IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.01.2018

DELIVERED ON : 08.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.815 of 2011

S.R.David ... Appellant/Respondent

Vs

D.Sreedhar ... Respondent/Respondent

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, to call for the records in C.A.No.86 of 2011, on the file of Additional District Judge, Fast Track Court-III, Coimbatore and to set aside the judgment of acquittal dated 17.09.2011 and consequently confirm the sentence of conviction against the respondent/accused herein as imposed by the Judicial Magistrate-II, Coimbatore in C.C.No.141 of 2008, dated 01.04.2011.

For Appellant : Mr.G.Shivasurya

For Respondent : Mr.N.Manokaran

JUDGMENT

This Appeal is directed against the Judgment of acquittal passed in C.A.No.86 of 2011 on the file of the learned Additional District Judge, Fast Track Court No.III, Coimbatore, dated 17.09.2011 reversing the Judgment of Conviction sentencing the respondent to undergo simple imprisonment of 1 year and fine Rs.5,000/- and in default to undergo 3 months imprisonment vide the order dated 01.04.2011 in C.C.No.141 of 2008.

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2.The sum and substance of this Appeal as follows:

It is the case of appellant S.R.David that the respondent D.Sridhar borrowed a sum of Rs.2,10,000/- on 15.07.2007 from him. It was agreed by him to repay the said amount within two months from date of borrow. However, the respondent failed to keep up his promise.

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3.When the complainant/appellant demanded the above amount, the respondent issued a Cheque bearing No.245839 dated 08.01.2008 drawn on ING Viyasa Bank towards his liability. Accordingly as per respondent's instruction the cheque was presented for encashment. However the cheque remained dishonored with an endorsement account closed. Thereupon a legal notice was issued to the respondent calling upon him to repay the amount. Even then as there was no payment made by the respondent, the above complaint in C.C.No.141 of 2008 came to be lodged by the appellant for an offence punishable under section 138 of N.I. Act.

4.To substantiate his claim the complainant examined himself as PW1 and documents in Ex.P1 to Ex.P4 were marked. Ex.P1 is the dishonored cheque, Ex.P2 is the return memo and Ex.P3 and Ex.P4 are the legal notice and its acknowledgment respectively.

5.Defending the appellant's complaint the respondent adduced both oral and documentary evidence and on defense side 3 witnesses including the appellant was examined and documents in Ex.R1 to Ex.R9 were marked.

6.After keen contest, the trial Court was pleased to hold the respondent/accused guilty of the offence punishable under section 138 of N.I. Act towards the dishonor of cheque issued by him to the appellant. Accordingly, the Trial Court convicted and sentenced the respondent in above terms.

7.Aggrieved over conviction the respondent herein filed Appeal in C.A.No.86 of 2011 before the learned Additional District Judge, Fast Track Court No.III, Coimbatore. The lower Appellate Court on evaluation of the Trial Court's judgment and case records set aside the conviction of accused holding that the complainant has not come to Court with clean hands and that the subject cheque of the complaint was found materially altered both in figure and the ink also varied. Therefore misbelieved the version of the complainant, the Appellate Court rejected the complainant's case holding to be untrue and not credit worthy. As against the same the present Appeal is filed.

8.I heard Mr.G.Shivasurya, learned counsel for the appellant and Mr.N.Manokaran, learned counsel for the respondent and perused the entire materials available on record.

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9.The prime ground of attack over the impugned order is that the Appellate Court erred in fixing the burden of proof on the complainant when the initial burden of proof rest upon the accused. It is the case of the appellant that once signature in the cheque is admitted, the respondent is liable to be punished.

10.When the respondent had not successfully rebutted the presumption against him, the appellate Court ought not to have set aside the well reasoned judgment of conviction of the Trial Court.

11.It is also contended that the Appellate Court below erred in verifying the variations of signatures, handwriting and ink in Ex-P1 for the reason that the trial Court has already scrutinized the said cheque.

12.Per contra it is the case of the respondent / accused that in actual blank cheques were issued in respect of a chit transaction pertaining to a chit fund activity conducted by the complainant. Whereas the said blank cheques issued for security purpose came to be misused by the appellant/complainant.

13.It is further case of the respondent that out of the compromise talks between appellant and respondent an amount of Rs.63,000/- was paid to the appellant which was due to the appellant by the respondent. But instead of returning the cheque, the complainant has misused the blank cheques issued to him.

14.Thus the defense of the accused is that blank cheques issued to appellant are misused. In this context from the evidence PW1 in as much as the issue of difference in ink and figures in subject cheque it is appellant's case that the cheque was handed over in full form to him.

15.On hearing upon the rival submissions and on perusal of case records, this Court is not inclined to accept the contention of the learned counsel for the appellant that the Lower Appellate Court has misguided itself in scrutinizing Ex.P1. Such contention can never be accepted. Being an Appellate Court it is the duty of such Court to scrutinize the impugned order before it in the light of available evidence.

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16.There can be no doubt that Sections 118 and 139 contemplates presumption to be drawn in favor of the complainant. However, the said presumption will come to play only on the Court satisfying that the cheque was duly executed.

17.It would be significant to state that execution of cheque do not mean the mere handing over of a blank cheque but it means that the cheque is given in full form. The complainant cannot be justified in doing material alteration beyond the knowledge of the accused.

18.In other words it would be certainly unlawful if a complainant is allowed to fill up details of cheque beyond the knowledge of the accused such that filling up date and the amount in a blank Cheque.

19.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.

20.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.

21.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 that there was due execution of cheque. The figure denoting amount found to be written in different inks and the handwriting in as much as the digits and words also differs. The different ink, pen and manipulation of the amount would show that the complainant had failed to demonstrate due execution of the cheque. Therefore I do not find any error or illegality over the impugned order of acquittal made by the lower appellate Court.

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22.In the result, this Criminal Appeal is dismissed by confirming the order of the learned Additional District Judge, Fast Track Court No.III, Coimbatore dated 17.09.2011.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

vs

To

1.The Additional District Judge,
Fast Track Court-III, Coimbatore.

2.The Judicial Magistrate No.II, Coimbatore.

3.The Chief Judicial Magistrate, Coimbatore.

+1 cc to Mr.N.Manokaran, Advocate Sr.No.76600
+1 cc to Mr.G.Shiva Surya, Advocate Sr.No.76269

Judgment made in
Criminal Appeal No.815 of 2011

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