

D. Jerome Jay Kumar Vs. D. Phillip

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Court : Karnataka

Decided On : Jul-19-2017

Judge : The Honourable Mrs. Justice Rathnakala

Appeal No. : Criminal Revision Petition No. 1393 of 2015

Appellant : D. Jerome Jay Kumar

Respondent : D. Phillip

Judgement :

(Prayer: This Criminal Revision petition is filed under Section 397 r/w 401 of Cr.P.C., praying to set aside the judgment dated 14.09.2015 passed in Crl.A.No.25001/2015 by the LVII Additional City Civil and Sessions Judge, Mayo Hall Unit, Bangalore and judgment and sentence dated 10.12.2014 passed by the XIV A.C.M.M., Bangalore in C.C.No.35318/2010 convicting the petitioner and dismiss the complaint in C.C.No.35318/2010 on the file of XIV A.C.M.M., Bangalore.)

The judgment of conviction and sentence recorded by the XIV Addl.CMM., Bangalore, in a proceedings under Section 138 of the Negotiable Instruments Act, 1881 ('the Act' for brevity) upheld by the lower appellate court is under attack in this revision petition.

2. Parties will be referred to as per their ranking before the Trial Court.

3. The complainant after issuance of statutory notice to the accused lodged a private complaint under Section 200 of the Cr.P.C. before the jurisdictional court alleging offence under Section 138 of the Act against the (husband and wife) purchased immovable property/residential site in a revenue land; towards the part payment, issued a cheque dt.20.2.2009 for Rs.12 lakhs drawn on SBM Lingarajapuram Branch, Bengaluru and the cheque was presented by the complainant before his banker. It was returned with the endorsement "exceeds arrangement". The legal notice/demand notice sent through RPAD and UCP dt.26.8.2009 is served on the accused on 4.9.2009 but he failed to make payment of the cheque amount.

4. The accused was procured, his plea for the offence under Section 138 of the Act was recorded and he pleaded not guilty. Complainant led the evidence of himself as PW-1 and a witness as PW-2. After the closure of the complainant's evidence, statement of the accused under Section 313 of Cr.P.C. was recorded. He led rebuttal evidence as PW-1 and marked documents Exs.D1 to D5.

5. The trial court on consideration of the evidentiary material placed before it, held the accused guilty of the offence, convicted him of simple imprisonment for one year and acting under Section 357(3) of Cr.P.C., first accused was directed to pay compensation of Rs.19,20,000/-, out of which Rs.5,000/- was to be deposited as fine.

6. In the appeal, the lower appellate court refused to interfere with the said order.

7. Sri.Sunil Rao, learned Counsel for the petitioner/accused submits, it was the case of the complainant that he had entered into Memorandum of Understanding ('MOU' for short) with the accused wherein accused had undertaken to pay a sum of Rs.15 lakhs upon the performance of certain conditions numbered under said MOU/Ex.P10. It was the cross- examination admission of the complainant that the contractual obligation was not complied with. Even otherwise, it was not within the domain of the trial court to investigate, whether the contract between the parties had been satisfied, thus, the courts below erred in coming into conclusion that there was a debt owed by the accused to the complainant. As per the sale deed/Ex.D1 under which PW-2 sold the property to the accused, entire sale

consideration was paid to the complainant. It suggests that the complainant was indirectly holding the property in the name of PW-2 and has taken benefit out of said transaction. PW-2 has categorically admitted during cross-examination that the entire sale consideration under Ex.D1 was given to the complainant and he did not receive even a single rupee under the said transaction.

Learned Counsel continues, it is the case of PW-1 that to avoid payment of stamp duty, the sale consideration was shown as Rs.8,75,000/- instead of purported consideration of Rs.26,50,000/-. PW-2 admits that money claimed by the complainant was unaccounted money of the registered transaction but this fact was lost sight by the trial court.

8. Reliance is placed by the learned Counsel on following judgments: 1) Indus Airways Pvt.Ltd. and Ors. - vs- Magnum Aviation Pvt.Ltd. and Another (2014) 12 SCC 539; 2) G.M.Sathyanarayana -vs- Anandkumar (Crl.A.No.993/2008 DD 11.12.2013); (3) G.Pankajakshi Amma and Others -vs- Mathai Mathew (dead) through LRs and Another ((2004) 12 SCC 83) and (4) Reverend Mother Marykutty -vs- Reni C.Kottaram and Another ((2013).

