IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.10.2018

DELIVERED ON : 13.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.1369 of 2003

S.Thiagarajan ... Appellant/Complainant

Vs

V.Sampath ... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378(4) of the Criminal Procedure Code, to set aside the judgment of acquittal dated 20.03.2003 passed in C.C.No.1546 of 2001 by the learned IX Metropolitan Magistrate Court, Saidapet, Chennai.

For Appellant : Mr.G.Walter Soloman

For Respondent : Mrs.S.Sujatha (Legal Aid Counsel)

JUDGMENT

This Criminal Appeal is filed by the Appellant against the order of acquittal passed by the learned IX Metropolitan Magistrate Court, Saidapet in C.C.No.1546 of 2001 dated 20.03.2003.

2.Brief case of the Appellant

The case of the appellant is that the accused who is the Managing Director of M/s Blue Jaggar Estate Ltd, entered into an agreement dated 11.02.1996 for Rs.21,32,012/-with him for construction of a house measuring 2400 sq.ft. and to provide facilities such as electricity, water connection and sewage connection etc. Even after the receipt of sum of Rs.20,75,000/- as advance, the respondent/accused had not even completed 75% of the construction work as agreed upon.

3.The respondent/accused approached the appellant/complainant and expressed his cash crunch in his business and requested the Appellant to give a loan of Rs.1,00,000/- to complete the construction for that amount he executed a promissory note, and agreed to pay with interest to the effect and the accused had agreed to show the progress in the construction work, even after the payment of Rs.85,000/- the accused had not shown any progress in the work. since the respondent/accused has not done the work as agreed upon, the appellant/complainant himself took up the construction and completed the work, and the value of the work done is Rs.2,33,000/- and prior to the commencement of remaining pending work through a letter dated 09.10.1999 handed over the keys of incomplete house. when the appellant demanded to repay the amount to discharge the part of his liability, the respondent/accused issued cheque drawn in favour of the Appellant/complainant and this concerned cheque bearing No.144886 dated 17.09.2000 drawn on Syndicate Bank, Nungambakkam Branch, Chennai for Rs.1,46,280/-. The Appellant/complainant presented the cheque in his bank Punjab National Bank, Thiruvanmiyur Branch,Chennai-41 on 17.01.2001 and the same was returned dishonoured with an endorsement "Insufficient Funds" and this was intimated by the accused memo dated 18.01.2001 and the appellant was intimated vide debit advice dated 19.01.2001. The appellant issued a notice to the accused on 01.02.2001 and the accused received same on 05.02.2001 failed to make repayment and hence the complaint.

4.On receipt of the complaint, the learned Magistrate recorded the sworn statement of the appellant/complainant PW1 and took cognizance of the offence. The respondent/accused on appearance before the trial Court pleaded not guilty to a charge under Section 138 of Negotiable Instruments Act. PWs-1 to 3 were examined and Exhibits.P1 to P15 were marked on the side of the complainant. The respondent/accused got himself examined as DW1 and examine DW2 and marked Exhibits-D1 to D 9 on his side.

5.The learned Magistrate on an appreciation of evidence found the respondent not guilty of the offence punishable under Section 138 of Negotiable Instruments Act and acquitted him. The appellant/ complainant has now come up with this appeal challenging the acquittal.

6.I heard Mr.G.Walter Soloman, learned counsel for the appellant and Mrs.S.Sujatha, learned Legal Aid Counsel appearing for the respondent and perused the entire materials available on record.

7.The following points arise for consideration:

1) Whether the acquittal of the respondent/accused under

Section 138 of Negotiable Instruments Act rendered by the trial Court can be sustained?

8.The learned counsel for the appellant submits that the trial judge ought not to have acquitted the accused based on the evidence of PW1 to PW3 whose evidence is cogent and without any ex-aggregation.

9.The learned counsel for the appellant submits that the lower Court failed to note that subject matter of the cheque was given towards the liability to pay to the appellant.

10.The learned counsel for the appellant submits that the lower Court erred in acquitting even after knowing the fact that subject matter of the cheque was signed by the accused and issued towards part liability.

11.The learned counsel for the appellant submits that the Lower Court ought not to have acquitted the accused based on the evidence of DW1, who has deposed that the cheque and promissory note was given at the time of entering the agreement which is highly imaginary and artificial.

12.The learned counsel for the appellant submits that the Lower Court failed to note the fact that there is no mentioned about the issuance of post dated cheques in the agreement which would clearly go to show that the cheque was not issued during that period of entering into agreement as security.

13.The learned counsel for the respondent supported the findings of the Trial Court.

14.Admittedly, the respondent before this Court is the only person to whom loan is alleged to have been given by the complainant. Admittedly, the complainant had filed complaints under Section 138 of Negotiable Instruments Act against the respondent for not repaying the loan amount as per the impugned cheque.

