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Crl.A.No.60 of 2020

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED : 07.03.2023

CORAM:

**THE HONOURABLE Dr.JUSTICE G.JAYACHANDRAN**

Criminal Appeal No.60 of 2020

M/s.K.R.G.Textiles,  
Rep.by its Proprietor,  
R.Govindaraj  
S/o.Rangasamy,  
No.12/88, Karumathampatty Road,  
Opposite City Union Bank,  
Somanur,  
Coimbatore.

.. Appellant

**/versus/**

K.Kathirvelu

.. Respondent

Criminal Appeal has been filed under Section 378 of Criminal Procedure Code praying to set aside the judgment passed by the learned V Additional District and Session Judge, Coimbatore in Crl.A.No.308 of 2018 dated 19.08.2019 and reversing the order passed in C.C.No.817 of 2017 on the file of the Judicial Magistrate, Sulur, Coimbatore and convict the respondent.

For Appellant : Mr.J.Jayan

For Respondent :Mr.N.Ponraj

**J U D G M E N T**



Crl.A.No.60 of 2020

This Criminal Appeal is filed by the complainant, who succeeded before the Trial Court, but suffered a reversal order from the lower Appellate Court, challenging the legality of the order passed by the lower Appellate Court he is before this Court.

**2. The brief facts of the case leading to this appeal are as below:**

For the sake of convenience, the parties are described as complainant and the accused.

The complainant is carrying on business under the name and style of M/s.K.R.G.Textiles and it is a proprietary concern. The accused used to purchase Gada cloth on credit basis. In the course of their business, a sum of Rs.13,00,000/- was over due payable by the accused. After repeated demands, the accused issued the following three post dated cheques as part satisfaction of the balance amount:

| <i>Date</i> | <i>Cheque Number</i> | <i>Amount</i> |
|-------------|----------------------|---------------|
| 11.07.2007  | 757261               | Rs.2,29,500/- |
| 19.07.2007  | 751268               | Rs.1,27,500/- |
| 11.08.2007  | 594543               | Rs.98,000/-   |

The cheques were drawn on IDBI bank, Coimbatore branch. The cheques were presented for collection on 03.09.2007 through the complainant's bank M/s.Catholic Syrian Bank, Karumathampatty branch. The cheques were returned with a memo of the accused banker on 05.09.2007 stating that “Refer



Crl.A.No.60 of 2020

to Drawer". This was intimated to the complainant by his banker on 06.09.2007. He caused statutory notice to the accused calling upon him to pay the dues. The accused received the notice on 08.10.2007 and issued a reply notice dated 09.10.2007 denying the liability. Hence the complaint under Section 138 of Negotiable Instruments Act, presented on 20.07.2018.

3. Before the Trial Court, the complainant examined himself as PW.1 and marked nine (9) exhibits. In defence, the accused examined himself and three other witnesses and marked two (2) exhibits.

4. The learned Judicial Magistrate, who tried the case in C.C.No.817 of 2017 found the accused guilty for the offence under Section 138 of N.I.Act, holding that the accused has not rebutted the presumption, convicted him to undergo one year Simple Imprisonment and imposed a fine of Rs.10,000/-, in default to undergo 3 months Simple Imprisonment. Same was challenged by the accused before the V Additional District and Sessions Judge, Coimbatore in Crl.A.No.308 of 2018.

5. The lower Appellate Court, on considering the defence held that the statutory notice was not caused within 30 days from the receipt of the intimation from the bank. Hence the complaint itself is beyond the period of



Crl.A.No.60 of 2020

limitation prescribed under Section 138(b) of N.I.Act. Therefore, the lower Appellate Court held that there is no proof of compliance of mandatory provision and no cognizance under Section 138 of N.I.Act can be taken. For the said sole reason, the judgment of the Trial Court has been set aside and the accused was acquitted.

6. In this appeal, the complainant has contended that the lower Appellate Court failed to appreciate the fact that the accused has candidly admitted the receipt of statutory notice dated 05.10.2007 marked as Ex.P.6. His reply notice is marked as Ex.P.8. Receipt of the notice and service on the accused admitted by the accused in his reply notice and even otherwise the postal acknowledgement and the acknowledgement card which was not traceable at the time of complaint, was traced subsequently and very much available with the complainant to show that the statutory notice was sent on 05.10.2007.

7. The complainant has annexed the copy of the postal receipt in the typed set of papers, but no application filed to receive it as an additional documents in the appeal. Therefore, this Court is not inclined to refer the document, but proceed to decide the issue with the other available materials.



