IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :08.06.2023

Pronounced on :16.06.2023

Coram:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.327 of 2020

Dr.M.Chandrasekar,
S/o S.K.Mayilanandan,
Managing Director,
SKM Animal Feeds and Foods India Pvt.Ltd.,
NanjaiOothukuli Post,
Erode Taluk, Erode District,
Rep.by his Power Agent,
B.Thirumavalavan,
The Deputy General Manager,
SKM Animal Feeds and Foods India Pvt.Ltd.,
NanjaiOothukuli (Post),
Erode Taluk & District. ..Appellant/Complainant

/versus/

V.M.Duraisamy,
Proprietor,
M.N.Farms,
4/717, Vadakkalur PO,
Annur Taluk,
Coimbatore District. .. Respondent/Accused

Prayer: Criminal Appeal has been filed under Section 378 of Cr.P.C., to set aside the impugned judgment dated 20.11.2019 made in S.T.C.No.397 of 2018 on the file of the Judicial Magistrate-cum-Fast Track No.1, Erode, punish the respondent herein for the offence under Section 138 of the Negotiable Instruments Act and impose fine equal to the cheque amount.

For Appellant :Mr.Md.Riyaz for
Mr.K.Muthu Ganesapandian

For Respondent :Mr.G.Arul Murugan

JUDGMENT

The private complaint initiated under Section 138 of the Negotiable Instruments Act, 1881, by the appellant herein against the respondent was taken cognizance by the Judicial Magistrate-cum-Fast Track Court No:1 as S.T.C.No: 397 of 2018. After examination of witnesses, the trial Court held that the complaint is not by the payee or the holder in due course. Also, the debt not proved. Hence, acquitted the accused.

2. Against the order of acquittal dated 20/11/2019, the complainant has preferred this appeal. On *prima facie* satisfaction, leave to file appeal against acquittal was granted by this Court on 17/08/2020.

3. The appellant company is a manufacturer of poultry feeds and the respondent is the proprietor of M.N. Farms, a trader in poultry feeds. The trade relationship between the parties prevail for years and the appellant used to supply feed on credit basis to the respondent maintaining a running account.

4. During the end of March 2018, the outstanding payable by the respondent stood as Rs.39,27,246/-. After giving credit to the offer and concession as on 01/05/2018, the outstanding balance was struck as Rs.33,06,391/-. To clear this due, the respondent gave a cheque dated 21/06/2018 drawn on Canara Bank. The cheque on presentation bounced with an endorsement 'exceeds arrangement'. For the statutory notice issued to the respondent demanding payment of the cheque amount, the respondent replied denying liability, hence complaint presented before the Judicial Magistrate,(FTC II), Erode on 29/08/2018. The complaint was returned on 01/09/2018 with an endorsement to be presented before the jurisdiction Court. Accordingly, the complaint was presented before Judicial Magistrate (FTC-I), Erode. After recording the sworn statement of Mr.Thirumavalavan, the power agent of Mr.Chandrasekar, the complaint was taken cognizance by the Court on 19/08/2018.

5. To prove its complaint, the power agent of Mr.Chandrasekar, MD, SKM Animal Feeds and Foods India (Pvt) Ltd was examined as PW-1. Through him 10 Exhibits were marked. The accused was examined as DW-1 in defence and exhibited 4 documents.

6. After appreciating the evidence, the trial Court concluded that the accused through oral and documentary evidence had shifted the onus of proof on the complainant. The statutory presumption of debt on the accused is duly rebutted. Contrarily, the complainant has failed to prove that the accused owe the cheque amount through best evidence available.

7. In the impugned judgement, the trial Court has observed that the complainant after getting intimation Ex.P-4 from the Bank regarding return of the cheque (Ex.P-3) on 22/06/2018 had caused the statutory notice (Ex.P-5) on 20/07/2018. The said notice was received by the accused and he had replied (Ex.P-7) to the complainant on 14/08/2018. Thereafter, the complainant had initiated the criminal proceedings in tune with the ingredients required under Section 138 of the Negotiable Instruments Act, 1881, to set the criminal law into

motion. However, the complaint filed by Dr.Chandrashekar, the Managing Director of SKM Animal Feeds and Foods India Private Limited represented by his Power Agent, Thirumavalavan, General Manager of SKM Feeds and Foods India Pvt Limited, who is not the payee or the holder of the cheque in due course is not maintainable.

