

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 11.01.2016

DELIVERED ON : 19.01.2016

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM

Criminal Appeal No.1263 of 2003
& CrI.M.P.No.119 of 2016

M/s.Surana & Surana
rep.by its
Power of Attorney Agent
Mr.G.Kalyan Jhabakh ... Appellant

vs.
Kamal Babbar ... Respondent

Criminal Appeal filed under Section 378(4) of Cr.P.C.,
against the judgment made in C.C.No.5079 of 1999 dated
21.07.2003 on the file of the VIII Metropolitan Magistrate,
George Town, Chennai and setaside the same.

For appellant : Mr.A.Ramesh,
Sr.Counsel for
Ms.J.B.Abitha Banu
For Respondent : Mr.V.Krishnamoorthy

JUDGMENT

This Criminal Appeal has been directed against the dismissal
order dated 21.7.2013 passed in Calendar Case No.5079 of 1999 by
the VIII Metropolitan Magistrate, George Town, Chennai.

2. The appellant herein, as complainant, has filed the
complaint in question under section 138 of Negotiable
Instruments Act, 1881 and the same has been taken on file in
Calendar Case No.5079 of 1999, wherein the present respondent
has been shown as sole accused.

3. It is averred in the petition that the petitioner has
appeared as a counsel in a Civil Suit for the accused and
towards his fees, the accused has given 2 cheques, each for a
sum of Rs.1,25,000/- on 26.04.1999. The accused has also given
one more cheque in favour of the complainant and all the cheques
have been put into the concerned bank for collection, but the

cheques in question have been returned stating "funds insufficient" and subsequently, a statutory notice has been given and even after receipt of the same, the accused has not discharged his liability and under the said circumstances, he has committed an offence punishable under section 138 of Negotiable Instruments Act.

4. The trial court, after considering the divergent evidence available on record, has dismissed the complaint, by way of holding that the cheques in question have not been issued in connection with legally enforceable debt and against the dismissal order, present Criminal Appeal has been filed at the instance of the complainant as appellant.

5. The learned senior counsel appearing for the appellant/complainant has repeatedly contended that after receipt of the statutory notice given by the complainant to the accused, he has not given any reply notice nor any independent notice and in fact, with regard to the amounts in question, a Civil Suit has been filed, wherein an executable decree has been passed, but the trial court, without considering the evidence available on record, has erroneously dismissed the complaint and therefore, the dismissal order passed by the trial court is liable to be set aside and the respondent/accused is liable to be punished in accordance with law.

6. The learned counsel appearing for the respondent/accused has contended that the averments made in the complaint have not at all been proved on the side of the complainant and further, the power agent of the complainant has not been examined and in a Civil Suit filed by the complainant, detailed written statement has been filed, wherein it is averred to the effect that the cheques in question have not been given in connection with fees of the complainant and the trial court, after considering the nature of defence taken on the side of the accused, has rightly dismissed the complaint and therefore, the dismissal order passed by the trial court need not be set aside.

7. The consistent case put forth on the side of the complainant is that in respect of fees of the complainant, the cheques in question have been issued on 26.04.1999, each for a sum of Rs.1,25,000/- and the same have been put into the concerned bank, but the concerned bank has returned the same stating "funds insufficient" and subsequently, a statutory notice has been issued and even after receipt of the same, the accused has not discharged his liability and thereby committed an offence punishable under section 138 of Negotiable Instruments Act, 1881.

8. In fact, the complaint in question has been filed by

power of attorney/agent, viz., N.Sridhar. On the side of the complainant, the said Sridhar has not been examined. On the side of the complainant, one Kalyan Jhabak has been examined as P.W.1. During the course of cross-examination, he has candidly admitted that the present complaint has been filed as power of attorney by the said Sridhar. Further, he has admitted in his evidence that at the time of filing Civil Suit, the accused has given a sum of Rs.20 Lakhs and out of Rs.20 Lakhs, Rs.15 Lakhs towards court fees and Rs.2.50 Lakhs towards expenses and Rs.2.50 Lakhs towards counsel fees.

9. It is a settled principle of law that a complaint under section 138 of Negotiable Instruments Act, 1881 can be filed through power of attorney/agent. If he knows personally about the transactions mentioned therein, he can adduce evidence, but here position is otherwise. As pointed out earlier, the complaint in question has been filed by power of attorney/agent, Sridhar, but for the reasons best known to the complainant, he has not been examined on the side of the complainant. Instead of examining him as P.W.1, the said Kalyan Jhabakh has been examined as P.W.1 and he is not the power of agent of the complainant. Even the complainant has not chosen to examine himself with regard to nature of transactions alleged to have been taken between him and the accused. Since neither the complainant nor his power of attorney/agent has been examined on the side of the complainant, it is very clear that the averments made in the complaint have not at all been legally proved. On that score alone, the present complaint is liable to be dismissed.

10. Even assuming without conceding that P.W.1 knows personally the transactions mentioned in the complaint, the Court has to look into as to whether his evidence would be sufficient for coming to a conclusion that the cheques in question have been issued in connection with legally enforceable debt.

11. As adverted to earlier, the specific admission given by P.W.1 is that at the time of filing Civil Suit, Rs.20 Lakhs has been given by the accused to the complainant and out of Rs.20 Lakhs, Rs.15 Lakhs towards Court fees, Rs.2.50 Lakhs towards expenses and Rs.2.50 Lakhs towards counsel fees. In fact, on the side of the complainant, no proper explanation has been given as to what circumstances the complainant has received a sum of Rs.2.50 Lakhs towards expenses in filing a civil suit.

