

THE HIGH COURT OF SIKKIM AT GANGTOK
(Criminal Writ Jurisdiction)

DATED : 26.07.2013

CORAM

**HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PIUS C. KURIAKOSE**

W.P. (Crl.) No. 1 of 2011

Radhey Shyam Swami,
S/o Late Lakman Ram Swami,
Prop. Apsara Saree Centre,
Sitla Bazaram, P.O. Soodulpur,
Distt. Churu,
Rajasthan.

.... **Petitioner.**

- versus -

1. Amrit Singhi,
S/o Late Amar Singh Singhi,
R/o Lall Market Road, Gangtok
P.O. & P.S. Gangtok,
(East Sikkim)
Pin – 737 101.

2. State of Sikkim,
Through the Chief Secretary,
Government of Sikkim,
Gangtok,
Sikkim.

..... **Respondents.**

For Petitioner : Mr. Eklovyra Rai Nagpal, Advocate.

For Respondents : M/s. A. Moulik, Sr. Advocate with K. D. Bhutia, Manish Kr. Jain, Pujan Kharka and


Ranjit Prasad, Advocates for respondent No.1.

M/s. Karma Thinlay, Sr. Govt. Advocate and S. K. Chettri, Asstt. Govt. Advocate for the State-respondent No. 2.

J U D G M E N T


Pius, CJ

This petition is filed by the first respondent in Crl. Revision No. 4 of 2009 on the files of the Court below namely, the Sessions Court, East and North Sikkim at Gangtok, invoking not only the constitutional provisions under Articles 226 and 227 of the Constitution of India but also under Section 482 Cr. P.C. - the inherent jurisdiction of this Court, seeking quashment of order passed by the Court below setting aside orders of discharge, which had been given to the petitioner by the Chief Judicial Magistrate, East and North Sikkim at Gangtok in Private Complaint Case Nos. 2/2010, 03/2010 and by Judicial Magistrate's Court in 13/2010, where the petitioner was the accused. Copies of the orders passed by the learned Chief Judicial Magistrate have been placed on record by the petitioner in Private Complaint Case No. 2/2010 and 3/2010 respectively as Annexures P-2 and P-3, while Annexure P-4 is the order of discharge passed by the




learned Judicial Magistrate (East & North) at Gangtok in favour of the petitioner and Annexures P-2 and P-3 are orders passed by the Chief Judicial Magistrate subsequent to passage of the impugned order in revision by the learned Sessions Judge. This petition challenges those subsequent orders also .

2. The facts, briefly stated, are that the first respondent as complainant filed three private complaint cases against the petitioner under Section 138 of the Negotiable Instruments Act, 1881 before the Court of the Chief Judicial Magistrate (East & North) at Gangtok and, according to the petitioner, he and the complainant settled all their disputes involved in all the three cases between themselves and entered into an agreement on 26.06.2009. The petitioner says that on the basis of the agreement which he entered into with the respondents, he filed an application on 03.09.2009 before the trial Court seeking composition of the offences alleged against him and the Court on noticing the agreement entered into between the parties, which is not in dispute, disposed of all the three cases as compromised and the petitioner-accused was discharged. The complainant-respondent challenged the above order of discharge by filing three separate revision petitions before the Court of Sessions, East and North Sikkim at Gangtok.




3. The petitioner's grievance is that the learned Sessions Court, though did not have jurisdiction to entertain the revisions did entertain the same and would set aside the order of discharge passed by the Magistrate and remit the three complaints back to the trial Court for resumption of trial. In the Memorandum of Writ Petition, the petitioner has raised various grounds of challenge against the common order passed by the Sessions Court. *Inter alia*, it is urged that the order passed by the Magistrate, which was challenged in revision before the Sessions Court had effected acquittal of the accused and hence the revisions were not maintainable.

4. It is urged that it is without properly applying the mind as to the contours of the jurisdiction under Section 378 (4) of Cr. P.C. that the learned Sessions Court entertained the revisions and ultimately allowed them. It is urged that the learned Sessions Court would have found that the remedy available to the respondent-complainant even if he had a genuine grievance was to file a regular appeal before this Court after obtaining leave. Apart from raising grounds of challenge against any order passed by the Sessions Court, the petitioner has raised grounds against the orders passed by the Magistrate pursuant to the common order passed by the Sessions Court and on the basis of the ground, it is prayed that the common




order passed by the Sessions Court as well as the subsequent orders passed by the trial Court based on the above common order is set aside and the original order of discharge passed by the Magistrate is restored.

