IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.03.2020
PRONOUNCED ON : 20.03.2020

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

Crl.A.Nos.534 & 535 of 2013

Jeyaramachandran ...Appellant in both appeals

Vs.

Babu @ A.M.Iqbal ...Respondent in both appeals

Common Prayer: Criminal Appeals filed under Section 378 Cr.P.C. to set aside the judgment of the Addl. District Judge, Namakkal, Namakkal District made in C.A.Nos.23 & 22 of 2012 dated 9.11.2012 in setting aside the judgment of the learned Judicial Magistrate No.1, Namakkal made in S.T.C.Nos.99 & 62 of 2009 dated 29.03.2012 convicting the Respondent/Accused herein for the offence under section 138 of the Negotiable Instruments Act and sentencing him to undergo simple imprisonment for a period of one year and to pay a compensation of Rs.12,50,000/- & Rs.12,00,000/- i.d., to undergo 3 months S.I. respectively.

In both Appeals

For Appellant : Mr.V.Murugesan
For Respondent : Mr.T.R.Sivaraman

C O M M O N J U D G M E N T

The complainant in S.T.C.Nos. 99 & 62 of 2009, on the file of the Judicial Magistrate Court No.1, Namakkal is the appellant.

2. The appellant laid the complaint against the respondent/accused under Section 138 of the Negotiable Instruments Act on the footing that the appellant and the respondent had been engaged as friends and whileso, the respondent represented that he is planning to send people to abroad for jobs and also apprised him to inform persons known to him for sending abroad and believing his words, according to the appellant, he and two others jointly on 10.01.2005, paid

Rs.10,00,000/- and on 03.02.2005, paid Rs.7,00,000/-, totally, they had paid Rs.17,00,000/- to the respondent. However, as assured by him, the respondent had not sent them to abroad and therefore, the appellant had requested the respondent to return back the amount given to him and the respondent had issued 5 cheques bearing Nos.316509 to 316513, drawn on ICICI bank, T.Nagar, dated 05.08.2007, 05.10.2007, 05.12.2007, 15.02.2008 and 28.02.2008, totally for Rs.17,00,000/- and directed the appellant to present the cheques for collection and accordingly, the appellant had presented three cheques dated 05.12.2007, 15.02.2008 and 28.02.2008, totally for a sum of Rs.12,50,000/- for collection. However, the abovesaid cheques have been returned for the reason 'funds insufficient' and following the same, the appellant issued the statutory notice on 18.06.2008, calling upon the respondent to pay the amount due under the cheques. However, the appellant had evaded to receive the same and the notice sent had been returned and the respondent knowing fully that there is no amount in his account had issued the cheques with the dishonest intention to cheat the appellant and hence, according to the appellant, the respondent is liable to be punished under Section 138 of the Negotiable Instruments Act and hence the complaint.

3. On the abovesaid reasons, it is found that three complaints have been preferred by the appellant against the respondent.

4. Insofar as the S.T.C.Nos. 99 & 62 of 2009 are concerned, the trial Court namely, Judicial Magistrate No.1, Namakkal had, based on the appreciation of the materials placed on record and the submissions put forth by the respective parties, held that the respondent is guilty under Section 138 of the Negotiable Instruments Act and accordingly, sentenced him to undergo simple imprisonment for one year and also directed him to pay the cheque amount as compensation to the appellant in default to undergo simple imprisonment for three months.

5. Impugning the conviction and sentence imposed on him, the respondent/accused has preferred the appeals.

6. The appellate Court by way of the impugned judgment set aside the conviction and sentence imposed on the respondent/accused and acquitted him of the offence punishable under Section 138 of the Negotiable Instruments Act and accordingly, allowed the appeals preferred by the respondent/accused. Challenging the same, the present appeals have been preferred by the appellant.

