IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.No.31 of 2009

N.Perumal ... Appellant/Complainant

Vs

C.Purusothaman ... Respondent/Accused

Prayer:- This Criminal Appeal is filed against the judgement of the XV Metropolitan Magistrate, George Town, Chennai -1, dated 20.11.2007 made in CC.No.5656 of 2004, acquitting the Respondent/ accused under Section 138 of the Negotiable Instruments Act and consequently, to convict the respondent/accused for the offences under Section 138 of the Negotiable Instruments Act and impose the cheque amount of Rs.2,10,000/- as compensation to be paid to the appellant herein.

For Appellant: Mr.Kishore Kumar
For M/s. Sai Bharath and Ilan

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

JUDGEMENT

This Criminal Appeal has been filed to set aside the judgement of the XV Metropolitan Magistrate, George Town, Chennai -1, dated 20.11.2007, made in CC.No.5656 of 2004, acquitting the Respondent/ accused under Section 138 of the Negotiable Instruments Act and consequently, to convict the respondent/accused for the offences under Section 138 of the Negotiable Instruments Act and to direct the Respondent/ accused to pay the cheque amount of Rs.2,10,000/- to the appellant herein.

2. The Appellant/ complainant, had filed the private complaint under Section 200 Cr.P.C., for offence under Section 138 of the Negotiable Instruments Act against the Respondent/ accused before the Trial Court, alleging that to purchase a land, measuring 2400 sq.ft., the Appellant has given a sum of Rs.2,35,000/- to the father of the Respondent/ accused, towards

sale consideration and when the Appellant came to know that the father of the Respondent/ accused was not the owner of the said property, but, he was only a Power Agent, he gave a complaint to the St.Thomas Mount Police Station on 30.8.2003 and during enquiry a sum of Rs.25,000/- was given to the Appellant by the respondent's father and further, the respondent's father agreed to pay the balance amount and since he did not pay the balance amount, another complaint was given to the same Police Station, wherein the accused and his father appeared and gave two post dated cheques, both dated 16.04.2004, for Rs.1,10,000/- and Rs.1,00,000/- and that when they were presented for encashment on 26.04.2004 with the concerned Bank, they were dishonoured, with an endorsement "Insufficient Funds", on 27.04.2004 and that again on the instructions of the Respondent/ accused, when they were represented on 11.05.20024, again the said cheques were dishonoured with the same endorsement. In spite of several demands, the Respondent/ accused did not come forward to reply and pay the cheque amounts. An advocate notice was sent on 14.05.2004, it was returned with the endorsement "Not Claimed" on 25.05.2004. Hence, the private complaint under Section 138 of the Negotiable Instruments Act has been filed before the Trial Court.

3. Before the Trial Court, the Appellant/complainant was examined as PW.1 and Exs.P1 to 5 were marked. On the side of the Respondent/ accused, the wife of the Appellant/Complainant was examined as RW.1 and the Respondent/ accused examined himself as RW.2. On consideration of the materials available on record, the Trial Court, by the impugned judgement, finding that there was no privity of contract between the Appellant/complainant and the Respondent/accused and also between the father of the Respondent/ accused and finding that though in the cheques, the amounts were filled up by the Respondent/accused, the name of the payee was written by some body else and relying on the decision of this court reported in 2007 LW Crl. 992 (Suburam Vs. Rajendran), acquitted the Respondent/accused holding him not guilty under Section 138 of the Negotiable Instruments Act. As against the same, this Criminal Appeal has been filed, by the complainant.

4. This court heard the learned counsel on either side and considered their rival submissions and also perused the materials placed on record.

5. The learned counsel for the appellant/complainant would submit that the findings of the trial Judge are perverse and that the ground, on which, the trial Court has acquitted the respondent/ accused is that there was no privity of contract between the appellant/complainant and the respondent/accused, in as much as the sale of the property was by his father to the

wife of the complainant and that if the cheque is issued in discharge of debt of his father, it is deemed to be issued in discharge of a legally enforceable debt and that the dishonour of the cheque would attract the offence under Section 138 of the Negotiable Instruments Act.