5. On entering appearance, the first respondent-complainant had filed a counter affidavit. Through the above counter affidavit, the first respondent has repudiated the various grounds raised by the petitioner in challenge of the common order passed by the Sessions Court and the subsequent order passed by the Magistrate's Court. It is contended that no case is made out for invocation of Articles 226 and 227 of the Constitution of India and much less the inherent powers under Section 482 of the Cr. P. C. As a preliminary contention it is urged that the petitioner in one breath challenged the common order passed by the Sessions Court, while in the next breath, he challenges the order passed by the Magistrate after submitting to the jurisdiction of the Magistrate in obedience to the impugned common order. It is contended that the order passed by the Chief Judicial Magistrate on 03.09.2009 discharging the petitioner is not an order of acquittal as contemplated by Chapter XX of Cr. P.C. It is pointed out that the cheque, which was the subject matter of the Private Complaint Case No. 02/2010, was for a sum of Rs.1,00,45,837/-. It is




further pointed out that the subject matters of the Private Complaint Case No. 03/2010 were two cheques of a total value of Rs.1,69,60,761/- and lastly, it is pointed out that the cheque, which was the subject matter of the Private Complaint Case No. 05/2005, was for a sum of Rs.50,00,000/-. As regards the Private Complaint Case No. 02/2010, it is pointed out that no witness was examined in that case, but as regards the Private Complaint Case No. 3/2010, the evidence of the complainant was completed and the case stood posted for adduce of defence evidence. As regards Private Complaint Case No. 13/2010, it is pointed out that in that case the evidence of both sides was completely recorded and was posted for final hearing. It is then pointed out that the three complaint cases referred to by the petitioner were not the only complaints filed by the respondents against the petitioner. Yet another 4th case, being the Private Complaint Case No. 18/2006 had also been filed by the complainant's paternal uncle against the petitioner. That complaint case was finally disposed of resulting in conviction of the petitioner for the offence alleged and an appeal is pending at the instance of the petitioner in that case which is now pending before the Sessions Court.

6. It is pointed out that the agreement relied on by the petitioner in the petition pertains to settlement of all the above four



cases in which the petitioner is accused. In the counter affidavit the first respondent refers extensively to the various clauses in the agreement dated 26.06.2009 and alleges that the petitioner has violated some of the important clauses of that agreement particularly clause No. 5, which is to the effect that the petitioner, who is the second party, shall clearly demarcate 7 (seven) Bighas of land situated at Check Post Kasba Rajgarh, Rajasthan and hand over its peaceful possession from all encumbrances thereof to the petitioner or their authorised representative within six months from the date of agreement.


7. The counter affidavit points out that in terms of clause 9 of the agreement, the agreement itself will be treated as null and void and unenforceable in the eye of law, if any of the parties infringes any of the terms and conditions set forth in the agreement. According to the first respondent as the petitioner violated clauses 3, 4, 5 and 6 of the agreement, the agreement has become null, void and unenforceable. The first respondent contends that his obligation to withdraw from the complaint against the petitioner arises only when the petitioner discharges all his obligations under the agreement.



8. It is contended that it is Section 257 of the Cr. P.C. which provides for withdrawal of a complaint and the order passed by the learned Magistrate is not on the basis of actual withdrawal of the complaint by the complainant. The order purports to be on the basis of the above agreement dated 26.06.2009 which already had become unenforceable on account of non-performance of the conditions by the petitioner.


9. It is then contended in the counter affidavit that the observation of the learned trial Court that the parties had compromised the case is incorrect as Section 147 of the NI Act does not contemplate a compromise of this nature. There can be a compromise on the basis of an agreement only when all the mutual terms of agreement are fulfilled. Even monetary portion of the agreement was paid 2 years after the order dated 03.09.2009 was passed. Even now several terms of the agreement remain unfulfilled.

10. It is then contended that the orders dated 03.09.2009 were passed by the trial Court not on the grounds mentioned in Sections 251 to 257 of Cr. P.C. of Chapter XX of Cr. P.C. 1973, but the order was passed under Section 258 Cr. P.C. forgetting that the same was being passed on a private complaint. The orders passed by the



trial Court are not orders of acquittal, but they are orders of discharge stopping the proceedings on the basis of an alleged compromise. It is contended that the orders of the Magistrate cannot attract provision of Section 147 in view of the obvious position that the parties did not sign and file a compromise petition, the observation of learned Sessions Court in the impugned order that there was no compromise is perfectly correct.


