IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2018

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THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Crl.A.No.487 of 2009

K.Senthil Vigneshwar ... Appellant

Vs.

P.Ravichandran ... Respondent

Prayer:
Appeal filed under Section 378 of Cr.P.C. seeking to call for the records and set aside the judgment of acquittal dated 13.03.2009 made in C.A.No.390 of 2008 on the file of learned Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore, reversing the judgment of the trial court dated 17.11.2008 made in C.C.No.729 of 2006 on the file of learned Judicial Magistrate No.3, Coimbatore.

For Appellant : Mr.P.M.Duraiswamy

For Respondent : Mr.N.Ponraj

J U D G M E N T

The appellant has filed this appeal seeking to call for the records and to set aside the judgment dated 13.03.2009 made in C.A.No.390 of 2008 by the learned Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore, reversing the judgment dated 17.11.2008 made in C.C.No.729 of 2006 by the learned Judicial Magistrate No.3, Coimbatore.

2.The appellant is the complainant and the respondent is the accused in C.C.No.729 of 2006. The case of the appellant is that on 02.01.2004, the respondent borrowed a sum of Rs.2,00,000/- from him and executed a pro-note for the same. The respondent also agreed to give interest at the rate of 24% for the borrowed amount. Thereafter, the respondent gave a cheque dated 15.02.2006 for a sum of Rs.3,00,000/- drawn from Bank of India. The said cheque when presented for collection was returned as 'insufficient funds' on 17.02.2006. Thereafter, the appellant sent a legal notice to the respondent on 11.03.2006 and the same was received by the respondent on

14.03.2006. Since the respondent neither gave reply for the legal notice nor repaid the amount, the appellant filed the case in C.C.No.729 of 2006 before the learned Judicial Magistrate No.3, Coimbatore.

3.On the side of the appellant/ complainant, one witness was examined and 6 documents were marked as exhibits. On the side of the respondent/ accused one witness was examined and no document was marked as exhibit.

4.After trial, the Trial Court convicted the respondent/ accused for the offence under Section 138 of the Negotiable Instruments Act and sentenced him to undergo 1 year simple imprisonment and to pay a fine of Rs.2,000/- in default to undergo 1 month simple imprisonment.

5.Aggrieved by the said conviction and sentence, the respondent/ accused filed C.A.No.390 of 2008 before the learned Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore. The said appeal was allowed, setting aside the conviction and sentence passed by the Trial Court. Aggrieved by the said acquittal of the accused, the appellant/ complainant has filed this appeal before this Court.

6.The learned counsel appearing for the appellant would submit that the lower Appellate Court arrived at a conclusion contrary to the tenure of the Act. The Act impose presumption in favour of the appellant. The appellant has to establish his case before the Trial Court and the said requirement was established before the Trial Court. After trial, the Trial Court correctly convicted the accused and imposed the punishment. However, the lower Appellate Court drawn rebuttable presumption in favour of the respondent/ accused and allowed the appeal filed by the respondent/ accused, which is un-sustainable in law.

7.The learned counsel appearing for the appellant would further submit that as per Section 138 of the Negotiable Instruments Act initial burden lies on the complainant to mark the instrument, Banker's memo and to issue legal notice to the accused. Thereafter, it is for the accused to disprove the case. The appellant clearly established his case by examining himself as P.W.1. On the side of the respondent one Sivaraman was examined as D.W.1. Both the appellant as well as D.W.1 endorsed the pro-note executed by the respondent/ accused. Hence, in order to clear the legally enforceable debt only, the cheque dated 15.02.2006 for a sum of Rs.3,00,000/- drawn from Bank of India was given by the respondent/ accused to the appellant. The said cheque when presented for collection was returned as 'insufficient funds' on 17.02.2006. Thereafter, the appellant sent legal notice to the respondent on 11.03.2006 and the same was also received by the respondent on 14.03.2006. The Trial Court after considering all these facts, rightly convicted the respondent/ accused for the offence under Section 138 of the Negotiable Instruments Act and imposed punishment. However, the lower Appellate Court on erroneous consideration has allowed the appeal filed by the respondent/ accused and acquitted the respondent/ accused which is un-sustainable one.

8.Per contra, the learned counsel appearing for the respondent/ accused would submit that the respondent examined one Sivaraman as D.W.1 before the Trial Court, who clearly deposed that there was no business transaction inbetween the appellant and the respondent and no amount was borrowed from the appellant/ complainant by the respondent/ accused. He would further submit that there was business transaction inbetween one Dhamodaran and the respondent, for which, the respondent issued cheque in favour of the said Dhamodaran. The said Dhamodaran set up the appellant for presentation of the cheque. The said facts were clearly proved by the respondent.