6. The learned counsel for the Appellant would further contend that the father of the respondent/accused had cheated the wife of the complainant in respect of sale of the property and that in respect of the complaint given by the appellant's wife, the father of the respondent/accused was summoned to the Police Station, for enquiry where the respondent/accused had issued the two cheques in question towards the liability of his father and if it is the stand of the Respondent/ accused that there was no privity of contract, the respondent/accused should have replied to the legal notice issued, whereas, the legal notice by the appellant/complainant had been returned as unclaimed and in such view of the matter, the Trial Court erred in applying the judgement reported in 2007 Law Weekly(Crl.) 992, Suburam Vs. Rajendran and acquitting the accused. He would rely on the decision of the High Court of Delhi reported in 2003 66 DRJ 101 (Pratap Singh Vs. Atal Behari Pandey) in support of his contentions.

7. On the other hand, the learned Legal Aid Counsel for the Respondent/ accused would contend that there was absolutely no legally enforceable debt and that it is the admitted case of the appellant/complainant that the complaint was given against the father of the respondent/accused before the Inspector of Police, St. Thomas Mount Police Station on 30.08.2003, regarding sale of a property in favour of the wife of the Appellant/complainant and that during the enquiry, the father of the respondent/accused was made to agree to pay Rs.2,35,000/- towards the market value of the property and that the father of the respondent/accused gave Rs.25,000/- on 30.08.2003 and promised to pay the balance amount and that since the balance amount was not paid, another complaint was given to the same police station and that the accused and his father appeared before the Inspector of Police and the Respondent/ accused gave two post dated cheques. He would submit that the father was made to pay the amount of Rs.25,000/- under compulsion and further, the said cheques were issued under coercion and threat of arrest and that on the date of issuance of cheques, there was absolutely no legally enforceable debt. He would submit that since the facts of the case were similar of the facts of the case reported in 2007 Law Weekly (Crl) 992 the trial Judge had rightly acquitted the respondent.

8. In the present case, the issuance of two cheques by the Respondent/ accused is not disputed. Now, the only question

to be considered is as to whether the cheques issued by the Respondent/ accused were towards the discharge in whole or in part of any debt or other liability and that the cheques were issued in respect of a legally enforceable debt and that too with free consent.

9. It is the case of the Appellant/complainant that the father of the Respondent/accused, Chandran was doing Real Estate Business and he approached the complainant to purchase a vacant land, measuring about 2,400 sq.ft. at Attipattu Village and that the father of the accused was only a Power Agent of the property. The accused/complainant had purchased the property on 22.11.1984 and he laid a foundation for construction of the building and spent money during the year 1993. At that time, one Sathya Narayanan came and represented that he is the owner of the land and produced all the documents.

10. Hence, complaining that the father of the Respondent/accused cheated the complainant, the Appellant/ complainant gave a complaint before the St. Thomas Mount Police Station on 30.08.2003. The Inspector of Police had enquired the accused's father and he promised to pay Rs.2,35,000/- towards the present market value of the property and the accused's father gave Rs.25,000/- on 30.08.2003 and promised to pay the balance amount. Since, the accused's father did not pay the balance amount, the complainant gave another complaint before the same police station and that the accused's father appeared and Respondent/ accused before the Inspector of Police and gave two post dated cheques, viz. Cheque No.505284 of the ICICI Bank for a sum of Rs.1,10,000/- dated 16.04.2004 and another cheque No.505285 of the ICICI Bank, for a sum of Rs.1,00,000/- dated 16.04.2004.

