

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

CRM-M-29402-2014 (O&M)

Reserved on : 28.02.2019

Pronounced on :12.03.2019

M/s Vatika Ltd. and others

...Petitioners

Versus

Bimla Devi

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Mr. Akshay Bhan, Senior Advocate with
Mr. Gurinder Singh, Advocate &
Mr. Shantuanu Bansal, Advocate
for the petitioner.

Mr. Yogesh Goel, Advocate
for the respondent.

ARVIND SINGH SANGWAN, J.

Prayer in this petition is for quashing of the impugned summoning order dated 01.07.2014 (Annexure P-6), passed by the trial Court, as well as the order dated 21.08.2014 (Annexure P-7), passed by the revisional Court and the impugned complaint No. 370 dated 01.07.2014 (Annexure P-5), titled as ***Bimla Devi vs. Vatika Limited and others***, along with all the subsequent proceedings arising therefrom.

Brief facts of the case are that respondent Bimla Devi filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (*for short 'N.I. Act'*) with the allegations that accused Nos. 2 and 3, on behalf of accused No. 1, entered into an agreement of collaboration on 06.08.2013 for development of land in village Garhi Harsaru, Tehsil and District Gurugram. The accused persons agreed to purchase the said land for a total sale consideration of Rs. 3,50,00,000/- (Rupees three crore and fifty

lakh only). Out of which, Rs. 50,00,000/- was paid, vide cheque No. 379524 dated 06.08.2013, drawn at IndusInd Bank, MG Road, Gurugram and the balance amount of Rs. 3,00,00,000/- (Rupees three crore only) was agreed to be paid after some time and then the accused had given a post dated cheque bearing No. 379529 dated 07.04.2014, amounting to Rs. 3,00,00,000/-, drawn on IndusInd Bank, Sushant Lok, Phase-I, Gurugram to complainant/respondent and assured her that the same would be honoured on its presentation.

It was further stated that the complainant presented the aforesaid cheque to her bank, however, the same was returned to the complainant with endorsement "***Payment stopped by Drawee***", vide return memo dated 07.04.2014. Thereafter, the complainant, after serving a legal notice to the accused persons, filed the impugned complaint.

The trial Court, after recording the statement of the complainant, summoned the petitioners/accused under Section 138 of the N.I. Act, vide impugned summoning order dated 01.07.2014.

The petitioners, thereafter, filed a revision before the Court of Sessions and pleaded that in August, 2013, when the complainant approached petitioners, the collaboration agreement dated 06.08.2013 was executed between the complainant and petitioners and when the complainant has further shown her willingness to sell the land, another agreement to sell was executed on 07.08.2013 for a total sale consideration of Rs. 3,50,00,000/-, against which, the complainant has already received Rs. 50,00,000/- as an advance/part of sale consideration, vide cheque No. 379524 dated 06.08.2013 and balance sale consideration of Rs. 3,00,00,000/- was agreed to be paid at the time of execution of sale

deed.

It is further stated in the 'grounds of revision' before revisional Court that since there was a dispute regarding title of the said land between the complainant/respondent and Ombir etc., the petitioners were informed by the complainant that she had purchased the said land but the sale deed was not mutated in her favour in the revenue record and a civil suit titled as '**Bimla Devi vs. Ombir etc.**' is pending in the Courts at Gurugram. It is further stated that the complainant had also filed a suit titled as '**Bimla Devi vs. State of Haryana etc.**' in which the aforesaid Ombir etc. were also party and it was assured by the complainant that the suit will be decided and the sale deed will be executed, however, the suit is still pending and when the complainant started putting pressure on the petitioners for further payment, a posted dated cheque of Rs. 3,00,00,000/- as security was given to her with the understanding that she will not present the said cheque for encashment till the decision of the above said civil suit. Thereafter, the petitioners handed over a cheque No. 379529 dated 07.04.2014 for Rs. 3,00,00,000/- to the complainant as a security cheque. At the time of receiving this cheque, the complainant has executed an affidavit, duly attested by the Executive Magistrate, Gurugram on 07.08.2013, that she will execute the sale deed after the decision of the civil suit and will not encash the said cheque till the civil suit is decided, however, without the decision of civil suit, the aforesaid cheque was presented before the bank and since the petitioners had stopped the payment, the cheque was returned, subsequent to which, the impugned complaint was filed by the complainant. It was further submitted that since the cheque in dispute was not handed over towards any existing debt or liability, in reply to the legal notice dated 05.05.2014 and

23.05.2014, all the facts were explained. Still, the complainant filed the impugned complaint.

The revisional Court, however, dismissed the revision by passing the impugned order dated 21.08.2014. The operative part of the order reads as under:

“I have heard Shri Manju Jain, Advocate, learned counsel for revisionists, Shri, S. P. Sharma, Advocate, learned counsel for respondents and have gone through the material and evidence available on the file besides going through the grounds of revision taken by the revisionists and relevant provisions of law on the point.

