

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATE : 30.11.2018

CORAM:
THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Criminal Appeal No.130 of 2006

E.Ramesh .. Appellant/Complainant

.. Vs ..

P.Sivaraj .. Respondent/Accused

PRAYER: Criminal Appeal filed under Section 378 Cr.P.C., against the judgment of acquittal dated 24.11.2005 by the learned Additional District and Sessions Judge - Fast Tract Court, Vellore in C.A.No.104 of 2004, reversing the judgment of the learned Judicial Magistrate No.4, Vellore in C.C.No.433 of 1997 dated 29.06.2004.

For Appellant : Mr.R.John Sathyan

For Respondent : Ms.T.P.Savitha

JUDGMENT

The Criminal Appeal has been filed under Section 378 Cr.P.C., against the judgment of acquittal dated 24.11.2005 passed by the learned Additional District and Sessions Judge - Fast Tract Court, Vellore in C.A.No.104 of 2004, reversing the judgment of the learned Judicial Magistrate No.4, Vellore in C.C.No.433 of 1997 dated 29.06.2004.

2.For the sake of convenient, the complainant is referred as appellant and the accused is referred as respondent.

3.The appellant who lost his case before the First Appellate Court and succeeded before the trial Court, has filed the present Criminal Appeal.

4.The sum and substance of the case is as follows:-

The respondent approached the appellant and borrowed a sum of Rs.1,00,000/- on 01.06.1995. Thereafter, the appellant demanded money from the respondent, for which, the respondent issued a cheque on 28.01.1997 for a sum of Rs.1,31,000/- drawn on Union Bank of India, Vellore Branch. The said instrument was presented for collection, on the same day, through his banker viz., Bank of Baroda, but, the same was returned with the endorsement "insufficient funds". Again on instructions from

the respondent, the appellant has presented the said cheque on 23.05.1997. Unfortunately, that instrument also returned as "insufficient funds".

5. Thereafter, in order to complete the statutory requirement, the appellant had issued a legal notice to the respondent through registered post on 06.06.1997. The said legal notice was returned as "Refused". Therefore, the appellant had filed a case under Section 138 of the Negotiable Instruments Act in C.C.No.433 of 1997 before the learned Judicial Magistrate No.4, Vellore.

6. Before the trial Court, since, the respondent did not plead guilty, the trial was proceeded against him. The appellant examined himself as P.W.1 and marked 8 documents and also examined P.Ws.2 and 3, in order to prove the bankers memo. The respondent examined himself as D.W.1 and one more witness Krishnan was examined as D.W.2 and marked 2 documents.

7. After elaborate consideration, the trial Court convicted the respondent under Section 138 of the Negotiable Instrument Act and sentenced for one year Simple Imprisonment. Further, the respondent is directed to pay a compensation of Rs.1,31,000/- to the appellant.

8. Aggrieved against the judgment of the trial Court in C.C.No.433 of 1997 dated 29.06.2004, the respondent herein had preferred Criminal Appeal before the learned Additional District and Sessions Judge - Fast Tract Court, Vellore and the same was taken on the file in C.A.No.104 of 2004. Thereafter, the First Appellate Court acquitted the respondent. Against which, the present Criminal Appeal has been filed by the appellant.

9. Heard Mr. John Sathyan, learned counsel appearing for the appellant and Ms. T.P. Savitha, learned counsel for the respondent.

10. The learned counsel appearing for the appellant would submit that as per Section 138 of the Negotiable Instrument Act, the initial burden lies upon the appellant and presumption is in favour of holder of the instrument. Accordingly, the appellant has clearly established that the instrument was issued by the respondent, in favour of the appellant, for legally enforceable debt, which was borrowed in the year 1995. Since, the said amount was not paid, in order to clear the legally enforceable debt, the respondent issued Ex.P.1 - instrument, in favour of the appellant, to repay the debt. The said instrument was presented before the bank, however, the same was returned two times, as "insufficient funds". Further, the said facts were clearly established before the trial Court. Therefore, the trial Court has rightly convicted the respondent under Section

138 of the Negotiable Instruments Act. However, the First Appellate Court, on erroneous consideration of D.W.2 witness, acquitted the respondent, which is unsustainable in law. Even in questioning of 313 Cr.P.C, the respondent had deposed that he did not know about the appellant. However, contrary to questioning of 313 Cr.P.C statement, he produced the document, which was marked as Ex.D.1, which clearly shows that there was earlier Police complaint between the appellant and respondent and the Police has compromised the appellant to collect only Rs.40,000/- from the respondent. From the above contra statement, it is clearly proved that there was a legally enforceable debt in favour of the appellant to be paid by the respondent. However, the First Appellate Court, on erroneous consideration, acquitted the respondent.

11. Per contra, the learned counsel appearing for the respondent would submit that, in the present case, the entire claim made by the appellant is based on the promissory note, which was allegedly executed in the year 1995. Further, he would submit that D.Ws.1 and 2 had jointly borrowed a sum of Rs.50,000/- from the appellant, for which, the appellant has collected blank promissory note and cheque from the respondent and subsequently, after two years, the appellant has presented the instrument for collection. However, the said promissory note was not marked before this Court. Further, there is no explanation or proof for collecting lesser amount from the respondent. Later, the appellant has wrongly filled the amount of Rs.1,31,000/- in the blank cheque and presented it before the bank. Hence, the amount mentioned in the cheque is not correct. Therefore, the prosecution has not proved the case.

12. Upon careful perusal of the evidence and materials on record, impugned Judgment and contentions of the appellant and respondent, as per complaint, the respondent borrowed a sum of Rs.1,00,000/- from the appellant through promissory note in the year 1995. It is not in dispute that the instrument - Ex.P.1 dated 28.01.1997 was executed by the respondent and it has been presented by the appellant for the alleged legally enforceable debt through promissory note. However, the said promissory note was not presented before the trial Court. It is true under Section 139 of the Negotiable Instruments Act that the presumption is always in favour of holder of the instrument. The respondent himself was examined as D.W.1 and he has deposed that he and D.W.2 have jointly borrowed a sum of Rs.50,000/- from the appellant. However, a complaint has been filed only against the respondent and not against D.W.2. Since, the respondent rebutted the presumption by examining D.W.2 and in his evidence the D.W.2 clearly endorsed the evidence of D.W.1. In the present case, the promissory note was not marked before the trial Court, which gives doubt on the prosecution, unless the promissory note is marked before this Court, one cannot come

to the conclusion that there is a legally enforceable debt on the part of the respondent. There is no oral as well as documentary proof to prove that there is a legally enforceable debt to be paid by the respondent. Accordingly, he is liable to be acquitted as held by the First Appellate Court. This Criminal Appeal need not be interfered in the mechanical manner.

13. In the result, the Judgment passed by the learned Additional District and Sessions Judge- Fast Tract Court, Vellore, in C.A.No.104 of 2004 dated 24.11.2005 is confirmed and the present Criminal Appeal is dismissed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District and Sessions Judge - Fast Tract Court Vellore.

2.The Judicial Magistrate, Vellore.

3.-do- thro' The Chief Judicial Magistrate, Vellore.

+1cc to Mr.T.P.Savitha, Advocate, S.R.No.82726.

Copy To:

The Section Officer,
Criminal Section,
High Court, Madras.

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Criminal Appeal No.130 of 2006

VGI (CO)

rrs 02/01/2019

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