

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.02.2018
DELIVERED ON : 21.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.816 of 2008

M/s.Jay A.R.Enterprises,
Partnership firm having office
at No.7, N.S.Krishnan Street,
Easwaran Nagar, Chennai-600 075.

rep. by its Managing Partner,
P.Janardhan Rao

by his Power of Attorney
V.Prabhakaran

... Appellant

Vs

M/s.SCRAFT TRADERS,
rep. by its Proprietor,
Basant Saha,
having its office
No.433, Moti Street,
Kolkotta,
PIN - 700 013.

... Respondent

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the order of acquittal passed by the trial Court dated 31.10.2008 made in C.C.No.155 of 2007, on the file of the learned IInd Metropolitan Magistrate Egmore, Chennai-8.

For Appellant : Mr.B.Kumar, Senior Counsel
for M/s.R.Loganathan
For Respondent : Mr.Venkatesh Mohanraj

JUDGMENT

This Criminal Appeal is filed by the appellant/complainant against the order of acquittal passed by the learned IInd Metropolitan Magistrate, Egmore, Chennai dated 31.10.2008 made in C.C.No.155 of 2007.

2. Breif case of the appellant:

The complainant company JAY AR Enterprises is a partnership firm. The appellant/accused M/s. Script Traders are dealers in ferrous non ferrous and M.S.C.I. Roolling Scraps and Electrical Goods. Air conditioning plant, Machinery item jute and Hessian Baga etc and interest to procure iron ore fines for the purpose of exporting to overseas countries and for that purpose, the complainant paid Rs.50,00,000/- that the iron ore fines was not of expected quality, the arrangement made with the complainant and the appellant/accused was broken and the appellant/accused has released position and the appellant/accused agreed to send the amount of Rs.50,00,000/- to the complainant as such the appellant/accused has chosen to issue the cheque bearing No.169002 dated 10.4.2006 drawn on State Bank of India, Subodh mullick square, Kolkkotta towards the return of the amount. The said cheque was presented for realization in the complainant bank Indian Overseas Bank, SME Branch Chennai on 5.10.2006 and the same was returned by 7.10.2006 on the ground of funds insufficient. The complainant bank forwarded a debit note on 14.10.2006. On 8.11.2006 a statutory notice was issued to the appellant/accused and the same was received by the appellant/accused on 11.11.2006. The accused has neither sent reply on tenable ground nor made any payment. Hence the complaint preferred before the learned IInd Metropolitan Magistrate in C.C.No.155 of 2007. During trial the appellant examined himself as PW1 and marked Exhibits-P1 to P12. On the side of the respondent/accused Exhibit D1 and D2 were marked and no witness was examined on their side. The learned trial Court after appreciating the evidences acquitted the respondent/accused under Section 138 of the Negotiable Instrument Act. Hence this appeal.

3. The learned counsel for the appellant submits that the trial judge on having found that the Exhibit P1 cheque even though has its face value of Rs.50,00,000/- has its cause of action to prosecute for the lesser amount, taking into account the part payment made by the appellant/accused after the offending cheque was issued in lieu of the earlier liability of Rs.50,00,000/- i.e. to say cause of action lies for prosecution for the balance amount of Rs.30,00,000/- passing order of acquittal is unwarranted and unjustified. The order of acquittal is liable to be set aside.

4. The learned counsel for the appellant submits that after arriving at a finding that the complainant satisfied each and every part of cause of action and further the appellant/accused is liable to pay Rs.30,00,000/- under the offending cheque and the order of acquittal as holding that the demand notice Exhibit P4 is bad in law. It is unjustified and liable to be set aside.

5.The learned counsel for the appellant submits that the defence by the appellant/accused that the Exhibit P1 cheque is forged one on having filled up the date of the cheque on the cheque and negotiated further for realizing amount in furtherance to the defense, on receipt of notice Exhibit P4 the appellant/accused went and filed a complaint before the 17th Metropolitan Magistrate, Kolkotta under section 467 and 471 of IPC and at last the accused chosen to withdraw the complaint in Exhibit P12 series and thereby left the defence pursued. This being so, the order of acquittal is clearly erroneous and it is liable to be set aside.

