BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reservation	15.04.2019
Date of Judgment	12.07.2019

CORAM

THE HONOURABLE MRS. JUSTICE T.KRISHNAVALLI

Crl.A.(MD)No.422 of 2009

Thangaraja : Appellant/Complainant

Vs.

Shakthivel : Respondent/Accused

Prayer: Criminal Appeal filed under Section 378(4) of the Criminal Procedure Code against the judgment made in S.T.C.No.1209 of 2007, dated 20.10.2009 on the file of the Judicial Magistrate, Sathankulam.

For Appellant : Mr.K.Prabhu
For Respondent : Mr.A.John Vincent

J U D G M E N T

This Criminal Appeal is directed against the judgment passed in S.C.No.1209 of 2007, dated 20.10.2009 by the Judicial Magistrate, Sathankulam.

2.On 25.03.2007, the respondent borrowed a sum of Rs.1,00,000/- for the purpose of urgent need as loan from the complainant-appellant. The said amount was to be repaid within a period of two months. On or about 17.06.2007, the respondent handed over a cheque bearing No.688196, dated 07.07.2007 for a sum of Rs.1,00,000/- in favour of the appellant. The said cheque was presented by the complainant for collection to his banker namely Pandiyan Grama Bank, Semmarikulam branch on 07.07.2007. It was dishonoured with the remarks “Funds Insufficient” on 11.07.2007.

3.On 10.08.2007, the appellant issued a legal notice to the respondent calling upon him to pay the amount in question within 15 days from the date of receipt of the notice. Admittedly, the respondent after receiving the notice, had not chosen to paid the amount due. The appellant thereafter filed a complaint petition against the respondent under Section 138 of the Negotiable Instruments Act, 1881 (for short “Act”) before the Judicial Magistrate, Sathankulam.

4.The learned Judicial Magistrate, acquitted the respondent from the charge levelled against him. Aggrieved by the said order, the appellant/complainant is before this with this appeal.

5.Heard both sides and perused the materials available on record.

6.The main contention raised on the side of the appellant/complainant is that since the evidence of PW1 is very clear, cogent and convincing and the cheque issued by the accused for Rs.1,00,000/- has been presented for collection and the cheque has been returned on the ground that "Funds Insufficient" and the appellant has sent a legal notice (Ex.P4) and the reply has been sent by the accused Ex.P5, but in the reply notice, the accused has not taken any plea that he was not available on 17.06.2007, but now during the course of evidence, he has taken the plea that he has travelled from Chennai to Coimbatore and he examined the witnesses to that effect also and the accused has stated before the Court that after returning from Thirupathi, he got the train on 17.06.2017 at night and the complainant has argued before the Court that he can travel from Coimbatore on 17.06.2007 morning to Chennai, after the issuance of the cheque and this version is probablised, since he has not placed any document that he has returned from Tirupathi and got the train on 17.06.2007, so the reason assigned by the trial Court that on the date of issuance of cheque, the accused was not available at Coimbatore is not correct in the eye of law and prays that the criminal appeal has to be allowed, by setting aside the order of the trial court.

7.In this case, the contention of the complainant's is that on 25.03.2007, the accused borrowed Rs.1,00,000/- and for that, he gave the disputed cheque and when he presented the cheque for collection, it was returned as ''Insufficient Fund'' and then he issued legal notice and the accused issued the cheque fully knowing that he has no sufficient fund in his account and failed to repay the amount already borrowed from him. Further, the learned counsel for the appellant/complainant argued that if really the accused went to Tirupathi and only he returned to Coimbatore on 18.06.2007, he will definitely state the above fact in his reply. But the above fact was not stated by the accused in his reply. Hence, the story of the accused stating that on 17.06.2007, he was not in Coimbatore is not acceptable and on 17.06.2007, the accused was only at Coimbatore and hence, the accused may be punished under Section 138 of the Negotiable Instruments Act and prays that the criminal appeal may be allowed.

8.The contention of the respondent/accused is that on the date of alleged issue of cheque, the accused is not available in Coimbatore, on that day he has gone to Tirupathi and only on 18.06.2007, he returned to Coimbatore and hence, the contention of the complainant stating that on 17.06.2007, the accused issued the disputed cheque for the amount already borrowed from the complainant is not at all acceptable and only the accused borrowed amount from the complainant and only for the amount, he issued the disputed cheque to the son of the accused and the complainant on the basis of the cheque falsely filed this case against him and prays that the criminal appeal has to be dismissed.

9.In this case, the accused proved that on 17.06.2007, he was not in Coimbatore and he has gone to Tirupathi. To prove the above fact, on the side of the respondent/accused the General Manager Southern Railway, Chennai was examined as DW1.

10.DW1 deposed that on 17.06.2007, the train proceeded from Chennai to Coimbatore at 9.00 pm and in that train in Coach No.10, the accused and his wife, son and his father were travelled and they book the ticket on Internet and at the time of inspection by the TTR, the accused showed the Driving License as Identity Card and it was endorsed in the chat and the train reached Coimbatore on 18.06.2007 at 5.00 am.

