

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

CRIMINAL REVISION CASE No.2634 AND 2640 OF 2017

JUDGMENT:

One and the same complainant viz., S. Subbaiah, has filed two Calendar Cases against two different accused i.e., C.C. No.56 of 2015 against M. Suresh Babu, and C.C. No.57 of 2015 against M. Vijay Kumar. The fact-situation is identical, as for dishonour of cheques, the aforesaid Calendar Cases were filed for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 (for short 'NI Act'),.

2. The learned Judicial Magistrate of First Class, Special Mobile Court, Kurnool, in C.C. No.56 of 2015, by the judgment dated 02.08.2016, inflicted sentence of imprisonment of one year and fine of Rs.3,000/- with default sentence to undergo simple imprisonment for one month giving set off of the remand period, if any, already undergone by the revision petitioner under Section 428 of the Code of Criminal Procedure, 1973 (for short 'Code'). The same was affirmed by the learned Principal Sessions Judge, Kurnool, in Criminal Appeal No.214 of 2016 of 2016, respectively, by the judgment dated 4.09.2017.

3. Aggrieved over the same, former Criminal Revision Case is preferred by the revision petitioner viz., M. Suresh Babu, under Sections 397 and 401 of the Code. In the latter Criminal Revision Case, the learned Magistrate passed identical judgment, inflicting

identical sentence of imprisonment, fine and default sentence against the accused therein viz., M. Vijay Kumar, which were affirmed by the very same Principal Sessions Judge, Kurnool, in Criminal Appeal No.213 of 2016 on the very same day.

4. Heard Sri R. Siva Sai Swaroop, learned counsel for the revision petitioner, in both the cases, and, Sri M. Ajay Kumar, learned counsel for respondent No.2 - complainant, in both the criminal revision cases, and perused the material on record.

5. There is a typical situation occurring in both the complaints. While the matters were pending before the learned Magistrate, they were referred to Lok Adalat for resorting to alternate dispute resolution mechanism and the concerned Lok Adalat chosen to refer them to Mediation process. Thus, the Mediator has passed award in terms arrived at by both parties before him. Originally, the mediation report was not filed, however, by way of additional documents seeking permission of the Court, the revision petitioners filed a Memorandum of Settlement of Joint Compromise Petition arrived at by both parties, signed by the Mediator. This is not in dispute, since both the judgments i.e., the judgment of the trial court as well as the appellate Court refers to the settlement by way of mediation and even extracted the terms and conditions in paragraph No.10 by the learned Magistrate and in paragraph No.12, by the learned Principal Sessions Judge, of their respective judgments.

6. The learned counsel, Sri R. Siva Sai Swaroop, for the revision petitioners, would submit that the judgments rendered by both the Courts below in both the cases would reflect that on merits, both the Courts have not discussed in recording findings, but just based on terms of mediation settlement, presuming that there has been admission made by the revision petitioners arrived at the conclusion that nothing more is required except to record conviction and accordingly convicted and inflicted sentence of imprisonment and imposed fine. Thus, according to the learned counsel, the judgments rendered in both the cases tainted with patent illegality, and, therefore, interference is warranted. It is according to him that appreciation of evidence is totally lacking and, therefore, requests to set aside the conviction and sentences.

7. The learned counsel also referring to certain authorities would come out with the request that report of the mediator is enforceable under Section 431 read with Section 421 of the Code to recover the amount arrived at towards full and final satisfaction, as if it was a fine and the revision petitioners cannot be sent to jail.

8. To fortify his submissions, the learned counsel for the revision petitioner placed reliance in **Dayawati v. Yogesh Kumar Gosain** in Criminal Reference No.1 of 2016, rendered by a Division Bench of Delhi High Court. Precisely, the very same fact-situation is occurring in the said case. While answering the reference, the questions were extracted in Paragraph No.1, thus:

“1. What is the legality of referral of a criminal compoundable case (such as one u/s 138 of the NI Act) to mediation?

