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

+ **W.P(CRL.) No. 607/2012**

Date of Decision: 19th July, 2013

VIRENDER KUMAR (DECEASED)

THROUGH HIS FATHER BISHMBER DAYAL Petitioner

Through: Ms. Deepali Gupta, Advocate.

versus

STATE & ANR

..... Respondents

Through: Mr. Nikhil A. Menon, Advocate for
Mr. Dayan Krishnan, ASC with SI
Darmender Kumar, PS Roop Nagar.
Mr. J.P. Dhanda and Mr. N.A.
Usmani, Advocate for R-2.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

:SUNITA GUPTA, J.

1. This is a writ petition under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') filed by the petitioner who is the father of late Sh. Virender Kumar-complainant challenging the orders dated 21st May, 2009 passed by learned Additional Chief Metropolitan Magistrate ('ACMM') and the order dated 3rd September, 2009 passed by learned

Additional Sessions Judge ('ASJ'), Delhi with the prayer to summon the respondent in the complaint case filed by the deceased complainant.

2. In brief, the facts are that in the year 1994 Sh. Virender came in contact with M/s Raj & Company dealing in shares and stocks. Respondent No.2 Sh. Rajinder Singh Beniwal introduced himself as the proprietor of the firm. According to the complainant, he induced him to invest money in the share business. As such, he purchased shares from respondent No.2. Thereafter, respondent No.2 induced him to deal in speculative transaction by depositing 20% to 25% of margin money of shares intended to be sold or purchased by him. Various transactions took place. In all, a sum of Rs.1,16,000/- was paid in cash by the complainant to the respondent for shares to be delivered to him. However, no receipt was issued by him. On repeated persuasions, on 21st January, 1995, the respondent issued receipt of Rs.1,16,000/- to the petitioner duly signed by him and also returned the cheques of Rs.75,000/- and asked him to sign the receipt also. Thereafter, the respondent on the pretext of seeing the receipt took it back from the petitioner and added some lines despite strong

objection raised by the complainant. The said action was a fraud committed by the respondent with dishonest intention to cause damage/deface or cancel the document which was a valuable security for receiving the principal amount as paid or receiving the shares purchased against the said amount. The respondent, with dishonest intention to defraud the petitioner, had added certain lines that he is keeping Rs.1,16,000/- as margin money of shares worth Rs.2,36,000/- to nullify the liability and to cheat the petitioner of his hard earned money. Despite repeated attempts to contact the respondent for getting back his hard earned money or the shares purchased from it, the respondent refused to give the same, as such, various complaints were filed but no action was taken. As such, criminal complaint No. 170/2008 under Sections 200 Cr.P.C. read with Sections 467/477/420/406/506 of Indian Penal Code, 1860 ('IPC') was filed before learned Chief Metropolitan Magistrate ('CMM'), Tis Hazari Courts, Delhi. Vide order dated 21st May, 2009 learned ACMM dismissed the complaint holding that "it was a commercial transaction which cannot come within the purview of cheating. As far as receipt is concerned, I fail to understand as to how there was any forgery. It

is unbelievable that complainant who had soured relations with the respondent would give further money and would also give back the receipt to the respondent”. This finding was challenged by filing a revision, however, the revision was dismissed by learned Additional District and Sessions Judge vide order dated 3rd September, 2009 on the ground that “the receipt was altered in the presence of the petitioner himself and was accepted by him, as such no offence is made out”. It was submitted that both the orders are erroneous and mechanical, as such, it was submitted that the orders be set aside and the respondent be ordered to be summoned.

3. Notice was given to the state as well as to respondent No.2, who has filed his counter affidavit.

4. I have heard Ms. Deepali Gupta, learned counsel for the petitioner, Mr. Nikhil A. Menon, learned counsel for respondent No.1-State and Mr. J.P. Dhanda along with Mr. N.A. Usmani, learned counsel for respondent No.2 and have perused the record.

