(2015) 03 MAD CK 0499

In the Madras High Court

Case No : Criminal Appeal No. 990 of 2006

Sree Gokulam Chits and Finance Company Private Limited APPELLANT

Vs

A.P. Kumar RESPONDENT

Date of Decision : 03-03-2015

Acts Referred:

Contract Act, 1872 — Section 25, 25(3)
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139, 20

Citation : (2015) 03 MAD CK 0499

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R. Mala, J.—This Criminal Appeal arises out of the judgment of acquittal dated 29.03.2006 made in C.C. No. 533 of 2004 on the file of the learned Judicial Magistrate No. II, Coimbatore.

2. The appellant is a Private Limited Company duly registered under the Companies Act, 1956 and has been carrying the business of Chits represented by a Power Agent and the respondent herein is the subscriber of the chit group No. C3LC2 vide ticket No. 21 of the appellant company and he has to pay Rs.4,000/- per month for 25 months. The respondent/accused participated in the bid and he become the successful bidder and taken the bid for RS.75,000/- and then, he ought to have pay the balance amount of Rs.38,500/-. So, he issued a cheque/ Ex.P.2 dated 31.01.2004 drawn in Central Bank of India, R.S. Puram Branch. When it was presented for encashment in Dhanalakshmi Bank Limited, Gandhipuram Branch, that has been returned as of Account Closed? as per Return Memo/Ex.P.3. Ex.P.4 is the Debit Advise. So the appellant/complainant on 23.02.2004 issued Ex.P.5/statutory notice to the respondent under Section 138 of Negotiable Instruments Act, which was evidenced by Proof of Delivery/Ex.P.6. On 23.03.2004, the respondent/accused sent a reply/Ex.P.7. Ex.P.8 is the Ledger Extract of the respondent/accused. Even though the respondent/accused

received the notice and sent a reply, he has not repaid the money. Hence, the appellant/complainant was constrained to file a private complaint against the respondent/accused under Section 138 of Negotiable Instruments Act.

3. The trial Court has taken cognizance of an offence after recording the sworn statement and after following the procedure. Since the accused pleaded not guilty, the trial Court examined Exs.P.1 to P.8 on the side of the complainant and on the side of the respondent no oral and documentary evidence was marked. The trial Court after considering the oral and documentary evidence, acquitted the accused for the offence under Section 138 of Negotiable Instruments Act.

4. Challenging the judgment of acquittal passed by the trial Court, the learned counsel for the appellant/complainant submitted that the Trial Court has acquitted the respondent/accused stating that the cheque/Ex.P.2 has been given for discharging time barred debt. He would submit that it is a chit transaction and the respondent herein is a subscriber of the chit conducted by the appellant group No. C3LC2 vide ticket No. 21 and he has to pay monthly subscription of Rs.4,000/- for 25 months. The respondent being the successful bidder taken the bid for Rs.75,000/- and he ought to have pay the balance amount of Rs.38,500/-. So, he issued a cheque/Ex.P.2 dated 31.01.2004, which was presented for encashment and that has been returned as per Return Memo/ Ex.P.3, Debit Advise was marked as Ex.P.4. Statutory notice under Ex.P.5 dated 23.03.2004 has been issued and Ex.P.6 is the Proof of delivery. For which, the respondent had sent a reply/Ex.P.7. Since he has not repaid the amount, the complaint has been filed. The learned counsel appearing for the appellant also raised the plea of limitation. So the Trial Court has failed to consider the fact that once he has given a cheque acknowledging the time barred debt, the offence under Section 138 of Negotiable Instruments Act has been made out. Hence, he prayed for setting aside the judgment of acquittal. To substantiate his arguments, he relied upon the following decisions.

