

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.07.2018
DELIVERED ON : 02.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

Cr1.A.No.934 of 2007

Swamy ... Appellant/Respondent/Complainant

Vs.

Nizamuddin ... Respondent/Appellant/Accused

Prayer: Criminal Appeal filed under Sections 378 of Cr.P.C, against the judgment of acquittal dated 01.08.2007 of Additional District and Sessions Judge, Fast Track Court, Vellore in C.A.No.153 of 2005 by reversing the judgment of the learned Judicial Magistrate No.IV, Vellore in C.C.No.350 of 2002.

For Appellant : Mr.G.Vinothkumar

For Respondent : No Appearance

JUDGMENT

This appeal is directed as against the judgment dated 01.08.2007 passed in C.A.No.153 of 2005 on the file of the Additional District and Sessions Judge, Fast Track Court, Vellore thereby reversing the judgment of the learned judicial Magistrate, No.IV, Vellore passed in C.C.No.350 of 2002 dated 26.08.2005 where in the accused has been convicted.

2. The case of the complainant is that the accused availed loan to the tune of 2,00,000/- on 05.04.2002 and undertake to pay interest at the rate of 24% per month. He also executed a promissory note to the said sum. The accused towards repayment of the part of the loan amount, has issued a cheque bearing No.957011 dated 11.09.2002 for a sum of Rs.2,00,000/- drawn on Karur Vasya Bank, Dindivanam Branch. The cheque was presented on 12.09.2002 and it was returned dishonoured for the reason, "no sufficient funds". Therefore, he caused statutory notice on 04.10.2002 and after receipt of the same, the accused sent a reply notice dated 04.10.2002 denying the averments and allegations made in the statutory notice. Therefore, the appellant filed the complaint.

3. The Trial Court after furnishing the copies to the accused, since the accused pleaded not guilty examined the witnesses, P.W.1 to P.W.3 and marked Ex.P.1 to Ex.P.10 and on the defendant's side, the respondent has marked Ex.D.1. The Trial Court, after considering the evidences and materials available on record convicted the accused for the offence under Section 138 of Negotiable Instruments Act and sentenced him to undergo one year rigorous imprisonment and also awarded to pay compensation of a sum of Rs.2,00,000/- to be payable by the accused to the complainant under Section 357 of Sub-Clause 3 of Cr.P.C. As against the same, the accused preferred an appeal in C.A.No.153 of 2005 and the learned Additional District and Sessions Judge Fast Track Court, Vellore, after hearing the arguments on both sides reversed the judgment of the trial Court and acquitted the accused. As against the same, the present appeal has been preferred by the complainant.

4. The learned counsel for the appellant/complainant would submit that the P.W.1/the complainant proves that the accused borrowed a sum of Rs.2,00,00/- and executed a promissory note Ex.P.1 to the said amount. He issued cheque towards the part- repayment of the loan obtained by him to the tune of 2,00,000/- and the said cheque was returned dis-honoured for insufficient of funds. Even after receipt of the statutory notice, he did not repay the sum borrowed by him. The complainant himself was examined as P.W.1. The promissory note issued by the accused was marked as Ex.P.1. The cheque issued by the accused was marked as Ex.P.2. The return memo and paying slip were marked as Ex.P.3 and Ex.P.4. The counterfeit of the deposit of the cheque was marked as Ex.P.5. The legal notice issued to the accused was marked as Ex.P.6 and its postal receipts and return cover were marked as Ex.P.7 & Ex.P.8. The reply notice issued by the accused was marked as Ex.P.10. The Manager of Indian Co-operative Society, Mr.Palani was examined as P.W.2 to support his case. He has also examined the Manager, Karur Vaisya Bank, wherein the accused hold the account as P.W.3, to prove that the cheque has been dishonoured for insufficient funds. Therefore, the appellant's counsel submitted that the appellant has proved his case beyond any reasonable doubts and the learned Magistrate, rightly convicted the accused, but the First Appellate Court, without considering the above facts and circumstances, under wrong perception has reversed the conviction and acquitted the accused. As such, he prayed for restoration of the conviction passed by learned Magistrate.