Crl.A.No.60 of 2020

WEB COPY

8. As far as merits of the case is concerned, the lower Appellate Court except on proof of serving the statutory notice has not discussed anything about the facts to reverse the findings of the Trial Court. In the appeal before this Court preferred by the complainant, the learned counsel for the respondent/accused canvassed that there was no privity of contract between the complainant and the accused. This has been explained categorically in the reply notice marked as Ex.P.8. The subject cheques were in fact issued to one Shanmugam, when the accused had dealing with Shanmugam who was running yarn business by the name of Kalaivani Exports and Ganapathy Exports. These cheques were given as security for the goods supplied by Shanmugam. Later, when he found that the goods supplied by Shanmugam are sub standard, the same was brought to the notice of Shanmugam and he had agreed to reduce the cost of the yarn and also promised to get back the Gada cloth manufactured with the substandard quality. Thus the account between him and Shanmugam got settled. However, the cheques given as a security had been misused by Shanmugam through his friend, the complainant herein and the same has been presented for collection. Having put forth his defence even at the earliest possible time through reply notice Ex.P.8, by preponderance of probability, the statutory presumption of legally enforceable debt has been discharged. The



Crl.A.No.60 of 2020

complainant while in his complaint has stated that these three post dated cheques were given to discharge his pre existing liability, in the cross examination, he has admitted that he has supplied the goods only after receiving the post dated cheques. Which means that the goods were supplied only after receiving the subject cheques and it was not given to discharge a existing debt. Further would submit that the complainant in the cross examination admits that he does not remember the exact amount due and payable by the accused. He admits that he does not maintain the accounts for the goods sold and he has not paid VAT for the goods sold to the accused. The complainant admits in the cross examination that he is accompanied by Shanmugam to the Court indicating that the complaint is master minded by Shanmugam. Relying upon Exhibits D1 and D2, the statements of account maintained by the accused. The learned counsel for the respondent/accused submitted that by preponderance of probability as well as by positive evidence, the accused has established that the subject cheques were not issued to the complainant for any enforceable debt. Also, the complainant had not produced any evidence to prove the fundamental fact that there was privity of contract between him and the accused. No evidence from the complainant to show the goods were supplied to the accused on a particular date, the goods were supplied on credit and to discharge the debts, the subject cheques were issued. Having failed to prove the fundamental facts,



Crl.A.No.60 of 2020

the complainant under Section 138 of N.I.Act cannot have the privilege of presumption under the statute as per the dictum laid down by the Hon'ble Supreme Court in ***Rangappa Vs. Mohan*** reported in ***AIR 2010 SC 1898***. The learned counsel for the respondent also relied upon the judgment of this Court in ***Mohan Vs. Viswanathan*** reported in ***MANU/TN/3361/2018*** which has extracted in the earlier judgment of the Hon'ble Supreme Court and had concluded that there is discrepancy regarding the actual amount due and payable and there is no proof for the goods sold. This will help the accused that he has discharged the burden of rebutting the presumption by preponderance of probability.

9. Per contra, the learned counsel for the appellant/complainant submitted that the contention raised by the accused falsified by his own evidence. Particularly, the accused pleaded that there is no privity of contract between him and the complainant, whereas in the witness box, when he was cross examined, he admits that the bank statement maintained by him in IDBI bank reflects transaction between him and the complainant company. Further, Shanmugam to whom he alleged to have given the subject cheques was summoned by him to give evidence on his behalf and he was examined as



Crl.A.No.60 of 2020

DW.3. The said Shanmugam has categorically said in the chief examination itself that though he and the accused had business transaction, three cheques which is the subject matter of this complaint were not given to him. This witness (DW.4) not even requested to be cross examined, declaring him as hostile witness as per Section 154 of Indian Evidence Act.

**10.** The learned counsel for the complainant also relying upon the testimony of DW.2, the bank officials of IDBI bank, where the accused maintained his account had produced the statements of account Ex.D2. Referring the entries in the statements of account has mentioned about two transactions dated 20.01.2007 & 24.01.2007, wherein two cheques issued by the accused in favour of the complainant for a sum of Rs.1,18,750/- and Rs.2,16,200/- were encashed indicating that the plea of the accused that he does not know the complainant and there is no privity of contract with him is falsified. Just to get rid of the criminal liability unsustainable defence been projected.

**11.** This Court, after careful consideration of the evidence placed before the Court by the complainant and the accused as well as the judgment of the Trial Court and the reversal order of the Appellate Court primarily, finds



Crl.A.No.60 of 2020

that the dismissal of the complaint on the ground that it is barred by limitation is incorrect. The three subject cheques were marked as Ex.P.1 to Ex.P3 issued from the account maintained at IDBI bank by the accused returned with complainant's banker's seal M/s.Catholic Syrian bank, Karumathampatty branch with dated 06.09.2007 and an endorsement at the back of the cheque that “Our clearing stamp dated 05.09.2007 cancelled”. The cheque returned memo is marked as Ex.P4 series. Ex.P5 is a debt memo of Catholic Syrian bank dated 06.09.2007 indicates that the three cheques presented by the complainant were returned back with debiting a sum of Rs.30/- as service charges towards the return of three dishonoured cheques.

