

(2006) 11 KAR CK 0026
In the Karnataka High Court
Case No : Criminal Appeal No. 799 of 2002

Ganesh Enterprises

APPELLANT

Vs

D.R. Sarala

RESPONDENT

Date of Decision : 28-11-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2007) 3 BC 709 : (2007) 2 CivCC 779 : (2007) 3 KarLJ 137 : (2007) 2 KCCR 1089 : (2007) 5 RCR(Criminal) 838

Hon'ble Judges : K. Ramanna, J

Bench : Single Bench

Advocate : N.P. Kalleshgowda, for the Appellant; A.C. Balaraj, for the Respondent

Judgement

K. Ramanna, J.—This appeal is filed by the unsuccessful complainant challenging the order of acquittal passed by the XVI Addl. C.M.M. Bangalore, dated 4.4.2002 in C.C. No. 34858/99.

2. Brief facts of the case are that the appellant/complainant M/s. Ganesh Enterprises represented by its partner H.N. Narasimha Gupta and that the accused had purchased raw silk and twisted yarn on credit basis from the complainant and for repayment of the same she had issued 3 cheques and when they were presented to the bank for encashment, they were returned with an endorsement "Funds Insufficient". So, the complainant got issued the demand notice to the accused calling upon her to pay the cheque amount and the same was served on the accused but in spite of that, she failed to pay the same, therefore, the complainant filed a complaint against her for an offence punishable u/s 138 of Negotiable Instruments Act. During the course of trial, the complainant examined himself as P.W.1 and got marked Exs.P.1 to P.12. Thereafter, the statement of the accused u/s 313 Cr.P.C. was recorded and accused/Sarala examined one witness as D. W.1 in support of her case. Hence, this appeal.

3. Heard the arguments of the learned Counsel appearing on both sides and perused the records.

4. It is submitted by the learned Counsel for the appellant that after considering the evidence, the trial Court acquitted the respondent for a simple reason that the appellant has not produced the single invoice bills before the Court to show that the accused has purchased silk from the appellant/company and the said 3 cheques Exs.P.2 to 4 issued by the respondent have not been totally denied by her husband. It is argued that when the respondent issued 3 cheques for the amount due by her, she ought to have given reply immediately after receipt of the same. More over, the trial Court has wrongly come to the conclusion that even if the cheques were received as security by admitting the signature and date mentioned in Exs.P.2 to P.4, the burden lies on the respondent to rebut the evidence. But in the instant case, no such steps have been taken by the respondent to rebut the evidence of the respondent. Infact, the respondent with ulterior motive failed to enter the witness box and depose whether the said cheques were issued by her are legally enforceable debt or otherwise. If at all the cheques were issued by the respondent as security, after repayment of the amount due, she would have insisted the appellant to return those cheques which wee taken as security. Therefore, the trial Court has totally recorded wrong findings on flimsy grounds. It is also argued that the appellant has produced Ex.P.11 the statement wherein, the date and bill number has been mentioned and that the transaction commenced from 1993 onwards but the cheques were issued in 1998. Therefore, the evidence adduced on behalf of the respondent without any ground cannot be taken into consideration even though he was the husband of the respondent. But the trial Court wrongly believed the version of P.W.1 and held that the notice issued if any, was not served on respondent and those cheques were collected as security and no books of accounts, bills and invoice are produced to show that the respondent was due in a sum of Rs. 1,10,000/- to the appellant. Since the respondent has not rebutted the evidence by examining herself as defence witness but her husband Rajendra examined as D.W.1 and some more witnesses about the purchase of raw silk from the appellant. Hence, he prays that the appeal be allowed by setting aside the order of acquittal passed by the trial Court and convict the respondent.

5. In support of his contention, learned Counsel for the appellant relied upon a decision of this Court reported in case of H. Narasimha Rao v. R. Venkataram ILR 2006 KAR 4242 wherein, it has been held as under:

Section 138 - Offence under - repayment of time barred debt - issue of cheque - whether constitute an offence - HELD, Since no fresh consideration is required to pay the time barred debt, and there is no legal bar for the debtor agreeing to pay the time barred debt, the dishonoured cheques issued towards repayment of time barred debt does constitute an offence u/s 138 of the Act - Order of acquittal is set aside.

6. He also relied on another decision of this Court reported in case of Dr.

Sampathkumar B.V. Vs. Ms. Dr. K.G.V. Lakshmi, GCIM, Lakshmi Health Centre, wherein, it has been held that:

Section 138 - Dishonour of Cheque "Cheques issued a Security" - Chequed only as security for repayment of the loan and blank cheques issued - complaint dismissed -legality of dismissal challenged - HELD - The dismissal of the complaint on the plea that it was issued only as security and hence no prosecution would lie is an untenable view. A cheque whether issued for repayment of loan or as security makes little difference u/s 138 of the Act. In the event of dishonour, legal consequences are same without distinction. When once issue of cheque is proved, a presumption u/s 139 of the Act would arise with regard to consideration.

