

A.F.R

Neutral Citation No. - 2023:AHC:203563

Court No. - 50

Case :- CRIMINAL REVISION No. - 395 of 2023

Revisionist :- Parmeshwar Srivastava @ Pappi

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Prakash Chandra Srivastava

Counsel for Opposite Party :- G.A.,Rajendra Singh,Shiv Bahadur Singh

With

Case :- APPLICATION U/S 482 No. - 5071 of 2023

Applicant :- Parmeshwar Srivastava Alias Parthsarthi Srivastava

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Prakash Chandra Srivastava

Counsel for Opposite Party :- G.A.,Rajendra Singh,Shiv Bahadur Singh

Hon'ble Ram Manohar Narayan Mishra,J.

1. Heard Sri Prakash Chandra Srivastava, learned counsel for the revisionist/applicant, learned counsel for the opposite party No.2, learned AGA for the State and perused the material placed on record.

2. Instant criminal revision has been preferred against judgment and order dated 9.1.2023 passed by learned C.J.M. Varanasi in Complaint Case No. 9647 of 2021, under Section 138 N.I. Act, P.S. Rohaniya, District Varanasi, whereby discharge application moved by revisionist/accused has been dismissed and the case was fixed for recording statement of the accused.

3. Factual matrix of the case in brief is that complainant who is respondent no. 2 in present revision filed a complaint before the court of Special C.J.M., Varanasi, under Section 138 N.I. Act which is registered as criminal case no. 9647 of 2021 wherein he has stated that complainant is having huge chunk of plots in Mauza Badi Khajuri Varanasi. The accused Parmeshwar Srivastava came into contact with him and posed himself as Director/Office bearer of Shine City Infra Project Limited and stated that he was purchasing plots for said Company and also promised to pay dividends by borrowing money in personal capacity from people. Complainant's wife Sadhna Singh sold her plot to Shine City Infra Project Limited in the year 2014 and received its sale proceeds. Accused visited the complainant and asked for paying him Rs. 4 crore to meet out the financial difficulties of the said Company. The complainant relying on representations of the accused who was his old acquaintance, lent him Rs. 3,92,00,000/- in presence of witnesses which was collected by him from different

sources and he assured him to refund the said amount within six months. Wife of the complainant also paid Rs. 2,00,00,000/- to the accused for purchasing some plots from said Company on reposing trust on representations of the accused. Accused gave 31 cheques to Sadhna Singh for her two crore rupees but got these cheques back from her and gave an allurements of making money double, thus accused took total Rs. 5,92,00,000/- from the complainant and his wife which he failed to repay. He had not given any plot to them lying with said Company. At one point of time, he gave a cheque of Rs. 3,24,00,000/- to the complainant on 10.5.2018 but subsequently he asked him to not present the said cheque for encashment but ultimately he did not pay the amount of said cheque. The complainant gave six cheques bearing dates 20.4.2021, 25.4.2021 of different amounts to discharge the debts of the complainant and his wife and assured him to pay remaining Rs. 2,00,00,000/- soon. The complainant produced said cheques before his bank Union Bank of India, Raja Talab, Rohaniya, Varanasi, however, three cheques were dishonoured with remarks "payment stopped by drawer" on 13.5.2021. Three cheques were dishonoured with remarks "payment stopped by drawer and funds insufficient", were dishonoured on 11.5.2021 and thus, he could not get the payment of said six cheques. After receiving the cheques back with said remarks of Bank. The complainant gave a registered notice to the accused through his counsel and when accused failed to pay the amount of said cheques, he filed present complaint on 18.6.2021.

4. Learned Special C.J.M. examined the accused/revisionist by order dated 14.9.2021 under Section 138 N.I. Act for trial. Accused assailed the said summoning order before this Court by moving an application under Section 482 Cr.P.C. No. 14311 of 2022 which is said to be pending before this Court.

5. Accused revisionist moved an application for discharge on 9.9.2022 with prayer that the said complaint was based on false, concocted and baseless facts and is not maintainable in the eye of law. The revisionist was informed by the office bearer or Director of said Company Shine City Infra Project Limited. He would neither purchase plots nor he had assured any dividend to the complainant, in fact four signed cheques of the accused got missing in the city of Varanasi which anyhow came in the hands of complainant who filled up amounts arbitrarily on said cheques whereas the accused had informed the said bank on 1.12.2020 and at P.S. on 27.11.2020 regarding missing of four cheques and issued instructions to bank to stop the payment. Relationship of the complainant and accused were cordial and he had negotiated with the accused for sale of his plots at village Lohta for which the accused had issued two cheques, Cheque No. 94401 for Rs. 9,00,000/- and Cheque No. 94409 for Rs. 10,00,000/- as earnest money but the complainant had not presented the said cheques for encashment and on pretext of missing of said cheques, he received Rs. 18,50,000/- through cheques/RTGS and Rs.

