IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2015

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

Crl.A.No.506 of 2007

Judgment reserved on : 11.02.2015
Judgment pronounced on : 13.02.2015

M.Saroja .. Appellant/Complainant

Vs.

1.S.Amali Arokia Marry
2.K.Karthikeyan .. Respondents/Accused

Prayer: Criminal Appeal is filed under Section 378 of Cr.P.C., against the judgment of acquittal dated 12.02.2007 in C.C.No.291 of 2004 on the file of the learned Judicial Magistrate, Mettupalayam.

For Appellant : Mr.S.Gunalan
For Respondent : Mr.G.Sankaran

J U D G M E N T

This Criminal Appeal arises out of the judgment of acquittal dated 12.02.2007 in C.C.No.291 of 2004 on the file of the learned Judicial Magistrate, Mettupalayam.

2.The first and second accused are wife and husband and one Rosemary is the mother of first accused. The appellant and the first respondent were working in the school. The appellant as a complainant preferred a private complaint stating that one Rosemary had borrowed a sum of Rs.30,000/- on 14.03.2002 and on the same day at evening, Rosemary and the first respondent herein had borrowed another loan of Rs.30,000/- and executed Exs.P2 and P3/promissory notes which were written by the first accused agreeing to repay the same with interest at Rs.2.50 per Rs.100/- per month. Since the said Rosemary was retired from her service, the appellant/complainant asked first accused to execute a document guarantying the repayment of the total loan of Rs.60,000/-. On 06.06.2002, both the accused executed Ex.P4 security deed as required by the complainant and paid Rs.3,000/- towards interest for two months and made an endorsement on the back of the said document and the endorsement was marked as Ex.P5. Subsequently, both the accused jointly borrowed Rs.1,00,000/- from the complainant on 23.07.2002 and executed Ex.P6/promissory note in favour of the complainant agreeing to repay the same with interest at Rs.2.50 per Rs.100/- per month and the same was written by A1 and signed by A2. Then the first accused sent a letter Ex.P7 to the complainant for requesting another loan of Rs.50,000/- and promising to repay entire loan amounts in two parts. Again, on 17.10.2002, the accused borrowed a loan of Rs.50,000/- and executed a promissory note Ex.P8 and the same was written by A1 and signed by A2. In pursuance of the aforesaid promissory notes, the first accused has to pay total loan amount of Rs.2,10,000/- to the complainant with the accrued interest. In spite of repeated demands, the accused did not make any payment. On 20.11.2003, both the accused issued Ex.P9 cheque dated 27.11.2003 for a sum of Rs.15,000/-, but the accused requested the complainant not to present the cheque on 27.11.2003. Since they did not repay the amounts, the complainant presented the cheque for encashment on 06.04.2004 and the same was returned as "funds insufficient" vide return memo Ex.P10. On 30.03.2004, the first accused and her mother issued Ex.P11 notice to the complainant and the acknowledgment card was marked as Ex.P12. On 22.04.2004, the complainant sent a legal notice Ex.P13 to both the accused and the acknowledgment cards were marked as Exs.P14 and P15 and the return cover was marked as Ex.P16. After receipt of notice, the accused neither replied nor repaid the amounts and therefore, the appellant/complainant had filed a private complaint against the respondents/accused under Section 138 of Negotiable Instruments Act (hereinafter called as "the Act").

3.The trial Court has taken cognizance of an offence, after following the procedure and recording sworn statement. Since the accused pleaded not guilty, the trial Court examined P.W.1 and P.W.2 and Exs.P1 to P16 on the side of the complainant. On the side of the respondent, no evidence were let in. The trial Court after considering the oral and documentary evidence, acquitted the first accused stating that since notice under Section 138 of the Act is defective and imperfect, complaint under Section 138 of the Act itself is not maintainable. In respect of A2 is concerned, the trial Court acquitted him by holding that A2 is neither signatory nor the account holder.

