

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.02.2018

DELIVERED ON : 21.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.610 of 2007

P.Surya Narayana Murthy
Prop. of M/s.Gaiety 'N' Gains,
No.19, Marshals Road, Egmore,
Chennai-600 008. Appellant/Complainant

Vs

Dr.K.Senthil Nathan
Director of Sri Devi Hospital,
No.1620-A, 16th Main Road,
Anna Nagar West,
Chennai - 600 040. Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the order of acquittal passed by the learned V Additional Sessions Court, Chennai in C.A.No.66 of 2005 dated 17.11.2006.

For Appellant : Mr.R.Sankarasubbu

For Respondent : Ms.Jaya Aruni
for Mr.S.Vijayakumar

JUDGMENT

This Criminal Appeal is filed against the order of acquittal passed by the learned Vth Additional Sessions Court, Chennai in C.A.No.66 of 2005 dated 17.11.2006, wherein the learned Lower Additional Sessions Judge reversed the finding of the learned XIVth Metropolitan Magistrate, Egmore, Chennai in C.C.No.8364 of 2002 dated 14.02.2005.

2.Brief case of the Appellant

On 16.5.2002 an agreement was entered between the appellant/complainant and the respondent/accused for promotion and advertisement of the respondent/ accused Hospital Industry

as an official Medical Partner in the promotional and advertising event conducted by the appellants company on 7.6.2002 at Image Auditorium Chennai and thereby the respondent/accused placed the purchase order in advance to the appellant on 21.5.2002. As such the respondent/accused owes an amount of Rs.50,000/- to the appellant and Rs.40,000/- as advance and Rs.10,000/- was agreed to be paid on the date of event. In order to discharge the liability the respondent / accused issued a cheque bearing No.509168 dated 21.2.2001 for Rs.40,000/- drawn on Indian Bank. Asiatic Colony Branch, Chennai. The appellant presented the above said cheque through his Banker viz, Andhra Bank, Anna Nagar Branch, Chennai for realization on 3.6.2002 and the same was returned with an endorsement "Payment stopped by the drawer" on 4.6.2002. Therefore the appellant issued a statutory notice dated 15.6.2002 through his counsel under section 138 of Negotiable Instrument Act and the same was received by the respondent/accused and failed to pay the above said cheque amount within the stipulated time and issued reply notice received on 6.7.2002. The appellant/ complainant filed the complaint before the learned XVI Metropolitan Magistrate, Egmore, Chennai in C.C.No.8364 of 2002. During trial the appellant/complainant examined himself as PW1 and marked Exhibits-P1 to P6. The respondent/accused examined himself as DW1 marked Exhibits-D1 to D9. On completion of the trial the learned trial judge convicted and sentenced the respondent / accused to undergo simple imprisonment for a period of six months and to pay a compensation of Rs.40,000/- within a period of 2 months in default to undergo simple imprisonment for a period of 2 months.

3.The respondent/accused preferred the appeal against his conviction under Section 138 of Negotiable Instrument Act before the learned Vth Additional Sessions Judge, in Criminal Appeal No.66 of 2005.

4.The learned lower appellate Court on appreciating the evidence of both parties acquitted the respondent/accused and set aside the order passed in C.C.No.8364 of 2002 dated 14.2.2005.Hence this appeal.

5.Rival Submissions:

The learned counsel for the appellant submits that it is admitted fact that the entire transaction is vouched by a written agreement at the very initial stage, which clearly admits previous consent of the both the parties to conduct the advertisement program.

6.The learned counsel for the appellant submits that the Appellate Court failed to take note of the fact that there was a legally enforceable liability on the part of the appellant/accused is clearly established by the documents and through evidence let in before the trial Court.

7.The learned counsel for the appellant submits that the Appellate Court failed to take note of the fact that the respondent has curiously and conveniently taken the stand of Stop Payment after the fulfillment of the terms and conditions expressed in the agreement clearly reveals the dishonest intention of him.

8.The learned counsel for the appellant submits that Appellate Court failed to negate the version of the appellant/accused that one Ramanarayan received the cheque amount on behalf of the complainant company as utter falsehood and concocted imagination of the respondent.

9.The learned counsel for the appellant submits that the Appellate Court failed to take note of the fact that no authorization letter or identity card for the said Ramanarayanan was verified or produced on behalf of the Respondent before the trial Court to substantiate his stand and further more the said Ramanarayanan has not been examined before the trial Court.

10.The learned counsel for the appellant submits that the Appellate Court failed to take note of the fact that even the Respondent himself, in his oral evidence admitted that he has not received any receipt for the amount of Rs.40,000/- paid and the said Ramanarayanan has not produced any identify card to show that he is employed in the complainant company would show that the respondent has not discharged the claim of the complainant.

11.The learned counsel for the appellant submits that the Appellate Court failed to consider the finding of the Trial Court that as per the Exhibit-D2, a letter dated 5.6.2002 sent by the appellant/ accused to the petitioner/complainant will clearly establishes the case of the petitioner that the cheque amount of Rs.40,000/- was not received either by the petitioner or by his company.

12.I heard Mr.R.Sankarasubbu, learned counsel for the appellant and Ms.Jaya Aruni, learned counsel for the respondent and perused the entire materials available on record.