12. As this juncture, the learned senior counsel has made a

faint attempt to the effect that the fees of the complainant have already been settled between the complainant and accused and only on that basis, the accused has issued the cheques in question.

13. As a repartee to the contentions put forth on the side of the appellant, the learned counsel appearing for the respondent/accused has drawn the attention of the court to the decision reported in 2004 CrI.L.J.4436 (C.Manohar vs. B.R.Poornima), wherein this Court has had an occasion to deal with a case of similar situation and ultimately found that since no agreement has been produced by the complainant to show as to what arrangement has been made between him and accused with regard to legal fees, the court cannot automatically come to a conclusion that the cheques in question have been issued towards fees.

14. In the instant case, on the side of the appellant/complainant, no document has been filed with regard to fixation of fees. Further, as per admission given by P.W.1, it is easily discernible that the respondent/accused has given extra Rs.5 Lakhs apart from court fees for filing a Civil Suit. The only explanation given by P.W.1 is that for filing Civil Suit towards expenses, Rs.2,50,000/- has been given by the respondent/accused and the said explanation cannot be accepted.

15. It is a well known principle of law that as per Section 138 of Negotiable Instruments Act, the cheques in question should be given in connection with legally enforceable debt. In the instant case, as mentioned earlier, no acceptable evidence is available on the side of the appellant/complainant to the effect that the cheques in question have been issued in connection with legally enforceable debt and further, the averments made in the complaint have not been proved by way of examining the concerned person. Under the said circumstances, the Court cannot come to a conclusion that the respondent/accused has committed an offence punishable under section 138 of Negotiable Instruments Act, 1881. Further, mere failure on the part of the respondent/accused to give reply to the statutory notice does not amount to acceptance of the cheques to the effect that the same have been given in connection with legally enforceable debt.

16. The trial court, after considering the available evidence on record, has rightly dismissed the complaint. In view of the discussions made earlier, this Court has not found any merit in the contentions put forth on the side of the appellant/complainant and therefore, the Criminal Appeal deserves to be dismissed.

In fine, this Criminal Appeal is dismissed. The order of

acquittal passed against the respondent/accused in Calendar Case No.5079 of 1999 by the trial court is confirmed. Consequently, the Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

ajr

To :

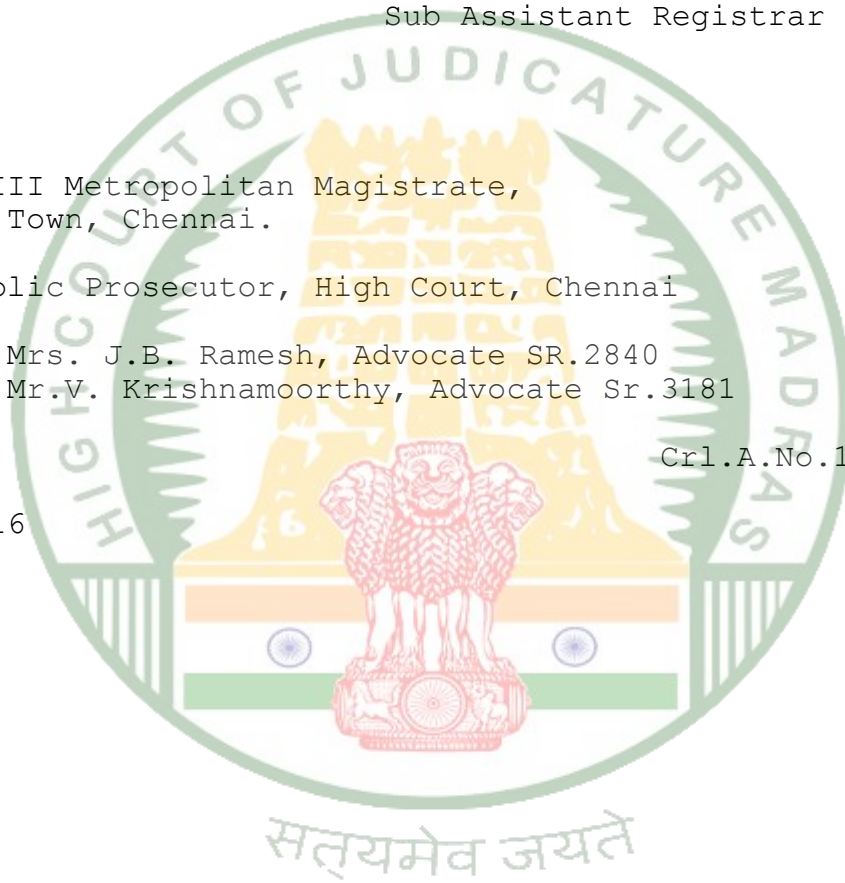
1. The VIII Metropolitan Magistrate,
George Town, Chennai.
2. The Public Prosecutor, High Court, Chennai

+ 1 cc to Mrs. J.B. Ramesh, Advocate SR.2840

+ 1 cc to Mr.V. Krishnamoorthy, Advocate Sr.3181

Crl.A.No.1263 of 2003

LRS (CO)
Eu 25.11.16



WEB COPY