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

+ CRL.A. 191/2005

% ***Judgment dated 12.11.2013***

M/S. RATHI UDYOG LIMITED Appellant
Through : Mr.Shiv Khorana, Adv.

versus

M/S AAR ESS & CO. AND OTHERS Respondents
Through : Mr.J.P. Gupta, Adv. for respondents.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Learned counsel for the parties submit that it is not necessary to summon the trial court record as certified copies of the order sheets and pleadings have been placed on record.
2. Present appeal is directed against the order dated 3.8.2004 passed by learned Metropolitan Magistrate in Complaint Case No.922/1 of 2002, by which the complaint of the appellant herein under Section 138 of Negotiable Instruments Act was dismissed.
3. While dismissing the complaint, the trial court has noticed in the impugned order that the accused respondent herein was summoned under Section 138 of Negotiable Instruments Act after a *prima facie* case was established against him. On 28.4.2003 an offer was made by the respondent that he would make the entire payment by the next date. But as the payment was not made the Court framed notice under Section 251 Cr.P.C. and the case was adjourned for

evidence on 26.8.2003. The trial court then goes on to notice that on the said date i.e. 26.8.2003 the parties compromised the matter and the respondent moved an application for settlement containing some terms and conditions including furnishing of a bank guarantee. The said application was also signed by the authorised representative of the appellant. The case was adjourned to 5.9.2003 on which date in lieu of bank guarantee the respondent handed over a cheque in the sum of Rs.9,59,155/- to the authorised representative of the appellant, who gave a statement about compromise having taken place and also accepted the cheque. The matter was adjourned to 1.11.2003 on which date the relieving Magistrate passed an order that the matter could not be compromised as both the parties had some dispute about the letter of authorisation and, thus, the case was again adjourned for evidence to 21.2.2004. On 21.2.2004 the Court *suo motu* raised the question with regard to maintainability of the complaint. The trial court was of the view that since the parties had arrived at an amicable settlement and compromised the matter, the complaint was bound to be dismissed and in case the subsequent cheque handed over to the complainant was dishonoured, being a separate cause of action, a fresh complaint would lie.

4. The trial court took the aid of a judgment rendered in the case of **Venketesh Dutt v. M.S. Shoe East Limited**, reported at 109 (2004) DLT 480, relevant portion of which reads as under:

“Proceeding under Section 138 of the act are penal proceeding and are independent of civil remedy of suit for recovery and therefore cannot be allowed to be converted into a civil suit. Since the offence under section 138 of the Negotiable Instrument Act is of compoundable nature parties may decide to compound the offence under Section 138 of the Act by way of cheque towards the liability of the accused during the pendency of the complaint, it amounts to compounding of the offence resulting acquittal as he has with open eyes entered into the agreement and accepted the cheques.”

5. Learned counsel for the appellant submits that firstly the judgment sought to be relied upon by the trial court in the case of **Venktesh** (Supra) is not applicable to the facts of this case as no lawful compromise was arrived at between the parties. Counsel further submits that acceptance of the cheque was conditional in nature which is evident from the statement made by the authorised representative of the appellant company on 15.9.2003, which reads as under:

“I agree to receive cheque bearing No.333206 dated 25/10/03 for Rs.9,59,155/- drawn on Punjab & Sind Bank, Kailash Colony, New Delhi, in lieu of Bank Guarantee and after encashment of cheque, I undertake to withdraw suit no.1549/2002 pending in High Court (now transferred to D.J.) and also the present complaint. I also receive the copy of compromise deed which shall be signed and after consulting our advocate. I also agree to hand over copy of agreement after signing it and approved before 25/10/03.”

6. Learned counsel for the appellant submits that in case the settlement was not conditional there was no occasion for the Court to have adjourned the matter to 1.11.2003 and secondly the authorised representative of the appellant accepted the cheque and the compromise deed, which was to be signed after consulting the lawyer. The Agreement was to be handed over after 25.10.2003.

Counsel further submits that the learned trial court has failed to take into consideration the order dated 1.11.2003 by which it was categorically recorded that no compromise had taken place between the parties and in the absence of any compromise the judgment in the case of **Venketesh** (supra) would not be applicable besides the decision rendered in the case of **Venketesh (supra)** is no longer good law in view of the decision rendered by the Apex Court in the case of **Lalit Kumar Sharma and Another v. State of Uttar Pradesh and Another**, reported at (2008) 5 SCC 638, more particularly paras 15 to 17, which read as under:

“15. Evidently, therefore, the second cheque was issued in terms of the compromise. It did not create a new liability. As the compromise did not fructify, the same cannot be said to have been issued towards payment of a debt.

