IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.07.2018

CORAM

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Crl.A.No.522 of 2011

Aruputham Enterprises,
Proprietor Tmt.V. Manjula
Represented by her Power
Agent P. Venkatesan,
14/18, Bashyam Street,
Vetri Nagar,
Chennai - 600 082. .. Appellant / Complainant

versus

J. Jayakumar .. Respondent / Accused

Prayer: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the judgment dated 18.07.2011 made in C.A.No.80 of 2010 on the file of the Additional District and Sessions Judge [Fast Track Court No.II], Poonamallee in reversing the judgment dated 02.09.2010 made in C.C.No.341 of 2007 on the file of the Judicial Magistrate, Ambattur by allowing the present Criminal Appeal.

For Appellant : Mr.M.Vijayakumaran

For Respondent : Mr.V.V.Sairam

J U D G M E N T

Aggrieved over the order of acquittal passed by the learned Additional District and Sessions Judge [Fast Track Court-II], Poonamallee, in Criminal Appeal No.80 of 2010, thereby, reversing the order of conviction passed by the learned Judicial Magistrate, Ambattur, in C.C.No.341 of 2007, the appellant has approached this Court praying to set aside the judgment passed by the learned Additional District and Sessions Judge and to restore the order rendered by the learned Judicial Magistrate, Ambattur.

2. The brief facts of the case are as follows:

In the month of January, 2007, the respondent approached the appellant for a hand loan to meet out his urgent family expenses, for which, on 05.02.2007, the appellant/complainant paid a sum of Rs.25,000/- by way of a cheque bearing No.705879, dated 05.02.2007 drawn on Indian Bank, Jawahar Nagar, Chennai. The respondent had agreed to repay the said loan amount within two months along with interest at the rate of 1% per month. Since the appellant and the respondent being close friends at the time of giving loan, the appellant had not insisted the accused to execute any kind of document in support of the loan. On the next day, after receiving the cheque, the respondent encashed the above said cheque for Rs.25,000/-. Again, in the month of April, 2007, the respondent/accused, who running his business in the name and style of "MARS TRAVELS" at Kodambakkam, Chennai, had approached the appellant/complainant and ask further hand loan of Rs.50,000/- to develop his business.

3. Considering the request made by the respondent, on 28.04.2007, the appellant gave Rs.50,000/- after deducting the interest to the loan already availed in the month of January, 2007. At the time of availing loan, the friends of the respondent viz., N.Ramalingam and S.Mohan Reddy came to the appellant's office. Further, at the time of giving the loan amount, the appellant insisted the respondent for executing a promissory note after calculating the entire loan amount, in complying the request of complainant, the respondent executed a promissory note for Rs.75,000/-, in which, the said N.Ramalingam and S.Mohan Reddy signed as witnesses. The respondent agreed to pay interest at the rate of 1% per month. The interest was paid upto July 2007. Thereafter, due to the non-payment of interest, the appellant compelled the respondent/accused to settle the entire loan. So, on 28.08.2007, the respondent/accused along with his two friends [N. Ramalingam and S.Mohan Reddy] went to the appellant's house and handed over the cheque bearing S.No.869912, dated 28.08.2007 for Rs.75,000/- drawn on UCO Bank, ICF Colony Branch, Chennai-38. In the trial court, the cheque has been exhibited as P.3, and the promissory note executed by the respondent, dated 28.04.2007 was marked as Ex.P.2.

4. On 28.08.2007 along with the cheque, the respondent had given the undertaking letter for the encashment of the cheque. Ex.P.4 is the letter of undertaking. Believing the words of the respondent, the appellant presented the cheque for encashment. But the cheque was dishonoured on the ground of "insufficient funds" through the return memo dated 31.08.2007. Therefore, on 01.09.2007, the appellant issued a statutory notice and the same was received by the respondent on

04.09.2007. The return memo issued by the bank authorities dated 31.08.2007 and the legal notice dated 01.09.2007 were exhibited as P.5 and P.6 respectively. Further, the acknowledgment card signed by the respondent was marked as Ex.P.7.

