

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Criminal Revision Case No.1698 of 2017

ORDER:

This Criminal Revision Case, under Sections 397 & 401 of the Code of Criminal Procedure, 1973, ('the Code') by the petitioners/ accused is directed against the order, dated 31.05.2017, of the learned XIX Special Magistrate, Hyderabad, passed in CrI.M.P.no.416 of 2017 in C.C.No.317 of 2016 (old C.C.No.858 of 2016).

2. I have heard the submissions of *Sri S.V.S.Sivaram*, learned counsel appearing for the petitioners/ accused, and of *Sri B.Vijaysen Reddy*, learned counsel appearing for the 2nd respondent/ complainant. I have also heard the submissions of the learned Public Prosecutor appearing for the 1st respondent/ State of Telangana. I have perused the material record.

3. What is to be noted is that the 2nd respondent/ complainant filed the aforementioned calendar case against the petitioners/ accused requesting to punish them for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The petitioners/ accused are resisting the said case. During the pendency of the said case, the complainant filed a petition under Section 63 of the Indian Evidence Act, 1872, requesting the trial Court to permit him to file Photostat copy of the cheque, dated 12.06.2014, for Rs.5,00,000/-, drawn on State Bank of India, Sripuram Branch, and receive the same on file as secondary evidence in the interests of justice.

4. The case of the complainant in support of the said request, in brief, is as follows: 'The above said cheque was issued by the petitioners/ accused towards a legally enforceable debt and that the said cheque when presented for collection was dishonoured. Therefore, the complaint was filed after

following the procedure established by law. Along with the complaint, which was filed on 24.07.2014, the complainant filed all the original documents including the original cheque. The office of the Court below after verification of the originals returned all the originals on the undertaking of the complainant's counsel that the originals will be produced at the time of trial. The Photostat copy of the cheque was already filed into Court. However, the original cheque was later misplaced in the house of the complainant. In spite of best efforts, he could not trace it. The cheque was returned by the banker of the accused for the reason 'insufficient funds'. In the above circumstances, the 2nd respondent is constrained to request the Court to permit him to adduce secondary evidence by producing the photostat copy of the cheque.'

5. Per contra, the case of the accused is this: 'The cheque on the basis of which the complaint is filed is a fundamental document. The bouncing of the cheque as envisaged under law is a *sine qua non* for initiating the criminal proceedings under Section 138 of the Act. The complainant has not filed the original cheque along with the complaint. Since the original cheque is not filed, there is no valid document to establish the contention of the complainant that the offence punishable under Section 138 of the Act has been committed. The averments in the petition filed by the complainant do not disclose valid reasons for non-production of the original cheque and for granting permission to produce a Photostat copy of the cheque and adduce secondary evidence. The petition is filed in a casual manner without assigning any reasons. No details as to when the cheque was misplaced and as to when the 2nd respondent acquired knowledge about the misplacement of the cheque are pleaded. If the original cheque is not produced and if permission is accorded to file the Photostat copy of the cheque, it causes great prejudice to the defence of the accused and prevents the accused from raising valid defence, which is available to them.'

6. At the hearing, learned counsel for the complainant/ 2nd respondent herein, would submit as under: “The original cheque was produced along with the complaint. After verification of the original cheque, the original cheque was returned along with all the original documents on the undertaking given by the counsel for the complainant that the originals will be produced at the time of trial. Thus, the original cheque was produced before the Court below and it was compared with the photostat copy of the cheque already filed into Court and available in the record of the Court. The trial Court having considered the facts correctly and the legal position in proper perspective accepted the version of the complainant that the original cheque was filed and returned on the undertaking that it will be filed at the time of trial. The trial Court also accepted the further version of the complainant that the cheque was misplaced after it was taken return and hence, granted the request of the complainant. Accordingly, the trial Court considered the request of the complainant by observing that in the circumstances stated by the complainant, it is possible for the complainant to prove his case only by producing photostat copy, as the original is misplaced and is lost and could not be produced. The well reasoned order of the trial Court does not warrant interference.’

