

Sanjay Kumar Basoya vs.canara Bank and Another

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Court : Delhi

Decided On : Jul-03-2017

Appellant : Sanjay Kumar Basoya

Respondent : Canara Bank and Another

Judgement :

* % IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on:

3. d July, 2017 1. CRL.REV.P. 262/2017 SANJAY KUMAR BASOYA Through: Mr. Jatan Singh and Mr. Pawan Madhukar, Advocates.

... Petitioner

versus CANARA BANK AND ANOTHER

... RESPONDENTS

Through: Ms. Seema Gupta, Advocates for Respondent No.1 Mr. Izhar Ahmad, APP for State.

2. CRL.REV.P. 263/2017 SANJAY KUMAR BASOYA Through: Mr. Jatan Singh and Mr. Pawan Madhukar, Advocates.

... Petitioner

versus CANARA BANK AND ANOTHER

... RESPONDENTS

Through: Ms. Seema Gupta, Advocates for Respondent No.1 Mr. Izhar Ahmad, APP for State.

3. CRL.REV.P. 264/2017 SANJAY KUMAR BASOYA Through: Mr. Jatan Singh and Mr. Pawan Madhukar, Advocates.

... Petitioner

versus Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 1 of 24 CANARA BANK AND ANOTHER Through: Ms. Seema Gupta, Advocates for

... RESPONDENTS

Respondent No.1 Mr. Izhar Ahmad, APP for State. CORAM: HON'BLE MR. JUSTICE I.S.MEHTA JUDGMENT I. S. MEHTA, J.

1. Instant revision petitions are preferred by the petitioner, i.e. Sanjay Kumar Basoya, under Sections

Cr.P.C. read with Section 482 Cr.P.C. for setting aside the separate impugned judgments dated 28.03.2017 passed by the learned Special Judge, NDPS-02(Central), Tis Hazari Courts, Delhi in criminal appeals Nos., i.e. 24/2017, 23/2017 and 25/2017, conviction judgment dated 26.11.2016 passed by the learned Metropolitan Magistrate- 03, NI Act, Tis Hazari Courts, Delhi in CC. Nos., i.e. 535341/16, 5353

and 535342/16, and order on sentence dated 20.02.2017 passed by the learned Metropolitan Magistrate-03, NI Act, Tis Hazari Courts, Delhi in CC. Nos., i.e. 535341/16, 5353

and 535342/16.

2. The brief facts as alleged in the complaints filed under Section 138 of the Negotiable Instruments Act, 1881 by the respondent/complainant-Bank are that the petitioner had availed the Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 2 of 24 OCC/OD limit of Rs. 50,00,000/- (Rupees Fifty Lakhs Only) from the respondent/complainant-Bank since the year 2005. It is further alleged that the petitioner failed to adhere to the financial discipline and the loan were classified as NPA. Thereafter, the petitioner approached the

respondent/complainant-Bank for settlement vide letters dated 09.03.2007 and 28.05.2007 and had issued certain cheques for repayment of the outstanding dues. The said cheques on presentation got dishonoured with remarks "insufficient funds" and the details of the said cheques are reproduced as under:-

"Sr. Cheque Amount Date of Return Remarks Legal No.No.Issuance Date Notice Issued by the petitioner Sanjay Kumar Basoya. In CC. No.535341/2016 1. 092831 Rs. 29.05.2007 12.06.2007 insufficient 20.06.2007 2,50,000/- funds 2. 092830 Rs. 27.05.2007 12.06.2007 insufficient 20.06.2007 2,50,000/- funds In CC. No.535338/2016 3. 092829 Rs. 28.04.2007 25.07.2007 insufficient 02.08.2007 5,00,000/- funds 4. 092828 Rs. 27.04.2007 25.07.2007 insufficient 02.08.2007 2,50,000/- funds 5. 092832 Rs. 24.04.2007 25.07.2007 insufficient 02.08.2007 2,50,000/- funds In CC. No.535342/2016 Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 3 of 24 6. 092833 Rs. 30.07.2007 31.07.2007 insufficient 02.08.2007 5,00,000/- funds 3. It is further alleged in the complaints under Section 138 NI Act that the respondent/complainant-Bank issued legal notices upon the petitioner demanding therein the payment of the said cheque amounts within 15 days from the receipt of the legal notices but the petitioner failed to make the payment of the cheque amounts in question to the respondent/complainant-Bank. Consequently, the respondent/complainant-Bank filed separate complaint cases under Section 138 of NI Act before the Court of Chief Metropolitan Magistrate, Delhi against the petitioner.

