M.Vairavan vs T.M.Selvaraj on 3 December, 2010

Author: S.Tamilvanan

Bench: S.Tamilvanan

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 03/12/2010

Coram
The Honourable Mr. Justice S.TAMILVANAN

Crl.A(MD)No.352 of 2009

M.Vairavan ... Appellant

vs.

T.M.Selvaraj ... Respondent

Criminal Appeal filed under Section 378 Cr.P.C against the Judgment, dated 25.09.2009 made in S.T.C.No.846 of 2005 on the file of the Judicial Magistrate No.VI, Madurai.

!For Appellant ... Mr.K.Jeganathan
^For Respondent ... Mr.R.Ganesan

:JUDGMENT

This criminal appeal has been filed by the appellant / complainant against the Judgment, dated 29.05.2009 made in S.T.C.No.846 of 2005 on the file of the Judicial Magistrate No.VI, Madurai.

2. It is an admitted fact that the case was taken on file on the complaint given by the appellant herein under Section138 of Negotiable Instruments Act, on the ground that the cheque, dated 31.03.2005 issued by the respondent herein for an amount of Rs.1,81,800/- drawn on Karur Vysya Bank for the consideration received, was dishonoured by the bank, while the same was presented for payment due to insufficient funds.

3. According to the appellant, after the cheque was dishonoured by the bank, legal notice, dated 16.04.2005 was issued by the appellant herein by Registered post. Having received the same, the

respondent / accused had not chosen to send his reply and the cheque amount was also not paid, hence, the case was filed by the appellant before the court below under Section 138 of Negotiable Instruments Act, however, the court below without appreciating the evidence, according to law, recorded acquittal. Aggrieved by which, this appeal has been preferred by the complainant.

4. It is seen that on the side of the appellant, he himself was examined as P.W.1 and Exs.P.1 to P.5 were marked and the respondent / accused examined D.Ws. 1 to 3 and marked Exs.D.1 and D.2. Considering the evidence, the Court below recorded acquittal, by way of the impugned Judgment.

5. Mr.K.Jeganathan, learned counsel appearing for the appellant submitted that it has been established beyond reasonable doubt that the cheque was issued by the respondent / accused for valuable consideration and the same was dishonoured only due to insufficient funds. Inspite of service of legal notice to the respondent / accused, there was no reply from him, however, the respondent / accused raised a defence, stating that the cheque was issued towards business transaction with the son of the appellant and that the same was discharged. When discharge is pleaded by the respondent admitting the issuance of the cheque, the burden is upon the respondent / accused to establish the defence that he had discharged the debt by repaying the amount due and payable under the cheque.

6. Learned counsel appearing for the appellant has not disputed the fact that there was business dealings between the respondent / accused and the son of the appellant, however, according to him, that is nothing to do with the amount due and payable to the appellant, as per the cheque issued by the respondent / accused in favour of the appellant herein. He has also drew the attention of this court to the defence documents marked as Exs.D.1 and D.2, relating to the year 2004. The cheque, Ex.P.1 was issued for the consideration received in favour of the appellant / complainant, only on 31.03.2005 and the cheque was bounced as per the endorsement dated 04.04.2005 made by the Indian Bank, Pudur Branch, Madurai and therefore, the defence raised by the respondent / accused is not legally sustainable. Had the defence raised by the respondent / accused been true, at least after receipt of the legal notice, he could have sent his reply by raising the alleged defence of discharge and therefore, the defence raised by the respondent / accused is only an after thought and legally not sustainable.

7. Per contra, Mr.R.Ganesan, learned counsel appearing for the respondent submitted that the respondent had business dealings only with the son of the appellant and the cheque was issued in favour of the appellant, for the amount due and payable to his son and therefore, the discharge pleaded by the respondent has been established and accordingly, the court below has recorded acquittal.

8. As per the evidence of the appellant, who was examined as P.W.1, the respondent / accused was known to him through his son and he paid a sum of Rs.2,00,000 in the year 2003 July. After he repaid some amount towards the loan, the balance payable was Rs.1,81,800/-. When the appellant / P.W.1 demanded the amount, the respondent / accused issued the cheque, dated 31.03.2005 drawn on Karur Vysya Bank for the aforesaid amount, when the same was sent for collection through Indian Bank by the appellant, that was bounced with an endorsement, dated 04.05.2003 by the

Bank. Ex.P.1 is the memo issued by the bank for deducting Rs.293/- in the account of the appellant on account of the dishonour of the cheque, subsequently, the appellant issued legal notice, dated 16.04.2005, the copy of the same was marked as Ex.P.4 before the court below. The respondent / accused received the notice on 26.04.2005, for which postal acknowledgement, Ex.P.5 has been marked. The respondent / accused has not disputed the fact that the legal notice was served on him and that there was no reply sent by him. There is no satisfactory explanation on the side of the respondent / accused for not sending his reply, despite the fact that he had received the legal notice sent by the appellant.

