(2009) 02 DEL CK 0232

In the Delhi High Court

Case No : Criminal Revision Petition No. 103 of 2008

Thakur Arora APPELLANT

Vs

The State NCT of Delhi and Another RESPONDENT

Date of Decision : 19-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 255, 320(8), 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 147

Citation : (2010) 6 RCR(Criminal) 1272

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Avtar Singh and Avneet Kaur, for the Appellant; Jaideep Malik, APP, for the Respondent

Final Decision : Disposed Off

Judgement

S. Muralidhar, J.—The challenge in this petition u/s 482 of the Code of Criminal Procedure 1973 (CrPC.) is to an order dated 11th December 2007 passed by the learned Metropolitan Magistrate (MM.) Delhi discharging the accused (Respondent No. 2 herein) in Criminal Complaint Case No. 2421/1/05 u/s 138 of the Negotiable Instruments Act 1881 (NI Act.).

2. The aforementioned complaint was filed in relation to the dishonour of a cheque No. 782563 dated 10th September 2005 in the sum of Rs. 60,000/- drawn by the Respondent No. 2 Ashok Verma in favour of the Petitioner Thakur Arora as part payment of loan borrowed by the Respondent No. 2 from the Petitioner. The said cheque was dishonoured with the remarks "funds insufficient".

3. During the pendency of the complaint the parties entered into the memorandum of understanding (MOU.) on 8th November 2006. The said MOU reads as under:

Memorandum of Understanding

This memorandum of understanding is executed at New Delhi on this 8th day of

November 2006 between Mr. Thakur Arora s/o Sh. Surat Prakash Arora r/o P-22A, Sri Niwas Puri, Private Colony, New Delhi (hereinafter referred as First Party)

And

Mr. Ashok Verma s/o Late Sh. Sohan Lal r/o 51, Vinobapuri, Lajpat Nagar-II, New Delhi - 110 024 (hereinafter referred as Second Party). Whereas the First Party has filed a criminal complaint u/s 138 N.I. Act against the Second Party and the same is pending before the Court of Sh. Jagdish Kumar, M.M., Patiala House Courts, New Delhi.

And whereas both the parties have agreed to amicably settle the abovesaid case on the following terms and conditions:

1. That the Second Party will pay to the First Party a sum of Rs. 1,25,000/- (Rupees one lakh twenty five thousand) towards all dues as full and final settlement.

2. That Rs. 5,000/- will be paid by the Second Party to the First Party on or before 15th December 2006 and the balance amount of Rs. 1,20,000/- will be paid vide twelve post dated cheques of Rs. 10,000/- (Rupees ten thousand only) to the First Party and the same shall be handed over on or before 1st December 2006.

3. That the Second Party will clear aforesaid payment i.e. of Rs. 1,25,000/- before 31st December 2007.

4. That after receiving the entire payment of Rs. 1,25,000/- the First Party will withdraw all his complaint/ proceedings pending in the Court of law.

5. That the Second Party has also assured that no cheque shall be dishonoured on any account and in case any cheque is dishonoured, this MOU shall come to an end and the above noted matter shall continue as there has not been any compromise/understanding.

6. That this MOU has arrived between the parties of their free will, coercion and without any influence/force from any side.

In witness whereof this Agreement is signed by both the parties in the presence of the following witnesses on this 8th day of November 2006.

4. Pursuant to the aforementioned MOU post dated cheques dated 16th December 2006 were given to the Petitioner. The complaint was listed on 9th November 2006 before the learned MM. Although the learned MM was informed of the MOU, the complaint was not disposed of on that basis.

5. Thereafter on 18th October 2007 the Respondent No. 2 accused filed an application before the learned MM u/s 147 NI Act read with Section 320(8) and 255 CrPC for recording the acquittal of the accused. Reliance was placed on the judgment of this Court in Venkatesh Dutt v. MS Shoes East Limited 2004 (1) JCC

(NI) 44. The said application was taken up by the learned MM on 11th December 2007. Learned Counsel for the complainant objected to the said application by pointing to the learned MM that the cheques dated 16th December 2006 given to the complainant by the accused pursuant to the MOU had also been dishonoured and therefore, the MOU had failed. It was pointed out that the judgment in Venkatesh Dutt did not apply since the Clause 5 of the MOU clearly stipulated that if any of the post dated cheques issued by the accused pursuant to the MOU were dishonoured then the MOU would come to an end and the complaint would continue as if there had not been any compromise. Learned MM relying upon the judgment in Venkatesh Dutt observed that a clause similar to Clause 5 in this case had been considered by the High Court in the said judgment and it had been held that such clause would be of no legal value. Further it was held by the High Court that the subsequent complaints filed on the basis of the dishonour of the further post dated cheques would continue since they were independently maintainable. However, the original complaint could not continue.

6. Despite service of notice issued in this petition none appears for Respondent No. 2.

7. Learned Counsel for the Petitioner submits that the judgment of this Court in Venkatesh Dutt is no longer good law in view of the judgment of the Supreme Court in Lalit Kumar Sharma and Anr. v. State of UP. He submits that when the compromise did not materialize, the cheques issued thereunder could not be said to have been issued in discharging the liability of the original debts and therefore no subsequent complaint would be maintainable.

8. In the present case the MOU contained a clear stipulation that if the cheques issued pursuant to the MOU were dishonoured, the MOU would come to an end and the original complaint would revive. The complaint was not disposed of on the basis of the said MOU and was kept pending, at which stage the Petitioner filed an application seeking discharge.

