IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 09.04.2019

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Criminal Appeal No.612 of 2011

M/s K.G.Denim Finance Limited
Coimbatore represented by
D.Ramesh
.. Appellant/Respondent/Complainant

/versus/

1.M/s Salem Textiles Limited
rep.by R.Prabakaran
S/o Ramasamy
Managing Director, Fairlands,
Salem.

2.R.Prabakaran
S/o Ramasamy Udayar,
Managing Director, Fairlands,
Salem. .. Respondents/Appellants/Accused

Criminal Appeal has been filed under Section 378 of Criminal Procedure Code praying to set aside the judgment dated 02.08.2011 passed in C.A.No.207 of 2010 by Additional District Court Fast Track Court No.III, Coimbatore reversing the order of conviction passed by Judicial Magistrate No.I, Coimbatore in STC.No.789 of 2007 dated 21.09.2010.

For Appellant : Mr.R.Rajarathinam

For Respondents : Mr.Sathish Kumar
for AL.Ganthimathi

J U D G M E N T

This appeal is preferred by the complainant, since he has lost his private complaint before the Lower Appellate Court, though succeeded before the Trial Court.

2. The fact involved in this case is that the disputed cheques marked as Exs.P7 and P8 claimed to be issued by the accused/respondent herein for discharging of legally enforceable

debt. The Lower Appellate Court has arrived at a conclusion that though the cheques were issued for discharging the liability, due to subsequent agreement between the parties, the principle of novation has come to play and therefore, the drawer of the cheques is not liable to pay the cheques amount.

3. The short point for determination is whether the principle of novation is applicable to the facts of the case. The admitted facts are that the complainant company and the accused company were involved in the textile business and they had an arrangement between themselves for providing bill discount facility. So, whenever the accused company purchased the raw materials, those bills were discounted by the complainant company and funds were raised for the accused company. The bills discounted has to be repaid within a period of 90 days. While so, under Exs.P.25 and P.26 bills were discounted, since those two invoices were not repaid within a period of 90 days, again it was re-discounted. The cheques Exs.P7 and P8 which were issued to discharge the said liability bounced. Hence, the complaint under Section 138 of Negotiable Instruments Act was initiated after causing statutory notice.

4. The accused, though, failed to reply to the statutory notice, he has taken a defence that after the invoices discounted under Exs.P.25 and P.26, there was an agreement between the parties. So, a short term loan of Rs.50,00,000/- was raised and that loan was also duly paid. Whereas, the debt payable to the complainant company under invoices Exs.P.25 and P.26 were already discharged, there is no enforceable liability. The Trial Court, after considering the deposition of 3 witnesses Pws.1 to PW.3 and the deposition of R.Prabakaran [DW.1] on behalf of the accused analyzing 34 documents on the side of the complainant and 9 documents on the side of the defence, has held that the cheque amounts Exs.P.7 and P.8 co-relate the amount found in Exs.P.25 and P.26. Therefore, it is a clear case of dishonouring the cheques issued to discharge the liability.

5. Contrarily, the Lower Appellate Court, on appeal, after detailed discussions satisfied that the debt was not discharged by the accused, taking note of certain submissions and correspondence between the parties, has concluded and negatived the defence of the accused and held the amounts under Exs.P.25 and P.26 were not discharged on 18.03.1996 as contended by the accused. Further, the Lower Appellate Court has observed that the amounts covered under those two Hundies were rolled over and subsequently covered under the short term loan. So, once a new contract has come into existence, the old one has to go out. Meaning that the Hundies amount mentioned in Exs.P.25 and P.26 later rolled over in Ex.P.33 and Ex.P.34 were discharged due to new contract.

6. It is not the case of the accused that a new contract has come into existence in the place of old contract covered under Exs.P.25 and P.26. It is the invention of the Lower Appellate Court, though not pleaded by the accused. In fact the testimony of DW.1 clearly indicates the defence of the accused that the liability under Exs.P.25 and P.26 was discharged by them. The cheques given as a security of those liabilities was not returned by the complainant and the same has been misused.

7. The Lower Appellate Court between paragraphs 10 to 16 and 19 had properly appreciated the facts and law regarding the liability and sequence of events under which the liability has occurred. The Lower Appellate Court has concurred with the view of the Trial Court that the liability under Exs.P.25 and P.26 Hundies were not discharged by the accused. The defence of the accused that the liability was discharged as per the entries found in the Exs.P.3 and P.4, the ledger account maintained by the complainant company, on verification, recorded it as false. In fact the Lower Appellate Court after analyzing Exs.P.3 and P.4 had clearly held that the Demand Draft number mentioned in Ex.P4 is only in respect of credit of Rs.675/- and Ex.P3 clearly indicates that a sum of Rs.49,98,649/- is due from Salem Textile Limited to the accused company. However, the Lower Appellate Court, while analyzing Ex.P.4 has found that the statement of loan account of Salem Textile maintained by the complainant company has reflected in Ex.P.4 does not indicate the total cheque amount. But a lesser amount and even if 36% of interest is added for the due the total amount falls lesser than Rs.49,98,567/- and therefore, had presumed that the two cheques Exs.P.7 and P.8 were not given for the existing liability.

