IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM No.A-236-MA of 2008 (O&M)
Date of decision: February 15, 2016

M/s Krishana Construction Company

...Applicant

Versus

S.K.Mittal and Company

...Respondent

CORAM: HON'BLE MR. JUSTICE INDERJIT SINGH

Present: Mr.Vikas Kumar, Advocate for the applicant.

Mr.Shiv Kumar, Advocate for the respondent.

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INDERJIT SINGH, J.

Applicant-M/s Krishana Construction Company has filed this application under Section 378(4) Cr.P.C. seeking permission for leave to appeal against respondent S.K.Mittal and Company, challenging the impugned judgment dated 22.11.2007 passed by learned Addl. Chief Judicial Magistrate, Faridabad, whereby the accused-respondent was acquitted.

It is mainly stated in the application that accompanying appeal is likely to succeed on the grounds taken therein. It is further stated that learned trial Court has ignored the fact that the respondent-accused has not paid the payment of ₹50 lacs despite the fact that the cheque was issued by the respondent-accused. Learned trial Court did not appreciate that the account from which the cheque was issued was that of respondent-accused and there is no requirement of cheque to be signed by the partner. It is also stated that learned trial Court failed to appreciate that the cheque was returned to the applicant on 30.10.2003 as there is no evidence to prove that the cheque was earlier returned. The order of acquittal passed by learned trial Court is totally illegal and liable to be set aside. It is, therefore, prayed that leave to file appeal be granted.

Notice of motion was issued and learned counsel for the respondent appeared and contested the application.

I have heard learned counsel for the parties and have gone through the record.

As per the record, the complainant M/s Krishana Construction Company filed a complaint against accused S.K.Mittal and Company under Sections 138 and 142 of the Negotiable Instruments Act and 420 IPC. As per complainant's version, complainant supplied material to the tune of ₹41 lacs in addition to previous supply, which was to be calculated at the end of the year. Accused handed over the cheque of ₹41,12,600/- to the complainant in discharge of part liability, which on presentation for encashment, was dishonoured and the complainant filed a complaint. After filing of the complaint, accused approached the complainant and requested him to settle the account out of the Court. Thereafter, a settlement was made between the parties with the understanding that earlier case pending in the learned Court regarding dishonouring of cheque of ₹41,12,600/- shall be withdrawn and accused issued cheque of ₹50 lacs in full and final settlement of the liability on 18.04.2003 drawn on Union Bank of India, Faridabad. The complainant deposed the said cheque on 21.04.2003 for encashment but it was dishonoured but at the request of accused, the same was again presented for encashment on 25.09.2003 but this time also, it was dishonoured by the banker of the accused for 'insufficient funds' in the account. The banker of the complainant informed regarding dishonouring of the cheque vide memo on 30.10.2003. Complainant served legal notice upon the accused vide registered post on 15.11.2003. When the payment was not made, then the complaint was filed.

Complainant examined himself as PW-1 and also examined R.P.Sotwal, Asstt. Manager, Union Bank of India as PW-2 and closed his evidence. At the close of the evidence, accused was examined under Section 313 Cr.P.C. and he denied the incriminating evidence and took the stand that his office was running in the rented premises of House No.1368 Sector-28. Two cheques were lost from his office. One of the cheque was already filled for ₹1,12,600/- which was bearing his signatures as well as signatures of Harish Kumar but the name of the drawer was vacant and the second cheque was the disputed cheque. Accused S.K.Mittal appeared as DW-1 and filed his affidavit Ex.D1 along with documents Ex.DW1/A to DW1/K. He also examined DW-2 C.P.Prasher, Advocate, DW-3 Radhey Sham, DW-4 Raj Pal, DW-5 Rajender Singh, DW-6 Subhash and DW-7 Anselmen Dang, Postal Assistant. Accused also tendered the copy of the FIR

Ex.C2 and closed his evidence.

After appreciating the evidence, learned Addl. Chief Judicial Magistrate, Faridabad, acquitted the accused-respondent vide impugned judgment dated 22.11.2007.

I have gone through the impugned judgment passed by learned trial Court. The findings given by learned trial Court are as per evidence and law and have been given while appreciating the evidence in right perspective. In no way, the findings can be held as perverse i.e. against the law and evidence. Nothing has been pointed out as to which material evidence has been misread or which material evidence has not been considered by the Court below. As per the evidence, the cheque was presented second time on 25.09.2003 and it was returned along with memo on 30.10.2003. Thereafter, legal notice was issued on 15.11.2003 and the complaint was filed on 24.12.2003. The Court below held that the cheque, as per complainant, has been dishonoured on the day it was presented i.e. 25.09.2003. The cheque was deposited by the complainant vide slip Ex.P4 and Ex.C3 is the dishonour memo, which reveals that the cheque was dishonoured on the same day. The Court held that accounts of complainant and accused are in the same bank i.e. Union Bank of India, Main Branch, Faridabad. The account number of complainant is 21158 whereas account number of accused is 50961. Therefore, the complainant was informed on the same day regarding dishonouring of the cheque vide memo Ex.C4 because accounts of accused and complainant were in the same bank. PW-2 R.P.Sotwal, Asstt. Manager, also stated that the cheque was dishonoured on the same day. He also stated that if the account of the drawer and the drawee are in the same bank then the cash is transferred from one account to another and the cheque is never sent in clearing branch and for that reason, the cheque Ex.C2 was dishonoured on 25.09.2003 itself and the dishonour memo was issued on 25.09.2003 itself, which is Ex.C4. He also stated that if the account of the drawer and the drawee are in the same bank, then the intimation regarding dishonour of the cheque is given to the holder of the cheque immediately there and then. PW-2 R.P.Sotwal was directed to bring the record to show as to when the dishonour memo was given to the complainant. PW-2 R.P.Sotwal appeared again and deposed that because Ex.C2 was the cheque of transfer and in case of transfer, the memo of dishonour is issued on the same day when the cheque is presented and the cheque is returned along with its memo to its holder.

