

THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT

CRIMINAL APPEAL No.981 of 2016

JUDGMENT:

Vide the present appeal, the appellant/complainant being aggrieved has challenged the judgment dated 01.06.2016 passed in C.C.No.21 of 2015 on the file of II Special Magistrate, Vijayawada, whereby respondent No.1/accused has been acquitted.

Learned counsel appearing on behalf of the appellant/complainant submits that the Court below ought to have considered that non-filing of income tax returns and not mentioning of the transaction in the said returns is not at all fatal to the case of the appellant/complainant, and it cannot be a ground to acquit the respondent No.1/accused.

Learned counsel further submits that the Court below erred in observing that the appellant/complainant has failed to prove his financial capacity, much less, to lend an amount of Rs.5 lakhs on the date of Ex.P1. He submits that the appellant/complainant has discharged his burden and the burden has been shifted to the respondent No.1/accused, who has failed to discharge his burden as mandated under the provisions of Negotiable Instrument Act (N.I. Act).

A perusal of record reveals that the appellant/complainant filed complaint under Section 190 and 200 Cr.P.C., for the offence under Section 138 and 142 of N.I. Act against the respondent No.1/accused before II Special

Magistrate, Vijayawada, to punish the respondent No.1/accused, according to law, and also to award compensation provided under Section 357 Cr.P.C.

The case of the appellant/complainant is that respondent No.1/accused borrowed an amount of Rs.5 lakhs from him and executed promissory note to that effect. Thereafter, he did not choose to pay any amount, on the demand made by the appellant. Consequently, the respondent No.1/accused issued a cheque bearing No.285009 for Rs.5 lakhs towards part payment of said debt, drawn on the Swasakthi Mercantile Co-operative Bank, Vijayawada, and assured that the same will be honoured on presentation. Accordingly, the appellant presented the cheque for collection, however, it was dishonoured due to "Funds insufficient". Thereafter, after doing legal rituals, the appellant/complainant filed the aforesaid case and examined PW.1 himself. He also filed chief affidavit and got marked Exs.P1 to P5 in support of his case. He also examined CW.1 on his behalf.

The specific case of the respondent No.1/accused is that the cheque involved in question is one among the other cheques obtained by the appellant/complainant along with another in C.C.No.516 of 2015 that is at the time of obtaining mortgage loan, only for the security purpose of the said loan. In fact, he never borrowed any amount from the appellant towards part payment of the said debt. So in view of all the

above, more particularly, the defence set up by the accused that the appellant/complainant filed a false case against the accused basing on the empty cheque available with him. The appellant/complainant has no sufficient financial capacity to lend the amount to the accused. Moreover, the income tax returns does not show that the amount lend by the appellant to the respondent No.1/accused.

It is not in dispute that on the cheque of respondent No.1/accused signature is genuine, however he disputing on the liability. The learned trial Court observed that the PW.1 by filing his chief affidavit, he reiterated all the facts mentioned in the complaint. More particularly, he stated that on 10.08.2012, the respondent No.1/accused along with her husband, borrowed an amount of Rs.5 lakhs from him, for their family expenses, and executed a promissory note to that effect, agreeing to repay the same with interest @ 24% p.a. Despite several demands, the respondent No.1/accused issued a cheque, which is marked as Ex.P2.

In the cross-examination of PW.1, the main attack from the accused side is that the accused never borrowed any amount from the complainant much less Rs.5 lakhs and never issued any cheque, much less, Ex.P2 cheque, which is alleged to have been issued to discharge the said debt is concerned, at first, with regard to the financial capacity of the complainant, to lend the amount of Rs.5 lakhs. PW.1 further deposed that he is working as Marking Executive in V.N.S.

Company since 10 years and he used to get salary of Rs.15,000/- after deductions. He further deposed that he paid the amount to the accused by way of cash and he accumulated the said Rs.5 lakhs which was given to the respondent No.1/accused by way of saving the same from his rents, salary and some amount which was released from deposits amount kept in the court.

The Court below further observed that regarding the sources of income stated by the appellant/complainant, he did not disclose and filed any scrap of evidence to show that he got salary of Rs.15,000/- per month after deductions. So also failed to prove that saving the same from his rents, salary and some amount, which was released from deposits, the amount kept in the Court. So, in the absence of any such proof has been filed by the appellant/complainant, the huge amount much less Rs.5 lakhs appears to unbelievable one.

Learned Court below also observed, he admitted that he is Income tax assessee and also admitted that he used to mention of all financial transactions in his returns. However, he failed to produce his income tax returns. In such a case, what prevent him to mention the debt covered under Ex.P1 through his income tax returns. On the other hand, in his cross- examination, he clearly admitted that he has not mentioned the debt recovered under Ex.P1 transaction in income tax returns. So, it is a fatal to the appellant/complainant keeping in view the decision relied on by the

accused reported in 2009 CrI.L.J. 3777 wherein the amount advanced by the complainant to the accused is large amount and is not repayable within few months. The failure to disclose the amount in income tax returns or books of accounts of the complainant may be sufficient to rebut the presumption under Section 139 of the said Act.

Moreover, CW.1 in his chief evidence categorically deposed that Ex.P2 was issued by their bank to the account holder. However, in Ex.P2, there is no rubber stamp on both sides. The account cheque pertaining to the account holder from 04.12.2009 to 15.02.2016, which is marked as Ex.X1. Ex.P2 cheque was not came to their bank for the purpose of collection of their statement account. So, once the CW.1 himself admits that Ex.P2 was not given to the appellant/complainant for the purpose of collection, as per their statement of account, under Ex.X1, it goes against the appellant/Complainant. Therefore, the evidence of CW.1 goes in favour of respondent No.1/accused. Moreover, in the cross-examination of CW.1, nothing was elicited to disbelieve his evidence. Therefore, his evidence also very much helps the respondent No.1/accused side than the appellant/complainant side.

The statutory notice required under Section 138 (b) of the N.I.Act, served on respondent No.1/accused is concerned, the appellant/complainant has admittedly relied on Ex.P4

and Ex.P5. On this aspect, the signature was not found place in Ex.P5.

In view of the above discussion, the complainant failed to prove his financial capacity, much less to lend amount of Rs.5 lakhs as on the date of Ex.P1, non-examination of attester and scribe, non-filing of any Income Tax Returns, showing the debt covered under Ex.P1, discrepancy with regard to the mode of payment under Ex.P1, paid to the accused that is two versions of PW.1, with Ex.P4, the evidence of DW.1, the serial number of the cheque involved in the present case along with C.C.No.516 of 2015 are side by side in nature and in view of the decisions cited supra, the Court below concluded that the complainant has failed to prove the legally enforceable debt existing between him and the respondent No.1/accused.

The appellant failed to point out the illegality or perversity in the judgment, whereby respondent No.1/accused has been acquitted.

Therefore, I find no merit in the present appeal and the same is accordingly dismissed.

Pending miscellaneous petitions, if any, shall stand closed.

JUSTICE SURESH KUMAR KAIT.

Date : 20-12-2016

Note: **L.R. Copy to be marked.**

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