IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.02.2018
DELIVERED ON : 30.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.737 of 2011

Kannaiyah Naidu
Power of Attorney holder of M.Nehru ..Appellant/Complainant

Vs

R.Vijayakumar ..Respondent/Accused

Prayer: Appeal filed under Section 378 of the Criminal Procedure Code, to set aside the judgment of the Additional District and Sessions Judge, (Fast Track Court), Tirupattur, Vellore District made in C.A.No.3 of 2009 dated 24.08.2011 in setting aside the judgment of the learned Additional District Munsif-cum-Judicial Magistrate, Ambur, Vellore District made in C.C.No.267 of 2007 dated 24.04.2008 and convict the Accused/Respondent thereunder.

For Appellant : Mr.T.R.Ravi

For Respondent : Mr.T.Murugamanickam

JUDGMENT

This appeal is directed against the judgment dated 24.08.2011 of the learned Additional District and Sessions judge, Fast Track Court, Thirupathur made in C.A.No.3 of 2009, reversing the Judgment of the learned Additional District Munsif cum Judicial Magistrate Ambur in C.C.No.267 of 2007 dated 24.08.2008.

2.This is an appeal against acquittal preferred by the complainant in above C.C.No.267 of 2007 filed under Section 200 of Cr.P.C. as against the respondent for an offence punishable under Section 138 of N.I. Act.

3.Originally the appellant herein / complainant was successful in establishing his case before the Trial Court in C.C.No.267 of 2007 and thereby Trial Court holding the respondent guilty, convicted the respondent to undergo 2 years of Rigorous Imprisonment and a fine of Rs. 10,000/- and in default to undergo 6 months simple imprisonment.

4.Assailing the order of conviction made by the Trial Court, the respondent herein preferred Appeal in C.A.No.3 of 2009 wherein the appellate Court found fault with the finding of the Trial Court, thereby acquitted the respondent.

5.As against the order of acquittal the complainant by way of this Criminal Appeal seek to set aside the Order of lower Appellate Court dated 24.08.2011 and prays to confirm the order of conviction made by the Trial Court.

6.On perusal of the case records, it is seen that the Original Complaint is made by M.Nehru, the appellant herein through his power agent Kannaiah Naidu. It is relevant to note here that this Criminal Appeal is also being represented by the complainant's power Agent Kannaiah Naidu.

7.It is the case of the appellant/complainant that the respondent Vijaykumar had borrowed a sum of Rs.2,25,000/-. In lieu of payment of the above debt, a cheque dated 06.08.2007 drawn on Punjab National Bank was issued to the complainant. As per the instruction of the respondent / accused the cheque was presented by the appellant for encashment on 17.09.2007. However, as the said cheque was returned dishonored for want of sufficient funds and despite of Notice there was no payment made by the respondent, the above complaint was lodged.

8.In the said circumstance, the complainant through his power Agent Kannaiah Naidu entrusting him to conduct the case on his behalf filed the complaint in C.CNo: 267 of 2007. Accordingly Kannaiah Naidu who also represents the appellant in this appeal before this court had hence filed a complaint under section 200 of Cr.P.C for an offence punishable under section 138 of N.I. Act on behalf of appellant.

9.To substantiate the complainant's case his power agent examined himself as PW1 and documents 1 to 5 were marked through him. Ex-P1 is the power deed dated 05.11.2007. Exs-P2, P3, P4 & P5 are the cheque, return memo of cheque, statutory notice of complainant and the reply notice issued by the accused respectively.

10.On the side of the respondent / accused there was no evidence in.

11.The learned trial judge on appraisal of oral and documentary evidence adduced by the appellant was pleased to found the respondent guilty of offence under N.I. Act towards the above dishonor of cheque and accordingly punished the respondent in above terms.

12.Contrarily on appeal by accused, the lower appellate Court reversed the said order of conviction on accused holding that the complainant failed to establish his case that there was a monetary transaction. More particularly the trial Court's finding is reversed on the ground that the power agent Kannaiah Naidu had deposed that he is totally unaware of the monetary transaction i.e., loan transaction. Therefore having disbelieved the complainant case and in the light of version of PW1 stating that he do not have any personal knowledge over the alleged transaction said to have taken place between the complainant and the accused, the lower Appellate Court set aside the conviction.

13.I heard Mr.T.R.Ravi, learned counsel for the appellant and Mr.T.Muruganantham, learned counsel for the respondent and perused the entire materials available on record.