11. It is then contended that the learned Magistrate passed this order on a date not fixed for a regular hearing of the case and on that fateful day a prayer was made for recalling of an N.B.W.A. which had been issued against the petitioner and during the course of this submission for recalling the N.B.W.A. the petitioner's counsel made a submission that the matter has been fully settled and that is why the petitioner is not appearing in the Court. It was ignoring the opposition of the learned counsel for the respondent to the above submission that the Magistrate passed the order discharging the petitioner. The counter affidavit reiterate the contention that the orders passed by the Magistrate on 03.09.2009 was without the jurisdiction or amounted to erroneous exercise of jurisdiction. They were not orders of acquittal and the only remedy available was revision which was rightly entertained by the learned Sessions Court.



12. It is then contended that by filing the present writ petition before this Court invoking both the supervisory jurisdiction under Article 227 and inherent jurisdiction under Section 482 Cr. P.C. the petitioner is trying to get an exoneration from the liability to pay a staggering sum of Rs. 2,85,45,837/- including the value of land which he on the terms of the agreement is bound to convey. The total stake involved in all the 4 cases including the case pending before the learned appellate Court is Rs.3,20,06,598/- out of which he has actually paid only Rs.35 lakhs. The counter affidavit proceeds to deny and repudiate the various grounds, averments contained in the writ petition.


13. I have heard the submission of Shri Eklovya Rai Nagpal, learned counsel for the petitioner submitted at the very outset that the learned Chief Judicial Magistrate (East & North) disposed of Private Complaint Cases No.5/2005, 7/2005 and 8/2005 fully and finally, thereby virtually acquitting the petitioner who was the accused. Therefore, in terms of Section 378(4) of Cr.P.C., the remedy available to the aggrieved person was to prefer an appeal before this Court after obtaining special leave to appeal. According to the learned counsel, the learned Sessions Judge acted without any jurisdiction in entertaining the revision. Learned counsel submitted that inasmuch as

the common order dated 19.05.2010 passed by the learned Sessions Judge was without jurisdiction, the same order amounts to nullity. Learned counsel submitted that the learned trial Court on application submitted by the petitioner's counsel recorded the composition of offences involved in Private Complaint Cases No. 05/20-05, 07/2005 and 08/2005 and disposed of the cases on the basis of agreement of compromise dated 26.06.2009. The learned counsel submitted that the counsel appearing for the complainant also conceded that the parties have entered into an agreement of compromise on 26.06.2009, compromising the issues between them. Learned counsel submitted that the Sessions Judge should have found that as the proceedings under Section 138 of the NI Act were being conducted in accordance with the proceedings laid down under Chapter XX for summons trial "discharge" of the accused was not possible. In such acquittal and not discharge as in a warrant trial proceedings was possible. Learned Sessions Judge should have seen that the remedy available in law to the aggrieved complainant was only an appeal under section 378 (4) Cr. P.C. with special leave. The learned counsel reiterated that the impugned common order has been passed without jurisdiction. As regards the order passed by the trial Court resuming the trial pursuant to the order passed by the learned Sessions Court, learned counsel submitted that the trial Court should have ignored the Sessions Court's




order as the same was passed without jurisdiction and hence a nullity. Referring to Annexure P-6 receipt learned counsel submitted that the entire amount payable in terms of the agreement dated 26.06.2009 of Rs.35 lakhs is paid by the petitioner to the respondent and was received by the respondent without any demand. Learned counsel submitted that it is after payment of the entire amount as per Annexure P-6 receipt that the petitioner filed Annexure P-7 application in P.C. Cases No. 2/2010 and 3/2010 for disposal of the cases in terms of the agreement dated 26.06.2009. The learned counsel submitted that on the basis of the agreement the complaint filed by the petitioner against the respondent was withdrawn. The learned counsel submitted that Annexure P-7 application was dismissed by the learned trial Court with cost of Rs.2,000 in each case by passing the orders which are also impugned in this writ petition and the cases are now posted on 19.05.2013 for trial.

