
(2010) 03 MAD CK 0273

In the Madras High Court

Case No : Criminal R.C. No. 188 of 2010 and M.P. No's. 1 and 2 of 2010

P.S. Sethuraman

APPELLANT

Vs

P. Elavazhagan

RESPONDENT

Date of Decision : 15-03-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 257, 258, 311, 313, 320
Negotiable Instruments Act, 1881 (NI) — Section 138, 147
Probation of Offenders Act, 1958 — Section 3

Citation : (2011) 3 BC 390 : (2010) 1 LW(Cri) 697 : (2011) 1 RCR(Civil) 924 :
(2011) 1 RCR(Civil) 924 : (2011) 2 RCR(Criminal) 62 : (2011) 2 RCR(Criminal)
6 : (2011) 2 RCR(Criminal) 6

Hon'ble Judges : T. Sudanthiram, J

Bench : Single Bench

Advocate : N. Senthil Nathan, for the Appellant; A. Ganesh, for Usha Raman, for the Respondent

Final Decision : Dismissed

Judgement

T. Sudanthiram, J.—The Petitioner and the Respondent herein are the accused and complainant respectively in C.C. No. 259 of 2007 on the file of the learned Judicial Magistrate, Ariyalur. The revision Petitioner herein is facing trial for an alleged offence u/s 138 of the Negotiable Instruments Act. The cheque amount involved is Rs. 5 lakhs. The Petitioner herein filed a petition before the trial Court u/s 258 r/w 320 Code of Criminal Procedure with a prayer to treat the compromise memo filed by the parties dated 07.10.2008 as compounding petition and to stop all the proceedings of the case and to discharge the accused. The said petition was dismissed by the learned Magistrate. Aggrieved by the order passed by the learned Magistrate, the Petitioner has preferred this criminal revision petition before this Court.

2. According to the accused/Petitioner herein, the parties have filed a compromise memo on 07.10.2008 before the trial Court and in the memo it was stated that the complainant already acknowledged the receipt of the Demand

Draft and agreed to accept the balance of Rs. 2 lakhs. Subsequently, when the last due of Rs. 50,000/- was paid through Demand Draft, the Respondent refused to receive the said demand draft on 23.11.2009 and hence a memo was filed on 23.11.2009 and thereafter, the learned Counsel for the Respondent received the demand draft for Rs. 50,000/- and acknowledged the same in the memo filed by the Petitioner. The learned Counsel for the Petitioner submitted that after the complainant receiving the cheque amount of Rs. 5 lakhs as full and final settlement, ought to have withdrawn the complaint u/s 257 Code of Criminal Procedure or ought to have filed a petition to compound the offence as per Section 147 of Negotiable Instruments Act. But the complainant/Respondent herein had failed to do so and in order to harass the accused proceeded with the trial which amount to abuse of process of the Court.

3. The learned Counsel appearing for the Petitioner relied on a decision of the Honourable Bombay High Court reported in 2006 CriLJ 618 (Usha Badri Ponnawalla v. Kurien Babu and another). He also relied on another decision of this Honourable High Court reported in 2009 LWCri 71 (M.O. Hasan Kuthoos Maricar Ltd., A v. Agate Madras International Finance Limited and another).

4. A counter was filed before the trial Court by the Respondent herein in which it is stated that the accused only filed a memo dated 07.10.2008 for presentation of the cheque for the part amount and the learned Counsel appearing for the complainant only made a specific endorsement that he received a cheque. The memo dated 07.10.2008 amounts only to recording of payment and not more than that and at no point of time, the complainant had made any endorsement admitting that he had entered into a compromise.

5. The learned Counsel appearing for the Respondent herein submitted that the petition filed by the accused before the trial court is not maintainable and the trial Court has no power to discharge the accused especially when the evidence of the prosecution side has been recorded and completed and the accused also has been questioned u/s 313 Code of Criminal Procedure and the case is posted for the examination of defence witness. The learned Counsel for the Respondent further submitted that even if the cheque amount has been paid by the accused and received by the complainant, it is optional for the complainant to withdraw the complaint or to file a petition u/s 147 of Negotiable Instruments Act for compounding the offence against the accused and the complainant cannot be compelled either by the accused or by anyone else to withdraw the case since the offence which had already been committed by the accused is not wiped out by making the payment belatedly.

6. The learned Counsel for the Respondent also relied on the decision of the Honourable Supreme Court reported in Rajneesh Aggarwal Vs. Amit J. Bhalla, .