7. The main reason adduced by the appellate Court, inter alia, for acquitting the respondent is that the payment of money

that was made by the appellant to the respondent is not for lawful purpose and therefore, no binding contract resulted therefrom and hence, according to the appellate Court, inasmuch as the cheque in question had been not issued towards a legally enforceable debt or other liability as contemplated under Section 138 of the Negotiable Instruments Act, the appellant is not entitled to maintain the complaint and on the abovesaid grounds, chose to acquit the respondent of the offence levelled against him.

8. The learned counsel for the appellant contended that the transaction entered into between the appellant and the respondent with reference to the sending of the persons to abroad for jobs is not opposed to public policy and therefore, according to him, the doctrine of in pari delicto is not applicable to the facts and circumstances of the case and therefore, according to him, the debt or liability involved in the matter was legally enforceable and the appellant is entitled to maintain the complaint against the respondent.

9. Per contra, according to the respondent's counsel, it was not enough for the cheques to have been issued and the same should have been dishonoured for maintaining the complaint under Section 138 of the Negotiable Instruments Act, on the other hand, according to him, it is also necessary on the part of the appellant to establish that the cheque in question has been issued for the discharge in whole or in part of any debt or other liability and therefore, according to him, inasmuch as the amount alleged to have been paid by the appellant to the respondent did not result in a legally enforceable contract between them, consequentially, no legal debt or liability had been created, therefore, the cheque in question could not be regarded as being in discharge of any debt or liability as contemplated under Section 138 of the Negotiable Instruments Act.

10. As above pointed out, the case projected by the appellant is that he and two others had advanced Rs.17,00,000/- to the respondent on the premise that he had assured them to send abroad for securing jobs.

11. Section 23 of the Indian Contract Act, 1872 reads as follows:

> '23. What considerations and objects are lawful, and what not.- The considerations or object of an agreement is lawful, unless-
> it is forbidden by law; or
> is of such a nature that, if permitted, it would defeat the provisions of any law;or
> is fraudulent; or

involves or implies injury to the person or property of another;or
the Court regards it as immoral, or opposed to public policy.
In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void'.

12. As per Section 2(g) of the Indian Contract Act,1872, an agreement not enforceable by law is said to be void.

13. In the light of the abovesaid factors, it has to be seen whether the agreement entered into between the appellant and the respondent for securing jobs at abroad for the appellant and others and the payment of money thereof is legally enforceable.

14. Illustration (f) of Section 23 of the Indian Contract Act, 1872, reads as under:

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000/- rupees to A. The agreement is void, as the consideration for it is unlawful.

15. In the light of the abovesaid illustration, it is found that the facts of the present case fit into the same and therefore, it can be held that the agreement between the appellant and the respondent is void as the consideration of Rs.17,00,000/- was in the nature of an illegal gratification and was unlawful.

16. On similar facts, the Delhi High Court had an occasion to consider the issue involved in the matter in the case reported in 2007 Crl.L.J.2262 (Virender Singh V. Laxmi Narain and another) and the principles of law with reference to the abovesaid issue had been determined by the Delhi High Court in the following manner:

'(A). Contract Act (9 of 1872), S.23, Illus.(f) - Unlawful consideration of agreement - Money paid by way of illegal gratification for purposes of arranging the job for complainant's son pursuant to agreement between petitioner and complainant - Agreement is void, consideration therein being unlawful.

(B) Contract Act (9 of 1872), S.65-

Obligation of person receiving advantage under void agreement - Agreements which are void ab initio and their illegality is known to the parties at the time of execution - Would not fall within the purview of S.65.

(C) Maxim - Pari delicto portior est conditio possidentis (defendentis) - Applicability - Exceptional circumstances to which maxim does not apply, stated.(Para 12)

(D) Negotiable Instruments Act (26 of 1881), S.138 - Dishonour of cheque - Legally enforceable debt or liability - Complainant paid sum of Rs.80,000/- to accused for purpose of securing job for his nephew - As job was not made available to complainant's nephew, he requested accused to return said amount - Dishonour of cheque issued by petitioner towards said amount - Agreement between petitioner and complainant for securing job is void, consideration therein being unlawful - Parties being in pari delicto, therefore, said sum of Rs.80,000/- cannot be recovered - Thus, there did not exist any legally enforceable debt or liability for discharge of which it could be said that cheque in question was issued - Consequently, S.138 would not be attracted.

