

Palraj Vs. Lalchandh

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Court : Chennai

Decided On : Apr-24-1998

Reported in : [2001]103CompCas527(Mad)

Judge : Rengasamy, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138

Appeal No. : Criminal Appeal No. 585 of 1993

Appellant : Palraj

Respondent : Lalchandh

Advocate for Pet/Ap. : Mohideen Batcha, Adv. for;S. Packiaraj, Adv.

Disposition : Appeal allowed

Judgement :

Rengasamy, J.

1. This appeal is against the order of acquittal passed by the learned Judicial Magistrate No. 4, Thiruchirapalli, C. C. No. 22 of 1993, for the offences under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act').

2. The appellant/complainant has stated in his complaint that the respondent/accused borrowed a sum of Rs. 12,000 from him on September 19,

1992, that when he demanded the repayment of the loan, the respondent/accused, without paying the amount, has issued a cheque dated October 19, 1992, which is marked as exhibit P-1 for a sum of Rs. 12,000 drawn on Karur Vysya Bank, that he presented the cheque for collection of the amount through the Punjab National Bank on October 21, 1992, but the cheque was returned dishonoured on October 22, 1992. The complainant would further state that he issued a notice to the accused on November 3, 1992, under the original of exhibit P-4, informing the dishonour of the cheque, but the accused has sent a reply/exhibit P-5 dated November 4, 1992, stating that the cheque was issued as a security in the chit transaction and he has not committed the offence under Section 138 of the Act. The complainant, thereafter, had filed the complaint before the judicial magistrate under Section 138 of the Act.

3. The complainant examined himself as P.W.-1 for the transaction and the issuance of the cheque by the accused. P.W.-2 who is an employee in the Punjab National Bank, has spoken about the bouncing of the cheque. The accused had examined himself as D.W.-1 and two other witnesses on his side. In his evidence, he has stated that the cheque was issued at the time when he received the prize amount for the chit transaction and this was issued only as a security for the future payment, that he had paid the subscription up to the 17th instalment for two chits, but as he refused to issue the receipts and he also did not pay the prize amount to his friends D.Ws.-2 and 3, who became subscribers of the chit on his request, he did not pay the subsequent subscriptions and it will not amount to offence under Section 138 of the Act. D.Ws.-2 and 3 also have stated that the prize amount was not paid to D.W.-1 and they questioned the accused as they became the subscribers of the chit only at the instance of the accused, and, therefore, he was responsible for the payment to D.W.-1.

4. The learned Judicial Magistrate-4, Thiruchirapalli, who assessed the evidence on both sides, has found that the cheque/exhibit P-1 was issued only for the security and as there is dispute between the complainant and the accused, the accused has not paid the amount, and the non-payment due to dispute will not attract Section 138 of the Act. On this finding, the learned judicial magistrate has acquitted the accused, and the complainant has come forward with this appeal.

5. Unfortunately, learned counsel, who has entered appearance for the respondent/accused, has not come forward to represent his client/respondent, though the matter is listed and is coming daily in the list.

6. Learned counsel appearing for the appellant, Mr. Mohideen Batcha, contended that even assuming that exhibit P-1/cheque was issued as a security for the future payments, it does not mean that the respondent/ accused has no liability to pay the amount under the cheque and the cheque will not become a waste paper when especially the accused himself would admit that he had not paid the subscription subsequent to the 17th instalment and the lower court has not properly considered the enforce-ability of the document, namely, the cheque, which was issued for the realisation of the amount.

7. Learned counsel Mr. Mohideen Batcha contended that the evidence is so clear from P.W.-I that the complainant gave a hand loan of Rs. 12,000 to the respondent/accused on September 19, 1992, as the accused gave an undertaking to pay the amount within one month and as he could not pay the money in cash within one month, he issued the cheque on October 19, 1992, and there is no reason to disbelieve the testimony of P.W.-1. Learned counsel Mr. Mohideen Batcha further pointed out that D.W.-2 has admitted in his evidence that the complainant is conducting 'a finance, by which, he is giving loans to the persons who approached him for a loan and in addition to that, he is also running the chit funds. If exhibit P-1/ cheque was issued for the hand loan repayable to the appellant/complainant, and this cheque was not honoured when presented by the complainant for encashment, certainly it will amount to offence under Section 138 of the Act. Or taking the case of the respondent/accused the question is whether the bouncing of the cheque will amount to offence. The complainant would admit that he was conducting the chit transaction during the relevant time and the accused was a subscriber of two chits, each for Rs. 50,000 and the period was 25 months. The respondent/accused himself had admitted in his evidence that for both these chits, he became a prized subscriber, even in the second month for one chit and the third month for the other chit, and he had received the entire prized amount after executing the promissory note and issuing a blank cheque for each chit. The complainant also would admit that he used to take a promissory

note and also a cheque for the future payments of the subscription amount. As the chit amount was received by the subscriber, even before the full period was over, naturally, for the purpose of security, it appears that the appellant/complainant was obtaining the promissory note and the cheque. So even assuming that exhibit P-1/cheque is one issued as a security for the future payments of the subscription, the question is whether the accused was not bound to honour the cheque.