1. K.N. Beena Vs. Muniyappan and Another, (2001) 8 AD 566 : AIR 2001 SC 2895 : (2006) 4 BC 287 : (2001) 107 CompCas 459 : (2002) 1 CompLJ 55 : (2001) CriLJ 4745 : (2001) 9 JT 228 : (2001) 8 SCC 458 : (2001) AIRSCW 4344 : (2001) 7 Supreme 810

2. P. Talamalai Chetty Vs. Rathinasamy, AIR 1998 Mad 23 : (1997) 1 LW 843

3. M/s. R. Sureshchandra and Co. Vs. M/s. Vadnere Chemical Works and others, AIR 1991 Bom 44 : (1990) 2 BomCR 692

4. Parry and Co. Ltd. Vs. Southern Roofings Private Limited, (1996) 2 CTC 614 : (1996) 1 MLJ 656

5. Even though the matter was posted for several hearings for respondent arguments, there is no representation on behalf of the respondent.

6. Considered the submissions made by the learned counsel appearing for the appellant and perused the typed set of papers.

7. Now, the only point to be decided is that whether the Cheque/Ex.P.2 has been issued by the respondent on 31.01.2004? It is an admitted case that the appellant is running a chit and the respondent is a subscriber of the Chit. Since he is in default in payment of remaining monthly instalment, he issued a cheque, which was presented for encashment and that has been returned as "Account Closed". Hence, Statutory Notice has been issued. The respondent sent a reply/ Ex.P.7 and in that, he has fairly conceded that he is a subscriber and he received the chit amount after completion and the transaction has been completed on 24.09.1999 and after that, there is no transaction, therefore there is no necessity to issue a cheque in the year 2004. Further it was stated that he closed the account on 05.07.2000 itself. In such circumstances, it is the duty of the appellant to prove that the cheque/Ex.P.2 has been issued on 31.01.2004.

8. The learned counsel appearing for the appellant relied upon the decision reported in K.N. Beena Vs. Muniyappan and Another, (2001) 8 AD 566 : AIR 2001 SC 2895 : (2006) 4 BC 287 : (2001) 107 CompCas 459 : (2002) 1 CompLJ 55 : (2001) CriLJ 4745 : (2001) 9 JT 228 : (2001) 8 SCC 458 : (2001) AIRSCW 4344 : (2001) 7 Supreme 810 , wherein it was held that mere denial or rebuttal by accused in the reply to the legal notice sent by the complainant is not enough. Accused had to prove by cogent evidence that there was no debt or liability. It is appropriate to incorporate the paragraph Nos. 6 and7, which reads as follows:

"6.In our view the impugned Judgment cannot be sustained at all. The Judgment erroneously proceeds on the basis that the burden of proving consideration for a dishonored cheque is on the complainant. It appears that the learned Judge had lost sight of Sections 118 and 139 of the Negotiable Instruments Act. Under Sections 118, unless the contrary was proved, it is to be presumed that the Negotiable Instrument (including a cheque) had been made or drawn for consideration. Under Section 139 the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. Thus in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebutable. However the burden of proving that a cheque had not been issued for a debt or liability is on the accused. This Court in the case of Hiten P. Dalal Vs. Bratindranath Banerjee, AIR 2001 SC 3897 : (2001) 2 BC 773 : (2001) 106 CompCas 574 : (2001) 3 CompLJ 313 : (2001) CriLJ 4647 : (2001) 3 Crimes 220 : (2001) 5 JT 386 : (2001) 4 SCALE 275 : (2001) 6 SCC 16 : (2001) 3 SCR 900 : (2001) 2 UJ 1384 : (2001) AIRSCW 3861 : (2001) 5 Supreme 49 has also taken an identical view.

7. In this case admittedly the 1st Respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials/averments in his reply dated 21st May, 1993 were sufficient to shift the burden of proof onto the Appellant/Complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The 1st Respondent had to prove in the trial, by leading cogent evidence, that there was

no debt or liability. The 1st Respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st Respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction."

But the above citation is not applicable to the facts of the present case. It is admitted fact that the chit transaction has been completed in the year 1999. In such circumstances, it is the duty of the appellant/complainant to prove that the cheque has been given on 31.01.2004, i.e. after five years.

