

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Criminal Revision Case No.1341 of 2017

ORDER:

This Criminal Revision Case, under Sections 397 and 401 of the Code of Criminal Procedure, 1973, ('the Code') by the petitioner/ accused is directed against the order, dated 16.03.2017, of the learned IV Additional Chief Metropolitan Magistrate, at Hyderabad, passed in CrI.M.P.no.3773 of 2016 in C.C.no.957 of 2013 filed by the complainant, under Section 65 of the Indian Evidence Act, 1872, requesting to receive on file the photostat copy of the cheque bearing no.397972, dated 24.03.2011, and the cheque return memo, dated 24.05.2011, as secondary evidence, as the original cheque and cheque return memo are missing.

2. I have heard the submissions of *Sri N.Harinath*, learned counsel appearing for the petitioner/ accused (hereinafter, 'accused'), and of *Sri K.S.A.Narasimha Rao*, learned counsel appearing for the 2nd respondent/ complainant (hereinafter, 'complainant'). I have also heard the submissions of the learned Public Prosecutor appearing for the 1st respondent herein, State of Telangana.

3. To begin with, it is necessary to refer to the pleadings of the parties.

The case of the complainant is this: 'He filed complaint against the accused requesting to punish him for the offences punishable under Sections 406 and 420 IPC. The cheque, which was dishonoured, was issued by the accused to the complainant towards a legally enforceable debt. The said cheque, when presented for collection, was returned along with a memo with the return endorsement 'funds insufficient'. The complainant filed photostat copies of the cheque and cheque return memo into Court. He did not file the original documents into Court at the time of filing of the complaint with an

intention to file them at the time of trial. At this juncture, the said original cheque and the cheque return memo were missing from the complainant. The same could not be traced in spite of making best efforts by the complainant to trace them. The copies of the same are already on record as they were filed at the time of filing of the complaint. The issuance of the cheque was not denied by the accused. As the original documents are lost, there is no other alternative for the complainant, but to file the photostat copies of the lost documents. In the facts and circumstances, the question of disputing the genuineness of the copies does not arise. They are free from any kind of material alterations. The said documents are crucial to substantiate the case of the complainant. Without exhibiting the said documents, it is not possible for the complainant to succeed in the matter. If the copies of the documents are not permitted to be filed, the case is likely to be dismissed on technical grounds. The receiving of the copies of the said lost original documents on file is necessary to adjudicate the case on proper lines. No prejudice would be caused to the accused if the photostat copies of the original cheque and cheque return memo are received on file and permission is accorded to lead secondary evidence. If an opportunity to lead secondary evidence, as requested, is not granted to the complainant, he would lose his valuable right to prove his case beyond reasonable doubt and as required under law.

4. Per contra, the case of the accused is this:

The complainant admitted that the original documents, namely, original cheque and the cheque return memo are in his custody. He stated that the documents will be filed at the next date of hearing and sought adjournment till December. The examination-in-chief, which commenced on 21.01.2016, was deferred for marking of the original documents. When the trial Court insisted for continuation of the trial and recording of evidence, the complainant filed the present petition in the month of October 2016. The complaint case was

originally referred to the police. The police have also not gone through the original documents. Simply in collusion with the complainant, the charge sheet was filed even though there are no grounds to file a charge sheet. No chance was given to the accused at the earliest point of time to say anything in the matter. No notice was given and no opportunity was granted to the accused to either deny or admit the documents. In his examination-in-chief, the complainant/ LW1 stated that the cheque was given for Rs.13,90,000/- though they were supposed to receive only Rs.5.5 lakhs, as Rs.7.9 lakhs was already received by them. The complainant knows all the facts. But the case was registered under his influence. The original cheque and cheque return memo are the crucial documents in the present case. While taking photostat copies of the original documents, copies of the contents on the reverse side of the cheque are not taken. The backside portion of the cheque contains a noting that the cheque was given for surety and that payment will be made subject to settlement. As per the provisions of Section 65 of the Indian Evidence Act, 1872 ('the Act', for short) the complainant is not entitled to introduce as secondary evidence, the Photostat copies of the cheque and cheque return memo, in view of the facts and circumstances of the instant case. The conditions laid down in Section 65 of the Act are not fulfilled in this case. The matter is in the nature of a civil litigation; but, it was converted into a criminal case in collusion with the investigating agency, because the civil case cannot be filed as the originals were lost.