4. Subsequently, the learned Metropolitan Magistrate in each complaint case vide separate judgments dated 26.11.2016 convicted the petitioner for the offence committed under Section 138 of NI Act and vide separate orders on sentence dated 20.02.2017 sentenced the petitioner to undergo simple imprisonment for a period of six months in each complaint case and directed the petitioner to pay a compensation of Rs. 1,00,000/-(One Lakh Only) to the respondent/complainant-Bank within two months from the date of the orders, i.e. 20.02.2017, failing which the petitioner will be liable to further undergo simple imprisonment of one month in each complaint case.

5. Aggrieved from the said judgments of conviction dated 26.11.2016 and orders on sentence dated 20.02.2017 the petitioner filed appeals under Section 374(3) Cr.P.C. before the Court of Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 4 of 24 District and Sessions Judge, Tis Hazari Courts, Delhi and the learned Special Judge, NDPS-02 (Central) Tis Hazari Courts, Delhi vide separate judgments dated 28.03.2017 modified the substantive sentence of imprisonment by reducing the simple imprisonment for a period of six months to a period of three months in each complaint case. Hence the present petitions.

6. The learned counsel for the petitioner has submitted that whether a statutory appeal filed without challenging the conviction order can be disposed of by the appellate Court only on the point of substantive sentence of imprisonment and whether an appeal being a statutory right of the convict can be ignored by the appellate Court merely on the request of the counsel or otherwise for leniency on the point of substantive sentence on imprisonment?.

7. The learned counsel for the petitioner has further submitted that the cheques in question were given under a proposal for settlement to the respondent/complainant-Bank and the appellate Court committed a mistake of law by awarding sentences separately and to run the said sentences consecutively in three cases between the same parties under single loan transaction and not concurrently. Reliance is placed on the following judgments:-

"1) Lalit Kumar Sharma and Another vs. State of Uttar Pradesh and Another; (2008) 5 SCC638

2) V.K. Bansal vs. State of Haryana and Another; (2013) 7 SCC211

3) Benson vs. State of Kerala; MANU/SC/177/2016. Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 5 of 24

4) Shyam Pal vs. Dayawati Besoya and Ors.; MANU/SC/1363/2016.

5) Pankaj Kumar vs. Sunil Kumar Vaid; MANU/DE/3252/2011.

6) Thakur Arora vs. The State NCT of Delhi and Anr.; MANU/DE/1549/2009.

7) Nusun Genetic Research Ltd. and Ors. vs. The State of Telengana and Ors.; MANU/AP/0868/2015.

8. The learned counsel for the petitioner has further submitted that the conviction orders passed by the trial court is not in consonance with the facts and record of the case and there is a violation of settled procedure of law and are based upon conjectures and surmises.

9. The learned counsel for the petitioner has further submitted that it is the duty of the appellate Court hearing an appeal against conviction to decide the said appeal on merits but in the present case the learned appellate Court ignored this vital aspect of law and went ahead in deciding the appeal only on the point of substantive sentence of imprisonment therefore it is bad in law and liable to be set aside. Reliance is placed on the judgment of the Hon'ble Supreme Court in case Kalu Ram and Anr. vs. State of Delhi; MANU/SC/8201/2006 and judgment of the Calcutta High Court in case Nanilal Samnta vs. Rabin Ghosh; AIR 1964 CALCUTTA64

10. On the contrary the learned counsel for the respondent/complainant-Bank has submitted that the present revision petition is not maintainable and is liable to be dismissed as Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 6 of 24 the petitioner had grossly failed to show any error apparent on the face of record in the order dated 28.03.2017 passed by the appellate Court. The petitioner had only pleaded for leniency on the point of substantive sentence of imprisonment and had not challenged the judgment of conviction passed by the trial Court in the appeal.