9. On the side of the respondent / accused, three witnesses have been examined, however, the respondent / accused has not chosen to exam himself as a witness for the reasons best known to him. It is seen that on summon, wife of the appellant was examined on the side of the respondent / accused as D.W.3. As per the evidence of D.W.3, in the year 2003, her husband had paid a sum of Rs.2 lakhs to the respondent / accused as a hand loan, subsequently, for the balance amount due and payable towards the loan, the respondent / accused gave a cheque, dated 31.03.2005 and according to him a sum of Rs.18,200/- was paid by the respondent / accused to her son. She has also adduced hearsey evidence, that was also recorded by the court below. Though D.W.3 is admittedly the wife of the appellant, she has to be construed as a third party to the cheque transaction. In her evidence, she has stated that the appellant was running a business in the name of Srinivasa Oil and Spares, but she did not know the address of the business. Merely because D.W.3 is the wife of the appellant, her self contradictory evidence cannot be a proof for discharge pleaded by the respondent / accused.

10. It is pertinent to note that the respondent / accused has not stated that the cheque issued by him was a signed blank cheque by way of sending his reply notice or by examining himself as defence witness. Therefore, it is not the case of the respondent that it was a blank cheque, later on filled up by the appellant / complainant. When the respondent / accused has admitted the signature available in the cheque, the burden is upon the respondent / accused to adduce rebuttal evidence, in view of the presumption under Section 139 of Negotiable Instruments Act, which reads as follows :

> "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."

11. In the instant case, the respondent / accused has not adduced any rebuttal evidence to establish that the cheque was only a blank signed cheque handed over by him to the son of the appellant. Without specific pleadings, the respondent / accused cannot adduce rebuttal evidence, by way of examining some other witnesses, who are not competent to say whether it was a signed blank cheque or otherwise.

12. It is seen that D.W.1 was the Assistant, working in ICICI Bank, K.K.Nagar. Since the Manager was on leave, he was adducing evidence. According to him, the respondent / accused, T.M.Selvaraj had account in the bank and that as per the account copy for the period between 01.07.2004 and 27.07.2004, an amount of Rs.2 lakhs was paid to one Srinivasan on 09.07.2004. It is not in dispute

that the said Srinivasan is the son of the appellant / complainant herein, but the cheque relates to the year 2004, and the respondent / accused has not pleaded that the cheque issued by him was a signed blank cheque, by way of reply notice and adducing evidence. The encashment of cheque, dated 24.07.2004 in favour of the said Srinivasan cannot be taken as evidence for discharge, since the cheque relates to the ate 31.03.2005 and the discharge for the same could be possible only subsequently and not prior to the date of the cheque. Therefore, the documents marked as Exs.D.1. and D.2 have no relevance to plead discharge even to the son of the appellant / complainant.

13. D.W.2 has deposed that he worked in the Oil Company run by the respondent / accused from 1987 to 2005, that Srinivasan, son of the appellant had business transaction with the respondent / accused and that the appellant had never come to the office of the respondent / accused. It cannot be disputed that D.W.2 is a stranger to the cheque and he could not be construed as an eye witness for the issuance of the cheque or on the passing of consideration received thereon and therefore, I am of the view that the evidence of D.W.2 has no relevancy in this case.

14. The following decisions were relied on by both the learned counsel appearing for the appellant as well as the respondent :

1. State of Punjab vs. Hardial Singh, 2010 (3) MLJ (Crl) 556 (SC)

2. Central Bank of India & another vs. M/s. Saxons Farms & others, 2000-1- LW (Crl) 203

3. D.Sekar vs. G.Veerammal, 2010 (4) MLJ (Crl) 193

4. Ashok Jain vs. Balaji Exports, 2008 (3) MLJ (Crl) 271

5. M.A.Nachimuthu vs. N.Ravichandran, 2007 (2) MLJ (Crl) 1684

6. V.Varadaraj vs. V.Karuppiah Nadar, 2007 (2) MLJ (Crl) 900

7. Murugan Financiers vs. P.V.Perumal, 2005 Crl.L.J 269

8. N.Vaidyanathan Deepika Milk Marketing vs. M/s. Dodla Dairy Ltd., 2000 (1) Crimes 291

9. Suryanarayanan vs. M/s. Anchor Marine Service, etc., 1995-1-LW (Crl)

15. Learned counsel appearing for the respondent / accused submitted that there was no valid legal notice issued by the appellant / complainant to the respondent / accused.