11. Further averment in the complaint is that the respondent/accused requested the appellant/complainant to present the cheque on 26.04.2004, through State Bank of India, Maduravayal Branch. But, both cheques were returned on 27.04.2004 with an endorsement "Insufficient Funds" and thereafter, when the appellant/complainant had informed about the dishonoured cheques through phone, the respondent/accused had asked the Appellant/ complainant to represent the said cheques and when both the cheques were represented on 11.05.2004, again they were returned on 12.05.2004, for the same reason. Thereafter, the accused/complainant had sent a notice on 14.05.2004, to pay the amount within 15 days. Since it was not paid, the private private complaint had been filed.

12. Even in the private complaint, it is the admitted case of the appellant/complainant that the father of the accused was the Power of Attorney to the property and the cheques were issued to the appellant/complainant in the presence of the

Inspector Police at the Police Station.

13. On analysis of the records, it is seen that admittedly, the property had been sold to the wife of the complainant by one Sathya Narayanan and the father of the Respondent stood as Power of Attorney to that sale deed. The appellant and his wife were in possession of the property and about 20 years later, there had been dispute and that a complaint had been lodged during the year 2003 that somebody has raised dispute with regard to the property. It was agreed by the father of the Respondent/ accused that the said sale would be cancelled and the sale consideration would be repaid. Since it did not happen, a complaint was given against the respondent's father, pursuant to which the respondent's father was taken to the police station and only when the father of the respondent/accused was in custody, the cheques were obtained under coercion and threat.

14. Though a reply had not been sent to the legal notice, the respondent/accused is bound to prove his case by letting in cogent evidence and when the respondent/accused had examined the wife of the complainant as RW.1 and he had examined himself as RW.2 and let in evidence to show that after the complaint had been given to the Police Station concerned, the cheques were obtained in the Police Station under coercion and not under free consent and rebutted the presumption that the cheques were not issued in respect of a legally enforceable debt and that too they were obtained under treat of arrest. RW.1 in his deposition had stated that these cheques were obtained in the Police Station and that there was no privity contract between the respondent/accused and the appellant/complainant and between her and the Respondent/ accused.

15. Further, in the cross examination of the appellant/complainant, the complainant has also categorically admitted that the alleged property was sold by Sathya Narayanan and that the father of the respondent/ accused was only his Power Agent. Further, he had stated that he applied for Encumbrance Certificate, and the certificate reflected no Encumbrance in the property. Further, it is the evidence of RW.1, wife of the appellant/complainant that the earlier sale deed had not been cancelled. In effect, the sale deed executed in favour of the appellant/ complainant was not cancelled and as on the date there was no enforceable debt in favour of the complainant.

16. Further, during the cross examination of the complainant, he had admitted that the property was in his possession for 10 years and that the property still stands in his name. Further, the wife of the appellant/ complainant had also admitted that the cheques were obtained in the Police Station and that there was no financial transaction between her and the respondent/ accused. She had also admitted that there

was no financial transaction between her husband and the respondent/accused.

17. Further, it is the admitted case of both parties that the cheques were obtained in the Police Station. The respondent/accused, while examining himself, has let in evidence to prove that the property was sold by Sathya Narayanan to the wife of the appellant/complainant during the year 1984 and that his father was a Power Agent and during the time of sale in the year 1984, he was two years old and that during the year 1993, he was thirteen years old and studying in VIII standard and during the year 2003, he was studying in an Engineering College III Year and that he does not know anything about the alleged transaction between his father and the wife of the appellant/complainant. The copy of the age certificate of the Respondent/ accused was also marked as Ex.D1. The appellant/complainant has not taken any steps to cross examine the respondent/accused. When such being so, the burden to prove that the cheques had been issued towards discharge of legally enforceable debt and that they were issued under free will shifts on the appellant/complainant whereas the appellant/complainant had not proved the same.

