

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.11.2016
PRONOUNCED ON : 27.08.2018

CORAM

THE HONOURABLE MR. JUSTICE P. VELMURUGAN

Crl. Appeal No.158 of 2010

M.Thambu

... Appellant/Complainant

Vs.

R.Shree Ram Kumar

... Respondent/Accused

Criminal Appeal filed under Section 378(4) of the Code of Criminal Procedure to call for the records of the judgment dated 21.11.2009 in C.C.No.6 of 2007 on the file of the learned Judicial Magistrate No.VI, Coimbatore.

For Appellant : Mr.A.Mohan

For Respondent : Mr.T.Munirathinam Naidu

J U D G M E N T

The present appeal has been filed by the appellant against the order of acquittal passed in C.C.No.6 of 2007 dated 21.11.2009 by the learned Judicial Magistrate No.VI, Coimbatore under Section 138 of the Negotiable Instruments Act, 1881.

2. The case of the appellant/complainant is as follows:

(i) The respondent, who is a friend of the appellant/complainant, borrowed Rs.6,00,000/- as hand loan from him during the year 2006 for his business development. After repeated demands, for discharge of the said loan, the respondent issued a cheque bearing No.768492, dated 23.11.2006 drawn on I.C.I.C.I. Bank, Pricol Complex, Periyanaickenpalayam, Coimbatore in favour of the appellant. The appellant, presented the said cheque through Canara Bank and the same was returned on 24.11.2006 with an endorsement "insufficient fund" vide return memo along with debit advice. Hence, the appellant issued a legal notice dated 28.11.2006 through RPAD and the same was received by the respondent on 04.12.2006. On receipt of the said notice, the respondent sent a reply notice dated 11.12.2006 stating that he never borrowed any amount from the appellant. Hence, the appellant sent a rejoinder on 14.12.2006. As the respondent failed to repay the loan amount, the appellant/complainant filed a complaint before the learned Judicial Magistrate No.IV, Coimbatore under Section 138 of the Negotiable Instruments Act, 1881. The Court below after taking cognizance of the offence, taken the complaint on file.

(ii) In order to prove the case of the appellant, he examined himself as P.W.1 and marked the documents as Exs.P.1 to P.9.

(iii) When the above incriminating materials were put to the respondent/accused under Section 313 Cr.P.C., the respondent denied the same as false. However, in order to prove his case, he did not examine any witness and he has not marked any document on his side.

(iv) The learned trial Judge, after considering the entire records and the submissions made by the learned counsel on either side, by judgment dated 21.09.2007 in C.C.No.6 of 2007 dismissed the complaint and acquitted the respondent. Aggrieved by the acquittal of the respondent/accused, the present Criminal Appeal has been filed by the appellant.

3. The learned counsel for the appellant submitted that the respondent borrowed a sum of Rs.6,00,000/- in the month of May 2000 for his urgent needs for development of his business. He promised to pay the said sum within a period of one month. Despite repeated demands, the respondent did not come forward to pay the money. But, to discharge the debt, he issued a cheque bearing No.768492, dated 23.11.2006 drawn on ICICI Bank, Pricol Complex, Periyanaickenpalayam, Coimbatore in favour of the appellant on 23.11.2006. At the time of issuing the cheque, the respondent informed the appellant that the cheque would be honoured at the time of presentation. Therefore, the appellant, believing on the words of the respondent, on the same day, immediately presented the cheque for collection through his Bank viz., Canara Bank, Gudalor Branch, Coimbatore and the said cheque was returned as dishonoured for the reason "Funds insufficient" with debit advice dated 25.11.2006 and hence, he immediately issued a legal notice dated 28.11.2006, Ex.P.5 to the respondent. The respondent, after receipt of the said notice, sent a reply notice 11.12.2006, Ex.P.7 refusing the allegations and he did not repay the amount. Hence, the appellant filed a complaint.

