(2015) 02 KAR CK 0231

In the Karnataka High Court

Case No : Criminal Appeal No. 975/2009

Central Tools and Engineering Stores — APPELLANT

Vs

Engee Enterprises and Others — RESPONDENT

Date of Decision : 05-02-2015

Acts Referred:
Evidence Act, 1872 — Section 45, 73

Citation : (2015) 02 KAR CK 0231

Hon'ble Judges : Budihal R.B., J.

Bench : Single Bench

Advocate : M.D. Anuradha Urs, for the Appellant

Final Decision : Allowed

Judgement

Budihal R.B., J.—This is appeal is preferred by the appellant being aggrieved by judgment and order dated 02.11.2009 passed by the XIII Addl. Chief Metropolitan Magistrate, Bangalore, in C.C. No. 15981/2004.

2. The appellant has challenged the validity and correctness of the judgment and order of the Trial Court on the grounds that the learned Magistrate has erred and failed to see that the respondents/accused have estopped from going back against the Original Agreement marked as per Ex. P-7. The learned Magistrate has ignored the document Ex. P-7 although it was produced, marked and proved. The learned Magistrate has failed to see that the appellant has established the business relationship between the parties, issuance of chequs at first instance and its dishonor resulting in agreement and issuance of 5 cheques under the said agreement. Learned Magistrate has failed to see that the appellant/complainant has proved the circumstances under which agreement Ex. P-7 came into existence and it was substantially acted upon with delivery of 5 chequs, out of which 3 cheques were encashed and other 2 cheques got dishonored. The cheques, which are the subject matter of the prosecution, find their origin from Ex. P-7 agreement. Hence, he sought to allow the appeal and to set-aside the judgment and order under appeal.

3. Heard the arguments of the learned counsel appearing for the appellant/ complainant and learned counsel appearing for respondents/accused.

4. Learned counsel for the appellant has submitted that the entry regarding return of earlier cheque was not mentioned in Ex. D-2. There are insertions with regard to transactions dated 13.05.2003 and 15.05.2003 in Ex. D-2. The Trial Court has not properly appreciated oral and documentary evidence. The documents produced by the respondents/accused are wrongly relied upon by the Trial Court. Learned counsel has submitted that the respondents have issued totally five cheques in discharge of the existing debt in connection with the business transactions and three cheques were encashed and two cheques were dishonored. Hence, submitted to allow the appeal and to convict the respondents/ accused by setting aside the judgment and order under appeal.

5. Learned counsel for the respondents/accused, during the course of his arguments, submitted that the complaint is against the wrong persons. No notice was issued to accused No. 3 and it was issued only to accused Nos. 1 and 2. Learned counsel has submitted that respondents have seriously disputed the execution of agreement Ex. P-7, and the complainant has not proved its execution by the respondents. The complainant had not produced the documents to show the legally enforceable debt as against the respondents. Hence, submitted that the Trial Court has properly appreciated the materials placed on record and rightly dismissed the complaint and acquitted the accused. Learned counsel for the respondents has further submitted that there are no valid grounds for this Court to interfere with the judgment and order of the Trial Court.

6. I have perused the complaint averments, oral evidence of P.W.-1 and D.W.-1, documents at Exs. P-1 to P-13 and Exs. D-1 and D-2 and judgment and order under appeal.

7. Let me refer to the case of the parties in brief. The complainant in his complaint has mentioned that he deals in hardware and other materials required for business and manufacturing activities including construction, fabrication etc., The accused is the customer of the complainant for the last several years and maintained regular running account. The accused has made purchases from the complainant under various invoices for his business activities. Having regard to the long standing relationship, reposing trust and confidence, allowed the credit facilities as requested by the accused on the promise that the accused would make prompt payment. However, the accused failed to keep the promise to regularize the running account and his liability. The amount was accruing in a sum of Rs. 7,00,000/- for the purchases under various bills and the last transaction being as on 09.03.2004. In discharge of part payment, accused issued cheque bearing No. 165416 amounting to Rs. 4,76,292/- dated 09.03.2004 drawn on UCO Bank, but when it was presented for encashment to the complainant''s banker M/s. ICICI Bank, the same was dishonored with an endorsement "Insufficient Funds". The complainant issued legal notice on 23.03.2004 to the accused and the same was served on the accused.