16. The Hon'ble Supreme Court in the decision, Central Bank of India & another vs. M/s. Saxons Farms & others, reported in 2000-1-LW (Crl) 203, has held as follows :

"6. Section 138 of the Act, inter alia, provides that 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 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, such person shall be deemed to have committed an offence under the above Section. According to the proviso to the said Section unless the three clauses mentioned therein are fulfilled the provisions of the Section shall not apply. In these appeals we are concerned with Clause (b) which is quoted below :

"(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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid:

and"

7. Though, no form of notice is prescribed in the above Clause (b) the requirement is that notice shall be given in writing within fifteen days of receipt of information from the bank regarding return of the cheque as unpaid and in the notice a demand for payment of the amount of cheque has to be made."

In the light of the aforesaid decision, I am of the view that the legal notice served on the respondent / accused is legally sustainable under Section 138 of Negotiable Instruments Act, since the appellant / complainant has specifically demanded the amount on account of the dishonour of the cheque issued by the respondent / accused. Admittedly, there was no reply notice sent by the respondent / accused disputing the averments made in the legal notice.

17. In N.Vaidyanathan Deepika Milk Marketing vs. M/s. Dodla Dairy Ltd., reported in 2000 (1) Crimes 291, this Court held that for prosecution under Section 138 of Negotiable Instruments Act, it is immaterial whether the cheque was issued for discharge of one's own debt or liability or for discharge of another man's debt or liability.

18. Similarly, if a cheque is issued by the proprietor or proprietrix of a sole trading, complaint under Section 138 of Negotiable Instruments Act could be maintainable against the proprietor or proprietrix. Merely because the proprietary concern has not been arrayed as a party, it wont would not affect the maintainability of the complaint, as the proprietor or proprietrix is the sole authority of any sole trading concern.

19. Learned counsel appearing for the respondent / accused relying on the decision, State of Punjab vs. Hardial Singh, reported in 2010 (3) MLJ (Crl) 557 (SC) submitted that there was no proper notice under Section 138 (b) of Negotiable Instruments Act, 1881. The Hon'ble Supreme Court in the aforesaid decision has laid the ratio as follows :

> "When there is no statutory compliance of service of notice in accordance with provisions as mandated under Section 138 (b) of the Negotiable Instruments Act, 1881, the conviction is unsustainable."

As there is a proper service of notice to the respondent / accused, I am of the view that the decision cited by the learned counsel appearing for the respondent / accused is not applicable to the facts and circumstances of this case.

20. In the instant case, the appellant / complainant is only an individual, therefore, it cannot be said that non-production of his account books would affect the case under Section 138 of Negotiable Instruments Act, though the same is relevant in a case relating to financial companies and other institutions having books of account. The decision of this court in Murugan Financiers vs. P.V.Perumal reported in 2005 Crl.L.J 269 ended in acquittal on account of the non-production of books of accounts, sought for by the accused therein has no relevancy in this case.

21. In M.A.Nachimuthu vs. N.Ravichandran reported in 2007 (2) MLJ (Crl) 1684, this Court held that the complainant therein had not established the case under Section 138 of Negotiable Instruments Act, confirming the acquittal recorded by the trial court, on the ground that no evidence was let in by the complainant to prove that he had lent money as hand loan, which is also not applicable to the case on hand.

22. In the instant case, admittedly, the respondent / accused had borrowed money and issued cheque and he has not disputed the signature available in the cheque. In spite of service of legal notice, there was no reply sent by the respondent / accused. His plea is only discharge and therefore, as contended by the learned counsel appearing for the appellant / complainant, burden of discharge lies only on the respondent / accused, who has pleaded discharge. His plea that the loan amount was obtained only from the son of the complainant, after issuing the cheque in favour of the complainant is not legally sustainable. Similarly, the earlier payment made in the year 2004 cannot be taken as evidence for the alleged discharge of the amount due and payable for the cheque, dated 31.03.2005 and therefore, considering the evidence available on record, in the light of various decisions rendered by the Hon'ble Apex Court and this Court, I am of the view that the court below has given the findings only against the evidence available on record, which warrants interference by this Court.

23. As the cheque relates to the year 2005, considering the facts and circumstances, I find it just and reasonable, to impose fine, double the cheque amount to be paid as compensation to the appellant / complainant, so as to meet the ends of justice with default sentence.

24. In the result, this criminal appeal is allowed, holding that the guilt against the respondent / accused has been proved beyond reasonable doubt, accordingly, the respondent / accused is convicted under Section 138 of Negotiable Instruments Act and he is sentenced to pay a fine of Rs.3,63,600/- (Rupees Three lakhs sixty three thousand six hundred only), double the cheque amount, within a period of four weeks from the date of receipt of a copy of this order and the same is ordered to be paid as compensation to the appellant / complainant. In default of payment of fine

amount, the respondent / accused shall undergo one years simple imprisonment.

tsvn To The Judicial Magistrate No.VI Madurai.