

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 2618 of 2019

Ideal Real Estates Pvt. Ltd. & Ors.

Vs

Aris Capital Pvt. Ltd.

For the Petitioners : Mr. Dipanjan Dutt,
Mr. Surojit Saha,
Ms. Sonia Nandy,
Mrs. Sonia Ojha.

For the Opposite Party : None.

Heard on : 06.02.2023

Judgment on : 27.02.2023

Shampa Dutt (Paul), J.:

The revisional application has been preferred praying for quashing of the proceeding of Case No. C - 5223 of 2018 under Section 138 of the Negotiable Instruments Act, pending before the Court of the Learned Additional Chief Judicial Magistrate, Bidhannagar, North 24 Parganas, and all orders passed therein and an order dated 18.06.2019 passed by the Learned Additional Chief Judicial Magistrate, Bidhannagar, North 24 Parganas in Case No. C – 5223 of 2018, thereby rejecting the application of the petitioners, wherein inter alia the petitioner No. 1 sought to pay the amount of the dishonoured cheque and the petitioners prayed that the impugned proceedings may be closed and the petitioners herein may be discharged.

The petitioner's case is that the petitioner no. 1 is a company incorporated under the Companies Act, 1956, having its registered office situated at 50, Jawahar Lal Neheru Road, Kolkata – 700 071. The petitioner nos. 2 to 5 are the Directors of the petitioner no. 1 company and the petitioner no. 2 is the father of the petitioner no. 3. By a Board Resolution dated 20.02.2019 Shir Manoj Kumar Srivastava of the petitioner no. 1 company, has been authorized to represent the petitioner no. 1 company.

That Case No. C-5223 of 2018 was registered on the basis of a petition of complaint filed by the opposite party, therein alleging commission of offences by the petitioners punishable under Section 138 of the Negotiable Instruments Act.

The Learned Additional Chief Judicial Magistrate, Bidhannagar, upon receipt of the aforesaid petition of complaint, was pleased to take cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1981, against the accused persons by an order dated 07.12.2018. By an order of even date, the Learned Magistrate took on record the affidavit under Section 145 of the Negotiable Instruments Act, 1881 filed by the representative of the opposite party and examined him on oath, and upon consideration of the materials on record, the Learned Additional Chief Judicial Magistrate, Bidhannagar, was pleased to find a prima facie case made out against the petitioners under Section 138 of the Negotiable Instruments Act, 1981 and was thus pleased to direct issuance of process against the petitioners and fixed on 25.02.2019 for service return and appearance.

That 25.02.2019 was the first date of hearing of the impugned proceeding after service of summons on the petitioners. On the said date, the petitioners appeared before the Court of the Learned Additional Chief Judicial Magistrate, Bidhannagar, in connection with Case No. C- 5223 of 2018, and filed an application, therein stating that

inter alia the petitioner no. 1 is ready to pay the amount of the dishonoured cheque (in respect whereof the impugned proceeding has been initiated by the opposite party) and inter alia prayed that, the said amount may be accepted and the impugned proceedings may be closed and the petitioners herein may be discharged. In the said application, a copy to the demand draft prepared by the petitioner no. 1 for satisfaction of the amount of the aforesaid dishonoured cheque was annexed and the particulars thereof was stated, viz. demand draft no. 062776, dated 22.02.2019 drawn on Bank of India, for an amount of Rs. 6,59,096/- (Rupees Six Lakhs Fifty Nine Thousand and Ninety Six only) in favour of the opposite party.

The opposite party filed a Reply-in-Affidavit to the application filed by the petitioners, wherein inter alia the petitioner sought to make payment of the amount of the dishonoured cheque and prayed for closing of the proceedings. The sum and substance of the aforesaid reply filed by the opposite party, is inter alia to the effect that the payment tendered by the petitioner no.1 by way of the said application may be treated as a payment only for the purposes of compounding of the instant case and may not be treated as a waiver of the proceedings initiated by the opposite party against the petitioner no.1 company under the Insolvency and Bankruptcy Code, 2016, which has been numbered as C.P. No. 1621/KB of 2018 and is pending before the National Company Law Tribunal, Kolkata Bench.

