2023: PHHC: 116960

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CRM-M-33067-2011 (O&M)
Reserved on: 28.08.2023
Pronounced on: 04.09.2023

M/s Chlorophyl and others

. . . . Petitioner

Vs.

Cotton County Retail Limited

. . . . Respondent

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CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

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Present: - Mr. Ashish Bansal, Advocate, for the applicant/petitioner.

Mr. Harshit Anand, Advocate, for
Mr. Aalok Jagga, Advocate, for the respondent.

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DEEPAK GUPTA, J.

Prayer in this petition filed under Section 482 Cr.P.C. is to quash criminal complaint No.5086/2 dated 06.07.2010 titled *"Cotton County Retail Ltd. Vs. M/s Chlorophyl & Others",* under Section 138 of the Negotiable Instruments Act, 1881 [for short 'the NI Act'] (Annexure P-8) pending before in the court of ld. JMIC, Ludhiana, with all subsequent proceedings arising therefrom.

2. Complaint (Annexure P8) was filed by Cotton County Retail Limited (now respondent) seeking prosecution of accused – a partnership firm M/s Chlorophyl and its two partners Sajal Kumar Basu and Soma Basu (now petitioners), submitting that accused had been purchasing garments/accessories from the complainant-company on credit basis. After adjusting all the payments made by the accused, there was a debit balance of ₹14,47,606.69 as on 16.02.2010. In order to discharge their

part liability, accused issued a cheque No.339181 dated 04.05.2010 for ₹5 lakh drawn on Punjab National Bank, Mecheda, Maidnapur (W.B.). The cheque was handed over to the complainant at their Ludhiana office with assurance that it shall be encashed on presentation. However, when the complainant presented the cheque to its banker i.e. State Bank of Patiala, Overseas Branch, Ludhiana on 04.05.2010, the same was returned dishonoured vide Bank return Memo dated 05.05.2010 with remarks *"Payment Stopped by Drawer"*. Complainant then issued a legal notice dated 29.05.2010, sent through registered postal receipt dated 31.05.2010 as well as through UPC Post, calling upon the accused to pay the cheque amount within 15 days from the date of receipt of the notice. However, accused failed to make payment of the cheque amount within the stipulated period, compelling the complainant-respondent to file the complaint (Annexure P8). After recording preliminary evidence, the Court of ld. JMIC vide its order dated 06.07.2010 directed summoning of all the accused (now petitioners) to face prosecution under Section 138 of the NI Act.

3. (i) Seeking quashing of the aforesaid complaint, it is contended by the accused (petitioners herein) that complaint is the gross abuse of the process of law, inasmuch as specific restraint order had been issued by ld. District Judge, Purba Medinipur, West Bengal, whereby complainant (respondent herein) was restrained from encashing the cheque. Concerned Bank Manager was also directed not to release any amount of money qua said cheque till 21.07.2009. Said interim order was extended from time to time till 21.12.2009 and was never vacated till date. Besides, the court at Ludhiana, where complaint was filed, was

devoid of territorial jurisdiction. Still further, it is contended that dispute is purely of civil nature and that proceedings under Section 9 of the Arbitration and Conciliation Act are already pending before District Judge, Purba Medinipur, West Bengal, where the restraint order was passed. Even the proceedings under Section 11(4) of the Arbitration and Conciliation Act, for appointment of the Arbitrator are pending before the Court.

(ii) Elaborating further, petitioners referred about an agreement dated 21.08.2008 (Annexure P1) executed between the parties, which contains the arbitration clause. It is submitted that an amount of ₹50,000/- was deposited by the petitioners besides a bank guarantee of ₹9 lakh with the respondent. It is alleged that respondent-complainant, unilaterally changed the terms and conditions of the agreement by sending letters dated 27.03.2009 and 01.06.2009. It is also alleged that in the meantime, petitioner-firm lost cheque No.339181 of Punjab National Bank, Mecheda Branch, which was undated, but signed by one of the partners Sajal Kumar Basu, regarding which Daily Diary Report was lodged at Kolaghat Beat House, P.S. Kolaghat, Purba Medinipur on 11.06.2009 and the Bank was requested on 15.06.2009 to stop the payment of the cheque. Petitioner contends that later, on 18.06.2009 it was disclosed by the respondent to the petitioners that one of their staff members had taken the blank signed cheque from the petitioner's shop and on that basis started threatening the petitioners. Apprehending that respondent-company could invoke the bank guarantee and mis-utilise the stolen cheque, Civil Suit No.1 of 2009 under Section 9 Arbitration and Conciliation Act, 1996 [for short 'the Arbitration Act'] was filed before the District Judge, Purba Medinipur, West Bengal, wherein the restraint order was passed regarding the cheque in question as well as Bank guarantee on 21.07.2009, the operation of which continued till 21.12.2009 and which was never vacated.

