
(2009) 03 KAR CK 0066
In the Karnataka High Court
Case No : Criminal Appeal No. 255 of 2004

Matheson Bonsanquet Enterprises Limited	APPELLANT
Vs	
K.V. Manjunatha	RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2010) 1 ALD(Cri) 18 : (2010) 1 BC 158 : (2009) CriLJ 4460 : (2010) 1 Crimes 845 : (2009) 4 KarLJ 565 : (2009) 3 KCCR 2188 : (2010) 5 RCR(Criminal) 656

Hon'ble Judges : Arali Nagaraj, J

Bench : Single Bench

Advocate : A.Y.N. Gupta, for the Appellant; B. Vishweswaraiah, for the Respondent

Final Decision : Dismissed

Judgement

Arali Nagaraj, J.—The complainant in CC No. 26107/2000 on the file of the XIV Addl. Chief Metropolitan Magistrate, Bangalore [hereinafter referred to as the "Trial Court" for short] has challenged the correctness of the Judgment and order of acquittal dated 30.12.2003 passed in the said case acquitting the accused therein [respondent herein] of the offence under Section 138 of the Negotiable Instruments Act [hereinafter referred to as the "NI Act" for short].

2. Stated in brief the case of the appellant - complainant as alleged in the complaint filed by him u/s 200 Cr.PC before the Trial Court is as under:

(a) The complainant is a Company registered under the Indian Companies Act. The accused, namely K.V. Manjunath received Rs. 70,000/- as loan from the complainant through cheque bearing No. 963095 dated 2.6.1997. Towards repayment of the same, the accused issued to the complainant, a cheque bearing No. 331696 dated 2.9.1997 drawn on Canara Bank, Vasanthanagar Branch, Bangalore for Rs. 70,000/- being the loan amount. The accused also received from the complainant another sum of Rs. 70,000/- on 5.7.1997. As a security for

repayment of the same, he issued to the complainant a cheque bearing No. 340384 dated 15.9.1997.

(b) The above said cheques were presented to the Bank by the complainant, respectively on 5.12.1997 and 26.12.1997. Both of them came to be returned by the Bank with an endorsement that "Funds are insufficient". Therefore, the complainant got the statutory notices issued to the accused on dated 16.12.1997 and 31.12.1997 in respect: of the dishonour of the said cheques and thereby called upon the accused to make payment of the respective amounts, of the said cheques. The said notices were sent to the accused through registered post. Despite receipt of the said notices, the accused did not make payment of the said amounts. Therefore, the complainant filed the said complaint against the accused.

3. On appreciation of the oral evidence of PWs.1 to 3 and the documents Ex.P1 to P18 produced in the said case by the complainant and also the oral evidence of DW1 K.V. Manjunath and the documents Ex.D1 to D4, the Trial Court, by its impugned judgment and order, dismissed the complaint of the complainant and acquitted the accused of the offence punishable u/s 138 of the NI Act.

4. I have heard the arguments of Sri A.Y.N. Gupta, the learned Counsel for the appellant - complainant and Sri B. Vishweshwaraiah, the learned Counsel for the accused and perused the impugned judgment and order of acquittal and also the entire material on record.

5. The learned Counsel for the appellant - complainant, while referring to the grounds urged in the memorandum of appeal strongly contended as under:

(1) The Trial Court erred in not noticing the admission by the respondent - accused that he gave the said cheques to the complainant along with the letters dated 2.6.1997 and 5.7.1997 (Exs.P2 and P3) stating that the said cheques were towards repayment of the amount borrowed by him from the complainant.

(2) The Trial Court has not properly appreciated that in the memorandum of undertaking entered into between the complainant and the accused, there is a Clause to raise production of granite blocks of 10 to 20 cubic meters and the respondent - accused has failed to produce granite blocks as agreed.

(3) The Trial Court failed to appreciate that the respondent - accused, without submitting the statement, of accounts to the complainant, simply intimated to the complainant that he had spent a sum of Rs. 1,18,000/- on the quarry.

(4) The Trial Court, has committed error in accepting the oral evidence of the accused ignoring the documents produced by the complainant as to the amount borrowed by the accused from the complainant.

(5) The Trial Court, has failed to appreciate that the said amount of Rs. 1,40,000/- was taken by the accused as loan and the said cheques were issued by him towards the repayment of the same.

