IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.11.2018

CORAM:

THE HON'BLE MR.JUSTICE M.V.MURALIDARAN

Crl.A.Nos.468 & 469 of 2009

L.Babu ... Appellant in both the Appeals

Vs.

B.Vijayaragavan ... Respondent in both the Appeals

Common Prayer: Criminal Appeals filed under Section 378 of Cr.P.C., against the order made in C.C.Nos.783 and 772 of 2005 on the file of Judicial Magistrate No.2, Coimbatore dated 07.07.2009.

(In both the Appeals)
For Appellant : Mr.Palaniselvaraj

For Respondent : Mrs.S.Sujatha
Legal Aid Counsel

ORDER

These criminal revision petitions were preferred by the appellant/complainant against the order made in C.C.Nos.783 and 772 of 2005 on the file of learned Judicial Magistrate No.2, Coimbatore dated 7.7.2009.

2.Brief case of the appellant/complainant:

The facts of the case is that the appellant/complainant doing gold smith work and also sale of gold ornaments. Whereas, the respondent/accused and his sister Usha Mythili are known to the appellant/complainant and his family and both of them had business dealings with the appellant/complainant towards purchase of gold ornaments. During such course of business transactions from 7.8.2002 to 16.8.2002 the sister of the respondent/accused was liable to pay a sum of Rs.5,75,046/- out of the said business transactions and also paid a sum of Rs.1,26,126/- in part and there was a balance of Rs.4,48,920/-

liable to be paid by respondent/accused sister Usha Mythili and she executed a letter of undertaking on 15.9.2004 infavour of the appellant/complainant agreeing to discharge the sum of Rs.4,48,920/- within a period of 60 days from 15.9.2004 and also issued 6 cheques drawn on Indus Ind Bank Ltd, Avinashi Road, Coimbatore. The appellant/complainant presented the cheques for collection by his bank State Bank of Mysore, Tatabad Branch, Coimbatore on 10.3.2005 and the same was returned as dishonoured on 11.3.2005 along with bankers memo with an endorsement stating Insufficient Fund and Account Closed. The appellant/complainant issued a statutory legal notice to the respondent/accused on 28.3.2005 and the same was received by the respondent /accused and not repay the amount or reply. The appellant/complainant preferred a complaint under section 138 of Negotiable Instruments Act. One complaint filed in C.C.No.772 of 2005 against the dishonor of cheques Nos.652377 and 652378. Another complaint was filed against the dishonor of cheques Nos.652379,652380 and 652381 in C.C.No.783 of 2000.

3.During the trial, in C.C.No.772 of 2005, the appellant/complainant examined himself as PW1 and marked Exhibits-P1 to P15. The respondent/accused examined D1 to D3 and marked exhibit D1 on his side.

4.In the second case, in C.C.No.783 of 2005, the appellant/complainant examined herself as PW1 and marked Exhibits-P1 to P3. The respondent/accused witnesses were examined as DW1 to DW3 and Exhibit-D1 was marked.

5.After the trial, on appreciating the materials available on record the trial Court acquitted the respondent/accused for the offences under section 138 of Negotiable Instruments Act in both the cases. Aggrieved over the same, the appellant/complainant preferred this criminal appeal.

6.Rival Submissions in both cases:

The learned counsel for the Appellant/Complainant submits that the learned Magistrate ought to have issue in a proper perspective as to whether the cheque was issued for any legal claim which bounced or returned as account closed or insufficiency of funds. The law requires only there shall be issuance of cheque for legitimate purpose and bounced or returned the same due to the above reasons. That be so, the finding of the Learned Magistrate that no reason whatsoever as to why 5 out of 6 cheques drawn on same day which is highly irrelevant thereby the Learned Magistrate has exceeded his jurisdiction without applying the objects and principles of law and as such the same is liable to be set aside.

7.The learned counsel for the Appellant/Complainant submits that it is settled proposition of law by the Hon'ble Supreme Court that the penal provisions of Negotiable Instrument Act would be attracted even for the cheque returned or bounced for the reason account closed. The only issue in law has to been seen and decided as to whether the ingredients of section 138 are made out or not and such being the legal position, the finding of the learned Judge that the appellant/complainant having decided to file a single case, all the 6 cheques have been presented for encashment having known that the account closed is beyond the scope of the issue on hand and hence such finding is highly arbitrary and has no legal sanctity and as such the impugned order is liable to be set aside.

8.The learned counsel for the Appellant/Complainant submits that the learned Magistrate ought to have seen and considered as to whether the signature is admitted by the respondent and as such the legal presumption shall have to be inferred as to whether the signature is admitted by the accused. The presumption shall be in favour of payee of cheque could be drawn once signature in such cheque is admitted by drawer of cheque. In this case, the signature of the respondent/accused is not disputed and in such circumstances, the order of the learned Magistrate in acquitting the respondent/accused is ex-facie illegal and liable to be set aside.

9.The learned counsel for the Appellant/Complainant submits that the respondent/accused in order to settle the balance amount payable for and on behalf of his sister has executed a promise letter dated 15.9.2004 under Ex.A2 (C.C.No.772 of 2005) in which the respondent/accused has promised and agreed to pay the amount of Rs.4,48,920/- within 60 days and in pursuance of the same 6 cheques have been drawn and issued which is reflected with cheque numbers in Ex.A2 itself and such admitted vital document has not been dealt with by the learned Magistrate in a proper perspective with judicial mind and as such the order of the learned Magistrate is liable to be set aside in law on the ground on non-application of mind.