9.The learned counsel appearing for the respondent/ accused would further submit that the appellant in his examination has deposed that he did not know the residential address of the respondent and the said instrument was issued on the road side at Avinashi Road, near Residency Hotel. The said cheque was filled up by one Sivaraman who was a close relative of the appellant/ complainant. The said Sivaraman was examined as D.W.1. He would further submit that the appellant did not examine the said Dhamodaran.

10.In support of his contentions, the learned counsel appearing for the respondent/ accused relied upon the decision of this Court reported in (2018) 3 MLJ (Crl) 676 (Mohan Vs. Viswanathan), the relevant portion of which reads as follows:

> “17.PW1 in his evidence categorically states that Ex.P2 and Ex.P3 was filled up and given by the petitioner to the respondent at the time when he took the loan from the respondent. Whereas, PW2 who is the complainant states that in his evidence that Ex.P2 and Ex.P3 was filled up by another person called Mr.Nandhkumar and it is the same Mr.Nandhakumar, who has signed as one of the witness in the promissory note (Ex.P2). Therefore, there is an apparent discrepancy between the evidence of PW1 and PW2 with regard to the fundamental facts as to who filled up the contents of Ex.P2 and Ex.P3. The judgment relied upon by the learned counsel for the petitioner will clearly apply to the facts of the present case. In this

> case, since the execution of the cheque is under dispute, the person who filled up Ex.P2 and Ex.P3 gains a lot of significance. PW1 who admittedly is working as an accountant with the respondent gives a completely different version with regard to the person who filled up the promissory note and cheque which is in total variance with what PW2 has stated in his evidence. Therefore, this Court is of the considered view, that the respondent/ complainant has failed to prove the due execution of the cheque.
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> 20.From the evidence extracted above, it is clear that there is discrepancy even with regard to the actual amount that is due and payable by the petitioner.
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> 23.From the above evidence, it is very clear that a strong suspicion has been raised by the petitioner with regard to whether this loan transaction was actually shown in the Income Tax Returns.”

11.Heard the arguments advanced on either side and perused the materials placed on record.

12.Perusal of the entire documents discloses that the alleged promissory note was executed inbetween the appellant and the respondent on 02.01.2004 for a sum of Rs.2,00,000/-. However, the instrument, inorder to discharge the principal amount with interest, was issued in favour of the appellant on 15.02.2006 for a sum of Rs.3,00,000/-. Though the appellant has marked two documents namely, Ex.P1 and Ex.P2 to show the transaction inbetween the appellant and the respondent, Ex.P1 is the pro-note and Ex.P2 is the cheque. Apart from the above, no document was marked to show that there was continuous business transaction inbetween them from the year 2004 to 2006. Further, there is also no proper explanation for issuing the instrument for a sum of Rs.3,00,000/- and the same was omitted to be discussed by the Courts below.

13.This Court closely perused the evidence of the appellant and his cross-examination. The admitted fact is that the appellant did not know the residential address of the respondent/ accused and the said instrument was collected on the roadside at Avinashi Road, near Residency Hotel. In the same place, the instrument was filled up by one Sivaraman, who was the close relative of the appellant/ complainant. Though the pro-note discloses that a sum of Rs.2,00,000/- was advanced in favour of the respondent with interest at the rate of 24%, there was no demand from the appellant for collecting the interest and no documents were produced to substantiate the same. There is also no proper explanation for collecting the cheque for a sum of Rs.3,00,000/- from the respondent. In view of the above, this Court has no hesitation to come to the conclusion that there is no legally enforceable debt. The appellant did not prove the case that there is legally enforceable debt.

14.Considering all the above facts, I do not find any error in the judgment dated 13.03.2009 made in C.A.No.390 of 2008 by the learned Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore.

15.The criminal appeal is accordingly dismissed. The judgment dated 13.03.2009 made in C.A.No.390 of 2008 by the learned Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore, is hereby confirmed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District and Sessions Judge,
Fast Track Court No.III, Coimbatore.

2.The Judicial Magistrate No.3, Coimbatore.

+1cc to Mr.P.M.Duraiswamy, Advocate sr.no.77852
+1cc to Mr.N.Ponraj, Advocate sr.no.78418

Crl.A.No.487 of 2009

rgn(co)
nr 20/12/2018