15.During the cross-examination, the appellant/complainant, inter alia, stated that the respondent/accused issued cheque drawn in favour of the Appellant/complainant and this concerned cheque bearing No.144886 dated 17.09.2000 drawn on Syndicate

Bank, Nungambakkam Branch, Chennai for Rs.1,46,280/- and presented the cheque in his bank Punjab National Bank, Thiruvanmiyur Branch, Chennai-41 on 17.01.2001 and the same was returned dishonoured with an endorsement "Insufficient Funds".

16.Thus, in a nutshell, the case of the appellant/complainant is that he had advanced a loan of Rs.85,000/- in the name of Blue Jackers Estate Ltd. and the Exhibit P1 agreement was executed by both parties. Whereas the case of the respondent is that as per Exhibit-P1, the work was not completed due to various dubious methods adopted by the appellant and presented the impugned cheque for collection which is given as security and hence the cheque was not issued for legally enforceable debt. Neither in the reply notice nor in depositions did the respondent gave details of the loan which he claims to have secured, such as the exact amount of work as per Ex.P1, the date on which it was paid and the rate of interest agreed to be paid. There is no valid explanation from the respondent for not giving all such details.

17.In the cross-examination, the complainant/appellant inter alia stated that the sum of Rs.85,000/- which he paid to the respondent/accused for completing the works as agreed. The complainant/appellant produced all the materials to prove the loan alleged to have been taken. Therefore, his deposition in this regard remained substantiated. In the normal course of human conduct, no one is likely to take obligation of others just to give loan to another person, unless he/she obtains a substantial advantage, by undertaking exercise of this nature. He/she would know that even if the person whom he/she lends money does not return the loan amount, she would have to return the loan, to the persons from whom it is taken. Therefore, he/she won't take such a risk, except for strong reasons. Further in this case, admittedly the earlier transactions prove the nature of subsequent loan made by the appellant and this can't be doubted because of various disputes between them.

18.According to appellant/complainant, to settle the pending works, the loan was given to the respondent. It would be difficult to hold that that the loan was not given in his name and there is no liability as per NI Act. Moreover, there is no explanation for not producing the necessary documents by the respondent to discard the evidence of the appellant/complainant.

19.In view of the facts and circumstances as discussed earlier, it would be difficult to accept the case of the respondent/accused as appreciated by the learned trial Judge.

20.In these circumstances, I am of the considered view that though the appellant/complainant has shown the case of preponderance of probabilities, it is for the respondent/accused to disprove the presumption raised against him, the evidence which has come on record clearly shows that he had advanced a loan to the respondent which he is yet to repay. Therefore, it cannot be said that the cheque which the respondent had issued to the appellant were wholly without any consideration.

21.It is next contended by the learned counsel for the respondent that there is a separate complaint instituted before the consumer forum. He has also pointed out that admittedly many complaints under Section 138 of the Negotiable Instruments Act were filed by the appellant/complainant, besides a consumer case. In my view, even if the appellant/complainant was engaged in agreement for construction with the respondent, that would not debar him from filing a complaint under Section 138 of the Negotiable Instruments Act, if a cheque issued to him towards repayment of the loan advanced by him is dishonoured by the bank for want of funds and the drawer of the cheque fails to make payment within the prescribed time, after receipt of legal notice from the lender. The criminal liability is incurred only in case a cheque is issued in discharge of a debt or other liability, the said cheque is dishonoured for want of funds and the borrower fails to make payment of the amount of the cheque even after receipt of a notice from the lender.

22.In the result:

(a) this Criminal Appeal is allowed by setting aside the order passed in C.C.No.1546 of 2001, dated 20.03.2003 on the file of the learned IX Metropolitan Magistrate Court, Saidapet, Chennai;

(b) the respondent/accused is convicted and sentenced to undergo 6 months Simple Imprisonment and pay a fine of Rs.5,000/- in default to undergo 3 months Simple Imprisonment;

(c) the respondent/accused is directed to pay a sum of Rs.1,46,280/- as compensation to the appellant/complainant.

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.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

vs

To

1. The IX Metropolitan Magistrate Court,
   Saidapet, Chennai.

2. -Do- Through'The Chief Metropolitan Magistrate,
   Egmore, Chennai-8.

3. The Member Secretary,
   Legal Services Authority, Chennai.

Copy To : The Section Officer, Criminal Section,
High Court, Madras -104.

+2cc to M/s.Sujatha, Advocate SR.No.86345

+1cc to Mr.G.Walter Solomon, Advocate SR.No.86479

Criminal Appeal No.1369 of 2003

PA(CO)
GMY(10/01/2019)