11. The learned counsel for the respondent/complainant-Bank has further submitted that the contention of the learned counsel for the petitioner that the sentence should run concurrently and not consecutively is also not maintainable as the petitioner had committed separate and distinct offence and was rightly punished separately for each offence by the trial Court.

12. The learned counsel for the respondent/complainant-Bank has further submitted that there was an outstanding liability/debt against the petitioner as on the date of issuance of cheques and the contention of the learned counsel for the petitioner that the cheques were issued towards settlement and not towards the

payment in discharge of debt and would not attract the provisions of Section 138 NI Act is not maintainable in view of the judgment of the Hon'ble Supreme Court in the case Sampelly Satyanarayana Rao vs. Indian Renewable Energy Agency Ltd.; MANU/SC/1021/2016.

13. The learned counsel for the respondent/complainant-Bank has further submitted that the respondent/complainant-Bank had established its case against the petitioner under Section 138 NI Act beyond doubt whereas the petitioner has even failed to rebut the presumption in favour respondent/complainant-Bank. The petitioner has admitted the cheques in question, the dishonor of Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 7 of 24 cheques are a matter of record, service of legal notices were effected on the petitioner which he has admitted in the cross- examination and the question of legally recoverable debt was also answered in positive by the petitioner himself. Therefore, the presumption under Sections 139/118(a) NI Act was applicable to the facts of the present case. Moreover, the petitioner is estopped from raising any plea on merits before this Court as the petitioner had not challenged the judgment of conviction passed by the trial Court and only prayed for leniency on the point of substantive sentence of imprisonment before the appellate Court therefore, the present revision petitions are liable to be dismissed for want of any merit. Reliance is placed of the judgments of the Hon'ble Supreme Court in the cases A.K. Vijaya Kumar vs. R. Mohan; MANU/SC/0520/2012 and Sampelly Satyanarayana Rao vs. Indian Renewable Energy Agency Ltd.; MANU/SC/1021/2016.

14. The instant petitions are arising out of the impugned judgment passed in the following appeals:-

"i. Criminal Appeal No.24/2017 ii. Criminal Appeal No.23/2017 iii. Criminal Appeal No.25/2017 wherein the appellate Court upheld the conviction of the petitioner but modified the substantive sentence of imprisonment by reducing the simple imprisonment for a period of six months to a period of three months passed in each complaint case, i.e. CC. No.535341/16, CC. No.5353 and CC. No.535342/16. Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 8 of 24 15. The Hon'ble Supreme Court in the case of Kusum

Ingots & Alloys Ltd. vs. Pennar Peterson Securities Ltd. And Others; (2000) 2 SCC745 has laid down the following ingredients for taking cognizance under Section 138 of the NI Act:-

"" (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability; (ii) that 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; (iii) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank; (iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; (v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;"

16. In the instant case the respondent/complainant-Bank had filed three complaint cases against the petitioner for the offence committed under Sections 138 NI Act on 19.09.2007. The learned CrI.Rev.P. 262/2017, CrI.Rev.P. 263/2017 and CrI.Rev.P. 264/2017 Page 9 of 24 Metropolitan Magistrate relying upon the complaints which were supported with affidavits, documents and ocular evidence given by the AR of the respondent/complainant-Bank took cognizance under Section 138 NI Act and passed the summoning orders dated 22.09.2007 and subsequently, the learned Metropolitan Magistrate framed notices vide orders dated 01.08.2013 under Section 251 Cr.P.C.

17. In the instant case issuance of the cheques is not disputed by the petitioner. There is no dispute that the cheques in question belongs to the petitioner and the signatures on the same are made by him.

