.Rajeev Kumar, Advocate.

versus

M/s. Usaka Industrial Components Pvt. Ltd. Respondents

Through: Mr. Raman Gandhi, Advocate

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR,

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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 |

KAILASH GAMBHIR, J.:

1 . By way of the present petition filed under Section 482 Cr. P.C, the petitioners seek to set aside the order dated 1.5.2007 passed by the court of Shri N.K. Gupta, ASJ, Delhi in revision petition no. 17/2007, preferred by the

respondent against the order dated 30.11.2006 passed by the court of learned M.M. Delhi in complaint no. 400/2005 thereby acquitting the present petitioners.

2 . The brief facts of the case relevant for deciding the present petition are that the respondent filed a criminal complaint no. 400/2005 under Sections 138 & 142 of the Negotiable Instruments Act against the petitioners. The petitioners while appearing before the court of learned M.M. Delhi, took a preliminary objection that the complaint filed by the complainant respondent is not maintainable as the same did not fulfill the mandatory requirements of the offence punishable under Section 138 of Negotiable Instruments Act as the cheques in question were not presented for encashment during their validity period i.e. within six months from the date of the cheques. The court after hearing the arguments of both the parties and after going through the documents filed by the complainant respondent acquitted the petitioners vide order dated 30.11.2006. Feeling aggrieved by the said order the complainant respondent preferred a revision petition

bearing No.. 17/2007 before the Sessions Court. The learned ASJ vide order dated 1.5.2007 set aside the order dated 30.11.2006 passed by the learned M.M. and directed the petitioners to appear before the trial court on 8.5.2007. The petitioners have thus preferred the present petition impugning the order dated 1.5.2007.

3. Mr. Rajiv Kumar, learned counsel for the petitioners contended that the order of acquittal passed by the learned M.M. was based on the material placed by the complainant respondent itself as the cheques in question were not presented for encashment within their validity period i.e. within six months from the date of issuance of the cheques. Counsel further contended that as per Section 378 (4) Cr.P.C., only appeal could lie against the acquittal order dated 30.11.2007 and not a revision petition. In support of his contention, the counsel placed reliance on the judgment of the Apex Court in **Shri Ishar Alloys Steels Ltd. Vs. Jayaswala NECO Ltd., AIR 2001 SC 1161** and judgment of this court in **RPG Transmission Ltd. Vs. Sakura Seimitsu (I) Ltd., & Ors, 2005 (2) DCR 597**. Counsel submitted that

the cheque bearing No. 962590 for an amount of Rs.10 lac dated 25.2.2005 was valid upto 24.8.2005 and was presented firstly on 14.3.2005 and then on 31.8.2005 i.e., after the expiry of six months and on this ground alone the complaint was not maintainable which is clear from the endorsements made on the reverse of the cheque. Counsel further contended that the learned ASJ did not take note of the fact that in para 9 of the complaint the complainant itself has admitted that the second cheque bearing No. 962592 dated 2.3.2005 for an amount of Rs.5 lacs was presented by it on 2.9.2005 for encashment, when already the validity of the said cheque had expired on 1.9.2005.

4 . Counsel for the petitioners contended that the application under Section 294 moved by the petitioners was only for admission and denial of the documents and not seeking discharge of the petitioners and the learned ASJ wrongly observed that instead of preferring revision petition against the summoning order the petitioners had filed the application seeking recalling of the summoning order in the garb of filing an application for discharge. Counsel further

contended that the learned ASJ has also ignored the ingredients of the Section 138 (a), (b) & (c) which are necessary to attract the offence triable under Section 138 of N.I.Act. The counsel also relied on the following judgments in support of his contentions:-

K.M. Mathew Vs. State of Kerala - 1992 GLJ 3779 and SC Rastogi Vs. Smt. Renu Kalra - 2002 GLJ 2259.

