

HON'BLE SRI JUSTICE A.SHANKAR NARAYANA

CRIMINAL APPEAL No.735 of 2008

JUDGMENT:

Aggrieved by the judgment dated 20.08.2007 in C.C.No.439 of 2002 on the file of the Chief Metropolitan Magistrate, Visakhapatnam, acquitting the first respondent – accused, for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act'), the appellant – complainant preferred the instant appeal.

Facts, necessary for disposal of the instant appeal, briefly narrated are as follows:

The first respondent is the father of the friend of the appellant. Due to intimacy, a sum of Rs.4.00 lakhs was borrowed by the first respondent for business purpose agreeing to repay the same at 36% p.a. A pronote was duly executed on 30.01.2000. Later, on the demand made by the appellant, the first respondent issued a cheque bearing No.577911 dated 20.12.2001 drawn on State Bank of India, Steel Project Branch for Rs.6,68,000/- in favour of the appellant. When the said cheque was presented through his banker for clearance, the same was dishonoured with an endorsement 'insufficient funds' on 20.12.2001; and, when the cheque was re-presented on 26.12.2001, it was again dishonoured with the same endorsement on 28.12.2001. The appellant, therefore, got issued a notice dated 10.01.2002, through his counsel which was received by the first respondent on 11.01.2002, who answered it on 20.01.2002 with incorrect allegations and also pleading forgery. Due formalities were observed by the learned Magistrate in order to prove the accusation levelled against the first respondent.

The appellant, besides examining himself as PW.1, has examined the Bank Managers of both the banks as PWs.2 and 3 and marked Exs.P.1 to P.10. The respondent, besides examining himself as DW.1, examined the handwriting expert as DW.2 and marked Exs.D.1 to D.4. The learned Magistrate, observing the variance between the plea and proof in the case advanced by the appellant and also pointing out non-examination of the son of the first respondent, Amar; referring to the evidence of PWs.2 and 3 and observing in paragraph '19' that

the complainant failed to establish about the transaction; referring to the plea of forgery, evidence of DW.2, and the opinion of DW.2 contained in Ex.D.4; and the decisions on which reliance was placed by the respective parties, held, in paragraph '35', that the accused was entitled for acquittal and, thereby, acquitted the accused – first respondent.

The said judgment is under challenge in the instant appeal preferred by the complainant contending in the grounds that the approach of the learned Magistrate in holding that the appellant failed to establish about passing of consideration, issue of a cheque and execution of pronote followed by issue of a cheque by the first respondent – accused were all matters in respect of which presumption inlaid under Section 139 of the Act, and the observation of the learned Magistrate that the appellant ought to have examined the son of the first respondent as a prosecution witness is not proper. It is also stated that the learned Magistrate, somehow, overlooked that the cheque was dishonoured not for the reason that the signature on the cheque did not tally with the signature of the first respondent but for the reason that there was no balance in the account. It is also stated that the finding recorded by the learned Magistrate basing on the opinion evidence of the handwriting expert is improper. It is also stated that the learned Magistrate ought not to have accepted the case that a cheque leaf was stolen by the appellant without there being any basis on record. Hence, sought to set aside the judgment under appeal.

Heard Sri K.Somakonda Reddy, learned Counsel for the appellant, and Sri A.P.Venugopal, learned Counsel for respondent No.1.

Learned counsel for the appellant contends that the learned Magistrate, without reference to the presumption inlaid by the provisions of Section 139 of the Act, and without recording any definite finding on the evidence adduced by the appellant, not right in rejecting the case of the appellant simply observing that there was variance in the evidence portion and the complaint averments. His next submission is that, though, a plea of forgery was put-forth by the first respondent and the evidence of DW.2 was also recorded, except adverting to the opinion tendered by him, no finding was recorded thereon. It is also contended that, though, a plea of alibi is put- forth by the first respondent, it was not adverted to at all and what is to be found from the judgment is nothing but narration of events, decisions relied on by both sides and recording the

acquittal stating that the accused is entitled for acquittal in view of the discussion mentioned therein and, therefore, the acquittal recorded by the learned Magistrate is unsustainable.

On the other hand, the contention of the learned Counsel for the first respondent that the learned Magistrate has referred to the inconsistent versions in the averments and the evidence let in by the appellant, and since the very case of the appellant reflects that the amount of Rs.4.00 lakhs was alleged to have been paid to the son of the first respondent, Amar, presumption would not arise and, therefore, the acquittal recorded by the learned Magistrate cannot be faulted with, more particularly, when the evidence of expert, and his opinion as in Ex.D.4, is forthcoming.

Perused the judgment under challenge and, incidentally, the evidence let in by both sides. The judgment would reflect that the learned Magistrate has not recorded any definite finding at all. In fact, the presumption inlaid by the provisions of Section 139 of the Act was not at all adverted to, leaving apart whether it attracts or not by assigning reasons therefor. Even the so-called variance pointed out by the learned Magistrate is without any elaboration, and whether it would affect the case projected by the appellant or not is not finding place. Further, when a plea of forgery is put-forth by the first respondent, mere advertence to the evidence of DW.2, who is a handwriting expert, and the opinion tendered by him under Ex.D.4, there is no reference to the arguments advanced by the learned counsel on either side and no definite finding was recorded thereon. Likewise, even the plea of 'alibi' put-forth by the first respondent was just incidentally referred to in paragraph '21', though, not in specific terms but referring to events without any elaboration and without tendering any finding thereon. Thus, what is to be found from the judgment is nothing but a mere recording of acquittal holding that the accused is entitled for acquittal by referring to the events, the evidence and the authorities without answering the respective stands taken by both sides and without recording definite findings and arriving at the conclusion based on such findings. Thus, it is a fit case where the matter requires to be remitted as it reflects total lack of appreciation of evidence and appreciation of legal principles.

Hence, the matter is remitted to the Trial Court by setting aside the judgment

dated 20.08.2007 in C.C.No.439 of 2002 on the file of the Chief Metropolitan Magistrate, Visakhapatnam. The Trial Court is directed to dispose of the matter by affording opportunity to tender arguments by both sides and recording detailed findings thereon, as expeditiously as possible, preferably within a period of six months from the date of receipt of a copy of the order.

The Criminal Appeal is, accordingly, allowed.

Miscellaneous petitions pending, if any, shall stand dismissed.

A.SHANKAR NARAYANA,J

Date: 11.03.2015

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