4.Challenging the judgment of acquittal passed by the trial Court, learned counsel for the appellant/complainant submitted that notice itself is valid under law merely because mentioning of incidental charges will not vitiate the complaint under Section 138 of the Act. It is further submitted that notice is perfect and that factum was not considered by the trial Court. Hence, he prayed for allowing the appeal. To substantiate his arguments, he relied upon the following decisions:

(i) CDJ 2000 SC 070 (Suman Sethi v. Ajay K.Churiwal);
(ii) 2003 (4) CTC 252 (K.R.Indira v. Dr.G.Adinarayana);
(iii) 2005 M.L.J. (Crl.) 243 (Poppys Spinning Mills (P) Ltd., represented by Authorised Agent, P.Murugan, Tirupur v. C.Visalakshi, Proprietrix, Sri Karpaga Vinayagar Textiles, Tirupur and another);

5.Learned counsel for the respondents/accused submits that second respondent herein is neither the signatory nor the borrower. So the trial Court has rightly acquitted the second respondent/second accused. In respect of first respondent/first accused is concerned, notice sent by the appellant to her is defective and imperfect and there was no specific payment made and the same was rightly considered by the trial Court. It is further submitted that the appellate Court cannot set aside the judgment of acquittal, unless the judgment of acquittal is perverse. If two views are possible, the view favouring the accused shall be taken into consideration. Therefore, he prayed for dismissal of the appeal.

6.Heard the submissions made by both sides and perused the materials available on record.

7.According to the appellant/complainant, on 14.03.2002, the mother of the first respondent borrowed a sum of Rs.30,000/- from her and on the same day evening, the first respondent has borrowed a sum of Rs.30,000/- from her, for which, she executed the promissory notes Exs.P2 and P3. On 06.06.2002, first and second respondents, who are wife and husband respectively, had executed security deed Ex.P4 for the amount of Rs.60,000/-. Subsequently, first accused borrowed Rs.1,00,000/- from the appellant on 23.07.2002. Again on 17.10.2002, first respondent borrowed Rs.50,000/- and executed promissory note Ex.P8, which was attested by second accused and to discharge the same, Ex.P9 cheque bearing No.695821, dated 27.11.2003 for a sum of Rs.15,000/- was issued. When the appellant presented Ex.P9 cheque for encashment, it was returned as “funds insufficient”. Hence, the appellant/complainant issued Ex.P13 legal notice to both the accused and after receiving notice, respondents 1 and 2 herein did not sent any reply.

8.Now the point to be decided is that whether the judgment of acquittal made by the trial Court in respect of second respondent/second accused is sustainable? It is pertinent to note that Ex.P1 power of attorney deed was executed by the complainant to her husband and Exs.P2 and P3 are promissory notes. Ex.P4 is the security deed allegedly executed by both the respondents and the endorsement made on Ex.P4 is Ex.P5. Ex.P6 is the document written by the first accused on 23.07.2002 stating that she borrowed Rs.1,00,000/- from the complainant. Ex.P7 is the letter written by the first accused to the complainant requesting money. Ex.P9 is the disputed cheque allegedly issued by the first accused. Since Ex.P9 was returned as "funds insufficient", the appellant/complainant sent a legal notice Ex.P13 to both the accused.

9.As per Section 138 of the Act, which deals with dishonour of cheque for insufficiency of funds in the account, "any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid." In the case on hand, Ex.P9 cheque has been issued only by first accused in her personal capacity and the account also stands in the name of the first respondent. It is pertinent to note that the second respondent is neither signatory to the cheque Ex.P9 nor the account holder. In such circumstances, the trial Court has rightly acquitted the second respondent/second accused on the ground that he is neither the signatory nor the borrower and offence under Section 138 of the Act is not made out against him. In my opinion, the judgment of acquittal passed by the trial Court in respect of the second respondent/second accused does not warrant any interference and hence, it is hereby confirmed.

10.Now the point to be decided is that whether the judgment of acquittal made by the trial Court in respect of first respondent/first accused is sustainable? The trial Court has acquitted the first accused on the ground that no notice was issued under Section 138(b) of the Act and the notice sent by the appellant is defective in nature.

11.At this juncture, it is appropriate to consider the decisions relied upon by the learned counsel for the appellant:

(i) In CDJ 2000 SC 070 (Suman Sethi v. Ajay K.Churiwal), wherein it was held that for recovery of other demands as compensation, costs, interest etc., a civil proceeding will lie. Therefore, if in a notice any other sum is indicated in addition to the "said amount", the notice cannot be faulted, as stated above. It is appropriate to extract para-9 to 11, which are extracted hereunder:

> "9.In Section 138 legislature clearly stated that for the dishonored cheque the drawer shall be liable for conviction if the demand is not met within 15 days of the receipt of notice but this is without prejudice to any other provision of the Act. If the cheque amount is paid within the above period or before the complaint is filed the legal liability under Section 138 will cease and for recovery of other demands as

compensation, costs, interest etc., a civil proceeding will lie. Therefore, if in a notice any other sum is indicated in addition to the "said amount" the notice cannot be faulted, as stated above.

