HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 05.07.2022
Pronounced on: 15.07.2022

CRM(M) No.280/2021
CRM(M) No.281/2021

FAYAZ AHMAD SHEIKH …PETITIONER(S)
FAYAZ AHMAD SHEIKH

Through: Mr. Sheikh Hilal, Advocate.

Vs.

MUSHTAQ AHMAD KHAN ….RESPONDENT(S)
MUZAFFAR AHMAD DAR

Through: Mr. Waseem Shamas, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) By this common judgment, the afore titled two petitions filed under Section 482 of the Code of Criminal Procedure are proposed to be disposed of.

2) Through the medium of CRM(M) No.280/2021, the petitioner has challenged the complaint filed by respondent against him for commission of offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the NI Act) as also the proceedings emanating therefrom.

3) It appears that respondent/complainant had filed a complaint for commission of offence under Section 138 of NIA Act against the petitioner before the Court of Forest Magistrate, Srinagar (hereinafter referred to as the trial Magistrate). In the complaint, it was alleged that the petitioner had approached the respondent and offered to sell a patch of land measuring 01 kanal situated at Gangbugh Tehsil and District Budgam, pursuant to which the respondent/complainant advanced a sum of Rs.29.00 lacs as part payment. It was further averred in the complaint that the petitioner/accused had promised to provide the land in question within a week's time, failing which he was to pay damages to the tune of Rs.10.00 lacs. It was further alleged that the petitioner/accused failed to provide the land within the stipulated time as per the agreed terms which made him liable to return the amount received by him along with the damages. According to the respondent/complainant, the petitioner/accused issued three cheque bearing Nos.0010168 for an amount of Rs.5.00 lacs, 000170 for an amount of Rs.5.00 lacs and 000171 for an amount of Rs.5.00 lacs all dated 20th March, 2021, drawn on HDFC Bank Ltd. Branch office Baghat Barzulla. The respondent/complainant presented these cheques before the concerned bank but the same

were dishonoured with the endorsement "drawers account closed" vide memo dated 9th April, 2021.The respondent/complainant is stated to have served a demand notice upon the petitioner/accused by sending the same through registered post on 16th April, 2021 but in spite of having received the said notice, the petitioner/accused did not liquidate the amount of cheques to the respondent/complainant compelling him to file the impugned complaint before the trial Magistrate on 30.07.2021.

4) CRM(M) No.281/2021 arises out of a complaint filed by the respondent against the petitioner before the Court of Forest Magistrate, Srinagar, alleging commission of offence under Section 138 of the NI Act. As per the impugned complaint, the petitioner/accused had offered to sell a patch of land measuring 10 marlas situated at Gangbugh Tehsil and District Budgam, to respondent. Accordingly, the respondent is stated to have advanced a sum of Rs.14.00 lacs to the petitioner/accused and it was promised by him that the land in question would be handed over to the respondent/complainant within a period of one week failing which the petitioner/accused was to return the amount along with damages to the tune of Ra.10.00 lacs. It was alleged in the complaint that the

petitioner/accused did not deliver the possession of the land to the respondent/complainant within the stipulated time whereafter he, in order to liquidate the debt, issued two cheques bearing Nos.00169 for an amount of Rs.5.00 lacs and 000172 for an amount of Rs.9.00 lacs both dated 20th March, 2021, drawn on HDFC Bank Branch unit Baghat, Barzulla. The cheques, when presented to the bank for encashment, were dishonoured by the banker with the endorsement "account closed" vide memo dated 9th April, 2021, and when petitioner/accused did not liquidate the amount of cheques despite receipt of statuotyr demand notice, the impugned complaint came to be filed by the respondent/complainant before the trial Magistrate on 30.07.2021.