14.The learned counsel for the appellant would submit that if the accused wants to establish his case it is for him to recall the complainant to establish his case as to what was transpired between them or what nature of the business had taken place between them, but instead of that, it is not the duty of the complainant (Power of Attorney Holder) or being the complainant to the box and examine himself as one of the witnesses.

15.He would also submit that the power of attorney holder is legally entitled to file a complaint and give evidence on behalf of principal and that the accused has to establish his case. However, the Lower Appellate Court erred in holding the conviction on accused is baseless since only complainant would know about the transaction taken place.

16.It is also his contention that the presumption under section 118 and 139 of N.I. Act has to the rebutted only by the accused.

17.On hearing upon rival submissions on perusal of the records, it is not in dispute that the power of attorney of complainant had stated that the monetary transaction and the consequential issuance of cheque by the accused remain exclusively within the knowledge of the complainant. He further deposed that as only on 05.11.2007 the above general Power of Attorney deed came to be executed by complainant, he do not have knowledge of prior transactions.

18.It is indispensible to note that the complainant's Power Agent Kannaiah Naidu had specifically stated during cross examination that since the Power of Attorney came to be executed on 05.11.2007 he do not know the relation and transaction between the complainant and the accused.

19.At this juncture, it is noteworthy to state that the accused had let in evidence disputing the claim of complainant. It is the case of the respondent / accused that the cheque issued by him towards security was misused by the complainant despite of repayment of loan.

20.With regard to scope of representing a case under NI Act through power agent, the lower Appellate Court relied upon the decision of this Court in K.Gopalakrishnan Vs Karunakaran represented by Power of Attorney Thandapani reported in 2006 (4) CTC 333 and K.C.Behra prop Hansa Traders represented by power agent Hemant Behra vs Durga Lodge Pvt Limited rep by its director in holding that a complaint under NI Act can be lodged through power agent.

21.No doubt a party can be represented in litigation by his power agent. The physical presence of the litigants is not compulsory unless the Court require. One can have no quarrel over the settled law that in a case a party can always be represented through power agent for justifiable reasons.

22.Coming to the other facet as to whether Trial Court's conviction on accused, when the Power Agent is unaware of so called transactions between the appellant and respondent, it is seen that the complainant is not in a position to satisfy the Court as to nature of transaction and the amount involved. More particularly complainant is unable to satisfy the Court as to the date of cheque and its place of execution through evidence.

23.No doubt that presumption are to be drawn under section 139 and 118 of N.I. Act as against the accused. However, for the same the complainant has to satisfy the Court at first instance to show a legally enforceable liability.

24.In other words even without knowing the nature of the transaction and veracity of the allegations, there cannot be any conviction.

25.In this regard, the contention of the learned counsel for the appellant that accused has to call upon the complainant to establish the complainant's case and transaction is untenable and unacceptable.

26.In this regard it would be useful to look into the decision of this Court reported in 2011 ACD 1326 (MADRAS) P.Krishnasamy Vs Deltaknit Wearable's and other, wherein it was held that to presume under section 139 of the N.I. Act due execution of Negotiable Instrument is to be proved. Due execution means not signing a cheque but mean to give a cheque in complete form towards a legally enforceable liability.

27.It would also be useful to look into a decision of Kerala High Court 2011 ACD 1136 relying upon the decision of the Hon'ble Apex Court reported in AIR 2004 SC 175 and AIR 1996 SC 2184 holding that the procedural approach as though mere production of cheque proves all the relevant facts which prosecution must establish in a prosecution is an incorrect approach.

28.Thus firstly the complainant must allege and prove the due execution of the cheque by accused and the allegations must be established by way of evidence. In the case on hand as stated above, the complainant had utterly failed to satisfy the Court even as to the nature of the Transaction and its period. Therefore I do not find any error or illegality over the impugned order of acquittal made by the lower appellate Court.

29.In the result, this Criminal Appeal is dismissed by confirming the order of the learned Additional District and Sessions Judge, (Fast Track Court), Tirupattur, Velore District, dated 24.08.2011.

Sd/-
Assistant Registrar(CS-Ix)

//True Copy//

Sub Assistant Registrar

vs

To

1.The Additional District and Sessions Judge,
(Fast Track Court), Tirupattur, Vellore District.

2.The Additional District Munsif-cum-Judicial Magistrate,
Ambur.

+ 1 cc to M/s. T.R. Ravi Advocate Sr.74224

Criminal Appeal No.737 of 2011

CNR(CO)
EU(16/11/2018)