

THE HON'BLE DR. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No.266 OF 2007

JUDGMENT:

This appeal filed in view of acquittal recorded against the accused for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act'), in CrI.A.No.92 of 2005 by the III Addl. District & Sessions Judge, Ongole, on 20.07.2006.

2. The parties are hereinafter referred as arrayed in the original C.C.No.35 of 2005.

3. Learned counsel for the complainant, who is the appellant herein would submit that the accused borrowed an amount of Rs.75,000/- agreeing to repay the same with interest at 24% p.a., and executed a promissory note on 28.10.2003 and promised to repay the same on demand. Thereafter, to discharge the said debt, the accused has given a post dated cheque, dated 01.04.2004 for Rs.84,000/-. Thereafter, the complainant made several requests to pay the amount. The accused did not pay the same. When the cheque was presented to the bank, it was returned with an endorsement 'funds insufficient'. A legal notice was issued in terms of Section 138 of the Act. Even then the amount was not paid. The accused also did not give any reply notice.

4. To substantiate the case, the complainant was examined as P.W.1 and also examined P.W.2 and got marked Exs.P1 to P5. No evidence either oral or documentary was adduced by the accused.

5. The learned Judl. Magistrate of I Class, Special Mobile Court, Ongole, vide judgment, dated 09.08.2005 in

C.C.No.35 of 2005 found that the accused has committed the offence punishable under Section 138 of the Act and accordingly, convicted and sentenced the accused for the said offence. The accused was sentenced to undergo simple imprisonment for a period of six months and to pay an amount of Rs.84,000/- to the complainant towards compensation. On appeal before the Sessions Court in CrI.A.No.92 of 2005, the Court of Sessions was pleased to acquit the accused for the offence punishable under Section 138 of the Act on 20.07.2006.

6. Learned counsel for the appellant-complainant would submit that the Sessions Court held on examining of bank account of the complainant that the complainant has no capacity to pay the amount is erroneous. There is ample evidence to prove the guilt of the accused for the offence punishable under Section 138 of the Act and ultimately prayed to confirm the conviction and sentence recorded in C.C.No.35 of 2005.

7. On the other hand, learned counsel for the accused would submit that the accused did not borrow any amount from the complainant and did not issue any cheque to the complainant. In fact, the cheque was given to one Muppiri Ravi Kumar. In collusion with the said Ravi Kumar, a false complaint is filed before the Judl. Magistrate of I Class against the accused for the offence under Section 138 of the Act.

8. As seen from the record, the accused did not adduce any oral evidence and did not file any documents before the trial Court. The evidence of P.W.1 is that an amount of Rs.75,000/- was given to the accused under a

promissory note, dated 28.10.2003 with interest at 24% p.a., and the said document is marked as Ex.P1 and Ex.P1 corroborates with the oral evidence of P.W.1 and contents of complaint filed before the Judl. Magistrate of I Class. Ex.P2 is the returned cheque issued for Rs.84,000/- on 01.04.2004. As per the evidence on record, when the said cheque was presented for collection on 13.04.2004, it was returned with an endorsement 'funds insufficient'. The memo issued by the bank concerned is marked as Ex.P3. Ex.P4 is the legal notice, dated 23.04.2004, which corroborates with the evidence of P.W.1 and also specific mention of demand of payment of Rs.84,000/- relating to the dishonour of cheque. So, as per the record before this Court, there is no reply to the said legal notice. There is also record to show that the said legal notice was served on the accused. There is also evidence of P.W.2, who deposed that he is a witness to the subject transaction and corroborated the evidence of P.W.1. He has also specifically deposed about the execution of Ex.P1-promissory note by the accused in favour of the complainant and he has also attested the said pronote. Ex.P1-pronote bears the signature of P.W.2. P.Ws. 1 and 2 in cross-examination denied that they were deposing false. They have reiterated what they have stated in their chief examination.

9. As per the evidence of P.W.1, the cheque marked as Ex.P2 was given in order to repay the amount borrowed under Ex.P1- pronote. It is not the case of the accused that Ex.P1 was forged or fabricated for this purpose. No evidence is adduced even to substantiate the same. Even the accused did not deny his signature on Ex.P2-cheque.

10. The contention of the accused is that one Muppiri Ravi Kumar handedover the cheque to the complainant and the complainant fabricated false case against the accused. The said Ravi Kumar was not examined. Even the accused did not give reply mentioning his defence put forth before the trial Court. The averments in Ex.P4 satisfy all the requirements under Section 138 of the Act. It is also substantiated that the cheque was returned for want of sufficient funds in the account of the accused and had the defence set up by the accused is true, the accused would have examined the witnesses to substantiate his defence. There is no reason for P.W.2 to falsely depose about the execution of the pronote. The Sessions Court on appeal held that on verification of the bank account of the complainant, at any point of time, the complainant did not possess Rs.75,000/- in his account. The net salary of the complainant is Rs.5800/- in the year 2003 and ultimately held that the complainant has no capacity to lend such huge amount of Rs.75,000/- and acquitted the accused for the offence under Section 138 of the Act.

11. In the cases of this nature, the complainant need not file their bank account to substantiate that they possess money to lend to other persons on the date of lending or before that. There is a clear and ample evidence on record of P.Ws. 1 and 2 that Ex.P1- pronote is genuine. The payment of Rs.75,000/- is established by leading cogent and convincing oral and documentary evidence. There is also record to show that the cheque was given in favour of the complainant for Rs.84,000/- to discharge the debt. The Sessions Court ought not to have taken the said view. The conclusion of the Sessions Court is not based on

oral and documentary evidence. Such kind of conclusions are not sustainable. Learned Judl. Magistrate of I Class having appreciated all the facts and circumstances held that the complainant has proved that the accused borrowed an amount of Rs.75,000/- from the complainant under Ex.P1 and to repay the said amount, the accused has given the cheque under Ex.P2 for Rs.84,000/- and when the said cheque was presented in the bank for collection, it was returned with an endorsement 'funds insufficient' in the account of the accused. There is valid statutory notice issued to the accused. Ex.P5 is the postal acknowledgement to show service of the said notice and the complainant clinchingly established the accusation against the accused for the offence under Section 138 of the Act and after hearing the accused with regard to sentence, the trial Court rightly convicted and sentenced the accused to suffer simple imprisonment for six months and to pay an amount of Rs.84,000/- towards compensation under Section 357 (3) Cr.P.C. This finding is based on record and there is nothing to take a different view. Therefore, the acquittal recorded by the learned III Addl. Sessions Judge, Ongole, dated 20.07.2006 in CrI.A.No.92 of 2005 is set aside and the judgment passed by the learned Judl. Magistrate of I Class, Special Mobile Court, Ongole, in C.C.No.35 of 2005, dated 09.08.2005 is restored.

12. Accordingly, the Criminal Appeal is allowed. Miscellaneous petitions, if any pending in this appeal shall stand closed.

DR.SHAMEEM AKTHER, J

DATED: 16-11-2017

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