8. Further, the trial Court has held that the subject cheque (Ex.P-3) shows the payee as SKM Animal Feeds and Foods India Private Limited. The payee name is not written in hand, but a rubber stamp seal fixed. This proves the case of the accused that the blank signed cheque given to the complainant as securities been misused by the complainant by filling up the amount and affixing the seal of the complainant. Further, the trial Court has also pointed out that though the complainant says that the due arose in the course of business transaction continued for years together and the due payable is supported by the confirmation of balance receipt given by the accused, the complainant is failed to produce the said document or the invoices to prove supply of goods in credit. In contra, the accused has probablised his defence that the subject cheque was given only as a security and not for discharge of any enforceable debt.

9. It is also to be noted that the accused mounted the witness box and has reiterated his contention found in reply notice Ex.P7. According to the accused, the statement of account claimed by the complainant is not true and correct. He had good trade relationship with the complainant for long time, but during the year 2017-2018, the feeds supplied by the complainant was of substandard quality impairing the laying capacity of the hen. On complaint, the complainant company agreed to supply fresh feeds to the poultry owners free of cost to compensate their loss. After supplying the fresh feed, in lieu of the substandard feed supplied earlier, on a specific understanding that the supply is free of cost, the complainant wants to collect the costs of the feed which was supplied free of cost to compensate the poultry owners by misusing the signed cheque given in blank. To substantiate the said defence, the accused has marked Exs.D-2 and D3 cheques and the statement of account Ex.D-4, to show the complainant has given the cheques to the accused as compensation for supplying substandard feed. For the afore said reasons, the trial Court dismissed the complaint.

10. Submissions made by the Appellant/Complainant:-

The learned counsel appearing for the Appellant/Complainant submitted that the trial Court having rightly held that through Ex.P-3 to Ex.P-6, the complainant had proved the fundamental fact required to draw presumption under Section 139 of the Negotiable Instruments Act, 1881, ought not to have dismissed the complaint on the ground that the accused had probablised the defence that the cheque given in blank as security and the failure to file the invoices and confirmation of balance receipt dis- proves the case of the complainant.

11. Regarding maintainability of the complaint, the learned counsel for the appellant submitted that, the complaint filed by the payee company through its Managing Director Dr.M.Chandrasekar through his Power agent Thirumavalavan. The power of attorney deed in favour of Thirumavalavan is Ex.P-1, the copy of the memorandum and Articles of the Association of the complainant company which empowers the Managing Director of the company to take legal action on behalf of the company is Ex.P 2 and the extract of the minutes of the Board Meeting dated 22/06/2018 authorising Dr.M.Chandrasekar to sign, file and execute legal documents and represent, appear, attend before legal forum on behalf of the Company by himself or through his power agent is marked as Ex.P-10 . The reading of these documents would clearly show that the Board of Directors of

SKM Animal Feeds and Foods India Private Limited had resolved to authorise its Managing Director Dr.M.Chandrashekar to represent the company in all legal matters by himself or through his power agent. Accordingly, Dr.M.Chandrashekar, has appointed Mr.Thirumavalavan (PW-1) as his Power agent and through him, the complaint presented and contested. Hence, the complaint which has been filed by the payee through the power agent of its authorised representative, is legally sustainable. After duly taken cognizance, dismissing it later on hypertechnical reason is legally incorrect. Hence, the judgement is liable to be set aside.

12. Submissions made by the counsel for Respondent/Accused:-

Per contra, the learner counsel appearing for the accused/respondent herein submitted that a complaint not filed by the payee as required under the Negotiable Instruments Act, 1881. The statutory notice Ex.P5 dated 20/07/2018 caused by a lawyer addressed to the accused say the notice is issued under instruction from Dr.M.Chandrasekar, S/o S.K.Myilanandan, Managing Director, SKM Feeds and Foods India Private Limited. The cheque is not drawn in favour of Dr.M. Chandrashekar, but it is in favour of SKM Animal Feeds and foods India Private Limited. The signatory of the cheque is the proprietor of M.N.Farms. The payee name is not handwritten ,but a seal of SKM Animal Feeds and Foods Private India Ltd, is affixed, while the amount in words and numbers are handwritten. The trial Court has rightly held that while the payee is SKM Animal Feeds and Foods India Ltd, the complaint filed by Dr.M.Chandrashekar, though he claims to be the Managing Director of the said company not maintainable. The extract of the minutes of the Board of Directors resolution dated 22/06/2018 not filed along with the complaint. The authorised representative of the Company cannot further delegate his authority through a power deed.