8. Even though, now the accused has examined two witnesses, D.Ws.-2 and 3, to state that they became members of the chit on the request of the accused, and D.W.-3, who bid the auction on the 15th month for Rs. 18,000 was not paid the prize amount and on account of that, there is dispute and the accused had refused to pay the future subscriptions for the reason that the complainant had not paid the prize amount to D.W.-3. For the notice sent by the complainant under the original of exhibit P-4, the respondent/ accused had not mentioned anything about the non-payment of the prize amount to D.W.-3. Therefore, now, at the time of trial, the version of D.Ws.-2 and 3 that the non-payment of the prize amount to D.W.3, is a dispute not only between the complainant and D.W.-3, but also between the complainant and the accused, I feel, that, it is only an afterthought, because, this plea has not been taken in the reply notice/exhibit P-5. In exhibit P-5, the only ground taken by the accused is that after the payment of the subscription, for one of the chits, up to the 10th instalment, the complainant did not come to collect the subscription, so the accused went to the complainant in person and paid the subsequent instalments, through one cheque up to the 17th instalment, but the same has not been entered in the pass book/exhibit D-1, that the complainant evaded to make entry in the pass book for the subsequent months also, and, therefore, there was a misunderstanding between them. This misunderstanding is the only reason given in exhibit P-5/reply notice, for the non-payment of the subsequent instalments. As exhibit P-5 is the immediate reply sent by the accused to the complainant's notice, after the bouncing of the cheque, now, we have to consider the question whether there is any real dispute between the parties with regard to the subsequent payment of instalments justifying the accused to withhold the payments and allowing the cheque to bounce. Exhibit D-1/pass book shows that the accused had paid the subsequent subscriptions only up to the 11th instalment. Even though the accused has stated in his reply notice that he had

made a lump sum payment subsequently up to the 17th instalment, by cheque he has not produced any document to show that he had made payments for the subsequent instalments, after the 11th instalment entered in exhibit D-1/pass book. Even assuming that the accused was ready to pay the subsequent instalments, but the complainant was not willing to issue receipt for the same, he could have sent it by money order or draft, or sent a notice in writing that the complainant was not willing to issue receipts for his payment of the subscription. Without any material by acceptable evidence, the accused has contended that as the complainant was not willing to issue receipts for payment of the subsequent instalments, he did not make payments for the chit amount and the learned judicial magistrate also took the view that as this is a dispute between the parties, the bouncing of the cheque will not amount to an offence under Section 138 of the Act. As mentioned above, except the oral testimony of the accused, that he had made payments up to the 17th instalment, though his pass book/exhibit D-1 shows payment only up to the 11th instalment, and there is no material before the court to accept that he offered to pay the subsequent instalments, it cannot be stated that there is any real dispute between the parties in the matter of issuance of the receipt for the payment. So, the court has to come to the only conclusion that the respondent/accused has not paid the subsequent subscription after the 11th instalment.

9. The accused seems to have taken a contention that the complainant was running the chit funds without the permission of the Registrar and, therefore, action also is pending against him. The failure on the part of the complainant in obtaining the necessary permission will entail him for punitive action by the concerned Department, but, that will not enable the accused to withhold the payment when especially he is a prized subscriber, having already received the amount in advance.

10. When the accused himself would say that exhibit P-1/cheque was issued as a security for the chit transaction, the security must be enforceable in the event of the non-compliance of the conditions. In other words, as the accused had received the chit amount even in the second auction and he was bound to pay the subsequent instalments every month, for 23 months, naturally the security will

become enforceable, if he had not complied with the condition of payment of future subscription. In this case, exhibit D-1/pass book shows that after the 11th instalment, the accused has not paid the subsequent subscriptions proving the non-compliance of the conditions. Even assuming that the accused has paid the subscription as mentioned by him up to the 17th instalment, the non-payment of the subscription for the remaining 8 instalments also will amount to non-compliance of the conditions and the foreman of the chit, who has parted with his money to his subscriber, cannot remain idle with the cheque issued as security without enforcing his right. Therefore, when once the non-compliance of the conditions, namely, the failure to pay the future subscription is admitted by the accused himself, certainly, the cheque issued by the accused is encashable, even if it is treated that the same was issued only as a security. As the accused has stated in his evidence that on June 1, 1991, he took one chit in the second instalment and on July 1, 1991, the third instalment for the other chit, the subsequent 11th instalment would have been over by April 1, 1992. As there is no proof for the payment of the subsequent instalment the complainant was entitled to present the cheque for encashment any time after May, 1992. The complainant had presented the cheque only on October 21, 1992. Except the imaginary dispute between the parties, namely, foreman and the subscriber, there is no evidence of any real dispute between the parties. The reply notice/ exhibit P-5 also does not indicate any real dispute between the parties. When the subsequent subscriptions were not paid by the accused, naturally, the grievance would have been only to the foreman of the chit. But, that cannot be stated as a dispute between the parties. Therefore, the accused was bound to provide the funds for the cheque issued by him, or at least after issuance of the notice/exhibit P-4, he ought to have paid the cheque amount. In spite of the statutory notice giving him an opportunity to pay the amount, as the same was not paid, the accused has committed offence under Section 138 of the Act and certainly, he is punishable for the offence.

11. The lower court was not proper in drawing the inference that there was a dispute between the parties, on account of which the accused was not bound to provide funds. This view of the learned magistrate is totally incorrect and there are no materials to draw such inference, when especially exhibit D-1/pass book itself shows the failure to pay the subscription subsequent to the 11th instalment.

Therefore, the order of the court below is liable to be set aside.

12. In the result, the order of acquittal passed by the learned judicial magistrate is set aside and the respondent/accused is found guilty of the offence under Section 138 of the Act. The appeal is allowed accordingly.

13. Coming to the question of punishment for the offence, I feel that a heavy fine is a sufficient punishment to the accused. I impose a fine of Rs. 14,000 (rupees fourteen thousand only) against the respondent/accused and in the said amount, Rs. 12,000 (rupees twelve thousand only) would be paid to the complainant as damages. In default of the payment of fine, the respondent/accused has to undergo imprisonment for six months. As the accused is absent, time for payment is two weeks.

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