4. The learned counsel for the appellant further submitted that the trial Court has miserably failed to note that once the cheque is issued under the provisions of the Negotiable Instruments Act, the onus is on the side of the respondent to disprove or to rebut the legal presumptions under Sections 139 and 118 of the Negotiable Instruments Act. The respondent has not taken any steps to prove the defence raised in Ex.P.7, the reply notice dated 11.12.2006 by examining any witness or any document before the Court below. The provisions of the Negotiable Instruments Act, remains unchallenged and unrebutted, the judgment of acquittal is legally unsustainable either in law or on facts.

5. Moreover, the learned counsel for the appellant submitted that the respondent issued a cheque in favour of the appellant for discharging of the legally enforceable debt with a

knowledge of insufficiency of funds in his account on 23.11.2006 with mala-fide intention. Therefore, he had committed an offence under Section 138 of the Negotiable Instruments Act, 1881. The learned Magistrate failed to consider those aspects and simply dismissed the complaint and acquitted the accused. Hence, the judgment passed by the learned Magistrate is unsustainable either in law or on facts and same is liable to be set aside and the respondent has to be convicted and directed to pay the compensation equal to twice the cheque amount.

6.The learned counsel for the respondent submitted that the respondent never borrowed any amount from the appellant at any point of time and he never issued any cheque, much less than Rs.6,00,000/- mentioned in the alleged cheque Ex.P.1. The said cheque was rank forgery and was created by the appellant.

7.The learned counsel for the respondent further submitted that the respondent along with his wife and his father-in-law were running partnership firm in the name of 'Swadhi Steels and Hardwares' in Periyanaickenpalayam for the past 3 years. Prior to the occurrence, the appellant, who is an electrical licenced contractor, used to go to respondent's shop to purchase the electrical goods on behalf of his customers and by that way, he known the appellant. Hence, the appellant frequently, visited the shop of the respondent, and got some confidence of the respondent as his client and used to move in the shop freely and had access to the office of the respondent. In that way, the appellant some how got an old cheque leaf of the year 2003 from the heap of old papers from the respondent and conveniently forged his signature in the old cheque leaf and filled up the amount of Rs.6,00,000/- and other details in the old cheque leaf and the same was forged by the appellant as the signature found in the said cheque is not that of the respondent. The respondent, after receipt of the notice only, came to know that the appellant forged the signature and therefore, he gave a complaint and issued a reply denying the averments made in Ex.P.4, the legal notice.

8.The learned counsel for the respondent also submitted that the year mentioned in the cheque is 2003. The next following cheque leaf bearing No.768493 was used only by the respondent on 05.09.2003 and the next cheque leaf bearing No.768494 was also used by the respondent on 20.09.2003 for his personal purpose and the respondent did not borrow any amount and he did not issue any cheque to the appellant. Moreover, as there is a material contradiction in the documents filed on behalf of the appellant, the appeal is liable to be dismissed.

9.Heard Mr.A.Mohan, learned counsel for the appellant and Mr.T.Munirathinam Naidu, learned counsel for the respondent and perused the materials available on record carefully.

10. On a perusal of the judgment passed by the learned Judicial Magistrate No.IV, Coimbatore it is seen that the learned trial Judge created a doubt as there is a material contradiction in the notice, complaint and the evidence of P.W.1. When there are two views possible, one in favour of the accused and the other in favour of the appellant, the view favouring the accused should be considered. Accordingly, the learned Judge, dismissed the complaint and acquitted the accused.

