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CASE COMMENT – DAYAWATI V. YOGESH KUMAR GOSAIN: NO BAR IN SETTLING SECTION 138, NI ACT BY UTILISING ALTERNATE DISPUTE MECHANISMS

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ABSTRACT: *This is a landmark judgment of Division Bench of hon'ble Delhi High Court pronounced on 17.10.2017. This judgment mainly deals with the legal acceptability of referring the cases falling under Section 138 of the Negotiable Instrument Act, 1881 for the amicable settlement through the mediation: procedure to be followed for the settlement and the legal consequences of the breach of such settlement. It was held by the hon'ble court that there is no embargo for utilising Alternate Dispute Resolution techniques recognised under Section 89 of Code of Civil Procedure, 1908 for the purpose of resolving the disputes which are subject matter of offences under Section 320 Code of Criminal Procedure, 1973 or under Negotiable Instruments Act, 1881. This Judgment highlights the powers of the criminal courts to refer cases to mediation; the nature of proceedings under Section 138 of Negotiable Instrument Act, 1881; the procedure to be followed in such cases wherein mediation is involved and also the consequences of the breach of the settlement arrived at in mediation.*

Keywords - *Alternate Dispute Mechanisms, Mediation, Section 138 of NI Act, Section 320 of Cr.P.C., Section 89 of C.P.C. Settlement.*

I. INTRODUCTION

Alternate Dispute Resolution (ADR) techniques act as a means for disputing parties to arrive at an agreement short of litigation. It is well known that in recent years alternate dispute redressal mechanisms has gained widespread acceptance among both the general public and the legal profession. They are suited to numerous classes of cases and have been given legislative recognition and received judicial approval as well. They are advantageous over the traditional adversarial litigation before the courts as they are flexible, speedy, confidential, and less expensive. It promotes party autonomy and save relationships. In recent times, there are bulk of cases pending before the courts relating to complaints under Section 138 of the *Negotiable Instruments Act, 1881* (in short *NI Act*). There is no express provision in the *Code of Criminal Procedure, 1973 (Cr.P.C.)* and in the *NI Act* regarding resorting to these alternate dispute resolution mechanisms. In practice, the courts in India are increasingly referring the cases under Sec. 138 of *NI Act* to mediation without any legal basis. Before the pronouncement in *Dayawati v. Yogesh Kumar Gosain* [1] of the division bench of hon'ble High Court, the legality of the referral of these cases to mediation has not been settled. Now, it has been settled in this judgment that there is no bar to utilising of alternate dispute resolution mechanisms in cases under Sec. 138 of the *NI Act*. The researcher in this paper attempts to make an analysis of this judgment and tries to bring out the most important findings of the court.

II. FACTS IN BRIEF

The appellant Dayawati filed two complaints under Sec. 138 of the *NI Act* against the respondent. It was alleged that the respondent had a liability of Rs. 55,99,600/- towards her and he issued two cheques in discharge of part liability amounting to Rs. 11,00,000/- and Rs. 16,00,000/-. Both the parties expressed their intention to amicably settle their disputes and hence, both the complaints were referred for mediation to Delhi High Court Mediation and Conciliation Centre. On 14th May 2015, a mutual settlement agreement dated was arrived at between the parties under which the respondent (accused) agreed to pay the total amount of Rs.55,54,600/- to the complainant as the full and the final settlement amount in installments. It was agreed that complainant would withdraw the complaint cases after receiving the whole amount. Unfortunately, the accused/respondent did not obey its terms and the complainant/appellant moved to the Metropolitan Magistrate who, after giving two more opportunities for the compliance of the settlement made a reference to the Delhi High Court under Sec. 395 of the *Cr.P.C.*

III. ISSUES INVOLVED

Main issues that were involved in the case are as under:

1. Whether it is lawful to make a reference to mediation for resolution a criminal case which is compoundable?
2. Whether the *Mediation and Conciliation Rules, 2004* framed by the High Court by exercising the powers under *Code of Civil Procedure, 1908* be applied to a criminal case? If not, how the legal vacuum can be filled?
3. What procedure is to be followed after making a reference of dispute to Mediation?
4. In case of non-compliance if the settlement arrived at in mediation, then what procedure is to be followed by the court? Whether it is obligatory for the court to continue with the case and decide it on merits or to treat such a settlement agreement equal to decree capable of being executed?
5. If the mediation settlement agreement is treated as equivalent to decree, then what procedure is to be followed for its execution?

