IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 25.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

CRL.A.669 of 2009

Thiraviyam
S/o.Kannaiah Nadar ... Appellant/Complainant

Vs

Siva @ Sivakumar
S/o.Shanmugam ... Respondent/Accused

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C., against the Judgment dated 10.09.2009 in Criminal Appeal No.82 of 2008 on the file of the learned Additional District and Sessions Judge, (FTC No.I) Salem, wherein the judgment dated 23.04.2008 in S.T.C.No.396 of 2007 on the file of the learned Judicial Magistrate No.I, Sankari, is set aside and acquitted the accused.

For Appellant : Mr.S.Kalyanaraman

For Respondent : Mr.P.Jagadeesan

J U D G M E N T

The appellant is the complainant in S.T.C.No.396 of 2007. Aggrieved over the judgment dated 10.09.2009, rendered by the learned Additional District and Sessions Judge, F.T.C. No.I, Salem in Crl.A.No.82 of 2008 by reversing the judgment and set aside the conviction and sentence awarded in favour of the respondent/accused, by the learned Judicial Magistrate No.I, Sangagiri in S.T.C.No. 396 of 2007 dated 23.04.2008, the appellant/ complainant filed this criminal appeal.

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2. The case of the appellant before the trial Court is as follows:- The appellant herein is doing Mines business and on 02.12.2006, the respondent/accused availed loan of Rs.2 lakhs, for which, he issued a cheque for a sum of Rs.2,00,000/- dated 02.01.2007 drawn on Canara Bank, Vaikuntham branch. Subsequently, the appellant presented the same on 02.02.2007 before the Indian bank, Sangagiri Branch for encashment. The said cheque have been returned on 26.02.2007 stating reason that

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"Insufficient Funds". Thereby on 28.02.2007, he issued statutory notice demanding to pay the cheque amount within a period of 15 days. The said notice was returned as refused. The return notice was received by the appellant on 06.03.2007. Accordingly, the act committed by the respondent constitute for the offence under Section 138 of Negotiable Instruments Act. Hence, the appellant lodged a complaint before the Judicial Magistrate No.1, Sangagiri for initiating the action against the respondent.

3. In the trial Court, on the side of the appellant three witnesses were examined and 19 exhibits were marked as P.1 to P.13. The respondent was examined as D.W.1 and Ex.D.1 to Ex.D.3 were marked on his side. After concluding the trial, the learned Judicial Magistrate, Sangagiri came to the conclusion that the respondent/accused is found guilty for the offence punishable under Section 138 of Negotiable Instruments Act and sentenced him to undergo one year Rigorous Imprisonment and pay a fine of Rs.5,000/- i/d undergo three months Simple Imprisonment.

4. As against the order, the respondent preferred an appeal before the Additional District and Sessions Court, F.T.C.No.1, Salem in Crl.A.No.82 of 2008. At the time of disposing the said appeal, the learned Additional District and Sessions Judge came to the conclusion that there was no existing liability as contemplated under Section 138(b) of Negotiable Instruments Act and set aside the conviction and sentence awarded to the respondent. Against the said judgment, the complainant approached this Court by way of this criminal appeal.

5. In order to substantiate the claim made by the appellant/ complainant, the learned counsel for the appellant would submit that the first appellate Court allowed the appeal on two grounds. The first ground is that the statutory notice was not properly served to the respondent. The second point which was taken into account by the appellate Court is that the debts mentioned in the complaint has not been proved by the complainant in the trial Court.

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6. In this regard, he would further submit that the statutory notice sent by the counsel was purposely evaded by the respondent, the actual name of the respondent is Siva @ Sivakumar. But at the time of refusing the statutory notice, the respondent/accused mentioned before the Postman that his name is only Siva. In the civil original suit in O.S.No.18 of 2007 on the file of the Subordinate Court, Sangagiri, the respondent filed one interlocutory application in I.A.No.335 of 2007, in which, he admitted that his name is Sivakumar @ Siva, S/o.

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V.T.Shanmugam. The said document was marked as Ex.B.18. Further more, in the sworn affidavit filed by the respondent/accused, in the same application, the name of the respondent mentioned as Sivakumar @ Siva. The copy of the said affidavit was marked as Ex.P.19. Therefore, the respondent purposely evaded the statutory notice in this case. But, the first appellate Court without considering these aspects came to the conclusion that the statutory notice was not properly served with the respondent.

7. On the other hand, the learned counsel for the respondent/ accused would submit that in the trial Court, a copy of the Ration Card issued in favour of the respondent's family was marked as Ex.D.1 and a copy of the Passbook issued by the respondent's bank was marked as Ex.D.2 and a copy of the respondent's Driving licence was marked as Ex.D.3. Further, he would submit that these documents clearly disclosed that the name of the respondent is Siva only and not Siva @ Sivakumar. Further, the learned counsel for the respondent would contend that the statutory notice had not been issued to the correct address in which the respondent was residing.

8. Heard the submissions made Mr.S.Kalyanaraman, the learned counsel appearing for the appellant and Mr.P.Jagadeesan, learned counsel appearing for the respondent and perused the available records.