9. He also relied upon the decision reported in P. Talamalai Chetty Vs. Rathinasamy, AIR 1998 Mad 23 : (1997) 1 LW 843 , wherein it was stated in a suit on promissory note, signing of promissory note as per Section 20 of Negotiable Instruments Act, the holder having a right to complete the document. Here, there is no quarrel over the proposition. It is not the case that the respondent has given a blank cheque. So, the above citation is not applicable to the facts of the present case.

10. He would also relied upon the decision reported in M/s. R. Sureshchandra and Co. Vs. M/s. Vadnere Chemical Works and others, AIR 1991 Bom 44 : (1990) 2 BomCR 692 , wherein it was held that as per Section 25(3) of the Contract Act, promise to pay time barred debt, promise may be express or implied. Balance sheet of the firm, signed by partner, stating that firm is liable to P in certain sum, it amounts to promise within the meaning of Section 25(3). But here the case of the respondent is that he has not issued a cheque. In such circumstances, I am of the view, the above citation is not applicable to the facts of the present case.

11. He would also relied upon the decision reported in Parry and Co. Ltd. Vs. Southern Roofings Private Limited, (1996) 2 CTC 614 : (1996) 1 MLJ 656 , wherein it was stated that time barred claim, acknowledgment of liability of debt after expiry of period of limitation, letter promising to pay time barred debt would amount to contract. It is appropriate to incorporate the relevant paragraph of the decision, which reads as follows:

"5.According to the learned counsel, eventhough the claim under Ex.A.1 was a time barred one yet the plaintiff is entitled to the decree in view of the contract which the defendant had entered into with the plaintiff in his reply notice accepting his liability and praying for instalment for the said amount. As per Illustration (e) of Section 25 of the Contract Act, even if the debt is barred by Limitation Act if the debtor writes a letter promising to pay the amount due and barred by limitation, there is a contract and the creditor is entitled for the claim of the same. In the present case, the defendant has sent a reply under Ex.A.7 in which the defendant has accepted their liability for all the claims made by the plaintiff including the claim under Ex.A.1. In this letter under Ex.A.7, the defendant has promised to arrange for the payment of the entire amount due and has prayed for instalment stating that they are taking every effort to settle the claim of the plaintiff at the earliest. A reading of Ex.A.7 shows that the defendant has entered into an agreement with the plaintiff for the liability in respect of the time barred claim under Ex.A.1. As per the decision reported of the time barred claim under Ex.A.1. As per the decision reported in Maidens Hotel vs. WillnottAIR 1935 984 (Lahore) , a letter containing a promise to pay a debt which is barred by limitation is itself an agreement enforceable in law and is therefore, a contract and as such can form the basis of fresh cause of action."

In the present case, there is no evidence to show that the respondent has acknowledged the time barred debt and given a letter and then issued a cheque. Here, the issuance of cheque itself is disputed. So, the above citation is not applicable to the facts of the present case.

12. The appellant herein has not proved the issuance of cheque because the chit transaction has been completed on 24.09.1999, much prior to the alleged issuance of cheque/Ex.P.1. In such circumstances, I am of the view that the appellant herein has not proved that the cheque has been issued by the respondent on 31.01.2004. Once the appellant has not proved that the cheque has been issued on 31.01.2004, so he has not proved the basic ingredient of Section 138 of Negotiable Instruments Act that the cheque has been issued to him. Further, as soon as the respondent received the notice, he sent a reply denying the issuance of cheque. So, the appellant herein has not proved the issuance of cheque, that too, for discharging legally subsisting liability. But here, the appellant has also admitted that the chit has been completed in the year 1999 and the cheque/Ex.P.2 is alleged to be given in the year 2004. so, the Trial Court has rightly held that there is no evidence to show that the cheque/Ex.P.2 has been issued for discharging legally subsisting liability on the date of issuance of cheque. Hence, I do not find any merits in the appeal. Therefore, the judgment of acquittal passed by the trial Court is hereby confirmed.

13. In fine,

? This Criminal Appeal is dismissed.

? Judgment of acquittal dated 29.03.2006 made in C.C. No. 533 of 2004 on the file of the learned Judicial Magistrate No. II, Coimbatore is hereby confirmed.