THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No.626 OF 2007

JUDGMENT:

This Criminal Appeal, under Section 378(4) of Cr.P.C., is filed by the complainant in C.C. No.209 of 2002 on the file of the Judicial Magistrate of First Class, Tuni (for short, 'the trial Court'), questioning the judgment dated 06.03.2007 whereby the trial Court found respondent No.1/accused not guilty of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act, 1881) and accordingly acquitted him in terms of Section 255 (1) Cr.P.C.

2. Case of the complainant is as follows:

The respondent-accused borrowed an amount of Rs.1,50,000/- from the appellant-complainant on 07.02.2001 and executed a promissory note in his favour agreeing to repay the same with interest @ 24% per annum either to him or to his order, on demand. After repeated demands, the respondent-accused issued a cheque bearing No.829471, dated 13.8.2002 drawn on State Bank of Mysore, Kakinada branch for Rs.1,50,000/- in favour of the appellant-complainant towards part payment of the amount due under the aforesaid promissory note. When the said cheque was presented by the appellant-complainant through his account in Canara Bank, Yarra Koneru, it was returned with endorsement 'insufficient funds'. Thereafter, the appellant-complainant got issued statutory notice dated 26.08.2002 to respondent-accused. Though the respondent-accused received the said notice, he did not pay the amount covered under the dishonoured cheque to the appellant-complainant within the period stipulated under Section 138 of the Act, 1881. Hence, the appellant-complainant filed a complaint for the offence punishable under Section 138 of the Act, 1881, which was taken cognizance by the learned Magistrate for the offence punishable under Section 138 of the Act, 1881.

3. On appearance of the respondent-accused, the learned Magistrate complied with the provisions of Section 207 Cr.P.C. When the respondent-accused was examined under Section 251 Cr.P.C., he denied the accusation levelled against him, pleaded not guilty and claimed to be tried.

4. In order to prove the guilt of the respondent-accused, the appellant-complainant got himself examined as P.W.1 and marked Exs.P1 to P6 on his behalf.

5. After closure of prosecution side evidence, the respondent-accused was examined under Section 313 Cr.P.C. He denied the incriminating circumstances appearing against him in the evidence of prosecution witnesses. On behalf of

the defence, D.Ws.1 and 2 were examined but no documents were marked.

6. The trial Court, after considering the entire evidence on record, *vide* the impugned judgment dated 06.03.2007, found the respondent-accused not guilty of the offence punishable under Section 138 of the Act, 1881 and accordingly acquitted him of the said offence. Challenging the said judgment, the complainant preferred the present appeal.

7. Heard the learned counsel for the appellant-complainant and the learned Assistant Public Prosecutor appearing for the respondent No.2-State. Though notice is served on respondent No.1-accused, none appears for him. Perused the material available on record.

8. Learned counsel for the appellant-complainant would submit that the findings of the trial Court are contrary to law and evidence; that the learned Magistrate erred in acquitting the respondent-accused; that the evidence on record would constitute the offence punishable under Section 138 of the Act, 1881; that the learned Magistrate ought to have seen that the signature on the cheque in question is that of the respondent-accused and therefore ought to have presumed that the cheque was issued for discharge of a debt; that no reply was given by the respondent-accused to the statutory notice got issued by the appellant-complainant; that the

contention put forward by respondent-accused that he did not sign the cheque and he does not know the appellant-complainant, is untenable; that besides the cheque in question, there is also promissory note marked as Ex.P1, and ultimately prayed to set aside the impugned order of acquittal recorded by the trial Court and punish the respondent-accused for the offence punishable under Section 138 of the Act, 1881.

9. Now, the point for determination is whether the order of acquittal recorded by the trial Court in the impugned judgment is sustainable or liable to be set aside ?

