IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11.04.2019

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Criminal Appeal No.652 of 2015

M.Kanakaraj .. Appellant

/versus/

1.V.Ganesh Kumar, Proprietor,
M/s.Dyanamic Equipments & Conveyors,
13/1 C, Eachanari to Medukkarai Road,
Coimbatore-641105.

2.M/s.Dyanamic Equipments & Conveyors,
13/1 C, Eachanari to Medukkarai Road, Madukkarai Post,
Coimbatore-641105. .. Respondents

Criminal Appeal has been filed under Section 378 of Criminal Procedure Code praying to set aside the order of acquittal of the learned IV Additional District and Sessions Judge, Coimbatore passed in C.A.No.184/2014 dated 05.08.2015 against STC.No.101/2012 on the file of Judicial Magistrate Fast Track Court-II, Coimbatore.

For Appellant : Mr.A.Thiyagarajan

For Respondents: Mr.S.Panneerselvam

J U D G M E N T

Heard the learned counsel for the appellant. There is no representation for the respondents. Despite notice and after entering appearance through counsel, the learned counsel has not turned up to represent the respondents. Hence, the matter was adjourned from 10.04.2019 to 11.04.2019. Even today, there is no representation for the respondents. Hearing the appellants and perusing the records, this Court passes the following order:-

2. The appeal is directed against the order of acquittal passed by the Lower Appellate Court reversing the judgment of conviction and sentence passed by the Judicial Magistrate No.VII, Coimbatore in STC.No.101 of 2012 dated 19.11.2014.

3. The impugned order passed by the Lower Appellate Court holding that the accused/respondents have rebutted the presumption under Section 139 of Negotiable Instruments Act and the complainant has not established a prima facie case of enforceable liability. The invoices Exs.P4 to P6 relied by the complainant are of the month of August 2008, whereas the cheque is dated 29.07.2011, nearly 3 years after the date of the invoice. The complainant has not properly explained why he was awaiting for 3 years for recovery of money or presentation of the cheque. The Lower Appellate Court has also pointed out that the Sales Tax Department has certified that the accused company has closed the business in the year 2010 and from perusal of the bank record, it is clear that the account from which the subject cheque was issued closed long before the date of issuance of cheque. Further the Lower Appellate Court considered the defence taken by the accused that a sum of Rs.4,00,000/- was paid to the complainant the receipt issued by the complainant company marked as Ex.D3. Suppressing the said fact the complaint has been filed. The Lower Appellate Court has considered the statutory notice issued in the name of the proprietor whereas the complaint has been filed through Power Agent and therefore, the complaint is not maintainable.

4. The learned counsel for the revision petitioner point out the illegality and perversity in the Lower Appellate Court judgment in the following manner:

The goods sold and delivered to the accused firm M/s. Amman Traders is well fortified through the copy of the invoices marked as Exs.P4, P5 and P6. For taking delivery of the goods, the representative of the accused company has affixed the seal of the company and signed. The total value of the three invoices are of Rs.9,98,550/-. For the said amount after several persuasions, the accused issued the subject cheque marked as Ex.P7. On presentation of the cheque the same was returned as "account closed". When statutory notice was issued, the accused refused to receive and it was returned "unclaimed". At the same time, when the summons issued through Court to the same address, the accused has received it. There is no legal impediment for the complaint to be lodged through power agent. While the complaint lodged through Power Agent, the power of attorney documents also duly marked in the Trial Court only thereafter, it has taken the complaint on file. When the complainant has proved the legally enforceable debt, the Lower Appellate Court ought not to have reversed the finding on erroneous assumption that the complainant has awaited for 3 years from the date of delivery of goods and presented the said cheque, when the accused has closed the account long before the date of cheque.

5. The learned counsel for the revision petitioner would submit that the conduct of the complainant from his own evidence it is made clear that he has admitted the issuance of cheque and the liability. The only defence he has taken that, he has discharged the debt and to that effect the receipt Ex.D3 was issued. However, Ex.D3 was a photo copy of the receipt written in the letter pad of the accused company, which is purportedly signed by DW.2 who was the erstwhile staff of the complainant company. Even according to DW.2-the signatory of Ex.D3, in his cross-examination he admits that the accused owe Rs.9,00,000/- to the complainant. Therefore, the Lower Appellate Court ought not to have relied upon the documents and evidence of DW.2 to dismiss the complaint on the ground of suppression of fact.