IV. ANALYSIS AND COMMENT

This case mainly deals with the mediation in criminal cases under Sec. 138 of the *NI Act*. The *C.P.C* makes an explicit provision under Sec. 89 enabling the reference of disputes to alternate dispute resolution, however, the *Cr.P.C.* doesn't have any such express legislative provision allowing the criminal courts to make any such reference. Similar position is there in respect of cases under *NI Act*. Thus, the question which is required to be answered first is whether the criminal courts may refer parties to a dispute resolution by mediation. Reference was made of *Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Constructions Co. Pvt. Ltd.*, [2] wherein the hon'ble Supreme Court has given a list of those cases which are fit for reference to ADR and which are not fit for the same. Cases relating to prosecution for criminal cases are put under the category of non-suitable cases. The hon'ble court, however, made it clear that the classification of the cases is not extensive or inflexible, rather it is descriptive. The hon'ble High Court of Delhi while making reference of the said case observed that

this decision cannot be regarded as an authoritative judicial pronouncement as it does not specifically involve the legality of mediation in criminal compoundable cases. [3]

As there was no legal pronouncement regarding the issue, the hon'ble court made an analysis of various statutory provisions and interpret the same to determine the legality of referral by criminal courts. Sec. 320 of the *Cr.P.C.* gives a list of those offences under the *Indian Penal Code, 1860* that are compoundable. It also makes a difference between these offences as compoundable, either with or without the leave of court. It was observed by the hon'ble HC that even though there is no express provision, however, the Code recognises the settlement without making any specification in this regard or imposing any restrictions on the method by which the same be arrived at. Therefore, there is no prohibition to exploiting the alternate dispute redressal techniques including arbitration, conciliation, mediation (recognised under Sec. 89 of *C.P.C.*) for resolving disputes that are subject matter of offences under Sec. 320 of *Cr.P.C.*

In order to know about the nature of reference of complaint regarding dishonor of cheque, punishable under Sec. 138 of the *NI Act*, Sec. 147 of the Act declares every offence under the Act as compoundable. Thus, by making a bare reading of the section it would be manifest that it encloses a non-obstante provision and same is made operative notwithstanding anything contained in the *Cr.P.C.* It is also clear from the word 'shall' used under the section that there is no possibility for court to consider whether the demand for compounding of the offence be granted or not. Thus, the court held that a complaint case under Sec. 138, can be referred to mediation. Reliance was placed on *Damodhar S. Prabhu v. Sayed Babalal*[4], where in the hon'ble Supreme Court while construing Sections 138 and 147 laid down certain guidelines to encourage litigants to elect for compounding during the initial phases of the hearing to make effective the criminal justice scheme and for arranged system of imposition of costs on parties to proceedings for making undue delay in compounding of offences.

Regarding the second issue i.e. whether *Mediation and Conciliation Rules, 2004*, framed in the application of the powers given in *C.P.C.*, be brought in use and applied to criminal cases and if not how this legal vacuity can be filled. *Mediation and Conciliation Rules, 2004* (notified by the HC) are applicable to the mediation in Delhi. Rule 1 extends the application of these rules to all conciliation and mediation related to any litigation which is pending in the High Court of Delhi or any of its inferior courts. Thus, these Rules apply to suits or other proceeding. In order to determine whether the expression 'other proceedings' include criminal cases or not, the court traced out the provisions which give power to the High Court to frame these Rules [5]. The *Mediation and Conciliation Rules, 2004* in its preamble notified that these rules are made by means of rulemaking power under Part X of the *C.P.C.*, Sec. 89(2)(d) of the code and all other powers sanctioning in this direction. The emphasis was placed on use of the expression "all other powers enabling the High Court'therein. It was brought to notice that Sec. 477 of the *Cr.P.C.* that deals with the rule making power of the High Court by virtue of Clause (d) confers power on the High Court to formulate rules on any other matter. It was, further, noticed that Article 227(2)(b) of the Constitution also confers on every such court the rule making power

and also the power of prescribing form for the purpose of regulation of practice and proceedings of its subordinate courts. Thus, by taking into consideration these provisions, the hon'ble court held that these powers may also be exercised for the purpose of criminal cases.

Regarding the third issue i.e. where a dispute has been sent for mediation, then which procedure is to be followed, the hon'ble High Court first examined the character of the proceedings under Sec. 138. The hon'ble court observed, "the proceedings under Sec. 138 of the *NI Act* has a special character. They begin as a civil dispute which arise from the dishonouring of the cheque and then end with criminal consequences. Even though the enactment is penal in nature, however, its intentment, essence and object is to provide compensation and warrant restoration as well and this aspect must receive priority over punishment. Hence, the actions under Sec. 138 of the *NI Act* are different from other criminal cases. It is well established that they are certainly in the nature of a civil wrong which has been given criminal implications" [6]. Reference was made of *Kaushalya Devi Massand v. Roopkishore Khore* [7], where in a distinction was made between criminal offences and offences under Sec. 138. It was observed by the court that it is not appropriate to equate an offence under Sec. 138 with offences under the *Indian Penal Code, 1860* and other offences as the former are less serious in nature as compared to latter. It was held that Sec. 138 is very nearly in the character of a civil wrong to which criminal implications is given. Reliance was also placed on *R. Vijayan v. Baby* [8], in which the hon'ble SC of India ruled that the case falling under Sec. 138 are certainly "civil cases masquerading as criminal cases."