9. Sri.S.Raj Prabhu, learned Counsel for the respondent in his reply submits, the case of the petitioner is, the accused agreed to purchase the property, which was under the ownership of the complainant and a sale agreement was entered into on 20.12.2007 for a sum of Rs.26,50,000/- and Rs.6,50,000/- was paid in advance through cheque agreeing to pay balance Rs.20,00,000/- at the time of registration. It was on the request of the accused, the previous landlord Robert Raj joined for execution of the sale deed, the complainant signed the document as a witness. On the request of the accused, sale deed was shown as Rs.8,75,000/- as government value to avoid stamp duty. The cheque for Rs.15 lakhs was paid to the complainant towards the outstanding liability and the accused had sought time of 6 months. Thereafter MOU was entered on 21.2.2008 as per Ex.P10. On 15.8.2008, when the complainant demanded money, the accused paid Rs.5,000/- in cash and issued another cheque for Rs.50,000/- towards part payment and sought time for the balance amount. When he approached the accused, the accused stated that he will clear the documents by himself and get transferred in his name through

some agents and requested another six months' time. The accused took back the cheque of Rs.15 lakhs issued under MOU and issued another cheque for Rs.12 lakhs deducting Rs.3,00,000/- towards documentation charges and assured to repay the balance once the formalities are completed. However, he had paid Rs.12,05,000/- from the total consideration of Rs.26,50,000/- and when the cheque was presented before the bank, it was returned with the endorsement "exceeds arrangement". The advance amount of Rs.6,50,000/- shown in the sale agreement and that of the sale deed are one and the same and the advance amount is paid vide cheque No.411552 dt.20.12.2007 which is the date of execution of the agreement of sale between the parties and the sale deed is dt.20.2.2008. The amount of Rs.12,05,000/- paid until now is not to Mr.Robert Raj, but to the complainant. Said fact is admitted by Robert Raj during cross-examination. The MOU is between the complainant and the accused and Robert Raj is not a party to the said MOU.

It is the further submission on behalf of the complainant that the accused in his reply notice and also during evidence has admitted that the transaction was between himself and the complainant and also issuance of the cheque to the complainant. The very fact that the accused sold the said property to a third party under a registered sale deed (Ex.D2) and had mentioned that the tax pertaining to the site is paid to the Bangalore Mahanagara Palike establishes that the contract is complied. Having sold the property for valid consideration to one Champalal, he has made wrongful gain for himself. Out of Rs.15 lakhs amount due under the MOU, he deducted Rs.3 lakhs towards payment of betterment charge, tax and the expenses towards transfer of bank khata and issued a cheque for Rs.12 lakhs. Mr.Robert Raj, the original owner of the property is not a party to the MOU. Said Robert Raj/PW-2 in his evidence has admitted that complainant had sold the site to the accused and did not receive any amount from the accused. The accused has not explained as to how the cheque in question came in possession of the complainant. The trial court has rightly observed that the transaction under Ex.D1 was agreed for total consideration of Rs.26,50,000/-, which is mentioned in the MOU para-3/Ex.P10. The accused had made payment of Rs.11,50,000/- along with Rs.50,000/- by way of cheque and Rs.5,000/- by way of cash. The remaining amount is not paid so far either to the complainant or to the original owner Robert

Raj. If the complainant failed to comply the terms of the contract in the MOU, the accused would have taken action for the specific performance of the contract against him, which is not done. Now the complainant has raised the legal contention that the transaction being a benami transaction is hit by Section 2(9) of the Benami Transactions (Prohibition) Amendment Act, 2016. It is the case of the complainant that when he purchased the property from PW-2 Robert Raj, there was prohibition on execution of the sale deeds in respect of gramathana sites, hence, the complainant could not get the sale deed registered in his name from its erstwhile owner though he had paid entire sale consideration. The entire sale transaction is between the complainant and the accused only and the question of benami transaction does not arise.

Learned Counsel continues, the third fold of contention is, since the amount alleged to be due is an unaccounted money, there is no liability on the part of the accused to honour the claim. Manifestly, the amount due under the transaction as agreed under MOU was to be paid by way of cheque and on its presentation automatically the amount becomes accounted. The transaction is not in respect of enforceable debt but in view of the liability of the accused to pay to the complainant, the accused is guilty of avoiding stamp duty since it was for the purchaser to pay the stamp duty and the transaction was within the ambit of other liability which the accused owes to the complainant.

It is further submitted by the learned Counsel that, the accused for the first time before this court has raised the new point of law that a cheque issued in lieu of performance of contractual obligation does not attract the definition of debt within the meaning of Section 138 of the Act, placing reliance on the judgment of Indus Airways Pvt.Ltd. (supra) that the facts in the present case stand distinguished from that of the Indus Airways Pvt.Ltd.(supra). In the said case, there was a contract for supply of material in lieu of which advance postdated cheque was issued and due to the breach, the cheque was presented and the law declared by the Apex Court was advance payment for supply of goods not supplied not covered under Section 138.

