

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.10.2017

PRONOUNCED ON : 30.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.979 of 2007

Dr. Arjun Mathuranayagam .. Appellant

Vs

Sudhir Paul .. Respondent

Prayer:- Criminal Appeal filed under Section 378 of Cr.P.C., against the conviction and sentence passed by the learned XV Metropolitan Magistrate George Town, Chennai, vide his order dated 26.09.2007 in C.C.No.5254 of 2006 .

For Appellant : Mr.K.F.Manavalan

For Respondent : Mr. K.Thilageswaran,
Legal Aid Counsel

JUDGEMENT

Challenging the order of acquittal passed by the learned XV Metropolitan Magistrate, George Town, Chennai, in C.C.No.5254 of 2006 dated 26.09.2007, the present appeal has been filed.

2.The case of the appellant/complainant, is as follows:-

The appellant/complainant, is a medical practitioner and he engaged the respondent for providing rain water harvesting system in his house, and for the purpose of purchase of materials, the complainant had issued two cheques for a sum of Rs.4,000/- and Rs.6000/-, but the respondents/accused altered the above cheques as Rs.14,000/- and Rs.16,000/- and encashed the same. Apart from that, the accused also over charged the complainant to the extent of Rs.80,000/-. After negotiations, the accused himself worked out the difference of amount due to the complainant, and issued two cheques bearing Nos.149973 and 149974 drawn on Indian Overseas Bank, Madras Christian College Campus Branch, East Tambaram, Chennai, dated 25.10.2003 for a sum of Rs.35,000/- and 58,000/- respectively. When the above cheques were deposited before the drawee bank, the cheques were dishonoured for the reason 'of insufficient of funds'. Thereafter, the complainant issued a legal notice dated 27.01.2004 demanding the above amount. But, even after receipt of the notice, the respondent/accused neither sent any reply nor paid the cheque amount. Hence, the appellant has filed the complaint.

3. During the trial, the complainant examined himself as P.W.1 and marked xerox copies of two cheques (Ex.P.1 & Ex.P.2), the disputed cheques (Ex.P.3 & Ex.P.4) , return memos (Ex.P.5series), Debit Advices(Ex.6series), Legal Notice and Acknowledgment card (Ex.P.7 & Ex.P.8)._

4. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., the accused denied the same. However, he did not examine any witness nor mark any documents.

5. After considering all the materials, the court below acquitted the accused from the charge on the ground that the cheque bearing No.149974 was presented for collection on 04.11.2003, the another cheque bearing No.149973 was presented for collection on 17.11.2003 and the first cheque was returned by the bank on 15.11.2003 and the debt advice was marked as Ex.P.6., but the legal notice was issued on 27.01.2004. The second cheque was returned on 17.01.2004, but the legal notice was issued on 27.01.2004, i.e., after more than 30 days of the receipt of the memo from the bank and held that the complainant cannot issue a composite notice. The trial Court has also held that a composite notice is not valid and the complainant ought to have issued a separate notice for each cheques.

However, the trial Court rejected the contention of the accused that the legal notice issued by the complainant is not a valid notice and the notice did not reveal the actual amount. Now, challenging the above order of acquittal, the present appeal has been filed.

6. Even though notice has been served on the respondent, none appeared on behalf of him and hence, Mr. Thilageswaran, is appointed as Legal Aid Counsel for the respondent.

7. I have heard Mr. K.F.Manavalan, learned counsel appearing for the appellant and Mr. Thilageswaran, Legal Aid Counsel, appearing for the respondent.

8. The learned counsel appearing for the appellant would contend that the reason given by the trial Court is absolutely erroneous. So far as the return of first cheque is concerned, intimation was received on 15.11.2003, but the intimation of the second cheque was received on 17.01.2004. Hence, notice has been issued on 27.01.2004 within 30 days of the receipt of the memo from the bank. Even assuming that the first cheque is barred by limitation, the Court below ought not to have acquitted the accused, in respect of the second cheque, which is within the limitation period, and the Court below ought not to have acquitted the accused.

9. Per contra, the learned counsel for the respondent would submit that admittedly, for the return of first cheque, the intimation was received on 15.11.2003 and the complainant ought to have sent the notice on or before 15.12.2003, but the notice was sent only on 27.01.2004 beyond the period of 30 days. Apart from that on the same single complaint the respondent cannot be partly convicted and partly acquitted. Yet another aspect is Ex.P.7, legal notice, issued by the complainant, is only a defective notice, without specifying what is actual the amount due under the said cheques. In the above circumstances, the notice did not meet the legal requirement, but the Court below failed to consider the same. However, considering the point of limitation, the trial Court rightly acquitted the respondent and there is no infirmity in it.

