IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 12-10-2015

CORAM:

THE HONOURABLE MR. JUSTICE A. SELVAM

Criminal Appeal No.421 of 2007

K. Nagalingam ...Appellant

Vs.

V. Selvaraj ...Respondent

Criminal Appeal under Section 378, Cr.P.C., against the judgment of acquittal by the Additional Sessions Judge of Court of Sessions at Chennai (Fast Track Court No.5) in C.A.No.414 of 2004 dated 20-12-2005 reversing the judgment convicting the accused by the 7th Metropolitan Magistrate, Chennai @ George Town in C.C.No.4433 of 2002 by his judgment dated 30-09-2004.

For appellant : Mr. R. John Sathyan

For respondent : Mr. V. Srinivasa Babu

JUDGMENT

This criminal appeal has been directed against the order of acquittal passed in Criminal Appeal No.414 of 2004 by the Sessions Court/ Fast Track Court No.IV, Chennai, wherein the conviction and sentence passed in Calendar Case No.4433 of 2002 by the VII Metropolitan Magistrate, Chennai @ George Town are reversed.

2. The appellant herein as complainant has filed the complaint, in question under Section 138 of the Negotiable Instruments Act, 1881('NI Act' in short) on the file of the Trial Court and the same has been taken on file in C.C.No.4433 of 2002, wherein the present respondent has been shown as sole accused.

3. It is averred in the complaint that the accused has received a sum of Rs.5,00,000/-(Rupees Five lakhs only) from the complainant and in order to make a partial discharge, the

accused has given a cheque for a sum of Rs.1,22,000/-(Rupees One lakh twenty two thousand only) on 05-01-2001 in favour of the complainant and the same has been put into concerned Bank. But the concerned Bank has returned the same stating 'funds insufficient' and subsequently, a legal notice has been issued on 13-12-2001 to the accused and the same has been received by him on 26-12-2001. Even though the accused has received a legal notice, dated 13-12-2001 he has not discharged his liability and thereby, he committed an offence punishable under Section 138 of the NI Act. Under the said circumstances, the present petition has been filed for getting the relief sought therein.

4. The Trial Court, after considering the divergent contentions put forth on either side and also after perpending the available evidence on record has found the accused guilty under Section 138 of the NI Act and sentenced to undergo six months' RI. Against the conviction and sentence passed by the Trial Court, the accused, as appellant, preferred Crl.A.No.414 of 2004 on the file of the First Appellate Court.

5. The First Appellate Court after hearing arguments of both sides and upon re-appraising the available evidence on record has allowed the appeal and thereby, set aside the conviction and sentence passed by the Trial Court and ultimately, acquitted the accused. Against the order of acquittal, the present criminal appeal has been preferred at the instance of the complainant, as appellant.

6. The learned counsel appearing for the appellant/complainant has strenuously contended that the accused has received a sum of Rs.5,00,000/-(Rupees Five lakhs only) from the complainant and in order to make a partial discharge, on 05-01-2001, he issued a cheque for a sum of Rs.1,22,000/-(Rupees One lakh twenty two thousand only) in favour of the complainant and the same has been put into concerned Bank. But the concerned Bank has returned the same stating 'funds insufficient' and subsequently, a legal notice has been issued and evenafter receipt of the same, the accused has failed to discharge his liability and in the said circumstances, the complaint in question, has been filed on the file of the Trial Court and the same has been taken on file in C.C.No.4433 of 2002 and the Trial Court, after considering the available evidence on record has rightly found the accused guilty under Section 138 of the Act. But the First Appellate Court without assessing the evidence properly has erroneously allowed Crl.A.No.414 of 2004 and thereby, acquitted the accused and therefore, the order of acquittal

passed by the First Appellate Court is liable to be setaside and the conviction and sentence passed by the Trial Court are liable to be restored.

7. Per contra, the learned counsel appearing for the respondent/accused has also equally contended that in the instant case, the complainant has failed to prove that the cheque, in question has been in connection with an enforcement debt and the complainant has been examined as P.W.1 and in fact, he has given evidence against his contention and the Trial Court without assessing his evidence properly has erroneously found the accused guilty under Section 138 of the NI Act. But the First Appellate Court after reappraising the evidence properly has rightly allowed Crl.A.No.414 of 2004 and thereby acquitted the accused and therefore, the order of acquittal passed by the First Appellate Court need not be set aside.

8. For considering the rival submissions made on either side, the Court has to look into the following documents as well as evidence adduced on either side. The cheque, in question, has been marked as Ex-P1. Return memo issued by the concerned Bank has been marked as Ex-P2. A copy of legal notice dated 13-12-2001 has been marked as Ex-P3.