5. After receiving the statutory notice, the respondent neither pay the principle amount nor the interest. In the statutory notice, the appellant had insisted the respondent for the payment of cheque amount within a period of 15 days from the date of receipt of the statutory notice. But on 20.09.2007, the respondent sent a reply notice along with cheque bearing No.884974, dated 19.09.2007 for Rs.25,000/- towards part payment of the loan and the same has also dishonoured. So, after completing the legal formalities, the appellant had approached the learned Judicial Magistrate, Ambattur, through Power of Attorney one Venkatesh for initiating the action against the respondent under Section 138 of the Negotiable Instruments Act, 1881. During the time of trial proceedings, the respondent denied the allegation levelled in this case and pleaded as not guilty. In the proceedings under Section 313 Cr.P.C., he denied the incriminating materials available in the evidence of P.W.1 to P.W.3 as false one.

6. In the trial court, the reply notice sent by the respondent and the rejoinder were exhibited as P.8 and P.9 respectively. After taking cognizance, during the time of trial proceedings, on the side of the appellant, 3 witnesses were examined as P.W.1 to P.W.3. Further, 16 documents were exhibited as P.1 to P.16. On the side of the respondent, 2 documents were shown as Ex.D.1 and Ex.D.2. On conclusion of the trial, the learned Judicial Magistrate, Ambattur, convicted the respondent under Section 138 of the Negotiable Instruments Act, 1881, and sentenced to undergo six months Rigorous Imprisonment and to pay a fine of Rs.75,000/-. Further, it was ordered that in default of the payment of the compensation amount, liberty was granted to the appellant to approach the said Court under Section 431 of Criminal Procedure Code.

7. Against the said order of conviction, the respondent herein approached the Additional District and Sessions Court [Fast Track Court-II], Poonamallee by way of filing Criminal Appeal No.80 of 2010. After an elaborate enquiry, the learned Additional District and Sessions Judge [Fast Track Court-II] allowed the appeal and set aside the order passed in C.C.No.341 of 2007.

8. In the First Appellate Court, it was decided that the liability and issuing the cheque by the respondent had not been proved by the appellant, accordingly hold that the

respondent had not committed any offence under Section 138 of the Negotiable Instruments Act, 1881. Now, challenging the said findings and for setting aside the judgment rendered by the First Appellate Court, the appellant being the complainant in the trial court has approached this Court by way of filing this appeal.

9. Today, when the Criminal Appeal is taken up for consideration, this Court heard the arguments of Mr.M. Vijayakumaran, the learned counsel appearing for the appellant, Mr.V.V.Sairam, the learned counsel appearing for the respondent.

10. The learned counsel appearing for the appellant would submit that without assigning any reason to the findings arrived at by the trial Judge, the First Appellate Court came to the conclusion that the appellant had not proved the liability of the respondent and set aside the trial Court judgment. Further, he added that filing the complaint by P.W.1 on behalf of his wife is not an error. Further, he submitted that the findings arrived at by the First Appellate Court are baseless and not in accordance with law, the evidence given by P.W.1 to P.W.3 clearly establish the liability. Moreover, P.W.1 is entitled to give evidence on behalf of his wife. So, for the said reason, he prayed to allow this appeal.

11. The learned counsel appearing for the respondent would submit that the first point taken in the First Appellate Court is that the case has been instituted by the appellant through her Power of Attorney (P.W.1). Being the Power of Attorney, P.W.1 is supposed to have enough knowledge about the transaction happened between the appellant and the respondent. But, in this case, the cross examination of P.W.1 discloses that he did not have enough knowledge with regard to the loan transaction. Therefore, the conclusion arrived at by the First Appellate Court is legally sustainable and prayed for dismissing this appeal.

12. In this regard, he relied on the judgment of our Hon'ble Apex Court in the case of A.C.Narayanan and another vs. State of Maharashtra and another reported in 2013 (3) MWN (Cr.) DCC 38 (SC). In the said judgment having regard to the duty of the Power of Attorney, it was held as follows:

> "While holding that there is no serious conflict between the decisions in M.M.T.C. Ltd., and Anr. v. Medchi Chemicals and Pharma (P) Ltd., and Anr. 2001 (4) CTC 749 (SC); and Janki Vashdeo Bhojwani and Anr v. Indusind Bank Ltd., and Anr. 2005 (3) CTC 128 (SC), we clarify the position and answer the questions in the following manner:

(i) Filing of Complaint Petition under Section 138 of N.I. Act through Power of Attorney is perfectly legal and competent.