(iii) Still further, it is contended that despite the injunction order, the cheque was presented by the respondent-complainant and it managed to get remarks from the local Branch of PNB, without sending the cheque to West Bengal, where the drawee Bank is situated. Petitioner has relied upon ***Shri Ishar Alloy Steels Ltd. Vs. Jayaswals Neco Limited,*** *2001(3) SCC 609,* to contend that the drawee bank means only that bank, where the cheque was drawn and no other bank.

With all the above submissions, prayer has been made for quashing the complaint in question.

4. (i) In reply filed by the respondent-complainant company, execution of the agreement dated 21.08.2008 (Annexure P1) between the parties is not disputed. It is also undisputed that petitioner had issued a bank guarantee for an amount of ₹9 lakh which was to remain in force upto 12.08.2009. It is submitted that dealing between the parties continued till October 2010 and that petitioners were in debt to the extent of ₹14,47,681.69 and in part discharge of their liability, cheque in question was issued, which was dishonoured, compelling the respondent to file the complaint after making statutory compliances.

(ii) Respondents submit further that it has no office in West Bengal and therefore, action of the petitioners in filing the alleged Suit No.1/2009 under Section 9 of the Arbitration Act before District Judge, Purba Medinipur, West Bengal was a clever devise to frustrate the payment. The respondent-company was never served in that suit. It is stated further that bank guarantee was returned to the petitioners by order of the Court and thus, the interim relief became nugatory. Still further, it is submitted that cause of action to file the suit had expired on 12.08.2009 and that cheque in question was issued, when there was no injunction order. Respondent has also drawn attention towards para No.12 of the agreement between the parties, as per which the place of arbitration was to be at Ludhiana. It is also contended that powers under Section 482 Cr.P.C. cannot be exercised to quash the complaint involving questions of facts, which are to be determined during trial.

With above submissions, prayer is made for dismissal of the petition.

5. In rejoinder filed by the petitioner, the contentions raised in the petition have been reiterated.

6. During arguments before this Court, ld. counsel for the respondent has also drawn attention towards order dated 16.07.2011 (Annexure R4) of the District Judge, Purba Medinipur, West Bengal, whereby application to extend the interim order beyond 21.12.2009, moved by the petitioners and to stay the proceedings of the criminal complaint at Ludhiana, was dismissed. Further attention is drawn towards another order dated 11.04.2012 (Annexure R5) passed by the District Judge, Purba Medinipur, West Bengal, whereby application of the petitioner under Section 11 of the Arbitration Act, was dismissed.

7. Ld. counsel for the petitioner urges that interim order dated 21.07.2009 passed by the Court of District Judge, Purba Medinipur, West Bengal, was never vacated, though its operation was not extended beyond

21.12.2009. It is argued that there was no legally enforceable debt or liability in respect of the amount mentioned in the cheque due to restrain order of the court.

8. On the other hand, it is urged by counsel for respondent that interim order was never extended, whereas suit for appointment of Arbitrator under Section 11 of the Arbitration Act has already been dismissed. It is also contended that cheque could have been presented either before the Drawee Bank or in the Bank, where the Payee has the account. Still further, it is urged that as signature on the cheque in question was not disputed by the petitioners, so presumption under Section 139 of the NI Act is available to the respondent-complainant and it will be for the petitioner-accused to rebut the presumption.

9. I have considered submission of both the sides and have appraised the record carefully.

10. The whole edifice of the petitioner to seek quashing of the complaint in question under Section 138 of the NI Act is the order of injunction passed by District Judge, Purba Medinipur, West Bengal on 22.06.2009, which was extended from time to time upto 21.12.2009. It is alleged that the said order has not been vacated till date.

11. Annexure P3 is the copy of order dated 22.06.2009, which was passed by District Judge, Purba Medinipur, West Bengal, on an application moved by the petitioner-M/s Chlorophyl under Section 9 of the Arbitration Act and by way of this order, the Court restrained respondent No.1- Cotton County Retail Ltd. from invoking the bank guarantee from encasement and further cheque No.339181 of Punjab National Bank Mecheda, Maidnapur (W.B.) Branch till 21.07.2009.

Besides, the Branch Manger of Punjab National Bank, Mecheda was also directed not to release any amount of money of the bank guarantee and the cheque in question till 21.07.2009. Perusal of the various orders, as placed on record by the petitioner and forming part of Annexure P3, would reveal that operation of the said order dated 22.06.2009 was extended from time to time till a fixed date and for the last time, its operation was extended on 08.12.2009 till 21.12.2009. Petitioner has not been placed on record copy of any order to reveal that operation of the order dated 22.06.2009 was ever extended beyond 21.12.2009.