11. It is the specific case of the appellant that the respondent approached the appellant in the month of March 2006 for his urgent business needs as hand loan and the respondent promised him that he will repay the loan within one month without any interest. Since the respondent has not paid any amount as promised by him, the appellant insisted him to re-pay the said amount. At the instance of the appellant, he issued Ex.P.1., cheque bearing No.768492 dated 23.11.2006, drawn on ICICI Bank, Pricol Complex, Periyanaickenpalayam, Coimbatore in favour of the appellant on 23.11.2006 for Rs.6,00,000/-. Thereafter, the appellant presented the said cheque on the same day through his bank namely, Canara Bank, Gudalor Branch, Coimbatore and the said cheque was returned as dishonoured due to the reason "Funds insufficient" vide Ex.P.2, return memo dated 24.11.2006, and Ex.P.3, debit advice dated 25.11.2006. Hence, the appellant issued Ex.P.4, legal notice dated 28.11.2006 to the respondent. The respondent on receiving the said notice, issued Ex.P.7, reply notice dated 11.12.2006 denying the allegations made in Ex.P.4. Therefore, he made a complaint before the learned Judicial Magistrate No.IV, Coimbatore. In order to prove his case, the appellant himself examined as P.W.1 and marked 8 exhibits.

12. The cheque bearing No.768492 dated 23.11.2006, drawn on ICICI Bank, Pricol Complex, Periyanaickenpalayam, Coimbatore is marked as Ex.P.1. The Bank issued Return Memo stating that the cheque is returned as dishonoured with an endorsement "Funds insufficient" is marked as Ex.P.2. The debit advice, issued by the Bank along with Ex.P.2, is marked as Ex.P.3. The legal notice, issued by the appellant to the respondent, is marked as Ex.P.4. Acknowledgment card, issued by the postal authorities, is marked as Ex.P.6. Reply notice, issued by the respondent, is marked as Ex.P.7. The rejoinder notice, issued by the appellant to the respondent, is marked as Ex.P.8. The rejoinder notice, sent by the respondent, is marked as Ex.P.9.

13. It is seen from the evidence of P.W.1, that the respondent borrowed a sum of Rs.6,00,000/- as hand loan for his business development promising him to repay the said amount without any interest within one month. Since the respondent has not paid the said amount, he insisted him to pay the said amount. At his instance, the respondent issued Ex.P.1, the cheque dated 23.11.2006 bearing No.768492 dated 23.11.2006, drawn on ICICI Bank, Pricol Complex, Periyanaickenpalayam,

Coimbatore and the same was returned on 24.11.2006 for the reason "Funds insufficient" along with Ex.P.2, return memo and Ex.P.3, debit advice.

14. But, in his complaint he has stated that the respondent borrowed a sum of Rs.6,00,000/- during the year 2006 for his business development as hand loan as urgent and promised him to repay the said amount shortly. Despite several oral demands, for discharge of the debt, instead of repaying the amount borrowed, the respondent issued a cheque bearing No.768492 dated 23.11.2006, drawn on ICICI Bank, Pricol Complex, Periyanaickenpalayam, for Coimbatore. At the time of issuing the cheque, the respondent promised that the cheque would be honoured at the time of presentation. Therefore, he presented the cheque and the same was returned as dis-honoured due to the reason "Funds insufficient" Ex.P.2. vide Ex.P.3 Return memo and Ex.P.4, debit advice issued by the Bank.

15. Moreover, in the proof affidavit filed by the appellant before the Court below, he has simply stated that the respondent as a friend of him, during the year 2006, for business development borrowed Rs.6,00,000/- and promised him to pay shortly.

16. In the legal notice, Ex.P.4, it has been stated that on 01.03.2006, the respondent approached the appellant and borrowed Rs.6,00,000/- for his urgent business commitments promising to repay the same without any interest within one month.

17. During the cross examination, the appellant has stated that on 01.03.2006, he gave a sum of Rs.6,00,000/- to the respondent for business purpose and the respondent promised to repay the said sum within one month. He further stated that the respondent requested him one month prior to 01.03.2006 i.e, hand loan. But, he paid the said sum of Rs.6,00,000/- to the respondent by way of cash i.e. Rs.3,00,000/- from his savings and Rs.3,00,000/- from the sale proceeds of his vehicle and he is not having any amount from the Bank on that day i.e. 01.03.2006. But, for the said borrowed amount, the respondent issued a post dated cheque on 01.03.2006 by filling the date as 23.11.2006.