6. On considering the submissions made by the learned counsel for the appellant and the perusal of records, this Court finds that the reasoning given by the Court below is perverse and illegal. As pointed out by the learned counsel for the appellant, the statutory notice has been issued by one Ramasamy, the sole proprietor of M/s. Amman Traders, whereas while filing the complaint he has appointed one Kanagaraj and through him the complaint has been filed. There is no legal impediment under Section 138 of Negotiable Instruments Act to file the complaint through Power Agent. The Lower Appellate Court ought not to have taken this as a ground and disbelieve the case of the complainant.

7. Yet another reason which is stated for dismissing the complaint is that the complainant waited for nearly 3 years and presented a stale cheque which has been presented as a security. This reasoning has no legal base. In a trade, it is not always the suppliers rushed to Court to take action for recovery immediately. It all depends upon the strength of the trade relationship. Action in haste never resorted unless the claim is likely to be bared by limitation. The Court cannot import its view and presume that there is no legally enforceable debt. When the case of the complainant is well fortified by the invoices PW.4, PW.5 and PW.6. The acknowledgment by the accused indicates that the material shown under invoices were taken delivery by him. The issuance of the cheque from an account that has already been closed, only expose the culpability of the accused to cheat the complainant. The attempt to prove that he has paid Rs.4,00,000/- by cash on 07.12.2008 to the staff of the complainant company. Further expose his fake defence, since the person who deposed to support the acquittance slip Ex.D3, has stated that for machinery worth of Rs.4,00,000/- the said receipt was given. Whereas, Ex.D3 recital indicates that on 07.12.2008, the accused paid cash of Rs.4,00,000/- and since it was Sunday and holiday, the

complainant company was not in a position to issue a receipt. Ex.D3 is a self serving document not emanated from the complainant company but in the letter pad of the accused signed by the person who claims to be a representative of the complainant company. It being a photo copy, even at the time of marking this documents, the complainant has objected and the same has taken on file with objection.

8. In 313 Cr.P.C. questioning, the accused has again reiterated that the material worth of Rs.4,00,000/- was handed over to one Murugan, the Manager of the complainant company and suppressing the said fact, complaint has been lodged against him. This very contradiction of the accused is sufficed to hold that the cheque Ex.P7 was issued by the accused to discharge the enforceable debt arising out of 3 invoices marked as Exs.P4, P5 and P6. The defence attempted to be projected by the accused is proved to be a false defence, from the contents of Ex.D3, the evidence of DW.2 and the statement of the accused given under 313 Cr.P.C., proceedings. While Ex.D3 documents indicates cash of Rs.4,00,000/- given to the complainant company through the Manager Murugan. Murugan who was examined as DW.2, has deposed that the material worth Rs.4,00,000/- was taken. However, the accused still owe Rs.9,00,000/ to the complainant company.

9. In 313 Cr.P.C. questioning, the accused has stated that Rs.4,00,000/- worth materials were taken away by the Manager of the complainant company. The inconsistency between these 3 statements clearly proves that the accused has not discharged the debt and has issued a cheque to legally enforceable debt and the defence taken in the course of the trial is untenable and without any base. Though the Trial Court has rightly upheld the complaint and convicted the accused, the Lower Appellate Court had gone tangently without proper appreciation of fact as well as law and has passed illegal order. Hence, the same is liable to be set aside.

10. In the result, the appeal is allowed. The judgment of the Lower Appellate Court is set aside and the respondents/accused found guilty of offence under Section 138 of Negotiable Instruments Act. The conviction awarded by the the trial Court is restored. The Trial Court is directed to secure the accused and committing him to undergo the remaining period of sentence and the period of sentence if any under gone by the accused shall be given set off under Section 428 IPC.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The IV Additional District and Sessions Judge, Coimbatore

2.The Judicial Magistrate, Fast Track Court No.II, Coimbatore.

+1cc to Mr.A.Thiyagarajan, Advocate sr.35854

Crl.A.No. 652 of 2015

spd(co)
nr 20/06/2019