Subsequently on 18.06.2019, the learned advocate for the opposite party orally submitted that the opposite party is not willing to accept the said demand draft on the ground that the proceedings initiated by the opposite party against the petitioner no.1 company, under the Insolvency and Bankruptcy Code, 2016, are pending before the National Company Law Tribunal, Kolkata Bench. It was urged on behalf of the opposite party that if the amount is accepted and the instant prosecution is compounded, the case under the Insolvency and Bankruptcy Code, 2016 pending before the National Company Law Tribunal, Kolkata Bench, will be affected. The opposite party was unwilling to accept the amount of the cheque and instead wished to proceed with the instant case.

The Learned Court thereafter held that the reason cited by the opposite party was convincing and satisfying, and in such circumstances, the Learned Court rejected the aforesaid application filed by the petitioners and fixed 17.09.2019 for recording of plea in the impugned proceeding. Subsequently, the original demand draft, as aforesaid, was returned to the petitioner.

In the instant case, the opposite party has filed the complaint prior to the expiration of the said period of 15 days from the date of alleged service of the relevant, rectified demand notice on the petitioners. Thus, the instant complaint has been filed at a time when

no cause of action was available to the opposite party. In such circumstances, the instant complaint and the impugned proceeding is not maintainable in law, and is liable to be quashed.

Mr. Dipanjan Dutt, learned counsel for the petitioners submitted that the law is well crystalized from the judgments of the Hon'ble High Courts and the Hon'ble Supreme Court, that Section 141 of the Negotiable Instruments Act, 1981, raises a legal fiction and by reason of the said provision, a person though not personally liable for commission of an offence under Section 138 of the said Act, would be vicariously liable therefore. However, such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused herein vicariously liable for the offence committed by the company. Section 141 of the Negotiable Instruments Act, 1881, being a penal provision creating vicarious liability, must be strictly construed. It is trite law that arraigning a person as an accused with the aid of section 141 of Negotiable Instrument Act, 1881, with the mere averment that the said person is a Director of the accused company, does not satisfy the requirement of Section 141 of the said Act. It is incumbent on the complainant to spell out in the complaint the basic averment that the Director (arrayed as an accused) was in charge of and was responsible to the accused Company for the conduct

of its business, apart of the specific role played by the said Director in the dishonour of the cheque. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

In the instant case, the opposite party has not averred that the petitioner nos. 2, 3, 4 and 5 are in charge of the day to day affairs of the accused company.

The petitioner no. 1 submits that it is ready to pay the amount of the dishonoured cheque (in respect whereof the impugned proceeding has been initiated by the opposite party) in order that the impugned proceedings may be quashed and the petitioners herein discharged therefrom.

That the Hon'ble Supreme Court in *Meters and Instruments Private Limited and Another v. Kanchan Mehta*, reported in (2018) 1 SCC 560, has held that though compounding of an offence requires consent of both parties, even in absence of such consent, the Hon'ble Court, in the interests of Justice, on being satisfied that the complainant of a dishonoured cheque has been paid the cheque amount, may quash the proceedings and discharge the accused. In the instant case, the Learned Magistrate erred in failing to consider the aforesaid law as expounded by the Hon'ble Supreme Court. The Learned Magistrate by an order dated 18.06.2019, erroneously held that despite the willingness of the

petitioner to pay the amount of the dishonoured cheque, in the absence of consent of the opposite party, the proceedings under Section 138 of the Negotiable Instruments Acts, 1881 cannot be closed and the accused cannot be discharged from the said proceedings. Thus in the circumstances, in view of the settled law, upon the amount of the dishonoured cheque being paid to the opposite party, the impugned proceedings are liable to be quashed.

The petitioner no. 1 company is ready to pay to the opposite party the amount of the cheque dishonoured, (in respect whereof the present proceeding has been initiated) by the said demand draft.

The impugned proceeding is a gross abuse of the process of court which if allowed to continue for a single day more beyond the stage it has already reached, will degenerate itself into a weapon of harassment and persecution and as such the same is liable to be **quashed for the ends of justice.**

That it is expedient in the interest of justice, to uphold the dignity of law that the impugned proceeding is quashed.

Vide order dated 07.12.2018 the Learned Magistrate was pleased to take cognizance and issue process against the /accused petitioners.

On 14.03.2019, the petitioners filed a petition before the Trial Court praying for compounding the case by submitting a demand draft for the cheque amount.