18. Furthermore, the argument of the learned counsel for the petitioner that the cheques issued were given under a proposal for settlement and reliance on the

judgments Lalit Kumar Sharma (supra), V.K. Bansal (supra), Benson (supra), Shyam Pal (supra), Pankaj Kumar (supra), Thakur Arora (supra) and Nusun Genetic Research Ltd. (supra) is not convincing as in the instant case the cheques issued by the petitioner were in consequence of the OCC/OD limit of Rs. 50,00,000/- availed by the petitioner from the respondent/complainant-Bank which makes a legally enforceable liability qua against the petitioner. The reliance is placed on the judgment in the case Sampelly Satyanarayana Rao (supra) wherein the distinction has been drawn by the Apex Court which is reproduced as under:-

""7. It will be appropriate to reproduce the statutory provision in question which is as follows:

138. Dishonour of cheque for insufficiency, etc., of funds in the account.-Where any cheque drawn by a person on an Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 10 of 24 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 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, 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.

8. Clause 3.1(iii) of the agreement may also be noted:-

"3.1 SECURITY FOR THE LOAN The loan together with the interest, interest tax, liquidated damages, commitment fee, up front fee prima on repayment or on redemption, costs, expenses and other monies shall be secured by; (i) xxxxx (ii) xxxxx CrI.Rev.P. 262/2017, CrI.Rev.P. 263/2017 and CrI.Rev.P. 264/2017 Page 11 of 24 (iii) Deposit of Post dated cheques towards repayment of installments of principal of loan amount in accordance with agreed repayment Schedule and installments of interest payable thereon.

9. Reference may now be made to the decision of this Court in Indus Airways Private Limited v. Magnum Aviation Private Limited MANU/SC/0288/20

(2014) 12 SCC539 on which strong reliance has been placed by learned Counsel for the Appellant. The question therein was whether post-dated cheque issued by way of advance payment for a purchase order could be considered for discharge of legally enforceable debt. The cheque was issued by way of advance payment for the purchase order but the purchase order was cancelled and payment of the cheque was stopped. This Court held that while the purchaser may be liable for breach of the contract, when a contract provides that the purchaser has to pay in advance and cheque towards advance payment is dishonoured, it will not give rise to criminal liability Under Section 138 of the Act. Issuance of cheque towards advance payment could not be considered as discharge of any subsisting liability. View to this effect of the Andhra Pradesh High Court in Swastik Coaters (P) Ltd. v. Deepak Bros. (1997) CrI. LJ1942(AP), Madras High Court in Balaji Seafoods Exports (India) Ltd. v. Mac Industries Ltd. (1999) 1 CTC6(Mad), Gujarat High Court in Shanku Concretes (P) Ltd. v. State of Gujarat (2000) CrI LJ1988(Guj) and Kerala High Court in Supply House v. Ullas (2006) CrI. LJ4330(Ker) was held to be correct view as against the view of Delhi High Court in Magnum Aviation (P) Ltd. v. State (2010) 172 DLT91: (2010) 118 DRJ505 and Mojj Engg. Systems Ltd. v. A.B. Sugars Ltd. (2008) 154 DLT579 which was disapproved.

10. We have given due consideration to the submission advanced on behalf of the Appellant as well as the observations of this Court in *Indus Airways* (supra) with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in Section Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 12 of 24 138 of the Act. We are of the view that the question whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.

11. Reference to the facts of the present case clearly shows that though the word "security" is used in Clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. It is undisputed that the loan was duly disbursed on 28th February, 2002 which was prior to the date of the cheques. Once the loan was disbursed and installments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall Under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability. is clearly 12. Judgment distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract Under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability in question. Admittedly, on the date of the cheque there was a debt/liability in praesenti in terms of the loan agreement, as against the case of *Indus Airways* (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of is clearly covered by the statute in *Indus Airways* (supra) Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 13 of 24

installments was also described as "security" in the loan agreement. In applying the judgment in *Indus Airways (supra)*, one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

13. Crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court.

14. In *Balaji Seafoods (supra)*, the High Court noted that the cheque was not handed over with the intention of discharging the subsisting liability or debt. There is, thus, no similarity in the facts of that case simply because in that case also loan was advanced. It was noticed specifically therein-as was the admitted case of the parties-that the cheque was issued as "security" for the advance and was not intended to be in discharge of the liability, as in the present case.