5) It has been contended in both the petitions that the respondent/complainant Mushtaq Ahmad, prior to the filing of the aforesaid two complaints, filed an application before the Chief Judicial Magistrate, Budgam, and pursuant to order passed by the said Court, FIR No.85/2021 for offences under Section 420, 506 IPC of P/S, Budgam, came to be registered. It is contended that the contents of the aforesaid FIR are identical to the impugned complaints. It is further averred that investigation in the said FIR has been completed and

challan against the petitioner has been produced before the competent court and as per the challan, the offences under Section 420 and 506 of IPC stand disclosed against the petitioner.

6) On the strength of the aforesaid admitted facts, learned counsel for the petitioner has vehemently argued that the petitioner cannot be prosecuted twice on the basis of some set of facts as it would amount to double jeopardy. He has contended that continuance of proceedings in the impugned criminal complaints against the petitioner would be an abuse of process of law and it would amount of forum shopping. In support of his contentions, learned counsel for the petitioner has relied upon the judgments of the Supreme Court in the case of **Union of India vs. M/S Cipla Ltd,** (2017) 5 SCC 262 and **Rajiv Thapar & Ors. vs. Madan Lal Kapoor,** 2013 1 Crimes (SC) 169.

7) It has also been urged by the petitioner that the impugned complaints have been filed by the respondent/complainant beyond the stipulated time, inasmuch as the complaints have been filed after about two and half months of service of statutory notice of demand by the petitioner/accused.

8) I have heard learned counsel for the parties and perused the material on record including the trial court record.

9) It is not in dispute that the cheques which are subject matter of the two impugned complaints also find mention in the challan filed against the petitioner emanating from FIR No.85/2021 of Police Station, Budgam. It is also not in dispute that respondent Mushtaq Ahmad has lodged the said FIR on the basis of allegations which are identical to the allegations made in the impugned complaints. The question that arises for consideration is whether a person can be prosecuted for offence under Section 420 of IPC as also for offence under Section 138 of NI Act on the same set of facts and whether or not it would amount to double jeopardy. In order to find answer to this question, it would be profitable to analyze the legal position on the subject.

10) In **Maqbool Hussain v. State of Bombay,** AIR 1953 SC 325, a Constitution Bench of the Supreme Court has dealt with the issue of double jeopardy. The issue arose in the context of the fact that a person who had arrived at an Indian airport from abroad on being searched was found in possession of gold in contravention of the relevant

notification, prohibiting the import of gold. Action was taken against him by the customs authorities and the gold seized from his possession was confiscated. Later on, a prosecution was launched against him in the criminal court at Bombay charging him with having committed the offence under Section 8 of the Foreign Exchange Regulation Act, 1947 read with the relevant notification. In the background of these facts, the plea of “autrefois acquit” was raised seeking protection under Article 20(2) of the Constitution of India. The Supreme Court held that the fundamental right which is guaranteed under Article 20 (2) enunciates the principle of “autrefois convict" or "double jeopardy" i.e. a person must not be put in peril twice for the same offence. The doctrine is based on the ancient maxim "nemo debet bis punire pro uno delicto", that is to say that no one ought to be twice punished for one offence. The plea of “autrefois convict” or "autrefois acquit" avers that the person has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other and not that the facts relied on by

the prosecution are the same in the two trials. A plea of "autrefois acquit" is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter.

11) In **State of Bombay vs. S. L. Apte and anr.** AIR 1961 SC 578, a Constitution Bench of the Supreme Court, while dealing with the issue of double jeopardy under Article 20(2), held as under:

> *To operate as a bar the second prosecution and the consequential punishment thereunder, must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same i.e. they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out.*
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> *The next point to be considered is as regards the scope of Section 26 of the General Clauses Act. Though Section 26 in its opening words refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to "shall not be liable to be punished twice for the same offence". If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked.*

12) In A.A. Mulla & Ors. v. State of Maharashtra & Anr., AIR 1997 SC 1441, the appellants were charged under Section 409 IPC and Section 5 of the Prevention of