(ii) The Power of Attorney Holder can depose and verify on oath before the Court in order to prove the contents of the Complaint. However, the Power of Attorney Holder must have witnessed the transaction as an agent of the Payee/Holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the Complainant to make specific assertion as to the knowledge of the Power of Attorney Holder in the said transaction explicitly in the Complaint and the Power of Attorney Holder, who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of Section 145 of N.I. Act, it is open to the Magistrate to rely upon the verification in the form of Affidavit filed by the Complainant in support of the Complaint under Section 138 of the N.I. Act and the Magistrate is neither mandatory obliged to call upon the Complainant to remain present before the Court, nor to examine the Complainant of his witness upon oath for taking the decision whether or not to issue process on the Complaint under Section 138 of the N.I. Act.

(v) The functions under the General Power of Attorney cannot be delegated to another person without specific clause permitting the same in the Power of Attorney. Nevertheless, the General Power of Attorney itself can be cancelled and be given to another person.

13. Applying the principles of our Hon'ble Apex Court with the case in our hand, as rightly pointed out by the appellant counsel in this case, P.W.1 [P.Venkatesan], who is the Power of Attorney admitted in his cross examination that he did not know the particulars about the lending of money to the respondent. In this regard, in his cross-examination, he specifically stated that he did not know the transaction happened between his wife and the respondent. Further, he specifically stated that he had advanced only Rs.50,000/- as a

loan to the respondent, after deducting the interest due for the loan of Rs.25,000/-. The said circumstances shows that P.W.1 is not having due knowledge with regard to the loan transaction happened between the complainant and the accused. The said situation is against the findings of the Hon'ble Apex Court in clause [ii] stated supra. Therefore, the said lapse on the part of the appellant will shake the very root of her case.

14. The next contention of the learned counsel appearing for the respondent is that, the recitals of the promissory note clearly proves that it has not been executed in favour of the appellant. In this regard, he specifically pointed out that the wordings written in the promissory note create a doubt whether the promissory note of Rs.75,000/- was executed by the respondent in the month of April, 2007 or not. Now, on reading of the promissory note [Ex.P.2], it was stated as follows :

> நான் எழுதிக்கொடுத்த ரொக்க ஆன் டிமாண்டு பத்திரம் என்னவென்றால் 05.02.2007 அன்றைய தேதியில் என் அவசர குடும்பச் செலவு மற்றும் தொழில் அபிவிருத்தி செலவுக்காக தங்களிடம் ரொக்கமாக/செக்காக ரூபாய்.75,000/- எழுத்தால் ரூபாய். எழுபத்தைந்து ஆயிரம் மட்டும் பெற்றுக்கொண்டேன். இதற்கு மாதம் ஒன்றுக்கு ரூபாய்.100க்கு வட்டி ரூ.ஒன்று வீதம் மேற்படி அசலுடன் வட்டியும் சேர்த்து தாங்கள் கேட்கும்போது தங்களுக்காவது தங்கள் உத்தரவு பெற்றவர்களுக்காவது திருப்பிக் கொடுக்க மனப்பூர்வமாகவும், சுயநினைவுடனும் கையெழுத்திட்டு உறுதி அளிக்கிறேன்.

15. Therefore, as per the recitals found in the promissory note, it is clearly proved that the loan amount of Rs.75,000/- was received by the respondent only on 05.02.2007. But, P.W.1 to P.W.3 categorically mentioned in the proof affidavit that only Rs.25,000/- was paid as a loan on 05.02.2007. Hence, the existing liability of the respondent has not been proved by the appellant through the cogent and convincing evidence. Accordingly, interference is not necessary in the findings of the First Appellate Court.

16. In the light of the above discussion, I am of the considered view that the judgment rendered by the learned Additional District and Sessions Judge [Fast Track Court-II], Poonamallee, in Crl.A.No.80 of 2010 dated 18.07.2011 is correct and it does not need any interference.

17. In fine, the Criminal Appeal is dismissed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

sri

To

1.The Additional District and Sessions Judge
[Fast Track Court No.II],
Poonamallee.

2.The Judicial Magistrate,
Ambattur.

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

+1cc to Mr.M.VijayaKumaran, Advocate, S.R.No.47779

+1cc to Mr.V.V.Sairam, Advocate, S.R.No.46840

Crl.A.No.522 of 2011

PA(CO)
GSP(27/08/2018)