Learned counsel for revisionist took the plea that impugned order is liable to be set aside. As per revisionists, learned Trial Magistrate misinterpreted and misconstrued the legal and factual position of the case. Cheque bearing No. 379529 dated 07.04.2014 for Rs. 3 Crores was not against any existing debt or liability. The said cheque was to be presented for encashment at the time of registration of sale deed of the land. In August, 2013, respondent approached revisionist No. 1 and showed her desirous to sell her land. As per revisionists, respondent had a dispute regarding the said land with Ombir etc. and complainant/respondent had filed civil suit titled “Bimla Devi vs. Ombir etc.” Revisionists were given assurance that the said suit shall be settled within 7-8 months. The matter is still pending the Court of Ms. Yachna, learned Civil Judge (Junior Division), Gurgaon. Respondent/complainant pressurized the revisionists to handover a cheque of Rs. 3 Crores and cheque was actually issued as security. Complainant

had given undertaking that she would keep the cheque in her custody and same was not to be presented for encashment. Complainant got issued legal notice falsely and without any basis and misused the process of law. Order passed by learned Trial Magistrate on 01.07.2014 is not in accordance with law and same be set aside.

Learned counsel for revisionists placed reliance upon authority of law from the Hon'ble Supreme Court of India in case M/s Indus Airways Pvt. Ltd. and others vs. M/s Magnum Aviation Pvt. Ltd. and another, 2014 (2) Civil Court Cases 506, wherein law was laid down that cheque issued towards advance payment indicates that at the time of drawl of cheque, there was no existing liability. Offence under Section 138 of the Act is committed only when there is legally enforceable debt or other liability subsisting on the date of drawl of cheque.

Learned counsel for revisionists also took the plea that summoning of accused is a serious matter and law cannot be set into motion as a matter of course. The order of Magistrate summoning the accused must reflect that he has applied mind to the facts of the case and the law applicable thereto. Whereas, in the present case, learned Magistrate has not applied its judicious mind while passing the impugned order and same is liable to be set aside. On this point, reliance was placed upon authority of law from the Hon'ble Division Bench of Hon'ble Supreme Court of India in case M/s GHCL Employees Stock Option Trust vs. M/s India Infoline Limited, 2013 (2) RCR (Criminal) 519. On this point, reliance was also placed upon authorities of law from our own Hon'ble High Court in case Varinder Kumar Gupta and other vs. M/s

Creative Clothing, 2013 (3) RCR (Criminal) 330 and Pankaj Badlani and others vs. M/s Nectar Lifesciences Ltd. and others, 2013 (1) RCR (Criminal) 143.

I have gone through the above referred authorities of law from the Hon'ble Supreme Court of India and from our own High Court, referred to and relied upon by learned counsel for the revisionists. There is no dispute about the law laid down in these authorities of law and there cannot be any. With due respect, these authorities of law are some what distinguishable on facts from the facts of the case in hand.

In the present case, the complainant has come with specific plea that cheque Ex. C1 was issued for consideration and same was presented for encashment and same was dishonoured by the banker. Payment has not been made by the revisionists/accused despite legal notice. It is settled proposition of law that at the time of summoning of an accused in a complaint case, Trial Magistrate is supposed to look into allegations as levelled in the complaint or averred at the time when preliminary evidence is led. Trial Magistrate has to be, prima-facie, satisfied as to whether there are sufficient grounds for proceedings against the accused named in the complaint or not. It is not the duty of Trial Magistrate to enter into detailed discussion on the merits or demerits of the case. At the stage of summoning, regular trial for adjudicating guilt or otherwise of the persons complained against is not envisaged. Such a law was laid down by our own Hon'ble High Court in case Gurdeep Kaur Vs. Balbir Singh and others, 2005 (2) RCR (Criminal) 205.

In this case, learned Magistrate has rightly come to the conclusion on the basis of preliminary evidence and documentary evidence i.e. Cheque Ex. C1, Memo Ex. C2, Legal Notice Ex. C3 and Postal receipts Ex. C4 to C6 that there are sufficient grounds to proceed against the accused/revisionists under Section 138 of the Act. There is no reason or material before this Court for invoking revisional jurisdiction so as to set aside the order under challenge. More so, it is settled proposition of law that revisional court should be slow in interfering an order of the Subordinate court passed while exercising its discretionary powers. Such a law was laid down by our own Hon'ble High Court in case Harpreet Singh Dhawan Vs. Ramanpreet Singh, CR No. 7798 of 2011 (O&M) decided on 19.12.2011.