(6) The Trial Court committed error in coming to the conclusion, ignoring the

documents at Exs.P2 & P3, the two letters written by the accused to the complainant, that the accused had issued the cheque as security but not towards discharge of the existing debt.

6. As against the above contention, the learned Counsel for the respondent - accused strongly contended as under:

(i) The complainant-Company has not whispered anything in its complaint as to the transactions between itself and the accused in respect of the said quarry. The evidence of PW1 in his examination in chief is totally contrary to the averments in the complaint. Besides this, PW1 has clearly admitted in his cross examination that the said two cheques were issued by the accused to the complaint-company as security towards discharge of his obligation of quarrying or extracting granite blocks belonging to the complainant and therefore, the Trial Court was quite justified in dismissing the complaint and acquitting the accused based on the said evidence.

(ii) The complainant miserably failed to establish that there was any existing debt as on the dates of the said two cheques and therefore, the Trial Court as rightly acquitted the accused of the said offence.

7. As could be seen from the averments of the complaint-company which are extracted supra, (at para No. 2) its case is that the accused borrowed from it a sum of Rs. 70,000/- through the cheque bearing No. 963095 dated 2.6.1997 and another sum of Rs. 70,000/- through another cheque bearing No. 331696 dated 2.9.1997 and issued the two cheques in question towards discharge of the said loan amounts and that, the said cheques came to be dishonored by the Bank for want of sufficient, binds in the account of the accused and therefore the complainant: tiled the said complaint against the accused for the said offence.

8. It is pertinent to note that as rightly submitted by the {earned Counsel for the respondent - accused absolutely there is no whisper in the complaint as to any transaction between the complainant and the accused in respect of extracting of granite by the accused far and on behalf of the complainant. But it is the case of the accused that a memorandum of understanding was entered into between himself and the complainant, on dated 19.5.1994 as per Ex.D1 wherein the accused undertook to excavate granite blocks in the property belonging to the complainant for the benefit of the complainant and therefore, in pursuance of the said memorandum of understanding, the complainant gave him a sum of Rs. 1,40,000/- towards the cost of excavation of granite blocks that was to be carried by the accused and the accused issued the said two cheques as security towards the said cost of excavation. It is his further case that the said amount of Rs. 1,40,000/- was not paid to him by the complainant as loan but the same was paid to him towards the cost to be incurred by the accused on behalf of the complainant in excavating the granite blocks in the property of the complainant, and therefore, the said cheques were not issued by him towards discharge of any debt due by him to the complainant, it is his further case that he spent a sum of

Rs. 1,18,000/- towards the cost of excavation of granite blocks and returned the balance amount of Rs. 22,000/- to the complainant, and while returning the same, he addressed a letter dated 1.1.1998 after he received the notices Exhibits P6 and P8 respectively dated 16.12.1997 and 31.12.1997 issued by the complainant to him intimating him (accused) the dishonour of the said two cheques and this letter is produced by the complainant himself and the same is marked as Ex.P9.

9. Ex.P2 is the letter dated 2.6.1997 written by the accused to the complainant. It is stated therein that along with the said letter, the accused sent to the complainant the cheque bearing Mo.331696 (Ex.P10) dated 2.9.1997 and the said cheque was towards the loan amount received by him from the complainant through cheque No. 963095 dated 2.6.1997. Placing reliance on this letter, the learned Counsel for the complainant strongly contended that despite there being clear admission in this letter that the accused obtained loan from the complainant and he issued the cheque Ex.P10 towards the said loan the Trial Court committed serious error in holding that the said cheque was not issued towards the discharge of the existing debt due by the accused to the complainant, it is pertinent to note that as averred by the complainant in the complaint, the complainant-company paid to the accused a sum of Rs. 70,000/- as loan through cheque bearing No. 963095 dated 2.6.1997 (which is referred to in Ex.P2) and that the accused issued him the cheque bearing No. 331696 dated 2.9.1997 (which is also referred to in Ex.P2).

10. As to another cheque Ex.P13 bearing No. 340348 dated 15.9.1997 issued by the accused to the complainant, for another sum of Rs. 70,000, the averments at para No. 5 of the complaint read as under:

The complainant submits that the accused has received another sum of Rs. 70,000/- (Rupees Seventy thousand only) from the complainant on 5.7.1997 as Security for repayment of the aforesaid amount the accused (wrongly stated as complainant) had issued a cheque bearing No. 340384 dated 15.9.1997 drawn on Canara Bank, Vasanthnagar Branch, Bangalore. The letter sent by the accused is produced at document No. 7.