5 . Mr. Raman Gandhi, learned counsel for the respondent submitted that the learned M.M. has no power to revoke and review the order for issuance of process as per section 204 Cr.P.C., Counsel further contended that after the issuance of the process the Magistrate has to proceed according to Sections 254 and 255 of the Cr.P.C. Counsel submitted that after issuance of the summons the Magistrate ought to have permitted the parties to lead evidence and should not have discharged or acquitted the accused petitioners in the said complaint case. Counsel stated that the order passed by the learned M.M. was in violation and contrary to the law laid down by the Apex

Court in **Adalat Prasad Vs. Roop Lal Jindal (2004) 7 SCC 338** and **Subramaniam Sethuraman Vs. State of Maharashtra 2005 SCC (Crl.) 242**. The counsel further urged that as per the scheme of the Crl. P.C. the parties are permitted to lead evidence after the issuance of summons by the Magistrate and the accused cannot be discharged or acquitted at any intermediary stage without permitting parties to lead any evidence in a complaint case, therefore, the order passed by the Ld. ASJ is not suffering from any infirmity. Counsel further submitted that even otherwise the present petition is not maintainable in view of Section 259 of Cr.P.C. Counsel contended that the learned M.M. ignoring the contents of the complaint and the material allegations constituting the offence under Section 406/420/120B IPC had issued the process only under Section 138 of the N.I.Act. The counsel further maintained that the Ld. M.M. erred in acquitting the accused without trying them for offences under Section 406/420/120-B IPC as per the procedure in the code for the warrant cases. The counsel relied on following judgments:

- (a) Asia Metal Corporation Vs. State & Ors. – 130 (2006) DLT 545**
- (b) MCD Vs. M/s Batra Printing Press & Anr.**
- (c) State Vs. Bashir Ahmed – 23 (1983) DLT 486**
- (d) State Vs. Sinha Govindji**

6 . I have heard ld. Counsel for the parties and perused the record.

7 . The following issues arise in the present petition:

1. Whether a revision lies against the order of discharge/acquittal when the remedy of appeal is available under S. 378 of Cr.P.C.
2. Whether a person can be discharged at the stage of summons in a summons case in a summary trial.
3. Whether under Chapter XX of the CrPC the parties are permitted to lead evidence after the issuance of summons;

8 . The proceedings in the case under Section 138 of the Negotiable Instrument Act commence with filing of a complaint and cognizance being taken under Section 190(1)(a) of the Code following examination of the complainant. The learned Magistrate as already pointed out issued process against the accused persons in terms of Section 204 of the Code of Criminal Procedure and such

process can be issued only when the learned Magistrate was satisfied prima facie that accused persons has committed offence for which he must be called upon to face trial. The issuance of process, summons herein, for attendance marks the end of the pre-summoning stage and the case then has to be dealt with under Chapter XX which deals with trial of summons-cases by Magistrates. The procedure given in Chapter XX for trial of summons cases by the Magistrate starts with Section 251 which provides for substance of accusation to be stated as soon as the accused being summoned appears before the Magistrate. The post summoning proceedings before the Magistrate commence upon issuance of summons under Section 204 to the accused. When the accused enters an appearance in response to the summons, the Magistrate has to take proceedings under Chapter XX of the Code. At this juncture, it would be worthwhile to reproduce Section 251 of the Code of Criminal Procedure, which is as under:

“251. Substance of accusation to be stated.

When in a summons-case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge."