It was observed by the court that the *Cr.P.C.* and *NI Act* made provisions merely for the compounding of the offences, however, no technique is laid down as to how the settlement agreement is to be placed or considered by the court. The provisions of the *C.P.C* do not apply to litigations guided by *Cr.P.C.* Therefore, there is a legal vacuum, which is required to be filled. It was observed by the court that it could not trace any reason for not applying the principles contained in Order XXIII Rule 3 of *C.P.C.* at the time of consideration of a settlement under Sec. 320 of *Cr.P.C.* or Sec. 147 of the *NI Act*, which are usually applied in considering a settlement in civil cases. The hon'ble High Court observed that since the proceedings under Sec. 138 *NI Act* stand characterized as quasi-civil, so the courts should utilise principles of *C.P.C.* It was observed, that the criminal courts often used the principles contained in *C.P.C.* in cases falling under Sec. 138 of *NI Act* for doing complete justice [9]. It was, further, observed that there is no legal prohibition against the adoption of such procedure by criminal courts to whom a mediated settlement is reported. By taking into consideration the principles enclosed under Order XXIII Rule 3 of *C.P.C.*, the hon'ble High Court has laid down a detailed procedure while answering the third issue involved in the case [10]. The procedure so laid down contains seventeen points and divided into three parts viz. preliminary steps, contents of settlement and proceedings before the court of Magistrate. The procedure can be summarized as under:

- (1) **Preliminary steps:** When the respondent appears before the Magistrate, his admission and denial shall be recorded under Sec. 294 of *Cr.P.C.* If Magistrate is pleased at any phase of hearing of a case that there exists elements of settlement he shall enquire from the parties about their willingness of amicable

resolution of same. If the parties are willing he shall inform about various mechanisms of alternate dispute resolution and refer them to the mechanism so opted. The time is stipulated by the Magistrate within which the matter is to be negotiated which is ideally six weeks which can be extended at the request of the parties.

- (2) **Contents of Settlement:** Where the parties have been referred to mediation and a settlement has been arrived at, the settlement agreement should contain a clear specification as to the amount settled to be paid; method of payment; undertaking that the parties will be bound by settlement; a clear stipulation as to the penalty in case of default for non-compliance of settlement and a declaration of both the parties as to their understanding and voluntariness of the agreement.
- (3) **Proceeding before the Court:** When the settlement agreement is placed before the Magistrate, he would adopt the procedure under Order XXIII Rule 3 of *C.P.C.* The Court shall record a testimonial of the parties regarding the voluntariness, understanding and implications affirming the contents and confirming their signature. The Magistrate should also independently apply his mind regarding the same. The statement may be taken on affidavit. The Magistrate has to make an order whereby he specifically accepts the statement and has to specify that in the occasion of default by either party, the settled amount will be recoverable in terms of Sec. 431 *Cr.P.C.* read with Sec. 421 of the *Cr.P.C.* On request of the complainant for withdrawal of complaint on ground of compromise the Magistrate has to accept the request and the matter has to be compounded. The Magistrate has to pass the order of discharge/acquittal dependent on the phase of proceeding and same method would be followed in spite of the fact that the terms entail execution of the terms of agreement and payment of amount over a period of time.

Regarding the fourth issue i.e. what procedure is to be followed in case of non-compliance of settlement agreement arrived at in mediation, it was held by the hon'ble High Court that where an accused person makes a default or commits a breach of settlement agreement, in that event an order under Sec. 431 read with Sec. 421 of *Cr.P.C.* would be passed by the magistrate. Sec. 431 of the Code provides that where a court passes an order of money, other than a fine, and no method for recovery of the same has been expressly provided, in that case, it shall be treated as fine and recoverable as such. It was further held that contempt proceedings can also be taken under the *Contempt of Courts Act, 1971*.

