

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.07.2018

PRONOUNCED ON : 21.08.2018

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.A.204 of 2009

M/s.Prakash Finance,
Rep. by its Power of Attorney,
Mr.Prakash Chand. ...Appellant / Complainant
Complainant

Vs

R.Babu .. Respondent / Accused

Prayer:- Criminal Appeal filed under Section 378 of Cr.P.C, call for records in C.A.No.142 of 2008 and set aside the judgment of Acquittal dated 31.07.2008 passed by the learned III Additional Sessions Judge, Chennai in C.A.No.142 of 2008 against the order dated 27.03.2008 passed in CC.No.7009 of 2004 by the learned XXIII Metropolitan Magistrate, Saidapet.

For Appellant : Mr.M.L.Joseph for
M/s.Chennai Law Associates
For Respondent : Mr. M.L.Ramesh

JUDGMENT

This appeal is preferred against the judgment dated 31.07.2008 made in Crl.A.No.204 of 2009 on the file of the III Additional Sessions Court, Chennai reversing the conviction and sentence imposed on the respondent / accused by the judgment dated 27.03.2008 on the file of the XXIII Metropolitan Magistrate, Saidapet, Chennai, thereby convicting the respondent for the offence under section 138 of the Negotiable Instruments Act and sentencing him to undergo simple imprisonment for one year and fine of Rs.5,000/-, in default three months simple imprisonment.

The facts of the private complaint preferred under section 200 of Cr.P.C., punishable under section 138 of Negotiable Instruments Act are as follows:

2. The accused had approached the complainant for a loan to purchase a 1996 Model Ashok Leyland Lorry bearing Registration No.TN21 X

9595 under Hire Purchase Agreement. The complainant sanctioned and disbursed the loan for a sum of Rs.3,19,800/- to the accused on 06.12.2003 as per the Hire Purchase Agreement. The accused agreed to repay the said loan amount in 28 monthly installments i.e., Rs.12,000/- for the 1st installment and 11,400/- for the remaining 27 installments. The accused borrowed in payment of dues and he issued the cheque bearing number 649127 dated 31.05.2004 drawn on HDFC Bank, Valsaravakkam Branch to the tune of Rs.2,60,000/- towards the repayment of the loan borrowed by him in favour of the complainant.

3. On instructions, the said cheque was presented by the complainant and the same was returned dishonoured with an endorsement "Account Closed". On 01.06.2004, it was intimated to the complainant through the return memo dated 02.06.2004. Thereafter, the complainant caused legal notice dated 11.06.2004 and after the receipt of the same, the accused replied by the reply notice dated 29.06.2004 denying the averments made in the legal notice caused by the complainant. Thereafter the complainant filed the complaint before the Trial court. The complaint was taken on file and copy of the same was furnished to the accused and when the offence was explained to the accused, he pleaded not guilty.

4. The complainant examined PW-1 and the Power of Attorney was marked as Ex.P.1, Cheque was marked as Ex.P2, return memo was marked as Ex.P3, Debit Advice was marked as Ex.P4, legal notice was marked as Ex.P5, acknowledgement card was marked as E.P6, reply notice by the accused was marked as Ex.P.7 and the Hire Purchase Agreement and receipt dated 29.12.2003 were marked as Exs.P8 and P9. On the side of the accused, he did not adduce any evidence, but he marked documents Ex.D1 and Ex.D2. The trial court after considering all the facts and circumstances of the case found that the accused was guilty and convicted and sentenced him as stated above.

5. As against the said conviction, the accused preferred appeal and the appellate court reversed the conviction and sentence and acquitted the accused. Hence the complainant preferred this appeal as against the acquittal of the accused.

6. The learned counsel for the appellant would submit that the issuance of cheque and signature of cheque are not denied by the accused. It was issued only for the legally enforceable debt for the loan obtained by the accused under Hire Purchase Agreement. He would further contend that as per Section 118 of

N.I. Act, the presumption is in favour of the complainant and as per section 200 of N.I. Act, the holder of the blank signed cheque is empowered / authorized by the signatory of the cheque (drawer of the cheque) to fill in the contents including the vehicle, date, words on the cheque. The writings and the signature being in different inks by itself cannot permit the accused to wriggle out of his otherwise established debt or liability as per Hire Purchase agreement / Clauses 20 and 21. It is very clearly stated that the Hirer can become the owner of the vehicle only after paying all the money due to the financier. Until then, he cannot be deemed to be the owner of the vehicle. Further he would submit that the accused issued a cheque only to repay the entire loan amount borrowed by him. He did not even pay single installment as per the Hire Purchase Agreement. Thus presumption of non existence of liability was not at all possible as Hire Purchase Agreement was marked as PW.8. Therefore, the cheque is only for legally enforceable debt.

