
(2003) 12 AP CK 0072

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 332 of 2000

Sharda Finance Corporation

APPELLANT

Vs

L. Laxman Goud and Another

RESPONDENT

Date of Decision : 12-12-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 357
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (2004) 1 ALD(Cri) 596 : (2004) 2 ALT(Cri) 9 : (2004) 1 APLJ 460 :
(2004) 4 BC 244

Hon'ble Judges : K.C. Bhanu, J

Bench : Single Bench

Advocate : C.H. Ravinder, for the Appellant; G. Buchaiah Goud, (NP) for the Respondent No. 1 and Public Prosecutor for the Respondent No. 2, for the Respondent

Final Decision : Allowed

Judgement

K.C. Bhanu, J.—The appeal is directed against the judgment dated 31.12.1999 in C.C. No. 215 of 1998 on the file of the Court of Judicial First Class Magistrate, Gadwal whereunder the accused-respondent No. 1 herein was acquitted for the offence punishable u/s 138 read with Section 142 of the Negotiable Instruments Act on two grounds. Firstly, that the complainant-appellant failed to establish that the cheque in question was issued by the accused towards discharge of legally enforceable debt and, secondly, that the complainant had no valid money lending licence as on the date of transaction i.e. 30.5.1996. It is as against the said acquittal, the present appeal is filed by the complainant-appellant questioning the legality and correctness thereof.

2. The brief facts that are necessary for the disposal of the appeal may be stated as follows :

The complainant is a registered partnership firm registered under the Indian Partnership Act, 1952 and has been doing money lending business at Gadwal.

The complainant obtained the money lending licence on 4.11.1992. The accused borrowed a sum of Rs. 1, 50, 000/- from the complainant on 30.5.1996 vide cheque No. 266713 for Rs. 70, 000/- and vide cheque No. 366430 for Rs. 80, 000/-, agreeing to re-pay with interest at 27% per annum. Thereafter the complainant demanded the accused to pay the same but the accused did not re-pay that amount. At last the accused issued a cheque bearing No. 0820587 dated 9.11.1998 towards part payment of Rs. 95, 512-50 ps. which is marked as Ex. P-1 in this case. When the cheque was sent for collection, it was returned with an endorsement "funds insufficient". Thereupon, a statutory notice was got issued by the complainant, but the said notice was unserved for a continuous period of seven days at Gadwal address and it was not claimed when it was sent to the address at Secunderabad. Even after a lapse of 15 days from the date of notice, the accused failed to pay the amount. Therefore, the complaint was filed before the Magistrate.

3. The case was taken on file as C.C. 215 of 1998 and when the accused was examined for the offence punishable u/s 138 read with Section 142 of the N.I. Act u/s 239 of the Code of Criminal Procedure, he denied the same.

4. On behalf of the complainant 2 witnesses were examined and 10 documents were marked, whereas on behalf of the accused, he himself was examined as DW-1 and Ex. D-1 was marked.

5. The lower Court, after considering the material available on record, acquitted the accused. It is as against the said acquittal the complainant filed the present appeal questioning the legality and correctness thereof.

6. The learned Counsel for the appellant-complainant contended that once the issuance of Ex. P-I cheque was admitted by the accused, the presumption is that the cheque was issued for legally enforceable debt or liability and the burden shifts to the; accused to show that Ex. P-I was not issued for any legally enforceable debt. He further contended that Ex.. P-10, which is the money lending licence, reveals that the appellant is having money lending licence and, therefore, the acquittal of the accused is not proper on this ground also.

7. In spite of giving opportunity, the learned Counsel for the respondent No. 1-accused did not appear on 19.11.2003. To give him a chance the case is posted today. Even today, none appeared for the accused.

Perused the record and the documents.

8. PW-1 is the Managing Partner of the complainant company. He stated that the complainant company is carrying on business in money lending. He further stated that on 30.5.1996 the accused obtained a loan of Rs. 1, 50, 000/- from the complainant by way of two cheques, one is for Rs. 70, 000/- and another for Rs. 80, 000/-. The accused agreed to pay the same together with interest at the rate of 27% per annum. Thereafter the accused did not pay that amount except paying one monthly instalment of Rs. 3, 375/-. On 9.11.1998 the accused gave

Ex. P-1 cheque but when it was presented in the Bank, it was dishonoured on the ground of insufficiency of funds. Therefore, on 4.12.1998 the complainant company got issued a notice to the accused both at Gadwal and at Secunderabad addresses. The notice to the accused at Secunderabad address was returned as "not claimed" and the notice addressed to him at Gadwal address was returned as "party not available". PW-1 specifically admitted in the cross-examination that the accused gave the cheque in question to the Firm towards discharge of the loan of Rs. 1, 50, 000/- availed by him on 30.5.1996. He also admitted that he filed a civil suit against the accused in connection with the amount availed by him on 30.5.1996 and the same was pending as O.S. 5 of 1991 on the file of Senior Civil Judge, Gadwal. Except giving a suggestion that the complainant obtained a blank cheque from the accused, nothing has been elicited to discard the testimony of PW-1. Ex. P-8 is the certified copy of acknowledgement of Firm Registration, Ex. P-9 is the Partnership Deed and Ex. P-10 is the certified Copy of Money Lending Licence.