13. The Learned counsel for the respondent/accused stated that the complaint in the name of Dr.M.Chandrashekar through his Power of Attorney Thirumavalavan is based on the power of attorney deed marked as Ex.P-1. The said power of attorney deed is dated 24/08/2018. In the recital of the said specific power of attorney deed reads that Dr.M.Chandrashekar had appointed Thirumavalan as Power Agent to act on his behalf and and on behalf of the company to present the cheque No: 352594 drawn on Canara Bank given by Mr.V.M.Duraisamy, Proprietor, M.N.Traders. The trial Court on perusal of the records has rightly found that Ex.P-1-power of attorney given by Dr.Chandrasekar

to Thirumavalan to present the cheque No.352594 given by M.N.Traders whereas the cheque which M.N.Farms and complaint is against V.M.Duraisamy a Proprietor M.N.Farms. Further, Ex.P1 was presented before the Court only on 7th January 2019 and it was not filed along with the complaint. The alleged Board Resolution dated 22/06/2018 authorising Dr.Chandrashekar to represent the company or to appoint a power agent was produced before this Court only when PW-1 was re-examined on 31/07/2019. The same was not produced at the time of the complaint . Neither, the power of attorney deed dated 24/08/2018 executed in favour of Thirumavalavan refers about the Board resolution dated 22/06/2018. Since the complaint was not filed by the payee or the holder in due course, the trial Court has rightly held that the complaint is not maintainable. That apart, the complainant failed to prove the fundamental fact that the cheque was issued to discharge an enforcible debt. PW-1, who admits the complainant company have in its possession the invoices and confirmation of balance, failed to produce it to establish, there is debt exist. The reasoning of the trial Court for dismissing the complaint is legally and factually correct, therefore, the judgment of the trial Court is to be confirmed.

14. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent. Records perused.

15. The preliminary issue for consideration is, whether the complaint as framed is maintainable and the second issue is, whether the cheque marked as Ex.P-3 dated 21/06/2018 was drawn by the accused to discharge his debt.

16. The complaint describes the complainant as below:-

> Dr.M.Chandrasekar, Managing Director, SKM Animal Feeds and Foods India Pvt Ltd, represented by his power Agent, B.Thirumavalavan.

17. The cheque Ex.P-3 is drawn in favour of "S.K.M Animal Feeds and Foods Private Ltd.". Therefore, there is no quarrel about the identity of payee.

18. Section 7 of the Negotiable Instruments Act, 1881 defines 'Payee' as "the person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the 'payee'". Section 9 of the

Negotiable Instruments Act says that 'Holder in due course' means "Any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to the bearer, or the payee or indorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

19. Section 142 of the Negotiable Instruments Act, 1881 reads as below:-

> ***Section 142: Cognizance of offences:***_[(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—_
>
> _(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;_
>
> _(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:_
>
> _[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;]_
>
> _(c) no court inferior to that of a Metropolitan Magistrate_

or a Judicial Magistrate of the first class shall try any offence punishable under section 138.].

[(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction:—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]

20. Thus, on reading of the above Section and the judicial pronouncement of the Hon'ble Supreme Court, in ***National Small Industries Corporation Ltd. v. State (NCT of Delhi) and Ors.*** reported in ***[AIR 2009 SC 1284]***, it is clear as crystal, that if the 'payee' is a company, necessarily the complaint should be filed in the name of the company. Section 142 of the Negotiable Instruments Act, 1881 does not specify who should represent the company, if a company is the

complainant, it can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney.