15. In *HMT Watches Ltd. v. M.A. Abida* (2015) 11 SCC776 relied upon on behalf of the Respondent, this Court dealt with the contention that the proceedings Under Section 138 were liable to be quashed as the cheques were given as "security" as per defence of the accused. Negating the contention, this Court held:-

"10. Having heard the learned Counsel for the parties, we are of the view that the accused (Respondent

1) challenged the proceedings of criminal complaint cases before the High Court, taking factual defences. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 14 of 24 could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition Under Section 482 of the Code of Criminal

Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties. The High Court further erred in observing that Section 138(b) of the NI Act stood uncomplained with, even though Respondent 1 (accused) had admitted that he replied to the notice issued by the complainant. Also, the fact, as to whether the signatory of demand notice was authorised by the complainant company or not, could not have been examined by the High Court in its jurisdiction Under Section 482 of the Code of Criminal Procedure when plea was controverted by the complainant before it.

11. In *Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd.* [MANU/SC/7050/20

(2008) 13 SCC678, this Court has made the following observations of jurisdiction of the High Court in exercising its jurisdiction Under Section 482 of the Code of Criminal Procedure: (SCC pp. 685-87, paras 17 &

22) 17. The parameters of jurisdiction of the High Court in exercising its jurisdiction Under Section 482 of the Code of Criminal Procedure is now well settled. Although it is of wide amplitude, a great deal of caution is also required in its exercise. What is required is application of the well-known legal principles involved in the matter.

*** 22. Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of the said jurisdiction. Yet again, the High Court at that stage would not ordinarily enter into a disputed question of fact. It, however, does not mean parameters such explaining the Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 15 of 24 travel beyond the other, cannot also that documents of unimpeachable character should not be taken into consideration at any cost for the purpose of finding out as to whether continuance of the criminal proceedings would amount to an abuse of process of court or that the complaint petition is filed for causing mere harassment to the accused. While we are not oblivious of the fact that although a large number of disputes should ordinarily be determined only by the civil courts, but criminal cases are filed only for achieving the ultimate goal, namely, to force the accused to pay the amount due to the complainant immediately. The courts on the one hand should not encourage such a practice; but, on its jurisdiction to interfere with the

proceeding which is otherwise genuine. The courts cannot also lose sight of the fact that in certain matters, both civil proceedings and criminal proceedings would be maintainable.

12. In *Rallis India Ltd. v. Poduru Vidya Bhushan* [MANU/SC/0422/20

(2011) 13 SCC88, this Court expressed its views on this point as under: (SCC p. 93, para

12) 12. At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court. The High Court could not have discharged the

... RESPONDENTS

of the said liability at the threshold. Unless the parties are given opportunity to lead evidence, it is not possible to come to a definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the

... RESPONDENTS

ceased to be the partners of the firm. in respectful agreement with 16. We are the above observations. In the present case, reference to the complaint (a copy of which is Annexures P-7) shows that as per the case of the complainant, the cheques which were subject matter of the Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 16 of 24 said complaint were towards the partial repayment of the dues under the loan agreement (para 5 of the complaint).

17. As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

18. In *Rangappa v. Sri Mohan* MANU/SC/0376/20

(2010) 11 SCC441 this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the

holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment¹.

19. Thus, the question has to be answered in favour of the Respondent and against the Appellant. Dishonour of cheque in the present case being for discharge of existing liability is covered by Section 138 of the Act, as rightly held by the High Court."

19. In the instant case:-

"1) the petitioner had issued six cheques, i.e. cheque No.092831 of Rs. 2,50,000/- on 29.05.2007, cheque No.092830 of Rs. 2,50,000/- on 27.05.2007, cheque No.092829 of Rs. 5,00,000/- on 28.04.2007, cheque No.092828 of Rs. 2,50,000/- on 27.04.2007, cheque No.092832 of Rs. 2,50,000/- on 24.04.2007 and cheque No.092833 of Rs. 5,00,000/- on 30.07.2007, in favour of the respondent/complainant-Bank;

2) the aforesaid cheques were presented for encashment within a period of six months from the date on which they were drawn or within the period of their validity whichever is earlier;