50,020, cash from the accused from 5.11.2020 to 20.1.2020 as transaction of the complainant has made with Shine City Infra Limited , whom he has not impleaded as a party in complaint. The said complaint is not maintainable and barred under Prize Chits and Money Circulation Scheme (Banning) Act 1978 and Banning of Unregulated Deposit Scheme Act, 2019 and Section 58 N.I. Act and Section 219 Cr.P.C.

6. Learned magistrate dismissed the said discharge application dated 9.9.2022 by impugned order dated 9.1.2023, wherein the court observed that complaint has been filed in respect of dishonor of six cheques drawn by the accused in favour of complainant after completing legal formalities under N.I. Act and accused has been summoned by the court on finding sufficient evidence against him and evidence has to be recorded during trial.

7. Learned counsel for the revisionist submitted that learned magistrate has rejected the discharge application moved by revisionist vide impugned order in illegal manner and without considering the grounds taken therein in proper perspective. Impugned order is vitiated by illegality, irregularity and perversity and is not sustainable under law. It is further submitted that four blank cheques which were kept in the bag were lost by the revisionist in Sigra Tehsil, Varanasi and the accused had given information to his Bank and P.S. with regard to loss of those cheques, however, said cheques anyhow got in the hands of complainant and he filed a complaint subsequently on 18.6.2021. The revisionist is neither Officer nor Director in Shine City Infra Project Limited. He is not involved in purchase of land and he has not given any promise to give profit to the complainant. This is also false to say that revisionist demanded Rs. 4,00,00,000/- as debt from respondent no. 2. The contention of complainant that he had given Rs. 3.92 crore as debt to the revisionist is also false. The four signed but blank cheques were kept by the revisionist for payment of house construction items which got misplaced. The revisionist paid Rs. 90,00,000/- through cheques and cash to the complainant. Even that respondent no. 2 filed present complaint with malafide intention which is highly improbable that without taking any receipt, complainant handed over such huge amount of Rs. 3.92 crore as debt to the revisionist and also gave Rs. 2 crore cash for booking of plots. In fact wife of complainant herself sold a plot in favour of complainant and received Rs. 6.92,000/- from the Company. The revisionist was in fact working in the said Company but was neither office bearer nor the Director of the said Company. Due to some financial irregularity committed by promoters of the company , the revisionist was made accused in some criminal cases lodged under Sections 419, 420, 120B IPC on assumption of being office bearer of the Company and he has been enlarged on bail by this Court in most of those cases. It is nowhere stated in complaint that revisionist had taken the money or signed cheques in private capacity. In absence of impleading the Company in array of the accused person, complaint is not maintainable. He has been wrongly

introduced in the complaint as Director of the said Company. The accused has not signed the cheques in private capacity. Complaint is also not maintainable due to non-compliance of provisions of Section 141 of N.I. Act.

8. Per contra, learned counsel for the respondent no. 2 submitted that the case is of summon nature in which there is no specific provision for discharge, therefore, discharge application was itself not maintainable before court below. The complainant challenged summoning order before this Court through application under Section 482 Cr.P.C. but no interim or stay order was issued therein. The complainant has issued impugned cheques in personal capacity and not as authorized signatory of the Company, therefore, provisions of Section 141 of N.I. Act are not applicable in the case. Revision deserves to be dismissed.

9. Learned counsel for the revisionist placed reliance on a Full Bench judgment of Hon'ble Apex Court in Aneeta Hada vs. Godfather Travels & Tour Pvt. Ltd., 2012 LawSuit (SC) 244, wherein Hon'ble Apex Court allowed the criminal appeal preferred against order of High Court dismissing the petition under Section 482 Cr.P.C. filed by the appellant and quashed the proceedings under Section 138 N.I. Act against the accused appellant. Hon'ble Apex Court in said judgment held its own decision in Sheoratan Aggarwal and another v. State of Madhya Pradesh, 1984 4 SCC 352, runs counter to the ration laid down in a Larger Bench judgment in the case of State of Madras v. C.V. Parekh and another, 1970 3 SCC 491. Hon'ble Apex Court in Anita Hada's case (supra) reproduced provisions of Section 141 of N.I. Act as under:-

“15. At this juncture, we may refer to [Section 141](#) which deals with offences by companies. As the spine of the controversy rests on the said provision, it is reproduced below: -

141. Offences by companies. – (1) If the person committing an offence under [section 138](#) is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act, has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

16. On a reading of the said provision, it is plain as day that if a person who commits offence under [Section 138](#) of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a ‘deemed’ concept of criminal liability.”

10. The court held that in view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under [Section 141](#) of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries has to be treated restricted to its own facts as has been explained by us hereinabove.

