P.Venugopal vs Madan.P.Sarathi on 17 October, 2008

Bench: Cyriac Joseph, S.B. Sinha

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IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1699 OF 2008
[Arising out of SLP(Crl.) No. 6189/2006]

P. VENUGOPAL ... APPELLANT(S)

:VERSUS:

MADAN P. SARATHI ... RESPONDENT(S)

ORDER

Leave granted.

Appellant is before us aggrieved by and dissatisfied with the judgment and order dated 21.8.2006 passed by the learned Single Judge of the High Court of Karnataka at Bangalore in Criminal Revision No.1020/2006, whereby and whereunder the revision application filed by him from the judgment dated 14.10.2006 passed by the VIth Fast Track Court at Bangalore in Criminal Appeal No. 4050/2005 affirming the judgment and order dated 22.10.2005 passed by the XVIth Additional Chief Metropolitan Magistrate, Bangalore in CC NO. 3400/2002, was dismissed.

Respondent allegedly gave a hand loan of Rs. 1,20,000/- to the appellant on 4.10.2000. In discharge of the said debt the appellant is said to have issued two cheques for Rs. 60,000/- each on 26.4.2001 and 5.4.2001. The said cheques were presented before the bank on July 10, 2001 and were returned dishonoured on the ground that sufficient fund therefor was not available.

Upon service of notice upon the respondent, a criminal complaint was filed. By an order dated 20th November, 2002, cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881, was taken by the learned Magistrate.

Before the learned Trial Judge, the parties examined themselves. One of the contentions raised by the appellant was that there did not exist any relationship of creditor and debtor between the

parties. It was furthermore urged that notice in terms of the proviso appended to Section 138 of the Negotiable Instruments Act was not served upon the appellant.

Learned Additional Metropolitan Magistrate upon considering the materials brought on record by the parties, including the report of a hand writing expert, opined that the signatures appearing on Exhibit P-11 (Postal Acknowledgment) was not that of the appellant. The signatures of the appellant on the said Postal Acknowledgment was compared with his signatures on the cheque. Respondent, however, examined the postal peon - BA Subramanium as PW-2.

He stated that he knew the appellant very well.

The learned Metropolitan Magistrate did not place any reliance upon the said report of the hand writing expert and held that the notice was in fact served upon the appellant. It was also not disputed that the address of the appellant stated by the complainant was the correct address.

So far as the contention raised by the learned counsel that the appellant had failed to prove the relationship of creditor and debtor is concerned, yet again on appreciation of the evidence brought on record, the learned Trial Judge opined that the said relationship had been established.

Another contention which was raised by the appellant before the learned Trial Jude was that the cheque had in fact been issued to one Satya Murthy who was a property dealer, in respect whereof the learned Trial Judge held:

> "In the present case, the accused, to prove the arguments, has not produced any documentary evidence supports before the Court. On the contrary, the Accused has admitted his Signature on the document Ex.P.12 produced by the Complainant. It is marked as Ex.P12-A. In the Ex.P12, there is writing to the effect of having given the disputed cheques to the Complainant. As stated in this, these cheques are produced on 2.7.01. Therefore, in the absence of arguments of this Accused, having not produced in support, cannot be accepted. In case, if this Accused had really having given the Cheques to Sathyamurthy, if he, having mingled with this Complainant, had filed this Complaint, the Accused should have taken legal action against this Sathysmurthy and the Complainant, for having mis-used the alleged Cheques, but, there are no evidences before the Court, for having taken such any legal proceedings. Therefore, the defence evidence, raised by this Accused, having been rejected, the evidence produced by the Complainant, and the Rulings reported hereinabove, coupled with the and keeping in mind the rulings reported by the Learned Counsel for the Complainant, in AIR 2005 Karnataka Page 4486; ILR 1998 Page 1825; ILR 2001 Karnataka Page 4027; by coming to the conclusion that, the Accused has committed the offence punishable under Section 138 of N.I. Act, I answer the Point No. One in the 'Affirmative'. "

On the aforementioned finding that the respondent had proved its case against the appellant beyond any shadow of doubt, a sentence of three months' simple imprisonment as also a fine of Rs.

1,55,000/- was imposed upon the appellant. Out of the said amount of fine, Rs. 1,50,000/- was, however, directed to be paid to the complainant and the remaining amount of Rs. 5,000/- was directed to be credited to the Government.