16. Ingredients of Section 138 of the Act are as under:
(i) that there is a legally enforceable debt;
(ii) that the cheque was drawn from the account of the bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and
(iii) that the cheque so issued had been returned due to insufficiency of funds.

17. Thus, the second cheque was issued by Manish Arora for the purpose of arriving at a settlement. The said cheque was not issued in discharge of the debt or liability of the Company of which the appellants were said to be the Directors. There was only one transaction between Shri Ashish Narula, Shri Manish Arora, Directors of the Company and the complainant. They have already been punished. Thus, the question of entertaining the second complaint did not arise. It was, in our opinion, wholly misconceived. The appeal, therefore, in our opinion, must be allowed. It is directed accordingly. The respondent shall bear the costs of the appellants. Counsel's fee assessed at Rs.25,000.”

7. Learned counsel for the appellant submits that another Single Judge of this Court in the case of ***Thakur Arora v. State of NCT of Delhi & Anr.***, reported at 2009 V AD (DELHI) 757 has held that the case of ***Venketesh*** (supra) is no longer good law in view of the decision rendered by the Supreme Court of India.
8. Mr.J.P. Gupta, learned counsel for the respondents, submits that the parties had arrived at an amicable settlement and in terms of the settlement the cheque was handed over to the appellant. Counsel further submits that once the cheque was presented by the appellant, in case of dishonour a fresh cause of action would arise and, thus, the trial court has rightly dismissed the complaint of the appellant.
9. I have heard learned counsel for the parties and considered their rival submissions. The basic facts of this case are not in dispute that the appellant had filed a complaint under Section 138 of the Negotiable Instruments Act. During the pendency of the matter, a cheque in the sum of Rs.9,59,155/- was handed over to the complainant.
10. The submission made by learned counsel for the respondent that the parties had arrived at an amicable settlement and, thus, the trial court has rightly dismissed the complaint is without any force, on account of the fact that the learned Magistrate in its order dated 1.11.2003 has categorically recorded that the matter cannot be compromised and the case was put up for the evidence of the

complainant for 21.2.2004. The order dated 1.11.2003 reads as under:

"1/11/2003

Present A/R of Complainant with counsel
Accused no.2 on bail with counsel.

It is submitted by the counsel for the accused that since the complainant has not filed the specific letter of authorisation authorising him to withdraw the present complaint and civil suit pending before Distt. Judge in respect of same cheques, therefore the cheques issued by him was not honoured.

On the other hand counsel for the complainant states that no agreement to this effect of filing specific letter of authorising before encashment of the cheque took place. Counsel for the accuse states that if complainant filed letter of authorization, then they shall make arrangement for dishonoured amount within two months of the receipt of letter of authorization. This proposal is not acceptable to the counsel for the complainant and counsel for complainant submits that he can give 15 days time to make the payment. Both parties are struck to their stand to make payment. In these circumstances matter cannot be compromised. Put up for P.E. on 21/2/2004."

11. The submission made by the authorised representative of the complainant, which has been reproduced above, would show that he had agreed to withdraw the civil suit pending before the District Judge and the present complaint only on encashment of the cheque. He received a copy of the compromise deed but agreed to sign it after consulting his lawyer. Thus, in my view, it cannot be said that there was a complete settlement between the parties or else the complaint would have been dismissed on the same date. Moreover, there was no occasion for the trial court to *suo motu* review its own order dated 1.11.2003.

12. In the case of ***Lalit Kumar Sharma*** (supra) the Apex Court has categorically held that a cheque issued in terms of a compromise did not create a new liability and in case the compromise did not fructify, the cheque could not have been issued towards payment of a debt. In view of the law laid down by the Apex Court in the case of ***Lalit Kumar Sharma*** (supra) and taking into consideration that the compromise between the appellant and the respondent did not fructify, acceptance of cheque by the authorised representative was conditional in nature and the trial court in the order dated 1.11.2003 noticed the controversy between the parties that there was no absolute settlement, the present appeal is allowed.
13. The parties are directed to appear before District Judge-I, Tis Hazari Courts, on 10.12.2013 to enable the District Judge-I to mark the complaint to the appropriate Court of jurisdiction.
14. Accordingly, the appeal stands disposed of in view of above.

NOVEMBER 12, 2013
msr

G.S.SISTANI, J