10. I have considered the rival submissions made on either side and also perused the materials available on record.

11. The admitted facts in the above appeal are as follows :

The respondent/accused issued two cheques dated 25.10.2003 bearing No.149972 and 149973. The first cheque was presented for collection on 04.11.2003 and it was dishonoured on the

ground of insufficient fund and the intimation was received by the complainant from the bank on 15.11.2003. The second cheque was presented on 17.11.2003 and the same was also returned for insufficient of funds and the intimation was issued on 17.01.2004 and legal notice issued on 27.01.2004. But, under Section 138(1)(b) of the Negotiable Instruments Act, the complainant should issue notice demanding payment of cheque amount within 30 days from the date of receipt of information by him from the bank regarding the return of cheque. When the instruction regarding the return of cheque was on 15.11.2003, the notice ought to have been sent on or before 14.12.2003, but admittedly, the legal notice was issued only on 27.01.2004. So far as the second cheque is concerned, the cheque was returned only on 17.01.2004. The legal notice issued by the complainant is a composite notice and based on that notice a single complaint has been filed. But the trial Court acquitted the accused on the ground that the complainant ought to have sent a separate statutory notice for each cheque and the composite notice is not valid notice.

12. But the above finding is not valid as issuing a consolidated notice is not prohibited under law and the complainant can issue a consolidated notice making the demand, provided, consolidated notice is bound to provide sufficient information, with a

specific demand for payment of sum covered by the cheques dishonoured.

13. The learned counsel appearing for the respondent would contend that the legal notice issued by the complainant without specifying the actual amount due under the dishonoured cheque, apart from that in the legal notice only demanded a compensation of a sum of Rs.1,00,000/- for mental agony caused to the complainant and the money misappropriated with regard to the earlier cheque. In the above circumstances, the notice without specifying the amount demanded for the payments, the demand notice is not valid in the eye of law. Hence the offence is not completed.

14. It is settled law that the offence under Section 138 of Negotiable Instruments Act will be completed only on compliance of the following acts :

" (1) drawing of the cheque by a person on an account maintained by him with a banker, for payment to another person from out of that account for discharge in whole/in part of any debt or liability,

(2) presentation of the cheque by the payee or the holder in due course to the bank,

(3) returning the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque,

(4) giving notice in writing to the drawer of the cheque with 30 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount, and

(5) failure of the drawer to make payment to the payee or the holder in due course of the cheque, of the amount covered by the cheque within 15 days of the receipt of the notice."

सत्यमेव जयते

One of the ingredients is giving notice in writing to the drawer of the cheque within a period of 30 days of the receipt of information by the payee from the bank regarding the return of cheque and by demanding payment of cheque amount. If no demand has been made in the notice, it would fall short of the legal requirement.

15. The Hon'ble Supreme Court of India in a case reported in **2000 (2) SCC 380 (Suman Sethi /vs/ Ajay K.Churiwal)** held as follows :-

"It is well principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e., the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the "said amount" there is also a claim by way of interest, cost, etc. whether the notice is bad would depend on the language of the notice. If in a notice while giving the break-up of the claim the cheque amount, interest, damages, etc, are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad."

16. This judgment is considered by the Hon'ble Supreme Court in another judgment reported in **2003 (8) SCC 300 (K.R.Indira /vs/ Dr.G.Adinarayana)**, and held as follows :

"Though no formal notice is prescribed in the provision, the statutory provision indicates in unmistakable terms as to what should be clearly indicated in the notice and what manner of demand it should make. In Suman Sethi Case, on considering the contents of the notice, it was observed that there was specific demand in respect of the amount covered by the cheque and the fact that certain additional demands incidental to it, in the form of expenses incurred for clearance and notice charges were also made, did not vitiate the notice. In a given case if the consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishonoured, mere fact that it was a consolidated notice, and /or that further demands in addition to the statutorily envisaged demand were also found to have been made may not invalidate the same. This position could not be disputed by the learned counsel for the respondent. However, according to the respondent..... What is necessary is making of a demand for

the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice in question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which exposes the drawer for being proceeded against under Section 138 of the Act " .

17. In the light of the above judgments, I have to consider the legal notice issued by the complainant. The demand notice was marked as Ex.P.7. The operative portion of the notice is reads as follows :

"I hereby call upon you to immediately pay the entire and a sum of Rupees one lakh as compensation for the mental agony money misappropriated and particularly for the two cheques aforesaid failing which my client would be constrained to proceed to initiate action at all the appropriate forums at your cost and consequences".