Learned Counsel further submits, at this juncture provisions of Indian Contract Act has to be conjointly read with Section 138 of the Act. Section 2(d) of the Indian Contract Act, 1972, defines "consideration" as "when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration of promise." Hence, all reciprocal obligations would also be consideration of the contract and can be termed as "other liability" and the expression would include liability to pay which exactly is the crux of the case. At the very inception of the contract/MOU, the accused had liability to pay to the complainant and discharge of the said liability was treated as fundamental to the agreement. He had made part payments; Part consideration which was due and liable was not paid, due to non-performance and causing abstinence would entitle the benefit under the Act for the Respondent. As such the legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well.

Learned Counsel continues, on perusal of Section- 118(a) and Section-139 of the Act, it provides that every negotiable instrument was made or drawn for consideration, and that very such instrument, when it has been accepted, indorsed, negotiated and transferred for consideration shall be presumed, unless the contrary is proved that the holder of a cheque received the cheque of the nature referred to in Section-138 of the Act for the discharge, in whole or in part, of any debt or other liability. And in the present case it leaves no doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid.

10. Reliance is placed on the unreported judgment of the Delhi High Court in Four Seasons Energy Ventures Pvt. Ltd. -vs- State of NCT of Delhi and another to submit that other liability contemplated under Section 138 of the Act would cover any liability of the accused towards the complainant.

11. In the light of the above rival submission, now the point for consideration in this revision petition is,

"Whether the accused is not under liability to pay cheque amount of Rs.12 lakhs to the complainant?"

12. As per the MOU/Ex.P10 dated 21.2.2008, it is agreed between the parties that the accused has to pay Rs.15 lakhs to the complainant subject to the complainant clearing all the revenue debts and other pending documents for the clear title of the property; he was to pay complete tax and betterment charges from out of his own expenses for making good title of the property and hand over the title deeds on the day of sale deed. It is borne from Ex.P10 that the accused has paid Rs.50,000/- by way of cash and Rs.15,000/- by way of cheque dated 16.8.2008, vide endorsement dated 16.8.2008 borne on the MOU.

13. It is further seen that the cheque Ex.P1 is dated 20.2.2009 and is for an amount of Rs.12 lakhs; whereas Ex.P10 MOU is dated 21.2.2008 and the registered Sale deed executed by PW-2 was on 20.2.2008. It is undisputed that clear title in respect of the property has passed on to the accused, thus he could sell the property to a third person on the subsequent days. It is also not in dispute that against terms of MOU, accused took over the task of clearing off the revenue debts which the complainant was required to perform under the MOU. The tone of examination-in-chief evidence of PW- 1/complainant is to the effect that the cheque dated 20.2.2009 for Rs.12 lakhs was given on a subsequent date. On the date of registration of the sale deed he had issued a cheque for Rs.15 lakhs and by working out the difference of amount received on 16.8.2008 and the amount spent towards payment of tax, etc., said cheque for Rs.15 lakhs was received back from the complainant and fresh cheque for Rs.12 lakhs dated 20.2.2009 was handed over. The clear title having been passed by the original vendor to the accused, the inevitable conclusion is, in lieu of the expenses spent by the accused towards the obligations which the complainant was required to perform under the MOU, a cheque for Rs.12 lakhs was issued. The MOU is silent about the consequences of non-performance of the obligation agreed between the parties. The complainant in his evidence has stated that the cheque was towards the part of the sale consideration due under the sale transaction.

14. Effort is made by the accused to avoid his liability by seeking to invoke the provisions of section 2(9) of the Benami Transactions (Prohibition) Amendment Act, 2016 which reads thus:

"Section 2(9) "benami transaction" means,--

(A) a transaction or an arrangement--

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by--

(i) x x x x x x xxxxxx "

15. But in the absence of any evidence being brought on record, it cannot be held that PW-2 is the benami holder of the property.

16. In the judgment of Indus Airways Pvt.Ltd. (supra), the subject matter was dishonour of the postdated cheque paid towards advance payment. G.Pankajakshi Amma (supra), was a civil appeal and have no semblance to the matrix on hand. The contention urged that no consideration has flown under the MOU of 21.8.2008 is of no assistance since the said MOU is in the nature of acknowledgment of liability arising from the sale transaction of 20.8.2009. The judgment of Reverend Mother Marykutty (supra), pertains to a cheque issued during the course of work contract. The complaint allegation in the said case was not appreciated since before filing the complaint measurement of work and settlement of account had not yet been done.

17. The judgments of the courts below in that view of the matter are justified. No new legal contention raised for the petitioner would absolve him of his liability under the cheque/Ex.P1.

Revision petition is dismissed.