14. Learned counsel submitted that during the initial hearing of the present writ petition a contention was raised by the respondent that the petitioner had not handed over the vacant possession of 7 bighas of land situated in Rajgarh, Rajasthan. It was also submitted that once the petitioner does that, it may be possible to say that the petitioner has complied with all his obligations under the agreement. When the issue as to whether the above 7 bighas of land was actually




available in the possession of the petitioner became controversial, this Court appointed an Advocate Commission for finding out whether the land measuring 7 bighas was lying vacant and if so whether the petitioner would hand over the same to the respondent at spot. But the Advocate Commission reported that the entire land extending to $41\frac{3}{4}$ bighas of land were subject matter of original agreement of sale had vested in Nagarpalika from 04.10.2002 by the order of SDM, Rajgarh as per Section 90 of the Rajasthan Land Revenue Act read with Section 63(1) & (2) of the Rajasthan Agricultural Act, 1955. It has thus become impossible for the petitioner to hand over the vacant possession of the above 7 bighas of land. The agreement dated 26.06.2009 had thus become frustrated on account of reason outside the powers of the petitioner. The Advocate Commission Report also revealed that the entire extend of $41\frac{3}{4}$ bighas of land was actually in the name of the deceased father of the respondent and his 5 siblings and therefore the father alone could not have authorised the sale of any portion of the said un-partitioned land through the petitioner by execution of a power of attorney.


15. The learned counsel submitted that as provision of discharge is not applicable to the present case which is a private complaint case tried under Chapter XX of Cr. P.C., the order which is styled by the Magistrate as an order of discharge has to be read as an



order of acquittal and in support of the above submission Mr. Eklova Rai Nagpal relied on a number of decisions. Relying on the judgment of the Delhi High Court in **R.P.G. Transmission Ltd. Vs. Sakura Seimitsu (I) Ltd. And others : 2005 Cri. L.J. 2862**, he submitted that the fact situation in the above case is comparable to the fact situation in the present case. According to him, it is held by the Delhi High Court that as Section 258 which enables the Magistrate to stop the proceedings in a summons case which is not applicable to summons case instituted upon private complaints, the order of discharge has to be read as an order of acquittal. Mr. Nagpal also relied on the judgment of the Bombay High Court in **Om Gayatri and Co. & ors. vs. State of Maharashtra & Anr. : 2006 Cri L.J. 601** taking the view clearly that against an order of acquittal by the Magistrate under Section 256 (1) Cr. P.C., under revision, the learned Sessions Judge had no jurisdiction to entertain a revision. Reliance was placed by the learned counsel on a judgment of the Supreme Court in **Damodar S. Prabhu vs. Sayed Babalal H : AIR 2010 SC 1907**. It was submitted that after trial the progression of further legal proceedings in a case of trial under Section 143 NI Act for an offence under Section 138 NI Act would depend on whether there has been a conviction or an acquittal. In the case of conviction an appeal would lie to the Court of Sessions, thereafter a revision to the High Court




under Section 397/401 of the Cr. P.C. and finally a petition before the Supreme Court seeking special leave to appeal under Article 136 of the Constitution of India. Thus in the case of conviction there will be four levels of litigation. Whereas in the case of acquittal by the Judicial Magistrate, First Class (JMFC) remedy of the complainant would be to appeal to the High Court under Section 378 (4) Cr. P.C. and thereafter for special leave to appeal to the Supreme Court under Article 136. Therefore, there will be 3 levels of proceedings in the case of conviction for an offence under Section 138 NI Act. The revision entertained by the learned Sessions Judge against an order of acquittal was clearly not maintainable. Mr. Nagpal referred to the judgment of the Delhi High Court in **Kalpana Tyagi vs. Sneh Lata Sharma : 2003 Cri. L.J. 3395** It was submitted that that a distinction has to be drawn in regard to the complaints dismissed prior to the summoning of an accused and those dismissed subsequent to the summoning of the accused. If a complaint is dismissed prior to the summoning of an accused, the order can be challenged by way of filing a revision. But once Section 256 comes into play, the dismissal of a complaint has the effect of acquittal of the accused and hence the only remedy available to the complainant is to file an appeal under Section 378 of the Cr.P.C. The learned counsel relied on the judgment of the Supreme Court in **State of Madhya Pradesh vs. Dewadas &**



Ors. : AIR 1982 SC 800. It was submitted that against orders of acquittal passed in any case instituted in private complaint, the remedy available to the complainant was only an appeal with leave and not revision. The learned counsel relied on the judgment of the Allahabad High Court in **Jhantoo & ors. Vs. State of U.P. : 2010 Cr.L.J 2777** and submitted that whenever an order of acquittal in any private complaint case is passed by a trial Court, the remedy is to file an appeal against the acquittal after the special leave to appeal from the High Court under Section 378(4) of the Cr.P.C. and not a revision. Reliance was placed by the learned counsel also on the judgment of the Supreme Court in *State (Delhi Administration) vs. Dharampal* : AIR 2001 SC 2924 and it was submitted that remedy available to an aggrieved complainant when the accused is acquitted in a private complaint case, is an appeal under Section 378(4) and not a revision.