An appeal was preferred thereagainst wherein the appellant inter alia raised a contention that he had filed an application for adduction of additional evidence to prove that he, in fact, had filed a complaint petition against the respondent - complainant for misuse of cheque. Opining that no sufficient reason has been assigned for allowing the said application for adduction of additional evidence, it was held that the burden was on the appellant - accused to rebut the case of the complainant. It was held that no material has been brought on record by the appellant to show that the cheques had been issued in favour of Satyamurthy, particularly, when he had not been examined.

Before the Appellate Court, a further contention was raised that the complainant had not been residing at the address given by him, in support whereof a purported report of a police constable was produced.

The learned Appellate Court opined:

> "All the said contentions are of no use as it is not his concern to see if complainant is residing at the said address or not. Even if it is presumed for a while that complainant has no residence, it does not mean that he cannot transact with any other person. In the light of the same, what is required is had there been any transaction between complainant and the accused, had the accused in order to discharge the legally enforceable debt, issued the cheque, had the cheque issued was dishonoured when presented for realization and had inspite of statutory notice being issued and served, the accused did not discharge the legally enforceable debt."

On the aforementioned finding, the appeal was dismissed. The revision application filed by the appellant was also dismissed by reason of the impugned judgment.

Mr. Hegde, learned counsel appearing on behalf of the appellant reiterated the aforementioned contentions raised by the appellant before the Courts below. In support of the said contentions, the learned counsel strongly relied upon a decision of this Court in Krishna Janardhan Bhat vs. Dattatraya G. Hegde, [2008 (4) SCC 54].

Section 138 of the Negotiable Instruments Act reads as under:

> "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 amount arranged to be paid

> from that account by an agreement made with that bank, such person shall be deemed to have committed an ofence and shall, without prejudice to any other provision 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:
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> Provided that nothing contained in this section shall apply unless-
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> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
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> (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
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> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

The Act raised two presumptions; one contained in Section 118 of the Act and other in Section 139 thereof. Section 118(a) reads as under:

> "118. Presumption as to negotiable instruments.- Until the contrary is proved, the following presumptions shall be made:-
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> (a) of consideration.- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for cosideration;

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

Section 139 of the Act reads:

> "139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability."

Indisputably, in view of the decisions of this Court in Krishna Janardhan Bhat (supra), the initial burden was on the complainant. The presumption raised in favour of the holder of the cheque must

be kept confined to the matters covered thereby. The presumption raised does not extend to the extent that the cheque was issued for the discharge of any debt or liability which is required to be proved by the complainant. In a case of this nature, however, it is essentially a question of fact.

The complainant contended that he gave a loan of Rs. 1,20,000/- to the appellant. He denied and disputed the said fact. Both parties adduced their respective evidences.

All the three Courts below have arrived at a concurrent finding that the complainant has been able to prove his case of grant of a loan. Admittedly the burden of proof shifted to the appellant. Again a finding of fact was arrived at that the appellant had failed to discharge his burden.

In the aforementioned situation, we are of the opinion that the finding of fact arrived at by the Courts below cannot be said to be such which warrants interference by us.

So far as the question of service of notice in terms of the proviso appended to Section 138 of the Act is concerned, again the same is essentially a question of fact. If the evidence of PW-2 has been believed by the learned Trial Judge as also by the Appellate Court and the revisional Court, we in exercise of our jurisdiction under Article 136 of the Constitution of India should not interfere therewith.

So far as the address of the complainant is concerned, it appears, he is a resident of Marenahalli, J.P. Nagar, Bangalore, as it appears from the affidavit affirmed in support of the counter affidavit. From a perusal of the memo of appeal filed by the appellant himself before the Appellate Court, it would appear that therein also the same address was given, namely, Marenahalli, J.P. Nagar, Bangalore.

Appellant, therefore, was aware that the respondent had been residing at Marenahalli, J.P. Nagar, Bangalore as also the fact that he had shifted from his earlier residence, namely, No. 326, 41st Cross Road, 8th Block, Jayanagar, Bangalore.

For the reasons aforementioned, we are of the opinion that no case has been made out for our interference with the impugned judgment. The appeal is dismissed.

As the amount of fine has already been deposited, the Trial Court shall release the amount of Rs. 1,55,000/- in favour of the respondent, if it has not already been withdrawn.

.....J (S.B. SINHA) .....J (CYRIAC JOSEPH) NEW DELHI, OCTOBER 17, 2008.