11. However, in Anita Hada’s case (supra), appellant was authorized signatory of the Company registered under the Companies Act, 1956. She issued cheques in favour of the respondent Company which was dishonoured as a consequence of which the respondent initiated a criminal action by filing a complaint before the magistrate under Section 138 N.I. Act.

12. Learned counsel for the revisionist further placed reliance on a judgment Himanshu Vs. B. Shivamurthy & Anr., CrI. Appeal No. 1465 of 2009, decided on 17.1.2019, wherein Hon’ble Apex Court held that in absence of Company being arraigned, complaint against the appellant, therefore, was not maintainable. The appellant had signed the cheque as Director of the Company and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138 N.I. Act, High Court was not in an error in holding that Company could not be arraigned as an accused.

13. On the other hand, learned counsel for the respondent placed reliance on a judgment of Hon'ble Apex Court in Mainuddin Abdul Sattar Shaikh v. Vijay D. Salvi, Crl. Appeal No. 1472 of 2009, wherein Hon'ble Apex Court held in paragraph no. 11 as follows:-

“11. About the liability under [Section 138](#) of the NI Act, where the cheque drawn by the employee of the appellant company on his personal account, even if it be for discharging dues of the appellant-company and its Directors, the appellant-company and its Directors cannot be made liable under Section 138. Thus, we observe that in the abovementioned case, the personal liability was upheld and the Company and its Directors were absolved of the liability. The logic applied was that the Section itself makes the drawer liable and no other person. This Court in P.J. Agro Tech Limited (supra) noted as under:

“An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence.”

(Emphasis Supplied)

14. In P. Rasiya vs. Abdul Nazeer and another, Crl. Appeal Nos. 1233-35 of 2022, Hon'ble Apex Court while deciding the appeal against conviction of the case under Section 138 N.I. Act observed that presumption under Section 139 N.I. Act is a statutory presumption and, therefore, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the complaint/holder of the cheque, in that case it is for the accused to prove the contrary. The High Court has also failed to appreciate that it was exercising the revisional jurisdiction and there were concurrent findings of fact recorded by the courts below.

15. From perusal of impugned order and in the light of aforesaid judicial authorities of Hon'ble Apex Court, it is found that learned court below has addressed issues raised by the accused in discharge application in proper manner while dismissing the discharge application moved by revisionist by a reasoned order. From perusal of cheques in question, Cheque No. 94401, 94405, 94406, 94407, 94408, 94409, which is admittedly signed by revisionist, it bears that said cheques are signed by him not as an authorized signatory of the Company, say Shine City Infra Project Limited but it appears to be signed in his private capacity and not as authorized signatory of the company. The payee of the cheque is complainant who is not a Company but an individual.

16. On perusal of complaint also it appears that grievance of the complainant is directly against the revisionist projected himself as office bearer of the said company, therefore in these facts situation,

the mandate of Section 141 N.I. Act is not applicable in the case wherein it is provided that if the person committing an offence under Section 138 N.I. Act is Company, every person responsible to the Company for the conduct of negligence of the company as well as the Company shall be deemed guilty of the offence. The complaint is not legally barred for non arrangement of Company as an accused and the complaint filed against revisionist for charge under Section 138 N.I. Act is maintainable as such. The other issues raised by complainant are matter of evidence and which can only be decided after tender of evidence by the trial court and no finding can be given in present revision thereon. There is also force in the submissions of learned counsel for the respondent that there is no provision for discharge in the scheme of Cr.P.C. in a summons case and offence under Section 138 N.I. Act is in the nature of summons case and under Section 143 of the Act, the court of Judicial Magistrate is empowered to try the cases summarily. In summons cases, there is a provision under Section 258 Cr.P.C. wherein in a summons case instituted otherwise than complaint, magistrate is vested with the jurisdiction to stop the proceedings at any stage without pronouncing any judgment in certain cases and such stoppage of proceedings, if made before the evidence of principle witnesses has been recorded, it will have effect of discharge, however, said provision is not applicable in a case instituted upon complaint, therefore, no good reason is found warranting interference of this Court in impugned order passed by learned court below.

17. Case is liable to be decided on merits instead of being dismissed at pre-trial stage, as prayed by learned counsel for the revisionist before trial court as well as before this Court by seeking his discharge. Impugned order is not vitiated by any illegality, irregularity. Revision is devoid of merit and deserves to be dismissed.

18. Revision stands dismissed, accordingly.

19. Learned counsel for the applicant submitted that in view of rejection of discharge application by court below, moved by applicant and filing of criminal revision before this Court, present application has lost its significance.

20. Consequently, Application u/s 482 Cr.P.C. also stands **dismissed**.

Order Date :- 18.10.2023

A.P. Pandey