16. It was submitted that no useful purpose may be served by continuing with the trial of the case as during the pendency of three private complaint cases, the parties entered into a compromise through an agreement. Even if it is true that the agreement failed then the remedy is to approach the civil court for appropriate reliefs based on the agreement and not to continue with the original complaint cases, which are sure to result in acquittal of the accused-petitioner in view of the subsequent agreement.

17. Mr. A. Moulik, learned senior counsel for the respondent would resist all the submissions of Mr. Nagpal. He submitted that the original facts relating to the three private complaint cases against the petitioner should not be lost sight of. The petitioner who is known to the respondent and his late father was given power of attorney for selling out their landed property. The petitioner sold out the properties of the first respondent for a sum of Rs.3,20,06,598/- but the said amount, which the petitioner was bound to pay to the respondent or to his late father, was not paid to them. After much persuasion, the petitioner issued 4 (four) bank cheques amounting to Rs.69,60,761/-, Rs.50,00,000/-, Rs.1,00,00,000/- and Rs.1,00,45,837/- in total Rs.3,20,06,598/-. All the four cheques were dishonoured by the bankers. Therefore, four private complaints were filed against the petitioner for offence under Section 138 N.I. Act. In one case where the cheque amount was Rs.69,60,761/-, the petitioner was convicted by the trial Court and an appeal preferred by him is now pending before the Sessions Judge. The second case was P.C. Case No.05/2005 (renumbered as 13/2010) involving a cheque for Rs.50,00,000/- now at the final hearing stage before the trial Court. The third case relating to cheque for Rs.1,00,00,000/- being P.C. Case No.07/2005 (renumbered as 03/2010) was at the stage of defence evidence. The fourth case involving a cheque of Rs.1,00,45,837/-




numbered as P.C. Case No.08/2005 (renumbered as 02/2010) is even now pending and evidence has not yet started in that case.

18. It was during the pendency of the case that the petitioner entered into an agreement dated 26.06.2009 (Annexure-P5) with the first respondent and his late father. The terms of the agreement were that the petitioner shall pay a sum of Rs.35,00,000/- to the respondent starting from 26.06.2009 till 25.06.2011 on instalment basis. The petitioner will execute sale deed in respect of some of his land within certain time and clause 7 of the agreement provides that the first respondent shall withdraw the case pending before the Chief Judicial Magistrate's court and the Judicial Magistrate's court after the matter is finally settled. Clause 9 of the agreement clearly provides that if the party does not fulfil any of the terms of the agreement then the agreement shall become null and void and unenforceable in the eye of law. The terms of the agreement amount to a contingent contract. Mr. Moulik submitted that unless and until all the terms of the agreement are fulfilled, the petitioner cannot be absolved from the binding nature. According to Mr. Moulik, the petitioner never complied with the terms of the agreement. He paid only Rs.7,00,000/- and he cleared the balance amount of Rs.28,00,000/-only on 15.02.2011 as per Annexure-P6. The payment of balance amount was made long after the order discharging him was passed by the learned trial Court




on 03.09.2009. Therefore, it is clear that at the time of the order of discharge passed by the Magistrate, the petitioner had not discharged his obligations in the agreement. Mr. Moulik submitted that the petitioner could secure the order of discharge from the Magistrate by misleading the Court and misrepresenting to the effect that the terms of the agreement has been fulfilled. But as on the date when the Magistrate passed the order of discharge, the petitioner had paid only Rs.7,00,000/-. In view of Clause 9 of the agreement, the agreement became null and void long before 03.09.2009.

19. The learned senior counsel submitted that 03.09.2009 was not a date when the cases stood posted for regular hearing. After the agreement was made for compromising the matter, the accused/petitioner remained absent on the date fixed for hearing in the case and he did not even file any time petition. As a result, the learned trial Court issued N.B.W.A against him. On coming to know about N.B.W.A. order, he filed a petition for recalling the N.B.W.A. order claiming that there was an agreement and because of that agreement, he did not appear. It was on 03.09.2009 and on that day, he produced the agreement dated 26.06.2009 (Annexure-P5) and claimed that the same was compromised and that he had fulfilled the terms of compromise, the proceeding should be closed and warrant order be recalled. The learned senior counsel submitted that the




matter was not finally settled and the accused/petitioner did not clear the entire amount and that the terms of the agreement were not fulfilled yet. The Magistrate ignored the above submission of the learned counsel and discharged the accused on the ground of execution of the agreement dated 26.06.2009. According to Mr. Moulik, if the trial Court had perused the agreement, it would have been revealed that the accused/petitioner did not finally settle the terms of the agreement and hence, could not be discharged. No proper compromise petition has been filed and without a proper compromise signed by both the parties, the case could not be disposed of.