6.The learned counsel for the appellant submits that a sum of Rs.30,00,000/- the accused is liable to pay to the complainant and said that the appellant/accused is not liable to be furnished under section 138 of the Negotiable Instrument Act . The order of acquittal is liable to be set aside and appellant/accused need be convicted in the facts and circumstances of this case.

7.The learned counsel for the appellant submits that the learned trial judge failed to note that the letter of tender at the instance of the appellant/accused in Exhibit D1 dated 25.4.2006 answers all the defence are all fare and untenable in as much as it established the pre existed debt of 2005, Exhibited Exhibit A7 series, which contains cheque, return memo and debit advice this being so the order of acquittal is liable to be set aside.

8.The learned counsel for the appellant submits that the learned trial judge failed to note that all others contentions were disbelieved and found that the liability under Exhibit P1 offending cheque are available for the cause of action in the prosecution under section 138 of Negotiable Instrument Act.

9.The learned counsel for the appellant submits that the learned trial judge failed to note that the presumption under section 118 and section 139 of the negotiable instrument act in as much as there is no rebuttal evidence let in on behalf the appellant/accused. The order of acquittal is unwarranted and liable to be set aside.

10.The learned counsel for the appellant submits that the learned judge failed to note that the trial Court failed to follow the judgment of Supreme Court Judgment of three judges that unless the evidence was let in on behalf of the appellant/accused, the discharge of the presumption under sections 118 and 139 of the Negotiable Instrument Act. The order of acquittal is liable to be set aside.

11.The learned counsel for the petitioner submits the following citations cited supporting for his submissions:

- 1) (2000) 2 SCC 380 (Suman Sethi v. Ajay K.Churiwal and Another)
- 2) (2004) CRI. L.J. 3163 (M/C.TCI Finance Ltd. Secunderabad v. State of A.P. and another)
- 3) (2006) CRI. L.J. 3267 (M/s.Synergy Credit Corporation Limited v. M/s.Midland Industries Limited & Ors.)
- 4) (1999) 8 SCC 221 (Central Bank of India Another v. Saxons Farms and others)

12.The learned Counsel for the respondent cited the decision in support of his submissions reported in (2011)(3) MWN (Cr) (DCC) 93 and sought for dismissal of the appeal.

13.I heard Mr.B.Kumar, learned Senior Counsel for Mr.R.Loganathan, learned counsel for the appellant and Mr.Venkatesh Mohanraj, learned counsel for the respondent and perused the entire materials available on record.

14.PW1 is the power of attorney agent of the appellant/complainant company through which a proof affidavit was filed and he has narrated the contents of the appellant/complainant. At the first instance Exhibits P1 to P6 are marked and after the cross examination Additional Proof affidavit is filed and Exhibit P7 to P12 were marked. Exhibit D1 is the covering letter for sending three Demand Drafts for a total sum of Rs.20,00,000/- by the respondent/accused to the complainant firm. Exhibit D2 to relate to the proceedings pending before the XVII Metropolitan Magistrate Court, Calcutta. The respondent/accused has filed a complainant before the XVII Metropolitan Magistrate Court, Calcutta against this appellant/complainant for an offence of forgery.

15.As per the appellant/complainant, the offending cheque is dated 10.4.2006, it was presented before the appellant/complainant the same on 5.10.2006 and the same was returned by the respondent/accused bank for insufficiency of fund on 17.10.2006 and the same was forwarded by its bank on 14.10.2006. The appellant/complainant issued notice to the respondent/accused on 8.11.2006 and same was acknowledged by this respondent/accused on 11.11.2006. Even then no payment was made and hence this complaint is filed under section 138 of Negotiable Instruments Act within the period of limitation.

16.Now it is to be seen whether the complaint based on the cheque dated 10.4.2006 for a sum of Rs.50,00,000/- can be maintained as the respondent/accused has paid the part of the amount of Rs.20,00,000/- out of the liability of the

respondent/accused. The case of the respondent/accused is that Exhibit P2 is undated and this appellant/complainant has forged the cheque by adding the date and appellant/complainant has filled up the date and thereby committed the offence of forgery.