13.The respondent/complainant is the proprietor of M/s.Gaiety 'N' Gains and he conducted promotional and advertising cultural event in which the appellant/accused hospital PRO one Shanthi placed advertisement order in the cultural programme for promoting the hospital for Rs.50,000/- The respondent/complainant carried out necessary advertisement in newspaper, Hoarding and Television Media for the same.

14.The learned counsel for the appellant/accused contends that One Ramanarayanan was working under the respondent/complainant who received the money from the appellant/accused on behalf of the respondent/complainant firm in spite of the fact that Exhibit D3 and D5 clearly shows that the respondent/complainant is acquainted with the said Ramanarayanan.

15.The document of Exhibit D5 produced by the appellant/accused shows that one Mr.Sebastian employee of the respondent/complainant firm has written a letter dated 10.6.2002 to the PRO of the appellant/accused that Ramanarayanan received the amount of Rs.40,000/- against the disputed cheque. From the beginning one Ramanarayanan along with Marcelline met the appellant/accused and collected the cheque and subsequently Ramanarayanan has received the sum of Rs.40,000/- towards the payment of cheque and the same was evidenced as per Exhibit D3 and D5.

16.The learned counsel for the respondent/complainant contends that the appellant/accused had issued a cheque and the same was collected by the authorized representative of respondent/complainant Company namely M/s.Merceiline and Ramanarayanan on 1.6.2002. The appellant/complainant was not known the complainant personally and the entire discussion was done only by Ramanaryanan and Merceline with appellant/accused hospital and solicited the business of advertisement on behalf of respondent/complainant. After 2 days Ramanarayanan came to the appellant/accused hospital and collected the cash Rs.40,000/- against the said cheque. The appellant/accused immediately sent a letter on 3.6.2002 confirming the payment to Ramanarayanan Exhibit D3 and demanded the return of cheque. On 5.6.2002 confirming the payment of Rs.40,000/- to Ramanarayanan, but had only observed that the said amount was paid him as personal loan. Hence it is also clear that the said Ramanarayanan had been in touch with the respondent/complainant

and informed about the receipt of Rs.40,000/-The bank statements Exhibit-D6 as on the date of dishonor shows that the balance in the account at Rs.4,27,724/-.

17.On careful perusal of the evidences, it is seen that according to the accused, the complainant had received a blank signed cheque as a security for the purpose of contract work to the accused and the said cheque was misused by the complainant. To attract an offence under Section 138 of the N.I. Act, it has to be established that there was a legally enforceable debt or other liability existed between the parties. It is no-doubt the Court can presume that the cheque had been issued for discharging debt or liability. However, the said presumption could be rebutted by the accused by proving the contrary as has been done in the present case.

18.The presumption contained in Section 139 of N.I. Act is rebuttable one. It can be rebutted either by direct evidence or by the attendant circumstances. The complainant has to prove that the cheque which bounced was issued for discharging a debt or legal liability in whole or in part. The penal provision of Section 138 of N.I. Act could be attracted only when the complainant proves that the cheque in question was issued "for discharge in whole or in part of any debt or other liability".

19.Failing to prove the debt or legally enforceable liability on the part of the accused satisfactorily, the appellant had not made out the offence against the respondent/accused. When the appellant/ complainant was not forthcoming with definite evidence, the penal provisions would not be attracted. The dishonour of cheque issued in consideration of future liability would not constitute an offence under Section 138 of N.I. Act. The material words in Section 138 of N.I. Act, "a cheque drawn for discharge of whole or in part of any debt or liability" should be interpreted to mean only the past or current liability existing at the time when the cheque is issued. The complainant did not produce necessary document and the documents sought by the accused. In the instant case, some facts are missing. Though the presumptions weigh in favour of the drawee of the cheque, yet the complainant is required to present his case by cogent evidence. In this case, the complainant has not produced all the relevant documents before the Court. The essential requisites of a debt are:

- i) an ascertained or readily calculable amount;
- ii) an absolute qualified and present liability in regard to that amount with the obligation to pay forthwith or in future within a time certain;
- iii) the obligation must have accrued and

subsisting and should not be that which is merely accruing.

20. The appellant/complainant has failed to establish that the cheque was issued by the accused for discharging legally enforceable debt. The payment of Rs.40,000/- to the respondent/accused has not been established by acceptable material. The respondent/accused had not only denied having borrowed the said amount, but also rebutted the presumption by proving the contrary. It is no-doubt even if the cheque was issued as a security for repayment, it cannot be said that no prosecution would lie. However, issuance of the cheque in respect of a legally enforceable debt has to be proved in accordance with law. Further, the appellant/complainant has failed to prove that there was any legally enforceable debt payable by the respondent/accused. The appellant/complainant has not placed any evidence to show the loan transaction has come into existence. As the appellant/complainant has failed to prove that the cheque in question was issued for discharge in whole or in part of any debt or liability, it cannot be held that the trial Court was in error in dismissing the complaint. Considering the entire evidence and material on record, I am of the view that there is no merit in this appeal and accordingly the same is dismissed as devoid of merits.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

vs

To

1. The V Additional Sessions Judge, Chennai.
2. The XIV Metropolitan Magistrate, Egmore, Chennai-8

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

+1cc to Mr.C.D.Sugumar, Advocate SR.No.4452

+1cc to Mr.S.Vijayakumar, Advocate SR.No.4070

Criminal Appeal No.610 of 2007

SV(CO)
GMY(19/02/2019)