17. Considering the import of the abovesaid decision and applying the same to the case at hand, it is found that the complainant's case would not fall within the three exceptional circumstances to which the maxim in pari delicto does not apply and the three classes or cases being:

"(a) Where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it;

(b) Where the plaintiff is not in pari delicto with the defendant;

(c) Where the plaintiff does not have to rely on the illegality to make out this claim".

18. Accordingly, as held by the Delhi High Court, in the abovesaid decision, the case of the appellant would not fall in any of the abovesaid three classes of cases inasmuch as securing of job at abroad is not an unlawful object. Though securing a job at abroad may not be an unlawful object but what is unlawful

is the consideration paid to it and the consideration having been already paid by the appellant, the illegality stood completed on the part of the appellant and inasmuch as the appellant would have to rely upon the illegality to make out his claim or enforce the same, this case does not fall within the three class of cases mentioned above and as regards the second class of cases above referred to, in that backdrop, the Supreme Court in the decision reported in AIR 1968 SC 534 (Sita Ram Vs. Radha Bai) had held that it is settled law that where the parties are not in pari delicto, the less guilty party may be able to recover the money paid or property transferred, under the contract. It was further held that such possibility could arise in the three situations:

> '1. The contract may be of kind which has been made illegal by statute in the interest of a particular class of persons of whom the plaintiff is one;
>
> 2. The plaintiff must have been induced to enter into the contract by fraud by strong pressure;
>
> 3. The defendant is under a fiduciary duty to the plaintiff and it is in connection with this fiduciary relationship that moneys have come into his hands as proceeds of a transaction albeit illegal'.

None of the abovesaid three situations arise in the present case.

19. The doctrine or rule of in pari delicto is the embodiment of the principle that the Courts refuses to enforce the illegal agreement at the instance of the person who is a party to the illegality or fraud. As above pointed out, the three exceptional conditions to which the abovesaid maxim does not apply, not applying to the facts and circumstances of the present case, resultantly, as held by the Delhi High Court, in the abovesaid decision, considering the facts and circumstances of the present case, there did not exist any legally enforceable debt or liability for the discharge of which the cheques in question could be held to have been issued, in such view of the matter, Section 138 of the Negotiable Instruments Act would not be attracted and the abvoesaid aspects of the matter having also been taken into consideration by the Appellate Court and inter alia rightly chosen to acquit the respondent of the offence put forth against him.

20. In the light of the abovesaid discussions, the appellant having failed to establish that the cheques in question had been issued towards the legally enforceable debt or other liability, on that basis, it is found that he is not entitled to maintain the complaint against the respondent under Section 138 of the

Negotiable Instruments Act.

21. In the light of the above determination, the other reasons given by the appellate Court for the rejection of the complainant's case are therefore not required to be adverted to. In such view of the matter, the decisions relied upon by the appellant's counsel reported in (2017) 5 Supreme Court Cases 737 (N.Parameswaran Unni Vs.G.Kannan and another) & (1996) 7 Supreme Court Cases 523 (State of M.P. Vs. Hiralal and others) with reference to the validity of the statutory notice sent by the appellant to the respondent are not considered, particularly, in view of the abovesaid determination that the complaint laid by the appellant under Section 138 of the Negotiable Instrument Act is not legally sustainable.

22. On the whole, the judgment passed in C.A.Nos.23 & 22 of 2012, dated 9.11.2012, on the file of the Addl. District Judge, Namakkal, acquitting the respondent of the offence under section 138 of the Negotiable Act do not warrant any interference and resultantly, both the criminal appeals are dismissed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To:

1. The Addl. District Court, Namakkal.

2. The Judicial Magistrate No.1, Namakkal.

Pre-delivery Judgment in
Crl.A.Nos.534 & 535 of 2013

VSN II (CO)
KKV/02/09/2020