17. But it is seen whether the notice issued under Exhibit-P4 is valid, which had given rise to the cause of action. Admittedly on the date of Exhibit P4 balance amount under Exhibit-P1 cheque is only Rs.30,00,000/- But the demand is made for the entire Rs.50,00,000/- for which this appellant / complainant is not entitled on that date. No whisper is made in the Exhibit-P4 notice, complaint and in the proof affidavit filed at the first instance about the payment of Rs.20,00,000/-. Only after cross examination of PW1 and marking of D1 other documents from Exhibits P7 to P12 were marked by filing additional proof affidavit. Even in the two citations relied by this appellant/complainant, notices were issued only for the balance amount which is actually due and complaints were also filed only for the amount of actual liability. Hence those notices are valid and complaints maintainable. The liability is only for a sum of Rs.30,00,000/- on the date of notice a sum of Rs.50,00,000/- is demanded which is bad in law and the notice is not valid. When the notice becomes invalid there is no question of cause of action and consequently this complaint is not maintainable.

18. The facts and circumstances discussed above are sufficient to rebut the presumption, if any, under Section 139 of N.I. Act as held by the Hon'ble Supreme Court in Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay reported in [AIR 1961 SC 1316] and in M.S.Narayana Menon v. State of Kerala reported in [AIR 2006 S.C. 3366]. The appellant does not have a believable case. The truth of the defence version need not be looked into. What the appellant has failed to prove need not be disproved by the respondent. The learned Magistrate rightly found that the complainant failed to prove his case. There is no reason to interfere with the order of acquittal.

19. In the result, this Criminal Appeal is dismissed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The IInd Metropolitan Magistrate,
Egmore, Chennai-8.

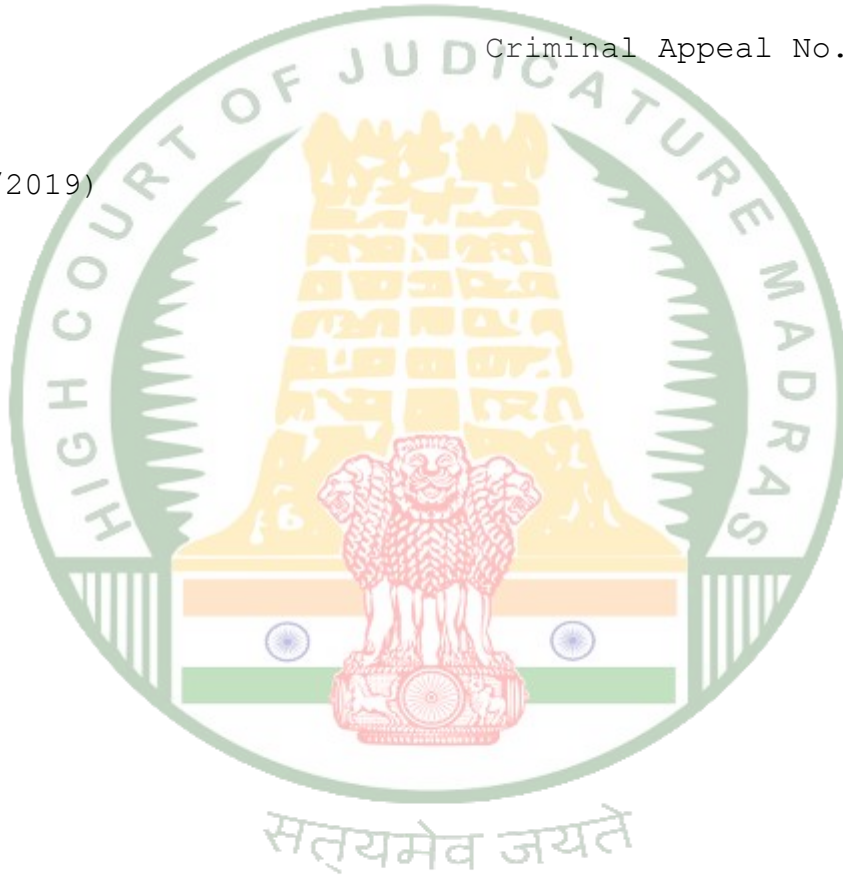
2.The Chief Metropolitan Magistrate Egmore, Chennai.

+2cc to Mr.Venkatesh Mohanraj, Advocate, S.R.No.4126

+1cc to Mr.R.Loganathan, Advocate, S.R.No.4353

Criminal Appeal No.816 of 2008

RV(CO)
GSP(12/02/2019)



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