18. The Trial Court, in order to justify the acquittal of the Respondent/ accused, has relied on the decision of this Court reported in 2007 LW (Crl.) 992 (Suburam Vs. Rajendran) , wherein it was held as under:-

> ""Para 7, From the above said facts narrated in the complaint, it is an admitted fact by the complainant himself that the petitioner herein had no direct liability towards the respondent herein. The cheque was issued only after the complaint was given against the brother of the petitioner herein and the petitioner was enquired in the police station and only thereafter, the cheque was given by the petitioner. Though this Court does not go into question whether the cheque was given by the petitioner in the police station due to coercion and threat, the fact remains, the cheque was issued only after the complaint bring given in the Police Station against the brother of the petitioner herein for cheating.
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> Para 8: The only question now to be considered is whether the cheque issued by the petitioner is towards the discharge is whole or in part, or any debt or other liability. The Explanation provided under Section 138 of the Negotiable Instruments Act. For the purpose of this section. 'debt of liability means a legally enforceable - debt or other liability.

Para 9: It is from the admitted facts of the complainant/respondent herein, that there but the question is whether he can be made liable for the amount admitted the criminal liability by his brother and undertakes to pay the amount legally the petitioner cannot be compelled to pay the amount and there is no legally enforceable debt other liability.

Para 10: Of course, there is a presumption in favour of the holder under Section 139 of the Negotiable Instruments Act.

" It shall be presented unless the contrary is provided that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge in whole or in part, or any debt or other liability"

Para 11: Still, when there is material in the complaint itself rebutting the presumption and in the admitted facts the liability to be legally, not enforceable debt or other liability; the petitioner need not undergo the order of trial."

19. In the decision of the Hon'ble High Court of Delhi reported in 2003 (66) DRJ 101 it has been held that proceedings under Section 138 of Negotiable Instruments Act are not proceedings of civil nature and date eventhough it is for discharging disability of another person criminal liability is on the person who has issued the cheque. The facts of the case are different from this case on hand. In this case the appellant has not proved that there was an existing legally enforceable debt on the date of issuance of cheque and thereby reliance cannot be place on the above decision.

20 In the case on hand, admittedly, after the complaint was given against the father of the Respondent/ accused, the cheques in question were issued only in the Police Station.

21. An Explanation is provided under Section 138 of the Negotiable Instruments Act. For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability. In the present case, even if the Respondent/ accused is stated to have issued the cheque admitting the liability of his father the Respondent/ accused cannot be compelled to pay the amount since, there was no legally enforceable debt or other liability on the date of the cheque when the property in question stood in the name of the wife of the appellant and the father of the respondent/accused himself was not liable to pay any amount or return any amount to the appellant/complainant or his wife and the respondent/accused had rebutted the existence of liability by letting evidence in defence.

22. Of course, there is a presumption in favour of the holder under Section 139 of the Negotiable Instruments Act. Such a presumption shall be presumed unless the contrary is proved that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge in whole or in part, or any debt or other liability.

23. But, in the case on hand, in view of the above admitted facts of the Appellant/ complainant and the evidence let in by the parties and particularly, when there is material in the complaint itself rebutting the presumption under Section 139 of the Negotiable Instruments Act, it can be safely held that on the date of issuance of cheques, there was no legally enforceable debt or liability, either on the father of the respondent/ accused or the respondent/accused. The Trial Court, considering the both oral and documentary evidence in a proper perspective manner, has rightly held that there was no privity of contract between the Appellant/complainant and the Respondent/accused and accordingly, acquitted the Respondent/accused, by the impugned judgement. This Court finds no illegality or infirmity in the impugned judgement of acquittal, which warrants no interference by this Court.

24. In the result, this Criminal Appeal is dismissed, confirming the impugned judgement of acquittal.

ssi/Srcm

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To
The XV Metropolitan Magistrate,
George Town, Chennai -1.

Copy to:-
The Section Officer,
Criminal Section,
High Court, Madras - 104.

+1cc to M/s.Sai & Bharath, Advocate, SR.No.22180/19

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Kak(23/04/2019)