21. Section 142 of the Negotiable Instruments Act, 1881, only requires that the complaint should be in the name of the payee. Where the complainant is a company, who will represent the company and how the company will be represented in such proceedings, is not governed by the Code but by the relevant law relating to companies. Section 200 of the Civil Procedure Code mandatorily requires an examination of the complainant; and where the complainant is an incorporeal body, evidently only an employee or representative can be examined on its behalf. As a result, the company becomes a de jure complainant and its employee or other representative, representing it in the criminal proceedings, becomes the de facto complainant. Thus, in every complaint, where the complainant is an incorporeal body, there is a complainant - de jure, and a complainant– de facto.

22. In ***Associated Cement Co.Ltd. v. Keshvanand*** reported in ***[AIR 1998 SC 596],*** the Hon'ble Supreme Court has observed that :

> "24. The above scheme of the new Code makes it clear that complainant must be corporeal person who is capable of making physical presence in the Court. Its corollary is that even if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the Court and it is that natural person who is looked upon, for all practical purposes, to be the complainant in the case. In other words, when the complainant is a body corporate it is the de jure complainant, and it must necessarily associate a human being as de facto complainant to represent the former in Court proceedings."

23. When the Negotiable Instruments Act,1881 clearly states that only the payee or, as the case may be, the holder in due course of the cheque alone can file the complaint and the Court can take cognizance of any offence punishable under Section 138 of the Negotiable Instruments Act, 1881, only based on such complaint, a power of attorney holder or an authorized agent of a Company cannot file a complaint in his personal capacity, even though he mentioned his

designation in the Company in the complaint. In such a situation, the power of attorney holder or, the authorized person can only represent the Company. The company itself should be the complainant especially when the cheques are issued in the name of the Company. The company will be the complainant – de jure and the power of attorney holder/the authorised person will be the complainant – de facto.

24. The cause title of the complaint and the recital in the complaint when scrutinised, this Court finds that the complaint is the Managing Director of SKM Feeds and Foods India Pvt Ltd. He has initiated the complaint through his power agent Thirumavalavan. Going by the provision and judicial pronouncements cited above, the complaint is not by the company but by the power agent of its Managing Director. Even though their designation in the company is mentioned, that will not satisfy the legal mandate required for maintaining the complaint by a company.

25. The dispute regarding the fact, whether the subject drawn by the accused from his account maintained in the name of the proprietor firm

M.N.Farms, the complainant had not produced any other document to show, there was debt in existence and to discharge the said debt, the cheque Ex.P-3 was given to the complainant company. The contra case of the accused is that, he is proprietor of two concern one by name M.N.Traders and another M.N.Farms. He had trade with the complainant company through both M.N.Traders and M.N.Farms. The statement of account ending on 31/03/2018 for both the concern was forwarded by the Complainant company for confirmation of balance. Those statements are Ex.D-4. As per the statement the balance payable by M.N.Traders as on 31/03/2018 is NIL. The balance payable by M.N.Farms is Rs.33,06,391.00. The accused did not confirm the balance claimed by the complainant, since there was dispute in the account. Lastly, it is pertinent to note, the power of attorney [Ex.P1] reads that the power is executed to prosecute the Proprietor of M.N.Traders. Whereas the cheque [Ex.P2] is drawn by the Proprietor of M.N.Farms. This error also adds further defect in the complaint. Thus, the payee not only properly represented, the power agent PW-1 also does not have valid power to prosecute the proprietor of M.N.Farms.

26. Thus, not only by letting evidence by preponderance of probability the accused had rebutted the presumption and had shifted the burden on the complainant to prove how and when the debt incurred or accrued by producing evidence like, invoices or any letter of confirmation of balance. Having pleaded that the debt arose in connection with goods sold, the proof of it not been placed before the Court. Therefore, both on law as well on facts the trial Court has arrived at the right conclusion and had dismissed the complaint.

27. This Court on considering the law and the facts confirms the judgment of the trial Court and thereby dismiss the Criminal Appeal as devoid of merits.

28. As a result, ***this Criminal Appeal is dismissed as devoid of merits***. The judgment of conviction passed by the learned Judicial Magistrate-cum-Fast Track Court No.1, Erode made in S.T.C.No.397 of 2018 dated 20.11.2019 is hereby confirmed.

16.06.2023

Index:yes/no
speaking order/non speaking order
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To:

The Judicial Magistrate-cum-Fast Track Court No.1, Erode.

DR.G.JAYACHANDRAN,J.

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Delivery judgment made in
Crl.A.No.327 of 2020

16.06.2023