10.The learned counsel for the Appellant/Complainant submits that the learned Magistrate ought to have seen that under Ex.A2 the respondent/accused with clear and categorical terms admitted the purpose and issuance of cheques bearing numbers, which being direct evidence without any ambiguity no question of burden or onus on the appellant/complainant to prove anything. Presumption in favour of payee of cheque can be drawn once signature in such cheque is admitted of drawer of cheque and such being the settled proposition of law, the order of the learned Magistrate is nothing but capricious, ex-facie illegal and as such the same is liable to be set aside.

11.The learned legal aid counsel appearing for the respondent/accused supported the findings of the trial Court and sought for dismissal of the appeal.

12.I heard Mr.Palaniselvaraj, learned counsel for the appellant and Mrs.S.Sujatha, learned Legal Aid Counsel for the respondent in both the appeals and perused the entire materials available on record, since evenafter receipt of the notice in this case, the respondent has not appeared and hence this Court appointed the Legal Aid Advocate.

13.In the case on hand, the learned trial Court miserably failed to follow the provisions and the law of presumptions envisaged in the Negotiable Instruments Act.

14.At the very outset, it may be added here that the jurisdiction of the appellate Court in case of acquittal, was determined by the Hon'ble Apex Court in a celebrated judgment of Ghurey Lal v. State of U.P. 2008 (10) SCC 450. Having considering the scope of Sections 378 and 386 of Cr.P.C. and a line of various judgments on the point, it was ruled as under (Para75):-

> "75. In light of the above, the High Court and other appellate Courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial Court's acquittal:
>
> 1. The appellate Court may only overrule or otherwise disturb the trial Court's acquittal if it has

"very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate Court would have "very substantial and compelling reasons" to discard the trial Court's decision. "Very substantial and compelling reasons" exist when:

i) The trial Court's conclusion with regard to the facts is palpably wrong;

ii) The trial Court's decision was based on an erroneous view of law;

iii)The trial Court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial Court in dealing with the evidence was patently illegal;

v) The trial Court's judgment was manifestly unjust and unreasonable;

vi) The trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial Court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate Courts must rule in favour of the accused."

Above being the legal position and evidence on record, now the short and significant question, though important, which invites an immediate attention of this Court and arises for determination in this case is as to whether the trial Court has committed such jurisdictional error to acquit the respondent and there are substantial and compelling reasons to set aside the judgment of acquittal or not in this respect?

15.Having regard to the contentions of learned counsel for petitioner, to me, the answer must obviously be in the positive, as the complainant has proved in this relevant connection and the present petition deserves to be allowed for the reasons mentioned here-in-below:

"As is evident from the record that the case of complainant from the very beginning was that both parties having business transactions. He used to borrow money from him for goldsmith. At the same time, the respondent had promised to re pay. Thereafter, the complainant filed the instant complaint against him in the indicated manner. The loan for transactions was allegedly advanced by the complainant to the respondent and it was stated to have been entered. No evidence, much less cogent, is forthcoming on record even to suggest remotely, how, when, in what manner, on what date, how much amount was advanced, by means of entries and how much balance amount remains to be paid."

16.These entries are only relevant under Section 34 of The Indian Evidence Act, 1872, that too, in case; the same were kept regularly in the course of business. At the same time, such entries must be kept in conformity with some known system of accountancy, either in the official language or customary language well known to the parties and not otherwise.

17.Sequelly, there is yet another aspect of the matter, which can be viewed entirely from a different angle. The case set up by the complainant in his complaint was that he used to advance loan to the respondent for in business purpose from time to time and he was required to repay the loan along with interest.

18.A complaint petition alleging commission of an offence under Section 138 of the Act must demonstrate that the following ingredients exist i.e.:

(a) a cheque was issued;

(b) the same was presented;

(c) but, it was dishonoured;

(d) a notice in terms of the said provision was served on the person sought to be made liable; and

(e) despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.

19.Therefore it is very clear that if (a) a cheque was issued; (b) the same was presented; (c) but, it was dishonoured; (d) a notice in terms of the said provision was served on the drawer and (e) if he fails to comply, then the offence is said to have been committed.

20.I do agree that the burden of proof lying on the accused required to be discharged by preponderance of probability and nothing more. However, the learned Judicial Magistrate has not discussed any evidence relating to the legal presumption and in fact has shifted the burden on the holder.

21.In my opinion, the trial Court has not given any finding on the other issues but has mainly considered the validity of the notice under Section 138(b) of the Act and the presumption. When the appreciation of evidence and the findings suffer from patent erroneous approach and the findings are perverse, the High Court can surely interfere.

22.In the result:

(a) both the criminal appeals are allowed and the C.C.Nos.783 and 772 of 2005 on the file of the learned Judicial Magistrate No.2, Coimbatore dated 07.07.2009, are set aside;

(b) the respondent/accused is convicted and sentenced for six months Simple Imprisonment for both the cases and to pay a fine of Rs.5,000/- to the appellant/complainant;

(c) the respondent/accused is directed to pay a sum of Rs.4,48,920/- as compensation to the appellant/complainant;

(d) the learned Judicial Magistrate No.II, Coimbatore is directed to take steps against the accused.

23.The Legal Aid Authority attached to this Court is directed to pay a sum of Rs.5,000/- to Smt.S.Sujatha, Legal Aid Advocate in both the appeals.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

vs
To

1.The Judicial Magistrate No.2, Coimbatore.

2.The Chief Judicial Magistrate,Coimbatore

copy to
1.The Legal Aid Authority, High Court ,Madras

2. The section officer,
Criminal Section,
High court
Madras

+2ccs to Mrs.S.Sujatha , Advocate SR.No. 78907
+1cc to Mr.Palaniselvaraj , Advocate SR.No. 79415

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A.SK(22/03/2019)