**12. Section 138 of Negotiable Instruments Act reads as below:**

*“138 Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the*



Crl.A.No.60 of 2020

*amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—*

*(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and”*

**13.** This provision mandates that the payee/holder in due course of the cheque to cause notice to the drawer of the cheque within 30 days from the date of receipt of information by him from the bank regarding return of cheque as unpaid. The statutory notice Ex.P6 is dated 05.10.2007. The contention of the accused is that the statutory notice was not sent on 05.10.2007 and therefore, it is beyond the limitation period of 30 days prescribed under Section 138(b) of N.I.Act. At the same time, the accused also accepts the receipt of the notice. On receiving notice has caused his reply dated 09.10.2007 which was marked as



Crl.A.No.60 of 2020

Ex.P8. To be noted, the reply notice sent by the accused through his counsel while he has taken a plea of no liability to pay the cheque amount and non existing of privity of contract, he has not mentioned about the date of receipt of notice except the date of notice. If really the accused had any ground to challenge the limitation, that should have been mentioned in the reply notice itself, which the accused has failed to mention. Even otherwise, since it is the accused to establish, burden of the fact contrary to the document namely Ex.P6, the statutory notice, which contains 05.10.2007 as the date of notice, the accused has not laid any evidence to prove the contrary to the entry in the document. No doubt that the complainant has not filed the postal acknowledgement or receipt which would indicate the date of despatch of the notice. But when the statutory notice dated 05.10.2007 admittedly received by the accused and no whisper about the date of receipt of the notice, it is to be presumed that the notice dated 05.10.2007 was sent on that day and after receiving the same, the accused has instructed his counsel to cause reply and accordingly the reply notice Ex.P8 has been sent.

**14.** The lower Appellate Court taking into consideration that the complainant has not produced the postal receipt, has turned against the complainant that there is no proof of despatch of the notice on 05.10.2007. This



Crl.A.No.60 of 2020

Court finds that the lower Appellate Court reversing the judgment of the Trial Court on the ground of limitation is perverse and contrary to the evidence in view of the reason stated above.

**15.** As far as the other grounds now canvassed by the learned counsel for the respondent/accused as pointed out by the learned counsel for the complainant, the defence taken by the accused is that there was no privity of contract is falsified through earlier payment made by the accused to complainant which was spoken by DW.2, the officials of the IDBI bank. Regarding the averment that the subject cheques were given to one Shanmugam and not to the complainant also could not be established by the accused. Even though, he was summoned and examined Shanmugam. The said Shanmugam D.W3 has categorically deposed that the subject cheques which are marked as Ex.P1 to Ex.P3 were not given to him during the period 2006-2007. The transaction with him were settled and closed by the month of August 2007. Thereafter, there were no dues from him or he received any cheque from him.

**16.** As far as non production of the invoice and admission by the complainant, he did not pay VAT by the transaction will gain significance only when the accused admits business transaction with the complainant and



Crl.A.No.60 of 2020

discharge of the debt.

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**17.** In the complaint, it is stated that it was a running account and the accused was liable to pay a sum of Rs.13,00,000/- , to discharge the part debts, the subject cheques were given by him. In the cross examination, the complainant had stated that normally only after the receipt of the cheques goods will be supplied. The learned counsel for the respondent/accused emphasising this as a contradiction submitted that the complainant has failed to prove the fundamental facts to sustain the complaint under Section 138 of N.I.Act to draw presumption under Section 139 of N.I.Act.

**18.** In the opinion of this Court, the said contention does not carry merit. The documents relied by the accused itself proves that there was business transaction between him and the complainant. He does not deny the execution of the cheques, but only denies in whose favour the cheques were given. Unfortunately the said Shanmugam to whom he claimed to have given the cheques had not supported his case.

**19.** In view of the positive evidence which stands against the accused and in favour of the complainant, and having failed to prove his defence even by preponderance of probability, the accused cannot claim that he is innocent and



Crl.A.No.60 of 2020

the cheques were not issued to discharge the enforceable debt.

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**20.** In such circumstances, this Court set aside the order of the lower Appellate Court, which has failed to appreciate the oral and documentary evidence properly and passed an order dismissing the complaint on the ground of limitation. Therefore, the order of the Trial Court is restored holding the accused guilty of the offence under Section 138 of N.I.Act.

**21.** Regarding the sentence, the learned counsel for the respondent/accused furnished medical record of the accused issued by Ganga hospital indicating that the accused has met with a road accident and his left foot crushed leading to amputation and states that the accused may not withstand incarceration if imprisoned.

**22.** Taking note of the said submission, the sentence of one year Simple Imprisonment and fine of Rs.10,000/-, in default 3 months Simple Imprisonment is modified as fine of Rs.4,55,000/- being the sum of three cheques amount and the same shall be paid as compensation to the complainant. Time for payment three months, in default 6 months Simple



Crl.A.No.60 of 2020

Imprisonment.

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**23.** In the result, this Criminal Appeal is partly allowed.

**07.03.2023**

Index : yes/no

Internet:yes/no

Speaking order/ Non speaking order

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**Dr.G.JAYACHANDRAN,J.**

rpl

To

1.The V Additional District and Session Judge, Coimbatore.

2.The Judicial Magistrate, Sulur, Coimbatore.

**Crl.A.No.60 of 2020**



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Crl.A.No.60 of 2020

**07.03.2023**