THE HON'BLE SRI JUSTICE P.KESHAVA RAO

CRIMINAL REVISION CASE No.2440 OF 2014

ORDER:

Heard the learned counsel for the petitioner and first respondent.

2. The present Criminal Revision Case is filed assailing the orders passed in Crl.M.P.No.7165 of 2014 in C.C.No.361 of 2012, dated 20.11.2014 on the file of the Court of Special Magistrate, Vijayawada, dismissing the petition filed under Section 243(2) of Cr.P.C. to summon the Branch Manager, Kotak Mahindra Bank Ltd., Pune to produce the accounts of loan transaction relating to the petitioner herein.

3. The facts, in brief, are that the first respondent-Bank filed C.C.No.361 of 2012 against the petitioner-accused for the offence under Section 138 of Negotiable Instruments Act, 1881 (for short 'the Act'). It is the specific case of the first respondent-Bank that the subject-cheque issued by the petitioner towards part payment of the legally enforceable debt has been dishonoured with an endorsement 'funds insufficient'. Pursuant thereto, after complying with the mandatory procedure as contemplated under the provisions of the Act relating to issuance of notice etc., the complaint came to be filed. During the course of trial, the petitioner herein has taken a specific defence that the entire loan amount in the form of 60 instalments along with interest has been paid. That apart, though the loan amount is Rs.60.00 lakhs and interest, the petitioner has paid excess amount. In all, the petitioner has paid Rs.77,37,780/-. In fact, in this regard, the

petitioner has already filed a suit in Special Civil Suit No.57 of 2012 for redemption of property and recovery of damages against the first respondent-Bank on the file of the Court of Civil Judge, Senior Division, Malegaon, Nasik District. After trial, the said suit has been decreed in favour of the petitioner vide judgment dated 14.3.2017. It is informed by the learned counsel appearing for the petitioner that aggrieved by the said judgment, an appeal has been filed by the first respondent-Bank in Civil Appeal No.69 of 2017 before the District Court, Malegaon. It is also brought to the notice of this Court that the appellate Court has granted stay only to the extent of recovery of amount subject to furnishing bank guarantee. Aggrieved by the same, it appears, the matter has been carried by way of C.R.P. before the High Court at Mumbai and the same is pending consideration. As far as the declaration sought by the petitioner in Special Civil Suit No.57 of 2012 that the notice issued under Section 138 of the Act declaring it as null and void is concerned, the same is not stayed.

4. Be that as it may, during the course of trial in the above said C.C., the petitioner filed an application in Crl.M.P.No.7165 of 2014 under Section 243(2) of Cr.P.C. to summon the Branch Manager of the first respondent-Bank at Pune to give evidence and produce the accounts relating to the loan transaction of the petitioner. The said petition was dismissed by orders dated 20.11.2014. Aggrieved by the same, the present Criminal Revision Case is filed.

5. The learned counsel for the petitioner mainly contended that during the course of cross-examination, P.W.1, who is the authorised officer of first respondent-Bank has categorically

admitted that on oral instructions, the case was filed at Vijayawada and there is no written instructions to him for the said purpose. In fact, the Chief Manager is the competent person to give instructions. The Associate President of the Bank, who is dealing with the cases in the entire country, gave oral instructions to him. The suggestion put to him that he has no instructions from the higher authorities to file the said C.C., has been denied. Therefore, the petitioner filed the impugned application to summon the competent person, who can depose before the Court with respect to the instructions given in writing to file the complaint and also with regard to payment of excess amounts, by producing the accounts before the Court.

6. The learned counsel appearing for the first respondent-Bank supported the impugned orders and submitted that there is no irregularity or illegality in the impugned orders passed by the Court below.

7. Having heard both the counsel and from the perusal of the material on record, the admitted facts are that the first respondent herein filed C.C.No.361 of 2012 for the offence under Section 138 of the Act against the petitioner. The case put up by the first respondent is that the petitioner herein issued the subject-cheque for realisation of part payment of legally enforceable debt. However, the petitioner has taken a specific stand that he has paid excess amounts in addition to the loan amount of Rs.60.00 lakhs along with interest. To support his contention, he brought to the notice of this Court that the suit in Special Civil Suit No.57 of 2012 filed by him for declaration, recovery of money and damages has

been decreed against the first respondent by judgment dated 14.3.2017. Aggrieved by the same, the first respondent filed an appeal in Civil Appeal No.69 of 2017 before the District Court, Malegaon, Nasik District. Since an interim order has been passed staying recovery of the said amount subject to the furnishing of bank guarantee, the first respondent-Bank filed C.R.P. before the High Court at Mumbai and the same is pending consideration. From this, it is apparent, the declaration made that the notice issued under Section 138 of the Act as illegal and null and void, is not stayed by the appellate Court or the matter has been carried to the higher Court by the first respondent. That apart, P.W.1 in the cross-examination has categorically admitted that there are no written instructions for him to file C.C.No.361 of 2012 in the Court. However, he asserted that on oral instructions, he filed the case at Vijayawada. In fact, the Chief Manager is the competent person to give instructions. Therefore, the petitioner has filed the present application to summon the Branch Manager, Kotak Mahindra Bank Limited, Pune to produce the concerned loan account particulars of the petitioner maintained with him.

8. From the perusal of the material on record, the learned Magistrate dismissed the petition by observing that by summoning the Branch Manager of the first respondent-Bank at Pune, is not helpful to the petitioner. However, in the conspectus of the issue that is discussed *supra*, particularly when P.W.1 has categorically admitted that the Chief Manager is the competent person to give instructions and also to ascertain with regard to the amounts paid by the petitioner in excess of the loan amount, the production of the relevant record and evidence of that competent person, is

necessary for the effective adjudication of the *lis* in the present case. Unless the concerned Manager is summoned with relevant records, the contentious issue relating to giving instructions to file the C.C. and the payment of excess amount by the petitioner to the first respondent-Bank cannot be adjudicated. Therefore, this Court is of the opinion that the learned Magistrate has committed an error in dismissing the petition.

9. Accordingly, the Criminal Revision Case is allowed setting aside the orders passed in Crl.M.P.No.7165 of 2014 in C.C.No.361 of 2012 dated 20.11.2014 on the file of the Court of Special Magistrate, Vijayawada and consequently, the Crl.M.P.No.7165 of 2014 stands allowed.

Pending miscellaneous petitions, if any, shall stand closed.

P.KESHAVA RAO,J

25th SEPTEMBER 2018.
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