2. Can the Mediation and Conciliation Rules, 2004 formulated in exercise of powers under the CPC, be imported and applied in criminal cases? If not, how to fill the legal vacuum? Is there a need for separate rules framed in this regard (possibly u/s 477 of the CrPC)?

3. In cases where the dispute has already been referred to mediation - What is the procedure to be followed thereafter? Is the matter to be disposed of taking the very mediated settlement agreement to be evidence of compounding of the case and dispose of the case, or the same is to be kept pending, awaiting compliance thereof (for example, when the payments are spread over a long period of time, as is usually the case in such settlement agreements)?

4. If the settlement in Mediation is not complied with - is the court required to proceed with the case for a trial on merits, or hold such a settlement agreement to be executable as a decree?

5. If the Mediated Settlement Agreement, by itself, is taken to be tantamount to a decree, then, how the same is to be executed? Is the complainant to be relegated to file an application for execution in a civil court? If yes, what should be the appropriate orders with respect to the criminal complaint case at hand. What would be the effect of such a mediated settlement vis-à-vis the complaint case?”

And after an elaborate discussion, referring to the relevant provisions of the Code and also settlement by intervention of the Lok Adalat

including the provisions of Section 89 of Code of Civil Procedure, 1908, answered the reference in a criminal case in paragraph No.118, thus:

“118.

III (xvii) We may also refer to a criminal case wherein there is an underlying civil dispute. While the parties may not be either permitted in law to compound the criminal case or may not be willing to compound the criminal case, they may be willing to explore the possibility of a negotiated settlement of their civil disputes. There is no legal prohibition to the parties seeking mediation so far as the underlying civil dispute is concerned. In case a settlement is reached, the principles laid down by us would apply to settlement of such underlying civil disputes as well.

In case reference in a criminal case is restricted to only an underlying civil dispute and a settlement is reached in mediation, the referring court could require the mediator to place such settlement in the civil litigation between the parties which would proceed in the matter in accordance with prescribed procedure.

Question IV : If the settlement in Mediation is not complied with - is the court required to proceed with the case for a trial on merits, or hold such a settlement agreement to be executable as a decree?

In case the mediation settlement accepted by the court as above is not complied with, the following procedure is required to be followed :

IV (i) In the event of default or non-compliance or breach of the settlement agreement by the accused

person, the magistrate would pass an order under Section 431 read with Section 421 of the Cr.P.C. to recover the amount agreed to be paid by the accused in the same manner as a fine would be recovered.

IV (ii) Additionally, for breach of the undertaking given to the magistrate/court, the court would take appropriate action permissible in law to enforce compliance with the undertaking as well as the orders of the court based thereon, including proceeding under Section 2(b) of the Contempt of Courts Act, 1971 for violation thereof.

Question V : If the Mediated Settlement Agreement, by itself, is taken to be tantamount to a decree, then, how the same is to be executed? Is the complainant to be relegated to file an application for execution in a civil court? And if yes, what should be the appropriate orders with respect to the criminal complaint case at hand. What would be the effect of such a mediated settlement vis-à-vis the complaint case?

V (i) The settlement reached in mediation arising out of a criminal case does not tantamount to a decree by a civil court and cannot be executed in a civil court.

However, a settlement in mediation arising out of referral in a civil case by a civil court, can result in a decree upon compliance with the procedure under Order XXIII of the C.P.C. This can never be so in a mediation settlement arising out of a criminal case.”

9. Sri Ajay Kumar, learned counsel for respondent No.2 - complainant, however, would not oppose the submission made by the learned counsel for the revision petitioner and what all he would

contend is that the complainant is interested in getting back the amounts in these two cases and nothing more.

10. Now, the question is whether both the Courts below recorded conviction just based on the terms and conditions arrived at by the parties as formulated by the Mediator presiding over the mediation as contended by the learned counsel for the revision petitioners?

11. It would suffice if one of these cases are taken up, as there is no difference in the cheque amounts since the amount involved in each of these two cheques is to the tune of Rs.5,00,000/-.