7. This Court considered the submission made by both parties and perused the records. The complaint has been filed by the complainant before the trial Court on 29.12.2006. A memo has been filed before the trial Court on 07.10.2008 in

which it is mentioned that in the above matter, compromise has been arrived between the parties out of the Court and the accused has already paid a sum of Rs. 1.5 lakhs and on 07.10.2008, the accused made further payment of Rs. 1.5 lakhs through demand draft and the time also was sought for the payment of remaining Rs. 2 lakhs. The memo has been signed by the counsel for the accused. The learned Counsel for the complainant had acknowledged the receipt of the demand draft for Rs. 1.5 lakhs. Another memo was filed on 07.11.2008 stating that a further part payment of Rs. 1 lakh was paid through demand draft. On 26.12.2008 a memo was filed by the learned Counsel for the complainant that a further sum of Rs. 50,000/- was received as part payment. On 23.11.2009 a memo was filed by the learned Counsel for the accused stating that the accused had brought a demand draft for Rs. 50,000/- the balance amount, but the complainant was not willing to receive the said demand draft.

8. It appears that after filing the memo, the learned Counsel for the complainant had received the said demand draft and also acknowledged the receipt of the demand draft. It appears from the record that both the complainant and the accused were absent on 23.11.2009. As the case was not withdrawn, the learned Magistrate allowed the application filed by the accused u/s 311 Code of Criminal Procedure, to recall and cross examine P.W.1 and posted the case for cross examination of P.W.1 on 04.12.2009. On the said date, i.e., on 04.12.2009, the accused had chosen to file the application u/s 258 r/w 320 Code of Criminal Procedure which had been dismissed by the learned Magistrate.

9. It appears from the record that there had been a compromise talk between the parties and the payments made by the accused also had been accepted by the complainant, except the last payment of Rs. 50,000/-. Only on 23.11.2009, when the learned Counsel for the accused presented the demand draft, it was not received by the learned Counsel for the complainant. As per the petition filed by the accused, the learned Counsel for the Respondent received demand draft and acknowledged it on the advise of the learned Magistrate. Therefore, it is made clear, though the complainant had been willing to compromise the matter, at a later stage had changed his mind after receiving a sum of Rs. 4.5 lakhs out of the cheque amount of Rs. 50 lakhs. The remaining amount of Rs. 50,000/- also was received as demand draft. The complainant is not denying the receipt of the amount of Rs. 5 lakhs which is the total cheque amount. But, the complainant is not coming forward either to withdraw the complainant or to compound the offence against the accused.

10. Now the question which arises for consideration is "Whether the court can terminate the proceedings acting upon the payment made in full due under the cheque during the pendency of the criminal proceeding in the absence of any request for withdrawal or for compounding of the offence by the complainant?"

11. The Honourable Bombay High Court in its decision reported in 2006 CriLJ 618 (Usha Badri Poonawalla v. Kurien Babu and another), has observed as follows:

19. Therefore, the oral evidence which is on record clearly discloses that the memorandum was executed by the parties on 9th September, 1997 under which the Respondent No. 1 received a sum of Rs. 3,76,896/-. He admitted the contents of the said document on oath. The memorandum specifically records that irrespective of the claim made by the Respondent No. 1 in the criminal complaint, money matters involved in the case have been settled amicably. After having agreed to settle the dispute amicably and after having agreed to withdraw the complaint, the Respondent No. 1 wants to prosecute the complaint only on the ground that he was to receive something more than what is mentioned in the written Memorandum. This stand has been taken nearly after seven years of the execution of Memorandum.

20. Considering the conduct of the Respondent No. 1 it is certain that the continuation of the proceedings by him will amount abuse of process of law and therefore, the complaint deserves to be quashed. Accordingly the petition is allowed in terms of prayer Clause (d).

12. In the decision of this Honourable High Court reported in 2009 1 CRILW 71 (M.O. Hasan Kuthoos Maricar Ltd., v. Agate Madras International Finance Ltd.), His Lordship Justice K. Mohan Ram has observed as follows:

12. The facts narrated above clearly shows that as on today the entire amount covered by the two cheques in question together with interest at 9% from the date of cheque till the date of demand drafts have been paid and the demand drafts have been encashed by the first Respondent and till date the said amounts realised by encashing the demand drafts have not been returned by the first Respondent to the Petitioners. The first Respondent wants to retain the said amounts and at the same time wants to further continue with the proceedings in C.C. No. 7842 of 1998 on the sole ground that the first Respondent had received the demand drafts without prejudice to their right and interest to pursue with the proceedings in the criminal case.

