IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-A-627-MA-2013(O&M)
Date of decision:-11.12.2017

Markandeshwar Finance
...Applicant

Versus

Malook Singh
...Respondent

CORAM : HON'BLE MR. JUSTICE H.S. MADAAN

Present : Mr.I.S.Pabla, Advocate
for the applicant.

Mr.Sunil Tandon, Advocate
for the respondent.
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H.S. MADAAN, J.

Applicant – Markandeshwar Finance through its partner Harpal Singh has filed this application under Section 378(4) Cr.P.C. seeking special leave to appeal.

Briefly stated, facts of the case are that complainant – Markandeshwar Finance through its partner Harpal Singh had brought a criminal complaint under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as the Act) against accused Malook Singh on the allegations that accused had raised a loan of Rs.55,000/- from the complainant and issued a cheque bearing No.559521 dated 13.3.2004 drawn on Oriental Bank of Commerce, Kurukshetra from his account No.5925 in favour of the complainant to discharge that financial liability; that the complainant had presented the cheque in his account with Punjab National Bank, Thanesar on 13.3.2004, which in turn forwarded it to the banker of the accused but it was received uncashed and banker of the accused accordingly informed banker of the complainant vide memo having endorsement "Insufficient Funds"; that thereafter the complainant got served a legal notice dated 24.3.2004 through his counsel calling upon the accused to make the payment within 15 days from the date of receipt of the notice; that accused sent reply to the notice but did not make the payment, as such the complainant had filed a complaint before Special Judicial Magistrate, Kurukshetra

After recording of preliminary evidence, accused was summoned. Notice of accusation under Section 138 of the Act was served upon him, to which, he pleaded not guilty and claimed trial.

During the course of evidence, complainant adduced evidence by examining himself as CW1 besides tendering documents.

With that the evidence of complainant was closed.

Statement of accused was recorded under Section 313 Cr.P.C. in which the accused while refuting the incriminating circumstances appearing against him denied that he had raised any loan from the complainant and issued cheque Ex.C1 for the said amount.

During his defence evidence, the accused tendered in evidence the reply of notice issued to him by the complainant as Ex.D1 and postal receipt as Ex.D2.

Thereafter, the defence evidence of accused stood closed.

After hearing arguments, the learned trial Magistrate dismissed the complaint under Section 138 of the Act and acquitted the accused. The main reasons given for arriving at such conclusion are as follows:

In the present case, as per complaint, the accused took a loan of Rs.55,000/- from the complainant and in order to discharge his liability the accused issued a cheque Ex.C1 in a sum of Rs.55,000/-. The complainant while appearing in the witness box as CW1 has admitted in his cross-examination that he has maintained the loan record of his firm i.e. "Markandeshwar Finance Company" and he fills up the income tax return thereof. He has also admitted that he has made the entry of Rs.40,000/- in his record but no entry of Rs.15,000/- has been made as the same was given in cash to the accused after taking the same from on Tej Singh Ranna. The complainant has neither placed on record the entry of the said loan register to prove the loan of Rs.40,000/- nor has examined said Tej Singh Ranna to prove the payment of Rs.15,000/- in cash. The complainant was even given an opportunity to produce the loan register by deferring his cross-examination on 23.4.2010 for 24.4.2010 but the said register was not produced before the Court. As the complainant has specifically admitted the writing of the entry of Rs.40,000/- in that register so the production of said register was very essentially to prove the advancement of loan of Rs.40,000/- to the accused by the complainant. The complainant has also not placed on record the income tax return to prove the advancement of said amount by him to the accused. As the complainant is a money lender so though no presumption under Section 139 *if available to him as held in case* ***M.Senguttavan Vs. Mahadevaswamy 2007(4) RCR(Crl.) 2008 Kerela*** *yet the same stands rebutted from the statement of the complainant himself as the complainant could not produce the advancement of the loan to the accused. It has also been held* ***M.S. Narayana Menon alias Mani Vs. State of Kerala & another 2006(3) RCR(Crl.) 504*** *that the presumption under Section 139 can be rebutted by the accused not only by production his own evidence but from the material brought on record by the complainant himself. The authority* ***Ganga Prashad Vs. Lalit Kumar*** *supra referred by the complainant does not help his case as in that case the amount was given by the complainant to the accused from his personal account and not from firm's account. But in the present case loan has been alleged to be given by the complainant to the accused from the firm's account and income tax return is being filed by the complainant firm which has not been placed on record.*