3) the cheques were returned dishonoured with the remarks Insufficient Funds vide dishonour memos dated 12.06.2007 in cheque No.092831 of Rs. 2,50,000/- and cheque No.092830 of Rs. 2,50,000/-, 25.07.2007 in cheque No.092829 of Rs. 5,00,000/-, cheque No.092828 of Rs. 2,50,000/- and cheque No.092832 of Rs. 2,50,000/- and 31.07.2007 in cheque No.092833 of Rs. 5,00,000/-;

4) the respondent/complainant-Bank had sent legal notices dated 20.06.2007 for cheque No.092831 of Rs. 2,50,000/- and cheque No.092830 of Rs. 2,50,000/-, 02.08.2007 for cheque No.092829 of Rs. 5,00,000/-, cheque No.092828 of Rs. 2,50,000/- and cheque No.092832 of Rs. 2,50,000/- and 02.08.2007 for cheque

No.092833 of Rs. 5,00,000/-; to the petitioner upon dishonouring of the aforesaid six cheques which are within 15 days of the receipt of information by respondent/complainant from the bank regarding the return of the cheques as unpaid;

5) the petitioner failed to make payment of the said amount to the respondent/complainant-Bank (the holder in due course Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 18 of 24 of the cheque) within 15 days of the receipt of the said legal notices dated 20.06.2007 and 02.08.2007.

20. On bare perusal of the abovementioned facts it is crystal clear that there was an existing liability qua against the petitioner under Section 138 of NI Act and the Apex Court in the case Kusum Ingots & Alloys Ltd. vs. Pennar Peterson Securities Ltd. And Others; (2000) 2 SCC745 has specifically stated that if the ingredients are satisfied by the complainant then the person who has drawn the cheque shall be deemed to have committed an offence and the relevant para is reproduced as under:-

"If In the explanation the aforementioned

"11. ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. the section clarification is made that the phrase "debt or other liability" means a legally enforceable debt or other liability."

(underlining supplied) to 21. In the instant revision petitions the cheques, i.e., cheque No.092831 of Rs. 2,50,000/-, cheque No.092830 of Rs. 2,50,000/-, cheque No.092829 of Rs. 5,00,000/-, cheque No.092828 of Rs. 2,50,000/-, cheque No.092832 of Rs. 2,50,000/- and cheque No.092833 of Rs. 5,00,000/-, were issued by the petitioner for repayment of the outstanding dues which were arising from the continuous liability qua against the petitioner from the OCC/OD limit of Rs. 50,00,000/- availed by him. In C.C.No.5353

the cheques were dishonoured vide return memos dated 12.06.2007 with a remark 'insufficient funds' and the legal demand notices were Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 19 of 24 issued on 20.06.2007, in C.C.No.5353

the cheques were dishonoured vide return memos dated 25.04.2007 with a remark 'insufficient funds' the legal demand notices were issued on 02.08.2007 and in C.C.No.5353

the cheques were dishonoured vide return memo dated 31.07.2007 with a remark 'insufficient funds' and the legal demand notices were issued on 02.08.2007. The issuance of legal demand notices by the respondent/complainant-Bank to the petitioner is not disputed between the parties. It is also not in dispute that the payment so demanded was made by the petitioner within the stipulated period or subsequent period till date which attracts conviction under Section 138 of the Negotiable Instruments, Act, 1881.

22. The aforesaid six cheques issued by the petitioner to the respondent/complainant-Bank were to meet their liability for the OCC/OD limit of Rs. 50,00,000/- availed by him and the contention of the learned counsel for the petitioner that the it forms part of one single transaction giving rise to one cause of action and the same could not be said to be distinct offences committed in each of the complaint cases to attract the provisions of Section 138 of the Negotiable Instruments, Act having different cause of action is not convincing as there is no plea on record to suggest that the cheques were issued on the same day/time/place/date and were undated which have been misused by the respondent/complainant-Bank by putting different dates on the cheques.