5. Learned counsel for both the sides advanced arguments in line with the respective pleadings of the parties, which are stated supra.

6. On merits and by the orders impugned in this revision, the trial Court allowed the petition of the complainant and received on file the photostat

copies of the cheque and the cheque return memo and accorded permission to the complainant to adduce secondary evidence.

7. Aggrieved thereof, the accused filed this revision case.

8. At the hearing, learned counsel for both the sides advanced arguments in line with the respective pleaded cases of the parties.

9. Learned counsel for the accused would further submit as follows:

The accused purchased a flat in one of the ventures of the complainant, namely, Vasistha Golden Towers. The said flat bearing no.202 is admeasuring 1456 Sq. feet, and the total consideration was Rs.52,50,000/- . A sale deed was executed in favour of the accused. The accused availed housing loan from Axis Bank Limited and paid the entire sale consideration. The complainant took up construction work and other finishing works and demanded a security by way of a cheque for Rs.13,90,000/- . On 24.03.2011, the petitioner handed over to the complainant, a security cheque with a clear understanding and also handwritten note behind the cheque to the following effect: "Security cheque subject to settlement of account". Thereafter, the accused paid an amount of Rs.7,90,000/- by way of demand draft drawn on Axis Bank. From the allegation in the complaint, it is evident that the complainant is admitting payment of the said amount. The complainant with a malicious intention presented the security cheque for collection and thereafter got filed a private complaint, got referred it to the police for investigation and got filed a charge sheet in collusion with the police, though the original cheque and cheque return memo are not produced before the police. The complainant stated that the originals would be filed at the time of trial. Ultimately, the complainant filed a petition under Section 65 of the Act alleging that the originals are lost and the complainant may be permitted to adduce secondary evidence by producing photostat copies of the cheque and cheque return memo. Though there is an

endorsement on the reverse of the cheque, the photostat copy of the contents on the reverse of the cheque was not taken while taking photostat copy of the cheque. The contents of the original cheque would disclose that entire case of the complainant is false. The transaction between the parties arose out of contractual obligations and therefore, the element of cheating or breach of trust cannot be inferred in this case. The request for permission to produce photostat copies and adduce secondary evidence on the ground that the originals are misplaced is completely untenable. The complainant is somehow trying to twist the arm of the accused and extract the money from him. The Court below erred in allowing the complainant to file photostat copies of the cheque and cheque return memo and adduce secondary evidence subject to observation that existence of endorsement on the reverse of the cheque is a matter of evidence to be adduced at the time of trial and further erroneously held that the petition of the complainant deserves to be allowed. Once the photostat copy of the cheque is allowed to be marked and the complainant is permitted to adduce secondary evidence, nothing else remains in the matter and the fact that there is a handwritten endorsement on the reverse of the cheque would be gone with the wind. If the photostat copy of the cheque is allowed to be marked great prejudice would be caused to the accused, in the facts and circumstances of the case.

10. Per contra, learned counsel for the complainant, while supporting the orders of the Court below, would contend as follows:

Along with the complaint, photostat copies of the original cheque and original cheque return memo are not produced. A request was made to refer the complaint to the police. On such request, the complaint was forwarded by the Court to the police concerned under Section 156(3) of the Code for investigation. After through investigation, the police filed a charge sheet for the offences punishable under Sections 460 and 420 IPC. The contentions of