7. The learned counsel for the appellant would further contend that after the loan disbursal, the registration certificate of the vehicle was submitted before the RTO Office to change the name in favour of the complainant. Thereafter it was not available in that RTO office. Hence, the complainant filed writ petition on behalf of management directing RTO office to issue New RC Book in the name of the complainant without insisting original RC book. Even though it was held against the complainant, it cannot be presumed that only for that reason, the vehicle was not sold out without original RC book. Therefore, the 1st appellate court committed an error in acquitting the accused. Further the lower appellate court committed error that the ink used in the cheque differs and as such it is presumed that the cheque was not issued at the time of borrowal of loan as security. He vehemently contended that under sub section 20 of Negotiable Instruments Act, the accused cannot be permitted to wriggle out of his liability. Therefore he prayed for conviction of the respondent.

8. He would rely upon the judgment dated 14.05.2015 passed by the "Delhi High Court in Suresh Chandra Goyal Vs. Amit Singhal", in report of security.

9. He would further rely upon the judgment in Crl.A.867 of 2016 passed by the Hon'ble Supreme Court in "Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Limited", relates to the value of post dated cheque while obtaining loan given as security.

10. Per contra, the learned counsel for the respondent would submit that the accused did not issue any alleged legally

enforceable debt at the time of borrowal of loan and it was handed over without filling the same as security to the complainant. In fact, after default of payment of installments, the vehicle was seized by the complainant. Therefore, there is no contract between the complainant and the accused as per the Hire Purchase Agreement. Once the Hire Purchase Agreement terminated the relationship between the financier and borrowal comes to an end. After seizing the vehicle, financier would sell the vehicle and if at all the borrowed amount has not fulfilled the requirements of entire loan amount, the financier can very well proceed against the borrower to recover the balance loan amount in accordance with law. He would further submit that after seizing the vehicle, there is absolutely no need to issue cheque for the entire loan amount by the accused. Even assuming that the accused issued a cheque for Rs.2,60,000/- it is seen from the Hire Purchase Agreement that the loan amount plus interest would be more than Rs.2,60,000/-. Therefore the appellate court has rightly acquitted the accused and prayed for dismissal of the appeal.

11. The learned counsel for the respondent would rely upon the judgment reported in "2004 CRI.L.J.3418 (Sudha Beevi Vs. State of Kerala and another) and the judgment reported in 2010-2-L.W. (Crl.) 831" (N.Rajangan Vs. M/s.Centurian Bank Ltd., through its Power of Attorney Mr.V.Thiagarajan) to support the case.

12. It is seen from the records that the accused has entered into Hire Purchase Agreement with the complainant to purchase a second-hand lorry for a sum of Rs.3,19,800/- and he did not repay any installment as agreed by him. Therefore, admittedly the vehicle was seized by the complainant and it was in the custody of the complainant. Therefore the Hire Purchase Agreement said to be terminated and if the amount realized by the complainant by selling the vehicle has not fulfilled his requirements, the complainant can proceed further to recover the balance amount from the accused in accordance with law. Further the alleged cheque was issued to the tune of Rs.2,60,000/-. It is seen from the notice Ex.P.5 that the accused did not pay any monthly installment and he was a chronical defaulter in repayment of monthly dues as on May 2004. The accused is liable to pay the sum of Rs.2,60,000/- to the complainant. When the complainant demanded the accused, he issued the cheque for the said sum. As per the Hire Purchase Agreement, the accused has to repay the loan amount in 28 monthly installments for Rs.12,000/- for the first month and Rs.11,400/- for the remaining months. Admittedly, the accused did not pay any amount. Then the total amount (Principal and interest) would be more than Rs.2,60,000/-. If the seized vehicle was sold for some amount, the remaining amount has to be recovered from the accused and it

is not stated anywhere. It is also seen from the records and according to the complainant the seized vehicle was not sold out since the registration certificate was misplaced by the RTO office. Therefore the entire case of the complainant is not believable one and the alleged cheque issued was not on account of any legally enforceable debt by the accused.

13. Further, it is seen that the accused has not paid any amount towards discharge of liability under the Hire Purchase Agreement, whereas in the legal notice Ex.P.5 it is stated that the alleged cheque issued for the amount of Rs.2,60,000/- was for the default committed by the accused till May 2004. If it is calculated till May 2004 from the date of borrowal of loan on 06.12.2003, definitely it would not come Rs.2,60,000/-. Therefore in any of the angle the alleged cheque could not pay the requirement of the complainant. Therefore it is clearly presumed that the said cheque was handed over by the accused at the time of borrowal of loan under the Hire Purchase Agreement as security. Therefore it cannot be taken as one issued for a legally enforceable debt.