20. Reliance was placed by Mr. Moulik in judgment of the Supreme Court in **K. Gyansagar vs. Ganesh Gupta & Anr. : (2005) 7 SCC 54**. Mr. Moulik submitted that the petitioner claims that any order passed by the learned Sessions Judge interfering with the order of "discharge" passed by the Magistrate was illegal. Significantly, the petitioner did not prefer any appeal or revision before the High Court against that order but the petitioner went to the Court of the Chief Judicial Magistrate requesting to disobey the said order passed by the learned Sessions Judge. The petitioner also filed an application for compounding the offence under Section 147 of the N.I. Act. From this, it will be clear that he had not earlier filed any



application under Section 147 of the N.I. Act. Mr. Moulik submitted that cases under the N.I. Act are triable by summons procedure. It is Chapter XX of the Cr.P.C. which deals with such cases. Sections 251 to 259 are the relevant sections. Section 255 Cr.P.C. provides that before acquitting or convicting an accused, the Court shall have to record entire evidence as required under Section 254 Cr.P.C. and thereby, the Court could pass order of acquittal or conviction. The present one being a case registered on the basis of a private complaint and not on the basis of a police case, the trial Court had no option but to acquit or convict the accused only after recording the entire evidence as contemplated under Section 254 Cr.P.C.. Therefore, the order passed by the trial Court cannot be an acquittal order. Section 258 Cr.P.C. alone allows the Magistrate to stop the proceedings midway but Section 258 is applicable only in a police case. In the present case, the proceedings were stopped midway and the accused was discharged ignoring the fact that the cases were private complaints. The order of the learned Judicial Magistrate was without the jurisdiction. Section 257 Cr.P.C. enables the Court to withdraw of a complaint but it is only the complainant who is enabled to withdraw this complaint. This has not happened here. The order of the Magistrate is nothing but a discharge order. Mr. Moulik also submitted that appeal pending before the learned Sessions Judge could




be compromised only after that appellant Court grants leave to compromise as required under Section 320(2) Cr.P.C. In this regard, the judgment of Supreme Court in **Bharat Singh vs. State of M.P. & Anr. 1990 (Supp) SCC 63** was relied on.

21. I have given my anxious consideration to the pleadings raised by the parties and also to the rival submissions addressed at the Bar. I have kept in mind the ratio emerging from the various decisions cited before me. I carefully read through the common order of the learned Session Judge and the subsequent orders passed by the Magistrate dismissing the application filed by the petitioner for recording compromise under Section 138 NI Act. The first question to be decided is as to whether the common order passed by the learned Sessions Judge is vitiated by an error of jurisdiction as contended by the learned counsel for the petitioner. The argument was that the order of discharge passed by the learned trial court stopping the proceedings in the private complaint cases even before trial and thus letting the petitioner's go whether the above order amounts to an acquittal attracting Section 378(4) Cr. P.C. The above arguments of the petitioner gets support from the judgment of the High Court of Delhi in **R.P.G. Transmission Ltd. Vs. Sakura Seimitsu (I) Ltd. & ors : 2005 Cri. L.J. 2862**, the judgment of the Bombay High Court in


Om Gayatri and Co. & ors. vs. State of Maharashtra & ano. : 2006 Cri L.J. 601 and also the judgment of the Delhi High Court in **Kalpana Tyagi vs. Sneh Lata Sharma : 2003 Cri. L.J. 3395.**

22. I am, however, not inclined in this case to adopt the ratio of the above three judgments and accept the arguments of the learned counsel for the petitioner that the order passed by the trial Court disposing of the private complaint cases on the basis of the agreement of compromise amounted to acquittal and, therefore, the remedy available to the complainant/ respondent was only an appeal before this Court with special leave. Obviously, the cases of offences under the Negotiable Instruments Act are triable by summons procedure, which is governed by Chapter XX of the Cr.P.C. Section 255 provides very clearly that an order of acquittal can be passed only after the entire evidence is recorded. It is Section 258 which alone entitles the Magistrate to stop the proceedings midway and to discharge the accused but the Section 258 applies only in cases initiated on the basis of a police report. In the present case, the learned Magistrate stopped the proceedings midway and set the petitioner/accused at large by passing an order of discharge which could not have been passed as the case was one passed on private complaints. Annexure-P5 agreement was entered into between the