23. However, the cheques issued are of different dates and the legal demand notices issued by the respondent/complainant-Bank are of Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 20 of 24 different dates constituting separate cause of action. Mere availing of the OCC/OD limit of Rs. 50,00,000/- does not ipso facto suggest that the offence committed is one. Whereas, the cheques issued on the different dates constitute different cause of action under Negotiable Instruments Act.

24. The trial Court correctly awarded substantive sentence to run consecutively rather than to award the sentence concurrently although the cheques issued by the petitioner were to meet their outstanding liability for the OCC/OD limit availed by him qua against the respondent/complainant-Bank but it does not form one

single transaction rather constitute separate cause of action.

25. So far the default sentences are concerned Section 30 of The Code Of Criminal Procedure, 1973 is reproduced as under:-

....

30. Sentence of imprisonment in default of fine. (1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law: Provided that the term- (a) is not in excess of the powers of the Magistrate under section 29; (b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine. (2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 29. It is an admitted fact emerging on the record that the petitioner 26. was directed to pay a fine of Rs. 1,00,000/- in each complaint cases as compensation to the respondent/complainant-Bank and in default Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 21 of 24 of payment the petitioner shall further undergo a simple imprisonment of one month for each complaint cases which does not exceeds one fourth of the term of imprisonment that the learned Metropolitan Magistrate could have awarded.

27. The trial Court while awarding the sentence and fine as compensation under Section 357(3) of the Cr.P.C. could have increased the fine amount twice the cheque amount under Section 138 of the N.I. Act, whereas the learned Metropolitan Magistrate has awarded the compensation of only Rs. 1 lakhs in each complaint cases which shows nothing biased/adverse qua against the petitioner exist in the factual parametric of the present revision petitions. The Apex Court has also held that the Court can impose sentence in default of payment of compensation awarded, reliance could be placed on the judgments Hari Singh vs. Sukhbir Singh And Others; 1988 4 SCC551 and Suganthi Suresh Kumar vs. Jagdeeshan; 2002 2 SCC420 28. Section 427 of The Code Of Criminal Procedure, 1973 is reproduced as under:-

427. Sentence on offender already sentenced for another offence. (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence: Provided that where a person who imprisonment or for life, Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 22 of 24 has been sentenced to imprisonment by an order under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately. (2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

The aforesaid Section is a discretionary in nature and this court has already said so in the case of M/s U Turn Housing Pvt. Ltd. & Anr. vs. State of (GNCT) of Delhi & Anr; Crl M.C. 820/2016 date of decision 19.08.2016 and the Apex Court in the case of V.K. Bansal (supra) has made it clear that the concurrent running of the sentence should be limited only to substantive sentence and not qua against the default sentences.

29. Therefore, I find no merit in the contentions of the learned counsel for the petitioner and the judgments relied by him are not helpful in view of the facts and circumstances of the case and the judgments; Sampelly Satyanarayana Rao (supra) and Kusum Ingots & Alloys Ltd.(supra).

30. As discussed above, this Court is of the view that the conviction judgment dated 26.11.2016 passed by the learned Metropolitan Magistrate-03, NI Act, Tis Hazari Courts, Delhi in CC. Nos., i.e. . 535341/16, 5353 and 535342/16, and order on sentence dated 20.02.2017 passed by the learned Metropolitan Magistrate-03, NI Act, Tis Hazari Courts, Delhi in CC. Nos., i.e. . Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017 Page 23 of 24

535341/16, 5353

and 5353

and subsequent impugned judgments dated 28.03.2017 passed by the learned Special Judge, NDPS-02(Central), Tis Hazari Courts, Delhi in criminal appeals Nos., i.e. 24/2017, 23/2017 and 25/2017 does not require any interference by this Court.

31. Consequently, the present revision petitions are dismissed for want of merit. One copy of this judgment be sent to the concerned Court(s).

32. Let one copy of this judgment be placed on the files of Crl. Rev. P. No.263/2017 and Crl. Rev. P. No.264/2017. No order as to I.S.MEHTA, J costs. JULY03 2017 Crl.Rev.P. 262/2017, Crl.Rev.P. 263/2017 and Crl.Rev.P. 264/2017
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