9. In the judgment in Venkatesh Dutt the facts were that during the pendency of the criminal complaint in relation to dishonour of a cheque in the sum of Rs. 1 crore a compromise was arrived at between the parties. Pursuant to the compromise several cheques were issued and accepted by the complainant. These subsequent cheques on presentation for payment were dishonoured. Clause 8 of the terms of compromise, similar to Clause 5 of the MOU in the present case, stipulated that in the event the cheques were dishonoured, the complainant shall have the "right to continue the above referred cases" and "to further initiate both civil and criminal actions including u/s 138 of the Negotiable Instruments Act with reference to the cheques issued under this Agreement." In those circumstances this Court held that

8. The very fact that a party enters into a compromise during the pendency of a complaint filed u/s 138 of the Act shows the cause of action pertaining to the initial cheque ceases to be available to the complainant as fresh cause of action

becomes available in respect of the cheques issued pursuant to the agreement between the parties in case those cheques are dishonored.

10. It was further held as under:

9. By no stretch of imagination complaints u/s 138 relating to several cheques given by a party to the complainant on account of the agreement between the parties towards liability against initial cheque leading to the filing of original complaint can be allowed to go simultaneously. Reason is simple. Section 138 of the Negotiable Instruments Act specifically refers to only that cheque which is issued towards the liability drawn by a person on an account with a banker for payment of money and no other cheque. Once the parties enter into an agreement during the pendency of such complaint or proceedings and complainant accepts the cheques given by the accused in lieu of the subject matter of original complaint every cheque gives rise to a fresh cause of action if it, on presentation is dishonored as in that case original complaint becomes extinct. Aggrieved person has a right to file as many complaints as many cheques were given to him as every cheque under the Act provides an independent and fresh cause of action to the aggrieved person.

11. It was therefore concluded that

12. In view of the foregoing reasons, the petition is allowed, the complaint filed by the respondent u/s 138 of the Act for cheque of Rs. One crore and the proceedings arising therefrom stand quashed whereas the subsequent complaints filed by the respondent arising out of as many as seven cheques shall continue being independently maintainable.

12. It appears that the aforementioned enunciation would no longer good law in view of the subsequent judgment of the Supreme Court in Lalit Kumar Sharma. The facts in this case were that M/s. Mediline India (P) Limited borrowed a loan of Rs. 5 lakhs from the complainant and in repayment thereof issued two cheques dated 30th November 1999 and 10th December 1999 for Rs. 3 lakhs and Rs. 2 lakhs respectively. The Company had two directors, namely, Ashish Narula and Manish Arora. The cheques on presentation were dishonoured with the remarks "insufficient funds". The complainant then filed a criminal complaint against Manish Arora and Ashish Narula u/s 138 NI Act.

13. An agreement was entered into between the parties during the pendency of the criminal complaint. Pursuant thereto Manish Arora on 29th July 2000 issued a cheque in favour of the complainant in the sum of Rs. 5,02,050/- . This cheque when presented for payment was also returned dishonoured with the remarks "insufficient funds". In regard to the dishonour of subsequent cheques the complainant filed another criminal not only against Manish Arora and Ashish Narula. Lalit Kumar Sharma, who became a director of the said company on 15th February 2000 and another person who became a Director on 1st December 1994, were also arrayed as accused. Both of them had resigned from the post of directorship on 30th November 2000. The learned MM summoned all the

accused. Their challenge in the revision petition was negatived by the High Court and thereafter they approached the Supreme Court.

14. The Supreme Court categorically held that in the above circumstances a separate complaint could not be maintained since the cheque issued in terms of the compromise was not towards any liability for which the earlier compliant had been filed and further when the accused there had been convicted and sentenced. The Supreme Court held as follows:

15.Evidently, therefore, the second cheque was issued in terms of the compromise. It did not create a new liability. As the compromise did not fructify, the same cannot be said to have been issued towards payment of debt.

16. Ingredients of Section 138 of the Act are under:

(i) That there is a legally enforceable debt;

(ii) That the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii)That the cheque so issued had been returned due to insufficiency of funds.

17. Thus, the second cheque was issued by Manish Arora for the purpose of arriving at a settlement. The said cheque was not issued in discharge of the debt or liability of the Company of which the appellants were said to be the Directors. There was only one transaction between Shri Ashish Narula, Shri Manish Arora, Directors of the Company and the complainant. They have already been punished. Thus, the question of entertaining the second complaint did not arise. It was, in our opinion, wholly misconceived. The appeal, therefore, in our opinion, must be allowed. It is directed accordingly. Respondent shall bear the costs of the appellant. Counsel''s fee assessed at Rs. 25,000/-.

15. There is considerable force therefore in the submissions of learned Counsel for the Petitioner that the law as explained in Venkatesh Dutt may not longer be considered to be good law in the light of the judgment of the Supreme Court in Lalit Kumar Sharma.

16. In the considered view of this Court, the complainant cannot be without a remedy. If he cannot, as explained in Lalit Kumar Sharma, be permitted to file a fresh complaint on account of the dishonour of the cheques issued pursuant to the compromise, then the original complaint must be permitted to be revived. Accordingly, the impugned order of the learned MM is set aside. The complaint will now be revived before the learned MM.

17. The matter will now placed before the learned ACMM on 2nd March 2009 for being assigned to the concerned learned MM for being proceeded in accordance with law.

18. The petition is disposed of.

19. Dasti.