5. It was submitted by learned counsel for the petitioner that the receipt was a “valuable security” which has been dishonestly defaced and cancelled by the respondent and as such respondent is liable to be

summoned and action is required to be taken against him in accordance with law. On the other hand, it is submitted by learned counsel for the respondent No.2 that the present petition is not maintainable, inasmuch as, the petitioner is the father of late Sh. Virender Kumar who had dealing with respondent No.2. Since the complainant has died and the petitioner was never in picture as to any transaction or discussions between deceased Virender Kumar and respondent No.2, therefore, he has no legal right to file the writ petition. Same has been filed only to harass respondent No.2. Moreover, the issue pertains to the year 1994-95; deceased Virender Kuamr had filed a complaint in District Consumer Disputes Redressal Forum where the complaint was dismissed. His appeals before the State Commission and National Commission were also dismissed. Powers under Article 227 of the Constitution is only limited and can be invoked only if there is want or excess of jurisdiction, failure to exercise jurisdiction, violation of procedure or disregard of principle of natural justice or error apparent on the face of the record. The point has already been discussed and determined by five Courts and cannot be re-agitated. As such the petition is liable to be dismissed.

6. Refuting the submission of learned counsel for respondent No.2, it was submitted that after the death of the complainant, his father being his legal representative is competent to file the writ petition as he comes under the definition of ‘victim’ as defined under Section 2(wa). Moreover, since the lower Courts have failed to exercise the jurisdiction vested with them, as such the writ petition is perfectly maintainable.

7. As regards the maintainability of the writ petition filed by the present petitioner, who is the father of the victim-complainant Virender Kumar, in the definition clause, (wa) has been inserted by Act 5 of 2009 in Section 2 of the Cr.P.C. It reads as under:-

(2wa) “victim” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim” includes his or her guardian or legal heir.”

8. A bare perusal of this definition clause goes to show that the expression “victim” includes his or her guardian or legal heir. Needless to say, the father of complainant is his legal heir, that being so, the writ petition filed by him is maintainable.

9. Coming to the merits of the case it is the case of the petitioner that during the course of various transactions between the petitioner and respondent no.2, a sum of Rs.1,16,000/- was paid by the petitioner to respondent no.2 for shares to be delivered to him. However the respondent no.2 neither repaid the amount nor the shares. Ultimately on 21.01.1995, he issued a receipt of Rs.1,16,000/- and also returned a cheque of Rs.75,000/- but thereafter on false pretext, took it back and then caused damage to the said document which was a valuable security thereby nullifying his liability.

10. In the counter affidavit filed by respondent no.2, there is no specific denial to this fact and only the averments made in the petition have been vaguely denied. May be, it is a commercial transaction and as per the averments made in the complaint itself, the petitioner on seeing the advertisement himself approached respondent no.2 for purchase of shares and therefore there was no inducement on the part of respondent no.2 to the petitioner to purchase shares from him and therefore offence under Section 420 may not be made out. But, so far as, receipt is concerned, no presumption can be drawn that “the complainant who was having sour relation with the accused would

not give further money or would also give back the receipt to the accused”, on which ground the complaint was dismissed by the learned ACMM or that “since the alteration was made by the respondent in the presence of the petitioner” and therefore no offence is made out as observed by learned ASJ.

11. The averments made in the complaint which were substantiated by the complainant while examining himself and other witnesses made out a case of summoning respondent no.2, at least as regards defacement of receipt which was a valuable security and falls within the definition of Section 477 IPC. Whether the receipt could not have been given back by the petitioner to respondent no.2 again or what was its effect of having been signed in the presence of the petitioner were required to be seen after summoning the respondent. But on the basis of inference the complaint could not have been dismissed.

12. As regards dismissal of the complaints made by the complainant before District Consumer Disputes Redressal Forum and appeals by State Commission and National Commission, the same were basically dismissed on the point of limitation and not on merits of the case.

13. Under the circumstances, the writ petition is allowed. Impugned order dated 21.05.2009 passed by the learned ACMM and order dated 03.09.2009 passed by learned ASJ are set aside. Respondent no.2 is ordered to be summoned for offence under Section 477 IPC.

14. The case is accordingly remanded back to learned CMM of the concerned District who may keep the case either with himself or may assign it to Competent Court of jurisdiction. Petitioner as well as respondent No.2 are directed to appear before learned CMM concerned on 01.08.2013. Copy of this order along with the Trial Court record be sent forthwith.

**SUNITA GUPTA
(JUDGE)**

July 19, 2013

AK/as