

THESE APPEALS HAVING BEEN HEARD AND RESERVED ON 05.02.2024, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

JUDGMENT

Appellant/complainant feeling aggrieved by Judgment of Trial Court on the file of XXII Addl. Chief Metropolitan Magistrate, Bangalore city, in C.C.No.9212/2019 and C.C.No.9213/2009 dated 11.04.2014, preferred these appeals.

2. Parties to both the appeals are referred with their ranks as assigned in the Trial Court for the sake of convenience.

3. These two cases are arising out of joint development agreement dated 27.01.2005 between complainant and accused, further, the cheque issued by accused in respective case for return of security deposit came to be dishonoured and the common question of law is to be decided in both these cases. Hence, both the appeals are taken up together for consideration.

4. Heard the arguments of both sides.

5. After hearing the arguments of both sides and on perusal of the Trial Court records, so also the impugned Judgment under appeal, the following points arise for consideration:

- i) Whether the impugned Judgment under appeal passed by the Trial Court in acquitting accused for the offence punishable under Section 138 of N.I.Act is perverse, capricious and legally not sustainable?
- ii) Whether interference of this Court is required?

6. On careful perusal of oral and documentary evidence placed on record, it would go to show that Complainant-M/s.Durga Projects Inc., is a registered partnership firm entered into registered joint development agreement dated 27.01.2005 with B.G.Babu Reddy, B.G.Seenappa and B.G.Narayana Reddy. The complainant has deposited a sum of Rs.27,00,000/- as refundable security deposit, which shall be refunded by the above referred persons after completion of the construction/project and after delivery of owner's share without any interest thereon. Out of them, B.G.Narayana

Reddy and B.G.Babu Reddy issued cheque in respective cases referred above for refund of security deposit being their share amount. The said cheque, on presentation by complainant, came to be dishonoured. Therefore, complainant filed complaint against B.G.Narayana Reddy and B.G.Babu Reddy for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred as 'N.I.Act' for the sake of brevity).

7. The Trial Court, after hearing arguments of both sides and on appreciation of oral and documentary evidence placed before it, acquitted B.G.Narayana Reddy and B.G.Babu Reddy in respective cases referred above vide Judgment dated 11.04.2014.

8. Complainant has challenged the said Judgment of acquittal in both these appeals contending that finding of the Trial Court that pursuant to joint development agreement dated 27.01.2005, the nature of dispute attracts civil action and without approaching the arbitrator under Arbitration and Conciliation Act, the complainant cannot maintain the complaint against accused for the

offence punishable under Section 138 of the N.I.Act, cannot be legally sustained. It is open for the complainant to maintain parallel proceedings, both by invoking the provisions of Arbitration Act and also penal action in terms of Section 138 of N.I.Act.

9. Per contra, learned counsel for the accused in both the appeals have argued that in view of the arbitration clause in the joint development agreement dated 27.01.2005, the dispute ought to have been raised by the complainant before the Arbitrator and criminal action cannot be maintained for the offence under Section 138 of N.I.Act. The liability of accused to pay the amount covered under the cheque which was given as a security refundable deposit could arise only when the completion certificate is issued by the competent authority and the possession is delivered to the accused.

10. On careful perusal of the Judgment of the Trial Court in both the cases, it would go to show that the Trial Court having recorded the finding that nature of dispute between the parties purely attracts the civil nature and

without approaching the arbitrator under Arbitration and Conciliation Act, the complaint filed by the complainant is not maintainable. The Trial Court having recorded such finding, did not address itself to the other aspects of the matter and proceeded to acquit the accused. Whether such acquittal order passed by the Trial Court can be legally sustained or not is to be now decided.

11. Learned counsel for the complainant, in support of her contention that notwithstanding arbitration clause in the joint development agreement dated 27.01.2005, complainant can maintain criminal action in terms of Section 138 of the N.I.Act on dishonour of cheque issued by the accused, relied on the Judgment of Hon'ble Apex Court in **GURUCHARAN SINGH AND ANR. v. ALLIED MOTORS LTD. AND ANR.** reported in **(2005)10 SCC 626**, wherein, it has been observed and held as under:

The complaints were filed before the award was made. It is also not in issue that objections to the award are pending. It is elementary that the civil proceedings or arbitration proceedings for recovery and the criminal proceedings under Section 138 of the Negotiable instruments Act are based on independent cause of action. The making of the award may be a defence to such a complaint but to what extent the defence would be valid, shall

depend upon the facts and circumstances of each case. Mere making of the award cannot be a ground to stall or stay the proceedings initiated under Section 138 of the Negotiable Instrument Act.