8. In this regard, this Court would wish to point out that while the defence of the accused is that, he has discharged the debt as on 18.03.1996 found to be false and Ex.P.3 clearly indicates that there was due of Rs.49,98,567/-, the application the principle of novation, which was not even pleaded by the accused is improper. In this context, the following judgments cited by the learned counsel appearing for the appellant is worth mentioning.

1.Rangappa v. Sri Mohan reported in (2010) 11 SCC 441
2.T.Vasanthakumar v. Vijayakumari reported in (2015) 8 SCC 378
3.New Standard Bank Ltd. V. Prabodh Chandra Chakrabarti reported in 1941(2) ILR (cal.)237
4.Domoo Khan v. Agha Arshad Khan reported in 1933 (9) ILR (Pat.)862
5.Babu ram alias Durga Prasad v. Indra Pral Singh reported in (1998) 6 SCC 358

9. From these judgments, it is a clear as crystal that to apply the principle of novation, the essential requirements is that there must be a complete substitution of a new contract in the place of an old one and whether all rights and liabilities under the old contract have been extinguished is the question of fact depending on the circumstances of each case. In Babu ram alias Durga Prasad v. Indra Pral Singh cited supra, the Hon'ble Supreme Court has categorically stated that the novation under Section 62 of the Contract Act requires a clear plea, the issues and the evidence. Such a question cannot be raised or accepted under Section 100 of the Civil Procedure Code for the first time in second appeal. Though this observation is in the context of a civil matter, the principles of novation when tested by the Hon'ble Surpeme Court, the Hon'ble Supreme Court has observed that this defence has to be pleaded clearly and proved.

10. As far as the fact of this case is concerned, the plea of novation not pleaded by the accused. He not only failed to plead that the defence but a contra plea has been taken by the accused. When the accused has pleaded that the liability has already been discharged, the question of novation or new contract substituting the old contract does not arise.

11. The perversity of the lower appellate Court is palpably seen from its conclusion that after holding the amount covered under two Hundies were not discharged, it has observed that when a new contract has been entered into, the old contract need not be performed and the old contract stands discharged. This observation of the Lower Appellate Court is neither in consonance with the provision of Section 62 of the Contract Act nor in consonance with the facts pleaded and proved by the parties. When a plea of novation was not the case of the defence, the Lower Appellate Court has held that the question of novation assumes significance to probablise the case of the accused and gone to the extent of saying that the accused has discharged the burden of rebutting the presumption under Section 139 of the Negotiable Instruments Act, 1881. The correspondence between the parties which has been discussed in detail both by the trial Court as well as the lower appellate Court does not indicate that the debts were discharged by the accused. Neither it indicates the old contract has been rescinded or substituted by any new contract. The statements of accounts Ex.P.3 and Ex.P.4 only prove that there was mutual running account between the parties and the balance has struck on a particular day indicating a sum of Rs.49,98,567/- is liable to be paid by the accused company. Exs. P.7 and P.8 are two cheques for Rs.24,98,830/- and Rs.24,99,754/- respectively which correspond with the Hundy Exs.P.25 and P.26 and also the statement of account as reflected in Ex.P.3.

12. Therefore, the complainant is bound to succeed not only on the presumption clause under Section 139 of the Negotiable Instruments Act, 1881. But, he has positively proved the liability of the accused through the evidence. Therefore, the Lower Appellate Court judgment being perverse and against the settled principles of law, this Criminal Appeal is to be allowed.

13. Accordingly, this Criminal Appeal is allowed. The judgment of the lower appellate Court is set aside. The trial Court judgment is restored.

14. The learned counsel appearing for the respondent would submit that Mr.R.Prabakaran, the Managing Director of the first respondent company, Salem, who was arrayed as second respondent is no more. If it is so, the case against him gets abated. However, the liability and conviction of the company for which the cheque was issued stands confirmed.

Sd/-
Assistant Registrar(Insp.cell)

//True copy//

Sub Assistant Registrar

rpl/ari

To
1.The Additional District Judge, Fast Track Court No.III, Coimbatore.

2.The Judicial Magistrate No.I, Coimbatore.

3. -do-The Chief Judicial Magistrate, Coimbatore.

Copy To
The Section Officer,
Criminal Section Records,
High Court, Madras.

+1cc to Mr.R.Rajarathinam, Advocate SR.No.34615

+1cc to Mrs.AL.Ganthimathi, Advocate SR.No.35097

Crl.A.No. 612 of 2011

GJ(CO)
GMY(30/05/2019)