

**HON'BLE SRI JUSTICE A. SHANKAR NARAYANA**

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**CRIMINAL APPEAL No.531 OF 2009**

**JUDGMENT:**

Aggrieved of the order, dated 28-07-2008, dismissing the complaint filed for the offence punishable under Section 138 of Negotiable Instruments Act 1881, in C.C. No.469 of 2006, passed by the learned Judicial Magistrate of First Class, Special Mobile Court, West Godavari at Eluru, the instant appeal is preferred by the complainant.

2 . The appellant herein is the complainant - M/s. Sri Lakshmi Subhadra Rice Mill, represented by its Proprietor Chakka Sriman Narayana, in the above C.C., while respondent Nos.2 and 3 - Powerset India (P) Limited, represented by its Managing Director, and its Managing Director viz., Prakash Bhattia, respectively, are accused Nos.1 and 2, respectively, before the Court below. Respondent No.1 is the State.

3 . For the sake of convenience, the parties herein are hereinafter referred to as arrayed in the C.C. before the trial Court.

4 . By the order under challenge, on the ground that the complainant was absent on 28-07-2008, and he was not regularly attending the Court and there was no representation on his behalf, dismissed the complaint for default, which was filed under Section 200 of Code of Criminal Procedure, 1973 (Cr.P.C.) read with Sections 138 and 142 of Negotiable Instruments Act, 1881 (NI Act) against the accused.

5 . The facts of the case would reflect that the complainant, which is a Rice Mill, for the purpose of its business, paid an amount of Rs.3,00,000/- to the 1<sup>st</sup> accused, represented by the 2<sup>nd</sup> accused, to purchase a diesel set generator (82.5 KVA). Subsequently, intending to cancel the said proposal of purchasing the generator set, complainant requested the accused to return the advance amount, for which, the 2<sup>nd</sup> accused, in the capacity of Managing Director, on behalf of the 1<sup>st</sup> accused, drawn four (4) cheques in favour of the complainant and issued the same for Rs.74,267/- each vide Cheque bearing Nos.434442, 434443, 434444 and 434445, respectively, of Bank of Baroda, Madras for the total value being Rs.2,97,068/- towards full and final settlement of the advance amount paid by the complainant. During the process of encashing the cheque, Karur Vysya Bank, Eluru, returned three cheques bearing Nos.434442, 434444 and 434445 with endorsement 'exceeds arrangements", by issue of Memo, dated 08-01-2004.

6 . Thereafter, the complainant got issued a registered notice, dated 20-01-2004, through the advocate to the 2<sup>nd</sup> accused requiring him to pay the contents of cheques within fifteen (15) days from the date of receipt of the notice, and, since there was default, complaint was laid for dishonour of the cheque bearing No.434442, dated 04-09-2003, contending that both the accused committed the offences punishable under Sections 138 and 142 of NI Act and 420 of Indian Penal Code, 1860 (IPC).

7. The above complaint was registered as C.C. No.469 of 2006 and the order under challenge dismissing the complaint for default was passed on 28-07-2008 observing that the complainant was absent, and he was not regularly attending the Court and there was no representation on his behalf.

8 . Challenging the aforementioned order, in the grounds of appeal, it is stated that the complainant was sincerely appearing before the trial Court, that the trial Court ought to have seen that he was a business man and required the said cheque amount involved in the case, that he appeared before the Court with great respect on 24-03-2007 and 21-06-2008 and that the trial Court having noted his presence, posted the matter to '28-07-2008', but his Advocate noted down the same as '29-07-2008'; the above grounds were taken by him opposing the order under challenge herein.

9 . Heard Sri Aravind Kumar P.S., learned counsel for the appellant - complainant.

10. Despite service of notice on the respondents vide Memo USR No.1041 of 2014 and proof of service in USR No.3070 of 2014, none appears for the accused.

11 . Learned counsel for the complainant (appellant) submits that since the instant appeal is preferred against dismissal of the complaint for default, an appeal under Section 378(4) of Cr.P.C. is maintainable as even cause of action has taken place prior to the amendment to Cr.P.C. introduced in 2009 by Amendment Act 5 of 2009. It is also his submission that the complainant could not appear before the trial Court on 28-07-2008 for the reason that he was given the date of adjournment as '29-07-2008' by his counsel on record and that apart it is not a case where the accused were served with summons and appearing before the Court regularly, as such, the valuable right of the appellant would get defeated in case his request is not acceded to.

12. Perused the docket proceedings filed along with the grounds of appeal.

13. The docket proceedings reflect that absence of the complainant was condoned on 07-07-2007, by which date non-bailable warrants issued against the accused were pending. The matter was adjourned to 31-08-2007, 06-10-2007, 06-12-2007, 02-02-2008, 26-04-2008, 21-06-2008 and finally to 28-07-2008. The complainant was present on 31-08-2007, and, thereafter, he was present before the trial Court on 21-06-2008, on which day, the trial Court observing that the learned counsel for the complainant was willing to execute the warrant, directed the office to re-entrust warrant of the accused to him and adjourned the matter to 28-07-2008.

14. Thus, the docket proceedings reflect that the accused have not made their appearance by the date of order under challenge and on the other hand, the complainant was present twice and on one occasion complainant's absence was also condoned on a petition.

15. Thus, when conduct of the parties in totality is considered, the trial Court is not right in dismissing the complaint for default.

16. For the aforesaid reasons, the order under challenge, dated 28-07-2008, is set aside. The complaint filed by the appellant is restored to its original number and the proceedings shall continue from the stage where the complaint was dismissed for default.

17. With the above directions, the Criminal Appeal is disposed of. As a sequel thereto, Miscellaneous Applications, if any, pending shall stand disposed of.

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**A. SHANKAR NARAYANA**

**March 6, 2015.**

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