9 . On bare reading of Section 251 it is manifest that at this stage the Magistrate is not required to make application of his mind and all that is required under Section 251 of the Code is that the substance of the accusation is to be stated and the accused is to be asked whether he pleads guilty or has any defense to make and it is also not necessary to frame a formal charge. Chapter XX which provides for the procedure for trial of summons cases, contains Sections 251 to 259. Section 251 provides that when an accused is brought before the Magistrate, the particulars of the offence of which he is accused of, shall be stated to him. After that, his plea of guilt is recorded and in case of examination of evidence under Section 255 of the Code, contained in this Chapter, the Magistrate shall acquit him if in his opinion the accused is not guilty of the offence. When a comparative study of Chapters XIX and XX is made, it makes it clear that charge has to be framed only in a warrant case and when the

charge is not framed, the accused necessarily has to be discharged. This shows that the words "charge" and "discharged", are inter-linked and inter dependent and have been used only in that procedure where the charge has to be framed that is in warrant cases. Where the law does not provide for the framing of the charge there can be no question of discharge. In summons cases, there cannot be a question of discharge as the provisions do not comprehend such a situation. The stage of acquittal comes after the framing of the charge. Under Section 251 of the Code only substance of accusation has to be stated. Technically, it might be taken akin to the framing of the charge, but when the question of discharge is to be considered relatively with this provision, it cannot be equated with the framing of the charge. In the instant case, the trial court after summoning the accused and without serving the notice required under Section 251 CrPC proceeded to hear the accused on the application for discharge. Clearly, no particulars of the offence of which the accused was charged were stated to him. Thus, deviating from the normal procedure, the trial

court without following the provisions of Section 251, heard him on the application for discharge and accordingly discharged him.

10 . Be that as it may, none of the provisions regarding summons case speak of any possibility of discharge except under Section 258, which does not apply to the present case. From bare perusal of the aforementioned Section 251, CrPC it is clear that this provision does not empower the Magistrate to discharge the accused facing trial in summons cases. In this regard in **Subramaniam Sethuraman (supra)**, the Hon'ble Apex Court observed as under:

“The case involving a summons case is covered by Chapter XX of the Code which does not contemplate a stage of discharge like Section 239 which provides for a discharge in a warrant case.”

11 . Thus, clearly in the instant case, the Magistrate erred in discharging the accused persons as the trial court could have either passed an order of dismissal under Section 203 or acquittal under Section 245 in a summons case. It could not have passed an order of discharge in a summons

case. Even if it discharged the accused but in law it meant acquittal only. From the perusal of the record, it appears that in the instant case, the Magistrate has decided the matter in a slip shod manner making the summary trial too terse. He did not at all adhere to the procedure prescribed for the disposal of a case in a summary way.

12 . The object of the revisional jurisdiction is to confer upon superior' Criminal Courts a supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law or irregularity of procedure and similar infirmities. Therefore, in order to correct the error of law, since the decision of the Magistrate is clearly in violation of the law laid down in the code and the law declared by the Hon'ble Apex Court in **Subramaniam Sethuraman (supra)**, therefore, clearly the remedy against such an order is filing of a revision petition and not an appeal. In this regard, this court in **Asia Metal Corporation (HUF) (Supra)** observed as under:

"5. I have considered the submissions made by the learned Counsel for the parties and find that

in view of the Supreme Court's decision in the case of Subramaniam Sethuraman (supra), there is no question of discharge under Chapter XX insofar as a summons-case which has been instituted upon a complaint is concerned. Chapter XX pertains to trial of summons-cases by Magistrates. Section 251 pertains to the substance of accusation to be stated. It provides that when in a summons-case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defense to make, but it shall not be necessary to frame a formal charge. Prior to the stage of Section 251 of the Code, the procedure that is prescribed is governed by Chapter XV of the Code starting from Section 200. Section 200 of the Code pertains to the examination of the complainant. Section 203 deals with the dismissal of complaint. In particular, it provides that if, after considering the submissions on Oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing. In a sense Section 203 marks the culmination of the pre-summoning stage. It either results in the dismissal of the complaint or it results in the advancement to the next stage, that is, Chapter XVI. Section 204 is the first section in Chapter XVI. Under Section 204 it is made clear that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding in a summons-case, he shall issue summons for the attendance of the accused. The issuance of summons for attendance marks the end of the pre-summoning