9. PW-2 is the Manager of Andhra Bank. He stated that the account bearing No. 3606 belongs to the accused in his Branch and a cheque for Rs. 1, 50, 000/- was presented to them by the complainant on 2.12.1998 but the same was returned on the ground of insufficiency of funds. Ex.P-1 is the signature of their Officer. Ex.P-2 is the Memo issued by the Bank.

10. As against the above evidence on behalf of the complainant, the accused himself was examined as DW-1. He stated that he had availed a loan of Rs. 1, 50, 000/- from the complainant company by executing a promissory note on 30.5.1996. He also admitted that he has not re-paid the loan amount. According to him, the complainant company obtained a blank cheque and due to the urgency he gave that blank cheque. A specific suggestion was put to him that he issued a cheque on 9.11.1998 towards part payment of the loan, but the same was denied. Once the issuance of cheque is admitted, the burden is on the accused to show that it was not issued by him for discharge of any legally enforceable debt or liability and it shall be presumed, unless the contrary is proved, that the holder of the cheque received the cheque of the nature referred to u/s 138 of the N.I. Act for the discharge, in whole or in part, of any debt or other liability u/s 139 of the N.I. Act. of course, it is a rebuttable presumption that the accused can show that the cheque in question was not issued for any legally enforceable debt or liability.

11. u/s 138 of the N.I. Act, three conditions have to be fulfilled to make a person liable, namely, (1) the cheque has been presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier, (2) 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 (3) the drawer of such cheque fails to make the 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 fifteen days of the receipt of the said notice.

12. It is also not in dispute that the accused got issued a notice under Ex. P-3. Ex. P-6 is the returned registered cover sent to the address of the accused at Gadwal, which shows that the accused was absent for 7 days. Ex. P-7 is the returned registered letter with acknowledgement due wherein it was endorsed that it was not claimed by the addressee. A clear finding has been given by the learned Magistrate that the service of notice is proper as the accused did not dispute the address mentioned in Ex. P-6 and that accused did not show that the address as mentioned in Ex. P-6 was a wrong address. On the other hand, Ex. D-1, which was produced by the accused, contains his residential address similar to that of the address mentioned in Ex. P-6. Therefore, the service of notice is proper.

13. The learned Magistrate also held that PW-1 (Jhade Swayam Prakash) is not authorized to file criminal proceedings on behalf of the complainant company. Ex. P-9 is the copy of the partnership deed. As seen from this document, PW-1 and another person by name G. Jeeweshwar are, empowered to represent the Firm before all the authorities of Income Tax, Sales Tax, Labour, Transport and other authorities of Central and State Governments as well as Private and Public bodies. It is not specifically recited in this document that PW-1 can sue or be sued on behalf of the company or initiate or defend legal proceedings before the Courts. Except this document, there is no other document filed. But, on the other hand, PW-1 categorically stated that he is the Managing Partner of M/s. Sarada Finance Corporation, which is registered under the Partnership Act. The said statement is not specifically denied or disputed in the cross-examination. It is not specifically suggested to him that he is not the proper or the authorized person for and on behalf of M/s. Sharada Finance Corporation. Therefore, in the absence of any denial or dispute with regard to the competency of PW-1 in filing the complaint against the accused, it cannot be said that he has no authority to file the complaint. Therefore, the finding of the learned Magistrate that PW-1 is not the proper person to file complaint against the accused as no document is filed authorizing PW-1 to lodge the complaint, is devoid of merit and wholly untenable in the absence of any specific denial by the accused, especially, when there is satisfactory evidence available on this aspect.

14. The other ground on which the learned Magistrate dismissed the complaint was that there was no specific averment in the complaint that the cheque was issued for any legally enforceable debt or liability. But, a reading of the complaint as a whole would clearly indicate that the accused obtained a loan of Rs. 1, 50, 000/- on 30.5.1996 and to discharge the said debt he issued the cheque in question towards part payment of the amount borrowed. Further, the evidence of PW-1 would clearly go to show that to discharge the amount of Rs. 1, 50, 000/- he gave Ex. P-I cheque. On the other hand, the accused also admitted that he obtained a loan of Rs. 1, 50, 000/- from the complainant company on 30.5.1996.

Therefore, the entire averments in the complaint and the evidence of PW-1 would clearly indicate that the cheque was given to discharge the debt contracted by accused and therefore the finding of the lower Court on this aspect is untenable.