Otherwise also the date of advancement of loan amount of Rs.40,000/- and 15,000/- are also essential to be mentioned the date of advancement of the loan in the complaint. Complainant has simply alleged the payment of consolidated sum of Rs.55,000/- which he failed to prove. The accused has specifically denied the taking of loan amount as well as issuance of the cheque Ex.C1 to the complainant and has placed on record the reply of the *notice Ex.D1 on the case file. The complainant has not denied the receipt of that reply. As the complainant has failed to prove the advancement of the loan amount and accused has succeeded in rebutting the presumption raised against him under Section 139 from the material placed on record by the complainant, so all the ingredients required for constituting the offence punishable under Section 138 of Negotiable Instruments Act is proved. So, accused is acquitted.*

The complainant felt aggrieved and he had knocked at the door of this Court by moving an application under Section 378 (4) Cr.P.C. for grant of special leave to appeal against the judgment of acquittal. It was filed belatedly by 1067 days, as such an application under Section 5 of the Limitation Act has been filed. Notice of this application was issued to the respondent, who has opposed this application tooth and nail.

I have heard learned counsel for the parties besides going through the record.

Section 3 of the Limitation Act, 1963 deals with Bar of Limitation providing that every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

Section 5 of that very act provides that any appeal or any application may be admitted after the prescribed period if the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. Here the explanation offered for gross delay of about three years is that after Special Judicial Magistrate had passed judgment of acquittal on 19.5.2010, the complainant had preferred an appeal No.CRM-A-18-MA of 2011 before this Court well within limitation; that this Court vide order dated 25.7.2011 directed the applicant to file an appeal before the Court of District & Sessions Judge, Kurukshetra in view of the provisions of Section 372 Cr.P.C.; that in compliance with that the complainant preferred an appeal against the judgment of acquittal to Sessions Court, Kurukshetra on 23.8.2011 and learned Additional Sessions Judge, Kurukshetra vide order dated 15.4.2013 held that the appeal was not maintainable, therefore the complainant had approached this Court again resulting in delay of 1044 days; that some time was consumed in removing objections raised by the registry of this Court, therefore the delay be condoned.

However, I find that the reasoning given does not appear to be convincing. A perusal of order passed by a Coordinate Bench of this Court in CRM-A-18-MA of 2011(O&M) dated 25.7.2011 goes to show that counsel for the applicant had prayed for permission to withdraw the application with liberty to file an appeal before the Court of District & Sessions Judge, Kurukshetra, in view of the provisions of Section 372 Cr.P.C. and he was permitted to do so with the liberty asked for. However, it is not that this Court had directed the complainant to file appeal before the Court of District & Sessions Judge, Kurukshetra. Ignorance of law is no excuse, therefore, if counsel for the applicant had suffered that statement, complainant cannot wriggle out of the same.

Then the complainant chose a wrong forum for filing of appeal by instituting it before Additional Sessions Judge, Kurukshetra who vide judgment dated 15.4.2013 had dismissed the same, where too counsel for the appellant had withdraw the appeal being not maintainable and Court had not made any such observation. The complainant is passing the buck to others while finding out a justifiable reason for the delay when no such reason actually exists.

Thus I do not find any reason to accept the application under Section 5 of the Limitation Act and condoning the gross delay of 1067 days in filing of the application for special leave to appeal. Even otherwise, on merits also no ground is there to allow the application in question. I do not find any illegality and irregularity in the judgment passed by the learned trial Court. Rather it is based upon proper appraisal and appreciation of evidence and correct interpretation of law.

Therefore, no ground is made out to grant special leave to appeal in this case. The application is, therefore dismissed accordingly.

(H.S.MADAAN)
JUDGE

11.12.2017
Brij

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No