14. In judgment relied upon by the learned counsel for the accused in 2004 CRI.L.J.3418, (Sudha Beevi Vs. State of Kerala), it was held as follows;

20.A perusal of various clauses in Annexure A8 agreement, in particular Cls.8 and 9, would clearly show that the owner is not entitled to present any of the post-dated cheques for encashment after termination of the agreement, especially after the vehicle was re-possessed by him. Even though the post-dated cheques issued by the hirer were supported by consideration at the time when, they were issued, they had ceased to be so when the vehicle was repossessed. The consideration had failed subsequently. Therefore, I have no hesitiation to hold that the cheque dated September 5, 1999 which was the subject-matter of Annexure A1 complaint was not supported by any consideration, since the agreement had stood "determined ipso facto" and also since the owner had admittedly re-possessed the vehicle even before the cheque was presented for encashment. Thus, there is no doubt that by effecting seizure of the vehicle, the owner had exercised the option available to him under the agreement. The post-dated cheques in the hands of the owner had become instruments for which consideration had failed. In that view of the

matter, no offence punishable under Section 138 of the Act would be attracted, since it is trite that in order to attract the above penal provision, the "debt or other liability" must be a legally enforceable debt or liability". If the negotiable instrument is not supported by consideration, there is no question of the provisions of Section 138 of the Act being attracted.

24. I am not inclined to consider the above questions since they do not arise for consideration in this proceeding. It is true that the learned Judge of the Punjab and Haryana High Court had proceeded to construe the hire purchase agreement in the above case as a loan transaction on the strength of the dictum laid down by Their Lordships of the Supreme Court in *Sundaram Finance Limited v. State of Kerala*, AIR 1966 SC 1178. In the above decision their Lordships held that the hire purchase agreement is nothing but a loan agreement. The question that arose for consideration in the case was whether the vehicles which were given on hire to the prospective purchasers by the financiers/dealers were exigible to tax under the Kerala General Sales Tax Act. By a majority decision, Their Lordships held that the real intent behind the hire purchase agreement in the above case was only advancement of a loan.

15. The aforesaid decision is followed by this Court of Madurai Bench reported in 2010-2-L.W. (Crl.)831, *N.Rajangan Vs. M/s.Centurian Bank Limited*, through its Power of Attorney *Mr.V.Thiagarajan*", wherein it was held as follows;

14. In view of the same, this Court is also of the view that once the financier had exercised the option of seizure of the vehicle, the post-dated cheque obtained from the purchaser cannot be presented for encashment after the seizure. The owner has to take recourse to other legal remedies for recovery of the balance amount. If and when the vehicle is sold subsequently, the owner can recover the balance amount for adjusting the sale proceeds of the vehicle. Of course, in the post-seizure scenario, it may be open to the parties to agree upon a new schedule

of payment or restructuring of the agreement concerned. So, the present case filed on the basis of the post-dated cheques issued by the petitioner is not attracted the offence under Section 138 of Negotiable Instruments Act, and hence, the same is liable to be quashed".

16. In the aforesaid judgment, it was laid down that the financier, after exercising the option of seizure of vehicle cannot present the post dated cheque obtained from the purchaser for encashment and the financier has to take recourse to other legal remedies for recovery of the balance amount. Therefore, this judgment is clearly applicable to the case on hand. The alleged cheque was presented by the complainant only after seizure of vehicle. Though the said vehicle was not sold by the complainant, the vehicle has been taken custody by the financier. The borrower did not pay the entire loan amount as agreed by the Hire Purchase Agreement. The financier can realize only the balance amount of the loan amount after adjusting the value of the vehicle. Therefore after seizure of vehicle, the alleged issuance of cheque cannot be presented by the financier / complainant. Therefore the cheque is not issued for any legally enforceable debt.

17. The judgments relied upon by the appellant is not applicable to the present case on hand. Though the judgments are pertaining to issuance of cheque as security, the cheque was not realized for the loan borrowed by the accused.

18. In view of the above discussion and the decision relied on by the learned counsel for the appellant / complainant has failed to prove the case of 138 of the Negotiable Instruments Act against the accused. Therefore the judgment dated 31.01.2008 passed in CrI.A.No.142 of 2008 on the file of the 3rd Additional District Sessions Judge, Chennai does not warrant any interference from this Court and the present appeal is liable to be dismissed. Accordingly, the Criminal Appeal is dismissed.

Sd/-
Assistant Registrar(CS-VIII)

// True Copy//

Sub Assistant Registrar

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To

1. The III Additional Sessions Judge,
Chennai.
2. The XXIII Metropolitan Magistrate,
Saidapet, Chennai.

Copy to:

1. The Section Officer,
Criminal Section (Records)
High Court, Madras.

GJII (CO)
RMP (24/09/2018)

CRL.A.204 OF 2009



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