9. On a perusal of the records, it is seen that the returned cover, in which the statutory notice was sent to the respondent was marked as Ex.P.7. In the said cover, the address of the respondent was mentioned as Sivakumar, S/o. Shanmugam, Kollankadu, V.N.Palayam, Sangagiri. Subsequently, the said letter was re-directed to the following address :- Sivakumar, S/o. Shanmugam, Narayanapillai Theru, Nehru Nagar, Suganya Nivas, Peramanur, Salem District. In the returned cover, the Postman endorsed as follows:- “நேரு தெரு. சுகன்யா நிவாசில் சிவா ஞ.டி, சண்முகம் என்ற விலாசத்தார் உள்ளார், இந்த விலாசம் சிவகுமார் ஞ.டி, சண்முகம் என இருப்பதால். தமது தபால் அல்ல என கூறி வாங்க மறுத்துவிட்டார், மற்றவர் யாரும் சிவக்குமார் என இல்லாததால் திருப்பப்படுகிறது,” In the said circumstances, it is necessary to see that whether the name of the respondent is Siva or Siva @ Sivakumar.

10. In this regard, it is an admitted fact that Ex.P.18 and Ex.P.19 are the copies of the affidavit which were filed by the respondent in the suit in O.S.No.18 of 2007. On going through the address mentioned in the said affidavit, it shows that the respondent himself admitted and filed the petition as his name is Siva @ Sivakumar S/o.Shanmugam. According to Ex.P.18 and 19, it is confirmed that the name of

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the respondent is Siva @ Sivakumar. Thus it concludes, only in order to avoid the receipt of the statutory notice, the respondent purposely stated as his name is only Siva. In this aspect, the entire circumstances show that the respondent purposely evaded in receiving the notice. The said aspect has been wrongly misconsidered by the first appellate Court and gave opinion that no proper service effected as contemplated by law. So this Court came to the conclusion that the endorsement and other circumstances show that the statutory notice was deemed to be served.

11. Next contention raised by the learned counsel for the appellant/complainant is that the first appellate Court finds that the complainant has not been proved the fact that the cheque was issued for discharging the legally enforceable debt. In this regard, the learned counsel for the appellant/complainant relied the judgement of this Court reported in "2017(2) MWN (Cr.) DCC 15 (Mad.) C.Kathirvel Vs. K.S.V.Cotton Mills (P) Ltd., rep by its Managing Director" in which this Court held at paragraph No.34 as follows :-

> "34. It is to be noted that the legal position is that only when the complainant discharges his burden that the cheque was issued by the respondent/accused towards the discharge of a legally enforceable whole or part of a debt or liability as the case may be, then, only the respondent/accused ordinarily will be called upon to answer his case...... "

In the above said case, the execution of cheque itself is under dispute. But in the case in hand, the respondent admitted the execution of cheque and mentioned as it was issued as security for the loan availed.

12. Further, at the time of giving evidence, the appellant stated that the respondent had issued post dated cheque dated 02.01.2007, for the loan availed by him. So evidence given by P.W.1 clearly proved that there was a transaction happened between the respondent and appellant. Since the signature and issuance of the cheque is admitted by the respondent, without any subsequent alternative evidence for disbelieving the case of the appellant, we cannot come to the conclusion that the alleged cheques have been issued as a security. Thereby, the next point which was hold by the first appellant Court for allowing the first appeal is factually not correct. Thereby, this Court held that cheque in question is issued only in order to discharge the legally enforceable debts.

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Following Paragraphs 13 and 14 substituted as per order Sub Sequently passed on 28/06/2018

"13. In the light of the above discussion, this Court comes to the conclusion that the respondent has found guilty for the offence 138 of Negotiable Instruments Act and sentenced to undergo six months simple imprisonment and to pay a fine of Rs.5,000/- in default to undergo three months simple imprisonment .

14. Accordingly, the criminal appeal is allowed. The judgement dated 10.09.2009, passed by the learned Additional District and Sessions Judge, (FTC No.I) Salem in Criminal Appeal No.82 of 2008 is set aside and the judgment dated 23.04.2008 passed by the learned Judicial Magistrate No.I, Sankari in S.T.C. No.396 of 2007 is confirmed. The learned Judicial Magistrate No.I, Sankari, is directed to secure the appellant for the purpose of sentencing him to undergo remaining period of the conviction, if any. It is also directed that the period of sentence already undergone by the appellant shall be given set off, as required under Section 428 Cr.P.C."

28.06.2018

AT

Sd/-
Assistant Registrar(CS IV)

//True copy//

Sub Assistant Registrar

To

1. The Presiding Officer,
   Additional District and Sessions Court,
   FTC No.I, Salem,

2. The Presiding Officer,
   Judicial Magistrate No.I,
   Sankari.

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Copy TO

The Section Officer,
Criminal Section,
High Court, Madras-104.

+1cc to Mr.S.Kalyanaraman, Advocate SR.No.40651
+1cc to Mr.P.Jagedeesan, Advocate SR.No.40771

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KGK(CO)
GN(31/07/2018)

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