11. From plain reading of the above averments of the complaint, it could be seen that it is not stated therein that the said amount of Rs. 70,000/- was taken by the accused as loan and the said cheque was issued by him towards discharge of the said loan. On the other hand, though it is not stated specifically therein for what purpose, the said amount was paid by the complainant to the accused, it is clearly stated therein that the said cheque (Ex.P13) was issued by the accused as security towards repayment of the said amount, it is pertinent to note that there is no specific averment in the complaint as to whether the complainant paid the said amount of Rs. 70,000/- in cash or through cheque. The document No. 7 which is referred to at para No. 5 of the complaint is the letter addressed by the accused to the complainant on 15.9.1997 which is marked as Ex.P3 for the complainant. As could be seen from the said letter (Ex.P3), he (accused) had

enclosed with, it the cheque bearing No. 340384 dated 15.9.1997 for Rs. 70,000/-. The letter reads as under:

As discussed and agreed, I have to produce 10 cubic mt. granite blocks for Rs. 1.4 lakhs which includes all expenses. Against this, I have received Rs. 70,000/- as first payment and I have given you a cheque for same amount as security.

Now I request you to kindly release the balance amount of Rs. 70,000/-. I am herewith enclosing a cheque bearing No. 340384 for Rs. 70,000/- dated 15.9.1997.

12. The above contents of the letter of the accused addressed to the complainant, which are not disputed, clearly go to show that the accused was to excavate and to produce 10 cubic meters of granite blocks by spending a sum of Rs. 1.4 lakhs and, the accused had received from the complainant. Rs. 70,000/- as first instalment towards cost of excavation and therefore, the accused, by sending the said cheque (Ex.Pi3) as security towards the balance amount of Rs. 70,000/- which was yet to be released by file complainant in favour of the accused, requested the complainant to release 2nd instalment of Rs. 70,000/- also. Further, it is pertinent to note that though the cheque Ex.P13 is dated 15.9.1997, the letter Ex.P3 along with which the said cheque was sent to the complainant is dated 5.7.1997. Therefore, it is crystal clear that Ex.P13 cheque was not issued by the accused to the complainant towards discharge of any existing loan as on the said date i.e. 5.7.1997 payable by him to the complainant but the said cheque was issued as security for the sum of Rs. 70,000/- which was yet to be released by the complainant to the accused towards cost of excavation of the granite blocks.

13. Further, though the complainant has not whispered in the complaint anything as to the transactions between the complainant-company and the accused in respect of excavation of granite blocks in terms of Ex.D1, the Memorandum of understanding. PW.1 has stated in his examination-in-chief that the accused had agreed to supply granite blocks of black colour within 22.8.1987 and since he did not supply the material within the said period, he wrote the letter dated 5.9.1997 (Ex.P4). But as could be seen from the contents of Ex.P4 letter, there is no whisper as to the Exs.P10 & P13 cheques issued by the accused. PW1 has further deposed in his examination-in-chief that since the accused did not supply the materials, his cheque was presented by him on 5.12.1997 and the second cheque was presented by him to the Bank on 26.12.1997. He has further stated in his examination-in-chief that on 8.1.1998 the accused approached the complainant-company and stated that by then he had spent a sum of Rs. 1,18,000/- towards extracting of granite blocks and was returning the balance amount of Rs. 22,000/- and accordingly, on that date, he returned Rs. 22,000/- to the complainant. Company and the company issued him a cash receipt.

14. Ex.D1 Memorandum of understanding entered into between the accused and the complainant-Company is clearly admitted by PW1 in his cross examination

inasmuch as he has stated therein that as per the agreement, his Company paid to the accused a sum of Rs. 1,40,000/- towards excavating the granite blocks from the quarry and the said money was given to the accused only to extract granite blocks. It is pertinent to note that this PW1 has further stated in his cross examination as: "it is true that in Ex.P3, the accused has stated that he has taken Rs. 70,000/- and he has given the cheque as security; It is true that our Company has taken both the cheques to avoid misutilisation of the funds by the accused." This evidence of PW1 and the documents referred to supra clearly go to show that the two cheques in question (Ex.P10 and P13) were not issued by the accused, towards discharge of any existing debt payable by him to the complainant as on the relevant dates of the said cheque, but they were issued by him as security for Rs. 1,40,000/- that was paid to him by the complainant towards the cost of excavation of the granite blocks in the quarry belonging to the complainant-Company.