In view of the above, present revision petition is without any merit. The same stands dismissed. Trial Court record along with a copy of this judgment be sent back to the Court concerned and revision petition file be consigned to record after due compliance.

Announced in open Court: (Shekhar Dhawan)

21st August, 2014. Sessions Judge, Gurgaon.”

Learned senior counsel for the petitioners has submitted that there is no legally enforceable debt or liability towards the petitioners as it is not disputed that cheque No. 379529 dated 07.04.2014 was given as a security cheque for Rs. 3,00,00,000/- and the respondent/complainant has executed an affidavit that she will not encash the same till the civil suit is decided or the sale deed is executed in favour of the petitioners.

Learned senior counsel for the petitioners has further argued

that in the agreement to sell (Annexure P-1), there is no reference to cheque No. 379529 which shows that it was not issued against the agreement to sell. The operative part of the agreement to sell reads as under:

“I, Smt. Bimla Devi wife of Sh. Jai Parkash resident of Village Kakraula Tehsil and District Gurgaon (hereinafter referred to as first Party) and M/s Vatika Ltd. Registered Office 621A, 6th Floor, Devika Towners, 6, Nehru Place, New Delhi through authorised signatory Sh. Brij Kishore Singh dated 06.08.2013 (hereinafter referred to as second party).

That I am owner in possession vide Vasika No. 14826 dated 05.02.1998 vide Jamabandi for the year 2005-2006 of the land is comprising in Khevat No. 241 Khata No. 281, Mumkin No.19, Killa No. 20 (8-0), Mumkin No. 20, Killa No. 16 (8-0), Kitta 2 Rakba 16 Kanal 0 Marla Salam is situated at Mauza Harsru, Tehsil and District Gurgaon. There is no loan against this land. I am duly authorized to sale this land. The mutation to the aforementioned land has not yet been registered in my name. I have filed Court case titled as Bimla Devi Versus Ombir Singh etc. at Gurgaon Court. The same has not yet been decided and I have got stay from the Court and there is no stay relating to the transfer of this land. The Court has accepted my possession in the aforesaid land. Now I have decided to sale this land amounting to Rs. 3,50,00,000/-(Rs. Three Crores Fiftly Lacs only) and received an advance of Rs. 50,00,000/- (Rs. Fifty Lacs Only) vide Cheque No. 379524 dated 06.08.2013 issued by Indusland Bank, M.g. Road Gurgaon and the balance sale consideration of Rs. 3,00,00,000/- shall be taken at the time of execution of sale deed and registry. The expenditure for stamp and

registration fee shall be carried out by the second party. The possession has been delivered to the Purchaser company (second party) at the spot. After the decision of the Court case, I shall get the mutation registered in the revenue record. The registry shall be done in favour of company within 15 days after mutation and I shall be bound by the following conditions. That I have not got any sale deed about this land to any third party and I shall be bound by this statement. That if there is any loan against this land of any Govt. or non-Govt. Institution, then I shall be responsible to pay interest before registration.

That I have no objection, if the purchaser company get the agreement in favour of its name, any nominee and any third person. If there is any legal hindrance about the ownership or any dispute takes place, then I shall be responsible for the same and the date of registry shall be deemed to have been increased till the decision. If through agreement, the seller backs out to get the registry done, then this agreement will be presumed. If the seller backs out to get the registry done, then the purchaser can get the registry done through Court. The expenditure for the sale will be met out by the purchaser for which separate agreement is done. That the purchaser company shall have the right to get the sale deed through cheque/order. Therefore, this agreement to sell has been written between both the parties so that the same can be used at the relevant time.”

Learned Senior counsel has further argued that the complainant has not disputed that she has given an affidavit which was duly attested by the Executive Magistrate, Gurugram on 07.08.2013 that she has received the

cheque No. 379529 in respect of Registry and agreement and she will not encash or clear this cheque unless the mutation of the land in dispute is decided in her favour and she will present the same only after the execution of registered deed i.e. sale deed.

Learned senior counsel has further argued that in the legal notice, there is a reference to the collaboration agreement with reference to aforesaid cheque No. 379529, however, there is no reference to agreement to sell, vide which, the amount of Rs. 50,00,000/- was paid and the petitioners, in reply to the legal notice, have duly explained the aforesaid facts as well as the affidavit of the complainant, however, despite that, the complainant, while filing the impugned complaint under Section 138 of the N. I. Act, has conveniently concealed the fact about agreement to sell as well as the about her affidavit, therefore, the trial Court was not in a position to appreciate the correct facts.

Learned senior counsel has further argued that till date, no suit for specific performance has been filed as the complainant is not having the clear title over the land in dispute as the civil suit is still pending and as per the contingent clause in agreement to sell, the sale deed will be executed only after the civil suit is decided and the land is mutated in favour of the complainant, therefore, the presentation of the cheque, even otherwise, was premature and was not to clear any existing debt or liability.