5. There is no representation on behalf of the respondent/accused.

6. Heard the argument advanced by Mr.G.Vinothkumar, the learned counsel appearing for the appellant.

7. This Court perused the materials available on record.

8. As per the case of the complainant, the accused is running business of Cycle spare parts and with regard to his business transactions, he borrowed a sum of Rs.2,00,000/- on 05.04.2002 at the rate of 24% interest per month and to that extent, he executed the promissory note. He failed to pay the interest and therefore, he issued a cheque dated 11.09.2002 towards the repayment of the part of the amount, which is evident from the reply notice Ex.P.10. The respondent/accused categorically denied the averments and also stated that at the time of borrowing loan, he handed over cheque leaves as security and requested not to present the same for collection. This letter was duly received by the complainant, on 12.09.2002. Whereas, the case of the complainant is that the accused issued the cheque on 11.09.2002 for a sum of Rs.2,00,000/- and if at all, the said letter was issued by the accused, he would not have issued the cheque on 11.09.2002. It is also curious to note that the accused admitted his liability to the tune of Rs.92,909/- and due to business loss he is not in a position to return the same. Therefore, he also sent a letter Ex.D.1 to prove his contention. As such, the accused did not issue any cheque to repay the part of amount as alleged by the complainant.

9. It is seen from the records that only after the receipt of the letter Ex.D.1 issued by the accused, the complainant presented the cheque which was issued at the time of borrowing the loan as security purpose. Therefore, it is evident that the alleged cheque was not issued for any legal enforceable debt by the accused. That apart, even according to the complainant a sum of Rs.2,00,000/- was borrowed by the accused for the interest at the rate of 24% per month. Hence, if the repayment amount is calculated with interest it comes to Rs.6,00,000/-. But the accused issued cheque only for a sum of Rs.2,00,000/-. As such the complainant has cleverly issued statutory notice as the cheque was issued only for part of the amount payable by the accused. Therefore, it has to be presumed that the cheque was not at all issued by the accused for any legal enforceable debt.

10. In this regard, it is appropriate to consider the judgment rendered by the Hon'ble Supreme Court of India reported in "CDJ 2009 SC 1411 - Jugesh Sehgal V. Shamsher Singh Gogi" in which held as follows:-

"9. It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

- (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account
- (ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;
- (iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;
- (iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;
- (v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from that bank regarding the return of the cheque as unpaid;
- (vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;

11. Further, the Hon'ble Supreme Court of India held in the judgment reported in "(2008) 4 SCC 54 - Krishna Janardhan Bhat V. Dattatraya G.Hegde" in paragraph Nos.34,35 and 44 which reads as follows:-

"34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defense on the part of an accused is "preponderance of probabilities can be drawn not

only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies.

35) A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.

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44. The presumption of innocence is a human right, (See Narendra Singh V.State of M.P., Ranjitsing Brahmajeetsing Sharma V. State of Maharashtra and Rajesh Ranjan Uyadav V. CBI) Article 6(2) of the European Convention on Human rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's rights and the interest of the society is required to be taken in to consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity there of may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Sectopm139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficult of proving a negative has been emphasised. It is not suggested that at negative can never be proved but there are cases where such difficult are faced by the accused e.g honest and reasonable mistake of fact."

12. In view of the above discussions and in view of the discussions cited supra, this Court is of the considered opinion that the complainant did not fulfil the requirements as envisaged under Section 138 of Negotiable Instruments Act and it is clear that the complainant has failed to prove his case beyond any reasonable doubts. Accordingly, the lower appellate Court rightly acquitted the accused and reversed the judgment passed by the learned Magistrate, which does not warrant any interference from this Court. Accordingly, this Criminal Appeal is liable to be dismissed.

13. In fine, this Criminal Appeal is dismissed and the judgment of acquittal passed in C.A.No.153 of 2005 on the file of the Additional District Sessions Court (Fast Track Court, Vellore is hereby confirmed.

dss

Sd/-

Assistant Registrar(CS--IX)

//True Copy//

Sub Assistant Registrar

To

1. The learned Additional District and Sessions Judge,
Fast Track Court,
Vellore.
2. The learned Judicial Magistrate No.IV,
Vellore.
3. The Public Prosecutor,
High Court, Madras.

+1 C.C. to M/S.G.VINODH KUMAR Advocate SR.NO.53110

Judgment in
Crl.A.No.934 of 2007

AD(CO)
ASK(21/08/2018)