12. In the former criminal revision case, the learned Magistrate in his discussion under the point he formulated, refers to the terms of mediation in paragraph Nos.9 and 10 thus:

“9. To substantiate the person of the complainant himself examined as P.W.1 and got marked Exs.P1 to P5. At the stage of 313 CrPC examination it was referred to Lok Adalath as both parties filed a memo. The Hon’ble District Legal Service Secretary appointed Sri G. Naga Seshiah, Advocate to act as mediator for which both parties settled as per the terms and condition of both parties are as follows: (1) Complainant filed complaint under section N.I.Act on the basis of cheque for Rs.5,00,000/- (Five Lakhs) against the accused. (2) Accused agreed to pay cheque amount of Rs.5,00,000/- (Rupees Five Lakhs) within three months in two instalments, out of which the accused agreed to pay 1st instalment of Rs.2,50,000/- (Two Lakhs fifty thousands)

on or before 30.4.2016 and II instalment of Rs.2,50,000/- on or before ie 15.6.2016 to the complainant and the same is agreed to receive the same by the complainant. (3) In case of payment of failure to pay as agreed Hon'ble Court is at liberty to pass appropriate judgment.

10. Perused the material record. But the accused did not comply the terms and conditions as enter by the both parties. As seen from the material record the accused found guilty for the offence punishable under section 138 of Negotiable Instruments Act.”

13. Thus, it is clear from the judgment of the learned Magistrate that he did not advert to the evidence on record through PW.1 and Exs.P-1 to P-5. The learned Principal Sessions Judge, in appeal also, adopts almost the same reasoning. It would suffice, if what has been discussed by him in paragraph Nos.12 and 13 to arrive at, that the conviction was recorded on the basis of terms and conditions arrived at and recorded in the mediation report. There is no independent analysis or appreciation of evidence on record. Thus, there is merit in the submission of the learned counsel for the revision petitioners.

14. Now, turning to what would be the just decision that can be rendered under the circumstances, the last mentioned term in mediation report requires advertence. It reads thus:

“(3) In case of payment of failure to pay as agreed Hon’ble Court is at liberty to pass appropriate judgment.”

Thus, the aforesaid clause would emphasise to pass appropriate judgments by the Court.

15. During the course of arguments, the leaned counsel on both sides were in agreement that in the former criminal revision case, a sum of Rs.1,65,000/- was already paid and in the latter, a sum of Rs.50,000/- was paid by the respective revision petitioners, and, in case, this Court grants time for payment of balance amount, the revision petitioners would comply with the order.

16. It is no doubt true, time can be fixed to clear the balance amounts by the respective revision petitioners and for violation, respondent No.2 has right to proceed with contempt action even, but, the question is whether can it be acceded to, for the reason, it is not a civil case, where mediation report can be construed as an award of Lok Adalat while dealing with the cases either under Section 397(1) or 401 of the Code. Exercise of power by the Court is circumscribed. Therefore, the reasonable direction that can be given is only to remit the matter, by setting aside the conviction recorded and the sentences inflicted, to the trial Court directing the learned Magistrate to dispose of the Calendar Cases on merits by fixing time line. The reason being, the parties would get an opportunity to enter into compromise

in accordance with law laid down by the Hon'ble Supreme Court in **Damodar S. Prabhu v. Sayed Babalal H¹**.

17. Therefore, not only for the reason that the parties would get an opportunity to avail of as mentioned supra, but, also, the Courts below will have to decide the case on merits by way of appraisal of evidence on record, the conviction recorded under Section 255(2) of the Code for the offence under Section 138 of NI Act and the sentences of imprisonment inflicted and the fine imposed on the respective revision petitioners, as affirmed by the learned Sessions Judge, are hereby set aside remitting the matters to the learned Magistrate directing to dispose of the respective Calendar Cases as expeditiously as possible not later than six (6) months from the date of receipt of a copy of the order, and, accordingly the calendar cases are restored to its original file.

18. With the directions as above, both the Criminal Revision Cases are allowed.

As a sequel thereto, Miscellaneous Petitions, if any, pending in both the present revision cases stand closed.

A. SHANKAR NARAYANA, J

January 2, 2018.

PV

¹ (2010) 5 SCC 663