parties; but the complainant did not file an application for withdrawal. The complainant had his own reason for doing so. According to him, the petitioner/accused had not discharged his obligations under Exhibit-P5. Compromise of a case is a bilateral activity. Just because the agreement Annexure-P5 has been entered between the accused and the complainant the trial Court will not be justified in straightway disposing of the private complaint cases in the absence of a bilateral application signed by both the parties. The position is well settled by a judgement of the Supreme Court in **K. Gyansagar vs. Ganesh Gupta & Anr. : (2005) 7 SCC 54**. It cannot also be forgotten that one of the cases between the parties is pending before the Sessions Court and the above case can be compromised only by obtaining leave from the Appellate Court. This position is also settled by judgement of the Supreme Court in **Tanveer Aquil vs. State of Madhya Pradesh & Anr. : 1999 Supp. SC 63**.

23. I also notice in the above context that on the day when learned trial Court passed the order disposing of the private complaints and discharging or releasing the accused, the case stood posted not for hearing or disposal, on the contrary the case stood posted for consideration of an application filed by the petitioner for recalling of the NBW which has been passed against him as he was absent on a previous posting date of the case. The action of the




learned Magistrate in taking up the matter and disposing of the whole case fully and finally on the basis of the agreement of compromise was highly irregular. The above irregularity was certainly liable to be corrected in revisional jurisdiction by the learned Sessions Court. I, therefore, approve the common order passed by the learned Sessions Judge, which is impugned in this writ petition to the extent the same set aside the order of discharge passed by the learned Trial Court after disposing of all the private complaints as compromised.

24. I shall now deal with the correctness of the subsequent orders Annexure-P2 datged 18.04.2011 passed by the Magistrate in P.C. Case No.2/2010, Annexure-P3 of even date passed by the same Court in P.C. Case No.3/2010 and the order dated 24.05.2010 passed by the learned Judicial Magistrate in P.C. Case No.13/2000. By Annexures-P2 and P3, learned Chief Judicial Magistrate has dismissed the application filed by the accused seeking a summary disposal of the two private complaint cases with costs. By Annexure P2, the learned Chief Judicial Magistrate dismissed the application filed by the accused wherein the prayer was for a disposal of those two private complaint cases in terms of an agreement of compromise entered into between the parties. The premise on which the application was filed was that the common order passed by the learned Sessions Judge in Criminal Revision Cases 4, 5 and 6 was in nullity and was liable to be ignored



by the learned Chief Judicial Magistrate. Per contra, in the order dated 24.05.2010 passed by the Judicial Magistrate is only to direct the registration of a case in private complaint on the basis of the direction issued by the Sessions Judge in the common order in three revision cases. In the view, I have taken regarding the legality of the common order passed by the Sessions Court in the three criminal revisions, I am in a position to sustain Annexures-P2 and P3 and also the order dated 24.05.2010.


25. At the same time, there are certain things which should be noticed. The three private complaints were instituted on the basis of cheques dishonoured. Cheques issued by the petitioner/accused were admittedly dishonoured. It is an admitted fact that during the pendency of the private complaint cases, the parties entered into Annexure-P5 agreement. One of the terms of the agreement was that the petitioner/accused shall pay Rs.35.00 lakhs within a time stipulated in the agreement. It is apparent that within the stipulated time, the payment was not made. Another important condition which is required to be fulfilled by the petitioner/accused is that a delivery of 7 bighas of land situated at Check Post Kasba, Rajgarh, Rajasthan and handed over its peaceful possession from free of all encumbrances to the complainant. A further condition is that the accused shall immediately withdraw two cases filed by him against the complainant.



Yet another condition is that the complainant shall, on receiving the amounts due from the accused, prepare a sale deed in respect of the 41¾ bighas of land situated at Check Post Kasba, Rajgarh, Rajasthan in his favour and send the same to the accused, who shall ensure that a sale deed signed by all the persons who are legally required to sign the same for ensuring transfer of the said land in the name of the accused. Clause 9 of Annexure-P5 agreement is to the effect that in case any of the parties infringes any of the terms and conditions set forth in the agreement shall become null, void and unenforceable in the eye of law.