Proceeding to the fifth issue i.e. if mediation settlement agreement is equivalent to a decree, then how execution of the same will be effected, the hon'ble court made the reference of the judgment of the Kerala High Court in *Sreelal v. Murali Menon & Anr.* [11], wherein it was held that the settlement agreement which is arrived as a result of mediation is not a decree and thus, same cannot be executed. While deciding this the hon'ble High Court made the reference of *Govindankutty Metion v. Shaji* [12], wherein it was held by the hon'ble Supreme Court that where a case under Sec. 138 is referred to Lok Adalat and the same is settled and by reason of the provision of Sec. 21 of the *Legal Services Authorities Act, 1987* an award passed by the Adalat in

terms of settlement has to be considered as decree which is suitable for execution by the court. However the Kerala High Court observed that though criminal compoundable cases can be referred to LokAdalat under *Legal Services Authorities Act, 1987*, they could not be referred to mediation in absence of any specific legal authority to that effect. The court was of the view that the mediation settlement has a limited role as a facilitator of compounding of offences. It was stated that if the offence is compounded the accused is acquitted and in case of non-compliance of settlement agreement, the settlement agreement has no legal sanctity and the matter has to be proceeded for trial on merits. The hon'ble High Court also referred *M/s Arun International v. State of Delhi &Anr.* [13], in which it was held that settlement in mediation under Sec. 138 of *NI Act* is binding and is to be treated as an executable decree.

In answer to the fifth issue i.e. if the mediation settlement agreement is treated as equivalent to decree, then what procedure is to be followed for its execution, it was ruled by the hon'ble court that such settlement agreement does not amount to a decree and hence, the same cannot be executed in a civil court. At the same time, it was also made clear that where a case is referred for mediation by a civil court, the settlement can be effective as a decree on the fulfillment of Order XXIII Rule 3 of *C.P.C.* which is never possible in case of mediation settlement resulting out of criminal case.

V. CONCLUSION

This is a commendable judgment of the hon'ble High Court of Delhi as it has settled the legal permissibility of referral of cases under Sec. 138 to cordial resolution through mediation. It has laid down a clear and detailed procedure to be followed for mediation settlement under the said section. It has also laid down the legal implication in case of breach of settlement arrived at as an outcome of mediation. While delivering the judgment the court very impressively made an interpretation of various legal provisions to bring out the powers of the courts in exercise of which they can refer the criminal compoundable cases to alternate dispute redressal mechanisms. For this purpose the court interpreted Article 227 of the Constitution of India, Sec. 477 of *Cr.P.C.*, Sec. 89 of *C.P.C.*, and *Mediation and Conciliation Rules, 2004* notified by the Delhi High Court.

It is submitted that in so far as the path laid down by the court is concerned, it has the potential to weaken the value of cheque transaction instead of enhancement for which Sec.138 of the *NI Act* was enacted. The court has completely changed the character of a criminal offence by calling an offence under Sec. 138 of the *NI Act* as a quasi-civil. If we have a look of Sec. 3(38) [14] of *General Clauses Act, 1837*, it would be clear that every act which is punishable is an offence. Sec. 138 of *NI Act* provides for punishment of cheque dishonor and therefore it will be an offence and further, in the absence of any contrary proposition it will have to be treated as an offence under *Cr.P.C.* The court in the judgment also equated Sec. 138 of *NI Act* and Sec. 125 of *Cr.P.C.* which is fallacious as the later has not provided any punishment in a manner to bring it within the definition of offence under the *General Clauses Act, 1837*.

It is to be noted that the court by this judgment has enabled the clever accused to play with the law and disturb the same. The court held that when the offence is compounded in form of settlement, then the court has to acquit/discharge the accused

as the case may be and in case of evasion or non-fulfillment or breach of settlement the amount would be recovered as fine under Sec. 431 of *Cr.P.C.* Thus, a defaulter accused can never be tried for the offence he has committed and he can easily be escaped from the punishment which he deserved to receive. The mediation process can be used by the accused as a tool for taking time, delaying the proceedings and even escaping from the punishment provided under the law.

REFERENCES

- [1] Dayawati v. Yogesh Kumar Gosain, decided on 17.10.2017 by Delhi High Court, available on https://www.scribd.com/document/362218444/Judgement-on-Mediation-in-Cheque-Bounce-Cases-Under-Section-138-NI-Act#from_embed, last accessed on 02.11.2017
- [2] (2010) 8 SCC 24.
- [3] Dayawati v. Yogesh Kumar Gosain, para 51 on page 39
- [4] (2010) 5 SCC 663.
- [5] Mediation and Conciliation Rules, 2004.
- [6] Dayawati v. Yogesh Kumar Gosain, para 67 on page 51.
- [7] (2011)4 SCC 593.
- [8] (2012) 1 SCC 260.
- [9] Dayawati v. Yogesh Kumar Gosain, para 82 on page 60.
- [10] For detail study of procedure see pages 81-87.
- [11] (2014) 3 KLJ 637.
- [12] (2012) 2 SCC 61.
- [13] (2015) SCC Online Del 9334.
- [14] Section 3(38): "Offence" shall mean any act or omission made punishable by any law for the time being in force;