18. The appellant in his complaint, has not stated any specific date but simply stated that during 2006, the respondent, for his business developments, borrowed a sum of Rs.6,00,000/- and promised to repay the same shortly.

19. In the proof affidavit also, he has simply stated that the respondent as a friend of him, during the year 2006, for his business developments borrowed Rs.6,00,000/- and promised to repay the same shortly. But, he has not specifically stated that on 01.03.2006, the respondent borrowed money and issued a post dated cheque dated 23.11.2006 bearing No.768492 dated 23.11.2006, drawn on ICICI Bank, Pricol Complex,

Periyanaickenpalayam, Coimbatore, whereas, in his cross-examination for the first time, he has stated that on 01.03.2006, he has issued a post dated cheque dated 23.11.2006. Hence, there is a material contradiction in the complaint, proof affidavit filed for Chief-examination and Cross-examination.

20. From the above, it is clear that the appellant has not stated any specific date either in the notice, complaint or in the proof affidavit, but he has simply stated that the respondent borrowed a sum of Rs.6,00,000/- during the year 2006 for his business development as hand loan on oral promise to repay the same shortly. Secondly, since the appellant repeatedly demanded to repay the said amount orally, the respondent instead of repaying the loan amount he issued a cheque dated 23.11.2006 bearing No.768492 dated 23.11.2006, drawn on ICICI Bank, Pricol Complex, Periyanaickenpalayam, Coimbatore. Further, the appellant, in his cross examination, has stated that the respondent issued post dated cheque dated 23.11.2006 on 01.03.2006, but, nowhere, he has stated that the respondent issued a post dated cheque on 01.03.2006 itself.

21. Further, the respondent has not examined any witness to disprove the defence as stated in the reply notice. It is well settled law that the appellant/complainant has to prove the case in the manner known to law. Even though, the respondent denied the case, he has not come forward to examine any witness to deny the execution of the cheque. Though the appellant alleged the borrowal of money and the issuance of cheque, he has not automatically entitled to the relief sought for in the complaint, unless he proved his case. There is a material contraction in the materials placed by the appellant namely, the complaint, proof affidavit and evidence. Even though, the respondent denied the borrowal and issuance of the cheque in the notice itself, the appellant has not stated anything either in the complaint or in the proof affidavit about the specific date of borrowal and date of issuance of post dated cheque.

22. Moreover, the trial Court, while analysing the cheque, has found that the ink of the signature and the ink of the other particulars are differs. The difference found in the ink of cheque and other particulars are also presumed to be in favour of the respondent. Therefore, the appellant has not established his case. Hence, the trial Court found that the respondent is entitled for acquittal and there is no need to interfere with the judgment passed by the Court below.

23. In a criminal case, it is not necessary for the accused to disprove the case of the prosecution beyond reasonable doubt. If the accused is able to satisfy the court by legally acceptable evidence that the case of the prosecution lacks bona fide, the accused will be entitled to benefit of doubt.

24. In this case, the trial court has considered all these aspects and has held that the appellant had failed to prove the case against the respondent beyond reasonable doubt.

25. Thus, when there are two views possible, one in favour of the accused and the other in favour of the appellant/complainant, the view favouring the accused should be taken into consideration in an appeal against acquittal.

26. Hence, I find no merit in the appeal against the judgment of the trial Court. In the above said circumstances, I find no reason to interfere with the order of acquittal passed by the trial Court. Hence, the appeal fails and the same deserves to be dismissed.

27. In the result, the appeal is dismissed. The judgment dated 21.11.2009 made in C.C.No.6 of 2007 by the learned Judicial Magistrate No.VI, Coimbatore is confirmed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

cla/tsh

To

The Judicial Magistrate No.VI,
Coimbatore.

Copy to: The Section Officer,
Criminal Section,
High Court, Madras.

CA(CO)

sm:12.9.2018

Crl.A.No.158 of 2010

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