12. The contention of ld. counsel for the petitioner that as order dated 22.06.2009 was not vacated, so it is to be assumed that its operation was automatically extended, has absolutely no force, considering the fact that operation of the order dated 22.06.2009 had been extended by different dates from time to time till particular fixed dates and for the last time, it was extended on 08.12.2009 till 21.12.2009. It will not be out of place to mention that petitioner later on moved an application under Section 151 CPC before District Judge, Purba Medinipur, West Bengal seeking temporary and *ad interim* injunction from proceeding with the criminal complaint at Ludhiana and stating therein that operation of the interim was extended till 21.12.2009. However, said application was out-rightly dismissed vide order dated 16.07.2011, copy of which has been placed on record by the respondent as Annexure R-4. In view of the said order Annexure R4, the main edifice of the petitioner stands broken.

13. Another plea raised by counsel for the petitioner is that proceedings under Section 11 of the Arbitration Act for appointment of Arbitrator were pending, on account of arbitration clause in the

agreement Annexure P1 executed between the parties. However, that application was also dismissed by the District Judge, Medinipur, West Bengal vide order dated 21.07.2011, copy of which has been placed on record by the respondents as Annexure R5. It was observed by District Judge in this order Annexure R5 that it is specifically provided in the agreement dated 21.08.2008 that the venue of arbitration is to be at Ludhiana and that it is the Chief Justice of the High Court, within whose local limits, the principle Civil Court referred to in Clause (e) of Sub Section (1) or 2 is situated, where the application would lie.

14. Petitioner, not only concealed the factum of dismissal of his application under Section 11 of the Arbitration Act by District Judge, Purba Medinipur, West Bengal, but he also did not place on record any document to show if he ever moved to this High Court for appointment of an arbitrator.

15. Another plea raised by the petitioner to quash the complaint is that cheque in question Annexure P4 is drawn on Punjab National Bank, Mecheda, Midnapur (W.B.) and that respondent-complainant procured return memo dated 05.05.2010 (Annexure P5) from the local branch of Punjab National Bank, Ludhiana to show that payment had been stopped. Contention is that return memo (Annexure P5) has not been issued by the Punjab National Bank Mecheda, Midnapur (W.B.) branch from where the cheque was issued and therefore, Section 138 of the NI Act is not attracted. Still further, it is argued that cheque was presented by the complainant-respondent before the State Bank of Patiala and not before the drawee Bank i.e. Punjab National Bank Mecheda,

Midnapur (W.B.). Reliance is placed on ***Shri Ishar Alloy Steels Ltd vs Jayaswals Neco Limited*** 2001 (3) SCC 609.

16. Section 138 of the NI Act, reads as under: -

> ***138 Dishonour of cheque for insufficiency, etc., of funds in the account.*** *—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *Provided that nothing contained in this section shall apply unless—*
>
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
>
> *Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]*

17. Hon'ble Supreme Court considered following questions in ***Shri Ishar Alloy Steels Ltd (Supra),*** in the context of the definition of 'the bank' as referred in Clause (a) of the proviso to Section 138 of the NI Act:

> *"(a) What is meant by, "the bank" as mentioned in Clause (a) of the proviso to Section 138 of the Negotiable Instruments Act, 1881?*

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(b) Does such bank mean the bank of the drawer of the cheque or covers within its ambit any bank including the collecting bank of the Payee of the cheque?

(c) To which bank the cheque is to be presented for the purposes of attracting the penal provisions of Section 138 of the Act?"

18. In ***Shri Ishar Alloy Steels Ltd (Supra),*** the admitted facts of the case are that the appellant issued Cheque No.2477086 dated 21st July, 1997 for ₹10 lakhs drawn on the State Bank of Indore, Industrial Estate Branch, Indore in favour of the respondent. The respondent presented the cheque for payment on 26th September, 1997, which was returned unpaid. Again on 20th January, 1998, the respondent presented the cheque to its bank i.e. State Bank of India at Raipur. The cheque reached the drawer bank on 24th January, 1998, admittedly after six months from the date it became payable. The cheque was returned unpaid by the bank of the respondent on 3.2.1998. A notice as required under proviso (b) of Section 138 of the Negotiable Instruments Act was issued on 10.2.1998 which was received by the appellant on 16.2.1998. A criminal complaint under Section 138 of the Negotiable Instruments Act was filed in the Court of Judicial Magistrate, First Class, Raipur against the appellant in which notice was issued for appearing in the court on 23rd September, 1998. The appellant filed Criminal Revision No.190 of 1998 in the Court of Sessions Judge, Raipur contending that as the cheque was presented for payment beyond the period of six months as prescribed under Proviso (a) to Section 138 of the Negotiable Instruments Act, 1881, no offence was made out, to be taken cognizance of. The revision was allowed by the Sessions Court on 3rd July, 1999. The respondent filed a further revision in the High Court, which was allowed

by holding that the cheque can be presented within the six months before the drawer's (payee's) bank or it can be presented before the drawer as well as the payee's bank.