Learned senior counsel has relied upon ***M/s Indus Airways Pvt. Ltd. and another vs. M/s Magnum Aviation Pvt.Ltd. and another, 2014 (2) R.C.R. (Criminal) 494*** to submit that where, on the basis of a contract to sell goods, the purchaser has made advance payment by way of a cheque and later on cancelled the order upon dishonouring the cheque, no offence

under Section 138 of the N. I. Act is made out as there is no legally enforceable debt or liability on the date of drawl of cheque.

Learned senior counsel has also relied upon judgment dated 26.11.2018 passed in **CRM-M-33435-2016** titled as **Dr. Simmi Aggarwal vs. Jarnail Singh**, whereby a co-ordinate Bench of this Court has held that where the cheque has been issued in lieu of an agreement to sell, which was never performed by the holder of cheque, the bearer of the cheque cannot be held liable in view of the judgment in **M/s Indus Airways Pvt. Ltd. (supra)**.

In reply, learned counsel for the respondent/complainant has argued that the collaboration agreement was only for the development of the land and in agreement to sell, there is no reference that the cheque was given as a security cheque.

Noticing the fact that collaboration agreement has not been placed on record, during the course of agreement, learned counsel for the respondent has placed a photocopy of the same on record, which was marked as 'X'. As per para 2 of this agreement, a cheque of Rs. 50,00,000/-, bearing No. 379524 dated 06.08.2013 was given to the complainant. This collaboration agreement was executed on 06.08.2013 and it is not disputed that on the very next day i.e. 07.08.2013, an agreement to sell was executed in which, the complainant has acknowledged that she has received an advance of Rs. 50,00,000/- through cheque No. 379524 dated 06.08.2013 and will receive balance amount of Rs. 3,00,00,000/- at the time of execution of sale deed.

After hearing learned counsel for the parties, I find merit in the present petition for the following reasons:

(a) Admittedly, respondent/complainant has not come before the

Court with clean hands and has not disclosed the plea taken by the petitioners in reply to the legal notice wherein it has been specifically stated that the collaboration agreement dated 06.08.2013, vide which an amount of Rs. 50,00,000/- was paid by cheque No. 379524, was followed by an agreement to sell dated 07.08.2013, in which, the complainant has acknowledged the aforesaid amount as earnest money and also furnished an affidavit dated 07.08.2013, duly attested by the Executive Magistrate, Gurugram, that the dispute cheque No. 379529 dated 07.04.2014 is in respect of balance sale consideration of the land as per agreement to sell and she will not encash the same till the land dispute is decided in her favour, mutation is sanctioned and thereafter, she will present the said cheque for encashment at the time of execution of sale deed.

In the absence of these documents, i.e. agreement to sell, reply to the legal notice and affidavit, having been executed before the Executive Magistrate, Gurugram, the trial Court was not in a position to apply its judicial mind about the existing agreement and liability inter se parties.

(b) It is also not disputed at bar by learned counsel for the complainant that the civil suit, filed by the complainant regarding dispute over the titled of land, is still pending and, therefore, the complainant was not in a position to execute the sale deed on the date when the cheque was presented before the bank or even today. Therefore, there was no legally enforceable debt or liability on the part of the petitioners who had given the cheque as balance sale consideration (security cheque) to be presented when the sale deed was to be executed.

(c) The respondent/complainant, in written reply filed in this Court, has not specifically denied the submissions of petitioners made in

para 2 and 3 of the petition, where the petitioners have relied upon agreement to sell dated 07.08.2013 and detailed the manner in which the cheque No. 379524 was given to the complainant, and in corresponding paragraphs of the reply, it has only been stated that the facts are the matter of record. Therefore, I find that the complainant has not disputed the defence set up by the petitioners.

(d) In view of the judgment in *M/s Indus Airways Pvt. Ltd. (supra)*, it is apparent on record that the disputed cheque was given future sale consideration, to be presented before the bank at the time of execution of sale deed. However, such eventually never happened on account of a dispute of title and ownership of the complainant over the said land, as she is in litigation with third person and that suit is still pending. Therefore, I have no hesitation to hold that cheque was never issued to clear any outstanding debt or liability as per Section 138 of the N. I. Act.

In view of the above discussion, the present petition is allowed and impugned summoning order dated 01.07.2014 (Annexure P-6), passed by the trial Court, as well as the order dated 21.08.2014 (Annexure P-7), passed by the revisional Court and the impugned complaint No. 370 dated 01.07.2014 (Annexure P-5), titled as *Bimla Devi vs. Vatika Limited and others* are hereby set aside. Consequently, the complaint is also quashed.

March 12, 2019

Waseem Ansari

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No