A perusal of the notice shows that the notice did not specify what

notice, even though the return of the cheque has been mentioned, the demand is made without specifying what was the due under the dishonoured cheque and apart from that the complainant only demanded a compensation of Rs.1,00000/- for the mental agony suffered by him. In the above circumstances, the notice fall short of the legal requirements and it is only a defective notice. Based on which, the complainant cannot maintain the present complaint.

18. In an appeal against acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him and the fundamental principle of criminal justice delivery system is that every person, accused of committing an offence shall be presumed to be innocent, unless his guilt is proved by a competent Court of law. Secondly if the accused has secured an order of acquittal, the presumption of his innocence is reaffirmed and strengthened by the trial Court. Even if two reasonable conclusions are possible on the basis of evidence on record, the appellate Court should not disturb the finding of the acquittal recorded by the trial Court.

19. In the above said circumstances, I find no reason to interfere with the impugned order of acquittal passed by the trial Court. Hence, the appeal fails and the same is deserves to be dismissed.

20. In the result, the Criminal Appeal fails and accordingly, the same is dismissed and the impugned order of acquittal passed by the court below is hereby confirmed. Consequently, connected miscellaneous petition is closed.

21. While parting with the case, I appreciate the services rendered by Mr.K.Thilageswaran, learned counsel who appeared on behalf of the respondent/accused, as Legal Aid Counsel. The Legal Services Authority is directed to pay his remuneration.

सत्यमेव जयते

30.11.2017

mrp

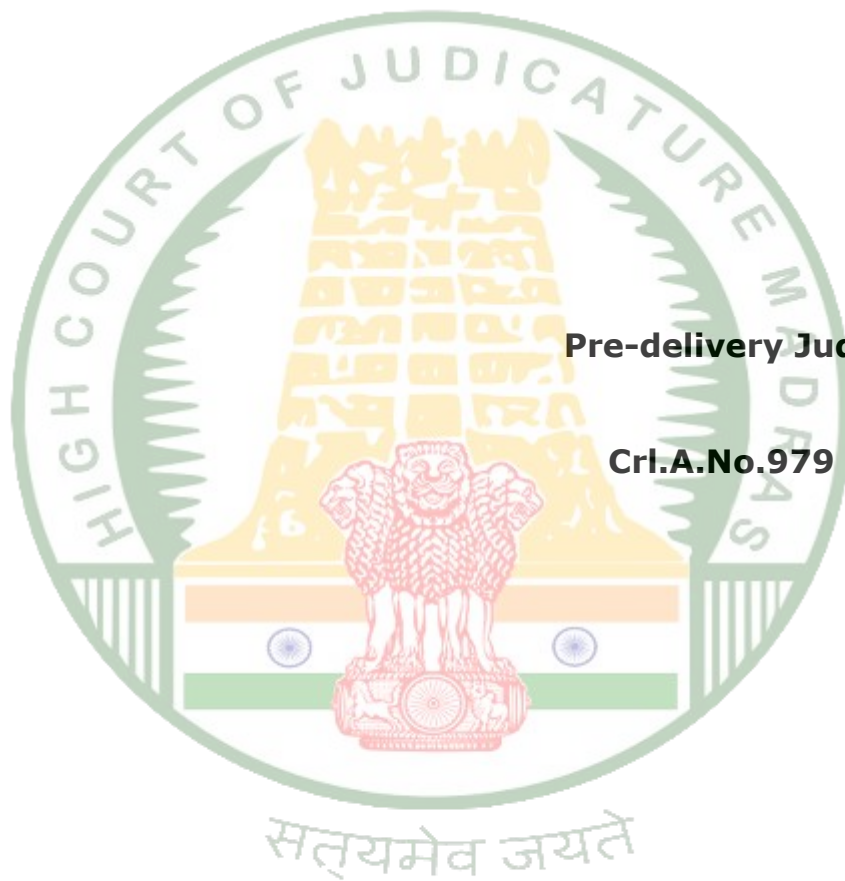
Index:Yes/No
Internet: Yes/No
Speaking order/ non speaking order

To

1. The Principal Sessions Judge,
City Civil Court,
Chennai.
2. The XV Metropolitan Magistrate,
George Town,
Chennai.

V.BHARATHIDASAN.J.,

mrp



**Pre-delivery Judgment
in
Crl.A.No.979 of 2007**

WEB COPY

.11.2017