11.Further in this case on the side of the accused, the TTR, who duty on 17.6.2007 was examined as DW2. DW2 also deposed that on 17.06.2007, the train proceeded from Chennai to Coimbatore at 9.00 pm and in that train in Coach No.10, the accused and his wife, son and his father were travelled and they book the ticket on Internet and at the time of inspection by him, the accused showed the Driving License as Identity Card and it was endorsed by him in the chat and the train reached Coimbatore on 18.06.2007 at 5.00 am.

12.In this case, the accused was examined as DW3. DW3 deposed that on 17.06.2007, he travelled in the Nilgiri Express in Coach No.10 with his family members and he showed his Driving License as Identity Card and the train reached Coimbatore on 18.06.2007 at 5.00 am.

13.On careful perusal of the evidence of DW1 to DW3, it reveals that on 17.06.2007, the accused with his family members travelled in the Nilgiri Express and he reached Coimbatore on 18.06.2007 at 5.00 am. No contra evidence was let in on the side of the appellant/complainant to prove that on 17.06.2007, the accused was in his office. Hence from the evidence of DW1 to DW3, it reveals that on 17.06.2007, the accused is not in Coimbatore.

14.It is to be noted that it is not necessary for the accused to state everything in the reply for the notice sent by the complainant. But the accused proved through documentary evidence that he was not in Coimbatore on 17.06.2007. Hence, the evidence of complainant stating that on 17.06.2007, the accused issued the disputed cheque is not at all acceptable.

15.The next contention raised on the side of the appellant/complainant is that since the notice has been issued on the 31st day which is also legal in this case and the Court has to apply either one of the day has to be excluded as per the General

Clauses Act, but the trial Court came to the conclusion that the legal requirements sending the notice is not at all acceptable and the complainant sent the notice within time and prays that the respondent/accused may be punished. For that, the learned counsel submitted the decision reported in **2009(4)MLJ (Crl.) 73 SC (Shiva Kumar Vs. Natarajan)** wherein it has been held as follows:-

> *"On or about 14.08.2003, appellant borrowed a sum of Rs.1,00,000/- for the purpose of his business as loan from the complainant - respondent. The said amount was to be repaid within a period of three months. On or about 20.11.2003 the appellant handed over a cheque bearing No.0652756 dated 27.11.2003 for a sum of Rs.1,00,000/- in favour of the respondent. The said, cheque was presented by the complainant for collection to his banker namely UCO Bank, Trichy Main Branch on 27.11.2003.*
>
> *It was dishonoured with the remarks "insufficient funds" on 02.12.2003. Information thereabout was received by the respondent on 03.12.2003.*
>
> *On 02.01.2004, the respondent issued a legal notice to the appellant calling upon him to pay the amount in question within 15 days from the date of the receipt of the notice. Admittedly, the appellant neither sent a reply to the said notice nor paid the amount due. Respondent thereafter filed a complaint petition against the appellant under Section 138 of the Negotiable Instruments Act 1881 (For short ''the Act'') before the Judicial Magistrate No.III, Tiruchirapalli.*
>
> *... ... ...*
>
> *The core question which arises for consideration is as to whether the notice dated 02.01.2004 was issued within the stipulated period of thirty days from the date of receipt of intimation of the dishonour of cheque.*
>
> *... ... ...*
>
> *Indisputable, the notice was issued on the 31st day and not within a period of thirty days from the date of receipt of intimation from the bank".*

16.The learned counsel for the appellant/complainant submitted that as per the case of the complainant, the complainant presented the cheque through his banker on 27.11.2003 and it was dishonoured with a remarks ''Insufficient Funds'' on 02.12.2003 and the above information was received by the complainant was 03.12.2003 and on 02.01.2004, the complainant issued a legal notice to the accused calling upon him to pay the amount in question within 15 days from the date of receipt of the notice and the accused sent a reply and further he filed the petition under section 138 of the Negotiable Instruments Act on 02.01.2004 within the stipulated period from the date of receipt of intimation of dishonour of cheque and hence there was no violation and prays that the Criminal Appeal may be allowed.

17.In this case, the complainant received the dishonoured cheque with remarks of ''Insufficient Funds'' on 11.07.2007. But he sent the notice only on 10.08.2007. Hence, it reveals that he has not sent the notice within 30 days.

18.In this case, the trial Court after careful perusal of the records come to the conclusion that the complainant failed to prove his case. Hence, this court is of the considered view that the well considered judgment of the trial court do not require any interference by this court.

19.In the result, the Criminal Appeal is **dismissed.**

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

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To

The Judicial Magistrate,
Sathankulam.

+1 CC to Mr.K.PRABHU, Advocate (SR-75124[F] dated 12/07/2019)

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MK (20.12.2019) 5P 3C