26. The arguments seriously advanced before me by Mr. Moulik are that as admittedly there has been violation of terms of agreement (most of the violation being from the part of the accused). The agreement has become null, void and unenforceable and hence ought to be ignored completely.


27. The above argument does not impress me much. The execution of the agreement can have certain implications on the sustainability of the three private complaints which were instituted on the basis that the cheque issued by the accused was dishonoured. Legal consequences of the action of the parties in entering into an agreement in respect to the subject matter of the private complaints



while the complaints were pending trial (and also in respect of matters outside the complaint) ought to be considered by the trial Courts before they take up the trial of the cases. The private complaints, when they were filed, certainly maintainable in law but the subsequent conduct of the parties in entering into an agreement out of their own volition and by binding themselves to the various terms and conditions contained in the agreement is a matter of immense consequence on the sustainability of the private complaints, in the present situation, where admittedly a portion of the amount covered by the cheques has been paid by the accused and received back from the accused by the complainant.

28. It is doubtful whether the accused petitioner can be convicted after trial in view of the subsequent event. More importantly the position is admitted that during the pendency of 3 cases the parties did enter into an agreement for the settlement, the terms of which, if honoured, could have resulted in settlement of all the disputes between them including the disputes involved in these cases. Clause (9) of the above agreement, Annexure P-5, certainly provides that if either party violates the conditions of the agreement, the agreement itself will become null and void. Even though parties have agreed so, it is difficult for me to accept the argument that the agreement has become null and void due to non-performance of its


conditions what happens when any condition of any agreement is not performed or is violated the agreement fails or in other words, there is breach of agreement. Breach of agreement does not render the agreement null and void. On the contrary, the breach of agreement may give right to action damages or specific performance of the terms of the agreement, if the agreement is specifically enforceable. Whatever that be the breach of the agreement gives rise to a cause of action before a competent civil court and not before the criminal court. In the instant case the main condition which has been said to be violated by the petitioner is the condition regarding the delivery of 7 bighas of land in Rajgarh. As regards that the petitioner's case is that even without his knowledge and consent the above land was acquired by the Nagarpalika and hence the agreement to the extent of compelling him to deliver 7 bighas of land has become incapable of performance. This Court did conduct an enquiry into the correctness of the above stand taken by the petitioner. This Court deputed an Advocate, who went over to the property in question and conducted an enquiry and submitted a report. I am of the view that the parties may have to ultimately work out their respective remedies out of the agreement before a competent forum. I clarify that the above views I have expressed in the above context of the implications of its breach of agreement are provisional and are made for the purpose of deciding



only this writ petition. At the same time I cannot accept the argument of Mr. A. Moulik that the agreement be ignored as the same has become null and void. I feel that the implications of the parties entering into an agreement in these 3 cases and sustainability of the accusation in these 3 cases should be considered by the learned trial Court before actually trial of the cases is taken up. I also notice that receipt of Rs.35.00 lakhs is not the only benefit derived already by the respondent. He desired the benefit of the complaint against him being withdrawn.

29. Hence even as I decline to interfere with the common order of the learned Sessions Court and the orders of the Magistrate which are impugned in this writ petition, I dispose of this writ petition, issuing the following directions:-

- (i) The trial Court which is presently in seisin of 3 cases i.e. P.C. Case Nos. 2/2010, 03/2010 and 13/2010, will before actually trial is taken up hear both the sides regarding the sustainability of the 3 cases in the context of Annexure P-5 agreement admittedly entered into by the parties and also the cash payment and withdrawal of complaint against the respondent which has taken place subsequently petitioner.
- (ii) Trial will be taken up by the Courts only on the basis of findings entered by the Courts based on the above hearing on the sustainability of the cases. If the Court feels that



the P.C. cases are no longer sustainable and the remedy of the parties is to work out their reliefs from a competent court on the basis of the agreement, which is admittedly violated, the Courts will be justified on disposing of these 3 cases in that manner issuing appropriate directions.

- (iii) Coming to the case which is pending in appeal, I direct the learned Sessions Judge, who is seized in that appeal to summon the appellant and the respondent to the Court Hall and to explore the possibilities of a settlement of all the issues between the parties before actual hearing of the above appeal is taken up.
- (iv) The appeal will be heard and disposed of finally only if the learned Sessions Judge is convinced that out of Court settlement is out of question.

30. The result is that the impugned orders are sustained and however, directions as noted above are issued to the trial Courts and the Sessions Judge concerned.

31. The parties will bear their respective costs in the writ petition.

Sd/-

(Pius C. Kuriakose)
Chief Justice
26.07.2013