HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

****

CRM-M-17076-2019 (O&M)

Date of Decision: 29.04.2023

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Anil Kumar R. ... Petitioner

VS.

Rishav Exports ... Respondent

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CRM-M-17182-2019 (O&M)

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Anil Kumar R. ... Petitioner

VS.

M/s Kapoor Cotsyn Exports ... Respondent

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CORAM: HON'BLE MR.JUSTICE SANDEEP MOUDGIL

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Present: Mr. Pardeep Kumar Sharma, Advocate for petitioner

None for the respondent

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Sandeep Moudgil, J.

1. This order shall dispose of the above-cited two criminal misc. petitions which involve common question of law and facts for adjudication by this Court.

2. For the sake of avoiding brevity, facts from CRM-M-17076-2019 are considered.

3. This petition under Section 482 CrPC has been filed by the petitioner for quashing of the order dated 04.01.2019 in complaint No.4577 of 2018 filed by the complainant under Section 138 of the Negotiable Instruments Act (in short, the NI Act) passed by the trial court under the amended Section 143-A of the NI Act.

4. The petitioner is the resident of Salem (Chennai) and is doing the business of commission agent in buying and selling garments from various

places. It is alleged that petitioner placed an order for Rs.10,00,000/- of garments of winter collections of US POLO brand to the respondent. At that time, the respondent promised to deliver the goods in one and half months accordingly, the petitioner gave five undated blank cheques each cheque amount to Rs.1,00,000/- and also initially transferred a sum of Rs. 5,00,000/- as per request of the respondent from his wife's account No. 007990200004113, YES BANK, COIMBATORE to the respondent on 04.10.2017 and also assured the respondent to clear the cheques once he receives the goods from the respondent with proper invoice. The deal was finalized on the above terms. The said cheques were given as a security. Later on, the petitioner came to know that the respondent was not the authorized dealer and distributor of the US POLO branded garments and thus he insisted the respondent to deliver the goods to his address with proper US POLO brand invoice, however, the respondent refused to give invoice in US POLO brand and owing to this reason the petitioner refused to receive goods without proper invoice in the brand name of US POLO. The petitioner also intimated the respondent to cancel the purchase order since the respondent was not willing to give original invoice for the goods to the purchased in US POLO brand name and the petitioner also informed the respondent to return the amount of sum of Rs. 5,00,000/- which was deposited in his account from the wife of the petitioner and also to return the give undated cheques each for a sum of Rs.1,00,000/- bearing Cheques No. 758833, 758834, 758835, 758836, 758837. The petitioner even intimated the bank regarding stop payment of the above cheques, however, the respondent fraudulently presented the three cheques, which were dishonoured. The respondent got issued legal notice and thereafter, filed the complaint under Section 138 of the Act which was registered on 05.04.2018.

5. During the pendency of the complaint, the trial court vide order dated 04.01.2019 directed the petitioner to make payment of 20% of the cheque amount under the amended Section 143-A of the NI Act. The aggrieved petitioner-accused has approached this Court.

6. Notice of motion was issued on 12.04.2019 and this Court directed that the effect of impugned condition of depositing 20% of cheque amount as interim compensation shall be kept in abeyance. Thereafter, the case was taken up on numerous dates, however, the respondent remained unrepresented throughout. Therefore, this Court proceeds to decide the case on merits.

7. Learned counsel for the petitioner contended that the impugned order is illegal and violative of Article 20 of the Constitution of India. It is submitted that the respondent fraudulently presented the cheques for encashment which were dishonoured on 07.12.2017 and again on 31.01.2018; legal notice was issued on 26.02.2018 and the complaint was filed on 05.04.2018. The dates reflected above would shows that the entire ingredients of unamended Act were completed before the amendment of Section 143-A of the NI Act which came into operation on 02.08.2018. Meaning thereby that the provisions of Section 143-A would not be applicable to the present case.

8. Learned counsel for petitioners submits that provisions of Section 143-A of the Act have been brought in force w.e.f. 1/9/2018 during pendency of the complaint therefore, they will not apply to the pending proceedings and

will have prospective effect having application to the proceedings initiated after the amendment.