the accused are false. It is true that the original documents are not filed into Court along with the complaint with an intention to file them at the time of trial. However, as stated in the petition of the complainant, at that juncture, the said original cheque and cheque return memo were missing and could not be traced despite the best efforts made by the complainant to trace them out. Taking advantage of the fact that the originals were lost, a theory was introduced that there is an endorsement on the reverse of the cheque and that the photocopy of the contents on the reverse of the cheque was not taken while taking copy of the front portion of the said cheque. There was no such endorsement on the reverse of the cheque. The contentions of the accused that the requirements of the provision of Section 65 of the Act are not fulfilled and that the order of the trial Court is erroneous are all false. The trial Court rightly made an observation that the contentions of the accused that there is an endorsement existing on the reverse of the cheque is a matter of evidence and that, therefore, the request of the complainant to adduce secondary evidence deserves to be considered. The order of the trial Court is a well reasoned order. If the photostat copies are not permitted to be marked and complainant is not allowed to adduce secondary evidence, the complainant may not be able to prove his case, as required under facts and in law. Only after full-fledged trial, the trial Court can decide as to which one of the two versions of the parties is correct. The complainant cannot be denied an opportunity to adduce evidence at the threshold. The contentions of the accused are untenable. In the light of the various observations in the order of the Trial Court including the observation that the question whether there is an endorsement on the reverse of the cheque is a question of fact and that it has to be looked into and decided by the Court only during the course of trial, it is clear that the trial Court adequately protected the interests of the accused while passing the impugned orders. The trial Court also observed that the

accused failed to produce any documents to show that the cheque was given as a security and that in the facts and circumstances, the request of the petitioner/ complainant cannot be rejected. Hence, the revision is devoid of merit and is liable to be dismissed.

11. I have given detailed and thoughtful consideration to the facts and submissions.

12. The background facts of the case, which lead to filing of the present revision, in brief, are as follows:

The complainant filed a complaint case against the accused under Section 190 read with Section 200 of the Code requesting to punish the accused for the offences punishable under Sections 406 and 420 IPC. Strangely, the complainant made a request to refer his complaint to the police of Amberpet for investigation under Section 156(3) of the Code, without making a request to record his sworn statement and take the case on file. Considering the request of the complainant, the trial Court forwarded the complaint for investigation and report. After investigation, a charge sheet was filed opining that there is a *prima facie* case for proceeding against the accused for the offences punishable under Sections 406 and 420 IPC. The accused is resisting the case. While so, during the pendency of the case, the complainant filed the aforesaid petition to permit him to file photostat copies of the cheque and the cheque return memo and adduce secondary evidence. In support of the said request he *inter alia* stated that the original documents are missing and could not be traced despite his best efforts to trace them out. The accused resisted the said request stating that the request to produce the photostat copies and adduce secondary evidence on the ground that the originals are misplaced and are not traced is completely untenable and that the complainant is somehow trying to twist the arm of the accused and extract the money from him. The

further contention of the accused is that the original cheque and cheque return memo are the crucial documents in the present case and that while taking photostat copy of the original cheque, copy of the contents on the reverse side of the cheque is not taken and that the backside portion of the cheque contains a noting that the cheque was given for surety and that payment will be made subject to settlement and that the complainant cannot be permitted to file photostat copy of the cheque and adduce secondary evidence.

12.1 From the rival contentions and pleadings of the complainant, it emerges that the complainant having stated in his complaint that the original cheque and the cheque return memo would be filed at the time of trial, is now contending that at this juncture, the said original documents are missing and could not be traced despite his best efforts and therefore, he may be permitted to file the photostat copies of the same and adduce secondary evidence. It is pertinent to note that the complainant did not produce the original cheque and cheque return memo even before the police during the course of investigation. A perusal of the copy of the complaint filed before the trial Court shows that there is a list of documents mentioned at the end of the complaint. The list of documents reads as follows:

List of Documents

1. Partnership Deed, dated 01.04.2006 [original]
2. Registration Certificate, dated 05.09.2007 [original]
3. Agreement of Sale, dated 28.08.2010 [xerox]
4. Work order, dated 24.03.2011 [xerox]
5. Payment Schedule/Receipts: As per enclosure [xerox]
6. Original Cheque, dated 24.03.2011 [original]
7. Original Bankers Advice, dated 19.05.2011 & 24.05.2011 [original]