15. The learned Counsel for the appellant ? complainant placing reliance on the two decisions of this Court reported in:

- (i) S.T.P. Ltd. Vs. Usha Paints and Decorators, A Proprietary Concern No. 1 and A.V. Ganesh,
- (ii) Dr. Sampathkumar B.V. Vs. Ms. Dr. K.G.V. Lakshmi, GCIM, Lakshmi Health Centre,

strongly contended that even if a cheque is issued by the accused to the complainant as security, the accused would be liable to be punished for the offence u/s 138 of the NI Act.

16. I have gone through both the said decisions. In first of them i.e., in S.T.P. Ltd. Vs. Usha Paints and Decorators, A Proprietary Concern No. 1 and A.V. Ganesh, , it is observed that there will be no distinction between the cheque issued for repayment and the one issued for security for repayment. It is further observed at paragraph No. 3 of the judgment as:

unlike the other securities, the cheque, even if it is issued as security for repayment it is from a negotiable instrument and with implied instructions for deferred presentation on future date, if the debt is unpaid as per the agreed terms. The cheque upon default of the terms if presented and dishonored, it very much amounts to an offence u/s 138 of N.I. Act. In that view, the acquittal of the accused is bad in law.

(Emphasis supplied by me)

On careful reading of these observations it is clear that for enforcing liability of the accused in respect of a cheque issued as security the complainant has to establish that the debt due to him by the accused "remained unpaid as per the agreed terms" and, there were implied instructions for deferred presentation of the cheque on future date. Besides this, the fact that there was a debt payable by the accused to the complainant in the said case was not in dispute. But, in the

instant case that fact is seriously disputed and it is not established by the complainant that there was an existing debt and it "remained unpaid as per the agreed terms" as on the date of the cheques in question and therefore, the complainant presented the said cheques to the Bank for their encashment. This being so, I am of the considered opinion that the above observations made by this Court, in the said case are of no help to the complainant in the present case.

17. in second of the said decisions i.e., in Dr. Sampathkumar B.V. Vs. Ms. Dr. K.G.V. Lakshmi, GCIM, Lakshmi Health Centre, it is observed by this Court, that a cheque, whether issued for repayment of loan or as security makes little difference u/s 139 of the N.I. Act; in the event of its dishonour, legal consequences are same without distinction. On careful reading of the judgment in the said case, it could be seen that the relevant; facts in the said case are not forthcoming from the judgment. Further, the accused therein had not led any evidence rebutting the presumption raised u/s 139 of the N.I. Act. But the accused in the instant case has led his evidence in support of his defence that he did not issue the said cheques either towards discharge of any loan or as security towards repayment of any loan but he issued them as security towards performance of his part of the agreement namely excavation of granite blocks by spending Rs. 1,40,000/- which he received from the complainant - company. This being so, I am of the considered view that the above observations of this Court in the said case are not applicable to the facts of the present case.

18. If a cheque is issued by the borrower to the lender admittedly towards discharge of any existing debt or liability, the same can be presented to the bank by the lender without any intimation to the borrower. But, where a cheque is taken by the lender from the borrower "as security" towards repayment of the loan advanced by the former to the latter such cheque cannot be said to have been issued by the borrower to the lender towards discharge of the existing debt unless there is any agreement, between the lender and the borrower that in the event of failure on the part of the borrower to repay the loan amount on or before a (sic) date, the lender would be entitled to present the said cheque to the Bank for its encashment. In the absence of such an agreement, in order to enforce the liability of the borrower to repay the loan amount, the lender has to demand the repayment of the loan from the borrower by issuing him a notice in writing or by making oral demand, duly intimating the borrower that if the loan amount, towards repayment of which the cheque was given by him (borrower) to the lender as security, is not repaid as agreed, the said cheque will be encashed by him (lender) by presenting it. to the bank, if the borrower does not repay the loan amount to the lender despite such demand being made against him by the lender, then only the lender would become entitled to present the said cheque to the bank for its encashment, Further, if the said cheque is not honoured for want of funds in the account, of the borrower or for any such other valid reason, and if the borrower further fails to comply with the statutory notice issued to him by the lender pursuant to dishonour of the said cheque, cause of action would accrue to the lender to prosecute the borrower for the offence u/s 138 of N.I.

Act. The lender has to establish beyond reasonable doubt, all these facts, in order to bring home the guilt, of the borrower for the said offence.

