SMT JUSTICE T. RAJANI

CRIMINAL APPEAL No.1566 of 2007

ORDER:

This appeal is preferred, by the appellant, who is the accused, aggrieved by the Judgment, dated 28.07.2007, passed in C.C.No.1423 of 2006 by the Court of V Additional Judicial Magistrate of First Class, Rajahmundry, by virtue of which the trial court dismissed the complaint filed for the offence under Section 138 of the Negotiable Instruments Act, 1881.

2. The facts of the case, briefly, are as follows:

The complainant entered into a memorandum of understanding on 19.12.2003, with the promoters of M/s.Apple Laboratories, Bolaram, such as Subbalakshmi & Associates and P.Koteswara Rao and Associates and he has been supplying medicines to several customers including Deccan Health Care Limited (hereinafter will be referred to as, "DHCL"), Hyderabad from 03.10.2004, as per the memorandum of understanding, on credit basis, of which the accused is the Managing Director. The complainant was obtaining delivery challans whenever medicines are supplied to the DHCL. Since the business turn-over of M/s.Apple Laboratories is not to the expectations of the complainant, he decided to cancel the memorandum of understanding and, as such, cancelled it on 29.05.2004 and at the time of discussions, accused was also present as one of the Directors of M/s.Apples Laboratories and since the accused was found liable to pay an amount of Rs.8,05,168/-, he agreed to

pay the same and gave post dated cheque to the complainant on 30.05.2004, with the date as 30.07.2006. The accused requested the complainant to present the said cheque on the said date and when the complainant was about to present the cheque on 30.07.2004, the accused further requested him to wait till January, 2005. As such, the complainant presented the cheque on 08.01.2005, but the same was dishonoured on the ground of insufficient funds. A legal notice was issued for which the accused issued a reply, dated 17.03.2005, with false and untenable contentions. Hence, the complaint.

3. The trial court took the case on file and on appearance of the accused before it, framed an accusation for the same offence and after recording the plea of not guilty of the accused, it conducted trial of the case and examined PWs.1 to 3 and marked Exs.P1 to P14 on behalf of the prosecution. The incriminating circumstance in the evidence of the prosecution witnesses was put to the accused when he was examined under Section 313 Cr.P.C. and he denied the truth of the evidence and reported no evidence on his behalf.

4. After considering the material on record, the trial court passed the impugned judgment. Aggrieved by the same, this appeal is preferred on the grounds that the Magistrate ought to have seen that when once the signature on the cheque is not denied, the presumption under Section 139 of N.I.Act comes into play. The Magistrate ought to have seen that since the accused is the son of the Managing Director of M/s.Apple Laboratories

which fell due to the complainant, he gave the cheque at the time of cancellation of Memo of Understanding and since the accused was also present at the time of said cancellation, the cheque is deemed to have been given towards discharge of the debt. The Magistrate should have seen that after entering into the memorandum of understanding with M/s.Apple Laboratories, the petitioner supplied drugs to DHCL, for which the 1st respondent is the Managing Director and also Director of M/s.Apple Laboratories, as such the 1st respondent/accused is liable to pay the amount. The Magistrate ought to have seen that giving of cheque is not denied in the cross examination of the petitioner at the first instance and it is denied only in the further cross-examination of the petitioner and there is no denial that the accused is not the Director of Apple Laboratories or DHCL. The Magistrate ought to have seen that when the Memo of Understanding entered into between the petitioner and Subba Lakshmi and Associates and P.Koteswara Rao and Associates, was terminated on 29.05.2004, the accused was found liable to pay an amount of Rs.8,50,168/- towards the discharge of the said liability. The Magistrate failed to see that the accused did not choose to examine himself as a witness or did not produce any document in support of his defence.

5. Based on the above grounds, the appellant seeks to set aside the judgment of the court below.

6. Now the point for consideration is whether the appellant/accused succeeded in proving that the cheque was issued towards legally enforceable debt.

POINT: -

7. The evidence of the complainant, who was examined as PW1, is that the Memo of Understanding entered into between them was cancelled on 29.05.2004 by way of a deed of cancellation. The cheques were stated to have been issued on 30.05.2004. The lower court mainly relied on the improbability of the delivery challans being dated 30.05.2004, which is a date subsequent to the date of cancellation of memorandum of understanding. The said improbability is not dispelled by the appellant's counsel.

8. There is no quarrel with the proposition that when once the accused admits his signature on the cheque, a presumption under Section 139 of N.I.Act operates. But, if on the evidence adduced by the complainant, the accused succeeds in probabilising his defence during his cross-examination, the said presumption stands rebutted. The cross-examination of PW1 can be looked into to see whether the accused could succeed in probabilising his case, which would suffice as a proof of his defence. He admits that he did not mention in the complaint, nor in the notice, that the delivery challans under Ex.P8 were given to him by the accused on 30.05.2004. He states that they were prepared on 30.05.2004 only. He also admits that Ex.P8 delivery challans do not exhibit that the medicines mentioned in

the delivery challans are received by DHCL or on its behalf, the Sales Manager, who signed on the said cheques, as already observed by the court below, was not proved to be working with DHCL . He also admits that in Ex.P7-cancellation deed, there is no whisper about the amount that is due by DHCL. He also admits that in Ex.P7, at paragraph 10, there is a recital that on assessment of the financial transaction of M/s.Apple Laboratories on 31.05.2004 there is a decrease in the gap between assets and liabilities, to a tune of Rs.8,05,168/- and that it shall be compensated by the transferor such as M/s.Subba Lakshmi Associates and M/s.P.Koteswara Rao and Associates. He states in the further cross-examination, which is done at a later point of time, that he filed the certified copies of the annual returns of M/s.Apple Laboratories and of DHCL, which indicate that the accused is the Managing Director of both M/s.Apple Laboratories and DHCL. But in the cross-examination, he admits that in Ex.P13, which is the annual return of M/s.Apple Laboratories for the year 2000-01, there is another Managing Director for M/s.Apple Laboratories by name Mento Gupta, but Ex.P12 speaks that the accused is the Director of DHCL, but not the Managing Director.

9. Except the said annual returns, which are inconsistent, the complainant did not file any other document, which shows that the accused is responsible, under the Memorandum of Understanding or under the cancellation of the Memorandum of Understanding, for the amount that is found to be due by DHCL. When the complainant chooses to adduce evidence in proof of

the liability, it is his burden to prove that there existed a legally enforceable debt by the date of issuance of cheque. When the cancellation of the Memorandum of Understanding, is prior to the date of cheque and when the complainant rests his case on the delivery challans, it cannot be believed that the medicines would be delivered to the accused even after the cancellation of the Memo of Understanding. Even the delivery challans are not proved sufficiently to believe that they were issued by or on behalf of the accused. The name of the accused does not figure in the Memorandum of Understanding and hence, he cannot be said that he is the person, who would be responsible for discharge of the debt that is due by DHCL.

10. The Judgment, which is relied upon by the counsel for the appellant, reported in *T.Vasantha Kumar v. Vijayakumari*[1] is on the aspect of presumption under Section 139 of the N.I.Act. On the basis of the evidence in this case, it was observed that presumption had nevertheless come into operation but the same is rebutted by the accused by proving his case by preponderance of probabilities.

11. In view of the above discussion, it has to be held that the accused failed to prove that the cheque issued by the accused is towards the legally enforceable debt. Hence, this court opines that the judgment of the court below needs no interference.

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[1] (2015) 8 SCC 378

Accordingly, the Criminal Appeal is dismissed. As a sequel, the miscellaneous applications pending, if any, shall stand closed.

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T. RAJANI, J

September 28, 2018
LMV