
(2006) 10 DEL CK 0151

In the Delhi High Court

Case No : Criminal Rev. P. No. 136 of 2005

Sumat Pershad and Sons

APPELLANT

Vs

Headstart Advertising and Marketing Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 12-10-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2007) 2 BC 443

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Vijay K. Gupta, for the Appellant; Sanjiv Anand, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—This revision petition is directed against the order dated 27.9.2002 passed by the learned Additional Sessions Judge whereby the respondents' application for recalling the summoning order of discharge was allowed. The respondents were, accordingly, discharged.

2. The learned Counsel for the petitioner, who was the complainant, submits that the impugned order suffers from two infirmities. Firstly, it has to be set aside because recalling of an order is not permissible in view of the decision of the Supreme Court in Adalat Prasad Vs. Rooplal Jindal and Others, . Secondly, he submits that the Court below has completely ignored the presumption that is raised by virtue of Section 139 of the Negotiable Instruments Act, 1881 which can only be rebutted by the accused by adducing evidence in a trial. He submitted that this presumption is a statutory presumption and it is an obligation on every Court to raise the same when the factual basis for raising such a presumption, in view of the provisions of Section 138 of the Negotiable Instrument Act, 1881 have been made out.

3. He submitted that the facts of the case are simple. A cheque was issued on

2.7.2000 by the respondents for an amount of Rs 6,95,254/- in discharge of a part of the liability existing on that date. The cheque was presented on 10.7.2000 and was dis-honoured. The issue was raised with the respondents, who, by a Pay Order dated 14.8.2000, paid the complainant the amount of Rs 6,95,254/- which was received in the account of the petitioner on 16.8.2000. But, the matter did not stop here. It was the case of the complainant that as per the understanding arrived at between the complainant and the respondents, the complainant was required to retain this cheque by way of security for future obligations which may arise in view of the ongoing transactions between the complainant and the respondents. According to the complainant, such transactions did take place and there were three bills raised against the respondents in respect of supply of certain paper material by the complainant to the respondents. The three bills were dated 16.8.2000, 18.8.2000 and 21.8.2000 and the total amount of the bills came to Rs 8,29,543/-. It is only after these goods had been supplied and, consequently, the respondents became liable to make the payment for the said sum of money that the cheque which had been issued on 2.7.2000 and had been retained as and by way of security was presented again on 29.11.2000. The same was returned unpaid (dis-honoured) on 1.12.2000 with the endorsement ?payment stopped by the drawer?. Pursuant to the dishonour the complainant issued a notice dated 8.12.2000 which has been marked as Exhibit CW1/11. The same was served on the respondents but no reply was received from them. Inasmuch as neither the payment nor any reply to the notice was received, the petitioner/complainant was constrained to file the complaint u/s 138 of the Negotiable Instruments Act, 1881 and it is in the course of these proceedings that the impugned order came to be passed. According to the learned Counsel counsel for the petitioner the presumption is clearly raised u/s 139 of the said Act and the same can only be discharged at the stage of trial.

4. The learned Counsel for the respondents submitted that the impugned order does not suffer from any infirmity. He submits that the amount of the cheque as initially issued, had been cleared by the respondents by virtue of the Pay Order dated 14.8.2000 and, Therefore, the entire amount of the cheque stood discharged. It is the case of the respondents that, despite repeated requests for return of the said cheque, the petitioner retained the same. He submitted that because the amount of the cheque had already been paid, the cheque was no longer to be used as a negotiable instrument, and, Therefore, no action could be taken pursuant to its subsequent dis-honour because there was no debt or other liability remaining after the clearance of the amount by the Pay Order dated 14.8.2000. According to the learned Counsel for the respondents the liability for which the cheque had been issued stood discharged on 16.8.2000 when the pay order was realized by the petitioner and, Therefore, on and from that day the cheque could not be construed as one having been issued in discharge of a debt or other liability. It is, Therefore, the submission of the learned Counsel for the petitioner that the impugned order calls for no interference.

5. Considering the arguments advanced by the learned Counsel for the parties and after examining the impugned order in detail, I find that the same is liable to be set aside on both counts raised by the learned Counsel for the petitioner. Firstly, in view of the decision of the Supreme Court in Adalat Prasad (supra) no order recalling the summoning order could have been passed. Secondly, once the cheque had been issued and the same had been presented and upon its dishonour the procedure prescribed for issuance of notice had been followed, the presumption u/s 139 was immediately raised. The Supreme Court has repeatedly stated that in law such a presumption has to be raised by the Courts considering such matters. Reference may be made to the decision in the case of Hiten P. Dalal Vs. Bratindranath Banerjee, , Maruti Udyog Ltd. Vs. Narender and Others, , M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, and Goaplast Pvt. Ltd. Vs. Shri Chico Ursula D'Souza and Another, . In the last mentioned case the Supreme Court clearly observed that it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. And, that can only be done in the course of trial. It is also a matter of evidence as to the manner and purpose for which the cheque was retained by the petitioner. The petitioner alleges that the cheque was retained by way of security for ongoing transactions and, that the respondents had given the authority to the petitioner to present the cheque in respect of the ongoing transactions. It is the case, on the other hand, of the respondents, that the cheque was not to be retained by the petitioner and was to be returned to the respondents which the petitioner did not do despite the repeated requests. These are the matters of evidence and cannot be dealt with at the summoning stage or at the stage of issuance of notice u/s 251 Cr.P.C.

6. Accordingly, the impugned order is set aside and the matter shall be placed before the learned C.M.M. for assignment to the appropriate Metropolitan Magistrate for further proceedings. It be placed before the learned CMM, Tees Hazari Courts on 13.11.2006 in the first instance for assignment and further proceedings.

7. The lower court record be sent back immediately.

This revision petition stands allowed.