9. I have heard the learned counsel for the petitioner and perused the record.

10. Undisputedly the complaint in the present case under Section 138 has been filed on 05.04.2018. By the Negotiable Instruments (Amendment) Act, 2018 published in the notification dated 2nd August 2018, Section 143-A has been incorporated in The Negotiable Instruments Act, 1881 and vide notification published in the Gazette dated 16th August 2018, the amended provision has been brought in force w.e.f. 1st September 2018.

11. In the present case, the complaint under Section 138 of NI Act was filed on 05.04.2018 i.e. prior to coming into force of amended provision section 143-A of the NI Act. Therefore, the sole issue involved in the present case is as to whether the provisions of Section 143-A of the NI Act will apply to a pending complaint under section 138 of Act.

Section 143A is to the following effect:-

> *"**143A. Power to direct interim compensation**. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant –*
>
> *(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and*
>
> *(b) in any other case, upon framing of charge.*
>
> *(2) The interim compensation under sub-section (1) shall not exceed twenty per cent of the amount of the cheque.*
>
> *(3) The interim compensation shall be paid within sixty days from the date of the order under sub- section (1), or within such further*

> *period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.*
>
> *(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial years, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.*
>
> *(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).*
>
> *(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section."*

12. A reading of Section 143A shows (i) interim compensation must not exceed 20% of the amount of the cheque; (ii) it must be paid within the time stipulated under Sub-Section (3); (iii) if the accused is acquitted, the complainant shall be directed to pay to the accused the amount of interim compensation with interest at the bank rate; (iv) the interim compensation payable under said Section can be recovered as if it were a fine under Section 421 of the Code of Criminal Procedure, 1973 ('the Code', for short); and (v) if the accused were to be convicted, the amount of fine to be imposed under Section 138 of the Act or the amount of compensation to be awarded under Section 357 of the Code would stand reduced by the amount paid or recovered as interim compensation.

13. In the present case, the complaint was lodged in the year 2018 that is to say, the act constituting an offence had occurred by 2018 whereas, the concerned provision viz. Section 143A of the Act was inserted in the statute book with effect from 01.09.2018. The question that arises therefore is whether Section 143A of the Act is retrospective in operation and can be invoked in cases where the offences punishable under Section 138 of the Act were committed much prior to the introduction of Section 143A.

14. While considering general principles concerning 'retrospectivity of legislation' in the context of Section 158-BE inserted in the Income Tax Act, 1961, the Supreme Court in Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Private Limited, (2015) 1 SCC 1 held as under:-

> *"28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought*

not to change the character of past transactions carried on upon the faith of the then existing law.”

15. The Supreme Court in Hitendra Vishnu Thakur and others vs. State of Maharashtra and others, (1994) 4 SCC 602, while considering the effect of modified application of the provisions of the Code, as a result of Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, whereunder the period for filing challan or charge-sheet could get extended, considered the issue about the ‘retrospective operation’ and held as under:-

> *“26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:*
>
> *(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.*
>
> *(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.*
>
> *(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.*

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

16. Similar issue came for consideration before the Supreme Court **G.J. Raja Vs. Tejraj Surana, (2019) SCC OnLine SC 989,** wherein it was held that Section 143-A of the NI Act would be applicable prospectively.

"20. It must be stated that prior to the insertion of Section 143A in the Act there was no provision on the statute book whereunder even before the pronouncement of the guilt of an accused, or even before his conviction for the offence in question, he could be made to pay or deposit interim compensation. The imposition and consequential recovery of fine or compensation either through the modality of Section 421 of the Code or Section 357 of the code could also arise only after the person was found guilty of an offence. That was the status of law which was sought to be changed by the introduction of Section 143A in the Act. It now imposes a liability that even before the pronouncement of his guilt or order of conviction, the accused may, with the aid of State machinery for recovery of the money as arrears of land revenue, be forced to pay interim compensation. The person would, therefore, be subjected to a new disability or obligation. The situation is thus completely different from the one which arose for consideration in Employees' State Insurance Corporation case.