13. At this juncture it will be relevant to refer a decision of the Apex Court reported in Rajneesh Aggarwal Vs. Amit J. Bhalla, relied upon by the learned Counsel for the first Respondent himself. In the said decision in paragraph-8 it is stated as follows:

8. In the aforesaid premises, we set aside the impugned orders of the High Court and allow these appeals and direct that the criminal proceedings would be continued. The money which had been deposited by the accused in this Court, may be refunded to the accused through his counsel. The Magistrate is directed to dispose of the proceedings at an early date.

In that case pending trial the accused had deposited the amount covered by the dishonoured cheque but the complainant therein did not agree for any settlement but yet when a quash petition was filed before the High Court the same was allowed but the order of the High Court was set aside by the Apex Court and while setting aside the order of the High Court the Apex Court has made the

aforesaid observations. While allowing the appeal the Apex Court has directed the money which has been deposited by the accused in the Court was directed to be refunded to the accused through his counsel.

14. When the above Criminal Original Petition was being heard, this Court posed a query to the learned Counsel for the first Respondent as to whether the first Respondent is willing to return back the amounts realised by the first Respondent by encashing the four demand drafts sent by the first Petitioner. But the learned Counsel for the first Respondent did not give any positive reply which shows that the first Respondent while wanting to retain the money wants to continue with the further proceedings in the criminal case, which in the considered view of this Court, amounts to clear abuse of process of law.

13. As far as Section 138 of the Negotiable Instruments Act is concerned, if the drawer of the cheque fails to make 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 15 days of the receipt of the notice from the holder of the cheque for payment as the cheque being dishonoured for insufficiency of fund or it exceeds the amount arranged to be paid, then the drawer becomes liable u/s 138 of the Negotiable Instruments Act from the 16th day. For the offence committed by the drawer of the cheque, a complaint also has to be preferred within one month of the date on which cause of action arises under clause(c) of the proviso u/s 138 of the Negotiable Instruments Act, i.e., from the 16th day of the receipt of the notice. Here, as per complaint, the accused had already committed the offence by not paying the cheque amount within 15 days from the date of receipt of the notice. The case was filed on 29.12.2006, the last payment of the cheque amount was paid only on 23.11.2009 nearly after three years. As the payment of the cheque amount has been made nearly after three years after committing the offence, the proceeding against the accused u/s 138 of the Negotiable Instruments Act cannot be said to be an abuse of process of court. Of course, it is open to the complainant as per Section 258 Code of Criminal Procedure to withdraw the complaint at any stage, if the trial is pending.

14. Section 147 of the Negotiable Instruments Act was introduced with effect from 06.02.2003 making the offence as compound-able offence. Unless the complainant himself comes forward either to withdraw the complaint or to compound the offence, the charge against the accused would remain to continue. In case if the trial is already over and the accused is convicted and during the pendency of the appeal preferred by the accused, if the accused makes the payment of cheque on his own, the conviction cannot be set aside on the ground of the cheque amount paid, unless the complainant agrees and comes forward for compounding the offence.

15. The Honourable Supreme Court in the decision reported in Rajneesh Aggarwal Vs. Amit J. Bhalla, , has formed a question for consideration and answered it as follows:

Question: Whether deposit of the entire amount covered by three cheques, while the matter is pending in this Court, would make any difference?

Answer: So far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereto will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the Court trying the offence. But by no stretch of imagination, a criminal proceeding could be quashed on account of deposit of money in the court or that an order of quashing of criminal proceeding, which is otherwise unsustainable in law, could be sustained because of the deposit of money in this Court. In this view of the matter, the so-called deposit of money by the Respondent in this Court is of no consequence.

16. In view of the ratio laid down by the Honourable Supreme Court, I am unable to follow the decision rendered in 2009 1 CRIL.W 71 (M. O. Hasan Kuthoos Maricar Ltd., v. Agate Madras International Finance Ltd.). Following the decision of the Honourable Supreme Court cited supra, I hold that the proceedings against the accused/revision Petitioner herein cannot be terminated.

17. The receipt of the cheque amount has not been denied by the Respondent herein. But still, the Respondent has not come forward for settlement with the accused. If the trial Court comes to the conclusion that the accused is guilty, then it is open to the learned Judicial Magistrate to take into consideration about the payment made by the accused and also take into consideration the other factors and to show leniency while sentencing the accused. Even the learned Judicial Magistrate may apply the relevant provision u/s 3 of the Probation of Offenders Act and admonish him, subject to Section 361 of Code of Criminal Procedure

18. With the above observation, the criminal revision petition is dismissed.