9. In Ex-P3, it has been simply mentioned that the accused has received a sum of Rs.5,00,000/- (Rupees Five lakhs only) from the complainant. No date has been mentioned. Even in the complaint, no specific date has been mentioned on which the accused has received a sum of Rs.5,00,000/- (Rupees Five lakhs only) from the complainant. At this juncture, the Court has to look into the evidence adduced by the complainant. The complainant has been examined as P.W.1 and his specific evidence is that the accused has in aggregation received a sum of Rs.5,00,000/- (Rupees Five lakhs only). Except the cheque, in question, no other documents have been obtained from the accused. The cheque relating to C.C.No.4433 of 2002 has been given by the wife of the accused in favour of his wife. Further, he deposed that he has to verify as to whether the accused has given twenty cheques.

10. From a cumulative reading of the evidence given by the complainant, the Court can easily come to a conclusion that the cheque in question is not supported by consideration. If really, the appellant/complainant has advanced a sum of Rs.5,00,000/-(Rupees Five lakhs only) to the respondent/accused, definitely the date on which the said sum has been given to him should have been mentioned in the

complaint as well as in statutory notice. But as stated earlier, no date has been mentioned either in the complaint or in statutory notice. Further, P.W.1 has deposed evidence to the effect that the cheque relating to C.C.No.4433 of 2002 has been given in favour of his wife by the wife of the accused. Therefore, it is needless to say that the cheque, in question is not supported by consideration.

11. Now, the Court has to look into the defense taken on the side of the respondent/accused. On the side of the respondent/accused, it has been contended to the effect that the respondent/accused has received some amounts from the complainant and the same have already been discharged and to that effect the wife of the accused has been examined as D.W.1 and through her, Exs-D9 and D10 have been marked. Even assuming without conceding that Exs-D9 and D10 are not believable documents, from the evidence adduced by P.W.1, the complainant, the Court can easily infer that after receiving blank cheques, the complainant has filed cases one after another.

12. It is true that the cheque, in question has been issued by the accused. Simply because the cheque has been issued by the accused and simply because a presumption is available under Section 139 of NI Act, the same is nothing but a rebuttable presumption. In the instant case, as noted down earlier, the evidence given by P.W.1, complainant cannot be admitted in any way. On the basis of his evidence, the Court can come to a conclusion that Ex-P1, cheque, in question, is not supported by consideration. It is not an exaggeration to say that on the side of the respondent/accused, acceptable evidence has been forth coming for the purpose of proving that Ex-P1, is not supported by consideration. Since Ex-P1 is not supported by consideration, the Court cannot come to a conclusion that the same has been issued in connection with an enforceable debt. Since Ex-P1, has not been issued in connection with an enforceable debt, it is highly impossible and also improbable to come to a conclusion that the respondent/accused has committed an offence mentioned in Section 138 of the NI Act.

13. The learned counsel appearing for the respondent/accused has drawn the attention of this Court to the following decisions:

(i) CDJ2009 MHC 3117 (S. Kamatchi Vs. Arkaa Medicament)

(ii) CDJ2012 MHC 5562 (S. Nagalakshmi rep. by Power Agent K.N. Venkataraman Vs. R. Nagalingam)

14. In both the decisions, this Court has held in clear terms that for the purpose of constituting an offence under Section 138 of the NI Act, the cheque, in question, must be issued in connection with an enforceable debt.

15. In the instant case, as pointed out earlier on the side of the appellant/complainant no clinching evidence has been forthcoming for the purpose of proving that Ex-P1, cheque has been issued in connection with an enforceable debt. Therefore, viewing from any angle, the contentions put forth on the side of the appellant/complainant cannot be accepted.

16. The Trial Court without considering the nebulous evidence given by P.W.1, complainant has erroneously found the respondent/accused guilty under Section 138 of the NI Act. But the First Appellate Court after re-appraising the evidence properly has rightly found that the respondent/accused has not committed an offence punishable under the said Section. Therefore, the present criminal appeal is liable to be dismissed.

In fine, this criminal appeal is dismissed. The order of acquittal passed in Criminal Appeal No.414 of 2004 by Sessions Court/Fast Track Court No.IV, Chennai is confirmed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

glp

To

1. The Additional Sessions Judge
(Fast Track Court No.5)
Chennai.

2. The VII Metropolitan Magistrate,
George Town, Chennai.

3. -Do- Through The CMM,
Egmore, Chennai.

Criminal Appeal No.421 of 2007

KSJ (CO)
PSI (20.10.2015)