19. Similarly where a cheque is issued by one of the parties to an agreement to the other party, as security towards performance of his part of the agreement with an understanding that in the event of failure on the part of the party issuing cheque to perform his part of the agreement on or before a specified date, the oilier party would get the right to get the said cheque encashed by presenting it to the Bank, on the default being committed by the party issuing cheque in performing his part of the agreement within the specified date, the other party may present the said cheque to the Bank for its encashment. If such cheque is returned dishonored by the Bank to the drawee by reason of "insufficiency of funds" in the account of the drawer or for any such other valid reason and, the drawer fails to comply with the statutory notice issued to him by the drawee pursuant to such dishonor, then only the cause of action would accrue to the drawee (i.e. the party who received the cheque) to prosecute the party who issued the cheque, for the offence u/s 138 of the N.I. Act. In such a case also, the complainant (the party receiving such cheque) has to establish beyond reasonable doubt all these facts, in order to bring home guilt of the party issuing the cheque (accused) for the said offence, it is pertinent to note that as could be seen from the averments in the complaint, it is not the case of the complainant that the accused issued the said cheques "as security towards performance of his part of the agreement and he failed to perform it and therefore he presented the said, cheques to the Bank in exercise of his right under the agreement, to get the said cheques encashed. On the other hand it is the specific case of the complainant, as averred in the complaint, that the accused issued both the cheques in question towards repayment of loan, it is the settled principle that in a criminal case, the complainant has to prove, beyond reasonable doubt, his case against the accused "as alleged in his complaint" but not a case which is contrary to the one alleged in the complaint.

20. In the case of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, , Hon"ble Supreme Court, has observed at paragraph No. 57 of its judgment as under:

The Appellant clearly said that nothing is true and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefore cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.

In the instant case, it is the evidence of PW1 complainant that as per the terms of Ex.D1, the memorandum of understanding, the accused had agreed to supply to the complainant-company Granite Blocks of black colour by excavating the same from the quarry belonging to the complainant-company at the cost of Rs. 1,40,000/- and therefore, the complainant-company paid to the accused the said

sum of Rs. 1,40,000/- towards cost of excavation of Granite Blocks and both the cheques in question were taken by the complainant-company from the accused to avoid mis-utilization of the funds by the accused. Thus, from this evidence of PW1 it is crystal clear that it is not. only the defence of the accused but it is the case of the complainant-company also, as deposed by PW1 in his examination-in-chief, that both the cheques in question were received by it from the accused as "security" towards performance of his part of the agreement i.e., excavation of granite blocks for the complainant company at a cost of Rs. 1,40,000/- that, was paid to him by the company in advance, which is quite contrary to the case of the complainant as averred in the complaint that the said cheques were issued by the accused towards repayment of the loan.

21. it is further clear from the above that the said cheques were not issued by the accused even as security towards repayment of any loan inasmuch as no loan was obtained by the accused for himself and the said amount of Rs. 1,40,000/- was received by him from the complainant towards cost of excavation of granite blocks. Further, it is an undisputed fact that the accused returned to the complainant-company Rs. 22,000/- along with his letter Dated 1.1.1998 stating therein that from out of Rs. 1,40,000/- given to him towards cost of excavation of granite blocks he had spent a sum of Rs. 1,18,000/- and therefore, he is returning the balance amount of Rs. 22,000/- to the complainant-company.

22. In view of my foregoing discussion, I am of the considered view that both the said cheques were not issued by the accused either towards repayment, or as security for the repayment, of any debt but they were issued as security for the performance of his part of contract entered into between himself and the complainant under the memorandum of understanding (Ex.D1) i.e. excavation of the granite blocks for and on behalf of the complainant company at the cost of Rs. 1,40,000/-. Further, it is not the case of the complainant as averred in the complaint that the accused committed breach of contract and as such the complainant acquired, as per the terms of the said memorandum of understanding, right, against the accused to get the said cheques encashed and therefore the complainant presented the same to the Bank for their encashment. Therefore, following the observations of Hon"ble Supreme Court in the case of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, I hold that no offence u/s 138 of N.I. Act was committed by the respondent-accused and as such, the Trial Court did not commit airy illegality in acquitting him of the said offence,

23. For the reasons aforesaid, I am of the considered opinion that the Trial Court was quite justified in dismissing the complaint and acquitting the accused by passing the impugned judgment and order. Hence, the present appeal is dismissed as being devoid of merits. No order as to costs in this appeal.