POINT:

10. The defence of the accused is as follows.

He did not issue any cheque to the appellant-complainant at any point of time. He has an account in State Bank of Mysore. He has transactions with one Abbai Reddy, who is working in Sairam Finance Company. He borrowed an amount of Rs.1.00 lakh from the said Sairam Finance Company and repaid the same. Sairam Finance Company filed a case against him before the Kakinada Court with regard to some dispute. He made many financial transactions with the said finance company and as he stopped transactions with it and started transactions with others, the present case is foisted at the instance of the said finance company.

11. To substantiate his defence, the accused got examined himself as D.W.1 besides examining one V.Srinivas as D.W.2. The appellant-complainant admitted that there are 6 cases pending on the file of the trial Court with regard to cheque bounce. The court below, while analyzing the evidence, held that there were disputes between Sairam Finance Company and respondent-accused with regard to financial transactions between them. Admittedly, Ex.P1-promissory note dated 07.02.2001 is not attested. There is signature of the scribe. Except the self-serving testimony of P.W.1 (the appellant herein), none has deposed about the money transaction between the appellant-complainant and the respondent-accused. The defence put forth on behalf of the respondent-accused is Sairam Finance Company is behind filing of the present complaint. As per the evidence, the respondent-accused knew Abbai Reddy, who was working in Sairam Finance Company. It goes to show that he is instrumental in lending money to respondent-accused by the said finance company. In such an event, the appellant-complainant could have examined the said Abbai Reddy to exhibit that the cheque in question Ex.P2 and the promissory note Ex.P1 were nothing to do with the books of account of Sairam Finance Company.

12. The requirements to convict a person for the offence punishable under Section 138 of the Act, 1881 are, firstly, the

complainant has to prove the outstanding debt and then issuance of cheque to discharge the debt either in part or in toto, and that the cheque given in that process was dishonoured for want of sufficient amount in the account of the drawer. The trial Court, while dealing with the contentions raised on behalf of the appellant-complainant, dealt with all the contentions assigning reasons including the respondent-accused not giving reply to the statutory notice Ex.P5 got issued under Section 138 (b) of the Act, 1881.

13. The court below also relied on a decision in *C.Antony v. K.G.Raghavan Nair*[1] wherein the cheque in question was returned with endorsement 'payment stopped' by the drawer. The contention of the accused in the said case was that no cheque was issued to the complainant and that blank cheques issued to some other person in connection with chit transactions were misused by the complainant in collusion with the said person. The trial Court dismissed the complaint. The High Court held the accused therein guilty of the offence punishable under Section 138 of the Act, 1881 drawing adverse inference and presumption that the cheque was issued in discharge of legally enforceable debt. The judgment of the High Court was set aside by the Hon'ble Apex Court.

[1] 2003 (1) L.S. 1 (S.C.)

14. In the case hand, in the circumstances narrated, it cannot be held that the respondent-accused was indebted to the appellant-complainant and issued the cheque in question Ex.P2 in discharge of a legally enforceable debt or liability. It is also questioned how the appellant-complainant filed 6 cheque bounce cases at one point of time. The subject money transaction appears to be suspicious one. There is possibility of collecting the cheques from Sairam Finance Company and foisting the cases.

15. It is settled law that an accused is presumed to be innocent unless his guilt is proved beyond all reasonable doubt. By the order of acquittal recorded by the trial Court, the presumption is further strengthened. In the facts and circumstances narrated above, the appellant-complainant failed to establish that the respondent-accused issued Ex.P2 cheque for discharge of a legally enforceable debt or liability. There is no infirmity in the impugned judgment to call for interference by this Court. The appeal is devoid of merit and is liable to be dismissed.

16. The Criminal Appeal is dismissed confirming the judgment dated 06.03.2007 in C.C. No.209 of 2002 on the file of the Judicial Magistrate of First Class, Tuni.

As a sequel, miscellaneous petitions, if any, pending in this Criminal Appeal shall stand closed.

Dr. SHAMEEM AKTHER, J.

Date: .2.2018
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THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

Crl.A. No. 626 OF 2007

DRK

.02.2018