7. Per contra, learned Counsel for the respondent submits that the trial Court is right in acquitting the respondent on the ground that the appellant has utterly failed to prove the charges levelled against the respondent. It is further submitted that the said three cheques were taken not for legally recoverable debt and they were taken as security. The notice was not at all served on the respondent but the appellant/complainant has not proved before the trial Court that it was a valid service. The appellant has also not produced any books of accounts like invoice, bills and etc., to prove that the respondent was due in a sum of Rs. 1,10,000/-. Therefore, the respondent who issued 3 cheques not for repayment of the said amount due but issued the same as security.

8. In support of his contention, learned Counsel for the respondent relied upon a decision reported in case of Jai Durga Enterprises and Anr. v. State of U.P. and Anr. AIR 2006 (ALL) 1244 wherein, it has been held thus:

Dishonour of cheque notice - Notice - One notice under registered post and one notice under U.P.C. were sent by complainant to accused - Notice under registered post had been returned by postman by endorsing false report while notice sent under U.P.C. was received by him - Notice sent by registered post thereby not served upon accused -Accused denied service of notice by filing affidavit - Same not controverted by filing counter affidavit - It would be deemed that there was no sufficient service - In absence of sufficient service, no offence u/s 138 was made out - Proceedings liable to be quashed.

9. Having heard the learned Counsel appearing on both sides, the point that arises for my consideration is whether the appellant being a complainant proved the charges levelled against the respondent for an offence punishable u/s 138 of N.I. Act with legal and cogent evidence.

10. It is an undisputed fact that the appellant is a businessman and he being a proprietor of M/s. Ganesha Enterprises came in contact with respondent/Smt. Sarala, Proprietor of M/s. Priyanka Silks. Ex.P.11 is the statement of account marked through P.W.1 discloses that right from 1993 onwards up to 1996 respondent used to purchase raw silk and yarn from the appellant on credit basis and it is a running account. Whenever the amount was paid, they used to

mention the same in Ex.P.11. As on 16.12.1996 respondent was due in a sum of Rs. 1,56,825/- and the total raw materials purchased by the respondent from 1993-96 was Rs. 2,18,109-75 but she paid an amount of Rs. 62,101/- and if the same is deducted out of Rs. 2,18,109-75, the respondent is due in a sum of Rs. 1,56,825/-. But the respondent has not entered into witness box but her husband when examined as D.W.1 has not disputed about the amount mentioned in Exs.P.2 to P.4. The endorsement issued by the banker goes to show that when Exs.P.2 to P.4 were presented for encashment, the respondent had no sufficient fund to make payment. More over, non-examination of the respondent to rebut the evidence of the appellant is a fatal to the defence taken by her in this case. D.W.1 is her husband, who has clearly admitted that there was transaction about purchase of raw silk and other materials from the appellant up to 1996. The admission made by D.W.1 clearly goes to show that respondent was purchasing silk from 1993 onwards and from 4.3.1995 to 16.12.1996 she had purchased the raw materials worth Rs. 2,18,109.75 and the contents of the statement of account Ex.P.11 is also correct. When the amount due by the respondent has been shown in Ex.P.11 and the same has also been admitted as true and correct, the cheques Exs.P.2 to 4 issued by the respondent which came to be dishonoured when presented and those cheques were issued for legally recoverable debt, in my considered view, the trial Court has totally come to a wrong conclusion and therefore, the appeal is liable to allowed by setting aside the order passed by the trial Court.

11. Regarding service of demand notice, the appellant got issued notice through the counsel as per Ex.P.12 by Registered Post and under certificate of posting as per Ex.P.8. Notice sent by R.P.A.D. returned with an endorsement as "not claimed". It is a well settled law that the demand notice sent under certificate of post is to be served on the accused. Hence, the contention of the respondent that the appellant/claimant has not complied with the mandatory provisions of the Negotiable Instruments Act does not hold water.

12. For the foregoing reasons, the appeal is allowed. The judgment and order of acquittal passed by the learned XVI Addl. C.M.M. Bangalore, in C.C.No. 34858/99 dated 4.4.2002 is hereby set aside. The respondent/accused is hereby convicted for an offence punishable u/s 138 of the Negotiable Instruments Act. Keeping the law laid down by this Court reported in case of M/s. Metalloy-N-Steel Corporation, Bangalore Vs. M.A. Sridhara, , the respondent/accused shall undergo sentence till rising of the Court and to pay fine of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) in default of payment of fine, she shall undergo S.I. for a period of six months.

13. The respondent/Accused shall appear before the trial Court on 22.1.2007 to undergo sentence till rising of the Court from 11 a.m. till 5 p.m.

14. The respondent/Accused is granted 30 days time from today, to deposit the fine amount of Rs. 1,60,000/-. After depositing the fine amount, a sum of Rs. 1,55,000/- shall be paid to the appellant/complainant as compensation and the

balance fine amount of Rs. 5,000/- shall be credited to the State Exchequer.