IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Crl.A.No.218 of 2009
and
Crl.M.P.No.13992 of 2018

S.George ... Appellant

Vs.

Shankar ... Respondent

PRAYER: Appeal filed under Section 378 Cr.P.C. against the order of acquittal dated 08.04.2009 made in C.A.No.207 of 2008 on the file of the Additional District Court / Fast Track Court No.I, Erode reversing the order of conviction imposed in the judgment dated 31.07.2008 made in C.C.No.521 of 2007 on the file of the Judicial Magistrate No.I, Erode.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.K.Srinivasan,
Amicus Curiae

J U D G M E N T

The Criminal Appeal is filed by the appellant/complainant as against the Judgment in C.A.No.207 of 2008 on the file of the Additional District Court / Fast Track Court No.I, Erode, dated 08.04.2009 reversing the Judgment in C.C.No.521 of 2007 on the file of the Judicial Magistrate No.I, Erode, dated 31.07.2008.

2.For the sake of convenience, the complainant is referred as appellant and the accused is referred as respondent.

3.The appellant who lost his case before the First Appellate Court and succeeded before the trial Court, has filed the present Criminal Appeal.

4.Case of the prosecution is as follows:-

The respondent has purchased wed blue cow hides leathers from the appellant on credit basis as per the Invoice No.2 dated 23.12.2006, for a sum of Rs.6,40,320/-. In respect of the said transaction, the respondent has issued a post dated cheque-Ex.P.1 dated 02.02.2007, drawn on the Catholic Syrian Bank Limited, Chennai bearing No.541165 for a sum of Rs.6,40,320/-, drawn in favour of M/s Mariya Hides.

5.As per the request of the respondent, the appellant presented the above said cheque for collection on 21.06.2007, through Indian Overseas Bank, Periyasemur, Erode, and the same was returned on 28.06.2007 as "insufficient funds". The return memo is marked as Ex.P.2. Thereafter, in order to complete the statutory requirement, the appellant had issued a legal notice-Ex.P.4 to the respondent on 11.07.2007. The said legal notice was returned on 21.07.2007 as "Unclaimed" and marked as Ex.P.6. Therefore, the appellant had filed a case under Section 138 of the Negotiable Instruments Act, in C.C.No.433 of 1997 before the learned Judicial Magistrate No.I, Erode.

6.Since, the respondent did not plead guilty, the trial was commenced. In order to prove the case of the prosecution, P.W.1 was examined and Exs.P.1 to 7 were marked. On the side of the defence, D.Ws.1 and 2 were examined and Ex.D.1 was marked.

7.After elaborate consideration of evidences and the materials available on record, the trial Court convicted the respondent under Section 138 of the Negotiable Instrument Act, and sentenced him for one year Simple Imprisonment with fine of Rs.3,000/- in default to undergo one month Simple Imprisonment.

8.Aggrieved against the judgment of the trial Court in C.C.No.521 of 2007 dated 31.07.2008, the respondent herein had preferred Criminal Appeal before the learned Additional District Court / Fast Track Court No.I, Erode and the same was taken on the file in C.A.No.207 of 2008. Thereafter, the First Appellate Court acquitted the respondent. Against which, the present Criminal Appeal has been filed by the appellant.

9.Heard Mr.N.Manokaran, learned counsel appearing for the appellant and Mr.K.Srinivasan, learned amicus curiae for the respondent.

10.The learned counsel appearing for the appellant would submit that though the wed blue cow hides leathers were purchased from the appellant on credit basis as per the Invoice No.2 dated 23.12.2006, for a sum of Rs.6,40,320/-, for discharging the said liability, the respondent has issued a post dated cheque-Ex.P.1 dated 02.02.2007, drawn on the Catholic Syrian Bank Limited, Chennai, for a sum of Rs.6,40,320/-, drawn in favour of M/s Mariya Hides. As per the request of the respondent, the appellant presented the above said cheque for collection on 21.06.2007, through Indian Overseas Bank, Periyasemur, Erode, and the same was returned on 28.06.2007 as "insufficient funds". Thereafter, in order to complete the statutory requirement, the appellant had issued a legal notice-Ex.P.4 to the respondent on 11.07.2007. The said legal notice was returned on 21.07.2007 as "Unclaimed". Therefore, the appellant had filed a case under Section 138 of the Negotiable Instruments Act. Though, the trial Court has rightly convicted the accused on the ground that the presumption is always on the holder of the cheque and the appellant has clearly established the legal liability by way of invoice No.2 dated 23.12.2006, on erroneous consideration and subsequent issuance of two payments which was made in favour of the appellant, the lower appellate Court presumed that there was no legally enforceable debt on the part of the respondent. Accordingly, the respondent was acquitted from the charges, is unsustainable in law. The respondent is legally liable to pay the alleged amount to the appellant. If it is the case of the respondent that he is not legally enforcible to pay the said amount to the appellant, then it is for him to disprove the prosecution case. As per Sections 138 and 139 of the Negotiable Instruments Act, the presumption is always in favour of the holder of the cheque. Therefore, the appellant has established the prosecution case and he prayed to set aside the Judgement made in C.A.No.207 of 2008 dated 08.04.2009 on the file of the Additional District Court / Fast Track Court No.I, Erode.