The Court further discused the RBI circulation dated 28.01.1992. The Court held that if the cheque was dishonoured on 25.09.2003 and the information was given on the same day to the complainant, then the legal notice was to be issued within 30 days from dishonour of the cheque. In the case in hand, the complainant issued legal notice on 15.11.2003 and if that notice is not given in 30 days, then the complaint is not maintainable. In defence, accused examined DW-2 C.P.Prasher, Advocate, who had issued legal notice Ex.C5 on behalf of the complainant. He deposed that he did not maintain any register to indicate that when the notice was dispatched and the date 30.09.2003 is written with pen, which does not bear his initials. He further deposed that he did not remember that when this notice was dispatched to the accused vide postal receipt Ex.C8 and stated that on the postal receipt, the date may be 20.11.2003 or 27.11.2003. Accused also summoned DW-7 Anselem Dang, Postal Assistant. He deposed that they maintain the record only of the preceding 18 months and the record prior to that period is not available. He further deposed that from the perusal of postal receipt Ex.C8, it is clear that it is dated 27.11.2003. Therefore, the notice was actually dispatched on 27.11.2003. The Court held that in these circumstances, the present complaint is not maintainable.

Learned Court below, further from the evidence held that there is presumption under Section 139 of the Negotiable Instruments Act, which is rebuttable. Learned trial Court, in the case in hand, held that complainant placed on record only two bills mark A and mark B showing that the material was supplied to the accused. The complainant firm is Income Tax payee and also filed the sales tax return. It is pertinent that account books have not been produced by the complainant to show the outstanding amount against the accused. The complainant in cross-examination stated that after 2000, he is the sold proprietor of the firm. The complainant firm is covered under the Sales Tax and filed the sales tax returns quarterly or yearly. He further admitted that original copy of the bill is given to the purchaser and the second copy is retained by the firm and the same is kept in office. But the complainant showed ignorance about the fact whether the sales tax return was filed about the supply of the material made to the accused or not. He also admitted that he is filing the Income Tax returns since the year 1998-99 but he does not know whether the balance sheet is prepared or not.

The Court below also held that the complainant firm maintain the books of account in regular course of business but this evidence has been withheld by the complainant from the Court, so adverse inference is to be drawn against the accused. Apart from withholding the account books from the Court by the complainant, it was revealed from the income tax returns that nothing is shown outstanding against the accused in these returns. Accused appeared as DW-1 and has taken the stand that for the period from 1996-98, his office was with one Harish Kumar, who in relation was the brother-in-law of the complainant and that office was in house No.1368 Sector-28, Faridabad, which fact is admitted by the complainant in cross-examination. In the year 1999, accused shifted his office from house No.1368, Sector-28, Faridabad and at that time, he found that some papers and cheques were missing and the complainant assured him to return the same, if any. The accused has taken the defence that one cheque which was of the amount of ₹1,12,600/-, was signed by him and was misplaced from his office and the second cheque is the disputed cheque which was misplaced. The cheque of ₹1,12,600/- was tampered by the complainant and thereafter, it was presented for encashment and was got dishonoured. The accused also produced on record certified copy of complaint regarding another case that the cheque also bears the signatures of Harish Kumar. In addition to that, one fact is more pertinent that account No.50961 was the joint account and it was to be operated by S.K.Mittal and Harish Kumar jointly, which fact is revealed from the account opening form.

Learned Magistrate held that the defence of the accused that complainant came in possession of the disputed cheque through his brother-in-law Harish Kumar appears to be near truth. DW-3 Radhey Sham has brought the gate pass. He further stated that cash book ledger book and all accounts were used to be maintained and were kept in the possession of Om Parkash Arora. The Court also discussed that balance sheet of the complainant company shows the sundry debtor only to the extent of ₹4,70,070/-, meaning thereby, the amount of more than ₹41 lacs was never outstanding against the debtors of the firm.

The Court below after discussing the evidence held that sufficient evidence has been produced on record by the accused to rebut the presumption attached to the cheque Ex.C2 under Section 139 of the Negotiable Instruments Act. The Court also held that cheque was not issued in discharge of any existing debt or liability. Rather it has come in possession of the complainant through some unlawful means. It is also held that complaint is not maintainable because the notice was not served upon the accused within time and complaint is barred.

In view of the above discussion, I find that the findings given by learned ACJM, Faridabad, are correct, as per evidence and law. In no way, the findings given by learned Court below, can be held as perverse. The impugned judgment dated 22.11.2007 passed by learned ACJM, Faridabad, is correct, as per law and evidence and does not require any interference from this Court.

Keeping in view above facts and circumstances, I find that no ground is made out to grant permission for leave to appeal and therefore, the present application stands dismissed.

February 15, 2016 **(INDERJIT SINGH)**
Vgulati **JUDGE**