Corruption Act, 1947 for making false panchnama disclosing recovery of 90 gold biscuits on 21-9-1969 although according to the prosecution case the appellants had recovered 99 gold biscuits. The appellants were tried for the same and acquitted. The appellants were also tried for offence under Section 120-B IPC, Sections 135 and 136 of the Customs Act, Section 85 of the Gold (Control) Act and Section 23(1-A) of FERA and Section 5 of Import and Export (Control) Act, 1947. The appellants filed an application before the Judicial Magistrate contending that on the selfsame facts they could not be tried for the second time in view of Section 403 of the Code of Criminal Procedure, 1898 (corresponding to Section 300 Cr. P. C). The Supreme Court held as under:

> *"After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the respective parties, it appears to us that the ingredients of the offences for which the appellants were charged in the first trial are entirely different. The second trial with which we are concerned in this appeal, envisages a different fact-situation and the enquiry for finding out facts constituting offences under the Customs Act and the Gold (Control) Act in the second trial is of a different nature. Not only the ingredients of offences in the previous and the second trial are different, the factual foundation of the first trial and such foundation for the second trial is also not indented (sic). Accordingly, the second trial was not barred under Section 403 Cr. P. C of 1898 as alleged by the appellants."*

13) After noticing the aforesaid judgments, the Supreme Court in the case of **Sangeetaben Mahendrabhai Patel vs. State of Gujarat & anr.** (2012) 7 SCC 621, while dealing with exactly the same question i.e. whether prosecution for offence under Section 138 of the NI Act and offences under Section 406, 420 of IPC can be continued simultaneously against an accused on same set of facts, observed as under:

> *27. Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 N.I. Act and the case is subjudice before the High Court. In the instant case, he is involved under Sections 406/420 read with Section 114 IPC. In the prosecution under Section 138 N.I. Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420 IPC is a serious one as the sentence of 7 years can be imposed. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary.*
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> *28. There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions.*

14) A similar question arose before the Andhra Pradesh High Court in the case of **V. Kutumba Rao vs. Chandrasekhar Raso and anr.** 2003 CriLJ 4405. It

would be apt to reproduce the observations of the Court made in para 11 of the judgment and the same read as under:

> *11. In my considered opinion the offences under Section 420, IPC and Section 138 of the Act are distinct and separate offences. If a person fraudulently or dishonestly induces another person to deliver any property or to do or omit to do anything which he would not do or omit if he were not deceived and such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property commits an offence of cheating. Such a person commits the offence punishable under Section 420, IPC. In a prosecution under Section 138, Negotiable Instruments Act any inducement so as to make the other person to deliver any property etc. as defined in Section 415, IPC, is not an ingredient. If a person issues a cheque and subsequently if the cheque was dishonoured by the Bank for want of funds, etc. and thereafter even after issuance of demand notice, the said person fails to pay the amount covered by the cheque within the time stipulated by Negotiable Instruments Act, that person commits an offence punishable under Section 138 of the Act. The question of inducement to other person to part with any property to do or omit to do anything does not at all arise for a decision in a prosecution under Section 138 of the Act. The offence under Section 138 of the Act is not committed on the date of issuing the cheque. The offence happens after it was dishonoured by the Bank for specified reasons and thereafter even after demand the person concerned fails to pay the amount covered by the cheque to the other person. These facts do not fall for a decision in a prosecution under Section 420, I.P.C. Some times at the time of issuing the cheque a person may induce the other person to part with property, etc. If such inducement is dishonest or fraudulent he may be committing the offence of cheating and thereby he becomes liable for prosecution. If such a person later within the time stipulated under the provisions of Negotiable Instruments Act repays the other person amount covered by the cheque he will not be liable for prosecution for the offence under Section 138 of the Act but still he can be prosecuted for the offence of cheating if at the time of issuing the cheque he had fraudulently or dishonestly induced the other person to part with property, etc. In a prosecution*