stage and the case then has to be dealt with under Chapter XX which deals with trial of summons-cases by Magistrates. At this stage, the Magistrate is not required to further apply his mind as to whether the case has to be proceeded with or not against the accused/summoned persons. All that is required under Section 251 of the Code is that the substance of the accusation is to be stated and the accused is to be asked whether he pleads guilty or has any defense to make and it is also not necessary to frame a formal charge. None of the provisions of Chapter XX speak of any possibility of discharge except under Section 258 which does not apply to the present case. The Supreme Court's decision in the case of Subramaniam Sethuraman (supra) is quite clear on this aspect and has categorically held that the case involving a summons-case is covered by Chapter XX of the Code which does not contemplate a stage of discharge like Section 239 which provides for a discharge in a warrant case. What has happened in the present case is that after summons were issued, at the stage of proceedings under Section 251 of the Code, the learned Metropolitan Magistrate has discharged all the accused except Yogesh Gupta. There is no provision of discharge at the stage of Section 251 of the Code and therefore, this is clearly contrary to the provisions of the Code as also to the law as declared by the Supreme Court in the case of Subramaniam Sethuraman (supra). This is an error which needs to be corrected and therefore, these revision petitions would be maintainable. The question of the discharge amounting to an acquittal is of no consequence because discharge itself is not permissible under the law. therefore, the consideration of the interpretation of Section 258 as was done in the case of RPG Transmission (I) Ltd. (supra) is not

at all necessary.

6. In view of the foregoing discussions, I hold that these revisions petitions are maintainable and that the learned Metropolitan Magistrate has committed a serious error which requires to be corrected. In this view of the matter, these revision petitions are allowed and the impugned order insofar it 'discharges' all the accused other than Yoges Gupta, is set aside.

7. The accused are directed to appear before the concerned Metropolitan Magistrate on 27.5.2006, the date already fixed in that matter for the remaining accused. I direct that the trial be conducted expeditiously keeping in view the newly amended Section 143 of the Negotiable Instruments Act, 1881. The same be concluded preferably within six months. These revision petitions stand disposed of."

13 . Thus, in view of the above discussion, remedy of revision was available against the order of the Learned Metropolitan Magistrate and therefore, the learned ASJ rightly exercised the power of revision in the instant case. Also, as discussed above, the Magistrate has no power to discharge an accused in a summons case. Thus, the first and the second issues are decided, accordingly.

14 . As regards the third issue of whether the parties can be allowed to give evidence after issue of summons, the answer is emphatic 'NO'. The stage of evidence comes after

the learned Magistrate examines the accused under Section 251 of the Code of Criminal Procedure. When the said stage is reached the learned Magistrate can pass an order only in terms of Section 255 of the Code of Criminal Procedure after taking evidence. At the stage of examination of the accused under Section 251 of the Code no paper or document on behalf of the accused can be relied upon by the learned Magistrate. If the contention of the counsel for the accused is accepted, there would be a mini trial even at the stage of Section 251. That would defeat the object of the Code. In this regard the decision of the Supreme Court in **State of Orissa v. Debendra Nath Padhi** reported in **(2005) 1 SCC 568** is worth mentioning, which is as under:

"18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced. The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207(a) omitted have already been noticed. Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the

object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.

23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's case holding that the trial court has powers to consider even materials which accused

may produce at the stage of Section 227 of the Code has not been correctly decided.”

15 . In view of the above discussion, the judgments relied upon by the counsel for the petitioners are of no assistance to the petitioners.

16 . Having regard to all the facts and circumstances of the case and the legal position discussed hereinabove, I am of the considered opinion that the learned Additional Sessions Judge did not commit any illegality or impropriety in allowing the revision while rejecting the order of the learned Magistrate. Therefore, no interference is made in the order dated 1.5.2007 passed by the learned Additional Sessions Judge.

17 . In view of the foregoing, the present petition is dismissed.

23rd March, 2009

KAILASH GAMBHIR,J.