21. Though arising in somewhat different context, proviso to Section 142(b) which was inserted in the Act by Amendment Act 55 of 2002, under which cognizance could now be taken even in *respect of a complaint filed beyond the period prescribed under Section 142(b) of the Act, was held to be prospective by this Court in **Anil Kumar Goel v. Kishan Chand Kaura, (2007) 13 SCC 492**. It was observed:-*

> *"10. There is nothing in the amendment made to Section 142(b) by Act 55 of 2002 that the same was intended to operate retrospectively. In fact that was not even the stand of the respondent. Obviously, when the complaint was filed on 28-11-1998, the respondent could not have foreseen that in future any amendment providing for extending the period of limitation on sufficient cause being shown would be enacted."*

22. In our view, the applicability of Section 143A of the Act must, therefore, be held to be prospective in nature and confined to cases where offences were committed after the introduction of Section 143A, in order to force an accused to pay such interim compensation.

*23. We must, however, advert to a decision of this Court in **Surinder Singh Deswal and Ors. vs. Virender Gandhi, (2019) 8 SCALE 445** where Section 148 of the Act which was also introduced by the same Amendment Act 20 of 2018 from 01.09.2018 was held by this Court to be retrospective in operation. As against Section 143A of the Act which applies at the trial stage that is even before the pronouncement of guilt or order of conviction, Section 148 of the Act applies at the appellate stage where the accused is already found guilty of the offence under Section 138 of the Act. It may be stated that there is no provision in Section 148 of the Act which is similar to Sub-Section (5) of Section 143A of the Act. However, as a matter of fact, no such provision akin to sub-section (5) of Section 143A was required as Sections 421 and 357 of the Code, which apply post- conviction, are adequate to take care of such requirements. In that sense said Section 148 depends upon the existing machinery and principles* *already in existence and does not create any fresh disability of the nature similar to that created by Section 143A of the Act. Therefore, the decision of this Court in* ***Surinder Singh Deswal*** *stands on a different footing.*

24. In the ultimate analysis, we hold Section 143A to be prospective in operation and that the provisions of said Section 143A can be applied or invoked only in cases where the offence under Section 138 of the Act was committed after the introduction of said Section 143A in the statute book."

17. On otherwise also, on a bare perusal of Section 143-A it bares out that the legislature has intentionally not used the word "shall", since it would have prevented the accused persons, even in genuine cases, from defending themselves without paying 20% as interim compensation amount to the complainant. This would have directly affected the fundamental right of an accused person to defend himself in a criminal case. This is the reason why the legislature had thoughtfully used the word "may" under Section 143A(1) of the Negotiable Instruments Act. Therefore, it is not possible to read the word "shall" into the word "may" which is used in the provision. The word "may", gives the discretion to the trial Court to direct the accused to pay interim compensation to the complainant. The exercise of discretion must always be supported by reasons, failing which the exercise of discretion will become arbitrary.

18. Therefore, whenever the trial Court exercises its jurisdiction under Section 143A(1) of the Act, it shall record as to why it directs the accused person (drawer of the cheque) to pay the interim compensation to the complainant. The reasons may be varied. It is more illustrative as to the various circumstances under which the trial Court will be justified in exercising its

jurisdiction under Section 143A(1) of the Act, by directing the accused person to pay the interim compensation of 20% to the complainant. The other reason why the order of the trial Court under Section 143A(1) of the Act, should contain reasons, is because it will always be subjected to challenge before the superior Courts. This Court while considering the petition will only look for the reasons given by the Court below while passing the order under Section 143A(1) of the Act. An order that is subjected to appeal or revision, should always be supported by reasons. A discretionary order without reasons is, on the face of it, illegal and it will be set aside on that ground alone. In the present case, the order passed by the trial court does not cull out reasons which can be said to be justified for directing the petitioner to deposit 20% of the cheque amount.

19. Consequently, following the decision of the Apex Court in **G.J. Raja Vs. Tejraj Surana's** case (supra), it is held that since the operation of Section 143-A of the NI Act is prospective in its applicability and also that the complaint in the present case has been filed on 05.04.2018 i.e. much prior to coming into operation of Section 143-A of NI Act w.e.f. 02.08.2018, this petition is allowed and the order dated 04.01.2019 (Annexure P3) passed by the trial court, directing the petitioner to pay 20% of the cheque amount, is set aside.

29.04.2023
V.Vishal

(Sandeep Moudgil)
Judge

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