

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A.346/2007

% Date of Reserve : 19.03.2009.
Date of Decision : 27.03.2009.

M/S BECTON DICKINSON INDIA LTD. ...Appellant
Through: Mr. Dheeraj Kumar, adv.

Versus

M/S SHIKA PHARMA (P) LTD & ANR. ...Respondents
Through: Mr. M.L. Sharma, adv. for R-2
Mr. Harish Garg, adv. for R-3.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MOOL CHAND GARG, J.

1. This order shall dispose of an appeal filed on behalf of the appellant under Section 378(4) of the Code of Criminal Procedure which was filed along with leave to appeal against the order dated 25.05.2004 passed by the Court of learned MM, New Delhi in complaint case No.3432/2002 which was dismissed in default and thereby the respondent/accused were discharged.
2. The leave to file an appeal has been allowed in favour of the appellant as per the order dated 22.05.2007 the said order has become final as it has not been challenged.
3. The short point involved in this matter is as to whether the

orders passed by the learned Metropolitan Magistrate in acquitting the respondent on account of the default of the complainant in appearing when the case was taken up on 25.05.2004 which has been upheld by the learned ASJ needs to be interfered with by this Court while exercising its powers under Section 482 of the Cr.P.C.

4. Insofar as the Revision Petition is concerned the same was dismissed by the learned ASJ only because against an order of acquittal an appeal lies under Section 378(4) of the Cr.P.C. before this Court and, thus, that order does not call for any interference.

5. Briefly stating the facts giving rise to the filing of this appeal are that the appellant/complainant filed a complaint against the respondents under Section 138, 141 and 142 of the Negotiable Instruments Act, 1881 (N.I. Act) which was dismissed by the Magistrate in default and thereby the accused persons who had been summoned and appeared, i.e., the respondents were discharged which amounted to their acquittal in view of the provisions contained under Section 256 of the Cr.P.C. It is, thus, submitted that in view of order of the learned ASJ, the appellant had no other remedy but to file the present appeal before this Court.

6. It is a matter of record that after recording pre-summoning evidence, the MM concerned summoned the respondents as accused persons. After summoning and putting appearance, the accused persons moved an application for recalling of the

summoning order before the learned ASJ who was seized of the matter, whom, the case was transferred from the Court of ASJ to the Court of learned MM under the orders of High Court when the matter was fixed for reply and arguments on 25.05.2004. It may be observed here that the transfer had taken place on a date prior to 25.05.2004 when the appellant was present and the case was adjourned for 25.05.2004. On that date, the appellant did not appear as it is his case that they inadvertently noted the next date of hearing as 27.05.2004 instead of 25.05.2004 and thus the complaint was dismissed by the Magistrate and the accused persons were discharged. In support of their contentions, the appellant has placed on record a copy of the case diary which goes to show that on 13.12.2003 the case has been noted for 27.05.2004. This fact is also reflected by the application moved by them for inspection of record where also they have stated the next date of hearing as 27.05.2004.

7. It is submitted that since the discharge/acquittal of respondents is without disposal of the said complaint case on merits, the order of the Magistrate and the order of the learned ASJ tantamount to causing miscarriage of justice and discharge of persons who deserves to be punished as the cheque issued on their behalf to the tune of Rs.14,13,436/- has dishonored intentionally. It is, therefore, submitted that the impugned orders discharging/acquitting the respondent/accused is bad in law, arbitrary, unjustified, illegal and is violative of settled principles of

law and also principles of natural justice and equity and hence the said impugned order deserves to be set aside/quashed.

8. It is also submitted that this Court while exercising its powers under Section 482 of Cr.P.C. can interfere in the matter to prevent miscarriage of justice and to do substantial justice between the parties. The default of non-appearance of the appellant only for one day should not come in his way to press his complaint on merits. It is, thus, prayed that the appeal be allowed and the order dismissing the complaint and acquitting the accused be set aside and the respondents/accused persons be directed to face the trial in this case, before the MM concerned.

9. The respondents have opposed the request made by the appellant and have also filed a reply. According to them on 25.05.2004 neither the complainant nor his counsel appeared and the complaint was dismissed. The plea taken by the appellant that they were not aware of the next date of hearing or that they have noted a wrong date is false inasmuch as on 24.05.2004 they moved an application for inspection which was allowed by the Court concerned and, thus, they came to know about the fact that the complaint was listed on 25.05.2004, yet they did not appeared. The said application is available at page 53 of the paper book. It is stated that despite knowledge of the case being listed on 25.05.2004 they have not appeared on that date and it is on account of non-appearance of the complainant

that the complaint was dismissed which has the effect of acquitting the respondents.