On 18.06.2019 the Magistrate, rejected the said petition as the complainant refused the said payment

Hence the revision.

In spite of due service, there is no representation on behalf of the opposite party.

The petitioner has filed a supplementary affidavit showing that a Deed of Settlement between the parties has been executed on 27.01.2022, showing the terms of settlement for payment.

Order dated 28th February, 2022 of the National Company Law Tribunal (NCLT) Kolkata, in the matter of Oarsman Capital Pvt. Ltd. & Ors. vs Ideal Real Estates Pvt. Ltd. (C.P. (IB)/1621(KB) 2018) is as follows:-

ORDER

(1) Learned counsel on both sides present.

(2) Three settlement agreements all dated 21.01.2022 have been entered into with the three financial creditor who are petitioners in the present petition.

(3) The corporate debtor has agreed to settle the outstanding between them in terms of the settlement agreements in which future payments are also envisaged the settlement agreements are taken on record and shall form a part of this order.

(4) The undertakings given shall be treated as undertakings given to the court. CP No. 1621/2018 shall stand dismissed as withdrawn in accordance with the three settlement agreements.

(5) Liberty is granted to the financial creditor to file appropriate applications for revival of the company petition at stage at which it was left of in case there is fault.

***Balraj Joshi
Member (Technical)***

***Rajasekhar V.K.
Member (Judicial)***

The following Judgments of the Supreme Court has been relied upon by the petitioner:-

a) Damodar S. Prabhuvs Sayed Babalal H....,(2010) 5 SCC 663, Criminal Appeals No. 963 of 2010, on May, 3 2010 [Para 21].

“21. With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded

scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay setting the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:-

THE GUIDELINES

- (i) In the circumstances, it is proposed as follows:-*
 - (a) That directions can be given that the writ of summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.*
 - (b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the court deems fit.*
 - (c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the*

condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.”

b) Meters and Instruments Private Limited and Anr. Vs Kanchan Mehta, (2018) 1 SCC 560, Criminal Appeals No. 1731 of 2017, on October 5, 2017.

“18.3. Though compounding requires consent of both parties, even in absence of such consent, the court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.”

c) Saregama (India) Ltd. vs Next Radio Ltd., 2021 SCC Online SC 325, Suo Motu Writ Petition (Crl.) No. 2 of 2020, on April 16, 2021.

“4. This gargantuan pendency of complaints filed under Section 138 of the Act has had an adverse effect in disposal of other criminal cases. There was an imminent need for remedying the situation which was addressed by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. Sections 143 to 147 were inserted in the Act, which came into force on 06.02.2003. Section 143 of the Act empowers the court to try complaints filed under Section 138 of the Act summarily, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (hereinafter, ‘the Code’). Sub-section (3) of Section 143

*stipulates that an endeavour be made to conclude the trial within six months from the date of filing of the complaint. Section 144 deals with the mode of service of summons. Section 145 postulates that the evidence of the complainant given by him on affidavit may be read as evidence in any inquiry, trial or other proceeding under the Code. Bank's slip or memo denoting that the cheque has been dishonoured is presumed to be prima facie evidence of the fact of dishonour of the cheque, according to Section 146. **Section 147 makes offences punishable under the Act compoundable.** The punishment prescribed under the Act was enhanced from one year to two years, along with other amendments made to Sections 138 to 142 with which we are not concerned in this case."*

Considering all the materials on record, it is before this court that a deed of settlement between the parties, regarding all their dues has been filed before the NCLT.

The matter therein has been withdrawn in accordance with the three settlement agreements with liberty to file appropriate applications for revival of the company petition at stage at which it was left of in case there is default.

The petitioner's prayer for payment of the cheque amount has been rejected by the Magistrate.

In the present case, the opposite party/complainant has not appeared in spite of due service.

Accordingly the order dated 18.06.2019 passed by the Learned Additional Chief Judicial Magistrate, Bidhannagar, North 24 Parganas, in Case No. C 5223 of 2018 is set aside, not being in accordance with law and the matter is remitted to the Learned Magistrate to dispose of the case in view of the settlement between the parties, by ensuring the presence of both sides, in the interest of Justice within one month from the date of communication of this order.

CRR is 2618 of 2019 is disposed of.

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)