> *under Section 138, Negotiable Instruments Act, the mens rea viz., fraudulent or dishonest intention at the time of issuance of cheque need not be proved. However, in a prosecution under Section 420,I.P.C. mens rea is an important ingredient to be established. In the former case the prosecution has to establish that the cheque was issued by accused to discharge a legally enforceable debt or other liability. This ingredient need not be proved in a prosecution for the charge under Section 420, I.P.C. Therefore, the two offences covered by Section 420, IPC and Section 138, Negotiable Instruments Act are quite distinct and different offences even though sometimes there may be overlapping and sometimes the accused person may commit both the offences. The two offences cannot be construed as arising out of same set of facts. Therefore, Section 300, Cr.P.C. is not a bar for separate prosecutions for the offences punishable under Section 420, IPC and Section 138 of the Negotiable Instruments Act. The question of application of the principles of double jeopardy or rule estoppel does not come into play. The acquittal of the accused for the charge under Section 420, IPC does not operate as estoppel or res judicata for a finding of fact or law to be given in prosecution under Section 138 of the Negotiable Instruments Act. The issue of fact and law to be tried and decided in prosecution under Section 420, IPC are not the same issue of fact and law to be tried in a prosecution under Section 138 of the Act. …….”*

15) From the aforesaid analysis of law on the subject, it is clear that offences under Section 138 of the NI Act and Section 420 of IPC are distinct from each other because ingredients of the two offences are different. While in a prosecution under Section 138 of NI Act, fraudulent or dishonest intention at the time of issuance of cheque need not be proved but in a prosecution under Section 420 of IPC, such intention is an important ingredient to be established. For proving offence under Section 138 of NI Act, it has to be established that the cheque has been

issued by the accused to discharge a legally enforceable debt or liability and the same has been dishonoured for insufficiency of funds etc. and despite receipt of statutory notice of demand, the accused has failed to pay the amount of cheque within the stipulated time. It is only when accused fails to make the payment within the stipulated time upon receipt of notice of demand that the offence under Section 138 of NI Act is made out against an accused. In the case of prosecution for the charge under Section 420 of IPC, these ingredients need not be proved by the prosecution. However, it has to be proved by prosecution that at the very inception i.e. at the time of issuance of the cheque by the accused, he had a dishonest intention. Thus, offence under Section 420 of IPC is made out at the time of issuance of the cheque itself which is not the case with offence under Section 138 of NI Act. Therefore, the two offences are distinct from each other and the principle of double jeopardy or rule of estoppel does not come into play.

16) Thus, the mere fact that respondent Mushtaq Ahmad had lodged an FIR, which has culminated in lodging of a challan against the petitioner containing allegations relating to the same transaction which is subject matter of the impugned complaints, does not make out a case of

forum shopping or double jeopardy. The complainants are well within their rights to continue prosecution for both these offences i.e. offences under Section 138 of NI Act and Section 420 of IPC simultaneously. The contention of learned counsel for the petitioner in this regard is without any merit.

17) The other contention raised by the petitioner is with regard to belated filing of the impugned complaints. In this regard it is to be noted that the impugned complaints have been filed by respondents/complainants during the period which is covered by the order of the Supreme Court dated 10th January, 2022, passed in the case titled **IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION** (Suo Motu writ petition (C) No.3 of 2020), wherein it has been laid down that the period from 15.03.2020 till 28.02.2022 shall stand excluded in computing the periods prescribed under proviso (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881. In view of the aforesaid order of the Supreme Court, it cannot be stated that the impugned complaints have been filed by respondents belatedly. Therefore, the order of taking cognizance and issuing process by the learned trial Magistrate, which has been impugned herein, does not call for any interference from this Court.

18) For the foregoing reasons, both the petitions lack merit and the same are dismissed accordingly.

19) A copy of this order be sent to the learned trial court for information.

20) Copy of this judgment be placed on both the files.

(Sanjay Dhar)
Judge

Srinagar,
15.07.2022
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***