10. It is also their case that the preliminary hearing of an application for grant of special leave to appeal is liable to be heard by division bench as per the orders and rules of Delhi High Court, Chapter-III, Part-B, Rule-1, Clause-IX(aa) and therefore, the matter is liable to be placed before the Division Bench subject to the orders of Hon'ble the Chief Justice. The appeal against acquittal is time barred besides being abuse of process of law and is liable to be dismissed in view of the submission made above. As far as the aforesaid argument of the respondents is concerned the same is not tenable in view of the perusal of the rules quoted by the respondents for the simple reason that the matters like the one in question was not marked to a Division Bench by the Hon'ble Chief Justice and were being listed before the Single Judge and, therefore, the Single Judge is entitled to deal with the matter.

11. Respondents also submitted that in an appeal against acquittal interference on the ground of mere possibility or probability is unwarranted unless and until there is perversity or misreading of evidence by learned Trial Court. Reference has been made to the case of Ashok Kumar Vs. State of Rajasthan AIR 1990 SC 2134. It is, therefore, submitted that in an appeal against acquittal, condonation of delay is not permissible because the law does not favour that an order of acquittal should remain

in jeopardy longer than what is prescribed by law of limitation. In this regard they have relied upon the judgment in Municipal Corporation Vs. Amrit 1981 Crl.L.J. 422. It may be observed here that this petition was filed on 04.04.2005 whereas the dismissal has taken place on 25.05.04 and thus, the appeal is barred by limitation. But in this regard it may be observed here that earlier the appellant had approached the Additional Sessions Judge in Crl. Revision No.20/2004 which was disposed of on 09.03.2005. There is no explanation by the appellant as to why he did not come to the Court immediately. It may, however, be noticed that the appellant did file a condonation of delay application which has already been allowed and the delay is condoned vide order dated 12.12.2006 passed by a learned Judge of this Court and therefore the point of limitation has no legs to stand.

12. Further, it is submitted that in the present case, thus, the cheque in question was signed by respondent No.3 on 01.11.2001. The respondent No.3 had resigned from the Board of Directors on 15.03.2001 as is also evident from Form No.32 (Annexure R-2) and as such he ceased to be director w.e.f. 15.03.2001, therefore, he had no authority to sign the cheque. It is also stated that the respondent company on whose behalf the cheque was issued also stood wound up and stands dissolved. The respondents have, therefore, prayed that the complaint against respondent No.2 is, therefore, was not maintainable and, in fact, is an abuse of process of law.

13. The respondents have also relied upon the following judgments:

1. Kalpana Tyagi Vs. Sneha Lata Sharma 104 (2003) DLT 127.
2. Yudhvir Singh Vs. Nagmani Financial Services (P) Ltd. & Ors. 108(2003) DLT 142
3. Ashok Kumar Vs. State of Rajasthan AIR 1990 SC 2134
4. Municipal Corporation Vs. Amrit 1981 Crl.L.J. 422.
5. M.L. Gupta Vs. Ceat Financial Services Ltd. 136(2007) DLT 308

14. I have given my thoughtful consideration to the submissions made on behalf of the parties. In the present case, it is apparent that the complaint was dismissed in default on 25.05.2004. The appellant had inspected the record on 24.05.2004 and had come to know that the case was listed on 25.05.2004 yet he did not care to appear on that day and accordingly the complaint was dismissed. There are some other factors which have been discussed above which show that the respondents were having some arguable case with respect to questioning the validity of summons issued in this case against the respondents. However, without going into the merits of the case, I hold that once the complainant/appellant failed to appear on the date fixed despite knowing about the date after inspection, the plea taken by him that they had noted the next date of hearing as 27.05.2004 is of no consequence. Accordingly I do not find any infirmity in the

order passed by the learned Metropolitan Magistrate which has the effect of acquitting the respondents. Accordingly the appeal filed by the appellant is dismissed.

15. The trial Court record be sent back along with a copy of this Order.

MOOL CHAND GARG, J.

MARCH 27, 2009
anb