12. Reliance is also placed on the Judgment of Hon'ble Apex Court in **STATE OF RAJASTHAN vs. KALYAN SUNDARAM CEMENT INDUSTRIES LTD. AND ORS.** reported in **(1996)3 SCC 87**, wherein the High Court stayed the proceedings of civil suits pending disposal of criminal cases. The Hon'ble Apex Court held that it is settled law that pendency of the criminal matters would not be an impediment to proceed with the civil suits.

13. Learned counsel for the complainant also relied on another Judgment of Hon'ble Apex Court in **SRI KRISHNA AGENCIES v. STATE OF A.P. AND ANR.** reported in **(2009)1 SCC 69**, wherein it has been observed and held as under:

Section 138 of Negotiable Instruments-- Act Cannot be quashed on ground that arbitration proceedings between parties pending -- No bar to simultaneous continuance of criminal proceeding--Impugned order set aside-- Complaint restored.

14. Reliance is also placed on another Judgment of Hon'ble Apex Court in **TRISUNS CHEMIAL INDUSTRY vs. RAJESH AGARWAL AND OTHERS** reported in **(1999)8 SCC 686**, wherein, it has been observed and held at Para No.9 as under:

We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of it own. Pre-emption of such investigation would be justified only in very extreme cases.

It is also profitable to refer another Judgment of Hon'ble Apex Court in **D.PURUSHOTAMA REDDY AND ANOTHER vs. K.SATEESH** reported in **(2008)8 SCC 505**, wherein it has been observed and held as under:

"Although, it is beyond any doubt or dispute that for the same cause of action, both civil and a complaint petition under Section 138 of N.I .Act would be maintainable, in terms of Section 357 of Cr.P.C., a duty is cast upon the civil courts to take into consideration into

account the sum paid or recovered as compensation in the criminal proceedings. The Judgment of conviction and sentence was passed by the Criminal Court on 15.12.2005. The suit was decreed by the Civil Court on 23.01.2006. Deposit of a sum of Rs.2,00,000/- by the appellants in favour of respondent was directed by the Criminal Court. Such an order should have been taken into consideration by the Civil Court."

15. In view of the principles enunciated in the aforementioned Judgments of Hon'ble Apex Court, it is evident that parallel proceedings under Arbitration Act and criminal action in terms of Section 138 of the N.I.Act can be maintained. If at all there is any award by the proceedings before the arbitration, then at the most, it can be a defence to the accused and cannot be a ground to hold that complaint under Section 138 of N.I.Act is not maintainable. Similarly, if the civil suit is decreed on the same cause of action of the amount covered under the cheque, the deposit made in criminal case has to be adjusted.

16. The Trial Court undisputedly has acquitted the accused on the sole ground that the joint development agreement dated 27.01.2005 stipulates that any dispute

has to be referred to the arbitrator and the matter being of civil in nature, complainant cannot maintain complaint under Section 138 of N.I.Act. In view of principles enunciated in the afore mentioned Judgments of Hon'ble Apex Court, the said finding of the Trial Court cannot be legally sustained and as a consequent result, accused cannot be acquitted on the said ground. The Trial Court did not address itself on merits of the case and therefore, the matter in both the cases are required to be remanded to the Trial Court for disposal of the same in accordance with law by giving opportunities to both the sides and for the said purpose, interference of this Court is required. Consequently, proceed to pass the following:

ORDER

Appeal filed by the appellant-complainant in Criminal Appeal No.434/2014 and 433/2014 are hereby allowed.

The Judgment of the Trial Court on the file of XXII Addl. Chief Metropolitan Magistrate in C.C.No.9212/2009 and 9213/2009 dated 11.04.2014 are hereby set aside.

The matters are remanded to the Trial Court for disposal of the same, in accordance with law, as expeditiously as possible by giving top priority, since it is a matter of 2009 and the counsels to co-operate for early disposal of the cases.

In order to avoid further delay, the parties who are now represented through their counsel, are directed to appear before the Trial Court on 11.03.2024 to receive further instructions from the Trial Court.

Registry to send back the records to Trial Court with a copy of this order.

SD/-
JUDGE

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