11.The private notice was not served effectively on the respondent/accused. Therefore, the appellant has filed a petition for substitute of service. Accordingly, this Court granted permission for paper publication on 04.12.2018. Affidavit of service has also been filed and the respondent's name was printed in the cause list. However, no one is ready to represent the case on behalf of the respondent. Hence, no other option, this Court appointed Mr.K.Srinivasan, learned counsel as amicus curiae in this case to represent respondent and to assist the Court.

12.The learned amicus curiae appearing for the respondent would contend that the dates are very important to decide the issue involved in this Criminal Appeal. Though, the Invoice is marked as Ex.P.7, it clearly indicate that D.W.2-Agent allegedly purchased the leather goods on behalf of the respondent on 23.12.2006 and his signature is found in the invoice. However, the respondent name is not found in the Invoice. Ex.P.1 - Instrument was issued on 02.02.2007 and thereafter, the respondent paid a sum of Rs.1 lakh on 30.03.2007 and Rs.2 lakhs on 01.06.2007 by way of Demand Draft to the appellant and the same were also accepted by the appellant (P.W.1) in his evidence. Therefore, the appellant/complainant has not proved the case beyond all reasonable doubt the respondent is entitled for acquittal. Hence, the Judgment of the lower appellate Court need not be interfered with by this Court in a mechanical manner.

13.In the light of the above submission, now it has to be decided 'Whether the order of acquittal passed by the lower Appellate Court is liable to be interfered with or not ?'

14.Admittedly, the case of the respondent and appellant is that the respondent purchased wed blue cow hides leathers from the appellant through his Agent (D.W.2) -Akbar ali on 23.12.2006 vide Invoice No.2. Thereafter, the respondent issued cheque-Ex.P.1, in favour of the appellant for a sum of Rs.6,40,320/-. The appellant presented the above said cheque for collection on 21.06.2007, through Indian Overseas Bank, Periyasemur, Erode, and the same was returned on 28.06.2007 as “insufficient funds”. Thereafter, in order to complete the statutory requirement, the appellant had issued a legal notice-Ex.P.4 to the respondent on 11.07.2007. The said legal notice was returned on 21.07.2007 as “Unclaimed”. Therefore, the appellant had filed the case under Section 138 of the Negotiable Instruments Act.

15.Further, it is made clear from the evidences of D.W's.1 and 2 that, the respondent has made payments for Rs.3 lakhs through Demand Draft and cheque to the appellant. However, the said instrument - Ex.P.1 was issued for a sum of Rs.6,40,320/-. After the cheque date only, the respondent made the above mentioned payment of Rs.3 lakhs. When that being so, the legally enforceable liability is only on the appellant to prove the prosecution case. When the appellant not established the case for legally enforceable debt of Rs.6,40,320/- and agreed in his examination that Rs.3 Lakhs was received on 30.03.2007 from the respondent. However, he has taken a defence that the said amount of Rs.3 lakhs was paid for another Invoice dated 20.12.2006. However, the invoice dated 20.12.2006 has not been marked before the trial Court. In the absence of the marking of alleged invoice, it may be presumed that the said amount was paid to the appellant by the respondent as part payment towards Invoice No.2, dated 23.12.2006. In view of the above, this Court does not find any error in the Judgment of the Additional District Court / Fast Track Court No.I, Erode, made in C.A.No.207 of 2008 dated 08.04.2009.

16.In the result, the Criminal Appeal is dismissed. However, liberty is granted to the appellant to initiate appropriate recovery proceedings against the respondent for a

balance sum of Rs.3,40,320/-. The period spent for this Criminal Appeal may be excluded for the purpose of limitation, under Section 14 of the Limitation Act. Consequently, connected miscellaneous petition is closed.
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Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Additional District Court
   Fast Track Court No.I,
   Erode

2. The Judicial Magistrate No.I,
   Erode.

Copy to:-

The Section Officer
Criminal Section
High Court of Madras.

+1cc to Mr.N.Manokaran, Advocate, SR.NO.7293

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and
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Kak(18/03/2019)