IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.574 of 2009

G.Shankar ... Appellant /Complainant

Vs

A.Asath Khan ... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the Order of acquittal dated 14.08.2009 made in STC.No.878 of 2007 on the file of the Judicial Magistrate No.I, Dharmapuri.

For Appellant : Mr.I.Abrar Md. Abdullah

For Respondent : Mr.D.Shivakumaran

JUDGMENT

This criminal appeal is preferred by the appellant / complainant against the order of acquittal passed by the Judicial Magistrate No.1, Dharmapuri in STC No. 878 of 2007 dated 14.8.2009 under section 138 of the Negotiable Instrument Act.

2.Brief case of the appellant/complainant

The case of the appellant is that he is working along with the respondent in Joy Associates at Dharmapuri for the past one and half year as partner cum collection agent for ICICI Bank and Bajaj Auto Finance Limited. In the course of business transaction, the amount payable to the share of the complainant stood Rs.3,47,500/- as on 13.9.2006. The respondent issued a cheque bearing number 22901 dated 13.10.2006 for Rs.3,47,500/- drawn on ICICI Bank Dharmapuri. The complainant presented the cheque for collection in his bank at ICICI Bank, Dharmapuri on 1.2.2007 and the same was dishonoured due to “insufficiency of funds” The complainant issued a statutory legal notice on 16.2.2007 to the respondent and the same was received by him on 27.2.2007. Since the amount was not paid, the appellant / complainant filed the complaint.

3.During trial, the appellant/complainant examined himself as PW1 and further examined PW2 branch manager. Exhibits P1 to P7 were marked on his side. The respondent examined DWs1 to 3 and marked Exhibits D1 to D4. On completion of the trial, the learned trial judge acquittal the respondent/accused under section 138 of the Negotiable Instrument Act. Aggrieved against the order of acquittal, the appellant/complainant preferred this criminal appeal.

4.The learned counsel for the appellant/complainant submits that the trial Court has failed to note that the execution of the cheque had not been denied, while so it is the burden on the part of the respondent/accused to rebut the presumption arises under section 118 and 139 of Negotiable Instrument Act. The trial Court has erred in disbelieving the evidence of PW1 merely based on some suggestion put in the cross examination.

5.The learned counsel for the appellant/complainant submits that the trial Court has failed to note that the evidence of PW 1 is very clear, cogent and unshaken. The proceedings under section 138 are summary in nature and there is no need or necessity to examine any other witness to corroborate the version of PW1.

6.The learned counsel for the appellant/complainant submits that the trial Court has failed to note that sections 118,138 and 139 of the Act would require that the Court "Shall presume" the liability of the drawer of the cheque for the amount for which the cheques were drawn on accepting the consideration.

7.The learned counsel for the appellant/complainant submits that the trial Court has failed to note that the wordings contained in sections 118 and 139 of the Act are "unless the contrary is proved" would make it clear that the presumption has to be rebutted by "proof" and not by a bare explanation, which is merely plausible unless the explanation is supported by proof, the mandatory presumption created by the provision cann0ot be said to be rebutted. The trial Court has given irrelevant findings in respect of Exhibit P5 which is not the subject matter in dispute in this case.

8.The learned counsel for the appellant/complainant submits that the trial Court has failed to note that Exhibit P1 was issued by the respondent/accused, therefore it is for him to prove as to who the cheque reached the hands of the complainant. There is a legal presumption under section 20 of the N.I.Act empowering the holder to fill up the instrument. Hence there is no material alteration.

9.The learned counsel for the appellant/complainant submits that the trial Court has failed to note that cheque dated 13.10.2006 and it is valid for a period of six months while so, the presentation of the cheque on 1.2.2007 would no way affect the case of the complainant.

10.The learned counsel for the appellant/complainant submits that the trial Court has failed to note that there is no law compelling the parties to register the partnership firm Exhibit P5. The respondent herein has admitted his business and the appellant was working as commission agent has been proved by documentary evidence.

11.The learned counsel for the appellant/complainant submits that the trial Court has failed to note that the documents marked as Exhibit D1 to Exhibit D4 are irrelevant to decide the cheque complaint.

12.The learned counsel for the respondent supported the findings of the learned trial judge.

13.I heard Mr.I.Abrar Md.Abdullah, learned counsel for the appellant and Mr.D.Shivakumaran, learned counsel for the respondent. I have carefully examined the evidences on record and the documents marked by both parties.

14.In this case, it is an admitted fact that the appellant and the respondent were partners in the firm Joy Associates. The profit amount of Rs.3,47,500/- was given to the appellant for his association for the past 1½ years which was deposited in the account of the respondent/accused. For this, the respondent/accused issued the cheque on 5.10.2006 to the appellant. The impugned cheque was presented on 1.2.2007 as per the direction issued by the respondent and the same was dishonoured.

15.The case of the respondent/accused is that the firm Joy Associates was closed as per exhibit D3 and he paid the pending balance amount of Rs.27,300/- of the complainant as per the notice issued by the ICICI Bank. Further due to the misunderstandings, the complainant misused the impugned cheque and filed the frivolous complaint against him.

16.The respondent/accused examined PW2 and 3 who were the employees of the Joy Associates. Both the witnesses categorically deposed that the complainant acted as an executive and one Shankar used to pay the commission amount to them and no cheque would be issued by Joy Associates. Further they deposed that the respondent/accused is the owner of the Joy Associates and denied the claim of the appellant/complainant.

17.During the examination of the complainant exhibits P1 to P4 were marked and later exhibit P5 partnership deed and other documents were marked at later stage recalling PW1. The admission made by the appellant/complainant in his evidence creates the doubt regarding the legally enforceable debt. The payments were made during the pendency of the firm cannot be discharged as a subsisting liability as deposed by the appellant. Further the loan amount alleged by the appellant have to be proved as a initial burden since the respondent set forth his defence in the cross examination denying the averments alleged in the complaint.

18.The main question is that whether the loan alleged is a legally enforceable debt or liability? On reading the evidences, this Court comes to the conclusion that the appellant failed to discharge the initial burden as per section 138 of the Negotiable Instrument Act.

19.The substratum of the case as focused by the appellant creates material contradictions in paying the loan amount to the respondent/accused. The exhibits filed by the respondent dislodge the case of the appellant.

20.Therefore, the learned trial Court rightly disbelieved the case of the appellant and this Court confirms the order without any interference by this Court.

21.In the result, the appeal filed by the appellant is dismissed.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

vs

To

1. The Judicial Magistrate No.I, Dharmapuri.

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

+1cc to Mr.D.Shivakumaran, Advocate SR.No.22406

+1cc to M/s.I.Abrarmd Abdulla, Advocate SR.No.22201

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SJ(CO)
GMY(29/01/2019)