7. Learned counsel for the petitioners/ accused would submit as follows: ‘The trial Court failed to see that the dishonoured cheque is a crucial document and that unless it is produced, the ingredients of the alleged offence do not stand established. Production of the original document itself is a *sine qua non* as it is the basic and fundamental document. The complainant is contending that the original cheque is filed into Court and that after verification it was also returned along with the other documents on the undertaking of the counsel for the complainant that the same will be produced at the time of trial. Nevertheless, there is only an endorsement by the learned

counsel for the complaint that he received all the originals after verification and that the same would be produced at the time of trial. But, there is no endorsement by the Ministerial Officer of the Court that the originals are filed, verified and returned. Even assuming for a moment that the original cheque is filed and returned, yet, production of the same is necessary for establishing the alleged case of the complainant. No foundation is laid by the complainant for adducing secondary evidence. A bald allegation was made that the original cheque was misplaced in the house and that the same could not be traced despite best efforts. Unless a foundation is laid with regard to loss of the original, secondary evidence cannot be permitted to be adduced.'

8. I have given earnest and thoughtful consideration to the facts and submissions.

9. In the calendar case that was taken on file for the offence punishable under Section 138 of the NI Act, the complainant seeks permission to file the photostat copy of the dishonoured cheque and adduce secondary evidence on the basis of the following submissions: "That the original cheque was filed along with the complaint into the Court. It was taken return along with the other original documents on an undertaking given by the counsel that it will be produced at the time of trial. Later, it was misplaced in the house and is lost in the house and is not traced despite his best efforts.' The accused contend that production of the original cheque itself is necessary to establish the ingredients of the offence. The petitioners/ accused are also disputing filing of the original cheque along with the complaint and its return to the learned counsel for the complainant on the undertaking that the same will be produced at the time of trial. However, a perusal of the list of documents at the foot of the copy of the complaint discloses that all original documents were once filed into Court. Further, the impugned order also discloses that the complainant

filed all the original documents and that on filing of the original documents only, the case was numbered and that there is an endorsement, dated 24.07.2014, of the counsel for the complainant on the complaint that he received all the originals from the Court subject to an undertaking that the original documents being taken return would be produced at the time of trial of the case. The Court below observed in its order that the said endorsement clearly shows and establishes that the complainant filed the original documents including the cheque for numbering purpose and had taken back the same after the case is registered. Since the original cheque was already filed and it was returned in the circumstances stated, the Court below permitted the complainant to file the photostat copy of the original cheque and adduce secondary evidence after having accepted the version of the complainant that the original cheque was lost after it was taken return from the Court. As rightly contended by the learned counsel for the complainant, unless the original cheque is really lost, no complainant would take the risk of filing a photostat copy. There is no necessity for the complainant to suppress the original cheque, which is an important document. It is not the case of the accused that the original cheque was suppressed for any extraneous reasons or with any oblique motive. The only contention of the accused is that production of the original itself is necessary. It is settled law that mere marking of documents is no proof. It is also to be noted that mere permission accorded to file the photostat copy of the cheque does not preclude the accused from advancing their defence, if any, and adducing their evidence in support thereof. In the facts and circumstances, this Court finds that the objections of the accused are untenable and that there are no merits in the revision warranting interference with the well considered order of the learned Magistrate. Therefore, if the photostat copies of the cheque received on file and permission is accorded to adduce secondary evidence, subject to the

qualification that all the relevant factual aspects of the matter, which are subject matters of the evidence to be adduced by both parties would be considered at the appropriate stage of the matter, such a course would protect the interests of both the parties and meets the ends of justice. On the above analysis, this Court finds that the learned Magistrate is justified in passing the impugned order and that there are no merits in the revision and that the well considered order of the learned Magistrate warrants no interference.

10. In the result, the Criminal Revision case is dismissed confirming the order of the trial Court, however, making it sufficiently clear that all the relevant factual aspects of the matter that would be forming part of the evidence to be adduced by both parties shall be considered by the trial Court in a just and fair manner at the appropriate stage of the case.

Pending miscellaneous petitions, if any, in this Criminal Revision Case shall stand closed.

04th August, 2017
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M. SEETHARAMA MURTI, J