8. Thereafter, the accused contacted the complainant and consequently, an agreement was entered into between the complainant and accused on 01.04.2004. Under the said agreement, accused issued five cheques all drawn on Syndicate bank and in all amounting to 5,25,000/-. The said cheques were issued in consideration of the debts due including the cheque that was dishonoured. Pursuant to the agreement, the complainant returned earlier cheque bearing No. 165416 dated 09.03.2004, which was for Rs. 4,76,292/-. Thereafter, the complainant presented three cheques, out of the five cheques, for encashment and they were encashed. On the promise and assurance made by the accused, complainant presented remaining two cheques bearing No. 888670 and 888671 dated 25.04.2004 and 30.04.2004 for a sum of Rs. 50,000/- and Rs. 75,000/- respectively, drawn on Syndicate Bank, Banasawadi II Stage Branch, through his banker M/s. ICICI Bank N.R. Road Bangalore, but said cheques were dishonoured with an endorsement "payment stopped by the drawer" as respondents/accused issued stop payment instruction for the said cheques. Complainant got issued legal notice dated 12.05.2004 as per Annexure-F, through both registered post and certificate of posting. Legal notice issued through RPAD addressing M/s. Engee Enterprises was served on the respondents/ accused on 13.05.2004. The notice addressed to M/s. Engee Engineering was returned with a postal shara "as not claimed". The respondents/accused along with his reply notice dated 25.05.2004 sent a Demand Draft for a sum of Rs. 7,428/- by making untenable and totally false contentions contrary to the contents of the agreement.

9. I have perused the oral evidence of P.W.-1 and D.W. 1.

10. Pw-1, the complainant, in his oral evidence, filed the affidavit by way of examination in chief and reiterated all the contents of the complaint. As per the evidence P.W.-1, he has stated that in discharge of the part payment, under various bills, the respondents/accused issued the cheque for an amount of Rs. 4,76,292/- and when he presented the cheque for encashment through his banker same was dishonoured with the endorsement "funds insufficient" vide communication dated 18.03.2004. It is also stated that when he issued the legal notice on 23.03.2004 to the accused, same was served on the accused and after the service of the legal notice respondents/accused contacted the complainant and consequently, an agreement was entered into between himself and respondents/accused on 1.04.2004, the agreement is produced as per Ex. P-7.

11. P.W.-1 has further stated in his evidence by way of affidavit that under the said agreement the respondents/accused had issued 5 cheques bearing Nos. 888667, 888668, 888669, 888670 and 888671 dated 02.04.2004, 15.04.2004, 20.04.2004, 25.04.2004 and 30.04.2004 respectively, all cheques were drawn on Syndicate Bank, in all amounting to Rs. 5,25,000/-. Pursuant to the said agreement P.W.-1 has returned the cheque bearing No. 165416 dated 09.03.2004 which was for Rs. 4,76,292/-. As per the terms of the agreement entered into, respondents/accused promised to pay Rs. 5,25,000/-. It is also his

case that three cheques, which were presented were encashed. But the remaining two cheques, which are produced at Exs. P-1 and P-2 were dishonoured, as the accused has issued the stop payment for those cheques.

12. In the cross examination, P.W.-1 has admitted that in para 5 of the complaint it has been wrongly mentioned as the amount due by the accused is Rs. 7,00,000/-, but the actual amount due by the accused is Rs. 4,76,292/- as mentioned in para 6 of the complaint. He has deposed that he can produce the bills in order to show that accused is due in a sum of Rs. 4,76,292. He has denied the suggestion that the signature appearing in Ex. P-7 is not the signature of accused No. 3. He has not seen accused No. 3 putting his signature to Ex. P-7. The attestor Keerthi took Ex. P-7 to accused No. 3 and got his signature to it and brought back the same to him. The signature appearing at Sl. No. 3 of the witnesses is the signature of Keerthi. Attestor Keerti took the Ex. P-7, one or two days prior and on 1st April he brought Ex. P-7 with the signature of accused No. 3.

13. I have also perused the oral evidence of the respondent No. 3/accused, filed by way of affidavit as examination in chief. His main contention is that the correct amount due as per the books of accounts maintained by him is a sum of Rs. 4,07,427.36/- and not Rs. 4,76,292/- as claimed by the complainant. It is also in his evidence that since the complainant was in need of money to meet his financial commitments, requested him to send six cheques and he being innocent person sent three cheques bearing Nos. 888667, 888668 and 888669 for an amount of Rs. 2,00,000/-, Rs. 1,00,000/- and Rs. 1,00,000/- respectively. All three cheqeus were drawn on Syndicate Bank, Banasavadi Branch, Bangalore. It is also his case that he had given two more blank cheques for the payment of the bills being purchased on 02.03.2004 vide bill No. 7023 for a sum of Rs. 4,540/- and 9.3.2004 vide bill No. 70243 for a sum of Rs. 6,902. The said cheqeus were handed over to the complainant on the condition that whatever the difference of amount stands as on 2.4.2004 in the books of accounts would be filled and the complainant has also agreed to inform him about the outstanding amount. Accused has denied that he has agreed to pay sum a of Rs. 75,000/- and Rs. 50,000/- as claimed in the legal notice and there is no legally recoverable debt.