19. After considering various provisions of the Act, it was held by the Hon’ble Supreme Court as under:

> *"The bank" referred to in clause (a) to the proviso to Section 138 of the Act would mean the drawee-bank on which the cheque is drawn and not all banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued. It, however, does not mean that the cheque is always to be presented to the drawer's bank on which the cheque is issued.* ***The payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque is drawn within the period of six months from the date on which it is shown to have been issued.*** *In other words a cheque issued by (A) in favour of (B) drawn in a bank named (C) where the drawer has an account can be presented by the payee to the bank upon which it is drawn i.e. (C) bank within a period of six months or present it to any other bank for collection of the cheque amount provided such other bank including the collecting bank presents the cheque for collection to the (C) bank. The non presentation of the cheque to the drawee-bank within the period specified in the Section would absolve the person issuing the cheque of his criminal liability under Section 138 of the Act, who shall otherwise may be liable to pay the cheque amount to the payee in a civil action initiated under the law. A combined reading of Sections 2, 72 and 138 of the Act would leave no doubt in our mind that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable. Such presentation is necessarily to be made within six months at the bank on which the cheque is drawn, whether presented personally or through another bank, namely, the collecting bank of the payee.”*

20. It is, thus, clear that the bank as referred to in Clause (a) of proviso to Section 138 of the NI Act, though means drawee-bank on which the cheque is drawn and not all the banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued, but it does not mean that the cheque is always to be presented to the drawer's bank on which the cheque is issued. In fact, the payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account, but to attract the criminal liability of the drawer of the cheque, such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque is drawn within the period of six months *(now three months after amendment in 2011)* from the date on which it is shown to have been issued.

21. In the present case, the cheque has been drawn on Punjab National Bank Mecheda, Midnapur (W.B.). Complainant presented it for collection to its banker i.e. State Bank of Patiala, Overseas branch, Ludhiana. The return memo dated 05.05.2010 (Annexure P5) reveals that it has been issued by the Punjab National Bank, Branch Office, Ludhiana addressing to the Manager, State Bank of Patiala, Overseas Bank, Ludhiana, informing that payment had been stopped by the drawer. Thus, it is a branch of the drawer's bank, which informed the banker of the complainant that cheque was dishonoured due to payment having been stopped by the drawer. Under Section 146 of NI Act, on production of Banker's slip, there is presumption that cheque has been dishonoured, though it is rebuttable presumption. Presumption is to be rebutted by the accused. It is not disputed that cheque in question was sent for collection

by the banker of the complainant within the time prescribed under Section 138 of the NI Act. As such, it is held that petitioner cannot be allowed to draw any advantage of the legal position explained in ***Shri Ishar Alloy Steels Ltd (Supra).***

22. Other contentions raised by counsel for the petitioner are that signature of one of the partners have been forged; or that there was civil liability or that complainant-respondent had unilaterally changed the terms and conditions of the agreement. It was also alleged that cheque had been misplaced regarding which Daily Dairy Report was lodged with the police.

23. Ld. counsel for the respondent-complainant has rightly pointed out that cheque has not been dishonoured on the ground of forged signature and rather, the cheque has been dishonoured on account of payment having been stopped by the drawer. Once, the cheque has been issued from the account of the petitioners and signatures were not found by the banker to be different from the specimen signature of the drawer, there was presumption under Section 139 of the NI Act in favour of the complainant to be read with Section 118 of the NI Act. It is for the petitioners-accused to rebut the said presumption during trial. This Court cannot go into the disputed question of facts for considering the petition under Section 482 CrPC for quashing the complaint on these grounds.

24. Having regard to all the aforesaid discussion, it is held that there is no merit in the present petition so as to quash the criminal complaint No.5086/2 dated 06.07.2010 titled 'Cotton County Retail Ltd. Vs. M/s Chlorophyl & Others', under Section 138 of the Negotiable Instruments Act, 1881 [for short 'the NI Act'] (Annexure P-8) pending

before the ld. JMIC, Ludhiana and the subsequent proceedings arising therefrom. As such, the petition is hereby dismissed. However, it is made clear that petitioners will be at liberty to raise defences available to them before ld. Trial Court, in accordance with law.

(DEEPAK GUPTA)
JUDGE

04.09.2023
Vivek

1. Whether speaking/reasoned? ***Yes****/No*
2. Whether reportable? *Yes/No*