15. The other finding of the lower Court is that the appellant-complainant failed to prove that the cheque was issued for any legally enforceable debt or liability. The learned Magistrate placed burden of proof on the complainant to show that it was issued for legally enforceable debt. Once issuance of cheque is admitted, the burden is on the accused to show that it was not issued for any legally enforceable debt or liability u/s 139 of the N.I. Act. Except stating that he signed the blank cheque, he did not state that Ex. P-I was obtained simultaneously at the time of execution of the promissory note. According to DW-1, the promissory note was executed by him on 30.5.1996. It was suggested to DW-1 that Ex. P-I cheque was issued by him but he admits that he issued the cheque but he says that it was a blank cheque when it was handed over to the complainant company. The contention of the accused is that he did not give the cheque on 9.11.1998 and to prove the same Ex. D-1, which is the passbook relating to him, is filed. As seen from Ex. D-I, the cheque bearing No. 587 was not presented to the Bank. The cheque bearing numbers before 587 and after 587 which were presented by the accused, were encashed. This particular number is missing as seen from the passbook. The cheque Nos. 581 to 586, 588 and 589 were presented by the accused in the year 1994. So, by that time the accused, did not borrow any amount from the appellant-complainant. Even according to the accused, he borrowed the amount on 30.5.1996 and on that date itself he issued, according to him, a blank cheque. If that is so, the missing of cheque bearing No. 587 in Ex. D-I in the year 1994 is of no consequence because by then he did not borrow any amount from the complainant. So the burden is on the accused to show that he did not give the cheque in question on 9.11.1998. The cheque number as mentioned in Ex. D-I did not tally with the cheque number in Ex. P-I to infer that Ex. P-I was issued in the year 1996. So the burden placed on the accused is not discharged by him. Hence, the presumption u/s 138 of the Negotiable Instruments Act can be drawn in this case. When it is the specific case of PW-1 that the accused gave the cheque in question towards discharge of loan of Rs. 1, 50, 000/- availed by him on 30.5.1996, the said statement remained unchallenged. Once a fact has been stated by the witness and the same is neither denied nor disputed by the accused, it can be said that such a fact is admitted. Therefore, the complainant prima facie proved that the cheque in question was issued for legally enforceable debt or liability. Therefore, the finding of the learned Magistrate on this aspect is contrary to law.

16. The next ground on which the learned Magistrate acquitted the accused is that by the date of transaction the complainant was not having any money lending licence. Ex. P- 10 is the money lending licence which was obtained on 4.11.1.992 and valid up to 3.11.1993. The same was renewed from time-to-time. The learned Magistrate observed that the renewal of licence appears to have been obtained on 18.7.1996 and earlier to that the licence was valid up to

31.12.1995, whereas the present transaction took place on 30.5.1996, therefore, by the date of transaction, the complainant company was not having any valid licence. As seen from Ex. P-10, it is clear that the renewal was obtained till 31.12.1996. The observation of the learned Magistrate that the renewal was obtained on 18.7.1996 is nothing but misconception, because earlier the licence was renewed up to 31.12.1995 and thereafter it was renewed up to 31.12.1996. Even assuming for a moment that the complainant was not having licence as on 30.5.1996, that cannot be a ground to acquit the accused, because as on that date there was no offence committed by the accused u/s 138 of the N.I. Act. The cause of action arose in this case after giving of notice dated 4.12.1998. By that time the complainant was having a valid licence. It is not in dispute that the licence will be given for a period of one year. The last date of validity of the licence of the complainant was 31.12.1995 as seen from Ex. P-10 and the next endorsement is that it was renewed up to 31.12.1996. An application must have been presented before the concerned authority for renewal and the authority concerned might have granted renewal as per the endorsement dated 18.7.1996. That does not mean that it will come into effect only after 18.7.1996. Therefore, the learned Magistrate committed grave error in not properly appreciating the contents of Ex. P-10.

17. In view of the above discussion, I am of the considered view that the accused committed an offence punishable u/s 138 of the Negotiable Instruments Act and the findings of the learned Magistrate are not in accordance with law and the same have to be set aside. Accordingly the order of acquittal recorded by the lower Court is set aside.

18. With regard to the sentence, admittedly the appellant-complainant filed a civil suit for recovery of the amount due under a pro note in C.S. 118 of 1997 on the file of the Court of Junior Civil Judge, Gadwal. Even the accused did not deny or dispute the liability to pay the amount. He admitted the claim in O.S. No. 6 of 1998 on the file of the Senior Civil Judge, Gadwal and sought for instalments. Having regard to these aspects at this point of time, it is not desirable or proper to send him to jail by imposing any sentence. Considering the facts and circumstances of the case, imposition of fine would be sufficient to meet the ends of justice.

19. In the result, the accused is convicted for the offence punishable u/s 138 of the Negotiable Instruments Act and sentenced to pay a fine of Rs. 5, 000/-, in default, to undergo simple imprisonment for one month. The fine amount imposed by this Court shall be paid within four weeks from the date of receipt of a copy of this judgment. He is further directed to pay a compensation of Rs. 50, 000/- u/s 357 of the Code of Criminal Procedure within a period of three months from the date of receipt of a copy of this judgment.

The appeal is allowed accordingly.