14. In his cross-examination respondent No. 3/accused has deposed that there was no panchayat held between himself and the complainant. He has produced the documents as per Exs. D-1 and D-2. Ex. D-1 is the Statement of Accounts and Ex. D-2 is the Original Accounts Ledger.

15. I have perused Ex. D-2, the Original Accounts Ledger. But as contended by P.W.-1/complainant that the entries dated 13.5.2003 and 15.5.2003 have been subsequently inserted in the said document Ex. D-2. Perusing the document Ex. D-2, it is clearly visible that the said entries have been made subsequently and the said two entries are not in the fashion of other entries made in the said document.

16. Perusing the materials on record, respondents/accused have seriously disputed the execution of agreement Ex. P-7, but as per the complainant the origin for the cheques as at Exs. P-1 and P-2, is the agreement under Ex. P-7. When that is so, the Trial Court ought to have ascertained whether really the agreement Ex. P-7 was executed by the accused as per the panchayat held and whether before the panchayat he has agreed for the same. But perusing the judgment of the Trial Court, the Trial Court has observed that it has compared the signature on the agreement Ex. P-7 with other signature of accused and they are not one and the same, and ultimately came to the conclusion that Ex. P-7 was not at all executed by the accused. Hence, the Trial Court has ultimately dismissed the complaint and acquitted the respondents/accused holding that complainant has failed to prove his case.

17. When the signature of the accused on Ex. P-7 was disputed and the case of the parties rests on the said document, the Trial Court instead of taking the risk of comparing the signature on the document Ex. P-7 with other signatures of the respondent/accused, could have referred the document Ex. P-7 to the hand writing experts to get the report and if necessary, the Trial Court could have summoned the said expert to give his oral evidence in respect of the said report. But the decision taken by the Trial Court to compare the signature on the document Ex. P-7 with other signature of the accused invoking Section 73 of the Evidence Act is not a correct decision. In this connection, let me refer to the decision of the Hon''ble Supreme Court rendered in Crl. A. No. 336/1976 decided on 26.9.1978 in case of the State (Delhi Administration) v. Pali Ram. Para Nos. 26, 27 and 30 of the said judgment reads as under:

"26. Section 73 is therefore to be read as a whole, in the light of Section 45. Thus read, it is clear that a Court holding an inquiry under the Cr.P.C. in respect of an offence triable by itself or by the Court of Session, does not exceed its powers under Section 73 if, in the interests of justice, it directs an accused person appearing before it, to give his sample writing to enabling the same to be compared by a handwriting expert chosen or approved by the Court, irrespective of whether his name was suggested by the prosecution or the defence, because even in adopting this course the purpose is to enable the court to compare the disputed writing with his (accused''s) admitted writing, and to reach its own conclusion with the assistance of the expert.

27. In the instant case, the Magistrate, as the extract form his Order dated May 20, 1972, shows after considering the peculiar circumstances of the case, and recalling the observation of the Calcutta High Court in Him Lal Agarwalla v. State (ibid) to the effect that Section 73 entitled "the court to assist itself for a proper conclusion in the interest of justice", expressly "applied this test to the present case". The peculiar circumstances which weighed with the Magistrate in directing the accused sample writing to be compared, in the first instance, by the Government Expert of Questioned Documents, included the contumacious conduct of the accused and the resiling of the material witness, Tek Chand,

which, according to Mr. Marwah, was possibly due to his having been suborned or won over by the accused. It was apparent from the record that the accused was playing hide and seek with the process of law and was avoiding to appear and give his sample writing to the police. The Magistrate therefore, had good reason to hold that the assistance of the Government Expert of Questioned Documents was essential in the interest of justice to enable the magistrate to compare the sample and the question writings with the expert assistance so obtained and then to reach a just and correct conclusion about their identity. Although the order of the Magistrate is somewhat inartistically worded, its substance was clear that although initially, the specimen writing sought from the accused was to be used for comparison by the Government expert, the ultimate purpose was to enable the Court to compare that specimen writing with the disputed one, Ex. P.W. 21F, to reach a just decision.

30. The matter can be viewed from another angle, also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence solely on comparison made by himself. It is, therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert."

18. Therefore, looking to the correct legal position in the decision of Hon''ble Supreme Court, the dismissal of the complaint and acquitting the respondents/ accused on the ground that signature on the agreement Ex. P-7 is not the signature of the accused, is not correct. Therefore, to do justice to both the parties in the case, I feel it is necessary to allow the appeal and to remand the matter to the Trial Court for fresh disposal.

19. Accordingly, the appeal is allowed and the judgment and order dated 02.11.2009 passed by the XIII Addl. Chief Metropolitan Magistrate, Bangalore, in C.C. No. 15981/2004 is hereby set-aside and the matter is remanded back to the Trial Court for fresh disposal in accordance with law.