10.Drawing our attention to Section 139 of the Act, Mr. Dhawan has urged that in the notice in addition to ''said amount" other demands are made the presumption as contemplated under Section 138 would operate. We are unable to accept the submission of the learned senior counsel as Section 139 has to be read with Section 138 and reading both the Sections together it would appear that presumption would arise only in respect of the "said amount".
We extract below the relevant portion of notice :

"I, therefore, by means of this notice call upon you to pay the amount of Rs.20,00,000/- along with the incidental charges of Rs.1,500/- spent on the cheque on its presentation and also Rs.340/- as notice charges within a period of 15 days from the date of receipt thereof, failing which my clients shall take necessary legal steps against you holding you liable for all costs and consequences thereof, which please note.”

11.In the notice in question the "said amount" i.e. the cheque amount has been dearly stated. Respondent No. 1 had claimed in additional to the cheque amount, incidental charges and notice charge. These two amounts are severable. In the notice it was clearly stated that on failure to comply with the demand necessary legal steps will be taken up. If respondent No. 1 had paid the cheque amount he would have been absolved from the criminal liability under Section 138. Regarding other claims, a civil suit would be necessary.”

12.In the case on hand, the last paragraph in page No.5 of Ex.P13/legal notice, it was stated as follows:

“Notice is therefore given to you calling upon you to pay the entire loan amount due to my client including the value of dishonored cheque with the accrued interest within 15 days of receipt of this notice, failing which, my client will take appropriate legal steps against all of you including the criminal prosecution as aforesaid against you Nos.1 and 2 and you will have to face the consequences thereof. “

In the above paragraph, it was specifically mentioned that notice has given to the accused calling upon them to pay entire loan amount due to the appellant including the value of dishonored cheque with the accrued interest within fifteen days from the receipt of the notice. But the amount due has not been mentioned, whereas in the above decision as cited supra, in the notice, the cheque amount was clearly stated. So the above decision is not applicable to the facts of the present case.

13.The above decision has been followed in 2003 (4) CTC 252 (K.R.Indira v. Dr.G.Adinarayana), which was followed in 2005 M.L.J. (Crl.) 243 (Poppys Spinning Mills (P) Ltd., represented by Authorised Agent, P.Murugan, Tirupur v. C.Visalakshi, Proprietrix, Sri Karpaga Vinayagar Textiles, Tirupur and another), in para-7, it was held as follows:

> "7.Now, at this stage, it would be worthwhile to make mention of the decision of the Supreme Court reported in K.R.Indira v. Dr.G.Adhinarayana, (2003) 4 C.T.C. 252, wherein it has been held thus:
>
> "Demand for amount covered by bounced cheque is conspicuously absent in notice issued. Notice is imperfect, since it does not contain any demand for payment of cheque amount. Complaint filed by the complainant and based on imperfect notice issued to drawer of cheques is not maintainable." .. .. "

14.Considering the above decisions along with the legal notice, in the earlier para of legal notice, it was stated that the cheque was issued for a sum of Rs.15,000/-, but in the later para, it was stated that notice has given to the accused calling upon them to pay entire loan amount due to the appellant including the value of dishonored cheque with the accrued interest within fifteen days from the receipt of the notice. It clearly shows that the appellant has not mentioned any amount. In the notice itself if the appellant has specified the amount, the notice would be perfect. Under such circumstances, since the appellant has not specified the amount, notice sent by her to the first accused is imperfect. The trial Court has rightly acquitted the first accused stating that since notice under Section 138 of the Act is defective and imperfect, complaint under Section 138 of the Act itself is not maintainable. Therefore, I am of the considered opinion, the judgment of acquittal passed by the trial Court in respect of first respondent/first accused does not warrant any interference and it is hereby confirmed.

15.Considering the aforestated circumstances of the case, I am of the view, the trial Court has considered all the aspects in proper perspective and came to the correct conclusion and rightly acquitted both the respondents/accused. So the judgment of acquittal passed by the trial Court does not warrant any interference and it is hereby confirmed and this appeal is dismissed as devoid of merits.

16.In fine,

- This Criminal Appeal is dismissed, confirming the judgment of acquittal dated 12.02.2007 in C.C.No.291 of 2004 on the file of the learned Judicial Magistrate, Mettupalayam.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Kj

To

1. The Judicial Magistrate, Mettupalayam.

2.-do- Thro The Chief Judicial Magistrate, Coimbatore District.

3. The Public Prosecutor, High Court, Chennai.

1 cc to Mr.S.Gunalan ,Advocate, SR.No.8050

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