Thus, a reading of the above list of documents mentioned at the last page of the complaint would suggest that the original cheque and the original banker's advice are filed into Court, but, in fact, the original documents are not filed into Court. Further, it was stated at the foot of the 'list of documents' that

the originals will be filed at the time of trial. Therefore, a wrong mention was made in the list of documents to the effect that the original cheque and original Bankers advice are filed though in fact, photostat copies are filed. Further, in the subject miscellaneous petition, the complainant stated that the photostat copies are filed with the complaint and that the complainant did not file the original documents before the trial Court at the time of filing of the complaint with an intention to file the originals at the time of trial. It is apt to now refer to the relevant pleading in the petition of the complainant, which is as follows: "At this juncture, the said original cheque and cheque return memo were missing from LW1." The complainant did not plead as to when the said documents were found missing and as to when he noticed that the said documents were missing. The statement that the original cheque and the original cheque return memo were missing was made for the first time in the subject petition filed on 18.10.2016 though the complaint was filed in the year 2013 by making a bald allegation that the original cheque and cheque return memo were lost. Therefore, the accused contends that no foundation was laid to seek permission to adduce secondary evidence. It is to be noted that the specific case of the accused is this: 'The complainant is a builder and he conducts his business under the name and style 'Rajarajeshwari Builders' and that the accused agreed to purchase the flat bearing no.202 admeasuring 1456 Sq. feet., for a total consideration of Rs.52,50,000/-, in one of the ventures of the complainant, namely, Vasista Golden Towers, and that the complainant also executed a registered sale deed and that the consideration was paid by the accused by availing loan from Axis Bank Limited and that later, the complainant took up construction and other finishing works and that at that time the complainant demanded a security by way of cheque for a sum of Rs.13,90,000/- and that accordingly, the accused issued a cheque towards security by making hand written note behind the cheque to the effect 'security

cheque subject to settlement of account'. The accused contends that there is an endorsement on the reverse of the cheque to the above effect and that to suppress the said fact; the complainant is falsely contending that the original cheque and the cheque return memo are lost. The accused also contends that the photo copy of the contents on the reverse of the cheque was not taken and therefore, the photocopy of the cheque filed into Court does not reflect the endorsement which is there on the reverse of the original cheque. However, the complainant denies the existence of any such endorsement on the back side of the cheque. In paragraph (4) of the counter of the accused, it is stated verbatim as follows: 'It is further submitted that the litigation is a civil litigation and the *de facto* complainant, in collusion with the prosecution, filed the present case against the accused because the originals were lost hence they could not file the civil case, but with the influence they have registered the present case against the accused which is not maintainable.'

12.2 Be that as it may. Taking into consideration the contentions of both the parties, the trial Court having made certain observations in its order accorded permission to the complainant to file photostat copies of the cheque and the cheque return memo and adduce secondary evidence. As rightly observed by the trial Court, the question whether there is an endorsement on the reverse of the cheque as stated by the accused, is a question of fact. The said aspect and the further aspect as to whether the photo copy of the contents, if any, on the reverse of the cheque, was not intentionally got taken by the complainant while getting a photostat copy of the cheque only to suppress the existence of any such endorsement on the reverse of the cheque are matters of evidence. Therefore, if the photostat copies of the documents are 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. It is settled law that mere marking of documents is no proof. In the facts and circumstances of the case, it is also made clear that mere permission accorded to file photostat copies and adduce secondary evidence does not preclude the accused from advancing his defence and adducing evidence in support thereof. In that view of the matter, this Court is of the considered view that the order in the revision can accordingly be confirmed subject to certain observations.

13. In the result, the Criminal Revision case is dismissed confirming the order of the trial Court, however, making it sufficiently clear that the accused is at liberty to cross-examine PW1 and his witnesses and also adduce evidence on all aspects including the aspect now raised with regard to existence of the endorsement on the reverse of the cheque and that the trial Court shall at the appropriate stage, appreciate and evaluate the evidence brought on record by both sides in a just and fair manner keeping in view the observations made by it in the impugned order and also the observations of this Court in the instant order.

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

03.07.2017
RAR

M. SEETHARAMA MURTI, J

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI



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Date : 03-07-2017

